

LET SLIP THE LAWS OF WAR! LEGALISM, LEGITIMACY, AND CIVIL-MILITARY RELATIONS

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Abstract: Over the last 50 years, the professional judgement of US military officers regarding the use of force has changed to increasingly incorporate legal reasoning in addition to traditional professional judgement based on expertise and professional military ethics. This change may be called military legalism. Military legalism developed in the US military after the Vietnam war because of the confluence of the contested legitimacy of US wars and the implementation of regimes of rule-based constraints on the use of force by policy-makers. When the legitimacy of a US conflict is contested, policy-makers are likely to implement rule-based regimes of constraint on the use of force in an effort to re-capture legitimacy (or at least have awareness of and the ability to influence military actions that would be likely to generate outrage and lead to further contests to legitimacy). Military officers operating under regimes of rule-based constraints are likely to adopt military legalism, in part because it satisfies the expectations of policy-makers who have formulated the rules, and in part because it satisfies institutional preferences (enhancing the military's legitimacy and diffusing responsibility for failure). Counterintuitively, the legalistic interpretation of these rules may lessen, rather than strengthen constraints on the use of force. While military legalism is normatively neither good nor bad, legalistic reasoning has been used to justify morally deficient policies, and a reliance on legal reasoning may have unanticipated and unexamined effects on the norms of civil-military relations.

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Foreword

This dissertation explores questions, formulated over the course of 25 years in uniform, about military professionalism, rules, and morality. As a Midshipman at the US Naval Academy, I absorbed a notion of military professionalism that closely resembled the one expressed by Samuel Huntington in *The Soldier and the State*: the military should have autonomy in the military sphere and should stay out of anything that smacks of politics; politicians, in turn, should give the military its objectives and allow wide latitude in how best to achieve them.¹ I say that I “absorbed” this idea, rather than that I was taught it, because I cannot recall any class or exercise in which military professionalism was explicitly taught. I do recall learning in a Naval leadership course that both the military and accounting were professions, but if a specific theory of military professionalism was offered, I have forgotten it. Many things at the Naval Academy were considered “unprofessional”: un-shined shoes, a sloppy shave, a sarcastic comment to a superior. But “professional” behavior was often taught by contrast with unprofessional behavior rather than by explicitly defining a sense of professionalism.

Nevertheless, it was clear that to be “professional” was an accolade best earned by excelling at those virtues the Naval Academy sought to instill and by not concerning yourself with other things. My classmate who challenged a new Secretary of Defense at a public lecture with a barbed question about whether the Secretary had “the courage” to change military regulations on homosexuals openly serving, for example, was perceived as being unprofessional in a way that was different and more significant than my classmate who perpetually looked as if he had slept

¹ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, Massachusetts; London, England: Harvard University Press, 1957).

in his uniform. To be professional meant to “keep your eyes in the boat”: to be concerned with learning the basics of the Naval profession and let others worry about other questions.

A few years later, I found this vision of professionalism subtly challenged. From December 1998 through September 1999 I was the speechwriter for Admiral James Ellis, Commander in Chief US Naval Forces Europe (CINCUSNAVEUR)/NATO’s Commander-in-Chief Allied Forces Southern Europe (CINCSOUTH). In March 1999, NATO began combat operations in Kosovo, with ADM Ellis serving as the NATO Joint Force Commander and the Commander of the US Joint Task Force supporting the operations. As my boss had little need for speechwriting during this conflict, I sat in the anteroom and took notes during his daily video teleconferences with his boss, General Wesley Clark (the Commander in Chief US European Command (USCINCEUR)/NATO Supreme Allied Commander Europe (SACEUR)), and other commanders. A pattern quickly emerged in the approval of targets: there was a clear set of rules for who could approve striking a target, based on the type of target and the anticipated number of “unintended civilian casualties.” The rules did not necessarily preclude proposing any particular target or type of target, but they required that the most sensitive targets—those most likely to produce large numbers of civilian casualties or otherwise generate a significant public reaction—be approved by the President himself, while others could be approved based on the authority of General Clark, my boss, or one of his subordinate commanders, depending on the numbers of expected casualties. In part because General Clark seemed to be more ambitious to expand the scope of targets to be struck than the administration, the approval process for the most sensitive targets was arduous. Planners used sophisticated collateral damage estimation tools to experiment with different combinations of weapons, approach and impact angles, and timing of the strike to minimize the anticipated casualties (and anticipated outrage), in order to keep

approval authority at the lowest possible level.² I was surprised to find that the lawyers—military judge advocates general, or JAG’s—were as important in assuring that a strike complied with the required rules as were the planners or “weaponers.” The professional judgment of military commanders for whom I had (and still have) great respect, such as ADM Ellis, was not sufficient; it needed to be blessed by a lawyer, as well.

My understanding of military professionalism was challenged again in 2004, when I served as the Aide to the Naval Inspector General, Vice Admiral A. T. Church III. In the wake of the release of the infamous Abu Ghraib photos, the Secretary of Defense directed VADM Church to conduct an inquiry into all interrogation techniques used by the Department of Defense during what was then known as “the Global War on Terrorism.” In most cases, we found that soldiers unclear about how to treat detained personnel suspected of being Taliban, al Qaeda, or Iraqi insurgent fighters fell back on principles of conduct entirely consistent with professional military ethics. But a significant minority did not. In some cases, such as the conduct at Abu Ghraib, this was a clear breakdown of discipline and professionalism, but in other cases soldiers tortured and abused those in their custody not despite orders, but because of them. The orders in question did not come from a rogue officer heedless of legal constraints, but instead had been carefully parsed and reviewed for legality by lawyers and military officers at the highest levels of government. This presented a real challenge: my vision of military professionalism emphasized that adherence to professional military ethics brings both honor and morality to conduct that would otherwise be immoral, such as killing people and destroying property. But military professionalism also requires obedience to lawful orders. A legalistic

² These characterizations are based on my personal recollections. For other accounts of the conflict and decision making process, see Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (New York: Public Affairs, 2001); Michael E. O’Hanlon and Ivo H. Daalder, *Winning Ugly: NATO’s War to Save Kosovo* (Washington, D.C.: Brookings Institution Press, 2004).

approach to the definition of torture resulted in lawful orders to commit immoral acts that violated professional ethics. How does a professional military officer resolve a conflict between the duty of obedience and the duty to follow professional military ethics?

During my final tour in the Navy, as the Chairman of the Seamanship and Navigation Department at the Naval Academy, these questions came into sharper focus. As an officer who had held command, I was asked to teach the ethics course to sophomores. (The curriculum at the Naval Academy had evolved since my time as a Midshipman, to include the addition of a course explicitly focused on the ethical component of officership.) While we taught Midshipmen what to do if they were to receive an unlawful order (ask for clarification of the order in writing, if possible; raise the issue to the officer giving the order and/or the officer's superior; do not follow a manifestly unlawful order), we did little to equip them to confront dilemmas such as the one faced by officers who were directed to develop policies for torture. These officers were in a quandary: according to the interpretation by senior civilian and military legal personnel of the laws governing torture, the orders to develop "enhanced interrogation" policies were not manifestly unlawful. Although there were strong arguments as to why such a legal interpretation might be flawed, these were legal arguments; for military officers to engage in such legal debates would take them far outside my understanding of professional military expertise. Once again, the vision of professionalism I had absorbed as a Midshipman--and which I was now teaching to a new generation of Midshipmen—didn't seem to capture the challenges faced by officers today.

This dissertation is an exploration of the complex reality that blends the expertise of the military officer, which I have been, with that of the lawyer, which I am not—why it arises, and what it may mean for military professionalism, civil military relations, and the future conduct of war.

Chapter 1: Introduction—What is military legalism?

“It used to be a simple thing to fight a battle...In a perfect world, a general would get up and say, ‘Follow me, men,’ and everybody would say, ‘Aye, sir’ and run off. But that’s not the world anymore, ...[now] you have to have a lawyer or a dozen. It’s become very legalistic and very complex.”

General James Jones, USMC (Ret), as cited in Dunlap¹

The puzzle

Military professionalism in the United States has changed over the past 50 years. Military officers, who once relied almost exclusively on their expertise as “managers of violence,” increasingly access legal norms and reasoning to justify their decisions regarding the use of force. This approach may be called *military legalism*. Conventional wisdom, summarized by General Jones in the epigraph above, suggests that the military would resist the intrusion of lawyers and legal reasoning into their domain of professional expertise; such intrusion is commonly supposed to limit military effectiveness and increase the difficulty of military operations.² Yet the integration of lawyers and legal reasoning into operational military decision-making has become so ingrained that commanders today rely heavily on legal advice

¹ Charles J. Dunlap Jr, “Lawfare Today: A Perspective,” *Yale J. Int’l Aff.* 3 (2008): 146 (Internal citation omitted).

² For a lurid exposition of this conventional wisdom in the case of the UK, see, Richard Elkins, Jonathan Morgan, and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat* (London: Policy Exchange, 2015), http://books.google.com/books?hl=en&lr=&id=PSshpbwti_3EC&oi=fnd&pg=PR8&dq=%22inquiry+%E2%80%99CUK+Armed+Forces+Personnel+and+the+Legal+Framework%22+%22period+of+active+service+was+as+Military+Assistant+to+the+Chief+of+the%22+%22Islamic+Studies+at+Cambridge+University.+He+is+the+Conservative+candidate%22+&ots=RqlxnxUotz&sig=TELWfyXjW74ljfp5exCmMBkJAqA.

and reasoning as an essential part of modern combat.³ This dissertation will explore the questions, what is military legalism, and under what conditions does it emerge.

The central argument of the dissertation is that military legalism emerges in response to two related trends: First, as the US has developed overwhelming military power relative to most other countries, adversaries (perhaps learning one of the ‘lessons of Vietnam’) have increasingly focused on winning victory in the political battle for legitimacy, rather than in the military contest on the battlefield. Adversaries exploit constraints on the use of force in order to limit US military effectiveness and provoke actions, such as strikes that result in large numbers of civilian casualties or the destruction of protected sites, that will generate public outrage. This is calculated to undermine the legitimacy of US military actions in both the domestic and international arenas. Contested legitimacy may result in diminished support, which in turn may further limit US policy options, perhaps ultimately leading to US withdrawal.

Second, in response to this trend by adversaries, US policy on the use of force has become increasingly governed by a system of rules, comprised of law, policy, and regulation, which seeks to bolster legitimacy by emphasizing the degree to which US military action is compliant with international law. Confronted with a situation in which their use of force is increasingly governed by rules, rather than the broad principles of professional expertise and ethics, and in which adversaries persistently try to undermine the legitimacy of their actions, US military officers have embraced military legalism, an approach to the justification of military decisions regarding the use of force that dramatically expands the role of legal reasoning in military decision making.

³ See generally, Terrie M. Gent, “The Role of Judge Advocates in a Joint Air Operations Center,” *Airpower Journal* 13, no. 1 (Spring 1999): 40–55; See, also Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance,” *American Journal of International Law* 104, no. 1 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628658.

Military legalism allows military leaders to interpret constraints on the use of force in such a way as to minimize the degree to which those constraints can be exploited for cover by adversaries, and by stressing rule-compliance, simultaneously seeks to undermine adversaries' efforts to delegitimize US military actions. In some cases, this has proven effective; in others, a casuistic interpretation of rules has undermined the ability of rule-compliance to garner legitimacy; in still other cases, military leaders have interpreted rules more strictly than law, ethics, or customs of combat would require in an effort to prioritize legitimacy over short term efficacy. Regardless of the outcome, military legalism represents a curious partial displacement of the norms and expertise of one profession—the military—by that of another—the law. Perhaps the most powerful effect of military legalism is to shift the question regarding a proposed use of force from “is this right?” or “is this the best course of action?” to “is this permissible?”

Military legalism defined

Military legalism is the practice of privileging legal reasoning rather than traditional professional judgment in justifying military decisions regarding the use of force. Military officers reasoning legalistically seek often to strike a balance between respecting the rules that constrain the use of force and effectively countering an adversary who exploits those rules for tactical or strategic advantage. Military legalism seeks to satisfy a need for both efficacy and legitimacy. The two most salient aspects of legal reasoning that military legalism privileges are rule formalism and advocacy.

Similar to the philosophical doctrine of legalism as developed by Judith Shklar, military legalism privileges rule formalism.⁴ A long-running debate exists within the philosophy of law between those who take a formalistic, rule-based view of law, often associated with the legal theorist H.L.A. Hart, and those who take a more pragmatic view, often associated with Justice Oliver Wendell Holmes. While such an over-simplification misses much nuance, the position of the formalist school may be summarized as “law is comprised of rules,” while the pragmatic school argues that “law is what judges say it is.”⁵ Military legalism comes down firmly on the side of the formalists in this debate. Rules create obligations or duties on those bound by them, but are specifically limited in how, when, and to whom they apply. Outside the scope of a rule’s limitations, or once the minimum requirements of a rule have been satisfied, the rule imposes no further obligations. By carefully parsing and narrowly interpreting the obligations and limitations of the legal, policy, and regulatory rules that constrain the use of force, military legalism may reduce the degree to which those rules constrain the use of force, while still adhering strictly to their requirements. This legalistic approach may expand the range and scope of military actions deemed acceptable without giving up the legitimacy and identity benefits of “playing by the rules.”⁶

⁴ Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964); Shklar also notes that the doctrine (or ethos, as she describes it) of legalism may be a term of “mild abuse” when used to describe, “the tendency to abstract legal concepts from their social setting and thereby to exaggerate the scope of their relevance. [When used in this sense, legalism] is, above all, ‘a misapplication of juristic distinctions to a context that will not support them.’” Judith N. Shklar, “In Defense of Legalism,” *Journal of Legal Education* 19, no. 1 (1966): 51 Military legalism is close to this usage, which Shklar characterizes as “thoughtful and proper,” despite being a term of “mild abuse.”

⁵ Robert Goedecke, “Legal Formalism vs. Legal Pragmatism,” *The Journal of Value Inquiry* 3, no. 4 (Winter 1969): 243.

⁶ Snider is one of the most vocal advocates of adherence to a moral code as part of the identity of US forces. See, for example, Don M. Snider, *The Army’s Professional Military Ethic in an Era of Persistent Conflict*, Professional Military Ethics Monograph Series 1 (Carlisle, PA: Strategic Studies Institute, U.S. Army War College, 2009); See also, Stephen Coleman, *Military Ethics: An Introduction with Case Studies* (New Brunswick and Oxford: Oxford University Press, 2013), 25, “Marines Don’t Do That.”

In contrast, traditional professional military judgment, while respectful of rules, emphasizes that rule compliance is not sufficient to lend legitimacy. A US Army study of military professionalism makes this distinction clear:

Particularly within an increasingly legalistic society, the officer's reaction to crisis must always be to place fulfillment of the moral obligation over that of the legal obligation, even at personal or professional expense. His or her role must be to do the right thing, to pursue the right outcome on behalf of those served, American society. ... *A principled understanding of officership requires instead that officers strive to attain the highest of moral standards, regardless of the minimum that the law might allow.*⁷

Second, military legalism privileges the norm of advocacy. Once a military officer has carefully parsed the rules to argue for the permissibility of an action, it is natural to advocate for that course of action. Advocacy is a core function of the legal profession, but not of the military profession. As advocates, lawyers are trained and expected to protect the interests of their client while providing the best, most persuasive defense of the client's course of action.⁸ To be sure, lawyers are not solely advocates. They are also expected to be advisors: the American Bar Association Model Rules of Professional Conduct enjoin lawyers in their advisory role to "provide a client with an informed understanding of the client's legal rights and obligations and explain their practical implications."⁹ However, even when providing advice, lawyers are expected to assume a particular "role morality" in which their advice pertains to what course of action is likely to be most efficacious when zealously advocated. Thus a lawyer who knows her

⁷ Don M Snider et al., *Army Professionalism, the Military Ethic, and Officership in the 21st Century* (Carlisle Barracks PA: U.S. Army War College, 1999), 40 (Emphasis in original).

⁸ J. Michael Martinez, "Law versus Ethics Reconciling Two Concepts of Public Service Ethics," *Administration & Society* 29, no. 6 (1998): 698; See also "Model Rules of Professional Conduct: Preamble & Scope | The Center for Professional Responsibility," accessed May 6, 2016, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html, "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

⁹ "Model Rules of Professional Conduct: Preamble & Scope | The Center for Professional Responsibility."

client to be guilty may not ethically advise the client to commit perjury, but has a professional responsibility to recommend and mount a defense that discredits witnesses against the client if she believes that has the best chance of setting him free.¹⁰

The line between advice and advocacy in the military can be blurry. Actions that constitute advocacy in the context of the military profession are subtler and less overt than in the legal profession. While a military officer observing that a particular use of force is acceptable under the rules is likely giving advice, when that same officer makes an argument as to how the rules may be interpreted to allow a particular action, she is engaging in advocacy for that interpretation, and by extension, for the uses of force it enables. Such reasoning would likely not be considered to be advocacy by a lawyer, but it is a departure from the idealized norm of providing professional military advice.

The norms of traditional military professionalism require that an officer be an impartial advisor with no hint of advocacy, zealous or otherwise. Kohn encapsulates the conventional understanding of the military advisory role:

[Military officers] should be candid in their advice and keep that advice confidential, providing their best military judgment about the various alternatives—realistic possibilities, *without any spin that might limit civilian choices or warp the advisory process toward a preferred outcome*. In advising political leaders and executing their orders, senior flag officers have a professional obligation to be straightforward and transparent: offering alternatives as well as “best advice,” neither downplaying nor overpromising consequences, both expected and unintended, and pointing out uncertainties.¹¹

¹⁰ See Monroe H. Freedman, “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,” *Michigan Law Review* 64, no. 8 (June 1966): 1469, <https://doi.org/10.2307/1287199>; as cited in David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), 53, 150–53.

¹¹ Richard H. Kohn, “First Priorities in Military Professionalism,” *Orbis* 57, no. 3 (June 2013): 385, <https://doi.org/10.1016/j.orbis.2013.05.005> (Emphasis added).

Military professionalism and professional military ethics

Military legalism is focused on military professionalism, the means by which the military defines and differentiates its scope of knowledge and expertise, and regularizes and institutionalizes its desired behaviors, including subordination to civilian authority. Huntington asserts that status as a profession requires corporateness, responsibility, and expertise, and further that the unique expertise of the military profession is as “managers of violence.”¹² Janowitz similarly asserts that professionalism requires a group with special skill acquired through intensive training, a sense of group identity, and a system of internal administration, which when self-administered, leads to the growth of a corpus of professional ethics and standards of performance.¹³ Huntington’s definition of military professionalism as comprising corporateness, responsibility, and expertise has the advantage of parsimony, as well as near-ubiquitous acceptance in the US military.¹⁴

Huntington’s theory of objective civilian control is founded on the notion that a professional military should be given autonomy within the sphere of their professional expertise, but that professionalism obliges the military not to delve into arenas outside their professional expertise.¹⁵ Military legalism challenges this construct in two related and significant ways: First, the autonomy of a professional military is challenged when justification for the use of force is reliant on norms and reasoning from another profession, rather than on the professional expertise

¹² Huntington, *Soldier and the State*, chap. 1.

¹³ Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (United States of America: The Free Press of Glencoe, 1960), 6.

¹⁴ See, for example Dayne Nix, “American Civil-Military Relations: Samuel P. Huntington and the Political Dimensions of Military Professionalism,” *Naval War College Review* 65, no. 2 (Spring 2012): 89–104; See also Jim Golby, “Improving Advice and Earning Autonomy: Building Trust in the Strategic Dialogue,” *The Bridge* (blog), accessed October 3, 2017, <https://thestrategybridge.org/the-bridge/2017/10/3/improving-advice-and-earning-autonomy-building-trust-in-the-strategic-dialogue>.

¹⁵ Huntington, *Soldier and the State*, chap. 4.

of military officers. Second, this reliance on legal norms and reasoning incentivizes the military professional to take on some attributes of the legal professional—an activity which violates Huntington’s strict injunction that a professional military will remain focused on the management of violence.

Although military legalism changes the way in which decisions regarding the use of force are made and justified, it does not necessarily result in a different decision outcome than traditional professional military judgment. Traditional professional military judgment incorporates professional military ethics, which closely mirrors the principles embodied in the law of armed conflict.¹⁶ While specific elements of professional military ethics may vary over time according to different cultural and social contexts, and different types of technology employed, the broad principles captured by Walzer in his ‘war convention’ remain relatively constant. To paraphrase: anyone engaged in harm is a combatant and may be hurt or killed; anyone who is not engaged in harm, including those who were previously engaged in harm but have stopped, is not a combatant and must be protected to the greatest practical extent.¹⁷ To intentionally or excessively harm non-combatants is not only wrong, it is unprofessional.

¹⁶ The congruence between professional military ethics and the law is not coincidental: in pre-professional militaries, officers were drawn largely from aristocratic classes who were influenced by norms of honor and chivalry in their conduct toward each other (though frequently not, in practice, toward civilians or common soldiers). As military professionalism emerged in the 19th Century, militaries expanded in size and officers were drawn from groups who did not share aristocratic roots or notions of honor. Around this time, written codes such as the Lieber Code, the St. Petersburg Declaration, and the first Hague conventions began to emerge, codifying many of the honor-based principles that had previously served as unwritten rules of war.; see Snider, *The Army’s Professional Military Ethic in an Era of Persistent Conflict*, 12; John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Free Press, 2012) The written codes expanded the expectation of honorable conduct beyond the aristocratic officer classes, creating a norm of honorable conduct in combat by professional forces, which included shielding those not engaged in conflict from its effects to the greatest extent practicable.

¹⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 1977), pt. 3.

Professional military ethics places a premium on compliance with the law, but it is not legalistic. Osiel summarizes the difference concisely: “Faced with a hard case, officers are more likely to do the right thing if they ask themselves: ‘What is required of honorable soldiers here and now?’ rather than ‘What does international law require?’”¹⁸

Military legalism represents a change in how decisions are made and justified by military officers, not necessarily a change in the types of actions resulting from the decisions. Rather than relying principally on their judgment and expert knowledge as professional managers of violence, military officers employing military legalism strictly compare a proposed action against a set of rules and advocate for the action based on the extent to which it may be argued to be rule-compliant. Those actions that are within the bounds of the rules are presumed to be legitimate; those actions outside the bounds are presumptively illegitimate. Military legalism shifts the locus of expertise and ability to decide the boundaries of how military action will be conducted—what means and methods may be employed against which types of targets. Under traditional professional military judgment this rests exclusively with the military officer as part of her responsibility as a professional manager of violence. Under military legalism, the responsibility is shared between the officer and the rule-maker—with the likely addition of a military lawyer who guides and validates the officer’s interpretation of rules.

What is not military legalism?

It is important to distinguish military legalism from several other phenomena. Military legalism is not the practice of complying with the law of armed conflict. Such compliance is entirely consistent with traditional professional military judgment. Military legalism is also not

¹⁸ Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (New Brunswick and London: Transaction Publishers, 2002), 23–24.

an excuse for manifest failure to comply with the law of armed conflict. While defense lawyers for the accused in incidents such as My Lai, Abu Ghraib, or Haditha may use legalistic arguments, such incidents represent clear violations of professional norms, which is why the accused are on trial. Military legalism, by contrast is about a new way of constructing professional norms, not about justifying their violation. Military legalism is also not just a story about the proliferation of laws and treaties governing war. The “legalism” in military legalism stems from the norms of rule formalism and advocacy complementing or supplanting traditional professional military judgment, not necessarily from the explicitly legal nature of the rules being parsed. In fact, often the rules in question are regulations or policy that exceed the minimum requirements of domestic or international law.¹⁹ Finally, military legalism is not about “lawfare.” Lawfare is focused on the use of law as a tool to achieve national security goals, while military legalism is focused on the influence of legal reasoning in military professionalism and decision making.

Although the military displays legalistic tendencies in arenas other than the use of force, legalism in such administrative functions is not uniquely military in nature, and is thus not military legalism. Military justice and discipline, for example, embrace processes to protect the rights of servicemembers, which privilege rule formalism and advocacy.²⁰ Personnel evaluations similarly privilege strict interpretations of rules and process compliance. The expanded use of contractors to perform functions previously performed by men and women in

¹⁹ It is also unclear that there has been growth in IHL governing US military actions. While there has been growth in IHL since World War II, the United States is not a state party to the most significant instruments, the 1977 Additional Protocols and the 1997 Ottawa Treaty banning anti-personnel land mines. Gary D. Solis, Interview w/ Prof Gary D. Solis, interview by Doyle Hodges, August 8, 2016.

²⁰ For a discussion of military justice in the 1960’s and 1970’s, see Robert Sherrill, *Military Justice Is to Justice as Military Music Is to Music* (New York: Harper Colophon, 1970); For contrast with today’s procedures, see generally “MILITARY JUSTICE FACT SHEETS,” accessed April 4, 2015, [http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS\[1\].html](http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS[1].html).

uniform requires that officers supervise contractors and hold them strictly accountable to the standards specified in the contract. While each of these examples are legalistic and occur in a military setting, they are not unique to the military. Federal employees in every agency oversee the execution of contracts and administer personnel actions according to strict compliance with formal rules. While military justice and discipline may intrude more into the daily lives of servicemembers than the civilian judicial system does into those of ordinary citizens, military justice has become far less distinctive since the adoption of the Uniform Code of Military Justice in the 1950's. A civilian lawyer arguing in a military court would find military rules of evidence and trial procedures that closely mirror those of the Federal court system.²¹ It is only when the introduction of rule formalism and advocacy implicates the central expertise of the military profession—the management of violence—that military legalism arises.²² This occurs principally in decisions regarding the use of force.

Examples of military legalism

The following examples help to illustrate military legalism:

Operational targeting: During the early phases of the 2003 Iraq war, commanders in the Third Infantry Division faced a complex and chaotic fight. With subordinate units widely dispersed and limited information available, the Assistant Division Commander (Maneuver) (ADC-M) and his staff maintained a forward headquarters close to the fighting in order to coordinate the combat actions of brigade combat teams and smaller units.²³ In addition to the

²¹ For an overview of the trends in military justice, see Victor Hansen, “Military Justice Reform: An Overview,” *Federal Sentencing Reporter* 27, no. 2 (December 2014): 88–90, <https://doi.org/10.1525/fsr.2014.27.2.88>.

²² Huntington famously identified the management of violence as the unique expertise of the military profession. The phrase itself is borrowed from Lasswell. Huntington, *Soldier and the State*, 20.

²³ Colonel Peter C. Bayer, “The Lessons of War: A Division G-3’s Thoughts on Operation IRAQI FREEDOM” (US Army War College, 2004), 13–14, Root Hall Library, US Army Heritage and Education Center.

fog of war, leaders were also concerned about complex rules governing their actions. As the operations officer observed, “The staff JAG [judge advocate general, a uniformed military lawyer], Colonel Lyle Cayce, was forward in our [command post] at the side of the ADC-M for the entire war and made invaluable contributions to the fight. The complexity of targeting ROE [rules of engagement] absolutely required that the senior tactical commander forward have the advice and counsel of the JAG.”²⁴

The JAG in question provided an anecdotal example of the type of advice and counsel he was called on to provide:

When [the Division Generals] expressed concern that the ROE required Secretary of Defense approval if we anticipated a specific number of civilian casualties (exact number classified), I explained that this applied to deliberate attacks—not defensive measures. Accordingly, after a proper analysis, the Division would be free to conduct counter battery fires without seeking approval from higher headquarters, even if the fire came from a restricted target, or no-fire target area, or if substantial civilian casualties were expected. I explained that we could easily work around this requirement. Later, I suggested and higher headquarters approved the most expansive definition of “defensive fires” possible to avoid making such requests to the Secretary of Defense.²⁵

Analysis of this account reveals several interesting aspects of military legalism. First, the legalistic rules of engagement that concerned the generals were policy rules, not obligations imposed by law. The law of armed conflict requires that uses of force be governed by the principles of military necessity, proportionality, and unnecessary suffering—all of which call for a military, rather than a legal judgment, and none of which impose a strict or specific numerical limit on how many civilians may be killed.²⁶ The ADC-M was likely in the best position to

²⁴ Bayer, 19.

²⁵ Col. Lyle W. Cayce, “Operation IRAQI FREEDOM: An SJA’s Perspective” (US Army War College, 2004), 12, Personal Experience Monograph Collection, US Army Heritage and Education Center.

²⁶ Proportionality, for example, requires that the number of anticipated casualties be proportional to the “direct and concrete military advantage” to be gained. For specific definitions of the criteria Office of

assess the military efficacy of a proposed strike that might result in a significant number of civilian casualties. The elevated approval authority for such strikes contained within the ROE was focused on preserving legitimacy by ensuring that senior leadership was made aware of strikes that would likely generate public outcry, rather than meeting a military or legal obligation. But, as Martins describes, while lawyers are frequently involved in the development of ROE to ensure compliance with minimum standards of the law of armed conflict, the rules are a policy tool developed jointly between policy-makers and military commanders. In his words, ROE are a matter of “training, not lawyering.”²⁷ If the commander was constrained by legalistic rules, the constraint came from policy makers and superior commanders, not lawyers.

Second, when confronted with a legalistic set of rules intended to constrain his actions, the commander turned to a formal legalistic interpretation in order to free himself from the constraints. Rather than being tied down by rules requiring approval authority, which would take hours to obtain, the commander used rule formalism to expand his freedom of action and restore his autonomy by determining that the rules did not apply to defensive fires, and by adopting a liberal definition of defensive fires. Contrary to conventional wisdom, the use of legal reasoning freed the commander to act as he desired, rather than constraining him.

Finally, we see evidence of advocacy by the commander in his push to broadly interpret the concept of defensive fires. Since the question of whether or not an enemy has fired at friendly forces from a given target is a question of fact not subject to interpretation, the most likely way in which defensive fires may be subject to an “expansive definition” is through concepts such as anticipatory self-defense. Such concepts incentivize the commander to

General Counsel Department of Defense, “Department of Defense Law of War Manual” (Department of Defense, June 2015), 52–61.

²⁷ Mark Martins, “Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering” (The Judge Advocate General School, 1994), 15.

advocate that almost any engagement is defensive, and thus subject to his own approval, rather than a deliberate, offensive action subject to the more cumbersome approval requirements.

Operational policy: In 1999, Serbian leader Slobodan Milosevic was using his network of state-owned television and radio stations to incite widespread violence against Kosovar Albanians living in the Serbian province of Kosovo. As NATO leaders developed a list of targets to be struck in a coercive show of force, US planners advocated for the inclusion of state-owned radio and television stations on the target list. Many NATO countries disagreed with their inclusion, arguing that the broadcast centers were civilian, not military targets, despite their undisputed role in supporting the ongoing ethnic violence inside Kosovo. Ultimately, the radio and television stations, along with bridges over the Danube in Belgrade, and centers for the storage of petroleum, oil, and lubricants, were included on a list of targets to be struck only by US aircraft operating under US command, in parallel with the NATO airstrikes.²⁸ In this instance, the European position more closely reflected traditional professional military judgment with its strictures against striking civilian targets, while the US position displayed both rule formalism and advocacy. By adopting a specific definition of ‘military purpose’ that included exhortations to ethnic violence as part of a government-backed campaign, US leaders advocated that the targets satisfied the specific rules regarding use for a military purpose and had thus lost their protected status as civilian targets.²⁹ This legalistic interpretation allowed US forces to preserve the constraint against intentionally striking civilian targets, but deny Milosevic the ability to protect an integral element of his ethnic cleansing campaign by co-locating it with civilian infrastructure.

²⁸ See Frederic L. Borch, “Targeting after Kosovo: Has the Law Changed for Strike Planners.,” *Naval War College Review* 56, no. 2 (Spring 2003): 64–81.

²⁹ Borch.

Not all instances of military legalism expand the scope of military action. In some cases, an adversary may exploit constraints not so much for tactical cover as for strategic advantage by provoking actions that, while permitted by law, policy, and regulation, undermine the legitimacy of friendly forces, much like a player may attempt to provoke an opponent and “draw a foul” in basketball.³⁰ In such cases, a commander may interpret constraints more broadly or even add constraints in order to deny the adversary the strategic advantage afforded by undermining legitimacy, even if it cedes some tactical advantage to the adversary. So long as this approach relies on rule formalism and advocacy, rather than military judgment and professional military ethics, it may still be an example of military legalism. A well-known and controversial example from Afghanistan illustrates this point:

Increasing constraints through legalism: In July 2009, General Stanley McChrystal, commander of US and NATO forces in Afghanistan issued a tactical directive to his forces, which placed substantial limitations on the use of air-to-ground munitions and indirect fires, especially in residential areas.³¹ The tactical directive was a general order, having the authority of law to those under McChrystal’s command. In this case, rather than interpreting rules to provide greater freedom of action, McChrystal specifically interpreted them so that his forces were subject to greater constraint. McChrystal was concerned that Taliban forces, in an effort to

³⁰ For the analogy of “drawing a foul” in basketball, see Michael Skerker, “Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones,” *Journal of Military Ethics* 3, no. 1 (March 2004): 27–39, <https://doi.org/10.1080/15027570310004636>.

³¹ Stanley McChrystal, “Memorandum Re: Tactical Directive,” 2009; Christopher D. Amore, “Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties,” *Nat’l Sec. LJ* 1 (2013): 60-61. “Indirect fires” are weapons, such as artillery and mortars, that are fired into the air and fall onto their target from above. Because of the potential inaccuracy this creates, it is not uncommon for the first round from an indirect fire weapon to hit near, but not precisely on, the target. Subsequent rounds are adjusted from this point of initial impact. Indirect fire weapons ordinarily fire an explosive shell, rather than a non-explosive bullet. The potential for damage or harm to nearby structures and people is higher with an indirect fire weapon than a weapon that is pointed directly at a target and fires a non-explosive shell, such as a rifle or machine gun.

undermine coalition legitimacy, were deliberately drawing coalition forces into situations where air strikes and indirect fire weapons would be certain to cause substantial civilian casualties.³² In response, McChrystal adopted a very specific and narrow set of regulatory constraints on the use of such weapons, which were resented and criticized by many soldiers.³³ The constraints appeared to be effective: in the first six months after the tactical directive was issued, civilian deaths attributed to coalition forces dropped by 30 percent, and deaths attributable to coalition air-dropped weapons decreased by 64 percent.³⁴ McChrystal's tactical directive was founded in his own military judgment, but took a legalistic form. He did not believe or assert that he was prevented from employing indirect fires or aerial bombing by law, nor did he argue that their use violated professional military ethics; instead, he created a set of policy and regulatory rules regarding the use of those techniques that were so specific as to effectively preclude their employment except under the most exacting circumstances.³⁵ A more traditional approach of professional military judgment might have involved articulating the strategic advantage the Taliban were gaining when indirect fires and air-dropped weapons were used in populated areas, and alerting subordinate commanders to place greater weight on the risks to Afghan civilians as compared to the risk to their own forces in balancing the "direct and concrete military advantage to be gained" by using these techniques. Instead, the tactical directive institutionalized the commander's judgment throughout the force by articulating a formal restrictive interpretation, and stipulating (a particularly powerful form of advocacy) that this interpretation be used.

³² Amore cites Cordesmann that ISAF forces were responsible for 28 percent of civilian deaths in Afghanistan in the six months prior to the issuance of the tactical directive. Amore, "Rules of Engagement," 72–73, 62.

³³ See, generally Amore, "Rules of Engagement."

³⁴ Amore, 73 citing Cordesmann.

³⁵ McChrystal, "Tactical Directive:" "The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions." (The specific conditions were deleted for classification purposes.).

What causes military legalism?

Balancing efficacy and legitimacy

A fuller discussion of the causes of military legalism, including consideration of alternative explanations, is contained in the third chapter. In this introduction, however, it is important to establish that military legalism has its roots in a desire on the part of military officers to be both militarily and strategically effective.

Decisions about the use of military force must attempt to balance two imperatives: efficacy and legitimacy. On one hand, military commanders want to take the most effective action possible to quickly and decisively achieve their military aim. On the other hand, militaries in a democracy are concerned that their actions must be perceived as legitimate, since to lose legitimacy may well undermine the realization of strategic benefits. Although efficacy may require bringing overwhelming force to bear on a target, it is not simply about achieving the maximum kinetic effect—otherwise we would see an inexorable trend toward what Clausewitz called “maximum force” in which armies prefer machine guns to rifles, artillery to machine guns, aerial bombs to artillery, large bombs, to small bombs, etc.³⁶ Today, as in Clausewitz’ time, the use of force is bounded by the value of both the political and the military object in question.³⁷

The value of the political object is directly related to the question of legitimacy. Legitimacy is a concept oft-invoked, but ill-defined in political science. Weber spoke of legitimacy as the justification of a ruler to give commands and to employ force to implement

³⁶ Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret, Indexed (Princeton, New Jersey: Princeton University Press, 1984), 76.

³⁷ One way to view this balance would be to consider efficacy as the use of force that is appropriate to the value of the military object, and legitimacy as the use of force that is appropriate to the political object. See Clausewitz, 78–81.

them.³⁸ Franck, writing in 1990, defined legitimacy as, “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”³⁹ Craig, writing in 2013, more succinctly defines legitimacy as, “a value judgment that gives authority to the exercise of power.”⁴⁰ Clark, while incorporating elements of both Weber’s and Franck’s definitions, goes further and argues that legitimacy is the constitutive requirement of international society: “Core principles of legitimacy articulate a willingness to be bound, both to certain conceptions of rightful membership of society, and to certain conceptions of rightful conduct within it.”⁴¹ Legitimacy thus involves the normative assessment of a claim to authority (or an action that derives from such a claim), the result of which affects the standing of the group claiming the authority, as judged by the group performing the assessment.

To use a concrete example, if a person sees a man strike a child in a store, the man may attempt to justify himself by explaining that he is the child’s father. Some people might consider the authority of a father to use corporal punishment to discipline a child as inherent in parenthood and would accord the father legitimacy; some might consider that parenthood brings a responsibility to never deliberately hurt a child, and would consider the act illegitimate and the father derelict in his parental duties. The view of whether or not parenthood brings authority to use corporal punishment is likely to be heavily influenced by the communities to which the

³⁸ See Politics as a Vocation, in Max Weber, *From Max Weber: Essays in Sociology*, trans. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 78–79; See also *The Social Psychology of the World Religions*, *ibid*, 294.

³⁹ Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York and Oxford: Oxford University Press, 1990), 24.

⁴⁰ Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Lanham, MD: Lexington Books, 2013), 12 italics omitted.

⁴¹ Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), 24.

person belongs (faith groups, cultural background, etc.), as well as the severity and nature of the physical force involved. Assessing the legitimacy of military action is similar: it is a judgment of whether the military measures being taken by a group of fighters are appropriate according to the standards of the society judging them, in light of the larger purpose of the fight. Phrased most simply, military legitimacy is the assessment of whether the military means are justified by the political ends.

Especially in evaluating a military course of action, the concept of legitimacy is highly contingent on context and on the audience performing the assessment. A military action perceived as legitimate by the US public may be perceived as illegitimate internationally, or vice versa. Further, the broader political context in which an action is carried out is also likely to influence the assessment of legitimacy. The massive bombing raids on Dresden and Tokyo in World War II were widely perceived at the time to be legitimate (although they engendered debate after the war); similarly-sized bombing raids during the Vietnam conflict, which resulted in many fewer civilian casualties, were widely perceived as illegitimate.⁴² While different audiences are likely to perceive the contextual appropriateness of an action differently, their judgments are not necessarily independent. A persistent sense of support or disapproval on the part of one audience may influence the assessment of another audience as to the appropriateness of an action.

Most US wars of the early- and mid- 20th Century were fought within a narrative framework, which helped to define the scope of legitimate military actions. World War I was

⁴² For a fuller discussion of the legitimacy of strategic bombing, see generally Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Ithaca and London: Cornell University Press, 2001); Regarding US bombing in Vietnam specifically, see Joseph R. Cerami, "Presidential Decisionmaking and Vietnam: Lessons for Strategists," *Parameters* 26, no. 4 (Winter /97 1996): 66–80.

fought to “make the world safe for democracy.”⁴³ World War II was fought to end the evils of Nazism and Imperial Japan; the record of atrocity compiled by those regimes made it easier to justify the employment of new means and methods of warfare, which brought a scope and intensity of killing not previously seen in warfare.⁴⁴ The onset of the Cold War provided an over-arching framework of competition with global Communism, which helped to define legitimacy in Korea and Vietnam. The nature of the Cold War competition between two rivals, each of whom had the potential to pose an existential threat to the other, however, complicated calculations of legitimacy. The sense of caution that emerged from a desire not to provoke through miscalculation an escalation to catastrophic total war changed the goal of many Cold War conflicts from total victory, as it was understood during World War II, to a more nuanced range of acceptable political outcomes.⁴⁵ Under such circumstances, the uncertain value placed on an elusive political goal made the argument for the appropriateness of military courses of action, which resulted in substantial casualties or offended a sense of “rightness” much more challenging, as will be discussed in Chapter 4.

Since the 1980’s, US military power has steadily increased, relative both to specific adversaries with whom the US has fought, and the general standard of global military capacity.⁴⁶

⁴³ For an interesting discussion of early questions of legitimacy versus efficacy in “total war,” see ANDREW BARROS, “STRATEGIC BOMBING AND RESTRAINT IN ‘TOTAL WAR’, 1915–1918,” *The Historical Journal* 52, no. 02 (2009): 413–431.

⁴⁴ For an overall discussion of this moral component, see Richard Overy, *Why the Allies Won*, Paperback (New York, London: W.W. Norton & Company, 1997), chap. 5; Regarding the application of airpower and strategic bombing, see Thomas, *The Ethics of Destruction*, chap. 4; For a discussion of more tactical innovations, such as the extensive use of napalm, see James D. Hornfischer, *The Fleet at Flood Tide: America at Total War in the Pacific*, Kindle (New York: Bantam Books, 2016), chap. 20.

⁴⁵ For a discussion of how this change affected US military professionals, see Donald F. Bletz, *The Role of the Military Professional in US Foreign Policy* (Westport, CT: Praeger, 1972), 235–42.

⁴⁶ See generally, “Trends in U.S. Military Spending,” Council on Foreign Relations, accessed October 16, 2017, <https://www.cfr.org/report/trends-us-military-spending> While defense spending is only a rough measure of military power, US military spending has accounted for at least 36% of global military spending every year since 1988.

This disparity of power affects legitimacy in two ways. First, it sows doubt around US claims of self-defense and proportionality. The end of the Cold War has exacerbated this trend, making it more difficult to access a globally resonant narrative which frames the conflict in a way that lends presumptive legitimacy. Since the only legitimate reason for the use of military force under the United Nations charter is national or collective self-defense (or as part of an operation authorized by the United Nations), and since it is difficult to imagine a scenario in which the US is existentially threatened by conventional military means, this places the US in a position where the international legitimacy of its military actions can readily be challenged.⁴⁷ Second, the disparity of military power makes it highly unlikely that an adversary will obtain a favorable result on the battlefield alone.

The diminished legitimacy of US military operations created by doubt as to *why* they are undertaken—whether they are truly proportionate or defensive in nature—creates an opportunity for adversaries to further undermine US legitimacy by seeking to provoke actions that violate constraints on *how* they are conducted, as well. Craig observes that, although the traditional just war theory categories of *jus ad bellum* (the justice of the cause for which the war is fought) and *jus in bello* (the justice of the means with which war is waged) are analytically distinct, many observers apply a sliding scale to the assessment of *in bello* decisions, depending on their assessment of the *jus ad bellum*.⁴⁸ This matters because much of the international law of armed

⁴⁷ See “Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression,” accessed March 23, 2015, <http://www.un.org/en/documents/charter/chapter7.shtml>, articles 39-42 and 51. See also, Chapter I, article 2.

⁴⁸ Craig, *International Legitimacy and the Politics of Security*, chaps. 4, Section 3 “A Level Playing Field?”; Walzer, citing Rawls, discusses this as well, and it forms the moral premise for his doctrine of “supreme emergency.” Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 229–32. The passage cited from Rawls reads, in part, “Even in a just war, certain forms of violence are strictly inadmissible; and when a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe.”

conflict reflects a codification and operationalization of traditional *jus in bello* principles. Craig cites Judith Gardam as saying about the 1991 Gulf War, for example, “in the assessment of [*jus in bello*] proportionality, civilians, and to a lesser extent combatants, of the aggressor state were afforded less weight in the balancing process than combatants of the ‘just side.’” Craig continues: “Since we cannot rely on...international organizations to limit war to defensive war, we tend towards controlling the aggressor by a partial application of the law relating to the conduct of war.” Speaking of the United Nations’ Goldstone Mission, which looked into Israeli operations in Gaza (Operation CAST LEAD) as an example of this, he says,

The Goldstone Mission’s *ad bellum* findings are the driving force behind much of the severe *in bello* criticism of Israel’s conduct of Cast Lead in Gaza. The report begins with a lengthily [sic] history of Israeli oppression of the Palestinian people that expands the time frame to contextualize Cast Lead as part of an aggressive occupation rather than a defensive response to several months of rocket fire.⁴⁹

Sloan, writing about the conflation of *jus ad bellum* with *jus in bello* more generally, picks up this theme:

Despite nominal consensus on the dualistic axiom [that judgments of *in bello* conduct should be independent of an assessment of *ad bellum* justification], international law tends to tolerate more incidental civilian harm (“collateral damage”) if the alleged *casus belli* is either (1) widely perceived as legal (for example, a clear and unassailable case of self-defense) or (2) formally illegal but still perceived as legitimate, meaning that it furthers broadly shared international values: preserving minimum order, halting human rights atrocities, and so forth.⁵⁰

Thus, as the military imbalance between the US and its adversaries has increased since the 1980’s, adversaries have both greater incentive and greater opportunity to undermine the

⁴⁹ Craig, *International Legitimacy and the Politics of Security*, 96.

⁵⁰ Robert D. Sloane, “The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War,” *Yale J. Int’l L.* 34 (2009): 55 as cited in Craig, *ibid.*, 97.

legitimacy of US military actions. First, US military actions are increasingly subject to scrutiny and criticism due to questions about their defensive nature and *jus ad bellum* proportionality. Second, this atmosphere of contested policy legitimacy creates greater scrutiny on US *jus in bello* decisions. An adversary who exploits traditional *jus in bello* constraints on the use of force for tactical advantage, for example by dressing like and hiding among civilian populations, employing women and young children both as shields and as fighters, and using culturally protected sites for military purposes, may achieve strategic advantages as well, by provoking actions that cause outrage and undermine US legitimacy, since the tolerance for civilian casualties or other violations of *in bello* constraint is likely to be quite low. The battlefield is important to such an adversary not as a place to win military victory, but principally as a venue in which to undermine the legitimacy of US actions. Instead of winning on the battlefield, the adversary seeks to obtain their victory by increasing the political costs in prestige and legitimacy until, in Clausewitzian terms, the costs of the conflict exceed the value of the object.

In this environment of contested legitimacy, senior US military and civilian policy-makers increasingly govern the use of force through a complex regime of rules comprised of law, policy, and regulation. These rules proscribe actions that might damage US legitimacy. Often, as in the example from Iraq cited previously, rather than simply ensuring compliance with international law, the rules are focused explicitly on assuring that senior policy-makers are aware of actions, which might spark outrage, such as the requirement for higher-level approval based on the anticipated number of civilian casualties. Military officers who must operate in this environment find themselves in a position where arguments as to their best military judgment do not satisfy or reassure senior military and civilian policy makers so much as assurance that the

proposed action is compliant with the established regime of rules. Military legalism is the unsurprising result.

Military legalism in the literature

The most closely related work to the concept of military legalism explored in this dissertation are Craig's 2013 analysis of Israel's efforts to use international law to garner legitimacy in its security policy, and McLeod's 2015 examination of international law and US counter-insurgency.⁵¹ Craig explores the nexus between law and legitimacy at the state level. He specifically examines the deployment of lawyers in the Israeli Defense Forces as part of a conscious effort to forestall both domestic commissions of inquiry and the threat of international prosecution for Israeli leaders.⁵² Craig's approach differs from this exploration of military legalism in that it focuses solely on the state of Israel and its efforts to claim legitimacy, with little examination of the civil-military implications of such efforts, and no discussion of its implications for Israeli military professionalism. Similar to Craig, McLeod explores the role of law in legitimating military actions, although he focuses much more narrowly on US counter-insurgency (COIN) policy and the way in which international law has shaped and strengthened its execution. McLeod asserts that this role of law is unique to counter-insurgency and uses this as a means to explore three pathways by which international law shapes state behavior, even in times of conflict.⁵³ In contrast, this dissertation asserts that the legitimating framework of rule compliance and law plays a role in both conventional conflict and insurgency. Both works are

⁵¹ Craig, *International Legitimacy and the Politics of Security*; Travers McLeod, *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan* (Oxford and New York: Oxford University Press, 2015).

⁵² Craig, *International Legitimacy and the Politics of Security*.

⁵³ McLeod, *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan*.

extremely helpful in examining the role of law in contemporary military operations, but the approach of both differs from this study.

‘Military legalism’ borrows heavily from the more general concept of legalism. Both Shklar and Bass have explored the notion of legalism, although each takes a slightly different approach. For Shklar, legalism is “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”⁵⁴ For Bass, legalism consists not only in a focus on rule-following, but also in the legal process due to those who stand accused of war crimes and the translation of the domestic norms of liberal states into the international system.⁵⁵ Bass thus subsumes principles as well as rules into his use of legalism in a way that Shklar does not. Although both Shklar and Bass use the term legalism to explore the migration of legal norms into other realms (for Shklar, their influence on society more broadly; for Bass, their influence on international politics), military legalism differs from both of these usages in that it reflects the migration of legal norms specifically from the profession of law into the military profession.

Kagan has written of adversarial legalism—a method of policymaking and dispute resolution that is characterized by formal legal contestation, litigant activism, and substantive legal uncertainty.⁵⁶ Kagan’s notion of legalism is most relevant in considering the societal trends that may frame and characterize military legalism (see discussion in Chapter Three).

The application of the term “military legalism” to describe the migration of the legal norms of advocacy and rule formalism into military decision making is consistent with the use of

⁵⁴ Shklar, *Legalism*, 1.

⁵⁵ Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2000); Gary J. Bass, “Atrocity & Legalism,” *Daedalus*, 2003, 73–82.

⁵⁶ Robert A. Kagan, “Adversarial Legalism and American Government,” *Journal of Policy Analysis and Management* 10, no. 3 (1991): 369, <https://doi.org/10.2307/3325322>.

the term “legalism” in both its philosophical and conversational meaning, and is thus not a case of conceptual stretching.⁵⁷

The profound influence of Huntington on the concept of military professionalism has already been mentioned. Huntington is, of course, not the only theorist of military professionalism; he is, however, one of the few whose theory takes seriously the component of professionalism that deals with justifying the use of force. Janowitz, in his classic *The Professional Soldier*, does not offer a theory of military professionalism (instead, he uses sociological tools to study the military as a profession) nor does he seriously address the notion of professional military ethics. “Self-administration,” he writes, “...implies the growth of a body of ethics. ...As it applies to the military, it presents an ambiguous topic, for what is the import of ethics and responsibility for the professional combatant?”⁵⁸ As a consequence, while Janowitz’ insights on the civilianization of military culture are valuable, he does not engage with the thorny questions of professional ethics and the legitimation of the use of force. Janowitz does identify one of the principal challenges posed by military legalism, however. In commenting on the importance of honor in the military culture, Janowitz observes, “The officer is less and less prepared to think of himself merely as a military technician.”⁵⁹ Janowitz’ conception of military honor is inwardly focused on gentlemanly conduct, personal fealty, brotherhood, and the pursuit of glory.⁶⁰ But many conceptions of military honor focus instead on the way in which honorable conduct in combat differentiates a warrior from a criminal.⁶¹ If decisions on the use of force are

⁵⁷ On the notion of concept stretching, see Giovanni Sartori, “Comparing and Miscomparing,” *Journal of Theoretical Politics* 3, no. 3 (1991): 249.

⁵⁸ Janowitz, *The Professional Soldier: A Social and Political Portrait*, 6 The question is left unanswered, rather than leading to a discussion of the importance of professional military ethics.

⁵⁹ Janowitz, 12.

⁶⁰ Janowitz, chap. 12.

⁶¹ See, for example, Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present* (Lanham, MD: Rowman & Littlefield Publishers, 2005); Michael Ignatieff, *The Warrior’s*

made according to the precepts of the legal profession rather than the military profession, the professional military officer may risk becoming the military technician described by Janowitz.

Feaver's influential analysis of civil-military relations minimizes the role of military professionalism, focusing instead on the strategic and hierarchical interaction of the military as an agent with civilian principals, and the associated challenges of working and shirking.⁶² Feaver subsumes the values of military professionalism in his discussion of the value that the military places on honor, which he considers to be one of the elements—though not necessarily the defining element—in shaping the military's preferences.⁶³ Although Feaver does not use the lens of professionalism in his analysis, the emergence of military legalism is consistent with Feaver's expectations for how bureaucracies respond under regimes of intrusive and non-intrusive monitoring.

Several authors address the intersection of law and military operations. Borch has written an excellent account of Army Judge Advocates in combat, documenting the rise of the discipline of operational law, which is closely associated with military legalism.⁶⁴ Dickinson offers a contemporary account, focused on the role of military lawyers in ensuring compliance with international law in the conflicts in Iraq and Afghanistan.⁶⁵ Neither Borch nor Dickinson seek to offer a theoretical explanation for the rise of the phenomenon they chronicle. Although he does not use the term “military legalism” or focus on its implications for military professionalism,

Honor: Ethnic War and the Modern Conscience (New York: Henry Holt and Company, 1997); “Honor, Not Law,” accessed April 4, 2015, <http://www.armedforcesjournal.com/honor-not-law/>.

⁶² Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge, Massachusetts; London, England: Harvard University Press, 2003).

⁶³ Feaver, 64–65.

⁶⁴ Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Washington, D.C.: Office of the Judge Advocate General and Center of Military History United States Army, 2001),

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.352.9121&rep=rep1&type=pdf>.

⁶⁵ Dickinson, “Military Lawyers on the Battlefield.”

Osiel's work on military atrocity and the manifest unlawfulness exception to the superior orders defense offers an insightful evaluation of the implications of rule-based approaches to military law and ethics.⁶⁶

In recent years, a new literature has arisen on the concept of "lawfare." While the concept itself has only recently achieved clear conceptual boundaries and still suffers from some degree of definitional disagreement, lawfare is distinct from military legalism.⁶⁷ A prominent blog devoted to the topic defines lawfare as "actions taken or contemplated to protect the national interest with laws and legal institutions"⁶⁸ One of the most prolific academic authors on the topic defines lawfare as "a method of warfare where law is used as a means of achieving a military objective."⁶⁹ Bartman, writing about the Soviet and Russian Federation use of the definition of aggressive war to justify their military actions defines lawfare as, "the manipulation or exploitation of the international legal system to supplement military and political objectives."⁷⁰ While the lawfare literature helps to illuminate the role of law and lawyers in

⁶⁶ Osiel, *Obeying Orders*.

⁶⁷ A 2011 special edition of the *Case Western Reserve Journal of International Law* did much to refine the definition of the topic. See, Orde F. Kittrie, "Lawfare and US National Security," *Case Western Reserve Journal of International Law* 43 (2011): 393; See also, Kittrie's subsequent book-length treatment Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford and New York: Oxford University Press, 2016).

⁶⁸ "About Lawfare: A Brief History of the Term and the Site," *Lawfare* (blog), October 24, 2015, <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>.

⁶⁹ Charles J. Dunlap Jr, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts" (Humanitarian Challenges in Military Intervention, Washington, D.C.: Carr Center for Human Rights Policy Kennedy School of Government, Harvard University, 2001), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship; Dunlap Jr, "Lawfare Today"; Charles J. Dunlap Jr, "Lawfare: A Decisive Element of 21st-Century Conflicts?" (DTIC Document, 2009), <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA515192>.

⁷⁰ Christi Scott Bartman, "Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us," *Case Western Reserve Journal of International Law* 43, no. 1/2 (2010): 423; Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2010), 1–2.

national security, it is focused consistently and exclusively on the legal discipline, rather than focusing on the military profession, as does military legalism.

Why military legalism matters

Military legalism may change the effectiveness of law as a constraint on war, the way wars are fought, and the conduct of civil-military relations. As a phenomenon, military legalism is normatively neither good nor bad; its manifestations may have positive or negative effects. In one of its worst manifestations, military legalism played a role in enabling the torture of prisoners by the US military. In a more positive manifestation, it has been used in an effort to seize and hold the moral high ground in counterinsurgency operations. Regardless of whether it manifests positively or negatively, military legalism represents shift in the paradigm of military professionalism that has not been widely acknowledged by the military itself, and which may affect both the role of professional military ethics, and the practicalities of US policy.

Perhaps the most significant risk posed by military legalism is that it may allow military operations to become unmoored from the moral principles that have guided them—however tenuously—and differentiated modern war from pure savagery. When it does so, wars are fought more viciously, even as the letter of the law intended to mitigate war’s viciousness is punctiliously observed. Yves Sandoz, former director of International Law and Policy for the International Committee of the Red Cross (ICRC) observed, “War will remain cruel and there will never be adequate compliance with rules aimed at curbing that cruelty. New problems will arise requiring new forms of action and new discussion about the adequacy of existing rules or their application to new realities.”⁷¹ But when the rules in question can be parsed and stretched

⁷¹ Jean-Marie Henckaerts et al., eds., *Customary International Humanitarian Law* (Cambridge ; New York: Cambridge University Press, 2005), xxi.

through formal legalistic interpretation, their strength and meaning is diminished and they may lose the connection with the purpose for which they were adopted. Already institutions such as the ICRC are scrambling to adapt international law in such a manner that it remains relevant to state practice regarding the targeting of civilians who periodically participate in hostilities.⁷² If military legalism becomes a dominant practice, such re-interpretations may only offer further loopholes to be parsed, interpreted, and exploited, rather than offering a definitive and well-recognized constraint. As Luban (paraphrasing Waldron) observed regarding torture: the law of torture is not like tax law, which requires precision since everyone may be expected to push it as far as is permissible; the law of torture is more like a prohibition of sexual harassment or domestic violence where, if you must ask for precision in determining how far you may permissibly go, you have missed the point.⁷³ Some areas of military operations are like tax law, but most are not. Military legalism risks treating all military decisions as if they were.

Military legalism also has the potential to change the power balance between the military and its civilian masters. By shifting the locus of decisions about the use of force from military professional expertise to rule-compliance, military legalism diminishes the traditional autonomy of the military. From the perspective of civilian leaders, this may be seen as desirable, moving the discussion from a relatively arcane realm in which they may not have experience or expertise (military professionalism) to a realm in which an increasingly large proportion of civilian leaders feel comfortable based on their own experience and expertise (law). On one hand, this could

⁷² See generally ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009,” *International Review of the Red Cross* 90, no. 872 (December 2008): 991–1047.

⁷³ David Luban, *Torture, Power, and Law* (Cambridge ; New York: Cambridge University Press, 2014), 111 Luban is paraphrasing a 2005 Columbia Law Review article by Waldron, “Torture and Positive Law: Jurisprudence for the White House.”

have the effect of “de-skilling” the military—turning military officers into Janowitz’ “military technicians” who have little to add to the discussion of when, why, and how force should be employed, rather than Huntington’s “professionals in the management of violence.” On the other hand, the domain of law lacks the presumption of civilian supremacy that defines the domain of military professionalism. In law, the superior argument should prevail, regardless of whether it is made by someone in uniform or in a suit. Thus, even as it offers the illusion of increasing the ability of civilians to control the military by interacting with military leaders in a domain that is more familiar and comfortable to the civilians, and diminishes the autonomy implicit in military professionalism, military legalism may promote a culture that undermines the assumption of civilian supremacy on which democratic civil-military relations are founded.

Summary, scope, and plan

To review, military legalism is the practice of privileging legal reasoning rather than traditional professional judgment in justifying military decisions regarding the use of force. Military legalism is an adaptive response by military commanders to a regime of rule-based constraints on the use of force implemented by policy-makers who are themselves adapting to adversaries seeking to undermine the legitimacy of US military actions.

Military legalism is focused on the process by which professional military officers make and justify decisions about the use of force. As such it focuses on military professionalism, since it is concerned with the expertise and responsibility of military officers. This distinguishes military legalism from several other phenomena: Military legalism is not the practice of complying with or violating the law of armed conflict; it is not a story about differing interpretations of what the law may allow or require; it is not just a story about the proliferation of laws and treaties governing war; and, it is not a different term to describe “lawfare.” Instead,

it is about a systematic shift in the way that professional military officers in the United States think about and justify the use of force.

For analytic purposes, military decision making may be divided into the strategic, operational, and tactical levels. This dissertation will look for evidence of military legalism principally at the operational level.

Strategic decisions focus on overall national policy and theater strategy. They are intensely political in nature and made in concert with political leaders, which makes it difficult to distinguish the effects of a change in military professionalism from the influence of political factors. These decisions are normally the purview of three- and four-star officers and their staffs, as well as civilian policy-makers.

Tactical decisions are decisions made by individual units, and may be made at any level from the lowliest private to the commander of a ship, company, or battalion. At the tactical level, decisions are focused on executing the orders given by higher headquarters. Decisions involving the use of force are frequently bound inextricably with questions of individual and unit self-defense. While tactical decisions are influenced by military professionalism, the urgency of combat and the relatively junior level of those making the decisions makes it difficult to isolate the influence of military professionalism, as compared to other factors.

The operational level sits between the strategic and the tactical. It is at the operational level that the broad strategic direction agreed by senior military and political leaders is translated into specific plans, and those plans are translated into mission orders to be carried out by individual units. The simplest way to think of the operational level of military decision making is that it involves units which are themselves comprised of other units. (For example, a brigade may be comprised of three or four battalions; a strike group may include four to six ships, plus

several squadrons of aircraft). The operational level normally involves commanders who are O-6's (Captains in the sea services, Colonels in the ground and air forces) through O-8's (two-star officers: Rear Admirals in the Navy, Major Generals in the Army, Marine Corps, and Air Force), although under some circumstances more senior or more junior officers and staffs may be drawn into operational-level decision making. Commanders at the operational level are almost always supported by a staff. This dissertation will focus on the operational level of decision making, because this is the level at which decisions should be guided most by the principles of military professionalism. The operational level of military decision making is as close Huntington's idealized vision of the military as "professional managers of violence" as it is possible to study in the real world. If military legalism is evident at this level of military decision making, it poses a strong challenge to the US military's preferred vision of itself as Huntingtonian autonomous experts operating in their own sphere of expertise.

Although military legalism may emerge in any democracy confronted with the challenge of contested legitimacy, the analysis in this dissertation is limited to the US military. This limitation allows the author to leverage the understanding of and insight into US military culture developed over the course of 25 years in the US Navy. Additionally, the US has both the most powerful military in the world, and the most powerful military of any democracy. Given the dwindling size of militaries in Europe, the majority of sustained military interventions that involved democracies over the past two decades have involved the US military. (Israeli operations in Gaza and the West Bank and French intervention in Mali serve as the most significant exceptions to this). Examining the US case thus has significant analytic and explanatory power for evaluating recent operations, and by extrapolation, likely future operations.

The dissertation is organized in six chapters. This first chapter defines the concept of military legalism, provides examples, situates the concept in the literature, and briefly makes the case for its importance. The second chapter examines macro-level empirical evidence of military legalism, in order to establish whether it is a widespread phenomenon, or an anecdotal occurrence. The third chapter looks more closely into the question of what causes military legalism. Chapter four looks at military decision making in World War II, Korea, and Vietnam in order understand why military legalism emerged in the US military only after Vietnam, instead of at another time. Chapter five examines two post-Vietnam conflicts for evidence of military legalism: the intervention of Marines in Beirut in the early 1980's and the US invasion and occupation of Iraq in 2003-2004. The final chapter offers thoughts about the implications and future of military legalism, as well as policy recommendations.

Chapter 2: How Widespread is Military Legalism?

There is no substitute for honor as a medium of enforcing decency on the battlefield, never has been and never will be. There are no judges, more to the point, no policemen, at the place where death is done in combat.

John Keegan, *The Face of Battle*¹

Before proceeding to a more detailed exploration of the causes of military legalism in Chapter Three, this chapter will examine evidence of how widespread the phenomenon of military legalism is within the US military. While subsequent chapters will focus on the way in which individual operational-level units and leaders justified their uses of force in various conflicts, this chapter examines macro-level observable implications of military legalism in the US military as a whole. Since one of those indications has to do with the number and role of military lawyers, the chapter begins with a brief discussion of the professional status of JAG's vis-à-vis professional military officers.

JAG's: professional lawyers, professional soldiers, or both?

The military employs both uniformed and non-uniformed lawyers; while those not in uniform are clearly civilians, the role of the uniformed lawyers, or JAG's, is less clear. Are they lawyers, soldiers, or both? An Army Reserve JAG serving in Iraq in 2003 comes down on the side of "both":

Our motto is 'Soldiers first, lawyers always. As 'soldiers first' we, like everyone, do our fair share of 'grunt' work: guard duty, packing and lugging gear, monitoring the radio for hours on end, physical training, driving vehicles,

¹ John Keegan, *The Face of Battle*, as cited in Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience*, 118.

filling out forms, arranging logistics, waiting in line, providing security. We never go out unarmed.²

This description of JAG's as both lawyers and soldiers is common among JAG's, but conflicts with a traditional understanding of the expertise of a professional soldier.³

Huntington's description of the expertise of military officership reflects a more traditional view of the difference.

The direction, operation, and control of a human organization whose primary function is the application of violence is the peculiar skill of the officer. It is common to the activities of the air, land, and sea officers. It distinguishes the military officer *qua* military officer from the other specialists which exist in the modern armed services. The skills of these experts may be necessary to the achievement of the objectives of the military force. But they are basically auxiliary vocations, having the same relationship to the expertise of the officer as the skills of the nurse, chemist, laboratory technician, dietician, pharmacist, and X-ray technician have to the expertise of the doctor...Individuals, such as doctors...belong to the officer corps in its capacity as an administrative organization of the state, but not in its capacity as a professional body.⁴

Huntington's description captures the distinctive traditional difference between JAG's and line officers. While JAG's are valued and necessary members of the military who enhance their credibility within the organization by taking on a variety of roles common to the mission (such as the 'grunt work' described above), their fundamental expertise is as lawyers, not as managers of violence. Much like a skilled tax lawyer must have an in-depth understanding of accounting or a medical malpractice lawyer must be up-to-date on the prevailing standard of care

² As quoted in James V. Grimaldi, "Army's JAG Corps Deals With Reality Of War in Iraq," *The Washington Post*, November 17, 2003, https://www.washingtonpost.com/archive/business/2003/11/17/armys-jag-corps-deals-with-reality-of-war-in-iraq/470cb052-8d67-4227-858b-df90a5b04ee0/?utm_term=.c0f171ce4ddf.

³ For an example of a prominent JAG promoting this dual identity, see Michael Nardotti, Oral History Nardotti, interview by Kevin Boyle and Michael McHugh, May 2000, 101, 165, The Judge Advocate General Legal Center and School; See also, generally LTC George R. Smawley, "The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Ret) (1969-1997)," *Military Law Review* 168 (2001): 1.

⁴ Huntington, *Soldier and the State*, 11-12.

and accepted treatments in order to successfully practice in their area of legal specialization, a JAG filling an operational law role must have an understanding of military culture, considerations, and capabilities. It is conceivable that the level of understanding developed by a JAG may equal or exceed that of some professional officers with whom she serves, much as the tax lawyer or malpractice lawyer may have a better understanding than some accountants or doctors. But the professional identity, expertise, and responsibility of the JAG is as a lawyer first. JAG's are uniformed lawyers, not soldiers with a law degree.

Although the first professional identity of a JAG is as a lawyer, the military profession in which she serves places some obligations on her, which are different from a civilian lawyer employed by the Department of Defense. JAG's, like other military members, are subject to the Uniform Code of Military Justice (UCMJ), which imposes on them a duty of obedience to lawful orders for which there is no civilian equivalent. In order to minimize potential conflicts between this duty and professional legal obligations, the military services have adopted rules for professional conduct of lawyers modeled closely on the American Bar Association (ABA) Model Rules of Professional Conduct for Lawyers.⁵ These rules, promulgated under the authority of the senior uniformed officer in the service, constitute a lawful general order, thus placing the JAG under both a professional ethical and a military legal obligation.⁶ These rules for professional legal conduct in the military may suspend some military norms. For example, although a JAG

⁵ For a good discussion and comparison, see Major Bernard P. Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," *Military Law Review* 124 (1989): 1. Ingold was commenting on the 1989 revision. The most current version is the 1992 edition of Army Regulation 27-26. The differences between the 1989 and 1992 editions are minimal, focusing on the specific identification of "senior counsel", providing some additional definition to the conduct considered to constitute misconduct, and modifying the structure to parallel the structure of the ABA rules. Milton H. Hamilton, "Legal Services: Rules of Professional Conduct for Lawyers" (DEPARTMENT OF THE ARMY WASHINGTON DC, 1992), Summary of Change.

⁶ Hamilton, "Legal Services," 1.

representing a junior enlisted Airman may be senior in rank to her client, she may only advise, not order, the client to pursue any particular legal course of action.⁷

Despite a close parallel between the civilian professional rules and the professional standards for military lawyers, the distinctive demands of the military profession still color the military rules in unique ways. For example, while civilian attorneys operating under the model rules have discretion as to whether a prospective crime being planned by a client is serious enough to warrant breaking the attorney-client privilege of confidentiality, such disclosure is mandatory under the Army's rules of professional conduct. Additionally, among the criteria that require a JAG to break confidentiality are actions, which are likely to result in "significant impairment of national security, or the readiness or capability of a military unit, vessel, aircraft, or weapons system," a uniquely military consideration.⁸ Also unique to JAG's, competent military authority (in addition to judicial authority) may decide that military considerations outweigh professional ethical considerations, while for civilian attorneys, only a tribunal (i.e. the judge) may make such a decision.⁹ For example, a JAG who has requested withdrawal from a case, even for reasons considered mandatory under the rules for professional conduct, may be compelled to continue her representation, not only if so ordered by the military judge, but also if ordered by a competent military officer, such as a senior JAG with responsibility for professional oversight, or potentially the commander on whose authority the judicial proceeding is convened.¹⁰

⁷ Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," 12–13.

⁸ Ingold, 19, citing Army Rule for Professional Conduct (RPC) 1.6 (b).

⁹ "Model Rules of Professional Conduct: Preamble & Scope | The Center for Professional Responsibility," sec. 1.16 (c).

¹⁰ Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," 30 In the case of the convening authority, such a move would potentially raise another uniquely military consideration: unlawful command influence. For a practical example of how this distinction may matter,

The unique status of JAG's as a member of one profession operating within the culture of another imposes two additional obligations on them. First, in addition to the interests of any particular client they may be serving or advising, JAG's always have a duty to the good of the military. As Ingold observes, "Army attorneys must balance three competing interests when determining how to resolve ethical issues: the interests of the Army, the interests of the client, and the interests of the legal profession."¹¹ If the interests of a client conflict with the interests of the Army, the Army's interests will almost always take precedence. Practically speaking, when confronted with an issue of institutional misbehavior, this obligation creates a preference for internal remedies (such as informing superior commanders, inspectors general, or ombudsmen) over external remedies (such as whistleblowing), which might embarrass the institution through negative publicity.¹²

Second, JAG's may be professionally obligated to consider non-legal and non-military factors in a way that military professionalism eschews. "In rendering advice, a lawyer may refer not only to law, but also to other considerations, such as moral, economic, social, and political, and other factors, that may be relevant to the client's situation but not in conflict with the law."¹³ This is not the same as providing politicized advice. In fact, some senior JAG's have suggested that an advantage of JAG's over civilian attorneys is that their advice is less likely to be politicized, since they are responsible to uniformed supervisors, rather than a politically-

see David Luban, "Indefensible: Why Guantánamo Defense Lawyers Can't Ethically Participate Any Longer," *Just Security* (blog), October 15, 2017, <https://www.justsecurity.org/45963/indefensible-guantanamo-defense-lawyers-cant-ethically-participate-longer/>, and the discussion of a single Navy LT left as sole counsel for a terrorist in a capital case after civilian counsel disqualified themselves due to concerns over client confidentiality being compromised. While the LT is governed by similar rules, he must wait for approval for his withdrawal from seniors in the Navy JAG Corps.

¹¹ Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," 59.

¹² Ingold, 28.

¹³ Hamilton, "Legal Services," sec. 2.1 and 2.1 comment; also cited in Ingold, *ibid.*

appointed service general counsel.¹⁴ But, as lawyers, JAG's have a duty to provide professional advice, which may be considered inadequate if it does not consider political or moral considerations.¹⁵ This differs significantly from a Huntingtonian view of military professionalism, which creates a sharp divide between military and non-military considerations, and gives extraordinary deference to civilian views of non-military questions. Huntington framed this deference as a tension between private morality and the professional duty of obedience.¹⁶ Feaver frames it even more strongly as the civilians' "right to be wrong."¹⁷

Much like medieval monks characterized themselves as being 'in but not of the world,' JAG's are in but not fully of the military profession. They operate side-by-side with military commanders, and share many of the daily hardships and rewards of military service. Their practice of the legal profession is uniquely colored by the fact that they are subject to military discipline and the service is always an additional client lurking in the background. JAG's often may develop a deep knowledge and understanding of military considerations; they may even identify closely with the military profession to the point of declaring that they are 'Soldiers first,' as did the Reserve JAG cited at the beginning of this section. But JAG's remain distinct from professional military officers by virtue of a different professional mindset, and a different set of professional ethics and obligations. It is precisely these differences which make JAG's such a valued asset to the commander.¹⁸

¹⁴ Grimaldi, "Army's JAG Corps Deals With Reality Of War in Iraq."

¹⁵ Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," 32.

¹⁶ Huntington, *Soldier and the State*, 78.

¹⁷ See Feaver, *Armed Servants*, 6, "The democratic imperative insists that this precedence applies even if civilians are woefully underequipped to understand the technical issues at stake. Regardless of how superior the military view of the situation may be, the civilian view trumps it. Civilians should get what they ask for, even if it is not what they really want. In other words, civilians have a right to be wrong."

¹⁸ For example, a JAG serving as an advisor to a three-star Navy operational commander, stated that the commander would often consult the JAG on non-legal questions because commanders valued the critical

Observable implications of military legalism

The primary systemic-level observable implications of military legalism in the US military are that there are likely to be more JAG's playing a greater role in operational military decisions, and law is likely to play a more prominent role in the US military's conception of military professionalism. An increase in military legalism should logically be accompanied by an increase in the numbers of military lawyers, since the norms and processes of the legal profession are not otherwise resident within the military. While the presence of more uniformed lawyers is suggestive, it is not conclusive. First, lawyers fill many roles in the military other than advising commanders on the use of force. Second, military legalism is focused on the mindset of military commanders, not lawyers—it is hardly remarkable if military lawyers are legalistic. An increasing role for military lawyers in decisions regarding the use of force, however, may be viewed like the presence of antibodies in a medical patient. While the antibody is not the virus, its presence is a strong indication that the patient has been exposed to the virus. Similarly, an increased number of military lawyers involved in decisions on the use of force is not the same thing as military legalism, but it is a strong indication that commanders are elevating the role of legal thinking in justifying their uses of force.

In examining the military's concept of professionalism, two logical places to look are professional publications and professional military education. In the case of professional publications, it is helpful to look both in publications by military lawyers, which reflect the trend of issues on which they are engaged by commanders, and publications by line officers, which reflect the trend of issues engaging the professional interests of commanders. In the case of

analysis and thinking brought by a member of the legal profession. NJ1, NJ1 Interview, interview by Doyle Hodges, May 9, 2016, 1.

professional military education, it is useful to examine the role of law in training at service academies, where officers are first being taught about the military profession, and at war colleges, where mid-grade officers are developed for higher command.

The number and organization of military lawyers

This section will examine the first observable implication of military legalism: there are likely to be more military lawyers playing a greater role in operational decisions. In order to establish whether this is the case, the number of lawyers in the military overall and the number of lawyers as a proportion of the force will be examined, as well as the manner in which JAG's are organized within the services as an indication of their institutional power. The role of military lawyers is examined in the next section.

The US military has “lawyered up” over the past 50 years. In every service except the Air Force, the total number of JAG officers nearly doubled between 1960 and 2015. (In the Air Force, the total number of JAG's actually decreased by about 50 from 1,232 in 1960 to 1,186 in 2015.) The ratio of JAG's per soldier more than tripled in the Army and the Navy, and more than doubled in the Air Force over the same period.¹⁹ This proportional increase has continued even during periods when the services themselves were drawing down significantly in size, such as the post-Vietnam drawdown, which lasted from 1972-1979, and the post-Cold War

¹⁹ In the Army, the ratio of lawyers/1000 troops increased from 1.145 in 1960 to 3.70 in 2015; in the Navy, it increased from 0.75 to 2.31; in the Air Force, it increased from 1.51 to 3.80. Doyle Hodges, “Legal Officers and Courts Martial Rates, 1960-2016,” February 6, 2017; It was suggested to the author that one reason the Air Force experienced less growth over this time period is because the Air Force historically has given its JAGs a greater role in areas that other services reserve for civilian General Counsel (e.g. contracting and acquisition law). Lt. Col. Alan Schuller et al., Stockton Center Interview, interview by Doyle Hodges, September 26, 2016; Such an explanation is consistent with the story of the development of a separate civilian Office of General Counsel in the Navy during WWII, as told in Jay M. Siegel, *Origins of the United States Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775-1967* (Washington, D.C.: U.S. Navy Judge Advocate General's Corps, 1997).

drawdown, which lasted from 1989 until the September 11 attacks of 2001. The ratio of JAG’s per 1000 active duty soldiers and airmen for the Army and the Air Force is depicted at Figure 1. (Navy and Marine Corps data is available only sporadically during this period, and is omitted for clarity. Based on data that is available from 1994-2015, the Navy and Marine Corps appear to have followed a similar trend.)

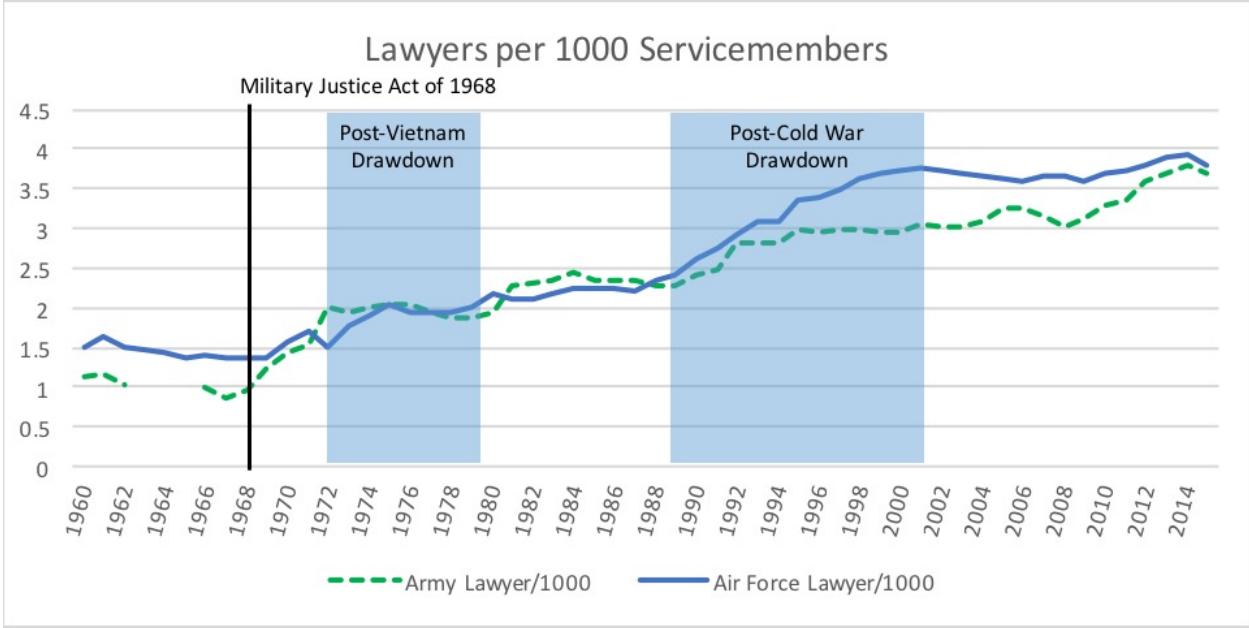


Figure 1: Lawyers per 1000 active duty service members, Army and Air Force 1960-2015²⁰

Another measure of the increasing number and influence of military lawyers can be gathered from the organizational form of judge advocates within the services. Prior to 1948, Army judge advocates were organized as a department. In 1948, the JAG Department was re-

²⁰ Data source: Hodges, “Legal Officers and Courts Martial Rates, 1960-2016.” This dataset was compiled using a number of sources, including the annual reports to Congress submitted by Service JAG’s for each year from 1959-2015, reports of service end strength available from the Defense Manpower Data Center, reports on Navy and Marine JAG endstrength obtained from the Defense Manpower Data Center with the assistance of CDR Steven Shepherd, USN (Ret), and documents obtained from the Army Judge Advocate General Legal Center and School (TJAGLCS) and Office of the Navy Judge Advocate General under the Freedom of Information Act. .

designated as the JAG Corps, with an authorized strength of one Judge Advocate General of the Army (TJAG) (2-star), an Assistant Judge Advocate General (2-star), three brigadier generals (1-star), and a number of officers between the ranks of colonel and first lieutenant equivalent to at least one and one-half percent of the authorized officer strength of the Regular Army.²¹ In the Navy, judge advocates did not achieve the status of a staff corps until 1967.²² Prior to that time, the Navy followed a mixed tradition of sending line officers to law school and asking them to balance operational tours as ship officers, aviators, or submariners with law-related shore duty, or later designating “law specialists” who were law school graduates and restricted line officers, unable to compete for command at sea, but without the autonomy and self-administration provided by a designation as a staff corps.²³ (The Marine Corps and Coast Guard continue to follow a model similar to the early Navy model, where line officers attend law school and are eligible for command assignment outside of the legal community. The Marine Corps model is more similar to the Navy “law specialist” model in that lawyers, while not differentiated into a separate staff corps, are unlikely—though not, strictly speaking, ineligible—to be assigned command of combat forces; the Coast Guard continues to blend the duties of lawyers and line

²¹ United States Army Judge Advocate General’s Corps, *The Army Lawyer: A History of the Judge Advocate General’s Corps, 1775-1975* (Superintendent of Documents, US Government Printing Office, 1975), 198.

²² Siegel, *Origins of the Navy Judge Advocate General’s Corps*, chap. 12.

²³ Siegel, 481–82 Staff Corps officers compete for promotion only against other officers of their particular specialization (e.g. Chaplains compete against Chaplains, JAG’s against JAG’s, Supply officers against other Supply officers), and are exempt from Congressional limitations on the number of officers that may serve in the grades of O-4 and above (individual services still control the number of Staff Corps officers in each grade via service policy, but this allows the flexibility to bring in specialists at a more senior paygrade without giving up an authorized position at that paygrade). In the Navy, line officers are divided into restricted line (RL) communities, such as intelligence, meteorology, or Foreign Area Officers, who compete only against other RL officers of their particular specialization for promotion, but are subject to Congressional limitations on the number of officers serving in the rank of O-4 and senior, and unrestricted line officers (URL) who compete against all other URL officers, and are also subject to Congressional grade limitations. The primary warfare communities in the Navy (surface warfare, aviation, submarines, SEALs) are comprised of URL officers. Only URL officers are eligible to succeed to command at sea.

officers, including command of cutters, aviation squadrons, and Coast Guard stations.²⁴) The Air Force, by contrast, continued to organize its lawyers as a department until 2003, meaning that Air Force lawyers competed for promotion against all Air Force line officers.²⁵ This was a conscious choice by the first Judge Advocate General of the Air Force, Major General Reginald Harmon, because he felt that maintaining lawyers as line officers would prevent them from being perceived as “outsiders” by the rest of the Air Force.²⁶

Organization as staff corps enhances the autonomy, numbers, and influence of military lawyers. Staff corps organization allows military lawyers to determine who from among their ranks should rise to leadership positions (rather than having these selections made by line officers), and ensures that a lawyer has a place at the table alongside other specialist staff functions.²⁷ The staff corps model has the added benefit of guaranteeing a minimum “critical mass” of lawyers, due to the requirement to maintain a sufficient number for competitive promotion. The Navy law community was particularly sensitive to the benefits of a staff corps model, since although the Navy had a uniformed Judge Advocate General since 1878, the first lawyer to serve as Judge Advocate General of the Navy did not assume office until 1939.²⁸ Even after it became accepted practice for the Judge Advocate General of the Navy to be a trained lawyer, it was still common before the formation of a separate JAG Corps for line officers with law degrees to view the job as a stepping stone to higher rank, rather than as the pinnacle of their

²⁴ Schuller et al., Stockton Center Interview.

²⁵ Patricia A. Kerns, *The First 50 Years: US Air Force Judge Advocate General's Department* (Government Printing Office, 2004), iii, <https://babel.hathitrust.org/shcgi/pt?id=uiug.30112075660339;view=1up;seq=9>.

²⁶ Kerns, 22.

²⁷ Senior Army Judge Advocates advised Air Force General Harmon that he was being “pretty stupid” by ignoring these benefits, cited in Kerns, 22.

²⁸ Siegel, *Origins of the Navy Judge Advocate General's Corps*, chap. 8.

military legal career.²⁹ A staff corps, led by a JAG who was not eligible for any higher position, better preserved the institutional equities of Navy lawyers.

In a final indication of the increased institutional status of JAG's, the 2008 National Defense Authorization Act increased the rank of the top uniformed lawyer in each service, the service Judge Advocate General, from two-stars (O-8—Major General in the ground and air services, Rear Admiral in the sea services) to three-stars (O-9—Lieutenant General or Vice Admiral). This move was intended to strengthen the independence and autonomy of uniformed military lawyers in the wake of concerns that dissenting opinions of service Judge Advocates General regarding the legality of harsh interrogation techniques were disregarded in the period from 2001-2003.³⁰

Role of military lawyers

Evidence that the number and institutional power of JAG's has generally increased does not prove that those lawyers are more involved in decisions regarding the use of force. JAG's fill many roles. The involvement of JAG's in decisions regarding the use of force is largely associated with a discipline that first emerged in the early 1980's: operational law. Among other JAG roles are military justice, environmental law, claims against the government, and advising on compliance with Federal Ethics Regulations (FER). In order to understand the extent to which an increased involvement in decisions on the use of force may be associated with the increased numbers of JAG's, it is necessary to look briefly at trends in each practice area, beginning with operational law.

²⁹ Siegel, 539 fn 11-14.

³⁰ See "JURIST - Pulling Rank: Reinforcing an Independent JAG Corps," accessed February 6, 2017, <http://www.jurist.org/forum/2008/02/pulling-rank-reinforcing-independent.php>.

Operational law

The development of the field of operational law is perhaps the most significant change in the role of military lawyers since World War II, since it represents the development of a new legal discipline, which is unique to the military. Up through the Vietnam war, the primary role of military lawyers in wartime was the administration of military justice and claims against the government.³¹ In the wake of the My Lai massacre, however, the Army found that its soldiers were not properly trained in the law of war.³² As a consequence, the Department of Defense initiated a Law of War Program, which, in addition to mandating training for all active duty personnel in the law of war, created a requirement that JAG's become involved in operational planning, to ensure compliance with law of war concerns.³³

When US forces invaded Grenada in 1983, Army lawyers were more deeply involved than they had been in any previous operation: already accustomed to reviewing operational plans, they became intimately (if somewhat belatedly due to the short planning timeline of the operation) involved in the drafting of rules of engagement (ROE), planning for handling prisoners of war, and assisting the commander on sensitive political questions.³⁴ An Army lawyer parachuted in with the first wave of the 82nd Airborne on 25 October 1983, and JAG's remained on-scene until the bulk of the US forces departed in December, 1983.³⁵ The distinction

³¹ See generally, Siegel, *Origins of the Navy Judge Advocate General's Corps*; United States Army Judge Advocate General's Corps, *The Army Lawyer*; Kerns, *USAF JAG: The First 50 Years*.

³² Colonel David E. Graham, "My Lai and Beyond: The Evolution of Operational Law," in *The Real Lessons of the Vietnam War: Reflections Twenty-Five Years After the Fall of Saigon*, ed. John Norton Moore and Robert F. Turner (Durham, North Carolina: Carolina Academic Press, 2002), 364; Solis, Interview w/ Prof Gary D. Solis; Colonel David E. Graham, Interview with "The Father of Operational Law," interview by Doyle Hodges, February 2, 2017.

³³ Graham, "Evolution of Operational Law," 366; Graham, OPLAW interview.

³⁴ Borch, *Judge Advocates in Combat*, chap. 2.

³⁵ Graham, "Evolution of Operational Law," 367.

between this level of involvement and the previous role of lawyers was captured by then-Captain Marc Warren, one of the lawyers who accompanied the invasion force:

I had the opportunity to do a lot of things as the law of war JAG, because back in those days, nobody really wanted to do it. It was considered to be a pain... There was some arm's-length view of JAGs that their utility other than in a very legal and regulatory...defined way was not great to the Army. In other words, if we needed a guy court-martialed, will you guys take care that? But otherwise, there wasn't a feeling like we have today, that the judge advocates are integrated into operations and integrated into the commander's staff....

Then came Grenada. Grenada I think, was although in the big scheme of operations, as we progressed, is minuscule. At the time, was a huge big deal for the Army because it was the first real combat deployment of the Army since Vietnam and the Marine Corps. I guess the Marines you have the asterisk in terms of Lebanon, but at least for the Army this was the first combat deployment post-Vietnam...

I can remember another one of those things, like it was yesterday being called in one morning in October 1983 as the law of war guy, over to the 18th Airborne Corps G3 shop [Operations directorate] the first question to me was from a Lieutenant Colonel in the G3: Captain, what's the rule on martial law? What are the rules on martial law? And I had with me in my really cool para-trooper camouflage... in my cargo pocket 27-1 [*sic*: he is referring to Army Field Manual 27-10, *The Law of Land Warfare*] and consulted it on martial law, and told him that I think actually he means something else, you mean, and I don't remember the exact conversation, but I do remember pulling out the 27-1 and confirming that really martial law was something that was applied here in the United States and that what I think he's talking about is maybe military government occupation, something like that. Then the next question was...do you speak Spanish because you're going with us? Well, the fact was, they speak English in Grenada. So we didn't know what the hell we were doing.³⁶

Although the compressed planning timeline for the Grenada invasion gave rise to humorous misunderstandings such as a planner not knowing the language spoken on the island, the integration of JAG's into operations helped to avoid misunderstandings that could have had

³⁶ Marc Warren, Warren Oral History, interview by Macias Stewart, Laura O'Donnell, and Gilman, 2015, 54–57, The Judge Advocate General Legal Center and School. Passages unrelated to Warren's Grenada experience have been omitted for clarity.

more tragic consequences, such as poor understanding or promulgation of the rules of engagement (ROE). The lessons-learned from Grenada—including the need to integrate JAG’s earlier and more fully into the planning process—influenced the development of operational law in subsequent military operations.³⁷

In December 1988, the Army founded a Center for Law and Military Operations (CLAMO) at The Judge Advocate General Legal Center and School (TJAGLCS) in Charlottesville, Virginia, in order to institutionalize the role of operational law for the Army and other services. As Borch notes,

CLAMO grew out of the experiences of judge advocates in Grenada during Operation Urgent Fury in 1983 and the recognition gained from other similar events that domestic and international law affected the planning for, and conduct and sustainment of, U.S. military operations. This idea behind CLAMO was that it would examine legal issues arising during military operations, and then devise "training strategies" for addressing those issues. Stated another way, CLAMO would gather legal lessons learned from military operations, analyze those lessons, and then disseminate them to judge advocates throughout the Army-and the entire Defense Department.³⁸

The next major milestone for operational law as a discipline came with the invasion of Panama, Operation JUST CAUSE. The role of JAG’s in the drafting of ROE for JUST CAUSE provides a useful insight into the changing relationship between commanders and their lawyers regarding the use of force. Colonel John Bozeman, a JAG serving on the staff of XVIII Airborne Corps, which was designated as the Joint Task Force Commander for the invasion, described the process:

... at some point, General Steiner [Commanding General, XVIII Airborne Corps] came back from a planning trip to Panama and he had some changes to

³⁷ John R. Bozeman, Bozeman Oral History, interview by Michelle Crawford and Rich Meyer, 2002, 485, The Judge Advocate General Legal Center and School.

³⁸ Fred L. Borch, "Clamo at 25: The Center for Law and Military Operations Celebrates Twenty-Five Years," *Mil. L. Rev.* 217 (2013): 193 Internal citations omitted.

the rules of engagement he wanted to make. ...What had happened while Jerry Coleman [a JAG on Bozeman's staff] was the Chief of Operational Law was a pleasure to see. He was so thoroughly versed in international law generally, and in operational law in particular, and he was a lieutenant colonel, so he carried a lot of weight in a Corps G-3 operations office. Jerry had opened the door to us for rules of engagement. He was so good at it that the Corps had gotten accustomed to having him do the first draft. It was unlike any other place that I was aware of in the Army at the time: when the planners started to talk about rules of engagement, which are an appendix to almost every plan they do, people in the G-3 office said, Oh, that's for the lawyers. ROE are not a legal responsibility in its primary development. ROE is the business of operators. It's well within their province and they're very capable of doing it. But I can't tell you how valuable it was to us to be thought of as the people who did the rules of engagement because it was one of the very first things that the planners thought about. When a commander gets his alert order, he's starting to think about the concept of operation, and he's not very deep into his thinking before he gets to the rules of engagement. In fact, many times his alert order will say something about the rules of engagement...

So, my office is involved right away. The benefit of all of this is immeasurable.

Let me insert a qualification here: it's a short bridge from what I just told you to someone concluding that the JAGs wrote the ROE for the operation. I'm uncomfortable with that. What we did was draft ROE that were accepted by the Corps G-3 and approved by the command. Developing ROE was a command responsibility and we were just the drafters. But I'm not aware of any change made to the rules of engagement themselves or to the supplemental rules of engagement, which I'm going to describe in a minute. And I'm not aware of any complaint or criticism that's ever been mentioned about them.³⁹

Although Bozeman emphasizes that responsibility for the ROE and the final decision regarding their approval belonged to the commander and his operational staff, the deep involvement of military lawyers in drafting the ROE for Operation JUST CAUSE reflected a very tangible way in which the emerging discipline of operational law increased the role of JAG's in military operations.

The status of the operational law JAG is now a matter of doctrine in the Army and the Air Force. The Army *Field Manual on Legal Support to Operations* specifies that a JAG should be

³⁹ Bozeman, Bozeman Oral History, 482-83.

forward deployed at the command post closest to the fighting, in order to “provide advice regarding ROE, LOW [law of war], and other OPLAW matters. They also maintain situational awareness to identify and resolve legal concerns before they become distracters.”⁴⁰ Similarly, in the Air Force, a JAG has been doctrinally integrated into the command structure of Air Operations Centers as an advisor to the Joint Force Air Component Commander (JFACC) and his staff.⁴¹

While the development of operational law is clearly relevant to military legalism, it is difficult to quantify precisely how much of the increase in military lawyers may be attributed to operational law, in part because few military lawyers practice operational law exclusively. Anecdotally, the Navy Judge Advocate General, Rear Admiral Michael Lohr remarked in 2003, “Much of the work related to the GWOT [Global War on Terrorism] is classified, so I cannot share it here, but suffice it to say that JAGs are in the thick of the Navy’s missions in support of GWOT around the world. *In fact, operational law is a true growth industry for us.* Likewise, we have received a steady flow of requests for judge advocates to support related missions like military commissions, Iraqi special tribunals, and various investigative efforts.”⁴²

A 2007 report on Navy JAG requirements conducted by the Center for Naval Analyses provides more specific numbers as to the proportion of the workload of Navy lawyers accounted for by various areas of practice. The report conducted a workload survey among Navy legal personnel. For those personnel serving outside the immediate office of the Navy Judge

⁴⁰ Department of the Army, “FM 27-100 Legal Support to Operations” (Headquarters, Department of the Army, March 1, 2000), 5–11.

⁴¹ Gent, “The Role of Judge Advocates in a Joint Air Operations Center,” 41.

⁴² “Navy Judge Advocate General Command History Report 2003” (US Navy Office of the Judge Advocate General, March 31, 2004), 10, Box: Post 1990 Command File Judge Advocate General CH 1995 to Kamisela Naval Security Group Activity CH 1990 492; Folder: Judge Advocate General (JAG) CH 2003, Navy History and Heritage Command (Emphasis added).

Advocate General and his staff (including the Naval Justice School), respondents were classified by whether they were civilian, officer, or enlisted, and the commands at which they worked were classified into four categories: operational, non-operational, afloat, and Joint. The non-operational category, which included legal service commands, hospitals, bases, and other headquarters, was the largest category, with 129 officers, of whom 94 responded to the survey. For these officers, operational law issues accounted for about 10% of the reported work hours.⁴³ Among 40 JAG officers assigned to operational commands (e.g. various Fleet headquarters and some shore-based operational units), operational and law of war matters accounted for 41% of the workload.⁴⁴ For the 18 officers surveyed who were serving in Joint billets, operational law issues accounted for 54% of their work hours.⁴⁵ For the 34 officer respondents serving in afloat billets (advisors to afloat commanders or staffs, or as JAG's assigned to an aircraft carrier or other large ship), operational law issues accounted for 19% of their workload.⁴⁶ Summing together the hours, operational law-related issues accounted for approximately 24% of the total reported workload of uniformed Navy lawyers outside of the office of the Judge Advocate

⁴³ Neil Carey et al., "An Analysis of Navy JAG Corps Future Manpower Requirements, Part 2: OJAG, Embedded SJAS, NJS, and Reservists" (Alexandria, VA: Center for Naval Analyses, April 2008), 189 Table 7-21. The figures were determined by summing the reported hours for "International and Operational Law," "Environmental Law (Operational)," and "Law of War" in the table. The author thanks CAPT Florencio Yuzon, JAGC, USN, for his responsiveness in releasing this private report via FOIA.

⁴⁴ Carey et al., 126–27 Tables 4-16 and 4-17. The figures were determined by summing the reported hours for "International and Operational Law," "Environmental Law (Operational)," and "Law of War" in both tables.

⁴⁵ Carey et al., 118 Table 4-11. The figures were arrived at by summing the same categories, although for Joint officers, the distribution was skewed heavily toward "International and Operational Law" (49%), with "Law of War" accounting for 5%, and "Environmental Law (Operational)" being reported at 0%.

⁴⁶ Carey et al., 195 (number of respondents), 199 (data) Table 7-28. The response rate of 70% for officers serving afloat was substantially lower than for the other groups, which may induce some error in calculating the significance of practice areas in which afloat JAG's spend considerable time, as a proportion of total JAG work-hours.

General responding to the survey.⁴⁷ Additionally, the report predicted that the workload in operational law would grow at 5.9% annually, doubling in 12 years.⁴⁸ While a similar workload study is not available for the Army, some indication of the role played by operational law may be inferred from the fact that an average of 506 legal personnel were deployed to support operations in 12 different countries each year between 2004 and 2015.⁴⁹

Although it is difficult to quantify precisely the extent to which the increase in the numbers of military lawyers may be attributed to their operational law roles, it is apparent from the data that over the past three decades, military lawyers have assumed an increasing role in military operations, which accounts for a substantial portion of the overall workload for JAG's. In order to contextualize this, it is necessary to compare it to other practice areas.

Military justice

To estimate the degree to which military justice and discipline demands may account for the increase in military lawyers, it is helpful to understand the variety of judicial and non-judicial punishments available under the Uniform Code of Military Justice (UCMJ) and the Manual for Courts Martial (MCM), and the role of JAGs in each. To that end, a brief primer on military justice is included at Appendix A. Without delving into great detail, however, it will suffice to understand that military justice proceedings include non-judicial punishments conducted under

⁴⁷ The actual total was 23.7% (4,389.5 out of 18,496 hours) Carey et al., 104-105 (non-operational); 118 (Joint); 126 (operational); 137 (afloat) Tables 4-4, 4-10, 4-16, 4-23; The workload survey received responses from 152 Navy JAG's, out of approximately 600 serving Navy JAG's at the time. Response numbers from Carey et al, *ibid.* Number of Navy lawyers from Hodges, "Legal Officers and Courts Martial Rates, 1960-2016."

⁴⁸ Carey et al., "Navy Future JAG Requirements Report," 32.

⁴⁹ This number includes more than just active duty JAG's: the reports specify that the numbers are comprised of officer and enlisted, active duty and reserve. Unfortunately, there is no way to break out the specific numbers of each category. The overall number, however, is an indication of a high level of deployed JAG support to military operations. Hodges, "Legal Officers and Courts Martial Rates, 1960-2016" Data drawn from the annual report of the Army Judge Advocate General to Congress for the years in question.

Article 15 of the UCMJ, as well as three types of courts martial: summary, special, and general. JAG's play a large role in special and general courts martial; it is common for the prosecution and defense team in serious general court martial cases to each be comprised of several JAGs. JAG's play a minor role in summary courts martial, and an even smaller role in Article 15 proceedings, although because these minor proceedings are more common, they may account for a greater proportion of the overall allocation of JAG workload.

Figure 2 shows the trends in military justice and discipline for the Army from 1960-2015. From the figure, it is clear that the overall court martial rate has fallen

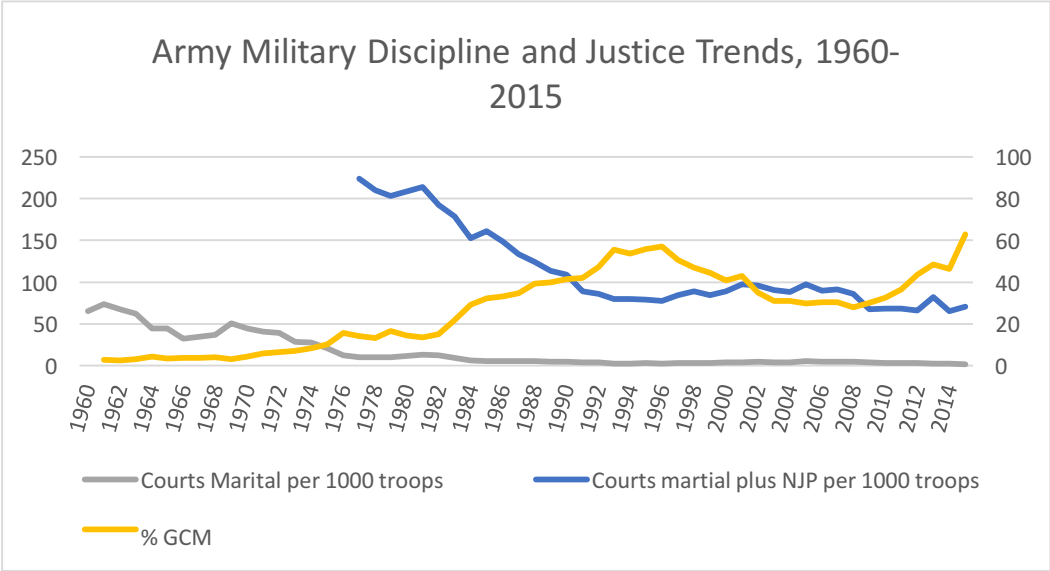


Figure 2: Army military justice and discipline trends 1960-2015⁵⁰

dramatically over time, from a high of 73 courts martial per 1000 troops in 1961 to just over 2 courts martial per 1000 troops in 2015. The overall disciplinary rate, which includes Article 15's plus courts martial has similarly fallen from 223 disciplinary actions per 1000 troops in 1977 to just over 70 per 1000 troops in 2015. While the number of courts martial has dropped precipitously, it is also true that a much greater proportion of the remaining

⁵⁰ Data source: Hodges (see note 20, supra for sources used in compiling this dataset).

cases are general courts martial, likely to be more complex and involve more JAGs than summary or special courts martial.

Figure 3 shows the same data for the Navy and Marine Corps. The lower proportion of general court martial cases in the Navy and Marine Corps stems largely from a cultural predisposition in the Marine Corps to use summary courts martial for offenses other services might dispose of at an Article 15 proceeding.⁵¹

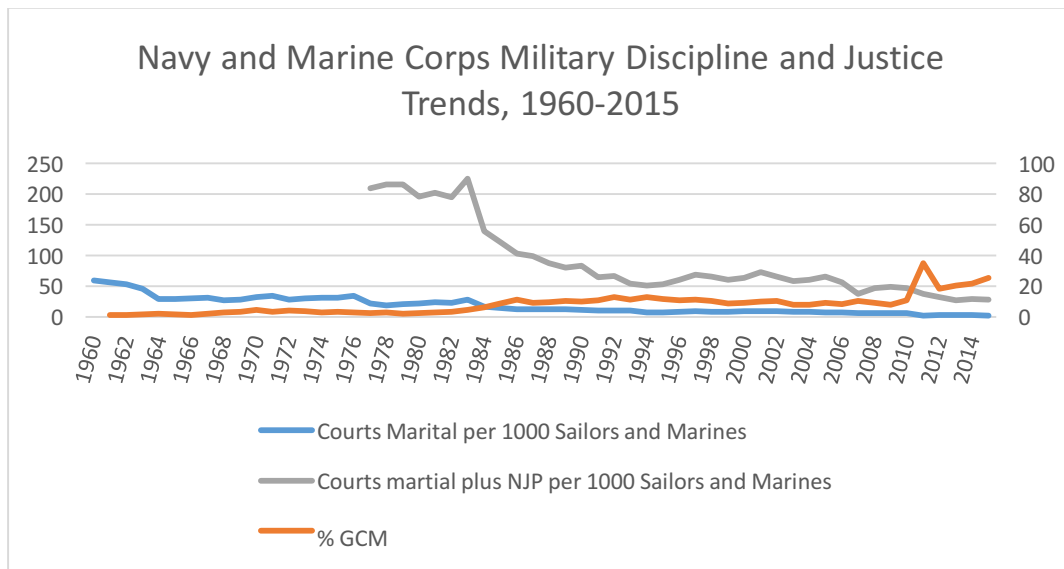


Figure 3: Navy and Marine Corps military justice and discipline trends, 1960-2015⁵²

Figure 4 shows the same data for the Air Force, displaying similar trends.

⁵¹ See generally, Ralph F Miller, “The Lost Battalion,” *Marine Corps Gazette* 91, no. 1 (January 2007): 53–55.

⁵² Data source: Hodges, “Legal Officers and Courts Martial Rates, 1960-2015.”

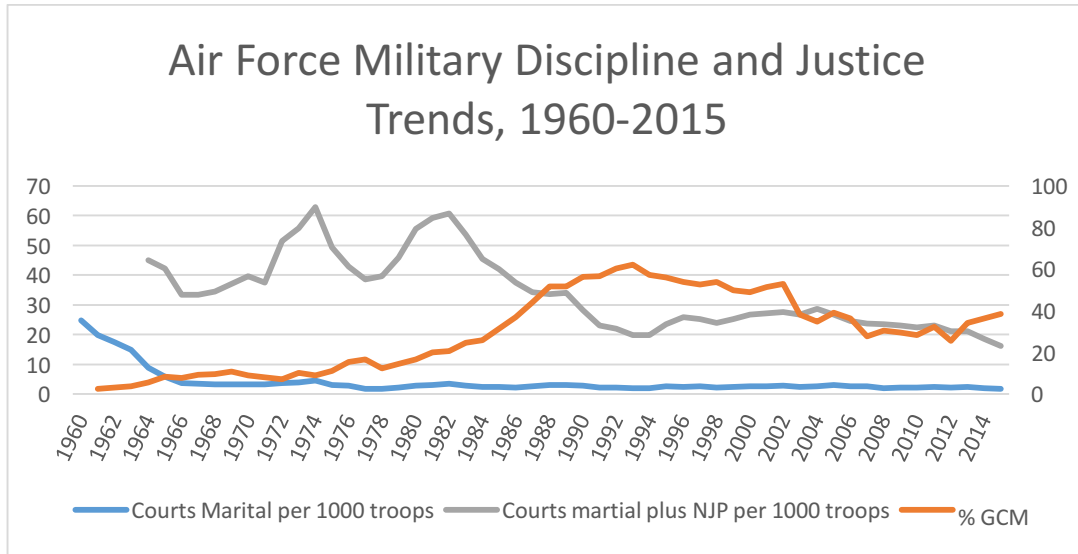


Figure 4: Air Force Military Discipline and Justice Trends, 1960-2015⁵³

From the data depicted in Figures 2-4, it is clear that, although there has been an increase in the complexity of courts martial, as shown by the increase in general courts martial as a proportion of all courts martial, the overall court martial and discipline rate has dropped dramatically over the past 50 years. When coupled with the overall decrease in the size of the active duty military (from almost 2.5 million active duty personnel in 1960 to just over 1.3 million in 2015), many fewer courts martial are being convened. (The Army, for example, convened over 57,000 courts martial in 1968, the first year that representation by counsel was guaranteed. In 2015, it convened just over 1,000.)⁵⁴

Data from the 2007 Navy manpower study bear out the conclusion that military justice requirements comprise a smaller proportion of overall JAG workload than do operational law issues. Summing the reported hours spent on all aspects of military justice (courts martial, NJP, investigations, records, administrative separations, and service as a military judge), these duties accounted for 14% of the overall workload among Navy JAG officers. This proportion was

⁵³ Data source: Hodges.

⁵⁴ Hodges.

substantially higher (26%) for officers serving at afloat commands, where more junior Sailors are stationed and more disciplinary actions are likely, and so small as to be almost non-existent (2.5%) for officers at Joint commands.⁵⁵

Military justice accounts for a relatively small and decreasing proportion of the total workload of uniformed attorneys, although this proportion is likely to vary with the size of the military. This contrasts with operational law-related issues, which occupy a larger and increasing proportion of the JAG workload.

Environmental law, claims, and ethics

Among the most significant area of growth in military law since 1960 is environmental law. Over 24 major federal environmental laws have been enacted since 1970, including the Clean Water Act, three different Clean Air Acts, the Endangered Species Act, and a variety of laws regarding dealing with the management of hazardous waste and environmental clean-up.⁵⁶ This more robust legal and regulatory environment has created a demand for military lawyers specializing in environmental law. The cumulative increase in environmental laws and regulations is depicted in Figure 5. The specific impact of these increases on uniformed JAG's is difficult to precisely assess, since military environmental law issues are addressed by both JAG's and civilian attorneys. Additionally, some environmental law issues are considered to be part of operational law. In the 2007 Navy study, environmental law accounted for less than 10% of the overall workload for JAG's, but was projected to grow at 5.9% annually.⁵⁷ While the overall

⁵⁵ Carey et al., "Navy Future JAG Requirements Report," 104-5, 118, 126, 137 Tables 4-4, 4-10, 4-16, 4-23.

⁵⁶ OA US EPA, "EPA History," Collections and Lists, US EPA, October 13, 2016, <https://www.epa.gov/history>.

⁵⁷ Proportion of workload Carey et al., "Navy Future JAG Requirements Report," 104-5, 126, 137 Tables 4-4, 4-10, 4-16, and 4-23; Anticipated growth rate, p. 27 Table 2-2. The specific source of the 5.9% figure is never provided. Since the same rate is used in estimates of the growth of environmental and

growth rate of environmental legal work should be relatively constant among services, the impact on JAG manpower is not, since each service is idiosyncratic in the division of labor among uniformed and civilian attorneys in non-operational practice areas.⁵⁸

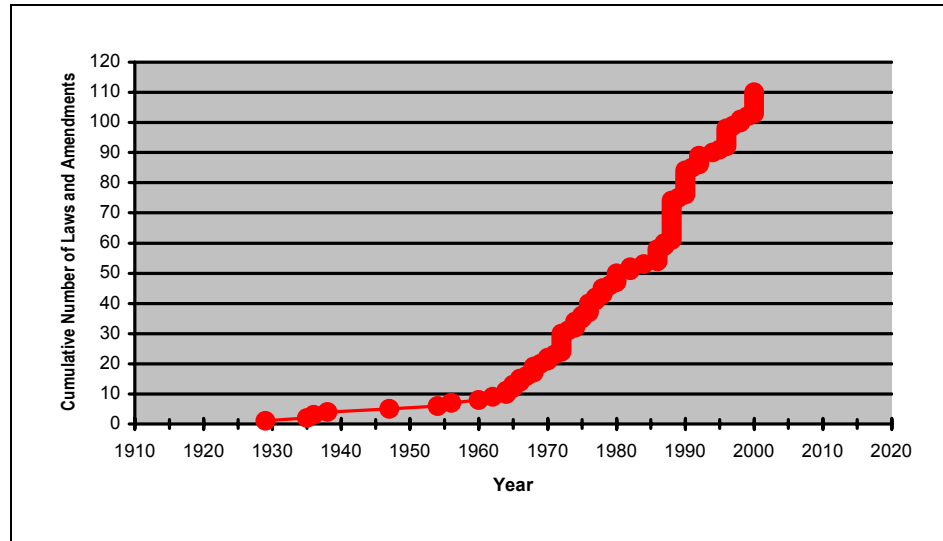


Figure 5: Increase in environmental law and regulations, 1930-2003⁵⁹

Claims are another area in which service differences make it difficult to assess how growth may have affected JAG manpower requirements. In the case of the Army, claims incident to combat operations are part of the broader operational law portfolio.⁶⁰ The Navy considers claims a separate practice area, but employs both uniformed and civilian attorneys in processing them. Claims are a small proportion of the workload for Navy JAG's in the 2007 study, comprising 0% of the workload for JAG's, but 20% of the workload for civilian lawyers at operational commands.⁶¹

operational law, it is likely that the projected growth rate is subject to greater uncertainty than the precise figure of 5.9% might suggest.

⁵⁸ Grimaldi, "Army's JAG Corps Deals With Reality Of War in Iraq."

⁵⁹ Data source: Carey et al., "Navy Future JAG Requirements Report," 31, Figure 2-4 (used by permission of the CNA Corp).

⁶⁰ Borch discusses the role of claims extensively in his history of operational law Borch, *Judge Advocates in Combat*.

⁶¹ Carey et al., "Navy Future JAG Requirements Report," 104, 118, 126, 137 Tables 4-4, 4-10, 4-16, 4-23.

Ethics advice is an area of JAG practice, which has grown in importance in a manner not captured in the 2007 study. In particular, the Glenn Defense Marine scandal, in which 35 Naval officers including five admirals have been indicted, charged, or otherwise disciplined, and another 150 Navy personnel are under investigation by the Department of Justice, has created an urgent growth in ethics as an area of practice for JAG's.⁶² A Navy JAG serving on the staff of a three star operational commander indicated that, while 60%-70% of the workload was focused on operational law issues, in the wake of the Glenn Defense Marine scandal, one of the three JAG's in the office was dedicated at least half-time to ethics advice.⁶³

Summarizing the data above regarding the number and role of JAG's, it is clear that the number of JAG's as a proportion of the force has increased since Vietnam. Those JAG's have more institutional influence and autonomy, and are playing a greater role in decisions regarding the use of force through the discipline of operational law. Other areas of practice, such as environmental law and ethics, have grown, as well, which may partially account for the increased numbers of JAG's as a proportion of the force. Traditional areas of JAG practice, such as military justice and claims have largely decreased, or have been civilianized, or subsumed into the discipline of operational law. This suggests that these practice areas do not account for the increased number and proportion of JAG's. While the increase in the number of military lawyers and the increase in the role of military lawyers in decisions regarding the use of force is not itself evidence of military legalism, the data is consistent with the expectations generated if military

⁶² See generally Craig Whitlock and Kevin Uhrmacher, "Prostitutes, Vacations and Cash: The Navy Officials 'Fat Leonard' Took down," *Washington Post*, August 23, 2017, <https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>. The Washington Post updates this site periodically with the results of the ongoing investigation.

⁶³ NJ1, NJ1 Interview, 1.

commanders are elevating the role of legal norms and reasoning their decisions regarding the use of force.

The role of law in US military professionalism

This section examines the second observable implication of military legalism: law is likely to play an increasing role in the US military's conception of military professionalism. This will be assessed by examining the frequency of professional publication by both JAG's and line officers on legal issues related to the use of force, and the role of law in professional military education at the undergraduate and graduate level.

Operational law in professional publications

One indication of the role that legal concepts play in the conception of military professionalism is the frequency with which military lawyers publish in professional legal journals on topics related to operational law, since it is likely to reflect the trend of issues on which JAG's are being consulted by military commanders, and the frequency with which line officers publish in professional military journals on the same issues, since this is reflective of issues engaging the commanders' interest.

In order to assess this, the author created a dataset of professional publications. By reviewing every article in the two most prominent military law reviews, *Military Law Review* and *Air Force Law Review*, from the inception of the journals in 1958 and 1959, respectively, and identifying those related to operational law, the author gained a sense of the degree to which JAG's are engaging on legal issues related to the use of force. The articles were further coded according to specific topics within the field of operational law, such as law of war, space law,

cyber-law, etc.⁶⁴ A similar review was conducted for two prominent professional journals, *Naval Institute Proceedings* and *Air and Space Power Journal*. In the case of *Proceedings*, the review covered the period from 1957 to the present, while *Air and Space Power Journal* covered the period from the journal's inception in 1987 to the present. These two journals were chosen because they are widely-respected peer-reviewed forums for professional officers from all services to publish on issues at the operational level. War college journals such as the *Naval War College Review* and *Army War College Parameters* were excluded from the dataset because they are focused on broader strategic questions, and feature a larger proportion of articles by civilian academics, thus offering a less accurate assessment of the interests and concerns of professional military officers. More tactically-focused journals, such as *Infantry Magazine*, *Military Review* and *Marine Corps Gazette* were excluded because they tend to focus at the tactical level on lessons learned that may be of value to company commanders and below. While it is possible to glean some evidence of military legalism from such tactically-focused publications, the "noise" created by other topics makes it difficult to draw meaningful conclusions from the data.

⁶⁴ In the case of the professional journals, articles not explicitly on legal issues were coded as having OPLAW-related content if legal issues related to the use of force occupied a significant portion of the article. For example, several articles on lessons-learned from conflicts in the Balkans were classified as being related to operational law, since ROE were discussed extensively and legal issues related to the use of force were identified as a major lesson learned. Doyle Hodges, "Professional and Legal Journal Content Analysis, 1957-2016," 2016.

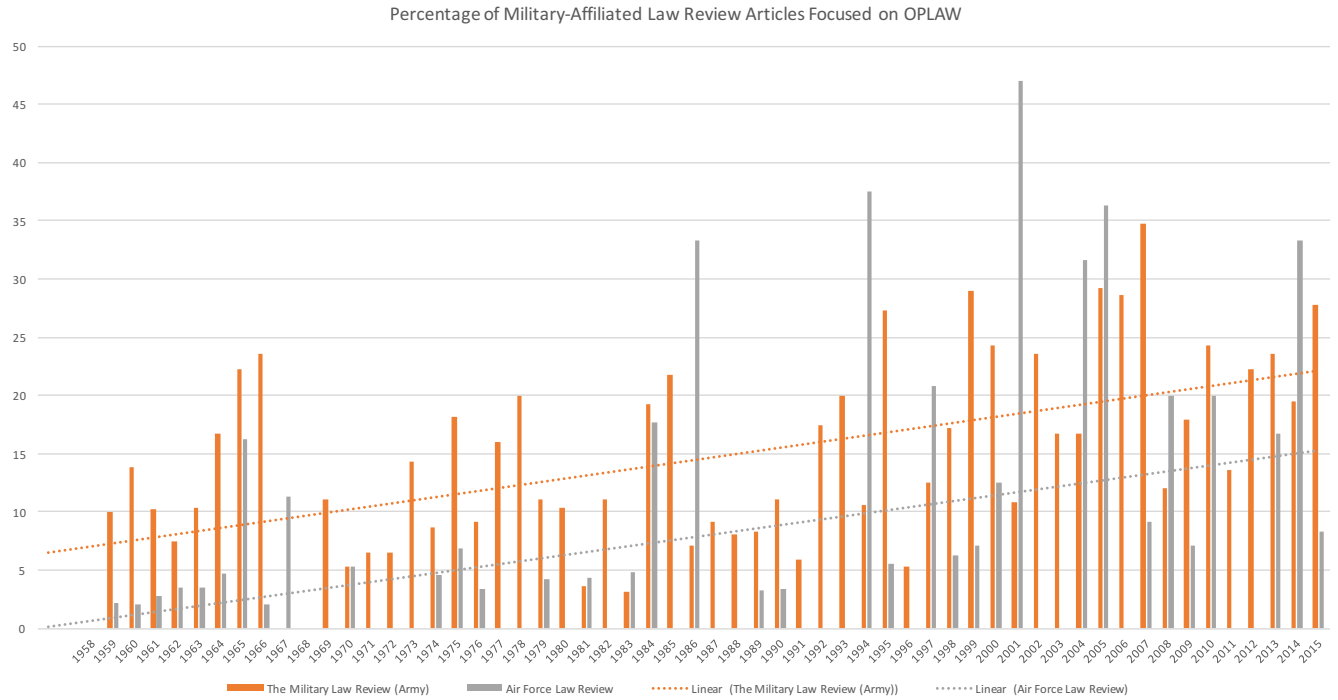


Figure 6: Military law review articles on operational law, 1958-2015

Figure 6 depicts the trend of military law review articles. As can be seen from the figure, operational law is a frequent topic in military legal journals, and the number of articles devoted to operational law topics is increasing over time. While the Army’s *Military Law Review* shows a higher overall proportion of articles devoted to operational law topics than the *Air Force Law Review*, both journals show an almost identical growth rate. Both services also show a tendency to engage in a greater focus on operational law a few years after a conflict, with spikes showing up in the wake of Grenada, the 1991 Gulf War, 1999 air operations in Kosovo, and during the ongoing conflicts in Iraq and Afghanistan.

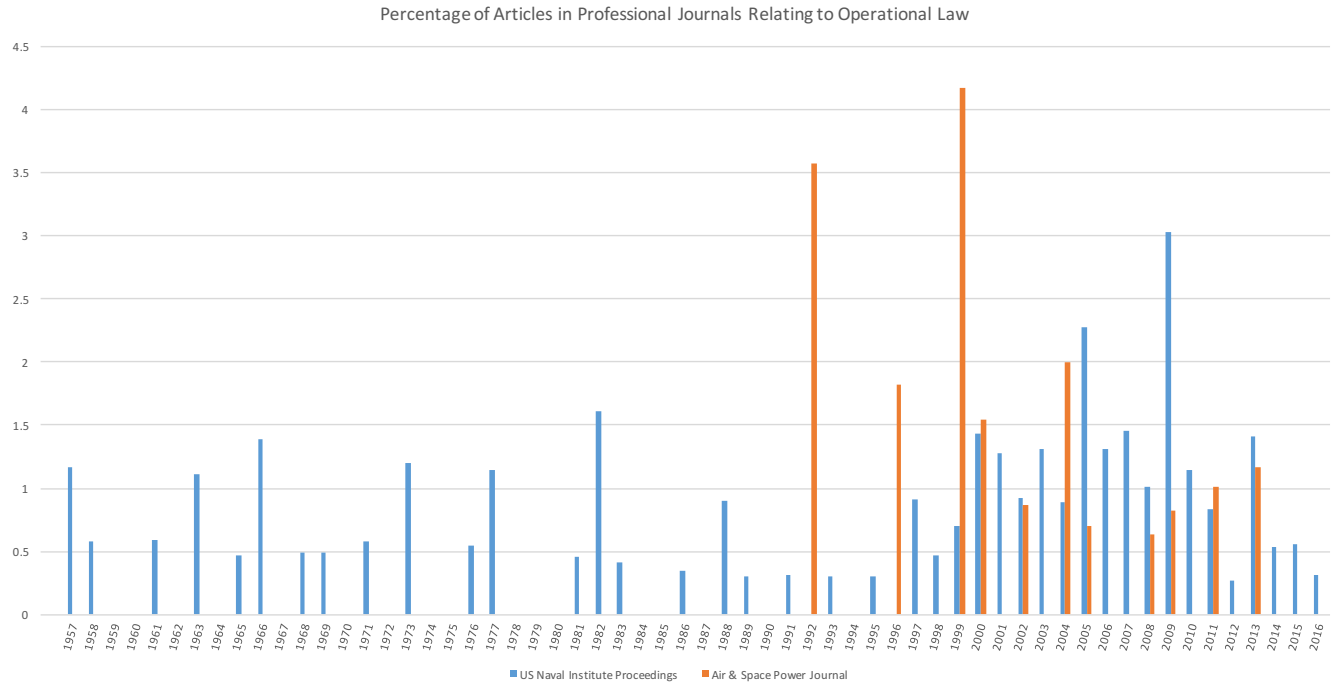


Figure 7: Percentage of articles in military professional journals related to operational law, 1958-2016⁶⁵

Figure 7 shows a similar analysis for the professional journals, with articles related solely to the law of the sea excluded from the total for the *Naval Institute Proceedings*.⁶⁶ The overall percentage of articles devoted to operational law issues is much lower in the case of professional journals, due largely to the broader diversity of topics covered in these journals., as compared to legal journals. As with military legal journals, however, the data show an increase in the frequency of publication by line officers on operational law topics. The trend is less pronounced than in the legal journals, and shows a decline in operational law-related articles after 2010. (In the case of *Proceedings*, this may be at least partly attributable to a change in editorship. The

⁶⁵ Hodges.

⁶⁶ A spate of articles related to law of the sea appeared in the *Naval Institute Proceedings* before and after the 1958 and 1960 UN Conferences on the Law of the Sea, and again in the period surrounding the 1983 UN Law of the Sea Convention. While law of the sea is a component of operational law, and it may be interpreted legalistically by operators, these discussions represented a more parochial professional interest, rather than an example of military legalism, and were thus excluded from the analysis. Hodges.

decline in *Air and Space Power Journal* articles has no immediately apparent explanation.)

Although professional journals do not show the same steady growth as law reviews, it is still clear that the late 1990's saw a marked increase in the interest in operational legal questions by professional line officers, which continues at a higher rate than the period prior to 1995.

The role of law in professional military education

A final indication of the evolving role of law in military professionalism may be gleaned from examining the role of law in professional military education. Professional military education includes the education of midshipmen and cadets to become officers, as well as the mid-career education offered at the various war colleges. In order to assess the role of law in professional military education, the author conducted a survey of curricula at all of the service academies and war colleges, and an in-depth review of the curriculum at the United States Air Force Academy in Colorado Springs, Colorado and at the Naval War College in Newport, Rhode Island.

Undergraduate professional military education

Instruction on military professionalism at service academies emphasizes both a moral and a legal foundation for the military profession. All three service academies include mandatory law courses in their curriculum, while West Point and the Air Force Academy include a variety of elective courses focused specifically on issues related to law and the use of force.⁶⁷

⁶⁷ On required courses, see "Courses :: Department of Leadership, Ethics, and Law :: USNA," accessed January 13, 2014, <http://www.usna.edu/LEL/Courses/>; On both required and elective courses, see "The United States Air Force Academy - Law (Law)," accessed January 10, 2017, <http://usafa.smartcatalogiq.com/en/2015-2016/Catalog/Courses/Law-Law-Law>; Regarding the introduction of law of war electives at USMA, see Solis, Interview w/ Prof Gary D. Solis; Regarding the role of law in the West Point curriculum more generally, see David A. Wallace, Roundtable with U.S. Military Academy Law Department, interview by Doyle Hodges, March 9, 2016.

Although not specifically focused on the use of force, the legal basis for the military as a profession is strongly emphasized at both the Naval Academy and West Point. In the Naval Academy course on ethics and moral reasoning, a week is devoted to the Constitutional basis of an officer's obligation.⁶⁸ At West Point, the course on civil-military relations is called "The State and the Soldier," a play on Huntington, and devotes about one third of its class sessions to topics related to Huntington's view of professionalism and the dangers of subjective civilian control.⁶⁹ In the section on "Modern Civil-Military Relations," roughly half of the sessions are devoted to legal topics, including the National Security Act of 1947 and Goldwater-Nichols.⁷⁰

In addressing the laws of war, the Naval Academy ethics course stresses both legal obligations and the notion of honor. Assignments include essays by Shannon French on *The Warrior's Honor*, and another essay entitled, "*Honor, not Law*," (which, somewhat ironically, is written by a Navy JAG.)⁷¹ Alongside these readings are presented Walzer's 'Legalist paradigm' of just war, as well as several case studies that focus on specific applications of the laws of armed conflict in combat and targeting scenarios.⁷² West Point offers multiple elective courses in the law of armed conflict, which are heavily subscribed by cadets.⁷³

⁶⁸ Rick Rubel, CAPT, USN (Ret), "NE 203: Moral Reasoning for Naval Leaders Syllabus Spring 2014," 2014 This section also draws extensively from the author's experience teaching NE 203 for four semesters at the Naval Academy.

⁶⁹ Michael E. Turner, LTC, AG, "Syllabus and Class Schedule: SS472 The State and the Soldier (5 Feb 2014)" (US Military Academy Center for the Professional Military Ethic, n.d.).

⁷⁰ Turner, LTC, AG.

⁷¹ Rubel, CAPT, USN (Ret), "NE 203 Syllabus"; "Honor, Not Law," accessed April 4, 2015, <http://www.armedforcesjournal.com/honor-not-law/>.

⁷² Rubel, CAPT, USN (Ret), "NE 203 Syllabus"; On the legalist paradigm, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 1977), 58–63.

⁷³ Solis, Interview w/ Prof Gary D. Solis; Wallace, Roundtable with U.S. Military Academy Law Department.

One indication of how Naval Academy Midshipmen prioritize legal considerations in conceptualizing military professionalism comes from an exercise conducted two years after completion of the ethics course. In the final weeks of the senior year course in military law, instructors from the ethics course co-teach a case study seminar with the law instructors on the secret bombing of Cambodia.⁷⁴ Discussion focuses on whether Major Hal Knight acted properly or improperly when he followed orders to re-direct B-52 bombing strikes into Cambodia, and to subsequently falsify the records of the strikes. The question rapidly becomes one of whether Knight was following a lawful order. Generally, the consensus of the Midshipmen (with more or less guidance from the instructors) is that the order to re-direct the strikes and falsify the records was not lawful. The fact that the scenario is part of a course in military law may account for the strong preference for legal, rather than moral reasoning. But, despite the case study being framed as one that involves both law and ethics, Midshipmen rapidly default to the legal viewpoint as a means of justification or condemnation.

The Air Force Academy Department of Law maintains records of the course syllabi for all law courses taught at the Academy since its founding in 1954. This collection is valuable for understanding whether and how the role of law in undergraduate professional military education has changed over the past 50 years. From the founding of the Air Force Academy until the implementation of the Department of Defense Law of War Program in the early 1970's what little coverage of the law of armed conflict that was included in the curriculum was principally contained in elective courses on international law.⁷⁵ In 1972, two lessons in the law of armed

⁷⁴ Stephen Wrage, "Major Knight and Cambodia," in *Case Studies in Ethics for Military Leaders* (Boston, MA: Pearson, 2011), 105-107-225 The comments that follow are based on the author's experience conducting approximately 8 such seminars.

⁷⁵ Typical of this period was the 1959 Law 452 course, International Law, which devoted 6 out of 36 class sessions to law of war issues. "Law 452 Syllabus: International Law and Organizations 1959" (US Air

conflict were added to the general law course required of all cadets, although the focus was principally on offenses unique to combat (mistreatment of prisoners, misbehavior before the enemy) rather than on a detailed review of the law of land warfare.⁷⁶ The amount of time devoted to law of armed conflict issues in required law courses increased to seven out of 42 sessions by 2003-2004, and a substantially greater portion of elective offerings were devoted to law of armed conflict and operational law.⁷⁷ During the 2015 academic year, the Air Force Academy offered six elective courses with substantial law of armed conflict content, and continued to devote approximately 15% of the lessons in the required law course to operational law issues.⁷⁸

Reviewing the data, it is apparent that law plays an important role in the conception of military professionalism taught to aspiring officers, and that the importance of law in undergraduate professional military education has increased over the past 40 years. This is consistent with the expectation that law and legal reasoning should play an increased role in the US military's conception of professionalism.

Graduate professional military education

Law has played an important role in war college curricula since their earliest days. The first graduate professional educational institution in the Army, the Artillery School at Fort Monroe, Virginia included a Department of Military Law and Administration alongside

Force Academy Department of Law, 1959), US Air Force Academy Department of Law The author is grateful to Colonel Linnell Letendre, USAF, and her staff at USAFA for access to these archives.

⁷⁶ "Law 400 Syllabus Spring 1972" (US Air Force Academy Department of Law, 1972), US Air Force Academy Department of Law.

⁷⁷ "Law 220S Syllabus: Law for Air Force Officers 2004-2005" (US Air Force Academy Department of Law, 2004), US Air Force Academy Department of Law In addition to the required course, an elective course on the law of armed conflict was offered, and law of armed conflict was covered in three other courses: Law for Commanders, National Security Law, and International Law.

⁷⁸ "The United States Air Force Academy - Law (Law)."

departments for engineering, military art and science, military history, and (fortunately) artillery.⁷⁹ Speaking of the Naval War College curriculum in the early 20th Century, Pappas observes,

Much emphasis was placed on the study of international law. Professor George C. Wilson of Harvard and Brown Universities had lectured at the Naval College on this subject annually since 1902. The studies accomplished by the college were recognized nationwide as outstanding in the field.⁸⁰

Writing of the role of international law at the war colleges in the early 1970's, Goldie identifies 13 topics in law, which were delivered to all Naval War College students in the form of mandatory lectures, including six in topics that would now be considered operational law: two lectures on international law and the use of force, a lecture on humanitarian laws of warfare, one on law and naval warfare, one on law and air and space warfare, and a lecture on international law and basic human rights.⁸¹ The Army War college curriculum at the time included 12 topics in international law, of which six would be considered as operational law today. Distinct from the Naval War College curriculum, the Army War College curriculum included sessions on the Geneva Conventions and "Weapons and Targets."⁸² The National War College offered an elective seminar in international law, in which two of the nine topics were related to operational law or the law of armed conflict. The Air War College offered the least coverage of law-related issues, with a single lecture by a distinguished scholar, followed by questions and answers.⁸³

⁷⁹ Harry P. Ball, *Of Responsible Command: A History of the US Army War College* (Carlisle Barracks PA: Alumni Association of the US Army War College, 1983), 21.

⁸⁰ George S. Pappas, *Prudens Futuri: The US Army War College 1901-1967* (Marceline, MO: Walsworth Publishing Company, 1967), 78.

⁸¹ L.F.E. Goldie, "International Law at the War Colleges," *American Journal of International Law* 66, no. 1 (January 1972): 124.

⁸² Goldie, 126.

⁸³ Goldie, 125-26.

Stiehm records that the Army War College added further topics in operational law after 1996, when it began to integrate ROE development into exercises and wargames conducted by Army War College students.⁸⁴ Additionally, students at the Army War College incorporated both ethical and legal concerns in discussing the implications of changes in the Army and in modern warfare for leadership. The discussion focused explicitly on the rules set out in codes of conduct and the UCMJ, as well as the implications of just war theory for operations other than war.⁸⁵

At the US Naval War College, the role of law in the core curriculum has remained relatively constant over the years at the level described by Goldie, although the delivery has varied with fewer college-wide lectures and more of the material incorporated into individual seminars. With the introduction of the elective program in the late 1960's, however, the opportunity to provide additional instruction on specialized topics in the law increased. Among the first electives to be offered was a course on *International Law and the Use of Force* in the 1967-68 academic year.⁸⁶ Similar courses, along with a course on the law of Naval operations continued to be popular throughout the next 15 years. In the mid-to-late 1980's an elective course, *Rules of Engagement*, was added to the curriculum, which continues to be offered today.⁸⁷ The value of the ROE course was such that, in addition to offering it at the War College in Newport, faculty from the War College began to export ROE training to fleet concentration areas, in order to ensure that non-lawyers were educated in the role and function of ROE.⁸⁸

⁸⁴ Judith Hicks Stiehm, *The US Army War College: Military Education in a Democracy* (Philadelphia: Temple University Press, 2002), 161–62.

⁸⁵ Stiehm, 149.

⁸⁶ “Naval War College: Syllabus for Elective Course Program, 1967-1968” (Naval War College, 1967), Elective Program Record Group 11 Sub Group II Box 1; Series 2; Folder 1, US Naval War College.

⁸⁷ Ashley Roach, Richard J. Grunawalt, and James Brush, “Elective WE 211 1986-1987: Rules of Engagement: Crisis Management and Conflict Control” (US Naval War College, 1986), RG 11 Subgroup II Electives 1984-88 Box 2 Series 2 Folder 8, US Naval War College.

⁸⁸ See, for example, Richard J. Grunawalt, “Operational Law Instruction in Support of CINCPACFLT; REPORT OF,” Memorandum for the President, Naval War College, February 14, 1989, Grunawalt papers

These operational law instruction events were unique—the Naval War College did not provide training outside of the War College setting on any other subject. Eventually, the material covered in the operational law trainings was incorporated into other classes taught by the Naval Justice School, and the War College’s role in the training ended. By the mid-2000’s, a variety of operational law electives were offered each year, including courses in ROE, contemporary issues in operational law, and operational law for commanders.

Similar to the undergraduate level, law plays a significant role in the graduate-level professional military education of officers. The quantity and variety of legal issues related to the use of force considered to be important in graduate level professional military education increased steadily over the past 40-50 years, as evidenced by increased offerings in topics related to operational law at both the Naval and Army War Colleges.

Summary

This chapter examined evidence as to whether military legalism is a widespread phenomenon, or an anecdotal issue. The evidence is consistent with the observable implications of widespread military legalism. The number of lawyers in the military has increased over the past 50 years, and the role of those lawyers in decisions regarding the use of force has increased substantially with the development of the discipline of operational law. Evidence showed that operational law constitutes a significant portion of the workload for military JAG’s, likely contributing to the increase in numbers of military lawyers, along with the practice areas of environmental law and ethics. Traditional JAG practice areas not involved with decisions regarding the use of force, such as military law and claims, could not account for the increased

MS Coll 114 Box 2; Series 3, Folder 19, US Naval War College The specific training session documented in this memo reached 79 officers, of whom 77 were non-lawyers. The Naval War College conducted numerous similar trainings during the period 1987-1990.

numbers of JAG's. Additionally, evidence showed that both military lawyers and line officers are publishing more frequently in professional journals on topics related to operational law, which is consistent with legal reasoning assuming greater prominence in professional decisions about the use of force. Finally, the role of law in professional military education at both the graduate and undergraduate level was shown to be significant and increasing.

These data are consistent with the premise of the dissertation that military professionalism in the US is changing to increasingly privilege legal norms and reasoning in decisions about the use of force. The next chapter will examine why this may be.

Chapter 3: What causes military legalism?

You cannot win a war today without simultaneously keeping legitimacy inside the country and around the world.

—*Military Advocate General Brigadier Avihai Mandelblit, Israeli Defense Forces*¹

This chapter offers an explanation for why military legalism developed in the US military in the period after the Vietnam War. Military legalism is the practice of privileging legal reasoning rather than traditional professional judgment in justifying military decisions regarding the use of force. Military legalism is a complex concept, influenced by policy choices made by senior policy-makers, the way adversaries choose to fight, and the military's response to these factors.

The time period over which military legalism developed was a time of significant change in the United States. Among the changes were changes in American society, including a growth in the number of lawyers and a so-called 'litigation explosion',² the decline and fall of America's most significant geopolitical adversary, resulting in a "unipolar moment" in which the United

¹ As quoted in Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Lanham, MD: Lexington Books, 2013), 1.

² See, for example, Fleming, "Court Survival in the Litigation Explosion," *Judicature* 54, p. 109 (1970), as cited in Marc Galanter, "READING THE LANDSCAPE OF DISPUTES: WHAT WE KNOW AND DON'T KNOW (AND THINK WE KNOW) ABOUT OUR ALLEGEDLY CONTENTIOUS AND LITIGIOUS SOCIETY," *UCLA L. Rev.* 31, no. 4 (1983): 5; Galanter disputes the notion of a litigation explosion or other arguments that American society has become more litigious in this and several subsequent articles. See, for example, Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," *Stanford Law Review*, 2005, 1255–1274; Marc Galanter, "Real World Torts: An Antidote to Anecdote," *Md. L. Rev.* 55 (1996): 1093. Ultimately, while Galanter is persuasive in arguing that American society has not necessarily become more litigious, it is reasonable to suppose that American society has become more legalistic in a manner consistent with Kagan's argument of adversarial legalism. See Robert A. Kagan, "Adversarial Legalism and American Government," *Journal of Policy Analysis and Management* 10, no. 3 (1991): 369, <https://doi.org/10.2307/3325322>.

States was the world's sole superpower;³ a decline of trust in government;⁴ and changes in the relationship between American society and the military.⁵ This same time frame also saw dramatic technological developments, which enabled a revolution in military affairs in the American military, but which many other countries could not exploit due to cost constraints or other limitations.⁶ Because of this, the United States has enjoyed a substantial qualitative advantage over every opponent it has fought since Vietnam. Many of the same technologies that contributed to the revolution in military affairs have also influenced the speed and manner in which news and images from the battlefield reach public consciousness.⁷ As a consequence, the military and the government compete with adversaries to capture the public narrative about a given use of force, even as they are fighting on the battlefield.⁸ The development of military

³ The term “unipolar moment” was popularized by Charles Krauthammer in an influential essay in *Foreign Affairs* Charles Krauthammer, “The Unipolar Moment,” *Foreign Affairs* 70, no. 1 (1990): 23, <https://doi.org/10.2307/20044692> Other scholars have done extensive work on the implications of unipolarity. See, for example G. John Ikenberry, Michael Mastanduno, and William C. Wohlforth, “Unipolarity, State Behavior, and Systemic Consequences,” *World Politics* 61, no. 01 (2009): 1–27.

⁴ See, for example, Andrew Kohut et al., “Deconstructing Distrust: How Americans View Government” (Washington, D.C.: Pew Research Center, March 10, 1998); Gallup Inc, “Trust in Government,” Gallup.com, accessed January 29, 2018, <http://news.gallup.com/poll/5392/Trust-Government.aspx>; Luke Keele, “Social Capital and the Dynamics of Trust in Government,” *American Journal of Political Science* 51, no. 2 (2007): 241–254; Pew Research Center for the People and the Press, “Public Trust in Government: 1958-2017,” Pew Research Center for the People and the Press, May 3, 2017, <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>.

⁵ These changes have included a shift from a draft to an all-volunteer force, and a change in the esteem/respect with which the military is held in society from a post-Vietnam nadir to a near-exultation during modern conflicts. On the implementation of the all-volunteer force, see Bernard Rostker, *I Want You!: The Evolution of the All-Volunteer Force* (Santa Monica, CA: RAND, 2006); On trust in the military, see Gallup Inc, “Trust in Government”; For a more evocative exploration of the trust/esteem issue, see Ben Fountain, *Billy Lynn's Long Halftime Walk*, Kindle EPub (New York: Harper Collins, 2012).

⁶ Andrew F. Krepinevich, *Cavalry to Computer: The Pattern of Military Revolutions* (National Affairs, 1994), http://people.reed.edu/~ahm/Courses/Reed-POL-359-2011-S3_WTW/Syllabus/EReadings/02.2/02.2.Krepinevich1994Cavalry.pdf.

⁷ Ben O'Loughlin, “Images as Weapons of War: Representation, Mediation and Interpretation,” *Review of International Studies* 37, no. 01 (January 2011): 71–91, <https://doi.org/10.1017/S0260210510000811>.

⁸ See, for example Steven Metz, “The Internet, New Media, and the Evolution of Insurgency,” *Parameters* 42, no. 3 (2012): 80; Jim Rutenberg and Robin Toner, “A NATION AT WAR: THE NEWS MEDIA; Critics of Iraq War Say Lack of Scrutiny Helped Administration to Press Its Case,” *The New York Times*, March 22, 2003, sec. US, <https://www.nytimes.com/2003/03/22/us/nation-war-media-critics->

legalism was influenced by all of these changes, as well as other factors. It is a story of complex causation.

Despite this complexity, the story of why military legalism developed after Vietnam can be simplified: The most important factors were the contested legitimacy of the conflicts in which American forces fought, which led policy-makers to adopt a dense regime of rule-based constraints in an effort to recapture legitimacy. The ability of rules governing the use of force to confer legitimacy stemmed, in part, from the Army's efforts after Vietnam to emphasize the confluence between ROE and the law of armed conflict. Military officers operating in this environment of rules responded by adopting military legalism, a framework for the justification of use of force decisions that was well-adapted to the regime of rules put in place by policy-makers.

The most important factor in changing the way in which military officers justify the use of force is a change in the expectations placed on them by policy-makers. Whereas commanders in World War II were ordinarily given broad goals and expected by policy-makers to use their own judgment as to how best to achieve them, a commander today may find herself operating within a densely-constructed regime of rules, laws, policies, and regulations, which policy-makers expect her to follow to the letter while achieving the stated goals. Policy-makers initially turned to these dense rule-based constraints after World War II as a way to avoid unintended escalation in an era where this could pose a new and truly existential risk.⁹ In the aftermath of

iraq-war-say-lack-scrutiny-helped-administration-press.html; Marie Gillespie, "Security, Media, Legitimacy: Multi-Ethnic Media Publics and the Iraq War 2003," *International Relations* 20, no. 4 (2006): 467–486; Eric V. Larson and Bogdan Savych, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*, Proquest ebrary (Santa Monica, CA: RAND Corp., 2007).

⁹ See, for example Kenneth P. Werrell, "Across the Yalu: Rules of Engagement and the Communist Air Sanctuary During the Korean War," *The Journal of Military History* 72, no. 2 (April 2008): 451–76.

Vietnam, and the My Lai incident in particular, the regime of rules assumed a normative dimension, incorporating the requirements of the law of armed conflict.¹⁰

Especially as the policy rules constraining the use of force began to be identified with the rules of international law, these rule-based regimes of constraint became tools in the battle for legitimacy. The Vietnam conflict was unique in that America was perceived to be defeated not on the battlefield, but in American living rooms.¹¹ By attacking the perceived legitimacy of the US war effort, North Vietnamese leadership achieved strategic victory, despite devastating tactical military defeats in force-on-force confrontations. Subsequent experience has sharpened this lesson for those who would face the American military in battle: When an adversary has engaged in conventional military conflict, as Saddam Hussein's forces did in 1991 and March-April 2003, the result has been a rout, often accompanied by a brief popular domestic upsurge of support for the military and the government in the US. When an adversary has instead avoided direct combat by adopting guerrilla, insurgent, and terrorist tactics, the result has been a protracted conflict characterized by diminishing public support and allegations that US troops have committed war crimes, or at least acted without due regard for the harm they are causing.¹²

¹⁰ See generally Colonel David E. Graham, "My Lai and Beyond: The Evolution of Operational Law," in *The Real Lessons of the Vietnam War: Reflections Twenty-Five Years After the Fall of Saigon*, ed. John Norton Moore and Robert F. Turner (Durham, North Carolina: Carolina Academic Press, 2002); Department of Defense, "DoD Program for the Implementation of the Law of War (Short Title: DoD Law of War Program) (DODD 5100.77)" (Department of Defense, November 5, 1974), National Archives Online, <https://catalog.archives.gov/id/26048945>.

¹¹ Although many commenters have made this observation, a succinct version of it may be found in David Petraeus, "The American Military and the Lessons of Vietnam: A Study of Military Influence and the Use of Force in the Post-Vietnam Era" (Princeton University, 1987), 104, 106 "Vietnam showed the military that there are finite limits to how long the American public will support a protracted conflict---at least a conflict that is not viewed as a crusade....the ability of television to convey the graphic detail of combat into America's living room gave [these] cautions even more significance."; See, also Michael Mandelbaum, "Vietnam: The Television War," *Daedalus*, 1982, 157-169.

¹² See, for example, the differential in support for the invasion of Iraq from 2004-2013, as reported in Gallup Inc, "On 10th Anniversary, 53% in US See Iraq War as Mistake," Gallup.com, accessed November 1, 2017, <http://news.gallup.com/poll/161399/10th-anniversary-iraq-war-mistake.aspx>; For representative examples of war crimes claims, see Charlie Savage and Elisabeth Bumiller, "Haditha

This type of low-intensity/high-publicity campaign cannot defeat US forces on the battlefield. Instead, it is aimed at contesting the legitimacy of US action. One way in which policy-makers may seek to win the legitimacy battle is by moving the locus of decisions that have the potential to negatively impact legitimacy from commanders in the field to rule-makers in Washington, and ensuring that their actions are associated with an institution with high intrinsic legitimacy, such as the law of armed conflict. In order to do this, they implement an exacting set of rules on the use of force.

Expressed graphically, this explanation for the emergence of military legalism looks like this:

Contested legitimacy → Many constraints on the use of force → Military legalism

This simplified explanation is not intended to suggest that other factors are not important to understanding why military legalism emerged when it did. The emergence of military legalism in the post-Vietnam US military is a classic case of path-dependency.¹³ Some additional factors may act as scope conditions, such as the general decline in trust in government, without which policy-makers might be inclined to rely on their own reassurances rather adopting a process which borrows from the legitimacy of law to help justify their actions. Others factors,

Massacre Case,” *The New York Times*, January 27, 2012, <http://www.nytimes.com/2012/01/28/us/an-iraqi-massacre-a-light-sentence-and-a-question-of-military-justice.html>; See also Joshua P. Andresen, “Transparency, Review, and Relief: The Far-Reaching Implications of the Kunduz Report,” *Just Security* (blog), May 13, 2016, <https://www.justsecurity.org/31056/transparency-kunduz-report/>.

¹³ The criteria for path dependency described by Bennett and Elman are causal possibility (more than one outcome is possible), contingency (the influence of random or exogenous factors), closure (some outcomes made less likely due to the exogenous event), and constraint (factors tend to keep actors on a path once it is chosen). Andrew Bennett and Colin Elman, “Complex Causal Relations and Case Study Methods: The Example of Path Dependence,” *Political Analysis* 14, no. 03 (2006): 252, <https://doi.org/10.1093/pan/mpj020>.

such as the technological developments in the media and in the military, serve to increase the potential challenges to the legitimacy of a particular use of force. Still other factors, such as a general increase in the perceived legalism of society, coupled with a decline in military experience among legislators and executive branch officials and an increase in the number of lawyers among members of the executive branch of government, may make the military more likely to see legalistic arguments as persuasive, as compared to traditional professional military judgment.¹⁴ The development of military legalism and its entrenchment in the American military profession is a story influenced by many different aspects of late-20th Century and early-21st Century American culture, policy, and history.

This chapter will focus on the simplified elements of the explanation connecting contested legitimacy, to a dense regime of rules, to the development of military legalism. In order to do so, it will address several questions: First, what is legitimacy as it relates to a use of force, and how do adversaries try to contest it? Second why might policy-makers turn to a regime of rule-based constraints on the use of force to try to re-capture legitimacy and are such regimes effective? Third, why might military officers operating under such a regime turn to military legalism? It will also discuss the influence of other factors, where such factors create necessary or permissive conditions for military legalism, or when they tend to create incentives that reinforce military legalism. Chapters 4 and 5 will explore the elements of this explanation using historical examples.

¹⁴ On the increasing role and prominence of lawyers in the executive branch, see David Fontana, "Executive Branch Legalisms," *Harv. L. Rev. F.* 126 (2012): 21; On the declining number of veterans in Congress, see Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress 2008* (Brookings Institution Press, 2009), figs. 1-8, 1-9, 1-10, 1-11, 1-12, 1-13.

Legitimacy and the use of military force

Legitimacy involves the interplay of community, power, authority, and norms. As discussed in Chapter 1, many theorists, including Weber, Franck, and Clark, offer definitions of legitimacy that touch on each of these elements. Craig's definition of legitimacy as "a value judgment that gives authority to the exercise of power" is the most concise and useful for examining legitimacy as it pertains to the use of military force.¹⁵ Craig's definition implies three significant elements: the assessment of legitimacy is contextually dependent on the particular exercise of power in question; within that context, the assessment of legitimacy is normative, and any assessment of legitimacy is made by a particular community. The legitimacy of military action is under continuing scrutiny, and the assessment may change, depending on how military power is exercised.

Normativity

Legitimacy is, at least in part, an assessment of whether an action or actor is right in the sense of meeting commonly held normative expectations for good. International law provides a normative framework by which the legitimacy of military force is frequently assessed. Much of the international law of armed conflict reflects the principles of just war theory. Often, even if those making the assessment do not express it in such terms, critiques of the legitimacy of the use of force are international law or just war critiques.

Traditionalist just war theory analytically divides the assessment of war between the justice of the ends for which the war is fought, *jus ad bellum*, and the means with which it waged, *jus in bello*.¹⁶ A given war may meet or fail the criteria in either category independent of

¹⁵ Craig, *International Legitimacy and the Politics of Security*, 12 italics omitted.

¹⁶ In addition to traditionalist just war theory, a modern revisionist (or reductivist) school of just war theory seeks to focus on the moral liability of individuals for their actions, independent of the liability of the institutions, which ordered the acts. For a concise exposition of the differences between traditionalist

the other; that is, a just war may be fought justly or unjustly without sullyng the justice of its cause, and an unjust war may likewise be fought unjustly or justly without redeeming the cause for which it is fought.¹⁷ The traditional *jus ad bellum* criteria are just cause, right intention, legitimate authority, last resort, a reasonable probability of success, and proportionality.¹⁸ International law incorporates the principles of just cause and legitimate authority through the prohibition on the use of force contained in the UN charter, except in self-defense or as authorized by the UN.¹⁹ International law is largely silent on the other *jus ad bellum* criteria, although questions of intention, last resort, and proportionality have featured prominently in debates about the legitimacy of specific military actions within the UN and other deliberative bodies.

Jus in bello, which focuses on the means by which war is waged, is the subject of much of the international law governing conflict. *Jus in bello* (and international law) generally requires, at a minimum, that combatants discriminate between civilian and military persons and

and revisionist just war theory, see Seth Lazar, “Just War Theory: Revisionists Versus Traditionalists,” *Annual Review of Political Science* 20 (2017): 37–54. Revisionist just war theory rejects the notion that an unjust war may be fought with just means, since any act taken for an unjust end is unjust by definition. The influence of the revisionists in conflating *ad bellum* and *in bello* legitimacy was discussed briefly in Chapter 1 and will be discussed further below. While some aspects of revisionist just war theory reflect a common moral intuition about the legitimacy of uses of force, much of it is an inwardly-focused debate within the discipline of moral philosophy, and thus not relevant to a practical understanding of the legitimacy of uses of force.

¹⁷ Some modern just war theorists contend that the intentional use of unjust means to prosecute an otherwise justified war may render the war unjustified. See, for example, the National Council of Catholic Bishops in Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds., *The Ethics of War: Classic and Contemporary Readings* (Malden, GA: Blackwell Publishing, 2006), chap. 57 regarding the use of nuclear weapons.

¹⁸ The *jus ad bellum* criteria are derived from the writings of many writers, to include Augustine, Aquinas, Grotius, Hobbes, and others. A concise discussion of these criteria may be found in Brian Orend, *The Morality of War* (Toronto, Canada: Broadview Press, 2006), 31–32; Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings* is a comprehensive anthology of just war thinking from the ancient Greeks through today.

¹⁹ “Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression,” accessed March 23, 2015, <http://www.un.org/en/documents/charter/chapter7.shtml>.

property, and that the means employed by the combatants be proportional to the military advantage to be gained.²⁰ (Of note, the concept of proportionality in the conduct of war is different from the concept of proportionality in relation to the justice of the cause for which war is fought, which is focused on whether war is an appropriate remedy to the wrong that has been done.) *In bello* proportionality is tied to the reality that even attacks against legitimate military targets are likely to result in death or injury to civilians, or the destruction of civilian property. Aquinas' Doctrine of Double Effect accepts that such acts may be morally permissible, so long as the act was not intended to harm civilians, and the act is proportionate to the end it is seeking to achieve:

Nothing hinders a single act from having two effects only one of which is intended (*in intentione*), while the other is beside the intention (*praeter intentionem*). . . . And yet, though proceeding from a good intention, [an] act may be rendered illicit, if it be out of proportion to the [intended] end.²¹

Aquinas' words are echoed in the definition of proportionality contained in the 2016 revision of the Department of Defense *Law of War Manual*:

In war, incidental damage to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, applying the proportionality rule in conducting attacks does not require that no incidental damage result from attacks. Rather, this rule obliges combatants to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained²²

Although popular critiques of the legitimacy of military action may not invoke just war theory or international law explicitly, international law and just war theory help to explicate the

²⁰ See, generally, Orend, *The Morality of War*, chap. 4.

²¹ Aquinas *Summa Theologiae* Question 64, in Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings*, 190 For further classical discussion of the doctrine of double effect, see also Vittoria (Chapter 27) and Grotius (Chapter 32) in the same volume.

²² Office of General Counsel Department of Defense, "Department of Defense Law of War Manual" (Department of Defense, June 2015), 61.

moral intuition behind them. The protest slogan, “No blood for oil,” used to protest both the 1991 and 2003 wars in Iraq, for example, is a critique of the *jus ad bellum* category of right intention. Many critiques of the 2003 US invasion of Iraq were focused on the criterion of last resort; others focused on whether Iraq had committed the crime of aggression in order to warrant invasion, or whether the invasion was an exercise of individual or collective pre-emptive self-defense.²³

Traditional just war theory and international law fail to fully capture the moral intuition behind the “sliding scale” critique, in which the acceptable uses of force during a military action are subject to stricter scrutiny if the legitimacy of the cause for which force is being used is questionable; for that, one must turn to revisionist just war theory. McMahan offers a strong version of the argument that links *in bello* to *ad bellum* legitimacy,

...an act of war cannot be proportionate in the absence of a just aim, or just cause... This understanding of just cause tends to erode the traditional theory’s distinction between *jus ad bellum* and *jus in bello*. For on this understanding, the requirement of just cause applies not just to the resort to war, or to the war as a whole, but also to individual acts of war. ...If this is right, then an unjust war cannot be fought “in strict accordance with the rules.”... [because] acts of war [in support of an unjust cause] cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition of permissible conduct in war.²⁴

While not everyone would go as far as McMahan in making *in bello* proportionality entirely dependent on *ad bellum* proportionality, the intuition that *in bello* legitimacy is related to, and to some degree dependent on, *ad bellum* legitimacy is less controversial. Rawls’ formulation reflects a more common understanding of the relationship, “even in a just war,

²³ For an example of a last resort critique, see Richard N. Haas, *War of Necessity: War of Choice. A Memoir of Two Iraq Wars*, Paperback (New York: Simon and Schuster, 2010); Rutenberg and Toner, “A NATION AT WAR” offers a critique more in line with Walzer’s legalist paradigm.

²⁴ Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114, no. 4 (July 2004): 713–14, <https://doi.org/10.1086/422400>.

certain forms of violence are strictly inadmissible; and when a country's right to war is questionable and uncertain, the constraints on the means it can use are all the more severe.”²⁵

Thus, normative assessment of the legitimacy of the use of military force is closely tied both to international law, and to a hybrid of traditionalist and revisionist just war theory. International law incorporates fewer of the principles of *jus ad bellum* than it does *jus in bello*. As a consequence, some critiques of the justice of the cause for which force is used, such as critiques of proportionality, last resort, or right intention, may not be addressed by compliance with international law. Some uses of force, such as the intervention in Kosovo, may satisfy the moral intuition of legitimacy, but be deficient according to both law and just war theory, since it was neither a response to an attack, nor conducted under the authority of the UN.²⁶ Although the justice of the cause for which military force is used may be assessed independently of the way in which troops use force, a stricter standard of moral scrutiny is likely to be applied to the means used by the military if the normative justification of the cause is weak or questionable, regardless of what law or just war theory may allow or require.

Community

Legitimacy is a normative assessment conducted by a group of people, or community; different communities may reach different conclusions as to the legitimacy of military action. Similarly, military uses of force involve multiple actors, including policy-makers and military commanders, each of whom may be assessed differently by different audiences. (The refrain, “I oppose the war, but I support our troops” is an example of such an assessment.) In justifying

²⁵ As cited in Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 228–29.

²⁶ See generally, Frederic L. Borch, “Targeting after Kosovo: Has the Law Changed for Strike Planners.,” *Naval War College Review* 56, no. 2 (Spring 2003): 64–81. See also; Michael E. O’Hanlon and Ivo H. Daalder, *Winning Ugly: NATO’s War to Save Kosovo* (Washington, D.C.: Brookings Institution Press, 2004).

military force, policy-makers are principally concerned with international and domestic audiences, while military commanders are concerned with those audiences, plus the forces under their command, and in the case of counterinsurgency, the local populace. These communities are not strictly independent: negative international opinion may influence domestic opinion, either by strengthening support in a show of defensiveness and solidarity (for example, the backlash against French condemnation of the 2003 Iraq war symbolized by the re-naming of French fries as “freedom fries” in the Congressional cafeteria), or by causing domestic audiences to pick up on and amplify international critiques (such as the frequent allegation by movements opposed to both the Vietnam and Iraq wars that the US was fighting an aggressive war in violation of international law).²⁷

Policy-makers and international legitimacy

When judging policy-makers, the international community is likely to focus on both the cause for which force is used and the way in which the military uses force. Assessments of legitimacy by the international community often involve a complex interplay of politics, law, norms, and identity.²⁸ While the normative standards of international law and just war theory play a significant part, pre-existing views of the states taking military actions, and their likely motives carry enormous weight, too. The case of Israel provides a powerful illustration of this, which has salience for the assessment of US actions, as well. As Craig observes,

Senior sources within Israel’s Ministry of Foreign Affairs chart an alarming decline in Israel’s loss of [sic] international legitimacy beginning with the occupation in the wake of the 1967 war...In these circumstances, the politics of

²⁷ On “freedom fries”, see for example “US Congress Opts for ‘Freedom Fries,’” *BBC News*, March 12, 2003, <http://news.bbc.co.uk/2/hi/americas/2842493.stm>; On anti-war movements, see Victoria Carty and Jake Onyett, “Protest, Cyberactivism and New Social Movements: The Reemergence of the Peace Movement Post 9/11,” *Social Movement Studies* 5, no. 3 (2006): 229–249.

²⁸ For an excellent discussion of the balance between these factors, see Craig, *International Legitimacy and the Politics of Security*, chap. 2.

legitimacy are influenced by a judgment whether Israel, as the occupiers, should have the right to defend itself from Palestinian resistance and if so on what terms...The Israeli political defense mounted through its public diplomacy deploys a narrative of a Western-style democracy imperiled by terrorism as part of a strategic normative engagement to reinforce the legitimacy of its military operations. Increasingly, it is this moral debate between networks of norm promotion [those who see Israel as an imperiled democracy versus those who see Israel as an occupier] that informs and competes with legal assessments of Israeli military operations in the strategies and negotiations that make up the politics of legitimacy.²⁹

The parallel between the challenges to Israel's legitimacy as a democracy, and also an occupying power in the West Bank and Gaza, and the challenge to US legitimacy is strong. Some states perceive the US to be an irresponsible actor in the international arena, and will always be skeptical of any action or argument by US policy-makers. Additionally, because the US frequently has an overwhelming disparity of force and an increasing technological advantage over putative opponents, US actions may be subject to doubt since the US is not plausibly threatened by much-weaker states, and military action against a weak opponent smacks of bullying, which violates a sense of fairness. This disparity of power, combined with the US' self-conscious self-image as the world's pre-eminent exemplar and defender of democratic values, increases the international scrutiny placed on the legitimacy of US military actions.³⁰ Since 2003, these challenges have been exacerbated by international condemnation of the invasion of Iraq as an unlawful exercise of force.

²⁹ Craig, 22.

³⁰ The iconic statement of the US self-image comes from Ronald Reagan: "I know I have told before of the moment in 1630 when the tiny ship *Arabella* bearing settlers to the New World lay off the Massachusetts coast. To the little bank of settlers gathered on the deck John Winthrop said: 'we shall be a city upon a hill. The eyes of all people are upon us, so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a byword through the world.' Well, America became more than 'a story,' or a 'byword'—more than a sterile footnote in history. I have quoted John Winthrop's words more than once on the campaign trail this year—for I believe that Americans in 1980 are every bit as committed to that vision of a shining 'city on a hill,' as were those long ago settlers." "Ronald Reagan: Election Eve Address 'A Vision for America,'" accessed November 1, 2017, <http://www.presidency.ucsb.edu/ws/?pid=85199>.

In an environment of skepticism regarding US motives and intentions, it is far more difficult to make a compelling argument for the international legitimacy of a particular use of force. This phenomenon is not limited to the US or Israel: although Russia asserted a legal basis for military intervention in South Ossetia and Ukraine, for example, many Western international observers viewed these claims as transparently false.³¹ While it is possible to lose legitimacy among allies through a lack of sufficient justification, as appears to have occurred during the 2003 invasion of Iraq, except in a clear case of self-defense against an existentially threatening attack, it is unlikely that arguments for justification to the international community will win over those who are pre-disposed to view US actions skeptically.³²

Policy-makers and domestic legitimacy

Policy-makers are concerned not only with the international legitimacy of military force, but also with domestic legitimacy. Often, the imperatives of domestic legitimacy may pull toward more aggressive action while those of international legitimacy may pull toward increased restraint. This observation may be true both of the initial decision to use force, and of the way force is used once this decision has been reached. A decisive use of force, framed as a defense of national interest, is likely to be regarded as legitimate domestically, even if it violates international norms. Baker and O'Neal found that the so-called "rally 'round the flag" effect, in

³¹ For a discussion of Russia's legitimacy claims, see, generally Emmanuel Karagiannis, "The Russian Interventions in South Ossetia and Crimea Compared: Military Performance, Legitimacy and Goals," *Contemporary Security Policy* 35, no. 3 (September 2, 2014): 400–420, <https://doi.org/10.1080/13523260.2014.963965>.

³² On the loss of legitimacy among Allies, see Scott and Ambler, "Does Legality Really Matter?," 68 "The US 'legitimacy problem' has been particularly acute in Europe, where, for the first time since World War II, a majority of Europeans has come to doubt the legitimacy of US power and US global leadership"; On the issue of reconciling legitimacy claims with a militaristic foreign policy, see also Michael J. Butler, *Selling a "Just" War: Framing, Legitimacy, and US Military Intervention* (New Haven and London: Palgrave Macmillan, 2012). Butler cites Ikenberry (2006) and Bukovansky (2002) in framing the challenge as the 'liberal contradiction' --the challenge of using military force to pursue a policy when doing so reveals a lack of faith in the liberal vision of progress toward a more pacific world.

which domestic audiences unite behind the President during periods of crisis, was stronger in incidents where the US was acting as the instigator of force, or acting as a revisionist to change the international order, both of which violate international norms on the use of force.³³ In the US case, domestic legitimacy is less likely to revolve around questions of just cause, legitimate authority, or *in bello* proportionality than it is around questions of *ad bellum* proportionality—whether a use of force is worth the long-term cost in blood, treasure, and prestige.³⁴ Corley has found that even incidents of atrocity by US forces, which substantially undermine international claims to legitimacy, provoke only small, short-term spikes in disapproval among the American public.³⁵ This is consistent with *New York Times* reporting that letters to the White House regarding Lt. Calley in the wake of the My Lai massacre ran 100 to 1 in support of Calley.³⁶ But domestic support for protracted uses of force tends to diminish over time.³⁷ Domestic legitimacy concerns may push toward measures that tend to shorten a conflict, rather than those that limit the intensity with which it is fought.

³³ In this case, I am using O'Neal and Baker's conclusions on support for the President, which they operationalize through opinion polling, as a proxy for domestic legitimacy of the use of force. O'Neal and Baker do not assess legitimacy in their article. The effect they observed was small (~5%), but larger than in other circumstances. William D. Baker and John R. O'Neal, "Patriotism or Opinion Leadership? The Nature and Origins of the 'Rally'round the Flag' Effect," *Journal of Conflict Resolution* 45, no. 5 (2001): 678 The danger of this leading to a "wag the dog" scenario in which a President starts an aggressive war for domestic benefit is mitigated by the relatively small size of the gains, and the fact that protracted wars tend to harm Presidential popularity over time.

³⁴ See, Gallup Inc, "On 10th Anniversary, 53% in US See Iraq War as Mistake", citing that over 75% of Americans supported the 2003 invasion of Iraq at the time; by 2008 68% of Americans believed it was a mistake; in 2013, that number was still at 53%.

³⁵ Christopher L. Corley, "Acts of Atrocity Effects on Public Opinion Support during War or Conflict" (Monterey, California. Naval Postgraduate School, 2007), 97–98 Corley examined the impact of My Lai and Abu Ghraib on public support among the American public for the Vietnam and Iraq wars respectively. Using Gallup and Pew polling data, he found no conclusive impact for My Lai, and a small, transient impact for Abu Ghraib. This contrasts with the impact of both events on international audiences, and on the military, which was substantial and long-lasting.

³⁶ Cited in Dave Philipps, "Shared Mission to Pardon US Soldiers Who Killed Civilians," *The New York Times*, May 19, 2016, sec. US, <https://www.nytimes.com/2016/05/20/us/clemency-war-crimes.html>.

³⁷ Gallup Inc, "On 10th Anniversary, 53% in US See Iraq War as Mistake."

Military commanders and legitimacy

Military commanders are cognizant of domestic and international legitimacy concerns in a different way than policy-makers. Commanders operating under a Huntingtonian conception of professionalism, which creates a sharp divide between the political and military sphere, are likely to be most concerned with the assessment of how force is employed, rather than on the justification of the goals of the larger operation. As discussed above, these considerations are not entirely independent. Political considerations or the nature of the operation may result in stricter scrutiny of the means with which military action is carried out. At the international level, this may involve placing significant constraints on the use of force, and cooperating closely with NGO's to transparently address failures to meet those constraints.³⁸

Regarding domestic legitimacy, commanders are concerned with the reputation of the military within American society. The Army doctrine publication on *The Army Profession*, emphasizes this point:

As a military profession, our relationship with the American people is built on a foundation of trust, continuously reinforced as we contribute honorable service, demonstrate military expertise, provide faithful stewardship, and exhibit courageous esprit de corps. ... The Army Profession reinforces trust with the American people by demonstrating its essential characteristics in everything it does, every day, and in every setting where it serves.³⁹

This emphasis on trust and esteem incentivizes military commanders to emphasize the discipline and restraint of their forces, along with their technical and technological prowess. It

³⁸ See, for example, discussion of DoD cooperation with ICRC and other NGO's in investigating the incident in which an MSF hospital in Kunduz was inadvertently struck by US forces. "Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors," Lawfare, accessed October 21, 2016, <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors>; Andresen, "Transparency, Review, and Relief."

³⁹ Department of the Army, "ADRP 1 The Army Profession" (Department of the Army, June 14, 2015), 1-4.

may also create a perverse incentive toward risk aversion, as controversial judgments by individuals may be disowned by the military in order to not harm the military's institutional prestige, which may discourage the exercise of individual discretionary judgment.

In addition to being cognizant of international and domestic legitimacy, military commanders must also be concerned with maintaining legitimacy among the forces they command, and in the case of counterinsurgency, among the local population. While military discipline will normally ensure compliance with orders, if troops assess that either the mission in which they are engaged or the commanders leading them lack legitimacy, this may manifest in the form of low morale, decreased effectiveness, and increased violations of regulations, including ROE.⁴⁰ The imperatives of maintaining legitimacy among troops who are exposed to mortal danger while conducting missions generally creates pressure toward less constraint on the use of force in countering that danger.⁴¹

Legitimacy is central to the conduct of counterinsurgency.⁴² McLeod relates, “the [counterinsurgency] catchphrase became ‘lose legitimacy, lose the war.’”⁴³ As he documents,

⁴⁰ For a particularly disturbing example of this, see Jim Frederick, *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (New York: Harmony Books, 2010); The question of legitimacy among troops is also the primary theme in Christopher D. Amore, “Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties,” *Nat'l Sec. LJ* 1 (2013): 39.

⁴¹ See, for example, the e-mail from a military intelligence officer to interrogators in Iraq, in which he stated, “The gloves are coming off gentlemen regarding these detainees, Col Boltz has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from further attacks.” “Paper Trail - E-Mail From Cpt. William Ponce | The Torture Question | FRONTLINE | PBS,” accessed July 22, 2015, <http://www.pbs.org/wgbh/pages/frontline/torture/paper/ponce.html>.

⁴² The overall focus of legitimacy in counterinsurgency is on the legitimacy of the host nation government. Inherent in this, however, is also a focus on constraining the use of force in order to avoid perceptions of illegitimacy. See generally Headquarters, Department of the Army, “FM 3-24: COUNTERINSURGENCY” (Department of the Army, 2006); See also Thomas Nachbar, “Counterinsurgency, Legitimacy, and the Rule of Law,” *Parameters, Spring, 2012*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242014.

⁴³ Travers McLeod, *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan* (Oxford and New York: Oxford University Press, 2015), 7.

the drafting of the 2006 counterinsurgency field manual placed great emphasis on constraining the use of force in accordance with international norms and the rule of law as a means of ensuring legitimacy. McLeod also features legitimacy centrally in his “three pathways” by which international law affects the behavior of states.⁴⁴

A holistic view of legitimacy—what is most influential to whom?

The preceding discussion of legitimacy is useful in understanding which forces are working most strongly on which actors, and what considerations are likely to be most influential in the overall fight for legitimacy. Table 3.1 summarizes the factors working on the different actors. In the table, the rows are comprised of the community or audience performing the assessment, while the actors being assessed and the scope of the assessment (the *ad bellum* legitimacy of the cause for which force is used, or the *in bello* legitimacy of the way in which force is used) comprise the columns. Each is assessed as to whether legitimacy concerns tend to pull them toward more or fewer constraints on the use of force. While more audiences seem to pull toward greater constraint than toward less constraint, the salience of the domestic communities, for whom legitimacy considerations pull toward fewer constraints, may be greater for policy-makers than the other communities, since international audiences don’t vote in domestic elections. In the case of military commanders, domestic legitimacy concerns pull in both directions: a lack of rapid success suggests a lack of capability, thus encouraging fewer constraints; a lack of constraint, on the other hand, may suggest a lack of discipline, harming legitimacy. The interaction of these elements may result in mixed pressures: policy-makers are pushed toward measures that maximize the likelihood of quick success (or at least do not unduly

⁴⁴ See particularly, McLeod’s three pathways by which international law impacts conduct of states, one of which is focused on legitimacy. McLeod, 17–28, 133–45, 194–207 (17-28 identifying the pathways; 133-145 on the role of legitimacy in drafting 3-24; 194-207 on the role of legitimacy in conducting COIN according to the precepts of 3-24).

limit military options), while also emphasizing compliance with international norms regarding *in bello* conduct. When a group is held in particularly high esteem (such as the contemporary American military), policy-makers may also be influenced by seeking to minimize apparent disagreement with that group, as well.

		<i>Actor/scope</i>		
		<u>Policy-makers:</u> <i>ad bellum</i>	<u>Policy-makers:</u> <i>in bello</i>	<u>Military:</u> <i>in bello</i>
<i>Audience</i>	<u>International</u>	<i>More Constraint</i>	<i>More Constraint</i>	<i>More Constraint</i>
	<u>Domestic</u>	<i>Less Constraint</i>	<i>More Constraint</i>	<i>Neutral</i>
	<u>Troops</u>	NA	NA	<i>Less constraint</i>
	<u>Local populace</u>	<i>More Constraint</i>	<i>More Constraint</i>	<i>More Constraint</i>

Table 3.1: Sources and direction pull of legitimacy considerations

Challenges to legitimacy

The US faces challenges to the legitimacy of decisions to use military force which arise from structural issues, policy choices, and the actions of adversaries. Structural issues and policy choices, although principally focused on *ad bellum* legitimacy, are likely to also result in a stricter scrutiny of *in bello* legitimacy. Adversary action seeks to exploit strict scrutiny of *in bello* legitimacy by inciting US forces to take actions that are likely to result in public outrage. Structural issues principally affect the international assessment of legitimacy, although there is some domestic effect, as well. Policy choices affect both international and domestic audiences, and the local populace in the case of counterinsurgency operations. Adversary action seeks to

influence these three audiences, and may also affect the perception of legitimacy among US forces.

Structural issues

The role of the US within the structure of the international system makes it difficult for policy-makers to advance a presumptively legitimate *jus ad bellum* claim, except in the rare case of an attack upon the US. As previously discussed, the reasons for this are twofold: First, a substantial tension exists between the frequency with which the US employs military force, and the strong ideological support for a rule-based international order expressed in US rhetoric and public diplomacy, which abjures the use of force except in self-defense. Even when policy-makers seek to characterize uses of force as defensive in nature or to carve out narrow, specific exceptions to justify humanitarian interventions, they are vulnerable to the criticism that such rhetoric is no more than window-dressing for the forcible pursuit of self-interest.⁴⁵

The second challenge stems from the fact that the US has an overwhelming superiority in military capacity and technology, as compared to most opponents. The disparity of military power creates an expectation that the US can militarily defeat most adversaries with ease. Among international audiences, this creates a strict scrutiny of the military means employed, since the perception exists that the US can afford to be selective about weapons and targets without endangering the ability to obtain a favorable military result. Among domestic audiences, this creates a pressure for rapid victories, and a sense of frustration with protracted, indecisive conflicts. These pressures are increased by precision weapons technologies, and the capacity to collect and integrate massive amounts of intelligence for use in targeting. Because the US

⁴⁵ Abraham D. Sofaer, *The Best Defense? Legitimacy and Preventive Force: Report of the Stanford University Task Force on Preventive Force* (Stanford, CA: Hoover Institution Press, 2010), 91.

military has the capacity to be extremely discriminate in the employment of force, there is a concomitant pressure to do so, and increased disapproval when US strikes kill civilians, or damage or destroy non-military targets.

Policy choices

While structural issues are largely beyond the influence or control of policy-makers, the policy choices they make may worsen existing challenges to legitimacy, or create new challenges. The most obvious example of this is the 2003 invasion of Iraq. The challenges to legitimacy posed by the choice to push for invasion, even in the absence of a new UN resolution authorizing the use of military force, were made worse by the subsequent failure to find weapons of mass destruction (WMD), which undermined the argument for the urgency of invasion. Because the US has such a well-developed intelligence capability, unsympathetic or neutral observers were left to wonder whether the absence of WMD was an indication of deception by US policy-makers seeking to justify their forcible pursuit of interest, or a mistake of nearly unfathomable proportions.⁴⁶ Either conclusion undermines US legitimacy regarding the invasion, and creates an atmosphere of doubt and skepticism about future uses of force.

Policy choices about the means used to conduct military operations may also generate challenges to legitimacy. The choice to use weapons, such as cruise missiles and drone strikes, which are highly discriminate but do not expose US personnel to risk, may carry increased legitimacy costs.⁴⁷ Although military commanders have a responsibility to protect their forces,

⁴⁶ On the general challenge, see Scott and Ambler, "Does Legality Really Matter?"; On challenges specifically related to the WMD threat, see Lawrence Freedman, "War in Iraq: Selling the Threat," *Survival* 46, no. 2 (Summer 2004): 7–50.

⁴⁷ For an example of the argument that drones create unique legitimacy concerns, see Greg McNeal, "Drones: Legitimacy and Anti-Americanism," *Parameters* 42/43, no. Winter 2012/2013 (2012): 25–28; For an argument that drones may be a more discriminate, and thus more legitimate, form of warfare, see Michael W. Lewis and Emily Crawford, "Drones and Distinction: How IHL Encouraged the Rise of Drones," *Geo. J. Int'l L.* 44 (2012): 1127; The term "imminent" has also become a legal term of art,

the choice to use such systems may communicate that commanders and policy-makers are prioritizing the safety of US military personnel over the safety of civilians who may be harmed by such strikes. This is true even if fewer civilians are killed or wounded by such strikes than might have been harmed by the use of weapons systems which, though less discriminate, expose US forces to greater risk by providing the adversary some opportunity to fight back. The perception that the US is willing to kill but unwilling to expose US troops to the risk of dying in order to achieve a policy goal creates doubt as to the *ad bellum* proportionality of the choice to use force, as well as violating a fundamental sense of fairness.

Challenges to legitimacy based on policy choices come from both the international and domestic communities, as well as from the local populace in counterinsurgency. In the international case, such challenges are often framed in terms of compliance with international law.⁴⁸ In the domestic case, *in bello* legitimacy concerns are often woven into a larger anti-war narrative focusing on the *ad bellum* legitimacy of US policy. For example, the public backlash that followed revelations of torture by US forces in Iraq, Afghanistan, and Guantanamo was often accompanied by questions about the legitimacy of the ‘war on terror’.⁴⁹ In the case of counterinsurgency, the legitimacy concerns may be focused either on the policy of supporting a particular government against an insurgency, or on the amount and type of force used by US troops and the government forces they advise and support.⁵⁰

which makes the *ad bellum* legitimacy case more problematic. Eric D. Montalvo, “When Did Imminent Stop Meaning Immediate; Jus in Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency,” *Army Law.*, 2013, 24.

⁴⁸ Scott and Ambler, “Does Legality Really Matter?”

⁴⁹ For an example of a critique that combined these elements, see Seymour Hersh, “Torture at Abu Ghraib,” *The New Yorker*, May 10, 2004, <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

⁵⁰ For example, the COIN field manual states, “COIN is ‘war amongst the people.’ Combat operations must therefore be executed with an appropriate level of restraint to minimize or avoid injuring innocent people. Not only is there a moral basis for the use of restraint or measured force; there are practical

Adversary action

By the time a military conflict is being fought, structural factors and policy choices are often already “baked-in.” While these factors may affect the perception of legitimacy, they are integral to the choice to use force, and can only be mitigated by concluding the conflict.

Adversaries seeking to exploit pre-existing structural or policy issues which weaken legitimacy may choose to fight in such a way as to further contest the legitimacy of US actions and try to create pressure toward concluding the conflict on terms favorable to them.

US forces frequently find themselves confronting adversaries who exploit US constraints on the use of force for tactical or strategic advantage. For example, they may not wear uniforms, they may employ women, children, and other non-combatants as fighters, or they may intentionally use protected sites for military purposes. Such actions are calculated to place US forces on the horns of a dilemma: If US forces observe the legal constraints against targeting civilians and protected sites, the adversary may be able to inflict more harm than otherwise possible, placing US troops and local civilians at increased risk, reducing military effectiveness, and prolonging the conflict, which undermines domestic legitimacy. If US forces ignore or weaken such constraints, they are likely to harm innocent civilians themselves, provoking outrage and undermining both domestic and international legitimacy. As Gross observes, such tactics are akin to the use of human shields:

Instead of providing protection from assassination, the right to shed their uniforms affords guerrillas the ability to maneuver among civilians, reconnoiter, move supplies, and establish firing positions. Mufti allows guerrillas to fight better, not retreat. As they fight among civilians, guerrillas also draw their adversaries into attacks that may disproportionately harm the civilian population and thereby give an attacking army cause to desist. The right to shed uniforms

reasons as well. Needlessly harming innocents can turn the populace against the COIN effort. Discriminating use of fires and calculated, disciplined response should characterize COIN operations.” Headquarters, Department of the Army, “FM 3-24,” paras. 5–38.

cannot confer protection without the shielding that the civilian population provides.⁵¹

In addition to exploiting the protection afforded to civilians, such tactics may be calculated to incite US forces to lose their discipline and commit atrocities. Solis recounts the testimony of an officer in Vietnam whose unit was repeatedly attacked or drawn into ambushes by women and children: “My people saw three Vietnamese boys, ranging in age from nine to twelve years old, wearing green utilities, carrying two AK-47’s and one SKS rifle, coming up on our position. We killed one of them. The other two got away.”⁵² The officer recounts many other similar incidents, including one in which three Vietnamese women drew Marines into a Vietcong ambush. Nine Marines were killed. Over a three-month period, his company suffered 99 casualties (85 wounded, 14 killed), many inflicted by women and children who would normally be protected from attack by virtue of presumptively being non-combatants. When these women and children took up arms, it became impossible to distinguish fighters from the local population. Shortly afterward, a squad from this company of Marines was implicated in the murder of 16 women and children in the nearby village of Song Thang-4.⁵³ A similar pattern of taking losses from fighters who mingled indistinguishably with local civilians preceded the massacres at My Lai and Haditha, as well.⁵⁴ Although no adversary tactic can justify atrocities, and US forces are clearly responsible for atrocities they commit, tactics that exploit civilian protections are calculated to make an atrocity more likely by placing increased pressure on the discipline of US forces. While such tactics are themselves clearly unlawful and illegitimate, US

⁵¹ Michael Gross, *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare* (Cambridge: Cambridge University Press, 2015), 62.

⁵² Gary D. Solis, *Son Thang: An American War Crime* (Annapolis, Md.: Naval Institute Press, 1997), 147.

⁵³ Solis, 147 (To place the scope of the casualties the company had taken in context, A typical Marine rifle company in Vietnam was comprised of approximately 150 Marines).

⁵⁴ On My Lai, see Graham, “Evolution of Operational Law”; On Haditha, see Savage and Bumiller, “Haditha Massacre Case.”

responses to them may pose a challenge to the international legitimacy of US military force and the legitimacy among local populations by increasing the risk of harm to civilians; responses to such tactics challenge domestic legitimacy by strengthening anti-war narratives and raising questions about the overall cost of the war; policies that limit the use of force in response to provocations may challenge legitimacy among US forces by causing troops to question whether they are allowed sufficient means to protect themselves against such attacks.

Responding to contested legitimacy

In response to these challenges to legitimacy, US policy-makers have adopted a rule-based regime to govern the use of force, comprised of law, policy, and regulation. This approach is perceived as responsive for two reasons: First, by moving the locus of broad decisions about how force is employed from commanders in the field to rule-makers in Washington (or other headquarters), policy-makers may perceive that they have more control over potential use of force decisions that might undermine legitimacy by causing high numbers of civilian casualties, excessive collateral damage, or casting the conflict in an unflattering light. Second, by emphasizing the degree to which US military action is controlled by rules, which meet or exceed the requirements of international law, policy-makers are addressing concerns about the *in bello* legitimacy of US military action. Although careful regulation of *in bello* conduct cannot cure a defect in the *ad bellum* legitimacy of a use of force, it is responsive to the strict scrutiny of military actions that follows from contested *ad bellum* legitimacy. This regime of constraint is principally imposed by policy-makers on military commanders, although senior military commanders operating at the strategic level may impose additional constraints on subordinate commanders at the operational or tactical level beyond those dictated by policy-makers.

Sources of constraint: law, policy, and regulation

Policy-makers may impose constraints on military commanders by means of law, policy, or regulation. Legal provisions provide the strongest form of constraint on the use of force, and are the least likely to change, either during the course of a conflict or from one conflict to the next. The most firmly established legal constraints are treaty law and bedrock legal principles of customary international humanitarian law (IHL), such as the requirements of distinction and proportionality in targeting.⁵⁵ The US has been reluctant to become a state party to new instruments of IHL over the past two decades, resulting in relative constancy in that body of international law which the US recognizes as constraining the employment of military force.⁵⁶

Policy constraints include written and unwritten guidance based on consideration of “international public opinion,” as well as guidance based on legal principles to which the US desires to be broadly faithful, but does not desire to be bound by legal obligation, leaving the option to derogate from the prescribed legal standard without repercussions if the situation requires. The phrase “international public opinion” is drawn from the Department of Defense *Law of War Manual*, where it is used to describe treaty norms that the US may not consider to be legally applicable in a given conflict, but which nevertheless figure prominently in international

⁵⁵ The US is a state party to 19 treaties governing the law of war. These are enumerated at Office of General Counsel Department of Defense, “DoD Law of War Manual,” sec. 19.2.1 (pp 1122-1124); See also Department of the Navy. Office of the Chief of Naval Operations, *The Commander’s Handbook on the Law of Naval Operations*, July 2007, NWP 1-14M (Washington, D.C., 2007), sec. 5.5.2 (pp 5-5 and 5-6); For additional established and binding legal principles, see Jean-Marie Henckaerts et al., eds., *Customary International Humanitarian Law* (Cambridge ; New York: Cambridge University Press, 2005), vol. I “Rules.”

⁵⁶ Typical of the policy-makers who have been responsible for that reluctance (and particularly instrumental in the decision not to ratify the 1977 Additional Protocols, even with reservations) are the views of Douglas Feith, a former senior official in the Reagan and George W. Bush Defense Departments. Col. Dick Jackson, Interview with Colonel Dick Jackson, JAGC, US Army (Ret): The Drafting and Adoption of the Department of Defense Law of War Manual, interview by Doyle Hodges, October 12, 2016; See, for example, Jon Kyl, Douglas J. Feith, and John Fonte, “The War of Law: How New International Law Undermines Democratic Sovereignty,” *Foreign Affairs* 92 (2013): 115.

assessments of legitimacy.⁵⁷ The term is used here more broadly to connote non-legal considerations which shape the judgement of US military actions, as well.

In addition to legitimacy-based concerns, policy constraints may include legal principles to which the US desires to remain broadly faithful, but to which it does not wish to bind itself in legal obligation. In practice, for example, the US observes most provisions of the 1977 Additional Protocols to the Geneva Conventions as a matter of policy, despite not having ratified the Protocols.⁵⁸ In another example, the 2015 edition of the Department of Defense Law of War Manual asserted that the US is under no legal obligation to consider journalists, aid workers, or human shields in estimating likely casualties when calculating the proportionality of a proposed strike, since those persons have either voluntarily placed themselves in danger, or in the case of non-voluntary human shields, have been intentionally placed in danger by an adversary.⁵⁹ While

⁵⁷ The DoD Law of War Manual uses the phrase “as a matter of policy” 16 times to describe US practice in situations ranging from adherence to law of war rules in situations that do not technically constitute armed conflict, to avoiding the destruction of cultural property, even when its protection may have been waived due to its use for a military purpose, to the designation of Air Mobility Command charter aircraft as “state aircraft.” Office of General Counsel Department of Defense, “DoD Law of War Manual”; Additionally, the US, although not a state party to the 1977 Additional Protocol I of the Geneva Conventions (AP1), has implemented the requirement under Art 82 of AP 1 to provide a legal advisor to commanders, even going so far as to assign a JAG to every Marine infantry battalion in Iraq and Afghanistan, which exceeds the AP1 requirement simply to have legal advisers available “at the appropriate level.” Gary D. Solis, Interview w/ Prof Gary D. Solis, interview by Doyle Hodges, August 8, 2016; Office of General Counsel Department of Defense, “DoD Law of War Manual,” 71.

⁵⁸ Solis, Interview w/ Prof Gary D. Solis; Jackson, Col Dick Jackson interview re: Law of War Manual.

⁵⁹ For a discussion, see John Merriam Merriam, “Must Military Medical and Religious Personnel Be Accounted for in a Proportionality Analysis?,” *Just Security*, July 8, 2016, <https://www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis/>; Marty Lederman, “Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual,” *Just Security*, June 27, 2016, <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/>; Oona Hathaway Hathaway, “The Law of War Manual’s Threat to the Principle of Proportionality,” *Just Security*, June 23, 2016, <https://www.justsecurity.org/31631/lowm-threat-principle-proportionality/>; The December 2016 revision to the Law of War Manual softened the position that such personnel need not be considered in proportionality calculations, and included language indicating that commanders might, in some circumstances, reach the conclusion that voluntary human shields were directly participating in hostilities, and had thus given up their immunity from targeting. See the discussion in Charles J. Dunlap, “A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields,” *Just Security* (blog), December 15, 2016,

this position accurately summarizes the minimum legal obligation acknowledged by the United States, as a matter of policy the US has routinely considered such personnel and avoided knowingly taking actions that would create unnecessary risk to them.⁶⁰ In a final example, President Bush, after declaring that the provisions of the Geneva Conventions, including common Article 3, which specifies minimum standards of humane treatment, did not apply in the conflict with Al Qaeda and the Taliban, went on to say, “As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”⁶¹

In general, although budgetary, logistic, and strategic policies may constrain the number and type of forces committed to a conflict, these considerations are outside the scope of policy constraints on the use of force for purposes of this analysis. In order to be a constraint on the use of force, a policy must be concerned with constraints on forces that are actually engaged in a given conflict, not policies that constrain whether or not forces should be committed at all. For example, the US decision not to deploy ground troops in the Kosovo campaign was a policy choice about whether those forces should be used at all, not what constraints should be placed on them if employed. Similarly, when Nixon contemplated deploying troops in response to the 1970 Jordanian civil war, but was dissuaded by his Joint Chiefs of Staff, since to do so would deplete the strategic reserve of forces available to defend Europe, the requirement to maintain a reserve was a constraint on whether forces could be deployed to the conflict, not how they would

<http://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/>.

⁶⁰ Jackson, Col Dick Jackson interview re: Law of War Manual.

⁶¹ George W. Bush, “Humane Treatment of Taliban and Al Qaeda Detainees,” February 7, 2002, http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

be employed if they were committed.⁶² It thus was a strategic constraint, not a policy constraint on the use of force.

Regulations, the final source of constraints, are the means by which the military gives effect to the legal and policy constraints that govern a conflict, as well as providing additional constraints that meet specific local needs. The most obvious of these regulations are the rules of engagement (ROE). The Department of Defense (DoD) defines ROE as, “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁶³

The Army Field Manual on *Legal Support to Operations* specifies,

In all operations, ROE may impose political, operational, and legal limitations upon commanders. Withholding employment of particular classes of weapons or exempting the territory of certain nations from attack are examples of such limitations. At the tactical level, ROE may extend to criteria for initiating engagements with certain weapon systems (for example, unobserved fires) or reacting to attack.

Effective ROE comply with domestic and international law, including the body of international law pertaining to armed conflict. Thus, ROE never justify illegal actions. In all situations, soldiers and commanders use force that is necessary and proportional.⁶⁴

Martins, a senior Army JAG, emphasizes that ROE serve three purposes: policy, legal, and military.

An example of ROE that serve policy purposes is Executive Order 11850, which prohibits first use of riot control agents and herbicides without

⁶² Discussed in Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge, Massachusetts; London, England: Harvard University Press, 2003), 135–36; Feaver bases his discussion largely on Barry M. Blechman and Stephen S Kaplan, *Force Without War: US Armed Forces as a Political Instrument* (Washington, D.C.: The Brookings Institution, 1978), 276–78.

⁶³ Department of Defense, *The Dictionary of Military Terms: The US Department of Defense* (Skyhorse Publishing Inc., 2009), 317.

⁶⁴ Department of the Army, “FM 27-100 Legal Support to Operations” (Headquarters, Department of the Army, March 1, 2000), 8–3.

Presidential approval. An example of a rule that serves military purposes is the common requirement in ground operations that the artillery tubes organic to a unit will not fire beyond a designated fire support coordination line, which ensures an efficient division of labor between fires controlled at one level and those controlled by higher levels of command. An example of ROE drafted for legal purposes is the prohibition that “hospitals, churches, shrines, schools, museums, and any other historical or cultural sites will not be engaged except in self- defense.”⁶⁵

Martins’ taxonomy of ROE matches the sources of constraint (law, policy, and regulation) previously identified and adds the possibility that regulations constraining the use of force may be added by commanders for administrative purposes, such as efficient division of labor between different echelons of command, or the avoidance of friendly fire. Besides adding constraints based on administrative military purposes, ROE commonly add a margin beyond what is strictly required under IHL, in order to minimize the possibility of inadvertent violation of the laws of war, or to satisfy other policy concerns.⁶⁶ In addition to ROE, commanders may use other mechanisms, such as tactical directives or verbal guidance statements to further constrain the range of options available for the use of force.⁶⁷ Other examples of regulatory

⁶⁵ Mark Martins, “Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering” (The Judge Advocate General School, 1994), 17 (internal citation omitted).

⁶⁶ NJ2, NJ2 Interview, interview by Doyle Hodges, June 14, 2016. NJ2 is a Navy JAG assigned to a Theater Special Operations Commander. Commenting on the density of constraints imposed by regulation, NJ2 remarked, “The reason that I can cite so few examples in combat as far as it relates to kinetic operations where the operation would be affected by the law in some sort of way — the reason I haven’t seen that is because commander’s guidance typically restricts the operation such that the outer limit of what legally may be done is never approached. It’s never in sight. So the aperture for what you may do lawfully in combat in my experience is much greater than what you may do after you’ve taken your commander’s guidance or the restrictions that he or she is placed into consideration.”

⁶⁷ NJ2. NJ2 explained the differing functions of ROE and tactical directives, as well as the role of verbal guidance, as, “If we look at the base ROE document, in many ways it’s like an à la carte menu at a Chinese restaurant. I can order number 204 or 193 or 37. Those measures will either restrict or permit the use of different types of weapons or tactics. There really is no line item on the à la carte menu for only conducting night operations only when certain conditions are obtained. So it’s not perfectly well-suited for a traditional ROE message. In addition to the tactical directive that you mentioned, in many operations when the concept of operations is being reviewed, the proposal if you will, it’s reviewed in conjunction with verbal guidance previously provided by various commanders. As judge advocates we sometimes capture the direct quote. In fact, I’ve seen some operations were portions of speeches from the commander-in-chief have been quoted as commander’s guidance with a date time group for when the

constraints include escalation of force procedures, such as are often employed at roadblocks or checkpoints, wherein US forces are required to employ a continuum of non-lethal means (time and circumstance permitting) before resorting to deadly force.⁶⁸ Regulatory constraints on the use of force are the least strong form of constraint—regulations may frequently be waived by commanders of a particular seniority, and may be fairly rapidly altered to meet changing local conditions. Nevertheless, regulatory constraints have the force of a lawful order to those governed by them and are more numerous than policy constraints.

Do rule-based constraints enhance legitimacy?

The first purpose of rule-based constraints, to move the locus of decisions from the field to strategic headquarters, does not in itself add to or detract from the legitimacy of a military campaign or use of force decision. Instead, it seeks to ensure that policy-makers get the opportunity to apply their own judgment, which may take into account domestic political considerations and other factors not within the purview of operational military commanders. For example, the specific ROE cited in Chapter 1, which required approval by the Secretary of Defense for targets where the anticipated number of civilian casualties exceeded a threshold value, does not necessarily bolster the legitimacy of a proposed strike. Instead, it ensures that senior civilian decision-makers are given the opportunity to weigh in on uses of force, which might reasonably be anticipated to produce a strong negative response. The factors considered by civilian policy-makers may be very different from those considered by military commanders. While it would be a violation of professional norms for a military commander to forebear striking a target with a high number of anticipated civilian casualties because of a domestic

commander-in-chief made that particular comment from behind a podium at a press conference or commencement speech."

⁶⁸ For a discussion of escalation of force procedures, see Randall Bagwell, "The Threat Assessment Process: The Evolution of Escalation of Force," *The Army Lawyer*, April 2008, 5–17.

political event, such as a major policy speech or US election, it is not a violation for a civilian elected or appointed official to give weight to such factors.

Rule-based constraints also attempt to address legitimacy concerns by “borrowing” the legitimacy of the processes and institutions they incorporate. In some cases, rule-based constraints bolster legitimacy by emphasizing compliance with international law; in other cases, rule-based constraints bolster legitimacy by emphasizing a sense of “rightness,” due to process-compliance, even if the process itself may not strictly reflect the strictures of international law.⁶⁹

International law and legitimacy

Given the skepticism that may accompany US assertions of legal compliance, and the foundational role of the US in creating the rule-based international order of which international law is a part, it is reasonable to ask why compliance with international law should confer legitimacy. Goldsmith and Posner offer a theory of international law that suggests it is based exclusively on states’ self-interest, properly understood.⁷⁰ Morrow similarly suggests that compliance with the law of war is reliant principally on reciprocity.⁷¹ If this view of international law is accepted, it is unclear why compliance with a set of rules designed to protect self-interest, inflected by the realities of state power, and followed only so long as the other side seems likely to follow them should necessarily confer legitimacy.

⁶⁹ The most prominent example of this is the US-backed NATO military action in Kosovo in 1999. For a discussion of the appeal to a sense of rightness in justifying the use of force, see Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (New York: Public Affairs, 2001).

⁷⁰ Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, USA, 2005), 13 Goldsmith and Posner argue that compliance with international law is best explained by a combination of coincidence (what Keohane 1984 would term “harmony”), cooperation, coordination, and coercion, all in pursuit of rational self-interest.

⁷¹ James D. Morrow, “The Laws of War, Common Conjectures, and Legal Systems in International Politics,” *The Journal of Legal Studies* 31, no. S1 (January 2002): S41–60, <https://doi.org/10.1086/340810>; James D. Morrow, “When Do States Follow the Laws of War?,” *American Political Science Review* 101, no. 03 (July 26, 2007): 559, <https://doi.org/10.1017/S000305540707027X>.

One answer to this critique is the close relationship between international law and norms regarding the use of force, and just war theory. Although few audiences will strictly compare a proposed use of force against just war criteria, the profound influence of just war theory in shaping Western norms regarding the use of force results in a close correlation between just war criteria and common moral intuition regarding the legitimacy of uses of force. This is particularly true in the *jus in bello* context: while there may be disagreement among some communities as to whether a member of a particular group is acting as a civilian, a belligerent, or a combatant, actions that routinely result in harm to innocent persons and non-military targets are widely regarded as illegitimate.⁷² The importance of discrimination and restraint in the use of force may be found in the Islamic just war tradition, as well.⁷³

A more theoretical explanation of the power of international law to confer legitimacy is offered by Brunnée and Toope, drawing from the domestic legal philosophy of Fuller.⁷⁴ According to Fuller, in order to justify an expectation that law will be followed, it must satisfy certain criteria: it must be general; it must be promulgated so that all may know what the law is; it cannot be retroactive, since people cannot change past actions to comply; it must be clear; it cannot contradict itself or ask the impossible; it must be relatively constant rather than always changing; and there must be reasonable congruence between the rules of law and official actions.⁷⁵ For Fuller, it is the satisfaction of these criteria that causes people to submit to legal authority and organize their actions around it, a practice which he termed ‘fidelity’ to the law.

⁷² For an early discussion of this, see Richard R. Baxter Major, “So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs,” *British Yearbook of International Law* 28 (1951): 323–60.

⁷³ See Valerie Morkevicius, “Why We Need a Just Rebellion Theory,” *Ethics & International Affairs* 27, no. 4 (2013): 406–9.

⁷⁴ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge ; New York: Cambridge University Press, 2010).

⁷⁵ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 232–37 as cited in Brunnée and Toope, 6.

As he observed in the course of a debate with Hart over the nature of law, “We should keep in mind that the efficacy of our work will depend upon general acceptance and that to make this acceptance secure there must be a general belief that the [law] itself is necessary, right, and good.”⁷⁶

For Brunnée and Toope, legitimacy is to international law as fidelity is to domestic law according to Fuller. By grounding their view of international law in this comparison, they blunt the criticisms of realists, such as Posner and Goldstone, that law is either a hypocritical fig leaf for the pursuit of self-interest, or, as Morrow argues, that it is little more than a *quid pro quo*. Instead, Brunnée and Toope argue that adherence to Fuller’s criteria gives international law force beyond reciprocity or self-interest. “What distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality... When norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements... actors will be able to pursue their purposes and organize their interactions through law.”⁷⁷ This view is also consistent with Franck’s definition of legitimacy, which emphasizes the normative compliance-pull exerted by legitimate rules.⁷⁸ On this view, when international law meets Fuller’s criteria for fidelity, it is followed out of a sense of legitimacy and legal obligation.

Military response to rule-based constraints

Military commanders operating under a regime of rule-based constraints may respond either by resisting the imposition of constraint, or by embracing and adapting to the rules; the process of embracing and adapting to rule-based constraints results in military legalism. In order

⁷⁶ Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” *Harvard Law Review* 71, no. 4 (February 1958): 642, <https://doi.org/10.2307/1338226>.

⁷⁷ Brunnée and Toope, *Legitimacy and Legality in International Law*, 6–7.

⁷⁸ Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York and Oxford: Oxford University Press, 1990), 16–24.

to understand which response is more likely, it is helpful to turn to two prominent theories of civil-military relations, those of Huntington and Feaver. The impetus for resisting the imposition of constraint may be found in Huntington's conception of the military profession, which emphasizes the role of expertise and seeks autonomy within the sphere of military activity, but this desire for autonomy is ultimately outweighed in Huntington's theory by an emphasis on obedience as the cardinal military virtue. Embracing and adapting to the constraints is also consistent with Feaver's agency theory, which emphasizes the desire to work without the burden of intrusive monitoring.

Huntington's model of objective civilian control

Huntington's theory of objective civilian control offers mixed prospects as to how professional military officers might be expected to respond under a dense regime of rule-based constraints on the use of force, but the expectations are ultimately consistent with military legalism. Huntington prizes the autonomy of the military professional to make decisions about the management of violence and discounts the ability of those not expert in the field to do so. As he observes, "The fact that war has its own grammar requires that the military professionals be permitted to develop their expertise at this grammar without extraneous interference."⁷⁹ The imposition of rules by policy-makers who lack expertise in the management of violence may be seen as diminishing the professionalism of the officer corps by presuming upon their expertise. On the other hand, Huntington elevates the virtue of obedience, even to bad or questionable orders.

When the military man receives a legal order from an authorized superior, he does not argue, he does not hesitate, he does not substitute his own views; he obeys instantly. *He is judged not by the policies he implements, but rather by*

⁷⁹ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, Massachusetts; London, England: Harvard University Press, 1957), 57.

*the promptness and efficiency with which he carries them out. His goal is to perfect an instrument of obedience; the uses to which that instrument is put are beyond his responsibility. His highest virtue is instrumental, not ultimate. Like Shakespeare's soldier in Henry V, he believes that the justice of the cause is more than he should "know" or "seek after." For if the king's "cause be wrong, our obedience to the King wipes the crime of it out of us."*⁸⁰

If the virtue of obedience can "wipe the crime" of immoral or unwise orders from military commanders, then surely it must also compel following orders, even when those orders intrude on the professional expertise of the commanders, especially when those orders may have a political end, as well as a military effect.⁸¹ While Huntington is critical of statesmen who intrude on the expertise of the military, he offers no recourse for the military, and his strong belief in civilian supremacy demands obedience.⁸² The most likely expected outcome under Huntington's theory of objective civilian control for a professional military operating under a regime of dense rule-based constraint is therefore more or less grudging obedience, coupled with an effort to reduce or eliminate such constraints, perhaps by taking advantage of the separation of powers to make the case to Congress that such rules harm military efficiency and effectiveness.⁸³

⁸⁰ Huntington, 73 emphasis added.

⁸¹ Huntington carries this so far as to fault those German officers who resisted Hitler in the 1930's: "The commanding generals of the German army in the late 1930's, for instance, almost unanimously believed that Hitler's foreign policies would lead to national ruin. Military duty, however, required them to carry out his orders: some followed this course, others forsook the professional code to push their political goals....the German officers who joined the resistance to Hitler...forgot that it is not the function of military officers to decide questions of war and peace." Huntington, 77.

⁸² In this regard, Huntington criticizes Hitler's involvement in military decisions, "The statesman has no business deciding, as Hitler did in the later phases of World War II, whether battalions in combat should advance or retreat." Huntington, 77 Despite this disapproval, Huntington does not suggest that such interference justified the generals' entanglement in politics. He does not comment specifically on the assassination plot, or on the professionalism of obeying manifestly unlawful orders, such as those issued to the Sonderkommandos for the murder of Jews in occupied territories.

⁸³ On the relationship between the military and Congress, and the tension this may cause in civil-military relations, see Huntington, chap. 15.

Feaver's agency theory

Feaver's agency theory of civil-military relations offers a different way of analyzing the question of military behavior under a regime of rule-based constraint, which also generates expectations consistent with the development of military legalism. Briefly, Feaver characterizes the civil-military relationship as a relationship between a principal (civilian policy-makers) and an agent (military commanders). Under his theory, policy-makers are assumed have differing goals than military commanders, and commanders have an incentive to achieve their own goals (shirking behavior), while policy-makers have incentive to use variously intrusive monitoring regimes to ensure the military complies with their desires (working behavior). When the interests of policy-makers and military commanders align, working behavior results, even without intrusive monitoring. Feaver describes this as Huntington's condition of objective civilian control.⁸⁴ Since Huntington's theory has a strong normative pull within the US military and describes the model of civil-military relations preferred by many military officers, this exerts an influence, which diminishes the strength of the assumption of divergent interests contained in Feaver's theory.⁸⁵ In short, military commanders would rather work toward policy-makers' goals under conditions of non-intrusive monitoring, than engage in shirking behavior, which risks the imposition of intrusive monitoring. Especially in light of the elevation of obedience as the cardinal military virtue, they are likely to value the absence of intrusive monitoring more than they value achieving success in those areas in which their goals differ from policy-makers, even at the cost of some professional autonomy.

⁸⁴ Regarding agency theory and divergent interests, see Feaver, *Armed Servants*, Chapter 2. Regarding working under non-intrusive monitoring as meeting Huntington's prescription, see Table 5.1, p. 120.

⁸⁵ On the influence of Huntington among military officers and their desire for autonomy, see Jim Golby, "Improving Advice and Earning Autonomy: Building Trust in the Strategic Dialogue," *The Bridge* (blog), accessed October 3, 2017, <https://thestrategybridge.org/the-bridge/2017/10/3/improving-advice-and-earning-autonomy-building-trust-in-the-strategic-dialogue>.

Legitimacy and a preference for rule-based constraint

In order to understand why the military might order their preferences in this way, and to help understand why this behavior emerged only after Vietnam, it is helpful to consider the military's institutional preferences. Military commanders since Vietnam are especially concerned with the prestige of the military. In the Vietnam war, the military repeatedly justified actions that seemed to violate international law and a sense of rightness by calling upon the authority of their professional expertise. An infamous example of this is the grotesque logic of a US Major who declared to journalist Peter Arnett that it, "became necessary to destroy the town" of Ben Tre in Vietnam, "in order to save it."⁸⁶ In making such an appeal, the military is asserting that their specialized expertise in the management of violence should outweigh both the constraints of international law and an intuitive sense of what is morally right. This creates a dissonance between the authority and expertise of the military, and common sense morality. The longer such dissonance endures and the more pronounced it becomes, the more likely the military's authority and expertise is to be called in to question. This is even more likely if such actions fail to lead to a positive outcome. For the Army in Vietnam, this resulted in an unprecedented loss of public trust and esteem.⁸⁷

Trust and esteem operate like a bank balance: the more often the military draws on public trust in their expertise and authority to legitimate actions that appear to violate common morality, the less public trust they are likely to command, and the less weight their authority is likely to carry. To some extent, the esteem in which the military is currently held allows military officers

⁸⁶ James Pringle Tribune International Herald, "Meanwhile : The Quiet Town Where the Vietnam War Began," *The New York Times*, March 23, 2004, <http://www.nytimes.com/2004/03/23/opinion/meanwhile-the-quiet-town-where-the-vietnam-war-began.html>.

⁸⁷ On the low public opinion of the US military post-Vietnam, see Richard W. Stewart, ed., *American Military History: The United States Army in a Global Era, 1917-2003*, vol. II, Army Historical Series (Washington, D.C.: Center of Military History, United States Army, 2005), 369.

the freedom to do this. As an institution, the military today is more highly trusted than any other institution in American society.⁸⁸ But having achieved this level of trust, the US military jealously guards it.⁸⁹ Relying on compliance with a set of rules imposed by policy makers, rather than relying solely on the authority and expertise of military professionalism to justify decisions on the use of force allows military commanders the freedom to justify potentially unpopular decisions without depleting the balance in their account of public trust. If anything, emphasizing the extent to which a decision complies with rules may increase the esteem in which the military is held by emphasizing their subordination to civilian authority, and that their use of force is strictly governed, rather than indiscriminate violence. More cynically, it also diffuses responsibility for decisions that have negative consequences.

In Feaver's terms, the integration of military lawyers into decisions regarding the use of force, and the adoption of military legalism as a means of justifying the use of force can be seen as a non-intrusive form of self-monitoring. It demonstrates a desire to comply with policy-makers' goals by framing justifications of the use of force in terms of the specific constraints policy makers have imposed, rather than in the terms of professional expertise, which policy-makers may perceive as arcane or not responsive to their desires. At the same time, military legalism is consistent with military commanders' preference to safeguard the trust and esteem placed in the military, preserving the legitimacy of the military as an institution among the American people. When concerns about the legitimacy of the military as institution are included

⁸⁸ Based on polls conducted 1-5 Jun 2016, 73% of Americans report having either "a great deal" or "quite a lot of confidence" in the military. This compares to 41% reporting similar views of organized religion and 6% reporting a similar view of Congress. Gallup Inc, "Confidence in Institutions."

⁸⁹ See, for example, the chapter heads of ADRP 1 "The Army Profession," which include, 'The United States Army--A Noble Calling, a Trusted Profession'; 'Our Shared Identity--Trusted Army Professionals'; 'Trust--The Bedrock of Our Profession'; 'Trust and Army Leadership', and 'Source of Trust: Adherence to the Army Ethic' Department of the Army, "ADRP 1," ii.

in the estimation of military commanders' goals, the benefits of increased legitimacy outweigh the costs of diminished autonomy, and military commanders' goals converge more closely with those of policy makers. Under these conditions, military legalism allows the military to work without intrusive monitoring, achieving their preferred outcome of objective civilian control, while satisfying the desires of civilian policy-makers.

Additional factors: technology, trust in government, and increased legalism in government and society

At the start of this chapter, the simplified explanation for military legalism was represented graphically as:

Contested legitimacy → Many constraints on the use of force → Military legalism

While this explanation is persuasive in explaining why military legalism develops, it does not explain why it developed when it did. In order to understand why military legalism developed in the wake of the Vietnam war, and not at some other time in US history, additional factors must be considered.

Media, social media, and military technology

The first factor helpful to understanding why military legalism emerged after the Vietnam conflict is the development of technology in the military and the media in the latter half of the 20th Century and beginning of the 21st. Technological developments over this period have dramatically increased the salience of reports from the battlefield, which amplifies and accelerates challenges to legitimacy, contributing to the environment in which military legalism develops and grows.

The impact of technology on public perception of war is not new. As early as the US Civil War, the impact of photography changed the way that the public responded to war. As Faust observed, citing the *New York Times*, “If [Matthew] Brady ‘has not brought bodies and laid them in our dooryards and along our streets, he has done something very like it.’”⁹⁰ By the time of the Boer War, powerful images enabled by the technologies of telegraphy, photography, and cinematography were used to stir up the ire of the British public against the perceived treachery of the Boer forces. As Popple writes, “the abuse of the flag of surrender was part of a broader range of so-called atrocity stories that circulated in the press and which were frequently translated for stage and screen.”⁹¹ But, as the British soon learned, the power of media could cut both ways:

...media coverage did have an important effect in helping to stimulate anti-war sentiment in the later stages of the war. Emily Hobhouse’s graphic description of the mass deaths in the concentration camps in 1901 was fully reported in the *Manchester Guardian*, the *Speaker*, and other Liberal journals and had a powerful impact on public opinion....With horrific news (and pictures) of the mass burials of thousands of tiny children and their mothers, imperialism lost the moral high ground.⁹²

Television and visual broadcast media give images of war even greater salience and urgency than words, photographs, or movies viewed days, weeks, or months after the fighting. Vietnam, as the first “television war,” taught the US military with dramatic effect the lesson learned by the British 70 years before regarding the role of media in framing the legitimacy of the war. As Kinnard observed,

⁹⁰ *New York Times* October 20, 1862, cited in Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Vintage Books, 2008), xvii.

⁹¹ Simon Popple, “‘Fresh From the Front’: Performance, War News and Popular Culture during the Boer War,” *Early Popular Visual Culture* 8, no. 4 (November 2010): 408, <https://doi.org/10.1080/17460654.2010.513821>.

⁹² Kenneth O. Morgan, “The Boer War and the Media (1899-1902),” *Twentieth Century British History* 13, no. 1 (2002): 11.

There were some dramatic moments which had a striking effect on the public. One of the most famous was Morley Safer's CBS broadcast from the village of Cam Ne in August 1965. Cam Ne was a village from which the Marines had allegedly been receiving fire from the VC. By chance, Safer went along on an operation, which he soon discovered was going to level the village. There was in reality no combat to film since there was no return fire from the village. What Safer did film was a Marine lighting a straw hut with a cigarette lighter, and the general burning of the village. ... War was no longer a glorious distant thing; it was American boys burning down villages while you watched in your own living room.⁹³

In modern conflicts, technological development allows images and reports of violence and its effects to spread in near-real-time. On March 26, 2003, during the invasion of Iraq, for example, the Iraqi government claimed that a coalition missile had fallen on a marketplace, killing at least 14 civilians and injuring many more. The incident occurred between 3 and 3:30 am, Eastern time. By 5:30 am, the story had led on *CNN Daybreak*, as well as on news reports in Japan and Germany. By 3 pm, the Arab League and 115 non-aligned countries had called for an emergency session of the UN Security Council. The US conducted a rapid investigation and within about 24 hours was able to show that no US or coalition missiles or bombs had fallen in the area surrounding the market, and that the most likely cause of the incident was an Iraqi anti-aircraft munition that fell back to earth. By that time, however, the narrative had been cast, and the issue of civilian casualties assumed greater prominence in both US and foreign media sources for the duration of combat operations.⁹⁴

⁹³ Douglas Kinnard, *The War Managers* (Hanover, NH: University Press of New England, 1977), 129–30.

⁹⁴ Larson and Savych, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*, 191–98 For reporting timeline, see Table 5.18, p. 191. For US media response, see pp 192-194. For foreign media reporting, see pp 197-198. While the incident appears to have served to keep reporting on civilian casualties at a constant level in US media, it was followed by an increase in reporting on civilian casualties among foreign media, in particular Agence France Presse.

Social media has further accelerated the distribution of shocking images from military operations, as well as increasing the risk that news and images may be manipulated.⁹⁵ As Metz notes,

On the Internet, information and ideas move with such rapidity and in such complex ways, it is impossible to identify or gauge the authority of a given source. Information may have been passed through hundreds, thousands, or even millions of individuals and locations via e-mail, online discussions, blogs, web pages, tweets, and so forth. No one will be able to identify its origin. The criterion for credibility thus becomes the inherent receptivity of the receiver. People assign credibility to information or positions that reinforce their existing beliefs, in most cases, because they cannot gauge the authoritative nature of the original source.⁹⁶

The effect of media technologies is to amplify and accelerate challenges to legitimacy. The effect of media technology thus is not in itself a causal explanation for military legalism, but does help to explain why military conflicts in the period post-Vietnam period were subject to many more (and more rapid) challenges to their legitimacy than previous conflicts. This environment of near-constantly contested legitimacy leads to the dense regime of rule-based constraints, which in turn leads commanders to adopt military legalism.

Additionally, as previously discussed, advances in military technology have given US forces the capacity to collect and process vast amounts of information, and based on that information, to strike with unprecedented precision. This capability brings with it an expectation that these technologies will be used in order to minimize harm to innocents as a consequence of US military operations.⁹⁷ Failure to exercise such care, or mistakes in execution of military

⁹⁵ For a general discussion of the power of images, see O'Loughlin, "Images as Weapons of War."

⁹⁶ Metz, "The Internet, New Media, and the Evolution of Insurgency," 84.

⁹⁷ For an example of a view that is highly critical and skeptical of US uses of force on these grounds, see Anicée Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, Terrorism and Global Justice (Oxford and New York: Oxford University Press, 2011); For the argument that legal justifications are little more than window-dressing for self-interest, see Goldsmith and Posner, *Limits of International Law*.

strikes where such systems are employed, may be seen as evidence of diminished regard for the value of civilian lives and property, and even cast as war crimes.⁹⁸ This provides yet another avenue by which adversaries can contest the legitimacy of US military actions.

Diminished trust in government

The second factor, which helps to explain why policy-makers have turned to rule-based constraints on the use of force, is the post-Vietnam decline in the extent to which Americans trust their government. In 1964, before the escalation of US involvement in Vietnam, nearly 80% of Americans reported that they trusted their government “just about all of the time” or “most of the time.” By 1975, in the wake of Vietnam and Watergate, that figure had declined to less than 40%.⁹⁹ This poor assessment of government reflected a poor assessment of the trustworthiness of government leaders: In 1964, 47% of Americans found the ethical and moral practices of their leaders to be excellent or good, while 34% found them only fair or poor. By 1975, these numbers had more than reversed: 63% of American found the ethical and moral practices of their leaders fair or poor, while just 28% thought they were excellent or good.¹⁰⁰ Although the numbers improved during the 1990’s, they have never returned to their pre-Vietnam levels.¹⁰¹

Unlike military commanders, policy-makers are not professionals in the sociological sense. While a professional may assert that only another professional who shares their unique professional expertise is qualified to judge their performance, policy-makers in a democracy are routinely evaluated on their performance by voters with no special knowledge or expertise. Likewise, policy-makers cannot take refuge for decisions that seem morally questionable by

⁹⁸ See for example “Centcom Report on the Kunduz Hospital Attack.”

⁹⁹ See figure Kohut et al., “Deconstructing Distrust,” 23.

¹⁰⁰ Kohut et al., 28.

¹⁰¹ Pew Research Center for the People and the Press, “Public Trust in Government.”

citing a unique profession-specific set of ethical standards. Policy-makers are thus far more susceptible to a crisis of trust and legitimacy than are military officers or other professionals. In the post-Vietnam environment of declining trust, policy-makers had to find a way to lend legitimacy to their policies, or risk being voted out of office. As discussed above, rule-based regimes of constraint offered just such a path, by “borrowing” the legitimacy of the institution of international law, and the process of rule-compliance, as well as offering greater control over actions that might result in contested legitimacy.

Societal legalism

The US has a reputation as a highly legalistic society; since the military draws from a broad cross-section of society, it would be surprising if the legalism of American society were not reflected in the military. In 1840, de Tocqueville observed,

...no one should imagine that in the United States a legalistic spirit is confined strictly to the precincts of the courts; it extends far beyond them.... there is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently, the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. ...So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.¹⁰²

While this trend has been present in US society from its earliest origins, Kagan suggests that throughout the 1970’s and in subsequent years, Americans adapted a unique approach to policy formulation, which he calls “adversarial legalism.” Kagan asserts that a culture of adversarial legalism has sprung from,

...a fundamental mismatch between a changing legal culture and an inherited political culture. Americans have attempted to articulate and implement the socially transformative policies of an activist, regulatory welfare state through the

¹⁰² Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer and George Lawrence, First Perennial Classics (New York: Harper Collins, 2000), 269–70.

legal structures of a reactive, decentralized, nonhierarchical governmental system. In the absence of a strong, respected national bureaucracy, proponents of regulatory change and social welfare measures have advocated methods of policy implementation that emphasize citizens' rights to challenge and prod official action through litigation.¹⁰³

The growth rate of lawyers as a proportion of the military is quite similar to the growth rate of lawyers as a proportion of the population at large. Figure 3.1 shows the comparison.

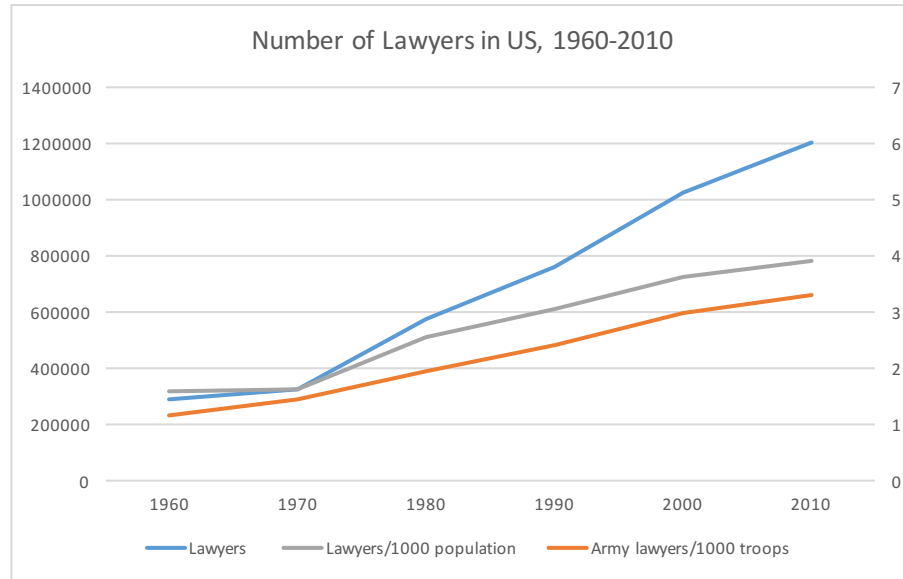


Figure 3.1: Lawyers in the US population vs. lawyers in the US Army¹⁰⁴

While the growth in the number of lawyers in the US clearly may influence the expectations of military officers drawn from the US population as to what modes of justification and argument are most likely to be persuasive and effective, a more important change may be the increase in the role of lawyers in policy formulation. Since the Vietnam war, the number and proportion of lawyers in Congress has actually declined somewhat, from 221 Representatives

¹⁰³ Kagan, “Adversarial Legalism and American Government,” 392.

¹⁰⁴ Sources: numbers of lawyers--“Total National Lawyer Population 1878-2017.Authcheckdam.Pdf,” accessed November 10, 2017, https://www.americanbar.org/content/dam/aba/administrative/market_research/Total%20National%20Lawyer%20Population%201878-2017.authcheckdam.pdf; National population figures taken from Census History Staff US Census Bureau, “Fast Facts - History - US Census Bureau,” accessed November 10, 2017, https://www.census.gov/history/www/through_the_decades/fast_facts/; Numbers of Army lawyers from Doyle Hodges, “Legal Officers and Courts Martial Rates, 1960-2016,” February 6, 2017.

(51%) and 67 Senators (67%) in 1975 to 156 Representatives (36%) and 55 Senators (55%) in 2013. Over the same period, however, the number of veterans in Congress has declined more precipitously from 307 Representatives (71%) and 73 Senators (73%) in 1975 to 88 Representatives (20%) and 18 Senators (18%) in 2013. As a consequence, there are proportionally many more members of Congress who are comfortable in the vernacular and reasoning of the law than there are who are comfortable in the vernacular of the military today, as compared to the period preceding and immediately following Vietnam.

Equally important is the proliferation of lawyers within the executive branch. Fontana reports,

There are, by law, as many as eight thousand positions in the executive branch to be filled by the President or someone nominated by the President. Many of these political appointments are legal positions. But looking just at the formal status of the position, ... understates the total number of lawyers in the executive branch hired due directly or indirectly to partisan politics or the legal qualifications associated with partisan politics. This is particularly true for lawyers hired for positions immediately below political appointees, and therefore often hired by political appointees.¹⁰⁵

While the specific numbers described by Fontana include legal positions all throughout the executive branch, including agencies unassociated with use-of-force decisions, such as Agriculture, Interior, and Commerce, the point about the proliferation of lawyers among political appointees in the executive branch generally is valid in those agencies and organizations responsible for national security decisions.

The influence of lawyers is noticeable also at the highest levels of the executive branch. Five of thirteen Presidents since World War II have been lawyers or had legal training (Truman attended law school for a period, but did not complete his training). Four of those five (Nixon, Ford, Clinton, and Obama) held office after the Vietnam war, and of those four, two (Clinton and

¹⁰⁵ Fontana, "Executive Branch Legalisms," 28–29.

Obama) had no military experience. Similarly, since the inception of the White House Chief of Staff position in 1946, a quarter of the incumbents between World War II and Vietnam were lawyers, while half of those who held the office after Vietnam were lawyers, or had legal training.¹⁰⁶ Of the fourteen Secretaries of Defense who have held the office since 1973, half have been lawyers or had legal training. It is reasonable to suppose that the pervasive presence of lawyers in senior positions throughout the executive branch, coupled with a decline in military service among policy-makers, may serve to reinforce military legalism by pre-disposing policy-makers to respond more favorably to arguments that are framed in a legal construct more familiar to them, and less favorably to arguments that rely exclusively on the professional expertise of military officers, which may be perceived as arcane or unresponsive.

Summary of the argument

In summary, military legalism is the practice of privileging legal reasoning rather than traditional professional judgment in justifying military decisions regarding the use of force. Military legalism is an adaptive response by military commanders to a dense rule-based regime of constraint imposed on their uses of force by policy-makers, responding to the contested legitimacy of US military action. These challenges to the legitimacy of US military action stem from structural elements, the choices made by policy-makers, and by deliberate action by adversaries to try to exploit constraints on the use of force and provoke actions that will undermine legitimacy. Military legalism is enabled by the increasingly legalistic nature of US society, and by media technologies, which amplify and accelerate challenges to legitimacy, but these are contributing, not explanatory factors.

¹⁰⁶ Biographical data taken from S.A. Warshaw, *Guide to the White House Staff* (Washington, D.C.: SAGE Publications, 2013) supplemented by online sources.

The next chapters will examine military decision-making in conflicts both before and after Vietnam in order to better understand how and why military legalism developed when it did, and to look for evidence of military legalism. Chapter 4 will examine military decision-making in World War II, Korea, and Vietnam, focusing on the development of rule-based constraints on the use of force and the military's changing response to them. Chapter 5 will examine two post-Vietnam military actions to look for evidence of military legalism: the 1982-1984 intervention in Beirut and the 2003 invasion of Iraq, to examine whether and how military legalism may have evolved in both a small-scale intervention fought in the Cold War security environment, and a large-scale conflict fought after the attacks of September 11, 2001.

Chapter 4: The path to military legalism

Lawyers and legal complications are inappropriate on a battlefield.

—General George C. Marshall¹

This chapter examines three conflicts in order to understand the historical events that led to the development of military legalism in the US military: World War II, Korea, and Vietnam. By examining the way in which the experience of these conflicts influenced policy makers and military officers, the way in which the use of force was constrained during these conflicts, and the legacy of these conflicts for international law and norms, the chapter illuminates the foundations of how and why military legalism came in to being. In particular, this examination helps to explain why military legalism emerged in the US military after the Vietnam war, rather than at another time.

A brief overview: World War II, Korea, and Vietnam

There is little evidence of military legalism in World War II. Fought against adversaries who not only failed to distinguish between civilians and combatants, but also in many cases systematically targeted civilians for genocidal slaughter, World War II was widely perceived in the United States as “the good war.”² As such, it was largely free from challenges to legitimacy, and constraints on the use of force were influenced most heavily by traditional military

¹ As cited in Gordon B. Baldwin, “A New Look at the Law of War: Limited War and Field Manual 27-10,” *Mil. L. Rev.* 4 (1959): 1 The quote is taken from testimony before the Senate Committee on Military Affairs in July 1941, as cited in Payne, *The Marshall Story* (1951) at p. 30.

² This phrase is the title of Studs Terkel’s history of the war. He mentions in an introductory note that he borrows the phrase from war correspondent Herbert Mitgang, and that it is a phrase widely used by those who participated in the war to distinguish it from the wars that followed. Studs Terkel, *The Good War*, Kindle (New York, London: The Free Press, 1984), Kindle location 147.

professionalism and existing international law, as modified by “military necessity” (which was often interpreted quite broadly), rather than by the rules which came to characterize constraint in later conflicts.³ Legal considerations do not appear to have been a routine element in operational planning.⁴ But new technologies posed troubling challenges to the efficacy of the law of land warfare, as it was then understood. In particular, the maturation of aerial bombardment, which was embryonic in the First World War, created in the Second World War the ability to visit devastating levels of destruction on the enemy’s heartland without needing to first defeat the enemy’s army.⁵ It is in the justification of the strategic bombing campaigns where what little evidence which exists of early forms of military legalism in World War II can be found.

Because the destructive violence of war was inflicted on areas behind the front lines, which were

³ On the legitimacy of the Allied cause and how it related to the overall war effort, see generally Richard Overy, *Why the Allies Won*, Paperback (New York, London: W. W. Norton & Company, 1997), chap. 9; On the broad interpretation of military necessity--even afforded by Allied war tribunals to some Nazi forces--see, Brian J. Bill, “THE RENDULIC ‘RULE’: MILITARY NECESSITY, COMMANDER’S KNOWLEDGE, AND METHODS OF WARFARE,” *Yearbook of International Humanitarian Law* 12 (December 2009): 119–55, <https://doi.org/10.1017/S1389135909000051>; On the degree to which Allied commanders attempted to invoke military necessity for bombing raids, which were expected to result in large numbers of civilian casualties, see the following in a letter from Bomber Command: “Lately our targets have been improperly called marshalling [sic] yards. Actually our targets are the locomotive sheds and the wagon repair sheds located within these yards. It is unfortunate that they are often located either within or on the outskirts of rather large cities.” Assistant Chief of Air Staff, Intelligence, Historical Division, “Ninth Air Force in the European Theater of Operations, 16 Oct 1943 to 16 Apr 1944,” Army Air Forces Historical Studies, 1945, 167, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3303/rec/1>.

⁴ For example, a US Marine Corps Staff Manual from 1944, which contained detailed instructions and examples for writing an operational order or plan does not refer to a legal annex, rules of engagement, or any rule-based constraint on the use of force. The role of the legal officer is limited to questions of military justice. United States Marine Corps, *Staff Manual (NAVMC--1022 DPP)* (Washington, D.C.: Headquarters, US Marine Corps, 1944), <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2414/rec/1>.

⁵ Schelling, speaking of the ultimate technological achievement in aerial bombardment to come out of World War II, observes that nuclear weapons achieve nothing that cannot be achieved against defenseless people “with an icepick,” but are distinguished solely by this quality that the destruction they bring is not pre-conditioned on the defeat of an adversary’s ground forces, thus making the civilian population at home a defenseless people despite maintaining a robust army in the field. Thomas Schelling, *Arms and Influence* (New Haven and London: Yale University Press, 1966), 18–23.

densely populated by civilians, the number of civilian casualties due to direct military action (especially aerial bombing) was unprecedented. As a consequence of this, and of the genocides perpetrated during the war, the question of constraints designed to protect civilians from harm became one of the most pressing issues of international law to emerge from the war.

The most significant influence of World War II on the emergence of military legalism came not during the war, but in the reckoning that followed. The legal processes used to determine the culpability of Nazi and Imperial Japanese officers after the war created a new standard of personal accountability for actions taken in pursuit of policy, even in response to superior orders.⁶ US officers themselves in World War II might not have fared well had they been held to that standard, especially in the context of the strategic bombing campaign.⁷ But the experience of the Nuremberg and Tokyo trials had a far-reaching influence in shaping how future generations of policy makers, military officers, and civilians viewed the concepts of military necessity, superior orders, and individual responsibility in war.⁸ Additionally, the 1949 Geneva Conventions, which were heavily influenced by the experience of the war, were among the first

⁶ See, for example, an interview with Benjamin Ferencz, who prosecuted the Einsatzgruppen cases: Mark Hull, “‘Vengeance Is Not Our Goal’: A Conversation with Nuremberg Prosecutor Benjamin Ferencz,” *War on the Rocks* (blog), August 5, 2014, <http://warontherocks.com/2014/08/vengeance-is-not-our-goal-a-conversation-with-nuremberg-prosecutor-benjamin-ferencz/> As Ferencz said, “The simple soldiers argued superiors’ orders; the higher ups who were on the policy-making level argued that what they did was in self-defense.”

⁷ For example, the US Strategic Bombing Survey estimated approximately 500,000 casualties from the Allied bombing campaign against German cities, including approximately 60,000 dead in a single strike on Hamburg, Germany. Office of the Secretary of Defense, “Fire Effects of Bombing Attacks,” National Security Resources Board (Washington, D.C., 1950), 12, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2040/rec/1>; For comparison, “SS General Otto Ohlendorf...admitted killing 90,000 people” Hull, “‘Vengeance Is Not Our Goal’” While the actions of the Einsatzgruppen differed meaningfully from strategic bombing in that the former specifically targeted victims based on their religion or ethnicity, from a practical perspective, neither strategic bombing nor Einsatzgruppen afforded protection to civilians based on their status.

⁸ See, among many examples, Adam Roberts, “Land Warfare: From Hague to Nuremberg,” in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven and London: Yale University Press, 1994).

instruments of international law focused principally on the protection of civilians in armed conflict, rather than on the regulation of the means with which war could be conducted.⁹

There is likewise little evidence of military legalism in the conduct of the Korean war, but the policy constraints imposed by fighting a limited war presaged the emergence of rules of engagement (ROE) and other regimes of rule-based constraints on the use of force. The domestic legitimacy of the Korean war was far more contested than that of World War II, in part because it was more difficult to mobilize public support for (and willingness to sustain casualties in support of) a war fought with limited means for a politically limited goal. The political limitations seen as necessary to prevent escalation to global war gave rise to rudimentary rule-based constraints similar to modern ROE. The emergence of these policy-based rules is the most enduring contribution of the Korean conflict to the development of military legalism. There is little evidence, however, that military commanders interpreted these rules legalistically; they instead continued to rely on their own professional military judgment, often without regard to the political constraints. Indeed, the most celebrated civil-military conflict of the war stemmed from the strategic commander, General Douglas MacArthur, giving undue precedence to his own professional military judgment, and seeking to disregard (as opposed to interpret or re-interpret) the rule-based constraints on the use of force imposed by the President. Many operational commanders showed a similar disregard for these constraints, as well.

The Korean war also saw the tragic consequences associated with fighting an adversary who, at times, was feared to be hiding among civilian populations. During periods of the war in which Communist troops were advancing, US commanders were confronted with massive

⁹ David P. Cavalieri, *Law of War: Can 20th-Century Standards Apply to the Global War on Terrorism?* (DIANE Publishing, 2005), 41; Geoffrey Best, "Restraints on War by Land before 1945," in *Restraints on War: Studies in the Limitation of Armed Conflict*, ed. Michael Howard (Oxford: Oxford University Press, 1979), 27.

refugee flows and were deeply concerned that North Korean infiltrators were hiding among the refugees. In response, the commanders adopted harsh policies, including direction to treat refugees as hostile and fire on them with aircraft, artillery, and infantry weapons. While the consequences of these policies were often tragic, they are notable not only for the civilian death toll, but for the lack of legalism with which they were developed and implemented, suggesting that exploitation of civilian protections alone by an adversary is not sufficient to give rise to military legalism.

By the time of the Vietnam war, rule-based constraints on the use of force were common, although they were focused more on implementing political limitations dictated by policy than on compliance with international law or other normative content. The domestic legitimacy of the Vietnam war was far more contested than most previous conflicts. By many accounts, it was the crisis of legitimacy, rather than any military setback, which led US policy makers to enter into peace negotiations, and ultimately withdraw from the conflict.¹⁰ As in Korea, military commanders seemed not to approach the rules governing their use of force with a legalistic mindset. In fact, pressure to show measurable accomplishment in relatively brief command tours led to an emphasis on body counts and other measures, which may have tacitly encouraged operational commanders to simply disregard constraints on the use of force, rather than to try to legalistically interpret them.¹¹ Vietnam was also marked by an increased number of military lawyers as compared to previous conflicts, partly due to the passage of the Military Justice Act

¹⁰ Although treated in many works on the war, a concise overview of this may be found in Andrew H. Sidman and Helmut Norpoth, "Fighting to Win: Wartime Morale in the American Public," *Electoral Studies* 31, no. 2 (June 2012): 334, <https://doi.org/10.1016/j.electstud.2012.01.008>.

¹¹ Douglas Kinnard, *The War Managers* (Hanover, NH: University Press of New England, 1977), 8; See also Karl Marlantes, *What It Is Like to Go To War* (New York: Atlantic Monthly Press, 2011), chaps. 6, "Lying".

of 1968, which required for the first time that the accused in all serious court martial cases be represented by a lawyer.¹²

The principal contribution of the Vietnam war to the development of military legalism came in the wake of one of the most shameful episodes in US military history. Following the massacre at My Lai, Congressional investigators asked military leaders whether there were rules in place beforehand to prevent such an atrocity.¹³ In large part, the answer was no: Although military law made murder a crime, and rules of engagement for ground forces emphasized the need to be sensitive to civilian casualties, especially in the context of artillery and aerial bombardment, there were not rules in place that specifically forbade soldiers from machine-gunning innocent host-nation civilians.¹⁴ Because the ROE for ground forces did emphasize the need to “minimize both friendly and non-combatant casualties,” Army leaders focused on ROE when pressed on whether they had issued policies prohibiting such conduct.¹⁵ The aftermath of My Lai highlighted issues of legitimacy and constraint in the national consciousness, and profoundly altered the US military’s approach to constraints on the use of force. The *Department of Defense Law of War Program*, which was a direct consequence of My Lai, changed the role of military lawyers in decisions regarding the use of force, as well as the

¹² George S. Prugh, “Law Practice in the Vietnam War,” *Mil. L. & L. War Rev.* 7 (1968): 147.

¹³ See generally, “Investigation of the My Lai Incident,” § Armed Service Investigating Subcommittee of the Committee on Armed Services, US House of Representatives (1970), 440, passim, https://www.loc.gov/rr/frd/Military_Law/pdf/MyLaiHearings.pdf.

¹⁴ See the comments of the senior US commander in Vietnam, General William C. Westmoreland, Interview with General William C. Westmoreland (Vol 2), interview by Martin L. Ganderson, 1982, 237, William C. Westmoreland Collection Box 70 Folder 2, Army Heritage and Education Center: “Now, we did not put out orders that you will not commit murder because that is basic to our Judeo-Christian creed, basic to the laws of our land--civil law. It was, basically, acts of murder and a total breakdown in discipline. There were those two matters: the criminal aspect and the breakdown within the command.”

¹⁵ “Americal Division Rules of Engagement” dtd 16 Mar 1968, contained in LTG William R. Peers, “Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (U) Vol III: Exhibits. Book II-Directives” (Washington, D.C.: Department of the Army, March 14, 1970), 588, https://www.loc.gov/rr/frd/Military_Law/Vol_III-exhibits.html.

approach of military commanders to rule-based constraints, including a requirement that lawyers review all rules of engagement to ensure compliance with international law.¹⁶

A brief note on scope and methodology

Each of the conflicts examined in this chapter—World War II, Korea, and Vietnam—are topics of broad scope and immense historical richness. Millions of pages of primary source documents are preserved, and millions more of secondary analyses have been written. Any treatment, especially one as narrowly focused as this, must limit the sources consulted, which naturally gives rise to concern over whether the omitted sources contain information, which might contradict the analysis. In an effort to address this concern, this chapter surveys a broad array of sources, consulting primary source documents from different periods in each conflict, from different military services, and in the case of World War II, from different geographic theaters of operations. A combination of official reports, oral histories, interviews, war diaries, and secondary sources were consulted, in order to access a variety of viewpoints. While the results of such an analysis cannot ever be comprehensive, they are consistent with the conclusions expressed in many respected secondary sources on the conflicts in question, and represent a good faith effort to track down any contradictory or disconfirming information.

Given the scope of all three conflicts and their prominent place in US history, there is no attempt here to summarize the course or conduct of each war. Any effort to do so would be both too long and inadequately detailed to convey the full scope of the conflicts. Instead, a general familiarity with each war is assumed, and explanatory details are provided as necessary in the examinations that follow.

¹⁶ Department of Defense, “DoD Program for the Implementation of the Law of War (Short Title: DoD Law of War Program) (DODD 5100.77)” (Department of Defense, November 5, 1974), National Archives Online, <https://catalog.archives.gov/id/26048945>; Colonel David E. Graham, Interview with “The Father of Operational Law,” interview by Doyle Hodges, February 2, 2017.

World War II: Traditional models of constraint and consequences of total war

An examination of constraints on the use of force during World War II provides insight into the alternative to military legalism as a means of constraint: traditional military professional judgment, as inflected by international law and military necessity. As a consequence, despite the lack of military legalism evident during the war (except, perhaps, in some justifications of the Allied strategic bombing campaign), an examination of World War II is valuable, both to understand what the traditional model of constraint looks like in practical application, and because of the legal developments in civilian protection and international law that resulted from the war.

Legitimacy and constraint in World War II

World War II was perhaps the last war fought by the US in which legitimacy was not significantly contested, either as a consequence of adversary actions or domestic political considerations. A review of the minutes of the high-level strategic planning conferences held among Allied political and military leadership from 1941 through 1945 reveals almost no time given over to considerations of domestic support for the war, or any concern expressed regarding Nazi or Imperial Japanese forces seeking to undermine Allied legitimacy.¹⁷ The media was

¹⁷ Joint and Combined Chiefs of Staff, "Proceedings of the American-British Joint Chiefs of Staff Conferences Held in Washington, DC on Twelve Occasions Between December 24, 1941 and January 14, 1942" (Joint History Office, 2003), World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3686/rec/2>; Office, US Secretary of the Combined Chiefs of Staff, "CASABLANCA Conference January 1943 Papers and Minutes of Meetings" (Office, US Secretary of the Combined Chiefs of Staff, 1943), World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3688/rec/2>; Office, US Secretary of the Combined Chiefs of Staff, "SEXTANT Conference November-December 1943 Papers and Minutes of Meetings" (Office, US Secretary of the Combined Chiefs of Staff, 1943), World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3691/rec/1>; Office, US Secretary of the Combined Chiefs of Staff, "Papers and Minutes of Meetings ARGONAUT Conference January-

perceived as broadly supportive of the war effort, and while there were occasionally concerns about the inadvertent publication of classified or embarrassing information, there was little concern that reporters were seeking out information that might undermine public support for the US war effort.¹⁸

Despite the broad domestic legitimacy enjoyed by the war effort, Allied commanders did show some concern for the impact of military operations on the civilian populations in occupied countries, as it might affect support for the Allies' cause:

As the Ninth [Air Force]'s operations were extended in an ever-increasing tempo over more and more targets in northern France, Belgium, and the Netherlands, the problem of civilian casualties seriously concerned the Bomber Command. Most of the marshalling yards, which were receiving such heavy blows, were located in densely populated sectors, and although some damage to the lives and property of citizens friendly to the United Nations was, perforce, inevitable, it was desired to avoid this whenever possible. This point was strongly emphasized by the Bomber Command in a teletype to the commanding officers of all wings and groups:

‘As has been stated many times, the political aspect in occupied countries does not allow for inaccurate bombing in areas which are well populated. ... I desire that it be brought to the attention of every leader again, and prior to every mission the necessity of holding bombs if the target area is not clearly visible. On several of our recent missions we have caused severe civilian casualties because some flight leaders have made poor decisions and have attempted to bomb without proper synchronization through 8/10 and 9/10 cloud...These few

February 1945” (Office, US Secretary of the Combined Chiefs of Staff, 1945), World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3687/rec/1>; Office, US Secretary of the Combined Chiefs of Staff, “TERMINAL Conference July 1945 Papers and Minutes of Meetings” (Office, US Secretary of the Combined Chiefs of Staff, 1945), World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3692/rec/1>.

¹⁸ Waldemar Solf, Solf Oral History, interview by Bradley Bodager and Andrew Stewart, April 1986, 18, The Judge Advocate General Legal Center and School: “I think the press during World War II was sympathetic to our military effort although Bill Mauldin was not exactly kind to military hierarchy. On the other hand, it was accepted all around and people would grumble and growl, but the war itself and the military effort were generally considered to be, well, recent books say, ‘a good war.’ There were problems with the press concerning Pearl Harbor. The Chicago Tribune, I guess let go with some information that they shouldn’t have concerning our communication intelligence intercepts but other than things like that, I was not aware of any major problems during World War II.”

isolated cases...have caused severe criticism which reflects on the whole command and which may dictate the type of targets upon which we are committed in the future.' [Teletype, HQ IX Bomber Cmd to 00's all wings and groups, 13 April 44 in History, IX Bomber Comd, April 44]¹⁹

Despite these concerns, policy makers and senior military commanders largely relied on traditional means of constraining the use of force: military professionalism and international law, which was commonly referred to at that time as 'the law of land warfare'. These concepts were closely tied together through the concept of military honor or chivalry. The unprecedented scope of the war, as well as the broad adoption of new technologies, most especially those that enabled large-scale strategic bombing, posed new challenges to the efficacy of such 19th Century conceptions of constraint.

Constraints in World War II: Honor, law, and professionalism

International law regulating armed conflict prior to World War II relied heavily on the concept of military honor or chivalry in constraining the use of force. This view of international law and constraints on the use of force was influential throughout the war. The War Department's 1914 publication on the *Rules of Land Warfare* articulated the balance between military necessity, military professionalism, and honor, as it was commonly understood prior to World War II:

The development of the laws and usages of war is determined by three principles. First, that a belligerent is justified in applying any amount and kind of force which is necessary for the purpose of the war; that is, the complete submission of the enemy at the earliest possible moment with the least expenditure of men and money. Second, the principle of humanity, which says that all such kinds and degrees of violence as are not necessary for the purpose of war are not permitted to a belligerent. Third, the principle of chivalry, which

¹⁹ Assistant Chief of Air Staff, Intelligence, Historical Division, "Ninth Air Force in the ETO," 167–68.

demands a certain amount of fairness in offense and defense and a certain respect between opposing forces.²⁰

Notable in this passage are both the reliance on chivalry and the invocation of “a certain amount of fairness,” and also the primacy of military necessity, which was often used to justify brutal measures in support of seeking a rapid conclusion to the war. The tension between these two conceptions is apparent, and yet was held in equanimity by senior officers whose understanding and experience of war had been heavily influenced by both the Civil War and the First World War.²¹

The focus on chivalry and unwritten rules as means of constraint continued even as the US war effort grew in scope and accelerated in pace. The 1940 update to the Army publication on the *Rules of Land Warfare* (which remained in effect throughout the war) retained the discussion of the three principles discussed above (military necessity, humanity, and chivalry), and further remarked, “The unwritten rules [of war] are binding upon all civilized nations. They will be strictly observed by our forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy.”²² Even in 1943, by which time Allied forces were routinely bombing German and

²⁰ War Department: Office of the Chief of Staff, *Rules of Land Warfare* (Washington: Government Printing Office, 1914), 13 (emphasis added).

²¹ In support of the Civil War influence, see, for example, the quote attributed to Francis Lieber, “the shorter war is, the better; and the more intensely it is carried on, the shorter it will be.” John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Free Press, 2012), 170 (epigraph). This view summarizes almost perfectly the argument for military necessity contained in the 1914 and 1940 manuals on the Law of Land Warfare.

²² United States Army, *Rules of Land Warfare*, vol. VII, Basic Field Manual (Washington, D.C.: Government Printing Office, 1940), 2, <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll9/id/879/filename/880.pdf/mapsto/pdf/type/singleitem>, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll9/id/879/rec/9>; On the edition of the law of war manual effective throughout the war, see W. Hays Parks and Elizabeth Wilmshurst, “The US and the Laws of War: Summary of the International Law Discussion Group Meeting Held at Chatham House on Monday, 21 February 2011” (Chatham House, February 21, 2011), 2, <https://www.chathamhouse.org/publications/papers/view/109626> As Parks mentions in his remarks,

Italian cities, and the war in the Pacific featured flame-throwing tanks used to burn Japanese soldiers alive in entrenched positions, a Judge Advocate General School publication used to educate military lawyers on the laws of war declared that, “Chivalry is Synonymous With Military Honor. The principle of chivalry enjoins good faith and denounces bad faith or treachery.”²³

If reliance on concepts such as chivalry and unwritten rules seems to hearken back to a 19th Century ethic, it does so with good reason: the laws and rules of war, as understood and practiced by the US military in World War II, had changed little since the issuance of General Orders 100 in 1863, better known as the Lieber Code. The 1914 handbook on the *Rules of Land Warfare* made this continuity explicit:

It will be found that everything vital contained in G.O. 100, of A.G.O. of April 24, 1863, "Instructions for the Government of Armies of the United States in the Field," has been incorporated into this manual. Wherever practicable the original text has been used herein, because it is believed that long familiarity with this text and its interpretation by our officers should not be interfered with if possible to avoid doing so.²⁴

Although the language highlighting this continuity was absent from the 1940 edition of the *Rules of Land Warfare*, the spirit remained, as did much of the text carried over from the Lieber Code and the 1914 edition of the manual.

The focus on chivalric concepts of warfare evident in the US understanding and interpretation of constraint in war dovetailed with the traditional ethos of the professional officer

minor changes were made in 1944, but the manual was still published by the Army with an effective date of 1940, even in subsequent re-editions of 1944 and 1947. The manual was not substantively changed until 1956, with the formal accession of the US to the Geneva Conventions of 1949.

²³ “Law of Land Warfare J.A.G.S. Text No. 7” (The Judge Advocate General’s School, Ann Arbor, Michigan, September 1, 1943), 8, Box ID: Judge Advocate General’s School and Corps Collection School Collection 1939-1 Dec 1943 Box 1 of 4, Army Heritage and Education Center.

²⁴ War Department: Office of the Chief of Staff, *Rules of Land Warfare*, 7.

corps in the US military.²⁵ Drawing heavily from European traditions, the small US officer corps prior to World War II adhered to a common code of honorable conduct, which made the explicit articulation of specific constraints in such manuals seem unnecessary; an exhortation to honorable conduct was considered sufficient.²⁶ Although the dramatic expansion of the size of the US military in World War II incorporated many officers who did not share the social class (and thus the values) previously associated with officership, the leadership of the US military was still drawn from career officers, normally graduates of West Point and Annapolis, who helped to ensure the continuation of a professional ethos, even among an officer corps drawn from portions of society not previously part of the shared identity as military professionals.

Protecting civilians: International law and operational planning

The requirement to distinguish between civilian and military targets is a bedrock principle found in both international law and US policy prior to and during World War II. Both the 1914 and 1940 editions of the *Rules of Land Warfare* manuals emphasized the distinction between “the armed forces and the peaceful population,” and the 1940 edition further stipulated that, “Inhabitants who refrain from acts of hostility and pursue their ordinary vocations must be distinguished from the armed forces of the belligerent; must be treated leniently; must not be

²⁵ See generally, Anthony E. Hartle, *Moral Issues in Military Decision Making*, 2nd ed. (Lawrence, KS: University Press of Kansas, 2004), 20; see also S.L. A. Marshall, *The Armed Forces Officer*, vol. 1 (Office of Armed Forces Information and Education, 1960), <http://www.au.af.mil/au/awc/awcgate/usmchist/officer.txt>; D.B.J. Trim, “Introduction,” in *The Chivalric Ethos and the Development of Military Professionalism*, ed. D.B.J. Trim (Leiden, Boston: Brill, 2003), 1–38.

²⁶ On the origins of this code, see, for example, “Washington’s 5 Rules for Honorable War,” *History Net: Where History Comes Alive - World & US History Online* (blog), accessed January 13, 2014, <http://www.historynet.com/washingtons-5-rules-for-honorable-war.htm>; For an interesting discussion of the concept of honor in US politics and policy more broadly, see also Allan Dafoe and Devin Caughey, “Honor and War: Southern US Presidents and the Effects of Concern for Reputation,” October 21, 2013, Available at SSRN: <http://ssrn.com/abstract=2343466>.

injured in their lives or liberty, except for cause and after due trial; and must not, as a rule, be deprived of their private property.”²⁷

The challenge posed by this responsibility to treat civilians on the battlefield leniently and with respect for their well-being was recognized by US planners early in World War II. Like many lessons in the war, it was learned by first getting it wrong. In an after action report on Operation TORCH, the Allied invasion of North Africa in 1942, a staff officer observed,

A more detailed plan for the control of the civil population is required before the start of another operation. The plan must be definite and should include provisions for adequate, trained administrators; give the status of the present civil government; set up curfew regulations for occupied areas; price control measures, currency and rate of exchange; make provision for survey parties to provide billets and bivouacs for combat troops and security details for rear areas; provide for the disposition and control of hostile elements of the population; and definite plans for seizure, security, and operation of utilities. The plan was incomplete for the TORCH operation.²⁸

The question of how to protect civilians, both during the conduct of hostilities and in its immediate aftermath, bedeviled planners in both the European and Pacific theaters. The Fleet Surgeon attached to Operation FORAGER (the US invasion of the Marianas and Palau Islands in 1944) reported,

Not only was it necessary to plan for the care of this large combat force with associated shore based naval units and advance echelons of garrison forces, but it was also incumbent on the corps medical organizations to anticipate the care of a possibly large number of civilian casualties, of whom many would be women and children. ...One platoon of the 31st Field hospital was assigned to care for civilian casualties on Saipan. This [became an] overwhelming task for a unit of this size and it was necessary to route some of these cases to other hospitals for surgical care. For a brief period, the Surgeon of the Amphibious Forces loaned a number of ship's medical officers and hospital corpsmen to

²⁷ War Department: Office of the Chief of Staff, *Rules of Land Warfare*, 21; United States Army, *Rules of Land Warfare*, VII:6.

²⁸ Allied Force Headquarters, “Lessons of Operation TORCH,” Staff Memorandum, January 19, 1943, 17, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/63/rec/1>.

assist in the care of these wounded civilians. Numerous women, children and babies were among the streams of helpless humanity flowing back from the battle area.²⁹

In considering how to deal with the question of civilians during the invasion of Europe, planners assumed that the Nazis would likely impose a curfew in the areas they occupied and that the movement of males between the ages of 16-65 would be severely restricted by German authorities.³⁰ This assumption allowed ground force planners to infer hostile intent on the part of any civilians who did attempt to move about the battlefield. As a practical example of the consequences of such an assumption, the XIXth Corps Standard Operating Procedure issued in November 1944 specified that civilians entering or attempting to move through the lines would be detained, searched, interrogated, and turned over to the Provost Marshall for disposition. “If they try to evade arrest, they will be brought under fire.”³¹

Traditional constraints: Military necessity and distinguishing military from civilian targets

While traditional military professionalism and the law of land warfare emphasized the necessity of distinguishing military personnel and targets from civilians, it also gave broad leeway to the concept of ‘military necessity.’ At times, the primacy of military necessity simply overwhelmed the distinction between military and civilian targets. For example, an after action report of operations by a tank battalion in Europe in 1944 observed, “When leading an attack,

²⁹ “Report by Special Staff Officers on Forager” (San Francisco: Headquarters Expeditionary Troops Task Force 56, October 1944), Surgeon report 1, 13, World War II Operational Documents, Combined Arms Research Library, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4450/rec/3>.

³⁰ “Operations Plan Neptune” (Headquarters, V Corps, March 26, 1944), 10, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/compoundobject/collection/p4013coll8/id/1027/rec/1>.

³¹ Maj. Gen. Raymond S. McLain, “Standard Operating Procedure XIX Corps” (Headquarters XIX Corps, US Army, November 1944), 15, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2387/rec/1>.

tanks should fire frequently at suspected or probable targets. We are still too sentimental in not being willing to fire on houses and barns, historical monuments etc.”³²

A mid-grade officer attached to a Corps-level artillery fire control center in Europe pithily summarized the lack of weight routinely given to distinguishing between civilian and military targets, as well as to minimizing damage incidental to the use of force: “Well, we never targeted civilian populations. The thought never even occurred to us to target civilians as such. [But] we weren't overly concerned about collateral damage.”³³

Similar to the experience in the European theater described above, US ground and naval forces in the Pacific theater did not deliberately target civilian personnel or structures, but the record of operations reveals little effort to practically distinguish between military and civilian targets. After action reports from the invasion of the Marianas and Palau Islands, for example, include multiple reports of “harassing fire” being employed by naval fire support ships against towns and other developed areas, which were also being used by Japanese forces as garrisons and fire support positions. In some cases, these artillery barrages were intended to break down Japanese defenses, while in other cases, they were intended as deception operations to make Japanese defenders believe a landing was imminent on a beach far-removed from the actual

³² HQ 1st Tank Battalion, “Combat Lessons Learned: HQ 1st Tank Battalion 11 August 1944” (Headquarters Army Ground Forces, August 11, 1944), 1, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4019/rec/2>.

³³ Solf, Solf Oral History, 29 Solf, already a lawyer, though not a JAG at this point in his Army career, relates in the same passage an interesting anecdote about the use of protected symbols: “During the Siege of Brest, the Germans would move wounded on a small ship from Brest to L’Orient, and they had the ship marked with a Red Cross emblem. However, it was attacked from time to time by our American artillery fire. Well, General Ramke, the German Commander, put an American Captain prisoner of war aboard that ship on one of its journeys to L’Orient, and when he returned Ramke arranged for a brief cease fire and had that Captain get back in our line with instructions to report to General Middleton [the Corps Commander] as to what happened on the journey. General Middleton immediately put a stop to any fire on the hospital ship.”

landing site.³⁴ The overall effect of the bombardments was such that, “naval gunfire and bombing destroy[ed] virtually all buildings [on the island].”³⁵

In the case of territories that had been held by Japanese forces for an extended period, the challenge of protecting civilians was exacerbated by Japanese propaganda, which led civilians to expect that they would be the victims of atrocities—including cannibalism—at the hands of US forces.³⁶ As a consequence, civilians frequently intermingled with Japanese troops in retreat, making the process of distinguishing between them virtually impossible. US troops on Saipan exposed themselves to increased risk and innovated in an effort to separate civilians from enemy troops, employing loudspeakers to urge “enemy troops and civilians to emerge and surrender or be killed,” but, “if the enemy did not respond, 40 millimeter fire was directed into the caves in an effort to kill the enemy or drive him forth,” even in the full knowledge that civilians were intermingled with the troops.³⁷ Many US servicemen, including senior officers, were deeply affected by the sight of civilians committing mass suicide by throwing themselves from cliffs on Saipan, rather than surrender to US forces.³⁸

Traditional constraints versus military necessity: the strategic bombing campaign

One of the most controversial Allied tactics of the war was the wide-spread use of aerial bombardment against targets in the enemy’s heartland. The degree to which aerial bombardment was constrained by the traditional laws and rules of land warfare was a matter of debate, both among lawyers and military officers. As Savarese and Witt commented,

³⁴ “Report by Special Staff Officers on Forager,” Naval Gunfire Support, 16, 52, 54, 56, 57, 59, 61, 62, 64, 106.

³⁵ “Report by Special Staff Officers on Forager,” Surgeon report, 8.

³⁶ James D. Hornfischer, *The Fleet at Flood Tide: America at Total War in the Pacific*, Kindle (New York: Bantam Books, 2016), Kindle location 3324.

³⁷ “Report by Special Staff Officers on Forager,” Naval gunfire support, 109.

³⁸ Hornfischer, *The Fleet at Flood Tide: America at Total War in the Pacific*, Kindle location 5839-5873.

At the start of World War II, the American military command purported to recognize certain core principles governing aerial bombardment. Many European strategists of the interwar period, however, believed that the advent of air power had signaled the end of legal constraints on warfare. Indeed, international efforts to codify the laws of war had largely failed to develop explicit, binding rules to restrict aerial bombardment of cities and industry, except by analogy to land and naval warfare. Amendments to the Hague Conventions on land and naval warfare in 1907 prohibited “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.” The rules left considerable latitude, however, for states to expand the definition of legitimate military targets such that most urban areas could be deemed “defended.” More stringent rules for air warfare had been drafted by the Hague Commission in 1923 and by the League of Nations in 1938, but they were never ratified.³⁹

Thomas argues that a “brittle norm” against bombing civilian populations existed at the start of the war, and held until August 1940, when the Luftwaffe, driven by increasing losses in daylight raids against military and industrial targets, shifted to night time raids against London, with the first coming on 24 August. The British retaliated with large-scale raids against Berlin the very next night. The British raids continued for two weeks; the Germans subsequently launched the Blitz against London, and the norm against bombing cities—heavily dependent on reciprocity—was irreparably shattered.⁴⁰ Once the norm against attacking population centers had been violated, the argument for restraint in the conduct of such attacks was difficult to justify.

The formal US position regarding legal constraints on aerial bombardment was relatively conservative, if sometimes conflicted. A 1943 instruction manual from the Judge Advocate General School emphasized that, “Deliberate or reckless bombing of noncombatants is forbidden as is bombardment for terrorizing the civilian population. The laws of humanity are applicable to

³⁹ Laura Ford Savarese and John Fabian Witt, “Strategy & Entailments: The Enduring Role of Law in the U.S. Armed Forces,” *Daedalus* 146, no. 1 (January 2017): 16–17, https://doi.org/10.1162/DAED_a_00419 (internal citations omitted).

⁴⁰ Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Ithaca and London: Cornell University Press, 2001), 126–32.

air war. Destruction as an end in itself or for the sole purpose of inflicting monetary loss on the enemy is forbidden.”⁴¹ A few pages later, however, the manual states that, “Military necessity may excuse the destruction of entire towns and cities,” citing General Sherman’s famous march to the sea as a precedent for such conduct.⁴²

Early in the war, US forces took more seriously the constraints against indiscriminate bombing than did British forces. The US practice of daylight bombing raids exposed US aircraft and crews to considerable risk, but was considered to be more accurate than the British night time bombing raids, and thus less likely to be perceived as indiscriminate.⁴³ As the war progressed, however, the value of the destruction wrought on German society by bombing, came to be seen as something of value in itself. In November 1943, at the SEXTANT conference of Allied leadership, a memorandum noted,

The Allied air offensive has inflicted heavy casualties on the civilian population. In addition, by compelling the German authorities to evacuate not only raided areas but also major cities throughout Greater Germany, it has spread alarm throughout the Reich, and has dislocated the social and economic life of the country. It has also greatly reinforced the effect of military reverses in convincing an increasing majority of the German people that defeat is now probable. ...The sense of hopelessness, ... and still more the voluntary and involuntary withdrawal of support for the war effort already seriously impedes the German leaders in their conduct of the war. The extent to which this is attributable to Allied bombing has conspicuously increased in the last quarter....

Probably five to six million people have by now been rendered temporarily or permanently homeless by bombing. ... The authorities are now being forced to divert labour and materials to the erection of large numbers of emergency hutments. ... By the end of September, it is estimated that the number of workers displaced by bombing from their normal productive activities in industry, or engaged in rehabilitation work necessitated by bombing had reached the million mark (6 ½ % of the industrial labour force).⁴⁴

⁴¹ “Law of Land Warfare,” 43.

⁴² “Law of Land Warfare,” 45.

⁴³ Savarese and Witt, “Strategy & Entailments,” 17.

⁴⁴ Office, US Secretary of the Combined Chiefs of Staff, “SEXTANT Conference Minutes,” 178–79.

A second memorandum at the same conference detailed the impact of the Allied bombing campaign on German morale.⁴⁵ By focusing on ‘morale’ as a military target, Allied leaders created a tissue of legitimacy for conduct which, on its face, violated injunctions against bombing for the purpose of inflicting destruction as an end in itself, or for creating economic harm.⁴⁶ This type of justification does bear early hallmarks of military legalism, employing a rule-formalistic interpretation of what constituted acceptable targets, and elements of advocacy. It is distinguished from the mature form of military legalism seen after the Vietnam war primarily in that it was principally indulged in by policy makers and senior officers operating at the strategic, rather than the operational, level of war. Had such justifications been commonplace among officers in operational command (broadly defined, the ranks between Lieutenant Colonel and Major General), it might have been evidence of a shift in military professionalism to incorporate military legalism, such as we see after Vietnam. Instead, officers at the operational level appear to have carried out their orders without much concern as to justification, which is in keeping with the prevailing view of individual accountability for

⁴⁵ Office, US Secretary of the Combined Chiefs of Staff, 182.

⁴⁶ The argument for morale as a target was formulated clearly by Lord Trenchard, sometimes described as the ‘Father of the Royal Air Force.’ Quoting from Goda (who quotes from Trenchard), “Lord Trenchard’s argument on 19 May 1941 was this: ‘... if you are bombing a target at sea, then 99 percent of your bombs are wasted, but not only 99 percent of your bombs are wasted but pilots (etc.). So, too, if the bombs are dropped in Norway, Holland, Belgium or France, 99 percent do Germany no harm, but do kill our old allies, or damage their property or frighten them or dislocate their lives.... If, however, our bombs are dropped in Germany, then 99 percent which miss the military target all help to kill, damage, frighten or interfere with Germans in Germany and the whole 100 percent of the bomber organization is doing useful work, and not merely 1 percent of it.’ Morale was defined only at the end of 1941 because of United States insistence and criticism. The attack on morale included ‘the disruption of transportation, living and industrial facilities of the German population rather than the more restricted meaning.’ This definition implied that the attack was directed not so much to destroying the German worker’s will to work as to deprive him of the means of working effectively. This distinction became more apparent in later stages of area bombing. It is obviously different [it is indeed not] from that put forward by Lord Trenchard and others who had supported the attack on morale earlier in 1941.” Paul J. Goda, “The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War,” *Mil. L. Rev.* 33 (1966): 103.

superior orders at the time (see discussion below). As previously discussed in Chapter 1, at the strategic level of war, policy makers and senior commanders may engage in legalistic justifications for political, rather than professional military purposes. While legalistic, this is not military legalism *per se*, since it does not represent a shift in military professionalism. Such appears to be the case with the justification of ‘morale’ (and ‘productive capacity’) as a target for the strategic bombing campaign.

Even before the adoption of ‘morale’ as a target, the accuracy possible with World War II delivery systems often made an attempt to claim that bombers attacking targets in or near populated areas were distinguishing between civilian and military targets little more than pretense. A review of bombing operations flown out of northwest Africa against targets in Italy in 1943 makes this clear. From 2-6 August 1943, for example, bombers from Northwest African Air Forces flew 31 daylight missions against targets in and around Adrano, Sicily. All told, these raids dropped over 232 tons of ordnance. In six of the missions, the targets are identified as troop concentrations, gun emplacements, or other distinctly military targets. In the other 25 missions, the targets are identified as the town itself, or roads in or near the town. Among the comments found in the assessment column are notes of strings of bombs missing the town and destroying buildings, or the enthusiastic comment on 3 August, a day of good visibility and heavy, accurate anti-aircraft fire that 10 bombs (out of 96 dropped on that mission) were seen to have hit the road, which was the target.⁴⁷ Other assessments of results include such comments as “town well covered, causing one good fire,” and, “Six direct hits scored on buildings & 3 bombs

⁴⁷ Headquarters, Northwest African Air Forces, “Tables of Operations: 31st July/1st August-14th August 1943” (Headquarters, Northwest African Air Forces, 1943), Table B p. 21, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4494/rec/1>.

fell in market square.”⁴⁸ These missions were daylight missions, flown between 7,000 and 11,000 feet in altitude, the most accurate profile for Allied bombing missions. Yet it is clear that, given the state of technology and enemy anti-aircraft fire, attempting to precisely distinguish and hit a target smaller than a town was a difficult proposition and one which was frequently unsuccessful.⁴⁹

In light of such limited accuracy even in daylight bombing, and the sense that the bombing campaigns were breaking down the war-making capacity of German society thus hastening the end of the war, it is not surprising that by early 1945, US leaders no longer showed the same level of uneasiness about ‘morale’ as a target. An enclosure to the minutes of the TERMINAL conference in July 1945 stated openly, “the mission of strategic bombardment against Japan is substantially the same as was the objective of our Allied air forces operating against Germany. This mission is to achieve the earliest possible progressive destruction and dislocation of the Japanese military, industrial, and economic systems, and to undermine the morale of the Japanese people to the point where their capacity for war is decisively weakened.”⁵⁰ Once the targeting of morale and productive capacity was accepted as legitimate, the large-scale bombing of cities was a logical development; once the bombing of cities was accepted as legitimate, firebombing showed itself to be one of the most effective tools in the Allied arsenal.

As was the case with choosing targets based on the possible “supplementary effects” of bombs that did not strike their military targets, firebombing was a tactic pioneered by the

⁴⁸ Headquarters, Northwest African Air Forces, Table B pp 20-23 of 152 (no page numbers in document).

⁴⁹ Headquarters, Northwest African Air Forces, 20–23 In further support of this, a 4 August raid on Bronte town included among its noted effects, “near misses on road, railway, and hospital” p. 32.

⁵⁰ Office, US Secretary of the Combined Chiefs of Staff, “TERMINAL Conference Minutes,” Enclosure 1 Strategic Bombing Operations p. 207.

British.⁵¹ In August 1943, the Royal Air Force flew four raids against Hamburg using principally incendiary bombs, which completely burned out 12 ½ square miles of the city, destroying 300,000 dwellings, killing over 60,000 people, and rendering nearly three-quarters-of-a-million people homeless.⁵² Having seen the success of this tactic, US planners adopted it for use against Japanese cities, where the reliance on wood construction made incendiary attacks even more effective. The decision to pursue firebombing was not uncontroversial, but US commanders, including General Curtis LeMay, specifically invoked the concept of military necessity to justify it:

Cruel as it might be in the short run, [LeMay] insisted this strategy was proving highly effective in degrading the military capabilities of the enemy, and therefore offered the best chance of winning the war as quickly as possible. By shortening the war, the bombing campaign would end up saving far more lives than it cost.⁵³

The effect of the firebombing campaigns on Japanese civilians was devastating. The US Strategic Bombing Survey estimated that major incendiary attacks in 1945 killed over 168,000 Japanese citizens, severely wounded another 200,000, and left over 8 million homeless.⁵⁴ For comparison, the same group estimated that the atomic bombs dropped on Hiroshima and Nagasaki combined likely killed 105,000-115,000 people with a similar number injured.⁵⁵ While

⁵¹ Thomas, *The Ethics of Destruction*, 132.

⁵² Office of the Secretary of Defense, "Fire Effects of Bombing Attacks," 8.

⁵³ Michael Bess, *Choices Under Fire: Moral Dimensions of World War II* (New York: Alfred A. Knopf, 2006), 95.

⁵⁴ Office of the Secretary of Defense, "Fire Effects of Bombing Attacks," 20; A separate assessment by the US Air Force reverses the balance between killed and injured, citing 269,187 people killed and 109,871 seriously injured. This Air Force tally asserts that 2,455,598 buildings were completely burned, 30,124 partly burned. Explosive (rather than incendiary) bombs destroyed an additional 54,195 buildings and damaged 63,810 by this account. USAF Historical Division, Air University, "Development of Night Air Operations, 1941-1952," US Air Force Historical Study (Maxwell Air Force Base, Ala.: Air University, 1953), 187, World War II Operational Documents, Ike Skelton Combined Arms Research Library Digital Collection, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3304/rec/1>.

⁵⁵ Office of the Secretary of Defense, "Fire Effects of Bombing Attacks," 28.

nuclear weapons held a particular horror in the ability to kill such large numbers with a single weapon in a short period of time, the firebombing campaign was no less horrific for its extended duration. US planners also sought to exaggerate the effects of incendiary bombs: In April 1945, for example, US raids began combining incendiary bombs with fragmentation bombs, intended to deter firefighting efforts.⁵⁶ A description of the destruction wrought by the firebombing campaign over a single two-week period in May-June 1945 gives a sense of its terrible impact:

In all, 2,537 sorties were sent out and more than 14 square miles of the three cities were added to the areas already in ashes [between 29 May and 15 Jun 1945]. The entire campaign against five cities, if Kawasaki may be considered as part of the Tokyo urban area, had burned out 105.3 square miles. Of the 110.8 square-mile total area of Tokyo, 56.3 square miles were destroyed. In Nagoya, 12.4 square miles out of 39.7 were leveled, as were 8.8 square miles out of 15.7 in Kobe. Osaka suffered destruction of 15.6 out of 59.8 square miles, and Yokohama lost 8.9 out of 20.2 square miles. Designated target areas amounted to 106 square miles, and 102 square miles were destroyed. In short, almost 42 % of the total built-up area of the five target cities had been burned to the ground.⁵⁷

In the strategic bombing campaign, the ability to destroy an enemy's economy and society created a perceived need to do so as a means to shorten the war. Justified in terms of military necessity, this campaign conflicted sharply with chivalric notions of military honor, which emphasized the responsibility of professional military officers to distinguish between combatants and the peaceful population, and to treat civilians with leniency and respect. The apparent conflict between professional honor and military necessity echoes concerns raised in the US Civil War and in World War I. In the Civil War, especially among Confederate generals, an attachment to medieval conceptions of individual chivalric conduct in the face of the relentless

⁵⁶ USAF Historical Division, Air University, "Development of Night Air Operations, 1941-1952," 166.

⁵⁷ USAF Historical Division, Air University, 167.

massed fire of Union forces became associated with the notion of “amateurism.”⁵⁸ In the First World War, as Keegan observes, “the appearance of the machine gun...had not so much *disciplined* the act of killing...as *mechanized* or *industrialized* it.”⁵⁹ Against relentless, mechanized killing, notions of honor—often rooted in social class—which compelled officers to stand upright in the face of machine gun barrages and lead their troops from the front became seen as a sign of futility and incompetence.⁶⁰ As in these earlier conflicts, the concepts of honor and chivalry inherent in US military professionalism yielded to the new realities of war in the strategic bombing campaign of World War II.

It is fair to ask how this could be. From all available evidence, the appeal—justified in terms of military necessity—of destroying the capacity of an enemy society to make war, thereby shortening the war and limiting the deaths of US and Allied servicemen, overpowered the notion that such tactics were dishonorable or unchivalrous. This process was made easier by a widely-shared sense that the Nazi regime was so evil as to justify such tactics, and a similar belief—held without apparent irony in light of the moral indictment of the Nazis—that the Japanese were sub-human: racially inferior, fanatical, and heathenistic, and thus not deserving of less brutal treatment.⁶¹ So, even as professional US military officers maintained a notion of honorable

⁵⁸ Mark A. Weitz, “Shoot Them All: Chivalry, Honour, and the Confederate Army Officer Corps,” in *The Chivalric Ethos and the Development of Military Professionalism*, ed. D.B.J. Trim (Leiden, Boston: Brill, 2003), 326.

⁵⁹ John Keegan, *The Face of Battle: A Study of Agincourt, Waterloo, and the Somme* (New York, London: Penguin Books, 1976), 234.

⁶⁰ For a discussion of the connection between honor and incompetence, see Norman Dixon, *On the Psychology of Military Incompetence* (London: Pimlico, 1976), 194–207.

⁶¹ Overy, *Why the Allies Won*, 294 As Overy reports, in opinion polls conducted during the war, 10% or more of the American population supported the physical extermination of the Japanese race. No similar question was even asked regarding the Germans.

conduct as part of their identity, they also approved attacks that annihilated civilian infrastructure, and resulted in the widespread slaughter of civilians.⁶²

The institutional legacy of World War II and the roots of military legalism

The direct toll of World War II on civilians, the genocides perpetrated by the Nazis, and the brutality of Japanese forces toward civilians and prisoners of war, prompted an unprecedented push, both for individual accountability for acts committed by German and Japanese forces, and for greater protection of civilians in time of war. In the case of the pursuit of individual accountability, the notions of war crimes and command responsibility were not new, but the extent to which they were enforced on individuals who were carrying out the national policy of their country was. In the case of civilian protections, the Geneva Conventions of 1949 represented a new development in the international law governing war.⁶³

The notion of war crimes existed prior to World War II, but was generally limited to conduct that violated the written or unwritten rules of chivalry that governed war. Violations were specifically exempted from consideration as crimes if they were carried out under superior orders. The 1940 manual on *Rules of Land Warfare*, reflected the prevailing wisdom regarding war crimes prior to the war:

The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battlefield; ill-treatment of prisoners of war; breach of parole by prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; misuse of the Red Cross flag and emblem; and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells

⁶² On the role of honor in the identity of US officers, see generally Marshall, *The Armed Forces Officer*.

⁶³ On war crimes and command responsibility, see William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," *Mil. L. Rev.* 97 (1982): 3; On the protection of civilians, see Best, "Restraints on War by Land before 1945," 27.

and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory. Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.⁶⁴

World War II saw the commission of most of these acts on a large scale, often by both sides. What differentiated the acts of US and British forces from those of German and Japanese forces was that, in the case of the Germans and Japanese, such acts were carried out so methodically and routinely that it was clearly a product of official policy. In the face of this, the argument that the perpetrators could not be held culpable because they were following orders stretched moral credulity.

Telford Taylor, Chief Prosecutor at the Nuremberg Tribunals, cites a vivid example of such a case. Under questioning, Otto Ohlendorf, commander of one of the Nazi *Einsatzgruppen*, whose duties consisted of killing Jews and Communists, stated that under his direction his unit had killed over 90,000 people, including women and children, in the 12-month period from June 1941 through June 1942, in compliance with the verbal orders he had received. Under cross-examination by a lawyer for the SS, the following exchange took place:

[Q]: But did you have no scruples in regard to the execution of these orders?

[A]: Yes, of course.

[Q]: And how is it that they were carried out regardless of these scruples?

[A]: Because to me it is inconceivable that a subordinate leader should not carry out orders given by the leaders of the state...

[Q]: Was the legality of these orders explained to these people under false pretenses?

⁶⁴ United States Army, *Rules of Land Warfare*, VII:82.

[A]: I do not understand your question; since the order was issued by the superior authorities, the question of illegality could not arise in the minds of these individuals, for they had sworn obedience to the people who had issued the orders.⁶⁵

The Nuremberg Tribunal walked a delicate path between the glaring amorality of Ohlendorf's position, and a recognition that many common soldiers lacked either legal training or the practical wherewithal to protest an order which might be unlawful. Further, eager to preserve the notion that the trials represented a true application of legal norms rather than simply victor's justice, the Tribunal was cautious not to create a standard which might provide grounds for the literal or metaphorical indictment of large numbers of Allied soldiers.⁶⁶ Ultimately, in the *High Command Case* (United States v. von Leeb, *et al*), the Tribunal recognized that,

Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon its principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law. ... He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.⁶⁷

The *High Command Case* created the distinction between orders, which a soldier or officer would normally be expected to carry out, and orders that were manifestly unlawful. A manifestly unlawful order is any order which a person of "ordinary sense and understanding"

⁶⁵ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston, New York, Toronto, London: Little, Brown, and Co., 1992), 248 Ohlendorf was ultimately convicted and executed for his actions.

⁶⁶ Fred L. Morrison, "The Significance of Nuremberg for Modern International Law," *Mil. L. Rev.* 149 (1995): 212.

⁶⁷ US v. Von Leeb et al, as cited in Office of General Counsel Department of Defense, "Department of Defense Law of War Manual" (Department of Defense, June 2015), 1058, n 27.

would understand to be unlawful under the circumstances.⁶⁸ In the case of a manifestly unlawful order, such as the orders given to Ohlendorf to kill unarmed civilians who posed no threat to his forces, superior orders created no defense. This distinction, crafted at Nuremberg in the wake of World War II, continues to this day.

While the standard for individual accountability created at Nuremberg has endured, the standard for accountability established in the Pacific theater has been more controversial. In the Nuremberg trials, officers were judged based on their direct responsibility: the actions of troops under their command in response to their orders. In the case of General Tomoyuki Yamashita, Commander of the 14th Imperial Japanese Army Group in the Philippines, the General was tried for his failure to prevent war crimes by his troops, without any allegation that he ever ordered or sanctioned their commission. Yamashita was found guilty and sentenced to death by hanging. Upon appeal to the US Supreme Court, the Court affirmed the sentence and held that, as commander of the Japanese forces, Yamashita had, “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”⁶⁹ This more expansive interpretation of indirect accountability continues to create uncertainty as to just how far a commander’s obligation extends for acts committed by

⁶⁸ This phrase, taken from the current US military Manual for Courts Martial, represents the post-Nuremberg standard adopted both the US and by international tribunals, such as those established to hear war crimes cases from the former Yugoslavia and Rwanda. Joint Service Committee on Military Justice, *Manual for Courts-Martial United States*, 2012 Edition (Department of Defense, 2012), II-110.

⁶⁹ “In Re Yamashita 327 U.S. 1 (1946),” Justia Law, 16, accessed November 23, 2016, <https://supreme.justia.com/cases/federal/us/327/1/case.html> Of note, the Court averred that the same standard had been applied to US officers in the past. The case cited by the Court dated from the Philippine insurrection of 1901, and stated explicitly that this responsibility held only when it was “apparent that the officer had the power to prevent [the crime].” Based on the general chaos that accompanied the Japanese defeat in the Philippines, it is far from clear that this condition obtained in Yamashita’s case. The extent of the responsibility to take reasonable measures to prevent the commission of war crimes, or to investigate them once reported, continues to be a controversial topic.

forces under her command without her knowledge or direction.⁷⁰ This uncertainty likely contributes to the desire of officers and policy-makers today to ensure that subordinate commanders have clear and specific rules governing what actions are permissible and impermissible in the application of force.

Along with the limitation of superior orders as a defense, the legal processes following World War II also limited the degree to which military necessity could be invoked as a justification for actions. Although some tribunals allowed relatively wide latitude to German commanders in justifying actions, such as forcibly evacuating villages and then destroying them in order to deny the advancing Soviet army either supplies or partisan supporters, as in the Rendulic case, the court in the same case dramatically limited the scope of the military necessity defense. “We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.”⁷¹ In essence, while the court in the Rendulic case accepted the argument that military necessity justified Rendulic’s actions in that particular case, it rejected the argument that military necessity could be used to categorically override *any* rule of law at any time.⁷²

The second major institutional legacy of World War II relevant to the emergence of military legalism is the focus of international law of armed conflict on the protection of civilians.

⁷⁰ For a discussion suggesting that the Yamashita standard has “lost favor,” see Bruce D. Landrum, “The Yamashita War Crimes Trial: Command Responsibility Then and Now,” *Mil. L. Rev.* 149 (1995): 293; For a discussion suggesting that the standard applied to Yamahshita was fair, see MG Kenneth J. Hodson, *Conversations Between Major General Kenneth J. Hodson and Lieutenant Colonel Robert E. Boyer Volume I*, interview by LTC Robert E. Boyer, 1972, I-III-23, Kenneth J. Hodson Papers *Recollections and Reflections: Transcripts of the Debriefing of MG Kenneth J. Hodson by LTC Robert E. Boyer, 1971-1972 Volume II Only Box 2*, Army Heritage and Education Center. This discussion is the more interesting since Hodson was the Army Judge Advocate General from 1967-1971, which included the My Lai incident and the trials of Lt. William Calley and CPT Ernest Medina.

⁷¹ The Hostage Case (United States vs. List et al) *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. 11 (1950), pp 1255-1256, as cited in Bill, “THE RENDULIC ‘RULE,’” 130.

⁷² Bill, 130.

The Geneva Conventions of 1949 codified for the first time explicit responsibilities of belligerent powers to protect civilians, the wounded, prisoners of war, and others who have been removed from combat.⁷³ Although previous international agreements had stipulated the need to distinguish between military and civilian targets, and prohibited the bombardment of undefended places, they focused principally on the protection of combatants by limiting the means with which war could be fought. The 1949 Conventions explicitly outlined a minimum standard of humane treatment for civilians, prisoners, and others removed from combat, as well outlawing atrocities against civilians in occupied territories, such as had characterized Nazi and Japanese occupation.⁷⁴ These protections came to be incorporated into the training of the US armed forces, and figured prominently in the investigations that followed the massacre at My Lai in Vietnam.⁷⁵

As a final note on the institutional legacy of World War II, it should be observed that the US strategic bombing campaign was the subject of judicial and institutional criticism following the war. Although no US officers or policy-makers were tried or convicted, the moral strength of the US position in the war crimes tribunals was undermined by the scope of devastation wreaked by US bombers. As Savarese and Witt remarked,

After the war, the costs of the most aggressive bombing campaigns revealed themselves once more. At Nuremberg, the strategic aerial bombardment of German civilians became a vast embarrassment for the Allies. German defendants accused of killing civilians asserted the defense that “every Allied nation brought about the death of noncombatants through...bombing.” In Tokyo, Justice Pal of India dissented from the convictions of Japanese war criminals, insisting that in view of the bombing campaigns over Japanese cities, the war

⁷³ Jean Pictet, *The Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, vol. 4 (International Committee of the Red Cross, 1958).

⁷⁴ For examples of previous accords protecting civilians and prohibiting attack on undefended places, see United States Army, *Rules of Land Warfare*, VII:6, 11 (citing the Hague Convention, Art. 25).

⁷⁵ Henry T. King Jr, “The Nuremberg Context from the Eyes of a Participant,” *Mil. L. Rev.* 149 (1995): 46; Investigation of the My Lai Incident, 645, 777, 834.

crime proceedings were nothing more than victor's justice. A court in Tokyo even concluded in 1963 that the Americans' atomic bomb attacks violated the international laws of war.⁷⁶

World War II summary and conclusion: traditional constraints and the risk of escalation

In evaluating the constraints on the use of force during World War II, it is worth asking whether such constraints were effective. Especially in light of the many millions of civilians who died as a result of the war, it is reasonable to argue that traditional modes of constraint were ineffective. At least one author suggests this may not be the case:

The experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to the notions custom, honor, professional standards, and natural law which preceded it. Codification in treaty form has such compelling virtues--verbal clarity, equal standards, the securing of formal acceptance by states--that it is bound to remain a central aspect of the laws of war. On the other hand, it risks being too rigid in the face of changing situations and technologies; and it can make rules seem like artificial impositions, rather than a natural outgrowth of the interests and experiences of a state and its armed forces.⁷⁷

While it is not immediately apparent that rule-based constraints would have been more effective than "custom, honor [and] professional standards," in limiting the devastating effect of the war on civilians, it is clear that these standards resulted in relatively limited constraints on the use of force, especially when combined with the broad scope of military necessity. In particular, this mode of constraint appeared to afford little protection against escalation. The rule-based constraints that followed in Korea and Vietnam had the avoidance of escalation as a primary goal. As the next sections will show, however, even when rule-based constraints were instituted in subsequent conflicts, the first instinct of many professional officers was simply to ignore them, citing a mixture of military necessity and professional judgment to act in ways contrary to

⁷⁶ Savarese and Witt, "Strategy & Entailments," 17 (internal citations omitted).

⁷⁷ Roberts, "Land Warfare: From Hague to Nuremberg," 137.

the rules. That would not change until the rules themselves were imbued with the normative values of custom, honor, and professionalism in the wake of the US experience in Vietnam.

Korea 1950-1953: Limited war and the development of rule-based constraints

As in World War II, there is little evidence of military legalism during the Korean war. Despite this, the Korean war is important to the development of military legalism because, as the first limited war fought in the nuclear age, it saw the development of rule-based constraints on the use of force imposed by policy makers on professional military officers. These early constraints were focused exclusively on policy questions designed to minimize the risk of the conflict spreading and escalating into a general global war, rather than on normative or legal questions, but they were the precursors to the modern regimes of constraint that give rise to military legalism.

The difficulty of fighting a limited war posed new challenges to the domestic legitimacy of the Korean conflict: When casualties mounted, domestic disapproval of the war increased.⁷⁸ The question of casualties, combined with an elusive sense of what the war was being fought to achieve, helped to cement Eisenhower's victory in 1952 over the Democratic candidate, Stevenson.⁷⁹ Despite these legitimacy challenges, as in World War II, the Korean war was fought against adversaries who were portrayed as evil. The legitimacy of the Korean conflict was thus contested not by the sense that US forces were fighting too brutally, but from the sense that the sacrifices asked of US forces were out of proportion to the limited aims of the war, and that those aims were too modest in light of the evil represented by global Communism and the

⁷⁸ See generally Steven Casey, "Casualty Reporting and Domestic Support for War: The US Experience during the Korean War," *Journal of Strategic Studies* 33, no. 2 (April 2010): 291–316, <https://doi.org/10.1080/01402391003590689>.

⁷⁹ Sidman and Norpoth, "Fighting to Win," 334; Casey, "Casualty Reporting and Domestic Support for War," 313.

North Korean regime. To the extent that domestic legitimacy suffered in the Korean war, it suffered from the impression that, if the war needed to be fought at all, it was being fought with too many constraints, rather than too few.⁸⁰

Another challenge highlighted by the Korean war, especially in the early days of the conflict, was that presented by fighting an adversary who was perceived to be hiding among the civilian population. In the late summer and early autumn of 1950, as US and UN forces were falling back toward what would become the Pusan perimeter and thousands of South Korean refugees clogged the roads, US troops and commanders worried that North Korean infiltrators were hiding among the mass of humanity, intent on penetrating behind US lines.⁸¹ In response,

⁸⁰ On the question of the necessity of the war, see Alan Goodrich Kirk, "Document 72: The Ambassador in the Soviet Union (Kirk) to the Secretary of State 25 Jun 1950," ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d72> "...this aggressive NK military move against ROK represents clear-cut Soviet challenge which in our considered opinion US should answer firmly and swiftly as it constitutes direct threat our leadership of free world against Soviet Communist imperialism. ROK is a creation of US policy and of US-led UN action. Its destruction would have calculably grave unfavorable repercussions for US in Japan, SEA and in other areas as well. We feel therefore, that we are called upon to make clear to the world, and without delay, that we are prepared upon request to assist ROK maintain its independence by all means at our disposal, including military help and vigorous action in UNSC. Embassy assumes that ROK has or will shortly ask for such assistance. Public declaration our willingness to assist in any feasible way desired by ROK need not, and should not, in Embassy view, await formal ROK initiative. Delay could suggest to Soviets possibility their precipitating with impunity further immediate action against Indochina et cetera." This position, while reasonable, was complicated by prior public statements of both MacArthur and (most notably) Secretary of State Dean Acheson, which suggested that the Korean peninsula fell outside of the defensive perimeter guaranteed by the United States. On the support for fewer constraints, see the description of widespread popular support for the position of General MacArthur, who publicly advocated expanding the scope of the war in Roy K Flint, "The Truman-MacArthur Conflict: Dilemmas of Civil-Military Relations in the Nuclear Age," in *The United States Military Under the Constitution of the United States 1789-1989*, ed. Richard H. Kohn (New York: New York University Press, 1991), 223-67; See also John W. Spanier, *The Truman-MacArthur Controversy and the Korean War* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1959).

⁸¹ Dale C. Kuehl, "What Happened at No Gun Ri? The Challenge of Civilians on the Battlefield" (U.S. Army Command and General Staff College, 2003), 45, Combined Arms Research library, <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll2/id/76/filename/77.pdf/mapsto/pdf/type/singleitem>, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll2/id/76/rec/133>.

US forces sometimes not only failed to distinguish between military and civilian targets, but also at times took refugees under fire out of fear that they were North Korean forces in disguise.⁸²

Legitimacy and constraint in Korea

Unlike World War II, Korea was a war in which the domestic legitimacy of the conflict, as measured by public support, suffered. Although heavy casualties certainly played a role in undermining public support for the war, the issue appeared to be not a lack of willingness to sustain heavy casualties but an unwillingness to sustain them in order to achieve the limited war aim, a political compromise which was not meaningfully different from the *status quo ante bellum*, rather than a decisive victory as in World War II.⁸³ Thus, although the legitimacy of the war was challenged, the challenge favored fewer constraints, rather than more.⁸⁴

Perhaps unsurprisingly, after an initial surge of support, public approval of the war in the US varied according to the fortunes of US forces in combat. In August 1950, when public outrage over the North Korean invasion was still high, 62% of Americans supported the war according the Gallup poll, despite setbacks on the battlefield. In February 1951, after the Chinese intervention and while US forces were being pushed back from lines near the Yalu

⁸² On failure to meaningfully distinguish civilian from military targets, see Dong Choon Kim, "Forgotten War, Forgotten Massacres—the Korean War (1950–1953) as Licensed Mass Killings," *Journal of Genocide Research* 6, no. 4 (December 2004): 530, <https://doi.org/10.1080/1462352042000320592>; See also Christopher D. Booth, "Prosecuting the Fog of War—Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by US Forces during the Opening Days of the Korean War in the Village of No Gun Ri," *Vand. J. Transnat'l L.* 33 (2000): 947, passim. This article also contains a detailed treatment of the No Gun Ri incident.

⁸³ Donald F. Bletz, *The Role of the Military Professional in US Foreign Policy* (Westport, CT: Praeger, 1972), 226–32.

⁸⁴ Sidman and Norpoth, "Fighting to Win," 339; MacArthur argued forcefully for the moral requirement to lift the constraints that had been imposed on him: "... If you don't attempt to bring this thing to a short and honorable conclusion, It means not only the indefinite sacrifice of life, but it means what is almost equally important, the complete degradation and sacrifice of our moral tone." Douglas MacArthur and George C Marshall, "Testimony of Douglas MacArthur. Reprinted by Permission from Korea: Cold War and Limited War, Second Edition, Edited and with an Introduction by Allen Guttman Pp. 26-52. Copyright © 1972 by D. C. Heath and Company. Published by D. C. Heath and Company.," May 1951, 41.

River toward the 38th Parallel, public support dropped to 39%. As the war settled into a stalemate in the autumn of 1951, public support stabilized at around 33%-35%, a number that did not vary significantly for the remainder of the war.⁸⁵

Another factor affecting both the legitimacy of the war and the public appetite for constraints was the manner in which the North Korean government was portrayed in the American press. Choi offers an example of coverage that was typical:

The magazines [Time and Life] also informed the American public that North Korean soldiers deliberately killed even their own citizens, including political prisoners, anti-communists, and relatives of South Korean soldiers (Time, 16 October 1950: 28; Time, 23 October 1950: 27; Life, 30 October 1950: 24; Life, 6 November 1950: 38). As the most provocative visual proof, Time published a gruesome picture from the Associated Press that captured the mass murdering of civilians in the Taejon area. The photograph titled ‘Enemies of Moscow’ was followed with this caption:

‘This shambles was a corner of Korea’s Buchenwald. Before abandoning devastated Taejon to U.S. forces last week, the Communist masters of the city led their civilian prisoners – men & women – from the concentration pens and methodically slaughtered them. By week’s end, U.S. troops had found 1,100 bodies.’ (Time, 9 October 1950: 33)

Provoking an historical analogy between Nazi atrocities and North Korean brutality, the image was used to communicate a strong message to the American public: we (the good guys) are fighting against Asian communists (the bad guys) on the Korean peninsula.⁸⁶

Such imagery of the adversary strengthened the notion that the conflict was a Manichean struggle of good versus evil and tended to bolster calls for fewer constraints, rather than more.

While this type of characterization early in the war probably helped to buoy public support for the war effort, it also made the task of selling a limited war aim to the public more difficult. The

⁸⁵ Gallup poll figures cited in the remarks of Alonzo Hamby in Francis H. Heller, ed., *The Korean War: A 25-Year Perspective* (Lawrence, KS: The Regents Press of Kansas, 1977), 170.

⁸⁶ Suhi Choi, “The Repertoire, Not the Archive: The 1950 Life and Time Coverage of the Korean War,” *Media, War & Conflict* 8, no. 2 (2015): 274.

geopolitical reasons for avoiding escalation to a global general war were sound, but it was difficult for the government to justify the deaths of thousands of US troops just so that the United Nations could reach a political settlement, which removed North Korean forces from the south but still allowed the North Korean government to continue abusing its own citizens in a manner likened to Hitler's Nazi regime.

A final factor influencing the legitimacy of the war, and the only one which seemed to pull toward greater constraint, was the involvement of the United Nations (UN). At the time of the North Korean invasion of the south on 25 June 1950, the Soviet Union was boycotting the UN to protest the refusal of the US, UK, and France to seat the newly-formed Communist government of the People's Republic of China, including in China's permanent seat on the Security Council. As a consequence of the Soviets' absence, US diplomats were able to rapidly secure UN condemnation of the North Korean invasion, and just two days later secured a Security Council resolution calling for all members of the UN to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."⁸⁷ The support and involvement of the UN added a significant degree of international legitimacy to the war effort; it also heightened US sensitivity to questions of constraint, particularly civilian casualties.

The need for constraint occasioned by the involvement of the UN specifically influenced the planning of US air operations. On 29 June 1950, President Truman directed the National

⁸⁷ United Nations Security Council, "Document 84: Resolution Adopted by the United Nations Security Council June 25, 1950," ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d84>; United Nations Security Council, "Document 130: Resolution Adopted by the United Nations Security Council June 27, 1950," ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d130>.

Security Council that, in order to avoid the perception of US bombing being “indiscriminate,” he wanted to ensure that the Air Force would attack only “purely military” targets in North Korea.⁸⁸ In September 1950, when the air force commander, Lieutenant General George Stratemeyer, requested permission from General MacArthur to launch a raid of 100 B-29’s against Pyongyang and other targets in North Korea, MacArthur was inclined to agree. The Joint Chiefs of Staff intervened, concerned about the degree to which such an attack could be perceived as an attack against the civilian population of North Korea. “Because of the serious political implications involved, it is desired that you advise the Joint Chief of Staff, for clearance with higher authority, of any plans you may have before you order or authorize such an attack or attacks of a similar nature.”⁸⁹ Despite this injunction, US bombing campaigns later in the war borrowed heavily from approaches developed during the strategic bombing campaign of World War II.⁹⁰

Constraints: Honor, professionalism, and international law

The constraints of honor, professionalism, and law on US forces changed little from World War II to the Korean war. The Geneva Conventions for the Protection of War Victims had been negotiated and finalized in 1949, but the US did not become a state party to the 1949 Conventions until February 1956, so the body of international law formally governing US forces was substantially unchanged from World War II.⁹¹ US military commanders in the Korean war

⁸⁸ Robert F. Futrell, *The United States Air Force in Korea 1950-53* (Washington, DC: Office of Air Force History, 1983), 41.

⁸⁹ Cited in Futrell, 42.

⁹⁰ See, for example, the subsequent request of the air force commander, General Stratemeyer, to General MacArthur to burn (firebomb) a North Korean town believed to be occupied by North Korean troops in order to “teach a lesson” to the North Koreans. MacArthur not only authorized the raid, but further directed Stratemeyer to “burn and destroy as a lesson any other of those towns that you consider of military value to the enemy.” George Stratemeyer, *The Three Wars of Lt. Gen. George E. Stratemeyer: His Korean War Diary*, ed. William T. Y’Blood (Washington, DC: Air Force History and Museums Program, 1999), 254.

⁹¹ William F Fratcher, “New Law of Land Warfare, The,” 1957, 143.

largely continued to operate as they had in World War II, within an understanding of professionalism and international law that emphasized military honor as tempered by military necessity. A law review article on military necessity written near the end of the Korean war characterized the common understanding of military necessity at the time in a manner consistent with the understanding of the concept shown during World War II,

To many international lawyers and army officers the terms ‘law of war’ and ‘military necessity’ are mutually incompatible. Many army officers consider the law of war as no more than a collection of pious platitudes, valueless, so they think, because it has no force and effect. Some international lawyers regard military necessity as the *bête noir* of international jurisprudence, destroying all legal restriction and allowing uncontrolled brute force to rage rampant over the battlefield or wherever the military have control.⁹²

This description, though somewhat hyperbolic, accurately captures the fact that military commanders in the Korean war often gave precedence to military necessity over the concerns of international law, especially provisions for the protection of civilians, in judging the desirability and suitability of tactics. As will be discussed, this expansive view of military necessity extended not only to the legal constraints imposed on the use of force during the operational conduct of the war, but even to the political and strategic aims of the war itself.

While US forces were not formally legally bound by the 1949 Geneva Conventions, US civilian and military leaders publicly sought to invoke protections very similar to the Conventions for prisoners of war and civilians in the conflict zone. In a technical sense, this was complicated by the fact that the UN was neither a state nor a party to the Conventions. Nevertheless, for both practical and moral reasons, forces acting under a UN flag could not very well derogate from a standard of conduct closely identified with the principles and purposes of

⁹² William Gerald Downey, “The Law of War and Military Necessity,” *The American Journal of International Law* 47, no. 2 (April 1953): 251, <https://doi.org/10.2307/2194822>.

the UN.⁹³ In the end, all sides formally announced that they would comply with the provisions of the Convention regarding the protection of prisoners of war, as well as with more limited measures designed to protect civilians on the battlefield.⁹⁴ These reassurances often failed to mitigate the brutal impact of the war on civilians and the abuse of prisoners by the North Koreans.⁹⁵

Military necessity, though broadly understood to give wide latitude in the selection of targets and military techniques at the strategic level, still constrained the actions of US troops at the operational and tactical level. US forces were held accountable for actions that violated the code of acceptable conduct by professional soldiers. For example, Levie recounts a murder trial in which US soldiers were tried and convicted for the murder of six North Korean civilians in

⁹³ For a detailed discussion of this issue, see Howard J. Taubenfeld, "International Armed Forces and the Rules of War," *The American Journal of International Law* 45, no. 4 (October 1951): 676, <https://doi.org/10.2307/2194248>.

⁹⁴ See Taubenfeld: "As a matter of practice, both the United Nations forces involved in the Korean conflict and those of both North and South Korea have announced the binding force of certain rules of war on themselves. On July 4, 1950, General MacArthur stated: 'Personnel of the armed forces of North Korea and other persons of North Korea who are taken into custody or fall into the hands of armed forces now under my operational control in connection with hostilities in Korea will be treated in accordance with the humanitarian principles applied by and recognized by civilized nations involved in armed conflict. I will expect similar treatment. . . . ' On July 13, 1950, the Republic of Korea sent formal word that it would cooperate with the International Red Cross and would abide by the Geneva Convention on War Prisoners to which it adhered on July 6, 1950. On that same day, the North Korean radio stated that the North Koreans were 'strictly observing the terms of the Geneva Conventions regarding prisoners of war.' The Unified Command has continued its operations on the basis of the binding force of the laws of war on it. The Third Report of the United Nations forces reports that measures to avoid the killing of civilians are being enforced: United Nations forces are urgently endeavoring to restrict destruction to the established military forces of the invader. . . . Civilians are warned daily (by radio, leaflets, etc.) to move away from military targets that must be bombed" Taubenfeld, 678 (internal citations omitted).

⁹⁵ Tales of North Korean maltreatment of prisoners are widespread. Regarding South Korean treatment of prisoners, see an anecdote regarding the use of North Korean POW's by South Korean forces to clear mines on a beach by walking the beach in Lt. Col. Miguel E. Monteverde, "Lieutenant General William P. Ennis, Jr., USA, Retired Oral History" (US Army Military History Institute, 1984), 147, Army Heritage and Education Center Regarding protection of civilians, see discussion below.

Pyongyang.⁹⁶ Other similar trials occurred, governed by the US Articles of War.⁹⁷ The apparent contradiction between prosecuting individual soldiers for the deaths of relatively small numbers of civilians, and the simultaneous endorsement of tactics such as strategic bombing, which were certain to kill thousands of civilians may seem hypocritical, or at least ironic, but it is explained by the commonly-held understanding of military necessity. The bombing tactics were believed to be necessary to hasten the end of the war; no similar argument could be made for the intentional killing of civilians by soldiers outside of combat.

Political constraints: limiting the aims and scope of the war

Unlike World War II, which was fought with the goal of total victory and the unconditional surrender of Germany and Japan, the Korean war was fought for the more limited goal of expelling North Korean forces from the south and restoring international peace.⁹⁸ The US complicated matters by briefly expanding the goal of the war to include the destruction of North Korean armed forces and the creation of a free and unified Korea. Even as the US contemplated these expanded goals, however, policy-makers cautioned that “it would not be in our national interest...to take action in Korea which would involve a substantial risk of general war. Furthermore, it would not be in our national interest to take action in Korea which did not

⁹⁶ Howard S. Levie, Oral History Levie, interview by Thomas Dougall and Richard Gordon, April 1987, 130, The Judge Advocate General Legal Center and School. The conviction was reversed on appeal due to a technical issue regarding the specification of the charge not including the names of the victims--this is an early example of a formalism in US military justice, which will be repeated in the charges and specifications brought in the My Lai case. While legalistic, this is not an example of military legalism, since it is concerned with military justice, rather than with uses of force. Nevertheless, this is an interesting example, coming as it does just prior to the adoption of the Uniform Code of Military Justice. It may plausibly be seen as a reaction to concern voiced by Congress over the seemingly arbitrary nature of military justice in World War II.

⁹⁷ Levie, 97.

⁹⁸ United Nations Security Council, “Document 84”; United Nations Security Council, “Document 130.”

have the support of the great majority of the United Nations...”⁹⁹ The goals of the conflict in Korea were at all times limited and heavily politically inflected.

The most significant political concern of policy-makers was the risk of the war escalating and drawing in the newly-nuclear-armed Soviet Union. This concern reflected not only the concern of the US, but also of many allies, especially Great Britain.¹⁰⁰ In order to avoid the risk of escalation, President Truman directed that US bombing missions should remain “well clear” of the Soviet and Manchurian borders.¹⁰¹ The exact meaning of the ambiguous phrase “well clear” became an item of contention between officials in the State Department, who were concerned about the risk of escalation, and Defense Department officials, who felt that the interpretation of the term by State was overly restrictive, and argued against such a restrictive interpretation by invoking military necessity.

⁹⁹ National Security Council, “National Security Council Report, NSC 81/1, “United States Courses of Action with Respect to Korea,” September 9, 1950, 1–2, History and Public Policy Program Digital Archive, Truman Presidential Museum and Library, <http://digitalarchive.wilsoncenter.org/document/116194>. NSC 81/1 came as US forces were beginning to break out from the Pusan perimeter. A week later, MacArthur’s successful amphibious landing at Inchon and the apparent collapse of North Korean resistance, seemed to confirm the optimistic assessment of US policy-makers as to the possibility of complete military victory against the North Koreans. The Chinese intervention in the war in October-November 1950 ended such optimism, and although the NSC did not formally revise the war aims outlined in September 1950, the armistice negotiations, which began in July 1951, focused on the 38th Parallel (the line dividing US and Soviet occupation zones in 1945, and the pre-war border between North and South Korea) as the line dividing between territory held by UN forces from that held by the Communists.

¹⁰⁰ See, for example, the JCS message to MacArthur in November 1950, in response to MacArthur’s request to bomb the Yalu River bridges: “(JCS 95878) from JCS Personal for MacArthur. 1. Consideration being urgently given to Korean situation at Government level. One factor is present commitment not to take action affecting Manchuria without consultation with the British. 2. Until further orders postpone all bombing of targets within five miles of Manchurian border. 3. Urgently need your estimate of situation and reason for ordering bombing Yalu River bridges as indicated in telecon this date.” The concern of the British was understandable: in the days prior to ICBM’s, Soviet bombers had a limited ability to strike the US, but posed a very real threat to the UK. JCS message contained in Stratemeyer, *The Three Wars of Lt. Gen. George E. Stratemeyer: His Korean War Diary*, 262.

¹⁰¹ Truman’s direction is extensively cited in an exchange of memoranda between the State Department and Defense Department, beginning on 12 August 1950 with H. Freeman Matthews, “Document 421: Memorandum by the Deputy Under Secretary of State (Matthews),” ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d421>.

A 14 August memorandum by the then-counselor to the Secretary of State summarizes the concerns over escalation. Although long, it is worth quoting extensively:

You will recall that attention was drawn ... to the concern which the Soviet leaders must feel over the proximity of the operations in Korea to their own frontiers and over the direct damage which could conceivably be done to their military interests by an extension of the area of hostilities.... it was also pointed out that any further direct detriment to the Soviet military establishment in the Far East resulting from hostilities in South Korea might be expected to hasten a re-entry of the Red Army into North Korea.

According to releases from General MacArthur's Headquarters of August 13, attacks were made August 12 by three sweeps of B-29 bombers on military (including naval) targets at Najin (Rashin), a North Korean port described in one communique as only 17 miles from the Soviet border. The attacks were made, one communique states, through heavy cloud cover, by radar guidance, and 500 tons of high explosives were dropped....

Given the speed at which these planes operate, and the fact that they were bombing through an overcast, it is obvious how easily they could not only have overflowed the Soviet frontier but actually have inflicted damage on the Soviet side of it. Aside from this, we must remember that this point is less than 100 miles from the entrance to the roadstead of Vladivostok and that the Soviet authorities are pathologically sensitive even to any reconnaissance activities, let alone actual bombings, in that vicinity. On top of this, we have the story apparently passed by General MacArthur's Headquarters three or four days after the announcement that censorship had been imposed, making it entirely plain that the relationship of Rashin to the hostilities in South Korea was only a pretext for our bombing and that the real reason for it was the desire to injure the Soviet strategic position in the Far East.

... this conduct on our part...can only appear to the Soviet authorities as evidence of a deliberate decision to exploit the South Korean hostilities for the purpose of reducing Soviet strategic capabilities in the area, ... it is entirely possible that a Soviet military re-entry into North Korea might occur at any time; or the Soviet Government might take other local measures, such as putting strategic bombing planes nominally at North Korean disposal, and beginning operations with them against our forces and our bases in Japan. We also cannot exclude the possibility that this evidence, as it must appear to them, of a United States intent to damage their strategic interests under cover of the Korean war, even at the price of greater heightened danger of serious complications, will naturally affect their estimate of the possibility of avoiding major hostilities, of the likely timing of such hostilities, and of the relative advantages of a Soviet initiation of such hostilities as opposed to a waiting policy based on the continued hope of avoiding them altogether.

GEORGE F. KENNAN¹⁰²

The tart response of Defense Secretary Johnson a week later to a series of memoranda expressing concern over the Najin bombing summarizes the weight given to military necessity by military commanders interpreting the President's directive to remain "well clear" of the border:

TOP SECRET

WASHINGTON, August 21, 1950.

MY DEAR MR. SECRETARY: ...The bombing of Najin was directed by the Joint Chiefs of Staff in accordance with their military responsibilities for the conduct of war operations. Najin is one of a number of highly important military targets in North Korea, all of which must be rendered incapable, as far as our forces are able, of providing logistic support to North Korean forces, if the success of our Korean operations is not to be seriously jeopardized. Your earlier objection to the attack which had already been made upon Najin was discussed with the President and the attack met with his approval.

Najin, being seventeen miles south of the North Korean frontier, is, of course, well clear of that frontier and its bombing is, accordingly, within the terms of the Presidential directive mentioned by you with respect to keeping bombing operations north of the 38th parallel "well clear" of the frontier. Also, the bombing of Najin is definitely within the terms of that same directive which authorized the extension of air operations "into Northern Korea against air bases, depots, tank farms, troop columns and other such purely military targets, if and when, in your judgment, this becomes essential for the performance of your missions...or to avoid unnecessary casualties to our forces." In connection with the foregoing, I must make plain, further, that the "well clear" restriction is, in my opinion, intended only to guard against the possibility of frontier violation and not to provide for political determination as to which military objectives within the area of North Korea may or may not be bombed.

The primary target at Najin is a petroleum storage plant. This petroleum storage plant is obviously a military asset to the operations of North Korean forces and, therefore, important to our own forces as a military target which must, in the interests of successful conduct of our own operations, be attacked until destroyed.

¹⁰² George F. Kennan, "Document 425: Memorandum by the Counselor (Kennan) to the Secretary of State," ed. Glennon, John (Government Printing Office, 1976), 425, 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d425>.

... I cannot agree that the possibility of Soviet conclusion that our purpose is to reduce their strategic capabilities should logically have special weight in the matter. Otherwise, it would follow that our entire Korean campaign is, or may be, so regarded by the Soviets, thus placing in question practically all military features of our Korean operations.

While I share your concern as to the over-all implications of possible eventual Korean developments and, in fact, as to the entire international situation, I am convinced that there must be no weakening exception to our military effort within Korean territory if we are to permit responsible military authorities to perform their required missions and if we are to avoid unnecessary casualties to our own forces, particularly in the light of the precarious situation now existing in Korea.

I firmly believe in the importance of political considerations in politico-military decisions. However, I also believe that the conduct of military operations, once we are committed to such operations, are not subject to question in detail as long as they are conducted within the terms of the over-all decision and as long as our military commanders are held responsible for their successful conclusion.

In short, once war operations are undertaken, it seems to me that they must be conducted to win. To any extent that external appearances are permitted to conflict with or hamper military judgment in actual combat decision, the effectiveness of our forces will be jeopardized and the question of responsibility may well be raised.

I repeat that we interpret the spirit of the expression "well clear" to be that our planes must not violate Soviet or Manchurian frontiers. We are carefully complying with this spirit not only in our planning, but also in our instructions to General MacArthur.

Sincerely yours,

LOUIS JOHNSON¹⁰³

Johnson's assertion that, "once war operations are undertaken...they must be conducted to win" was echoed by General MacArthur in his testimony before Congress after he had been fired by Truman. MacArthur's contention (both before and after his firing) was that, once begun, war could only be ended by victory, surrender, or stalemate, and that the political constraints

¹⁰³ Louis Johnson, "Document 454: The Secretary of Defense (Johnson) to the Secretary of State," ed. Glennon, John (Government Printing Office, 1976), 454, 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d454>.

dictated by Truman compelled stalemate, which he considered the bloodiest and worst of the three options.¹⁰⁴

The political constraints on the use of force under which MacArthur chafed extended beyond limitations on where US forces could conduct bombing missions. US and UN fighter aircraft were prohibited from attacking airfields in Manchuria, China, or the Soviet Union, as well as from pursuing enemy aircraft into the airspace of those countries.¹⁰⁵ This so-called “air sanctuary” became a controversial aspect of the war in many histories, creating the perception in some quarters that the US fought the war, “with its hands tied behind its back,” not only at the strategic level but at the operational level, as well.¹⁰⁶ Obviously, the operational level limitations reflected strategic level concerns over escalation, which were not ill-founded. In September 1950, US Navy aircraft shot down a Soviet bomber operating near a US carrier task force. The Soviets chose not to react or respond. In November 1951, a Navy patrol aircraft disappeared over the Sea of Japan; it was later learned that it had been shot down by Soviet fighters. In October 1952, Soviet fighters attacked and shot down an Air Force B-29 flying near the northern Japanese island of Hokkaido. In March 1953, Soviet fighters attacked an Air Force reconnaissance plane flying near the Kamchatka peninsula, although it escaped without damage.¹⁰⁷ Admiral Turner Joy, the US Naval commander in the Far East also gave orders to his forces that any unidentified submarine operating near US carriers was to be attacked and driven

¹⁰⁴ MacArthur and Marshall, “Testimony of Douglas MacArthur,” 38.

¹⁰⁵ See discussion of these limitations in November 1950, contained in Robert A. Lovett, “Document 743: The Deputy Secretary of Defense (Lovett) to the Secretary of State,” ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d743>.

¹⁰⁶ Kenneth P. Werrell, “Across the Yalu: Rules of Engagement and the Communist Air Sanctuary During the Korean War,” *The Journal of Military History* 72, no. 2 (April 2008): 451.

¹⁰⁷ James A. Field, Jr., *History of United States Naval Operations: Korea* (Washington: US Government Printing Office, 1962), 395–96.

off by any means available.¹⁰⁸ The risk of error or miscalculation leading to a global general war was constantly on President Truman's mind with good reason.

The military's response to political constraints in Korea

Many military commanders resented the constraints imposed by political leaders. Some thought, as MacArthur did, that war required a commitment to total victory; to limit the means with which commanders could fight amounted to, in MacArthur's inflammatory parlance, "appeasement."¹⁰⁹ Confronted with such constraints, several commanders followed MacArthur's lead: rather than parse the rules with legalistic interpretations, they simply ignored them.

The so-called "air sanctuary" provides the most persuasive evidence of this at the operational level. Despite high-level statements reinforcing the requirement not to pursue Communist aircraft across the Yalu, Werrell argues convincingly that such incursions were routine and frequently encouraged.

One junior pilot recalls that his wing commander briefed his pilots that there would be a court-martial for anyone who violated the Chinese border, yet on that very mission the briefer led a flight of four Sabres deep into China, almost to Mukden, where he destroyed a MiG. After landing, the Colonel asked his wingman where he had downed the Communist fighter, to which the young officer replied, "somewhere around the mouth of the Yalu." The commander responded, "Son, you have a bright future in the Air Force."¹¹⁰

¹⁰⁸ Field, Jr., 395.

¹⁰⁹ On the use of "appeasement," see MacArthur and Marshall, "Testimony of Douglas MacArthur," 41 "Senator, I have my own definition of appeasement that might disagree with yours. I believe when you enter into war, you should use sufficient force to impose your will upon the enemy. The only purpose we have in the Korean conflict is to make the enemy stop his depredations. It isn't his conquest. It hasn't got an ounce of imperialism in it at all. I believe that we do have the power to do so without sacrificing any of our other interests, and I do not believe in doing so that we in the slightest degree prejudice the beginning of another world war. On the contrary, I have said repeatedly I believe that it would have the opposite effect."; On the agreement of other commanders, see generally Stratemeyer, *The Three Wars of Lt. Gen. George E. Stratemeyer: His Korean War Diary*.

¹¹⁰ Werrell, "Across the Yalu," 466.

Other anecdotes collected by Werrell included incidents of F-86 gun camera footage showing engagements against MiG-15's with landing gear extended and parked MiG's visible in the background, or reports of numerous MiG's destroyed on the ground, both at a time when there were no flyable Communist aircraft at airfields in North Korea.¹¹¹ In such cases, the gun camera footage was often destroyed, or a false name and location for the target was created.¹¹² Some pilots approaching Chinese airspace flew low to the water and secured their Identification Friend or Foe (IFF) transponders, in an attempt to avoid US—rather than North Korean or Chinese—radar and violate the policy prohibiting missions in Chinese or Manchurian airspace.¹¹³

Some violations were too egregious to be overlooked, even by sympathetic commanders. Two F-80 pilots were court-martialed for strafing a Soviet airfield in 1950; ironically, this attack appeared to be a genuine error in navigation, rather than an attempt to ignore or circumvent the policy.¹¹⁴ Similarly, an attack by an F-51 on a Manchurian airfield in October 1950 resulted in an investigation and discipline for the offending pilot.¹¹⁵ Such disciplinary responses, however, were almost always initiated in response to high-level pressure from Washington. In the case of the attack on the Manchurian airfield, the commander of Far East Air Forces received an urgent message from the Chief of Staff of the Air Force: “the directives from the Joint Chiefs of Staff and from me are clear and complete as to the necessity of avoiding any violations of the Manchurian or Soviet borders. The probable attack of an F-51 on Manchurian territory as reported by you has had, as you know, the gravest political implications. There must repeat must

¹¹¹ Werrell, 464–65.

¹¹² Werrell, 465.

¹¹³ Werrell, 466.

¹¹⁴ Werrell, 464.

¹¹⁵ Stratemeyer, *The Three Wars of Lt. Gen. George E. Stratemeyer: His Korean War Diary*, 163.

not be any repetition or appearance of repetition of this incident.”¹¹⁶ The attack on the Soviet airfield in Siberia resulted in an even higher-level expression of concern: the Secretary of State recorded in a conversation that, “The Pentagon has sent a very stiff message to General Stratemeyer directing a report within 48 hours, which would be tomorrow night, and, in the event that the bombing did take place, directing that the commanding officer responsible should be removed.”¹¹⁷

Some pilots and commanders engaged in a form of interpretation of the rules, which may have been an early precursor to military legalism. This was particularly true regarding the rules governing “hot pursuit” during the period after Chinese intervention in the conflict: If a US aircraft was engaged in a dogfight south of the Chinese or Manchurian border and the Communist aircraft attempted to withdraw north of the Yalu, US pilots were permitted to continue the engagement in pursuit. (By that point in the war, although there was still concern in Washington that attacking ground targets inside China or the Soviet Union might provoke a Soviet response, the Chinese intervention had already materialized, and so there seemed to be less worry about finishing an engagement with Chinese aircraft in Chinese airspace, so long as it had started in the skies over Korea.) John Glenn, a Marine Corps fighter ace of the Korean war who later achieved fame as an astronaut and legislator, reported that, “you were permitted to go across the Yalu if you were in ‘hot pursuit,’ and what was ‘hot pursuit’ was liberally interpreted.”¹¹⁸ Nevertheless, it is apparent from the deceptive practices described above that

¹¹⁶ Stratemeyer, 160.

¹¹⁷ Dean Acheson, “Document 656: Memorandum by the Secretary of State,” ed. Glennon, John (Government Printing Office, 1976), 1950, Korea, Volume VII, Foreign Relations of the United States, <https://history.state.gov/historicaldocuments/frus1950v07/d656>.

¹¹⁸ Michael J. McCarthy, “Uncertain Enemies: Soviet Pilots in the Korean War,” *Air Power History*, Spring 1997, 39.

many commanders did not feel the need to engage in the creative interpretation of the rules, but preferred to simply disregard them with little reason to fear repercussions.

The most famous example of disregard for the constraints put in place by political leaders occurred at the strategic, rather than at the operational, level. The clash between MacArthur and Truman, which ultimately resulted in MacArthur's firing was a consequence of the General's persistent advocacy for the expansion of the war, including calls to involve Nationalist Chinese forces and to institute a Naval blockade of ports in southern China.¹¹⁹ MacArthur, as previously described, was contemptuous of efforts to limit the authority of the commander once the decision to go to war had been reached. While subordinate enough to sporadically keep Washington informed of his intent, he bristled at any policy that he perceived as limiting his options. His air forces commander, General Stratemyer, recorded the following after a meeting with MacArthur in November 1950—shortly after the Wake Island conference during which President Truman re-emphasized the constraints he had placed on MacArthur:

The gist of General MacArthur's instructions are as follows: Every installation, facility, and village in North Korea now becomes a military and tactical target. THE ONLY EXCEPTIONS ARE: the big hydro-electric power plant on the Manchurian border at Chansi and the hydro-electric plants in Korea. General MacArthur reiterated his scorched earth policy to burn and destroy.... We must not and cannot violate the border; consequently, no part of the bridges from the Manchurian side to the center will be hit.¹²⁰

Such instruction, while just barely respectful of the direction not to expand the war into China, shows little regard for the constraints dictated by Truman regarding the limitation of

¹¹⁹ See generally Eugene M. Emme and Robert E. Osgood, "Limited War: The Challenge to American Strategy," *Military Affairs* 22, no. 1 (1958): 42, <https://doi.org/10.2307/1985485>; See also MacArthur and Marshall, "Testimony of Douglas MacArthur."

¹²⁰ Stratemyer, *The Three Wars of Lt. Gen. George E. Stratemyer: His Korean War Diary*, 258.

civilian casualties. It again demonstrates an interpretation of military necessity that clashes sharply with both policy and international law.

At the strategic level, MacArthur's obstreperousness conflicted even with other senior military commanders. As General Ridgway, who relieved MacArthur after the latter was fired, recorded,

I thought that the President had made it unmistakably clear. His instructions to MacArthur were categoric [sic] (and disregarded in most cases), that he did not want to start World War III. MacArthur had been pressing to attack China, to bring Chinese troops onto the Korean peninsula, and to impose a blockade of the Chinese coast. All of which were war measures.... the President's objectives were very clear. I consulted with the Joint Chiefs on this. For instance, MacArthur wanted to attack targets across the Yalu. Vandenberg, the Chief of Staff of the Air Force, was very much opposed to it. He said, "If we do that now, our losses through attrition, plus combat, will so weaken us that we will not be able to respond or build up for two years thereafter in case something breaks out in Europe."¹²¹

Civilian protections in the face of fears of infiltration

In the summer and early autumn of 1950, as well as in the winter of 1950-51, when US and UN forces were falling back against Communist forces and large numbers of refugees clogged the roads to escape the Communist advances, commanders became deeply concerned that North Korean infiltrators were hiding among the refugees with the intent of penetrating behind UN lines.¹²² These fears were not entirely unfounded: a platoon leader early in the war, for example, recounts a tense confrontation with a sergeant who intended to shoot a civilian

¹²¹ Maurice Matloff, Oral History Interview with General M.B. Ridgway Commander-in-Chief, Far East Command and UN Command, 1951-52; Supreme Commander, Allied Powers Europe, 1952-53; Army Chief of Staff, 1953-55, April 18, 1984, 15, Ike Skelton Combined Arms Research Library Digital Collection,

<http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll11/id/1645/filename/1646.pdf/mapsto/pdf/type/singleitem>,

<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1645/rec/160>.

¹²² Kim, "Forgotten War, Forgotten Massacres—the Korean War (1950–1953) as Licensed Mass Killings," 530.

approaching their position. The platoon leader reported that the sergeant's intent was conditioned by the fact that his troops, by that point, had been shot at by many civilians, and had grenades thrown at them by children, causing the sergeant to view all civilians as a threat.¹²³ Similarly, pilots occasionally recounted receiving heavy fire from columns of what appeared to be refugees, including women and children.¹²⁴ Fehrenbach vividly recounts an episode of a presumed infiltrator in January 1951. Concerned about the risk of infiltrators, a Captain had ordered his platoon to allow no civilians to pass through their roadblock.

A sergeant, a recallee who had had to leave his new business and was understandably bitter about it, said, "Captain, I'm not about to shoot civilians." [The Captain] put hard black eyes on this man. "Sergeant, I realize you're new. We've had experience with this. Some of these 'civilians' have inflicted casualties on us, and unless you want to be killed, you'd better watch it."

One night, while on roadblock guard, the sergeant disappeared. [The Captain] figured some "civilians" had probably thrown his body into the deep snows along the road. In spring, thousands of skeletons were found all over the roadsides of Korea, but few of them could be identified.¹²⁵

The pervasiveness of such anecdotes suggest that at least some North Korean forces likely did try to infiltrate among civilian populations; the actual extent of that infiltration is unclear. What is clear is that US commanders believed the threat to be real and urgent. In response, they adopted a harsh policy of treating civilian refugees as a threat. An Air Force public relations officer related to the press the Fifth Air Force policy regarding civilian refugees: "...if they carry things on their heads, they are women. If they are in white and we haven't seen

¹²³ Col. Dean M Owen, "Project 83-3 Volney F. Warner General, USA Retired" (US Army Military History Institute, 1983), 35, Army Heritage and Education Center.

¹²⁴ Conway-Lanz recounts a single episode recorded in an Air Force history, with the assurance from the pilot that other pilots had experienced similar incidents. SAHR CONWAY-LANZ, "Beyond No Gun Ri: Refugees and the United States Military in the Korean War," *Diplomatic History* 29, no. 1 (2005): 65.

¹²⁵ T.R. Fehrenbach, *This Kind of War: The Classic Military History of the Korean War*, Kindle--50th Anniversary Edition (New York: Open Road Media, 2014), Kindle location 5843-5855.

them change clothes, they are refugees. But if the army reports they are troops in disguise, we strafe them.”¹²⁶

US ground forces gave more brutal direction. On 24 July 1950, the US 1st Cavalry Division issued an order, “No refugees to cross the front line. Fire at everyone trying to cross lines. Use discretion in case of women and children.”¹²⁷ On 25 July, the Eighth Army issued a directive that, “No refugees will be permitted to cross battle lines at any time. Movement of all Koreans in groups will cease immediately. ... There will be absolutely no movement of Korean civilians, as individuals or groups, in battle area or rear area, after the hours of darkness.”¹²⁸ The Eighth Army directed that this edict would be implemented through the distribution of leaflets, and “rigorous” enforcement by uniformed Korean police.¹²⁹ Given the chaos which characterized the Korean roads in July 1950, the direction of the 25th Infantry Division reflected the more common means of enforcement: civilians remaining in the area after leafleting and evacuation were to “be considered as unfriendly and shot.”¹³⁰

Clearly, policies that authorized and required US troops to open fire on civilians are shameful and tragic. What is notable about the policies from the perspective of this analysis, however, is the lack of legalistic justification with which they were developed and carried out. Commanders made little effort to soften or justify what they were doing through legalistic interpretation. In fighting near the Naktong River in southeastern Korea, communications logs

¹²⁶ New York Times 10 January 1951, cited in SAHR CONWAY-LANZ, “Beyond No Gun Ri: Refugees and the United States Military in the Korean War,” 64.

¹²⁷ As cited in Booth, “Prosecuting the Fog of War—Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by US Forces during the Opening Days of the Korean War in the Village of No Gun Ri,” 946.

¹²⁸ As cited in Kuehl, “What Happened at No Gun Ri? The Challenge of Civilians on the Battlefield,” 53.

¹²⁹ Kuehl, 53.

¹³⁰ Booth, “Prosecuting the Fog of War—Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by US Forces during the Opening Days of the Korean War in the Village of No Gun Ri,” 947.

reveal orders such as, “shoot all refugees coming across the river,” or, “any refugees approaching our position will be considered enemy and will be dispersed by all available fires, including artillery.”¹³¹ Confronted with what they perceived to be a severe military threat of infiltrators, commanders were left to exercise their own professional judgment as to how best to deal with the threat. In most cases, their interpretation of military necessity overrode constraints for the protection of civilians. The frequently heartbreaking results were likely only possible in the context of a war where the legitimacy concerns pulled toward less, rather than greater, constraint. Protecting civilians when the adversary is feared to be hiding among them is an area in which the development of military legalism in the years after Vietnam has had a positive effect.

Korean war summary and conclusion: The legacy of the limited war

The policy constraints placed on military commanders by political leaders in the Korean war became routine in subsequent conflicts. At the strategic level, the showdown between Truman and MacArthur was resolved decisively in favor of the civilians’ prerogative to implement constraints in order to achieve policy objectives. As evidence of this, the January 1954 revision to the Army’s principal field manual on operations (FM 100-5), contained the following language for the first time:

Military forces are justifiable only as instruments of national policy in the attainment of national objectives. Since war is a political act, its broad and final objectives are political; therefore, its conduct must conform to policy and its outcome realize the objectives of policy.

Victory alone as an aim of war cannot be justified, since in itself victory does not always assure the realization of national objectives. If the policy objectives are to be realized, policy and not interim expediency must govern the application of military power. Except in the prosecution of war in furtherance of a policy of ruthless annihilation, Army forces most nearly conform to the requirements of

¹³¹ As cited in SAHR CONWAY-LANZ, “Beyond No Gun Ri: Refugees and the United States Military in the Korean War,” 62.

national policy, since Army forces are designed to apply power directly against military power, with minimum damage to civilian populations and economies.¹³²

At the operational level, the verdict on constraints is more mixed: as seen in the case of the air sanctuary, operational commanders showed a willingness to simply ignore rules when they conflicted with their professional assessment of what was required by the military situation. The strategic bombing of North Korean cities (and, later in the war, irrigation dams) shows how much influence the concept of military necessity still carried in professional military circles as compared to constraints emphasizing the protection of civilians.¹³³ The case of refugee protection shows how operational commanders prioritized military necessity over constraints protecting civilians, even when it meant shooting at columns of refugees that included women and children. In the absence of a legitimacy challenge pulling toward greater constraints, little incentive existed to soften or justify such actions by framing them as complying with a given set of rules. Instead, they were accepted as part of the hard calculus of war, the specific expertise of professional military officers.

In the wake of the Korean conflict, many international and domestic commentators asked if international law could do more to limit the impact of war. In 1956, when the US became a state party to the 1949 Geneva Conventions, the Army manual on the law of war was significantly updated for the first time since before World War II, incorporating the guidance of the Conventions.¹³⁴ A 1959 Military Law Review article specifically examined the role of the law of war in limited wars, in light of the updated field manual. The authors recount a debate among international lawyers as to whether, in addition to policy limitations, a more specific set

¹³² Department of the Army, "Field Service Regulations: Operations (FM 100-5)," 1954, 7.

¹³³ On the bombing of irrigation dams, see Robert Jackson, *Air War Over Korea* (New York: Charles Scribner's Sons, 1973), 156.

¹³⁴ Fratcher, "New Law of Land Warfare, The."

of rules might be effective in both achieving the aims of limited war, and minimizing its risk.

Discussing the views of two prominent international lawyers, they conclude

McDougal and Feliciano take issue with this...attitude toward the law of war as being misleadingly simple. They describe this as a view characterized by an... .. over optimistic faith in the efficacy of technical legal concepts and rules, [which] is exemplified in the continued emphasis, evident in much of the contemporary literature of the law of war, on...definitions and formulations and in the common underlying assumption that certain predetermined 'legal consequences' attach to and automatically follow—independently of policy objectives, factual conditions and value consequences as perceived by determinate decision-makers—from such definitions and formulations. The theory McDougal and Feliciano thus deplore is...similar to the 'slot-machine' theory of law exemplified by the great 18th century codification of civil law undertaken under Frederick the Great of Prussia where the final product contained some 28,000 sections. It was the theory of this code that the task of the judge was to determine the facts and then simply fit them into the prepared pattern. It was believed that a perfect and complete system of law could be worked out and published as a set of rules. This assumption that a code could be explicit enough to answer all man's problems was supported in our own tradition by Jeremy Bentham and John Austin. The objective of the code was to preclude the judge from exercising any legislative powers, for the tyranny of the courts was feared more than the mandates of the legislator. The laws of war, however, have never been precise.¹³⁵

The Vietnam war: A crisis of legitimacy leading to military legalism

US involvement in the Vietnam war was limited from its outset. As in Korea, public support for a limited war wavered. Unlike in Korea, the adversary in Vietnam could be portrayed in a positive light, since the North Vietnamese and Vietcong claimed to be carrying on an anti-colonial struggle, first initiated against the French and then continued against the US. Perhaps more importantly, American society had changed in the decade since the Korean war. Trust in government was declining throughout the course of the war; the civil-rights movement saw large-scale protests against government policies over an extended period, and a vocal anti-

¹³⁵ Baldwin, "A New Look at the Law of War," 21.

war movement developed in the US, conducting similar protests even as the war was being fought.¹³⁶ The newly-ubiquitous influence of television gave these social developments even greater voice. Some members of the media were emboldened to act as critics of US policy in Vietnam, and nightly news broadcasts brought images of the war into American living rooms.¹³⁷

The same types of policy limitations seen in the Korean war featured prominently in Vietnam. At the operational level, these limitations were often formalized through the ROE. The policy restrictions created by ROE were frequently seen by commanders as overly restrictive. A study of the air campaign in Laos, for example, cites an average delay of over 4 days between the request to strike a target and receipt of a response.¹³⁸ As in Korea, many commanders confronted with such constraints simply ignored them and paid minimal heed to ROE.¹³⁹

This changed in the wake of the massacre at My Lai. Confronted with demands by Congress to explain how a US officer could claim to be following orders when he killed and

¹³⁶ Pew Research Center for the People and the Press, “Public Trust in Government: 1958-2017,” Pew Research Center for the People and the Press, May 3, 2017, <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>; Michael Mandelbaum, “Vietnam: The Television War,” *Daedalus*, 1982, 157–169.

¹³⁷ Mandelbaum, “Vietnam.” Mandelbaum argues, contrary to conventional wisdom, that the editorial slant of television coverage of Vietnam was not markedly negative. The senior US commander in Vietnam for much of the war disagreed. Westmoreland, General Westmoreland Oral History Vol 2, 56. “The impact of not only the written media, but the photographs that were promoted was substantial. There were no television cameras behind the enemy line, so that was a blackout. But everything that went on that was sensational in Vietnam was shown in living color in the homes of America. The viewers knew nothing different. Those extreme pictures and commentaries became typical. Many reporters in Vietnam sought Pulitzer Prizes and some got them by being negative and criticizing everything that went on. But all competing for sensationalism, many became the lead story on the morning news or in the big newspapers of the country.”

¹³⁸ Cited in Bernard C. Nalty, “The War against Trucks Aerial Interdiction in Southern Laos 1968-1972” (OFFICE OF AIR FORCE HISTORY WASHINGTON DC, 2005), 45. If the request had to be submitted a second time, the delay increased to over 14 days.

¹³⁹ Kinnard’s survey of 173 generals who held command in Vietnam revealed that, prior to My Lai, only one commander in five felt that ROE were rigorously adhered to within their command. Kinnard, *The War Managers*, 54.

ordered the killing of hundreds of unarmed civilians, military leaders pointed to guidance in the ROE about minimizing civilian casualties as evidence that the actions at My Lai violated existing orders.¹⁴⁰ While the ROE did contain such guidance, it had been promulgated principally in support of policy goals related to counterinsurgency, not as a means to ensure compliance with the law of war; the latter was largely assumed as part of military professionalism.¹⁴¹ In the wake of My Lai, ROE assumed a more normative aspect. Violations of ROE became associated with violations of the law of war.¹⁴² When the Department of Defense (DoD) implemented its *Law of*

¹⁴⁰ Investigation of the My Lai Incident, 440–67, 645–713.

¹⁴¹ On the policy goals of ROE, see Maj. Gen. Samuel W. Koster, “Americal Division Combat SOP Vietnam 1968,” August 1968, A-21, Historical Documents, Combined Arms Research library, <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll11/id/1970/filename/1971.pdf/mapsto/pdf/type/singleitem>, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1970/rec/135>. “It is obvious that misdirected or unwarranted artillery fires into areas occupied by noncombatants adversely affect the Government of Vietnam effort to win the people.”; See also the testimony of Colonel Barlow, 11th Brigade Commander (Americal Division), during the Congressional My Lai hearings. Investigation of the My Lai Incident, 774. “We are fully aware of the harm and damage that can be done to our relationship with the Vietnamese people through the indiscriminate application of force. I might mention that we not only are concerned with firing incidents but traffic accidents involving Vietnamese as well, and we take proper punitive action against such individuals when warranted. It is a subject that receives considerable emphasis at all levels of command”; On the assumption of law of war knowledge, see George H. Young, An Oral History of BG George H. Young, interview by E.A. Tivol, 1985, 4, Oral Histories, Army Heritage and Education Center,

<http://cdm16635.contentdm.oclc.org/utis/getdownloaditem/collection/p16635coll26/id/188/type/singleitem/filename/189.pdf/width/0/height/0/mapsto/pdf/filesize/1262688/title/An%20oral%20history%20of%20BG%20George%20H.%20Young>,

<http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/188/rec/13>. “Normally, after the unit had been in-country or the individual had been in-country for a short period of time, he was indoctrinated, he was told, and he did understand the rules of land warfare. And those instances where I did not observe this, I did not obtain this information to my satisfaction, I revisited those units to ensure that corrective action had been taken. And I was pleased that it had been taken.” Young was the Assistant Division Commander for the Americal Division at the time of the My Lai massacre. See also W. Hays Parks, “The United States Military and the Law of War: Inculcating an Ethos,” *Social Research* 69, no. 4 (Winter 2002): 984. “Speaking from personal experience as the senior prosecuting attorney for the First Marine Division during 1968 and 1969, respect for the law of war was a foregone conclusion.”

¹⁴² “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.” Gary D. Solis, *Son Thang: An American War Crime* (Annapolis, Md.: Naval Institute Press, 1997), 59.

War Program in 1974, military lawyers were specifically charged with reviewing plans and ROE to ensure compliance with international law.¹⁴³ Compliance with ROE thus became associated with the baseline honorable conduct required of professionals, in addition to achieving the political goals of policy makers. This marked a significant shift in the military's approach to ROE. It diminished the reliance on the professional judgment of operational commanders—which also diminished the strength of claims of military necessity—and increased the reliance on rules, and on lawyers to interpret those rules.¹⁴⁴ This shift created the conditions necessary for the emergence of military legalism.

Legitimacy and constraint in Vietnam

Vietnam was a conflict in which the US battled for legitimacy. In a volume on limited wars, one author invoked the North Vietnamese leader, Ho Chi Minh, who is said to have remarked “you will tire of killing us before we tire of being killed by you.” The author then summarized the conventional wisdom: “It is now widely accepted that the Vietnam war was lost not in Vietnam, but was lost in the United States where an increasingly hostile public opinion eventually forced the American Government to abandon even its limited objectives. The West has not yet learned how to conduct a war which is watched in living-rooms across the country by the wives and mothers of the men who are fighting it.”¹⁴⁵

US domestic support for the war in Vietnam started out moderately strong: The Gallup poll recorded 64% approval of the war in 1965, and support still hovered around 50% even as

¹⁴³ Department of Defense, “DoD Law of War Program (5100.77)”;

¹⁴⁴ Frederic L. Borch, *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia 1959-1975* (Fort Leavenworth, KS: U.S. Army Command and General Staff College Press, 2003), 121.

¹⁴⁵ John C. Garnett, “Limited ‘Conventional’ War in the Nuclear Age,” in *Restraints on War: Studies in the Limitation of Armed Conflict*, ed. Michael Howard (Oxford: Oxford University Press, 1979), 87. The Ho Chi Minh quote is cited in the same paragraph.

late as 1967.¹⁴⁶ As the war continued, however, public disapproval became stronger, with nearly 60% of Americans believing it was a mistake to have sent troops to Vietnam by 1973.

(Ironically, the war looks worse in retrospect. Polls conducted from 1990 to 2000 found nearly 70% of Americans believed that the war was a mistake.¹⁴⁷) While the disapproval numbers during the war are high, they are no worse than those found during the Korean war.

What distinguished public disapproval for the war in Vietnam from that of the war in Korea were the goals of those who disapproved. In the Korean war, disapproval was largely related to the belief that the US should either be fighting for total victory, or not at all.¹⁴⁸ In contrast, many of those who opposed US involvement in Vietnam tended to believe that the US was fighting an unjust war, and fighting it unjustly.¹⁴⁹ Access to media gave the public protests of those who disapproved greater political weight than it might have had otherwise. General William Westmoreland, the senior US commander in Vietnam observed, “[Congress was] influenced by the propaganda that 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, and we had people on the campuses of this country waving the flag

¹⁴⁶ Poll numbers cited by Alonzo Hamby in Heller, *The Korean War: A 25-Year Perspective*, 170.

¹⁴⁷ Gallup Inc, “The Iraq-Vietnam Comparison,” Gallup.com, accessed March 26, 2018, <http://news.gallup.com/poll/11998/IraqVietnam-Comparison.aspx>.

¹⁴⁸ “Where Americans stood on the Truman-MacArthur dispute closely pointed to how they felt about the war. Translating the parameter estimate for the Truman-MacArthur question in Table 3 into proportions, 70 percent of Truman supporters backed the war in Korea, but only 45 percent of MacArthur supporters did. This was not just a matter of personal choice, but related to the policies on how to pursue the war. Most Americans had a remarkably clear grasp of MacArthur’s plan to enlarge the war and seek a quick end to it, as detailed in a May 1951 Gallup Poll. And they favored his side 2–1 over Truman’s.” Sidman and Norpoth, “Fighting to Win,” 336.

¹⁴⁹ Allen Guttman, “Protest against the War in Vietnam,” *The Annals of the American Academy of Political and Social Science* 38 (March 1969): 56. Guttman also identifies a second group of protesters, who felt that the war was not winnable. This is similar to the critique of those who opposed the Korean war, but differs significantly in that Vietnam protesters did not argue for increased involvement or decreased constraint as a way to achieve victory.

of the enemy and cheering them on. ... There were more people in this country waving the flag of the enemy than were in South Vietnam.”¹⁵⁰

The focus of many protest groups on US conduct in the war resulted in contested legitimacy pulling toward increased constraints, rather than fewer as in Korea. In response, policy-makers implemented increasingly complex constraints, especially on air operations.¹⁵¹ The complex ROE, which seemed to some commanders to prohibit actions that might hurt the enemy, combined with press coverage critical of US policy in Vietnam generally, had an effect on the morale of troops responsible for carrying out the bombing missions. As one history of the air campaign observes,

By 1970, the war presented a tangle of inconsistencies; the United States fought to disengage rather than to win, and rules of engagement imposed strict limits on the use of force for that purpose. No wonder that one squadron commander complained of spending “an inordinate amount of time either defending our involvement in the war or trying to explain away the political restrictions on the use of air power.” He did not consider the young airmen and junior officers who took up his time ‘dissidents in the accepted sense of the word’; instead, he found them ‘highly intelligent and keenly inquisitive’ but ‘confused by the lack of credibility between stated policy and the application of policy as reported in the news media.’¹⁵²

The North Vietnamese proved a savvy enemy in exploiting the contested legitimacy of the war in American society. One of their tactics involved inviting celebrities to visit North

¹⁵⁰ Westmoreland, General Westmoreland Oral History Vol 2, 57–58.

¹⁵¹ See, for example, the rules governing Operation ROLLING THUNDER: “These ROE, recently declassified after the passage of twenty years, may now be discussed in detail for the first time. ROE initially restricted strikes to targets below 20 [deg] N latitude, and prohibited reattacks on targets. South Vietnamese participation was mandatory for all strikes. Air attacks were to be conducted by armed reconnaissance along authorized routes, with attacks on strategic targets - - all of which were assigned JCS target numbers -- authorized only on specific JCS direction. Target selection for these strategic targets was decided at the presidential level, as was the number of sorties to be placed against each target. Attacks against unauthorized targets, to include the antiaircraft network under construction in northeastern North Vietnam, were prohibited.” as cited in Stephen P. Randolph, “Rules of Engagement, Policy, and Military Effectiveness: The Ties That Bind” (AIR WAR COLL MAXWELL AFB AL, 1993), 5.

¹⁵² Nalty, “The War against Trucks Aerial Interdiction in Southern Laos 1968-1972,” 141.

Vietnam and using these visits to advance a ‘David versus Goliath’ narrative that large US forces were heartlessly threatening the small country of North Vietnam.¹⁵³ A photograph taken on one such visit of Jane Fonda, surrounded by young North Vietnamese soldiers, wearing a helmet, and apparently sighting through a North Vietnamese anti-aircraft piece, was particularly effective in polarizing American public opinion.¹⁵⁴ Partly in response to such tactics, and partly due to escalation concerns which echoed those in the Korean war, policy makers were especially sensitive to the damage that could be done by US bombing raids, and imposed significant constraints through ROE as to where and when targets could be bombed.

Traditional constraint in Vietnam: Law, honor, and professionalism

The most significant change to the law of war governing US forces in the period between Korea and Vietnam was the accession of the US to the 1949 Geneva Conventions in February 1956.¹⁵⁵ A revised *Law of Land Warfare* manual was issued in 1956 and remained in force throughout the US involvement in Vietnam, which substantially incorporated the content of the Conventions. In addition to emphasizing the protection of civilians, prisoners of war, and the sick and wounded, the revised field manual markedly curtailed the weight given in previous editions to the concept of military necessity.

¹⁵³ “The air war over the North further created the perception of the world’s richest and most advanced nation prosecuting an aerial bombardment of one of the world’s poorest nations -- fertile grounds for a public-relations disaster that could have dramatic domestic and international effects. This last aspect of the air war generated a deep and abiding concern that the bombing [should] remain clearly within the laws of war, and demonstrate restraint and a visible concern to limit civilian casualties.” Randolph, “Rules of Engagement, Policy, and Military Effectiveness,” 5.

¹⁵⁴ Fonda had been actively involved in the anti-war movement, and in support for veterans groups opposed to the war, before her trip to Hanoi. For her own account of her trip, including the infamous picture of her on a North Vietnamese anti-aircraft battery, see “The Truth About My Trip To Hanoi | Jane Fonda,” accessed March 26, 2018, //www.janefonda.com/the-truth-about-my-trip-to-hanoi/. Fonda argues in this account that she was unwittingly exploited by the North Vietnamese for propaganda purposes. .

¹⁵⁵ Fratcher, “New Law of Land Warfare, The”; Parks and Wilmshurst, “The US and the Laws of War.”

The prohibitory effect of the law of war is not minimized by ‘military necessity’ which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.¹⁵⁶

Training in the law of war among US forces in Vietnam, including training on the provisions of the Geneva Conventions contained in the revised field manual, was uneven. Although formally required, such training was frequently not conducted, or when conducted, focused on the conduct expected of US service members in captivity rather than on the constraints required to protect civilians and noncombatants on the battlefield.¹⁵⁷ While formal law of war training was inconsistent, commanders in Vietnam frequently argued that the dictates of military professionalism relied more on a strong moral grounding in what was right than on the formal legal constraints enshrined in law.¹⁵⁸ As Parks, an infantry officer and lawyer in Vietnam, observed,

¹⁵⁶ Department of the Army, “FM 27-10 The Law of Land Warfare” (Department of the Army, July 1956), 4.

¹⁵⁷ Solis, a Marine officer in Vietnam, recounts his own experience and that of other Marines: “Regulations had long required minimal training in the law of war during initial indoctrination of enlisted personnel, and periodic updating of instruction. Refresher training was required for troops in Vietnam also. But that training, if given, was perfunctory at best. Brig. Gen Mike Riche, who directed the Marine Corps’ Judge Advocate Division in the late 1980’s, was an infantry captain in Vietnam for thirteen months. He received none of the required law of war training (“Zero,” as he put it) nor did his Marines (again: “Zero”). Former Commandant of the Marine Corps P.X. Kelley, who spent two years in Vietnam combat, echoed that neither he nor his men received the training. (“None.”)” Solis, *Son Thang*, 58; On the content of the training, see Parks, “The United States Military and the Law of War: Inculcating an Ethos,” 984. “Law of war training prior to the Vietnam War placed more emphasis on the rights of an American soldier when captured than on his or her obligations toward others, or other compliance with the law of war (see, e.g., Jacobini, 1977).” Parks served as both a Marine infantry officer and lawyer during the war.

¹⁵⁸ “The United States Army is a civilized army, which implies that it has moral standards. Its members are also subject to the Uniform Code of Military Justice, which imposes a domestic legal standard. The more it does from a sense of oughtness, the more likely will customary law follow in the wake of this practice.” Joseph B. Kelly, “Legal Aspects of Military Operations in Counterinsurgency,” *Mil. L. Rev.* 21 (1963): 122.

If I may borrow from my personal experience. I received extensive training on counterinsurgency operations prior to my deployment to Vietnam in 1968. In 1964 I attended a two-week counterinsurgency course. In 1966 I was a student at the Basic School for Marine Corps lieutenants. Prior to departing for Vietnam, I went through mandatory counterinsurgency training within the Second Marine Division at Camp Lejeune, North Carolina. In each location, considerable time was devoted to how to conduct a cordon-and-search operation of a village, including a "country fair," a civic action activity (including dental and health care and feeding) for village citizens while their village was searched for guerrillas or their supplies. Respect for the individual and his or her property was stressed in this block of instruction and in every other aspect of each course. I do not recall hearing that this respect was based on the law of war. It was, of course, but it received emphasis because it was the right thing to do, both morally and operationally, and the way the Marine Corps expected us to conduct ourselves.¹⁵⁹

This emphasis on professional conduct was bolstered at times through the use of the military justice system, often enforcing law of war provisions through the use of the Uniform Code of Military Justice (UCMJ), but framing them in terms of professional conduct. The Staff Judge Advocate to the Commander, US Army Vietnam described one such example in 1968:

In this case a patrol had gone out from the 101st [Airborne Division], and when they got back into base one of the soldiers opened up his pockets and pulled out a couple of ears that he had cut off a VC corpse. Well, his sergeant promptly took them away from him, led him up to the platoon leader, who led him up to company commander. It was reported to USARV [US Army Vietnam], and this happened less than 24 hours after they discovered it, and they give him a field grade Article 15 [A non-judicial punishment procedure empowered to reduce enlisted soldiers in rank and fine them—see Appendix A]. *They called the company together, explained to them what he had done, and how he had disgraced the company. That's how they looked at it in that unit of the 101st. It was just simply something they didn't do.*¹⁶⁰

At times, the emphasis on the professional obligation to 'do the right thing' worked perversely to undermine the faith placed in international law and the Geneva Conventions by US

¹⁵⁹ Parks, "The United States Military and the Law of War: Inculcating an Ethos," 983 (emphasis added).

¹⁶⁰ MG Wilton B. Persons, Project 85-4 Wilton B. Persons, Major General, USA Retired Vol 2, interview by Colonel Herbert J. Green and Colonel Thomas M. Crean, 1985, 258, Box ID: Box Wilton B Persons Paper Box 1 of 2, Army Heritage and Education Center (emphasis added).

forces. A presentation on the law of war in counterinsurgency given during the 1963 Conference of Army Judge Advocates General included the observation that there was a cynical attitude toward the Geneva Conventions among many troops; soldiers believed that US forces could be relied on to behave with decency, regardless of the provisions of the Geneva Conventions, but, “the communists, and rebels in less civilized areas, do just about what they please anyway. So the law is a monstrous joke if the American relies upon it for any protections.”¹⁶¹ This type of attribution bias and appeal to reciprocity is reminiscent of the ‘brittle norm’ against bombing population centers described by Thomas in World War II.¹⁶² The difference is that the requirement to ‘do the right thing’ was now a question of law, rather than a much-weaker norm; as a result, simply ignoring the requirement by invoking military necessity was no longer a viable option.

Rule-based constraints in Vietnam: ROE

Vietnam was the first war in which US forces were widely constrained by formal ROE, in addition to traditional modes of constraint.¹⁶³ These ROE were developed principally to enforce policy goals rather than any law of war considerations, although some policy objectives resulted

¹⁶¹ “The Judge Advocate General’s Conference 9-12 September 1963” (The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia, September 9, 1963), 3–39, Box ID: Judge Advocate General’s School and Corps Collection School Collection 22 May 1945, 1952-1 Jul 1955, May 1963-Jun 1971 Box 2 of 4, Army Heritage and Education Center.

¹⁶² Thomas, *The Ethics of Destruction*, 126.

¹⁶³ Although US forces in the Korean War were governed by rule-based constraints, they were not formally referred to as ROE. According to Martins, the term evolved from a set of “Intercept and Engagement Instructions” issued after the end of the Korean War on 23 November 1954, which Air Force and Navy planners referred to as ROE. The term was formally adopted by the JCS in 1958, though at the time it still applied principally to air and naval forces. MAJOR Mark Martins, “RULES OF ENGAGEMENT FOR LAND FORCES: A MATTER OF TRAINING, NOT LAWYERING,” *Mil. L. Rev.* 143 (1994): 35; The first use the author could find of the term “rules of engagement” dates from November 1944, and was used to describe rules for the identification and engagement of aircraft by infantry forces. These rules were principally concerned with the avoidance of friendly fire, and advanced neither the policy nor the legal aims of modern ROE. McLain, “Standard Operating Procedure XIX Corps,” 21–22.

in an emphasis on conduct consistent with the law of war. Because the policy considerations for air and ground forces often differed, the ROE for air and ground forces differed substantially, as well. ROE for air operations in southeast Asia were often focused on the US domestic policy goal of blunting the anti-war movement by demonstrating that US air operations were limited and restrained, as well as on concerns over escalation of the war, including the possibility of direct Soviet involvement.¹⁶⁴ As a result, ROE for air operations tended to be cumbersome and complex. They defined geographic limitations for aerial bombing, target types, approval authorities, munitions types, and the types of missions on which different armed responses could be employed (reconnaissance missions, for example, differed from strike missions).¹⁶⁵ Ground force ROE, while often still lengthy and more complicated than soldiers desired, were simpler than air ROE.¹⁶⁶ Focused on constraining the use of force within the principles of counterinsurgency, ground force ROE most often placed limitations on the use artillery and tactical air support, as well as on the destruction of civilian property.¹⁶⁷ These limitations were

¹⁶⁴ On the assessment that ROE were focused on domestic concerns over the perceived lack of restraint, see Randolph, "Rules of Engagement, Policy, and Military Effectiveness," 11; On concerns over escalation, see generally Nalty, "The War against Trucks Aerial Interdiction in Southern Laos 1968-1972."

¹⁶⁵ On the complexity of the ROE and the distinction of target types, see the excerpts cited in Martins, "ROE for Land Forces," 37, fn 109; On target types and mission profiles, see Paul W. Elder, "Project CHECO Southeast Asia Report. BUFFALO HUNTER 1970-1972" (PACIFIC AIR FORCES HICKAM AFB HI CHECO DIV, 1973), 34; For examples of target types and munitions limitations, see Nalty, "The War against Trucks Aerial Interdiction in Southern Laos 1968-1972," 47.

¹⁶⁶ Regarding the length and complexity of ground force ROE, Solis reports, "James Webb, author of *Fields of Fire* and Reagan-era Secretary of the Navy, earlier had arrived in Vietnam as a new Marine infantry lieutenant... Webb 'was told to read and sign a copy of the rules of engagement. The document ran seven pages. Some of it made sense, but a lot of it seemed like an exercise in politics, micromanagement, and preemptive ass covering, a script for fighting a war without pissing anybody off.'" Solis, *Son Thang*, 97.

¹⁶⁷ Regarding these limitations, see for example Koster, "Americal Division Combat SOP Vietnam 1968," A-21. "7. MINIMIZING NONCOMBATANT CASUALTIES. It is obvious that misdirected or unwarranted artillery fires into areas occupied by noncombatants adversely affect the Government of Vietnam effort to win the people. Artillerymen at every echelon will plan and conduct fire support in accordance with the following guidelines. (1) Both the military and psychological objective of each operation will be considered. Prestrikes in populated areas, reconnaissance by fire into hamlets, and

normally framed as efforts to assist the South Vietnamese government in retaining legitimacy among their population, rather than as obligations to protect civilians under the law of war.¹⁶⁸

The nature of the insurgency in Vietnam, where enemy forces were frequently indistinguishable from South Vietnamese civilian population, and the US focus on South Vietnamese legitimacy rather than law of war compliance, resulted in a situation in which political approval by South Vietnamese authorities often played a role in the implementation of ground force ROE similar to that played by ‘military necessity’ in justifying bombing tactics in World War II and Korea. Because enemy forces used villages and hamlets as fighting positions, US commanders developed ROE that allowed for their destruction as long as an appropriate South Vietnamese leader (usually a district or province chief) vouched that they were not

poorly selected harassing and interdiction fires are examples of military measures which will be counterproductive. (2) A thorough and continuing program to emphasize both short and long range importance of minimizing noncombatant casualties will be conducted within each artillery unit. Troop indoctrination briefings will be held before each operation to include: location of noncombatants and other friendly forces, measures to prevent mutual interference, safety precautions for fire support, rules of engagement, identification of recognition signals, emergency procedures, and other appropriate matters. (3) The proper employment of artillery will contribute to the prevention of unnecessary damage to lives and property of noncombatants. Fire support of operations should be planned in coordination with province and district chiefs with due regard to security of plans.”

¹⁶⁸ See MACV Directive 525-3 contained in LTG William R. Peers, “Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (U) Vol III: Exhibits. Book I- Directives” (Washington, D.C.: Department of the Army, March 14, 1970), 119, https://www.loc.gov/rr/frd/Military_Law/Vol_III-exhibits.html. “...b. The use of unnecessary force leading to noncombatant battle casualties in areas temporarily controlled by the VC will embitter the population, drive them into the arms of the VC, and make the long range goal of pacification more difficult and more costly. c. The circumstances described above call for the exercise of restraint not normally required of soldiers on the battlefield. Commanders at all echelons must strike a balance between the force necessary to accomplish their missions with due regard for the safety of their commands, and the high importance of reducing to a minimum the casualties inflicted on the noncombatant populace. d. The VC exploit fully incidents of noncombatant casualties and destruction of property by RVNAF, US combat forces, and other Free World military forces. The objectives are to foster resentment against GVN and the United States, and to effect the permanent alienation of the people from the government.”; See also Kinnard, *The War Managers*, 29. “[ROE] applied principally to operations within South Vietnam and came as a result of a compromise between desirable military results and restrictive political and psychological factors. Such measures had as their immediate objectives avoidance of civilian casualties and property destruction by restricting the locations and conditions under which firepower could be applied in South Vietnam. Other restrictions existed on the use of chemical munitions and defoliants.”

friendly, or US commanders believed they had been built by the enemy expressly for use as fighting positions.¹⁶⁹ The concept of political approval expanded to include entire areas within which South Vietnamese authorities were empowered to assert that no friendly forces or civilians were present, freeing US forces to employ firepower without restriction. Senior commanders in Vietnam defined these areas as ‘specified strike zones’ (more commonly referred to as ‘free fire zones’). The Military Assistance Command Vietnam (MACV) directive on the conduct of artillery fire contained the following:

Specified strike zones. (1) Specified strike zones must be approved by GVN/RVNAF [Government of Vietnam/Republic of Vietnam Armed Forces] as appropriate. (2) Unobserved fire may be directed against all targets and target areas located within specified strike zones. ...

Uninhabited areas outside specified strike zones... (2) Unobserved fires may be directed at targets and target areas, other than VC/NVA forces in contact, only after Province Chief, District Chief, Sector Commander, or Subsector Commander approval as appropriate.¹⁷⁰

A particularly problematic practice approved under the ROE was the use of “harassing and interdiction” fires in specified strike zones or areas believed to be uninhabited. Based on the belief that Vietcong guerrillas were using jungle paths to move personnel and equipment, harassing and interdiction fires consisted of periodically firing artillery into such areas without any specific target. The results of such fire missions were not observed (i.e., no US or South Vietnamese forces were present on the ground or in the air to provide feedback as to where the shells struck), so there was no means to validate whether they might have inadvertently struck a civilian target (or any target at all). After visiting delegations from Washington expressed concern about the practice and the inherent risk of civilian casualties, the missions continued but

¹⁶⁹ See the Americal Division ROE dtd 16 Mar 68 contained in Peers, “Peers Report Vol III Book II,” March 14, 1970, 592.

¹⁷⁰ MAC-V Directive 525-18, as contained in Peers, “Peers Report Vol III Book I,” 136.

were re-named as missions against ‘intelligence targets’. In practice, the targeting of missions against ‘intelligence targets’ was just as random as that of harassment and interdiction fires.¹⁷¹

The military’s response to rule-based constraints in Vietnam prior to My Lai

Many military commanders intensely resented the restrictive nature of the Vietnam ROE, driving them to frequently violate or ignore the restrictions.¹⁷² One battalion commander recalled that when he assumed command of a battalion with a reputation for being particularly effective in finding Vietcong, he found a lax attitude toward ROE. “You send the 2nd [Battalion] of the 35th [Infantry Regiment] in there and they’d find [VC where other battalions had failed to do so]. They were experts at it. I don’t want to get into this, but I’ll just tell you that I tightened up the rules of engagement a bit on that battalion.”¹⁷³ A Marine charged with murder

¹⁷¹ See discussion in Kinnard, *The War Managers*, 47; For a discussion of a less random but still troubling version of this practice, see Dennis J. Reimer, *An Oral History of General Dennis J. Reimer, USA (Ret)* Interviewed by Dr. Lewis Sorley, 2000, interview by Lewis Sorley, 2000, 46, Oral Histories, Army Heritage and Education Center,

<http://cdm16635.contentdm.oclc.org/utills/getdownloaditem/collection/p16635coll26/id/60/type/singleitem/filename/61.pdf/width/0/height/0/mapsto/pdf/filesize/4301901/title/Oral%20history%20of%20General%20Dennis%20J.%20Reimer,%20USA%20retired>,

<http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/60/rec/62>. Reimer admiringly describes an artillery commander for whom he worked who pioneered the practice of using a TPS-25 fire-finding radar to detect personnel movement in specified strike zones. This system can detect movement, but offers no insight as to the identity of the personnel who are moving. Once detected, the artillery commander would launch fire missions at the targets because, “they were in an area where there weren’t supposed to be any civilians and so you knew they were enemy.”

¹⁷² As evidence of senior-level concern over this, see, for example, a November 1966 message from COMUSMACV to all US military activities in Vietnam: “Another potentially serious trend reflected in recent reports pertains to disparaging comments concerning restraints on application of firepower. Comments such as ‘the only good village is a burned village,’ are indicative of the trend. Here again, renewed command emphasis on troop indoctrination is necessary to insure that newly arrive [sic] personnel in particular are thoroughly conversant with need for minimizing non-combatant battle casualties, and understand the rationale behind current instructions on this subject.” The message was drafted and released by Maj Gen W.B. Rosson, Chief of Staff of MACV. Contained in Peers, “Peers Report Vol III Book I,” 235–38.

¹⁷³ William J. Livsey, *An Oral History of General William J. Livsey, USA (Ret)*, interview by Michael A. Canavan, 1990, 25, Oral Histories, Army Heritage and Education Center,

[http://cdm16635.contentdm.oclc.org/utills/getdownloaditem/collection/p16635coll26/id/167/type/singleitem/filename/168.pdf/width/0/height/0/mapsto/pdf/filesize/7127334/title/An%20oral%20history%20of%20GEN%20William%20J.%20Livsey,%20USA%20\(Ret.\)](http://cdm16635.contentdm.oclc.org/utills/getdownloaditem/collection/p16635coll26/id/167/type/singleitem/filename/168.pdf/width/0/height/0/mapsto/pdf/filesize/7127334/title/An%20oral%20history%20of%20GEN%20William%20J.%20Livsey,%20USA%20(Ret.)),

<http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/167/rec/15>. Livsey also

for a deliberate assault on civilians in the village of Son Thang testified when asked about ROE, “I remember some officer gave me some publication about a thousand pages long, so I didn’t get through it.”¹⁷⁴ Martins cites Walzer in describing the way in which ROE prohibiting the bombing of populated villages and hamlets were routinely circumvented or ignored.¹⁷⁵ Finally, as Kinnard observes, while senior commanders placed an emphasis on the prevention of war crimes, they did not establish any institutional mechanism to ensure compliance with ROE.¹⁷⁶

Another factor that may have led to a lax attitude toward ROE among some units was the reliance on body count as a measure of effectiveness for US operations. Kinnard relates that, “a high body count was the mark of an effective command—and ...many of the bodies were Vietnamese civilians, killed indiscriminately.”¹⁷⁷ Marlantes powerfully conveys the manner in which pressure from senior officers to inflate body counts led to routine misrepresentation of the number, and at times, the type of persons killed.¹⁷⁸ A battalion executive officer in 1969 observed,

The division was so focused under MG [Major General] Julian Ewell on body count that people were being sent out to rice paddies to dig up graves and count bodies if there was any doubt that they had not been included in the body count. There were just things that were not right and you knew that they were not right. I knew we’d lost our way in terms of our values--and I realized from this experience how important values were to the Army.¹⁷⁹

recounts that this battalion had special playing cards manufactured by the Bicycle Playing Card company to leave on the bodies of slain enemy fighters. “I didn’t like it, but I didn’t change it right away,” p. 36 .

¹⁷⁴ Solis, *Son Thang*, 97.

¹⁷⁵ Mark Martins, “Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering” (The Judge Advocate General School, 1994), Endnotes p. 61, n. 153.

¹⁷⁶ Kinnard, *The War Managers*, 51.

¹⁷⁷ Kinnard, 8. See also discussion of the use of body count for promotion and evaluation, p. 73.

¹⁷⁸ Marlantes, *What It Is Like to Go To War*, chap. 6.

¹⁷⁹ Reimer, *An Oral History of General Dennis J. Reimer, USA (Ret)* Interviewed by Dr. Lewis Sorley, 2000, 48.

While ROE were intensely resented among air commanders, there is less evidence of their widespread violation among air forces than in the case of ground forces. This may be in part because the more detailed rules governing air operations made violations more readily apparent. Additionally, while some air ROE required the participation of South Vietnamese forces, the ability of South Vietnamese political or military leadership to give dispensation for profligate use of firepower, with its obvious potential for abuse, was not a common feature of air ROE as it was for ground ROE. Still, strategic commanders worried that operational commanders were leaning too far forward, especially in strikes against the North Vietnamese air defense network.

Then, on the 21st of March [1972], rather than broadening the authorities [for strikes against North Vietnamese air defenses], Admiral Moorer [Chairman of the Joint Chiefs of Staff] sent a message to Admiral McCain [Commander-in-Chief, Pacific Command] and General Abrams [Commander, Military Assistance Command Vietnam], information to General Lavelle [Commander, Seventh Air Force], implying that recent air strikes against the enemy air defenses may have been outside the protective reaction authorities [ROE allowing US aircraft to strike North Vietnamese anti-aircraft sites that engaged or targeted them]. After referencing the initial 1968 authorities for use of armed escorts to protect reconnaissance aircraft and the various changes to the authority through February 1972, the Admiral said in part:

The increased number of protective reaction strikes since 1 January 1972 has attracted a considerable amount of high level interest here [Washington] and is receiving increasing attention from the press. Although it is recognized that these strikes are directly related to the increasing tempo of enemy air defense activity it is extremely important that such protective reactions be conducted strictly according to current air operating authorities

In view of the extreme sensitivity of this subject and the attention it is receiving, request you insure that all crews are thoroughly briefed that current authority permits protective reaction to be taken only repeat only when enemy air defenses either fire at or are activated against friendly forces.¹⁸⁰

¹⁸⁰ Elder, "Project CHECO Southeast Asia Report. BUFFALO HUNTER 1970-1972," 45.

Fighting an adversary who uses civilians for cover

Another aspect of the war in Vietnam which likely led to a diminished regard for both the law of war and ROE among ground forces was the extent to which Vietcong guerrillas used the civilian population for cover and enlisted civilians in the war effort. As was recounted in Chapter 3, the Vietcong routinely employed women and children as combatants, or to lure US forces into ambushes.¹⁸¹ As in Korea, where US commanders were concerned that North Korean infiltrators were using US respect for civilian protection as cover by hiding among refugee columns, US commanders in Vietnam quickly realized that through tactics such as fighting from populated villages and hamlets, and employing women and children as fighters, the Vietcong were seeking to exploit the US priority to protect civilians.

Press coverage of such tactics differed dramatically between the two wars. In Korea, when US commanders directed their forces to fire on approaching civilians out of fear that they hid enemy forces, press reporting sympathetically characterized the choice faced by US commanders as a tragic dilemma.¹⁸² By the time of Vietnam, however, US popular opinion was

¹⁸¹ Solis, *Son Thang*, 147.

¹⁸² The following account is taken from the 21 August 1950 issue of Life Magazine, as reported by Osborne under the headline, "Report from the Orient: Guns are not enough.": "It is the middle of the night. The regimental staff officers huddle around maps as they track the battle. A field phone breaks into the sounds of distant combat. An officer picks up the phone as a reporter records the discussion in the command post, "Oh, Christ, there's a column of refugees, three or four hundred of them, coming right down on B company." A major in the command tent says to the regimental commander, "Don't let them through." And of course the major is right. Time and again, at position after position, this silent approach of whitened figures has covered enemy attack and, before our men had become hardened to the necessities of Korean war, had often and fatally delayed and confused our own fire. Finally the colonel says, in a voice racked with wretchedness, "All right, don't let them through. But try to talk to them, try to tell them to go back." "Yeah," says one of the little staff group, "but what if they don't go back?" "Well, then," the colonel says, as though dragging himself toward some pit, "then fire over their heads." "Okay," an officer says, "we fire over their heads. Then what?" "The colonel seems to brace himself in the semidarkness of the blacked-out tent. "Well, then, fire into them if you have to. If you have to, I said." The next afternoon a staff officer picks up the phone in the command post. With a broken voice he responds to the report. "My God, John, its gone too far when we are shooting children." As cited in Kuehl, "What Happened at No Gun Ri? The Challenge of Civilians on the Battlefield," 1.

not sympathetic to soldiers confronted with the dilemma of an adversary hiding among civilians. Instead, the introduction to one publication critical of the war began with the statement, “a million children have been killed or wounded or burned in the war America is carrying on in Vietnam.”¹⁸³ Leading intellectuals such as Noam Chomsky characterized the American response to Vietcong tactics as “genocide.”¹⁸⁴ Confronted with popular charges of atrocity, even when they complied with ROE and the law of war, some US forces may simply have decided that compliance exposed them to risk for no discernible gain.¹⁸⁵ A racial component may also have compounded this: a senior Army JAG in Vietnam spoke of the challenge presented by the so-called “mere gook rule”—the perception that any offense (including violations of the law of war) was less serious if the victim was Vietnamese.¹⁸⁶

The crisis of legitimacy: My Lai and its aftermath

On 16 March 1968, troops from 1st Platoon, Company C, 1st Battalion, 29th Infantry Regiment, 11th Brigade, 23rd (Americal) Division entered the village of Son My, known to US forces as My Lai or ‘Pinkville’ and killed between 350 and 500 unarmed civilians, including infants, children, women, and elderly men.¹⁸⁷ Prior to the assault on My Lai, the platoon had

¹⁸³ Benjamin Spock and William F. Pepper, “The Children of Vietnam” (San Francisco: Ramparts, 1967), as cited in Guttman, “Protest against the War in Vietnam,” 61.

¹⁸⁴ Cited in Guttman, 61.

¹⁸⁵ Drawing largely on evidence from the Peers report, Addicott and Hudson suggest that this may have been the case with the US forces involved in My Lai. Jeffrey F. Addicott and William A. Hudson Jr, “The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons,” *Mil. L. Rev.* 139 (1993): 165–73.

¹⁸⁶ Persons, *Persons Interview Vol 2*, 255. Persons spoke of this in the context of the trial of a US officer who was tried for murder after shooting a Vietnamese prisoner. The members of the court martial initially returned a guilty verdict, until informed by the military judge that the charge carried a potential life sentence. Upon learning this, the court martial members (equivalent to a jury) reversed their guilty finding and found the officer guilty of involuntary manslaughter instead, which carried a maximum sentence of three years. No new evidence was presented between the two verdicts. Persons felt that this was an example of the “mere gook rule” at work--the perception among the court martial jury that a US officer did not deserve a life sentence for killing a Vietnamese prisoner, even if the facts of the killing were undisputed.

¹⁸⁷ Although described in many sources, details may be found in the Congressional investigation, *Investigation of the My Lai Incident*; See also LTG William R. Peers, “Report of the Department of the

been briefed that the area was under Vietcong control, and that they should expect heavy resistance. Although they had been led to expect that all civilians would have left the village to go to market by the time of their arrival, when they arrived in the village they encountered women, children, and old men.¹⁸⁸ The platoon commander, First Lieutenant William Calley, initially gave his men the ambiguous order, “You know what to do,” but when some soldiers began to guard the civilians rather than participate in the slaughter, he explicitly told them, “No, I mean kill them.”¹⁸⁹ Calley argued in his subsequent trial that he was obeying the orders of his company commander, Captain Ernest Medina to kill the villagers; Medina disputed this. Medina was tried for murder and found not guilty, while Calley was tried and convicted of multiple counts of murder. Calley was sentenced to confinement to hard labor for life, but his sentence was later twice commuted, first to 20 years, then 10. A petition for habeas corpus was initially granted, resulting in his release, but was subsequently reversed by a higher court. He was paroled after serving a total of just less than four years, much of it under house arrest in a small bungalow on Fort Benning, Georgia.¹⁹⁰

Army Review of the Preliminary Investigations into the My Lai Incident (U) Vol I: The Report of the Investigation” (Washington, D.C.: Department of the Army, March 14, 1970), 2-1 through, https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf; Additional facts for the following account are taken from United States Court of Appeals and Fifth Circuit, “519 F2d 184 Calley v. H Callaway” F2d, no. 519 (September 10, 1975): 184.

¹⁸⁸ Appeals and Circuit, “519 F2d 184 Calley v. H Callaway,” para. 5.

¹⁸⁹ Appeals and Circuit, para. 7.

¹⁹⁰ Appeals and Circuit, para. 2. Calley’s sentence was initially commuted on appeal to 20 years, and then to 10 years in the course of a second appeal. After Calley’s appeals were exhausted and he was ordered dismissed from the service and confined, President Nixon reviewed the case in April 1971, but declined to intervene. Despite many popular reports to the contrary, Calley never received a Presidential pardon. George S. Prugh, Conversations Between Major General George S. Prugh and Major James A. Badami, Volume II, interview by Major James A. Badami, Colonel Patrick A. Tocher, and Colonel Thomas T. Andrews, 1975, VIII 30-38, George S. Prugh Papers Recollections and Reflections: Transcripts of the Debriefing of Major General Prugh by Major James A. Badami, 1975 Box 1 of 2, Army Heritage and Education Center.

The viciousness of the massacre at My Lai and the contention that Calley was following orders would have attracted controversy under any circumstances. The controversy was magnified because the leadership of the Americal Division attempted to cover up the extent and seriousness of the atrocity. A later investigation by the Army conducted by Lieutenant General William Peers found that commanders at every level from company (an Army Captain) through division command (a Major General) had knowledge of the massacre and deliberately set out to “withhold and suppress information concerning the incident.”¹⁹¹ The cover-up provoked an even greater scandal, and also delayed the realization of the full impact of reckoning with My Lai within the military. Although the massacre occurred in March 1968, the Army’s investigation of the cover-up did not conclude until mid-1970; Calley was not tried until late 1970, and his conviction came in March 1971.¹⁹² Congressional hearings into the massacre occurred in mid-1970.¹⁹³

My Lai and the scandal over its cover-up had an immense impact on public support for the war. Telford Taylor, the former chief prosecutor at the Nuremberg Tribunals, published a book critical of the war and suggested that senior US leaders may have been guilty of war crimes by virtue of their failure to prevent or properly investigate and punish the My Lai incident, applying the standard established in the *Yamashita* case.¹⁹⁴ A Gallup poll conducted near the end of Calley’s trial in February 1971 showed a 13% drop in approval of Nixon’s handling of the war from a poll taken six months earlier—the *New York Times* ran six articles on the Calley trial

¹⁹¹ Peers, “Peers Report Vol III Book II,” March 14, 1970, 2–13.

¹⁹² Peers, “Peers Report Vol III Book II,” March 14, 1970; Appeals and Circuit, “519 F2d 184 Calley v. H Callaway”; Investigation of the My Lai Incident.

¹⁹³ Investigation of the My Lai Incident.

¹⁹⁴ Nuremberg and Vietnam: An American Tragedy (Chicago: Quadrangle Books, 1970), as cited in Jordan J. Paust, “My Lai and Vietnam: Norms, Myths and Leader Responsibility,” *Mil. L. Rev.* 57 (1972): 99.

during the period of the poll and the week prior, suggesting that the atrocity was at the front of public consciousness as to how the war was being handled.¹⁹⁵ At the broadest strategic level, as Addicott and Hudson observe,

Aside from the issue of individual culpability for those involved in the massacre, My Lai had a devastating impact on the outcome of the Vietnam War. In particular, because the United States apparently had no grand strategy to win the war, this one atrocity arguably did as much to harm the survival of an independent South Vietnam as any other single event during the Indo-China War. The public revelation of this massacre not only solidified the anti-war movement in the United States, but also cast a pall of confusion and shame over the nation at large. This aura contributed significantly to the eventual abandonment of South Vietnam to the communist forces in the North. Beginning in 1969, a vocal minority of war protesters incorporated the United States soldier into their opposition to the war. For many of these people, the enemy was now the American fighting man—not the communists.¹⁹⁶

The impact of My Lai on the US military was equally profound. During Congressional hearings on the incident, military commanders were repeatedly pressed on what measures they had in place prior to the incident forbidding such conduct. This questioning was especially pointed, given Calley's assertion that he was following orders and the notion of indirect command responsibility as established in *Yamashita*, by which a superior commander could be held accountable for a failure to take "such measures as are within his power and appropriate under the circumstances" to prevent the commission of atrocities by troops under his

¹⁹⁵ Gallup Inc, "The Iraq-Vietnam Comparison"; HOMER BIGART, "Two Doctors Say Calley Lacked Ability to Premeditate Slayings," *New York Times*, February 19, 1971, sec. A 6, ProQuest Historical Newspapers; HOMER BIGART, "TRIAL OF CALLEY RESUMING TODAY: HE IS EXPECTED TO TAKE THE STAND SOON," *New York Times*, February 16, 1971, sec. A 7, ProQuest Historical Newspapers; HOMER BIGART, "SANITY UNIT FINDS CALLEY 'NORMAL': ARMY PANEL RULES ON OFFICER CHARGE," *New York Times*, February 17, 1971, sec. A 8, ProQuest Historical Newspapers; HOMER BIGART, "Psychiatrist Ousted as Calley Witness And All of His Testimony Is Expunged," *New York Times*, February 20, 1971, sec. A 10, ProQuest Historical Newspapers; HOMER BIGART, "Defense Says Calley Regarded Victims as an Enemy," *New York Times*, February 18, 1971, sec. A 10, ProQuest Historical Newspapers; Richard Hammer, "Calley Trial: 'Doctor, Assume the Following to Be True...,'" *New York Times*, February 21, 1971, sec. E2, ProQuest Historical Newspapers.

¹⁹⁶ Addicott and Hudson Jr, "The Twenty-Fifth Anniversary of My Lai," 161 (internal citation omitted).

command.¹⁹⁷ In response to these questions, military leaders cited the ROE. The JAG for MACV offered a typical answer to Congressional questioning about regulations prohibiting actions such as those at My Lai:

In addition, commanders are required to follow published rules of engagement of this headquarters so as to preclude indiscriminate firing or actions which needlessly endanger noncombatants. The rules of engagement apply equally to artillery, tanks, mortars, naval gunfire, riverine forces, and air and armed helicopter support.

In addition, this headquarters has defined in simple terms what war crimes are and specifically stated that all such acts are prohibited and will be punished.¹⁹⁸

While ROE before My Lai did contain language emphasizing the importance of minimizing harm to non-combatants, as discussed above, such language was not focused on compliance with the law of war but with supporting the legitimacy of the South Vietnamese government. North Vietnamese and Vietcong forces benefited from the perception that the South Vietnamese government could not or would not protect civilians from harm. Further, the ROE did not contain a clear prohibition on uses of force that might harm civilians, but instead were crafted to emphasize the importance of judgment and the responsibility of commanders to minimize (as opposed to prevent or avoid) harm to civilians in carrying out military operations. The ROE for the Americal Division (ironically, signed on the very day of the massacre) were typical:

4.d. An unusual requirement is placed on junior leaders to carry out sensitive combat operations, often in an environment where large numbers of civilians are present. The determination of right and wrong in the heat of battle requires a keen, swift, and decisive analysis of all contributing factors and must be based on a thorough understanding of the legal and moral principles involved.

¹⁹⁷ “In Re Yamashita 327 U.S. 1 (1946),” 16.

¹⁹⁸ Testimony of Colonel Williams Investigation of the My Lai Incident, 713.

e. A written set of rules cannot be provided that will apply to every situation. Therefore, the final decision on engagement will be at the discretion of the senior tactical commander present who must consider the mission and the situation as well as his responsibility to minimize both friendly and non-combatant casualties and the destruction of private and public property. In cases where doubt exists concerning application of firepower, the commander will request guidance from higher headquarters. If the commander cannot contact higher headquarters or time does not permit contacting higher headquarters, the commander will take the action he deems appropriate and notify higher headquarters of his decision and subsequent actions as soon as possible.¹⁹⁹

The massacre at My Lai violated these ROE, but to describe the problem with My Lai as a failure on the part of Calley to consider the mission and his responsibility to minimize non-combatant casualties and the destruction of property so grossly understates the magnitude of the crime as to be obscene. General Westmoreland provided a more honest assessment of the extent of regulations prohibiting the type of willful murder committed at My Lai.

There are two matters that we had to deal with. One is the criminal element—the matter of murder—which is also a violation of the Geneva Convention. The Geneva Convention was associated primarily with the killing of prisoners—people in uniform. Every man in Vietnam had a little card, as you remember, you were there, which explained how to handle prisoners. Now, we did not put out orders that you will not commit murder because that is basic to our Judeo-Christian creed, basic to the laws of our land—civil law. It was, basically, acts of murder and a total breakdown in discipline. There were those two matters: the criminal aspect and the breakdown within the command.²⁰⁰

Regardless of whether the ROE were designed to implement law of war restrictions, or criminal law against murder, under questioning from Congress it became clear that, below the level of Westmoreland and his staff, ROE were not a priority. An uncomfortable exchange between Congressman Samuel Stratton (D-NY) and Lieutenant Colonel Jesmond Balmer, the G-3 (Operations officer) for the Americal Division was typical:

¹⁹⁹ “Rules of Engagement for the Americal Division” dtd 16 Mar 1968 in Peers, “Peers Report Vol III Book II,” March 14, 1970, 588–89 (emphasis added).

²⁰⁰ Westmoreland, General Westmoreland Oral History Vol 2, 237–38.

Mr. STRATTON. What instructions did you issue from your headquarters, with respect to operations in which there were going to be civilians involved, and the treatment of civilians?

Colonel BALMER. Many, sir. Rules of engagement would apply, the normal rules of engagement.

Mr. STRATTON. What were they?

Colonel BALMER. Well, we start with a new man coming into the country. In the case of a replacement coming into the Americal Division, during this timeframe, he went through the Americal combat course, conducted right at Chu Lai, in which part of his indoctrination during this 4- or 5-day, period was the proper treatment of prisoners of war, proper means of handling any civilians, noncombatants who fell into the hands of our forces.

Mr. STRATTON. After that, when does one hear about it again? You get a lot of stuff in your initial training? Pretty hard to remember that. What did General Koster [the Division commander] do to keep the troops informed of what the rules and regulations were?

Colonel BALMER. Constant reiteration, emphasis on the importance of the proper handling of prisoners.

Mr. STRATTON. How did he reiterate?

Colonel BALMER. Through his command channels, sir.

Mr. STRATTON. How was it done?

Colonel BALMER. I can't recall it ever being done in writing ...

Mr. STRATTON. How was it done, then, if you were so concerned about it? How did you do it?

Colonel BALMER. Face to face, sir, commander to commander.

Mr. STRATTON. Face to face? Commander to commander?

Colonel BALMER. Yes, sir.

Mr. STRATTON. Well, when was General Koster face to face with Colonel Barker [the Regimental commander] in this operation?

Colonel BALMER. During the operation, I do not know sir; but on his daily field visits to his subordinate commanders.

Mr. STRATTON. He wasn't in on the initial briefing of the operation, was he?

Colonel BALMER. I don't know, sir.

Mr. STRATTON Well, I'm wondering whether there was any face to face—we haven't found much face-to-face confrontation between the commanding general and his subordinate commanders. When did this take place?

Colonel BALMER I cannot, sir, pinpoint times and places.²⁰¹

Stratton's conclusion after cross-examining Balmer and many other officers was both scathing and accurate: "The rules of engagement were clear. [But] I get the impression that the enforcement was actually pretty slim and that nobody really followed this up in great detail."²⁰²

In response, military commanders scrambled to tighten both the ROE and the priority with which they were communicated to subordinate commanders and their troops.²⁰³ Some commanders insisted that they had always emphasized the importance of ROE, and were now re-doubling that emphasis as a result of My Lai.²⁰⁴ The ROE themselves were tightened considerably. For example, the revised ROE in the 11th Brigade after the My Lai incident included the following new provisions:

Throughout the lowlands or populated area within the 11th Brigade TAOR [Tactical Area of Responsibility]:

(a) An individual will not be engaged solely because he is evading.

²⁰¹ Testimony of Lt. Col. Jesmond Balmer Investigation of the My Lai Incident, 467.

²⁰² Investigation of the My Lai Incident, 645.

²⁰³ Testimony of Colonel Williams (MACV JAG) Investigation of the My Lai Incident, 712

"Commanders at all levels are trying to prevent such incidents. This is being done by more careful planning of operations and thorough briefing of troops to insure that rules of engagement are followed." See also the testimony of Major Pauli (Division JAG) with nearly identical language at 758-759.

²⁰⁴ Testimony of Colonel Barlow (11th Brigade Commander, Americal Division) Investigation of the My Lai Incident, 774 "As far as the impact it has had on my operations, let me first state that overall it has had little, if any, impact. We have always operated under rules of engagement which place strict restrictions relative to manner of dealing with civilian noncombatants. Undoubtedly, since the My Lai incident, more stress has been placed on these rules of engagement to preclude any such incidents in the future."

(b) Under no circumstances will an individual be engaged by either individual or crew served direct fire weapons and/or indirect fire weapons unless one or more of the following criteria are met:

- (1) The individual is carrying a weapon.
- (2) The individual is wearing a military uniform clearly identified as enemy. Black pajamas are not a military uniform.
- (3) The individual is moving during the hours of darkness outside of a GVN prescribed populated secure area.
- (4) The individual is observed committing a hostile act against friendly personnel.²⁰⁵

These revised ROE are clearly far more specific and defined than the previous version, which relied on a commander's judgment in applying the principle of minimizing civilian casualties as compared to the well-defined rules of the later revision. This represents a decisive shift in the direction of rule-based constraints. After My Lai, such a shift began to occur throughout the military as lawyers became more involved in the crafting of ROE and other operational decisions.

The legacy of My Lai: an expanded role for lawyers and legal reasoning

One of the interesting aspects of the Congressional hearings into My Lai is the number of lawyers testifying on questions related to ROE. Prior to this point, ROE were a means for policy-makers and strategic commanders to communicate and implement policy constraints. Lawyers played little or no part in their drafting.²⁰⁶ But when the Army pointed to ROE as the primary source of regulations prohibiting a massacre such as that committed at My Lai, ROE took on a legal aspect, as well. Concerns over the potential criminal liability of senior

²⁰⁵ Testimony of Colonel Barlow (11th Brigade Commander, Americal Division) Investigation of the My Lai Incident, 775.

²⁰⁶ See generally the discussion of the role of lawyers in Vietnam contained in Prugh, "Law Practice in the Vietnam War"; George S. Prugh, *Law at War: Vietnam 1964-1973*, Vietnam Studies (Washington, D.C.: Department of the Army, 1991); Borch, *Judge Advocates in Vietnam*.

commanders in the My Lai case pulled lawyers into ROE and operational questions in an unprecedented way.

Even before My Lai, lawyers played an expanded role in the Vietnam war relative to previous conflicts. In part, this was because of the passage of the Military Justice Act of 1968, which required that the accused in all serious court martial cases be represented by an attorney. This resulted in more military lawyers (and more lawyers per soldier) in Vietnam than in World War II or Korea.²⁰⁷ Prior to the passage of the Military Justice Act, about 60-70 military attorneys met the traditional military legal demands of MACV.²⁰⁸ After the passage of the act, the Army declared that it required an additional 401 JAG officers to meet the requirements.²⁰⁹ A substantial number of the new Army JAG's went to Vietnam.

Once in-country, senior JAG's found innovative ways for Army lawyers to contribute to the war effort, in addition to their military justice duties. Then-Colonel George Prugh, in a law review article written at the conclusion of his tour as the Staff Judge Advocate (SJA) for MACV, enthused,

The law tasks, however, have turned out to be much more than the familiar ones associated with the military lawyer in World War II and the Korean war. The military lawyer in Vietnam is involved in a practice that is at once the most exciting, most fluid, most difficult, most satisfying, and most demanding that the profession can offer. To accomplish his tasks he must combine not only skills of the soldier and the journeyman practitioner, knowledgeable in common law, both substantive and procedural, and jurisprudence. He must become fully acquainted with the actual practice of the civil law. He must strive to fill the role of a diplomat, a political scientist, a sociologist, an educator, and a salesman.²¹⁰

²⁰⁷ According to Borch, an armored division of 11,000 soldiers in World War II was served by a single judge advocate. Borch, *Judge Advocates in Vietnam*, 120; According to Solis, after the passage of the Act, the First Marine Division had 26 Marine Captain attorneys assigned. The lawyer captains in the Division outnumbered captains serving as infantry company commanders. Solis, *Son Thang*, x.

²⁰⁸ Prugh, "Law Practice in the Vietnam War," 147.

²⁰⁹ Borch, *Judge Advocates in Vietnam*, 50.

²¹⁰ Prugh, "Law Practice in the Vietnam War," 148.

In particular, Prugh pioneered a role for military lawyers in assisting the South Vietnamese government in establishing rule of law programs.²¹¹ He quickly grasped that the counterinsurgency campaign required the development of a credible and respected South Vietnamese judicial and legal system. He worked extensively with Vietnamese counterparts to bolster rule of law and enhance the credibility and transparency of the Vietnamese judicial system, as well as visiting Vietnamese prisons, and working with Vietnamese law enforcement officials to improve the standards of fairness, transparency, and accountability.²¹² While these roles were not operational in the sense of influencing targeting, ROE, or other elements commonly associated with operational law today, they represented a novel departure from the previous role of military lawyers as principally concerned with military justice, claims, and administrative law.²¹³ As Prugh observed, “every Staff Judge Advocate should ask two questions: What should I do to keep my command obedient to the law? What can the law do to further the mission of the command? In Vietnam, the second question kept us the busiest.”²¹⁴

²¹¹ Prugh, *Law at War*, 13.

²¹² Prugh, 22–27, 45,49.

²¹³ A 1939 Army manual defined the duties of the JAG, which did not change substantially in World War II or Korea, except for a larger role in investigating and documenting enemy war crimes. Judge Advocate General’s Department, “Army Extension Courses Special Text No. 294: Staff and Logistics” (Judge Advocate General of the Army, 1939), 42, JAG School and Corps Collection School Collection 1939-1 Dec 1943 Box 1 of 4, Army Heritage and Education Center. “The duties of the judge advocate are to advise the commander other members of the command in proper cases, on questions of law, to supervise the administration of military justice within the command, and to review and make recommendations as to action to be taken upon the proceedings of military courts. The judge advocate of a command is the legal adviser of the commanding officer thereof. The scope of his duties includes the legal phases of the business, property, and financial operations under the jurisdiction of the commanding officer of that command, and the legal phases of military disciplinary action thereon. The last mentioned duties include those specifically set out in Article of War numbered 36, 46, and 70. His connection with the subject of military tribunals in time of war or domestic disturbances includes provost courts and military commissions, and legal questions relating to claims and relations of the civil population which may arise in enemy territory or be incident to hostilities or domestic disturbances.”

²¹⁴ As cited in Borch, *Judge Advocates in Vietnam*, 27.

The expanded role of JAGs in Vietnam, combined with the legal liability concerns that now arose from questions of whether ROE fully satisfied the requirements of international law for commanders to take reasonable measures for the prevention of war crimes, paved the way for a greatly expanded JAG role in the review of operational plans and ROE. In 1972, as the after-effects of My Lai were being processed by all of the services, Waldemar Solf, a retired JAG Colonel then serving as head of the International Affairs division on the staff of the Army Judge Advocate General, recommended the creation of a law of war program for all of DoD, with the Judge Advocate General of the Army as the lead organization for implementation.²¹⁵ Solf's recommendation was approved, and in November 1974, the DoD formally launched its *Law of War Program*. Among the explicit requirements of the program were ensuring that all ROE were consonant with the law of war.²¹⁶ The Joint Chiefs of Staff (JCS) implementing direction for the law of war program required the legal counsel to the Chairman to review all operations plans. As Borch noted,

A few perceptive Army lawyers realized that this meant judge advocates must review all operations plans, concept plans, rules of engagement, execution orders, deployment orders, policies, and directives to ensure compliance with the Law of War, as well as with domestic and international law. These same military

²¹⁵ Borch, 54; Solf's background may have pre-disposed him to advocate for an expanded operational role for JAG's. Although a lawyer, he served as an artillery officer in World War II. From 1963-1965, while assigned to US Strike Command, he served as both the Staff Judge Advocate and the Civil Affairs officer. This arrangement reflected the preferences of the Commander of Strike Command, General Paul Adams, who had commanded US forces in Lebanon in 1956 and had found that his civil affairs officer was too oriented to a World War II-style occupation role, rather than a cooperative role with allies, and so fired his civil affairs officer and replaced him with his SJA. Adams continued this arrangement at Strike Command, drawing Solf into operational issues in a manner similar to what Prugh had done while SJA at MACV. Solf, Solf Oral History, 52-53.

²¹⁶ Department of Defense, "DoD Law of War Program (5100.77)," 5. "The Joint Chiefs of Staff will: 1. Provide guidance to the commanders of unified and specified commands conforming with the policies and procedures contained in this Directive. 2. Insure that a primary point of contact in the Organization of the Joint Chiefs of Staff is designated to handle actions concerning activities under the provisions of this Directive. 3. Issue and review appropriate plans, policies, and directives as necessary in consonance with this Directive. 4. Insure that rules of engagement issued by unified and specified commands are in consonance with the law of war."

lawyers also recognized that this could best be accomplished if judge advocates were integrated into operations at all levels, and while Army lawyers were not routinely to perform non-legal duties, effective integration would sometimes require judge advocates to take on non-legal tasks.²¹⁷

The requirement to submit operational plans and ROE for legal review was a substantial shift from the traditional reliance on military professionalism and honor to ensure compliance with international law. The new requirement forced military officers to begin to think differently about how they would justify uses of force. Where commanders in World War II, Korea, and Vietnam before My Lai had thought first about questions of professional judgment and military necessity, commanders in the post-My Lai US military had a new requirement to place legal considerations on an equal footing with previous professional considerations.

Vietnam summary and conclusion

For purposes of analyzing the roots of military legalism, the Vietnam war can be divided into two periods: Before My Lai, and after. Prior to the scandal caused by the massacre, cover-up, and subsequent investigations, many military officers in Vietnam approached rule-based constraints on the use of force much in the same way they had in Korea—with minimal, grudging compliance, and frequent violations. Although the US accession to the Geneva Conventions, and the revised *Law of Land Warfare* manual that incorporated its requirements, reduced the reliance that could be placed on military necessity as a justification for violating constraints, the ability of South Vietnamese military and political leadership to approve strikes by asserting that no friendly forces or civilians were present in an area provided a mechanism that gave similar flexibility to operational commanders. The emphasis on minimizing harm to civilians contained within the pre-My Lai ROE clearly stemmed from the imperative of preserving South Vietnamese legitimacy, rather than from a law of war requirement.

²¹⁷ Borch, *Judge Advocates in Vietnam*, 121.

After My Lai, ROE changed to provide a much greater level of specificity in who could be engaged by US forces, when, and why. These tightened rules effectively made the protection of civilians a baseline assumption, rather than one consideration among many in planning and conducting military operations. The transition to post-My Lai standards was not abrupt, in part because the cover-up of the incident delayed the realization of the full impact throughout the force.

The reliance on ROE by commanders seeking to prove that their actions met the legal standard established in *Yamashita* for taking “reasonable measures” to prevent the commission of war crimes, resulted in ROE developing a legal character after My Lai, which they had never previously enjoyed. This legal imprimatur was institutionalized by the implementation of the DoD law of war program. The JCS requirement for legal review of operations plans expanded the role of law and legal reasoning in military operations. As a consequence, law and legal reasoning assumed a place alongside traditional military professionalism in guiding the decisions of professional military officers regarding the use of force.

Overall summary: the roots of military legalism

This chapter has examined three conflicts in order to illuminate the roots of military legalism. Developments in each of the three conflicts created conditions without which military legalism would have been unlikely to emerge.

The examination of World War II revealed the challenges of a traditional view of constraint based on honor, chivalry, and professional military judgment, especially when balanced against the dictates of military necessity. The tribunals that followed World War II established a new standard of individual accountability for conduct in war, even when such conduct was taken in obedience to superior orders. The standard of direct responsibility

established in the Nuremberg trials created a distinction between routine orders, which should normally be followed without the requirement to scrutinize them for legality, and manifestly unlawful orders, which a person of ordinary sense and understanding would know to be unlawful under the circumstances, and the obedience of which provided no defense against war crimes charges. This standard endures today. The standard of indirect command responsibility for the prevention of war crimes established in the Pacific theater was more sweeping; although not as broadly accepted as the Nuremberg standard, it was sufficient to create concern among senior commanders about their potential legal liability in the aftermath of My Lai. Finally, the 1949 Geneva Conventions created a new international legal standard for the protection of civilians in war, and diminished the reliance that could be placed on military necessity to justify brutal acts in war.

The Korean war saw the introduction of rule-based constraints on the use of force, in order to prevent the escalation of the war into a general global war. Many commanders perceived these constraints as an unwarranted intrusion on their professional expertise and an insuperable obstacle to victory. They often ignored the rules at both the operational and strategic level. At the strategic level, this culminated in a showdown between President Truman and General MacArthur in which MacArthur was fired. The primacy of political objectives over military judgment was subsequently enshrined in Army doctrine.²¹⁸ The rule-based constraints

²¹⁸ As an aside, the relationship between political and military goals described in the 1954 FM 100-5 (note 132, supra) closely resembles the relationship emphasized in modern scholarship on Clausewitz. MacArthur's interpretation (see notes 84, 109, supra) more closely resembles the interpretation of Clausewitz offered by Liddell-Hart. See Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret, Indexed (Princeton, New Jersey: Princeton University Press, 1984), bks. 1, Section 27. Modern scholars, such as Paret, Handel, and Howard, would emphasize the following passage: "First, therefore, it is clear that war should never be thought of as something autonomous, but always as an instrument of policy; ...this way of looking at it will show us how wars must vary with the nature of their motives and of the situations which give rise to them." The first, the supreme, the most far-reaching act of judgment that the statesman and commander must make is to establish by that test the kind of war on

first employed in the Korean war later developed into the ROE that were pervasive in Vietnam. In their original form, ROE were almost exclusively instruments of policy, essentially devoid of legal or normative content.

The US military reaction to the My Lai massacre in Vietnam saw the confluence of rule-based ROE, as first seen in Korea, and the legal standards of personal accountability established after World War II. Prior to My Lai, ROE in Vietnam were used principally to enforce policy limitations, including a sensitivity to civilian casualties stemming both from domestic opposition to the war and the dictates of counterinsurgency. Army officers pointed to ROE provisions that emphasized the need to minimize civilian casualties when questioned by Congress as to what regulations were in place to prohibit a massacre like My Lai. As a result, ROE took on a more normative aspect after My Lai than they had assumed before. Army lawyers, already accustomed to playing a larger operational role in the Vietnam conflict than they had in previous wars, took the review of ROE as part of their purview, along with improving the education of troops and commanders on the law of war. The DoD *Law of War Program* formalized this responsibility, and the implementing instructions expanded the scope of the legal role.

In Chapter 3, it was argued that military legalism developed in the US when the legitimacy of US conflicts was contested and policy-makers implemented a rule-based regime of constraints on the use of force in an effort to re-capture legitimacy (or at least have awareness of and the ability to influence military actions that would be likely to generate outrage and further contest legitimacy). Military officers operating under this regime of rule-based constraints are likely to adopt military legalism because it offers two significant benefits: First, policy-makers are likely to perceive military advice framed in the context of how it complies with the rules they

which they are embarking; neither mistaking it for, nor trying to turn it into something that is alien to its nature".

have established as responsive to their direction, while advice framed in the context of military professionalism may be perceived as arcane and unresponsive. Second, when military action is framed in terms of its compliance with rules that have been reviewed for legal compliance, the military benefits from increased trust and prestige by virtue of emphasizing the measured, disciplined, and constrained nature of US military action. (More cynically, responsibility for action that has negative effects is also diffused.)

In the evolution of constraints and judgment from World War II, through Korea, to Vietnam, the foundations of each of these elements may be seen. They come together for the first time in the period after My Lai, where the legitimacy of the US war effort is contested, and rule-based constraints are endowed with the normative legitimacy benefits of compliance with international law. The next chapter will examine two post-Vietnam conflicts, in order to evaluate whether military legalism develops under these circumstances, as expected.

Chapter 5: Legalism in wars big and small

Policy is certainly more malleable than law...However, invoking LOAC [law of armed conflict] principles as the default regulatory foundation for all military operations is a key component in ensuring successful operational execution.

Corn, et al. The Law of Armed Conflict: An Operational Approach¹

This chapter examines two post-Vietnam conflicts to look for evidence of military legalism: The intervention of US Marines in Beirut from 1982-1984, and the initial stages of Operation IRAQI FREEDOM (the US invasion of Iraq) from 2003-2004. The Marine mission in Beirut was the first significant US military action to occur after the Vietnam war. It was a relatively small operation conducted in the context of the Cold War competition with the Soviet Union, and although it was described at the time as a peacekeeping mission, it featured both political limitations and adversary tactics similar to those encountered in counterinsurgency. The invasion of Iraq in 2003-2004 was the largest US military action since the terrorist attacks of September 11, 2001 and involved major combat operations against both conventional forces and insurgents. Together, these cases help to establish the extent to which military legalism may be influenced by the size of the conflict, the type of combat, and the international security environment.

In Chapter 3, it was argued that military legalism developed in the US military because of the confluence of the contested legitimacy of US wars and the implementation of regimes of rule-based constraints on the use of force by policy-makers. When the legitimacy of a US conflict is contested, policy-makers are likely to implement rule-based regimes of constraint on

¹ Geoffrey S Corn et al., *The Law of Armed Conflict: An Operational Approach*, Aspen Casebook (New York: Wolters Kluwer, 2012), 129.

the use of force in an effort to re-capture legitimacy (or at least have awareness of and the ability to influence military actions that would be likely to generate outrage and lead to further contests to legitimacy). Military officers operating under regimes of rule-based constraints are likely to adopt military legalism, in part because it satisfies the expectations of policy-makers who have formulated the rules, and in part because it satisfies institutional preferences (enhancing the military's legitimacy and diffusing responsibility for failure). Chapter 4 demonstrated the development of the conditions necessary for military legalism to emerge.

The examination of the conflicts in Beirut and Iraq in this chapter will test this explanation by focusing on the legitimacy of the conflicts in question, the regime of constraints put in place by policy-makers, and the degree to which those constraints were related to legitimacy concerns. It will look for evidence that operational-level military commanders operating under a regime of constraints adopted a legalistic approach to the interpretation of rules governing their use of force. In particular, evidence of rule-formalism and advocacy on the part of operational commanders will tend to confirm the thesis of this dissertation, that military legalism plays an increasing role in how professional US military officers make decisions regarding the use of force.

Unlike the previous chapter, the scope of the two conflicts discussed in this chapter is small enough that a brief summary will precede the analysis in each section. Particularly in the case of Iraq, these summaries will also help to establish the boundaries of the analysis.

Beirut: Early military legalism in a limited conflict

The intervention in Beirut from 1982-1984 was the first US military action in which clear evidence of military legalism is present. The Marines' mission in Beirut was characterized by many of the challenges that have bedeviled US military operations in the late-20th and early-21st

Centuries: Despite being a highly capable and professional military force, US Marines seemed to be rendered powerless by a combination of crippling political restrictions, an adversary who exploited US respect for civilian lives as a means to get close to and attack US forces, and a frustrating lack of clarity about a mission that evolved without any formal debate or change in the authorities given to and restrictions placed on the Marines. Defense Secretary Caspar Weinberger formulated his famous ‘Weinberger doctrine’ in the wake of the Beirut experience. In it, he advocated six conditions for the employment of US military force:

1. US troops should only be used in defense of a vital interest of the US or its allies.
2. Military force should be employed only when there is a wholehearted commitment to victory.
3. The political and military objectives of a US military operation should be clearly defined and the troops should be given the means to achieve them.
4. The size and composition of the force in relation to the political and military objectives should be reviewed and adjusted as required.
5. US forces should only be committed when there is reasonable assurance of public support.
6. US troops should only be sent in as a last resort.²

Each of these conditions may be traced back, directly or indirectly, to a failure in the planning and execution of the Beirut mission. Many of Weinberger’s conditions echo MacArthur’s position on the use of force in Korea (explained in the previous chapter), that once the decision to use military force is made, few constraints should be placed on the military in their pursuit of victory.

Operating under a regime of restrictive rule-based constraints derived from the peacetime rules governing the use of force in self-defense, both policy-makers and operational military

² Robert L. Sloane, “Introduction,” *Small Wars & Insurgencies* 1, no. 2 (August 1990): 95–96, <https://doi.org/10.1080/09592319008422947>.

commanders in Beirut engaged in interpretations of the rules to justify actions they felt were required by the mission. Military commanders were often more restrictive than policy-makers in their interpretation of the rules. Whether advocating for more or less freedom of action, both operational military commanders and policy-makers displayed evidence of rule-formalism and advocacy, the hallmark characteristics of military legalism.

A brief history of the Marines in Beirut 1982-1984

The story of the US intervention in Beirut in the early 1980's begins on June 6, 1982, when Israeli forces crossed the border into Lebanon with the stated intent of stopping attacks by Palestinian Liberation Organization (PLO) forces in Lebanon on Israeli villages.³ Lebanon had been embroiled in a civil war since 1975, and had become a haven for militias, foreign fighters, and terrorists. As one report stated,

[Lebanon] is a country beset with virtually every unresolved dispute afflicting the peoples of the Middle East. Lebanon has become a battleground where armed Lebanese factions simultaneously manipulate and are manipulated by the foreign forces surrounding them. If Syrians and Iraqis wish to kill one another, they do so in Lebanon. If Israelis and Palestinians wish to fight over the land they both claim, they do so in Lebanon. If terrorists of any political persuasion wish to kill and maim American citizens, it is convenient for them to do so in Lebanon.⁴

The Israeli invasion, Operation Peace for Galilee, encountered military success beyond the Israelis' expectations. Within three days, Israeli forces had moved past their stated objective of a creating a 40-kilometer security zone from the Israeli border and were on the outskirts of

³ The overall chronology of the Marines' presence is described in several sources. This brief overview draws principally from Eric Hammel, *The Root: The Marines in Beirut August 1982-February 1984* (San Diego, New York, London: Harcourt Brace Jovanovich, 1985); Long Commission, "Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983" (Washington, D.C.: Department of Defense, December 20, 1983); Benis M. Frank, *U.S. Marines in Lebanon 1982-1984* (Washington, D.C.: History and Museum Division, Headquarters, US Marine Corps, 1987).

⁴ Long Commission, "Long Commission Report," 22.

Beirut. Within a week, they had linked up with Lebanese Christian Forces in East Beirut. By June 25 they had encircled the city.⁵ The rapid military success seemed to offer the Israelis the opportunity not only to eliminate the threat posed by the PLO to northern Israeli villages, but perhaps to seriously degrade or even eliminate the PLO itself as a fighting force.⁶ US Marines on a routine deployment to the Mediterranean conducted a successful evacuation of US citizens from Lebanon on June 29.⁷ In July, Israeli military forces entered the PLO stronghold of West Beirut, engaging in difficult and bloody house-to-house fighting which lasted for weeks and took a terrible toll on civilians. Israeli casualties were also high. International public opinion—most especially that of the US, which had been guardedly sympathetic to the stated goal of reducing the PLO threat to Israel—began to shift against the Israelis as civilian casualties mounted.⁸ By August, both the Israelis and PLO leader Yasser Arafat were interested in finding a way to end the violence and reduce the negative publicity. US special envoy Ambassador Philip Habib was instrumental in negotiating a cease-fire and the evacuation of the PLO from Beirut under the protection of a multinational force, comprised of French, Italian, and US forces.⁹

The US contribution to this force, which came to be known as the first multinational force (MNF-1), was about 800 Marines from the 32nd Marine Amphibious Unit (MAU), the same unit which had conducted the non-combatant evacuation in June.¹⁰ The Marines had been kept on-call since the June evacuation, and had been involved in the planning between Habib and the US European theater commander, General Bernard Rogers, regarding the terms of their potential

⁵ Long Commission, 29; Weston D. Burnett, “Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra,” *Mil. L. Rev.* 107 (1985): 152.

⁶ Hammel, *The Root*, 14.

⁷ Long Commission, “Long Commission Report,” 29.

⁸ Hammel, *The Root*, 14–15.

⁹ Frank, *U.S. Marines in Lebanon 1982-1984*, 10–12; Hammel, *The Root*, 15–17.

¹⁰ Frank, *U.S. Marines in Lebanon 1982-1984*, 12.

involvement, including the rules governing use of force. Because the Marines' mission was peacekeeping rather than combat, the standing peacetime ROE provided the starting point for these rules and were adopted with few modifications.¹¹ On August 24, the first Marines went ashore in the Beirut port, where they were to provide direct security for the sea evacuation of PLO fighters and their families. The evacuation, though fraught at times, was extremely successful. The movement of PLO fighters and their families lasted approximately a week and the last ship departed on September 1. By September 10, the Marines re-deployed to their ships. French and Italian forces left at about the same time. The mission of MNF-1 was successful and complete.¹²

Within days of the departure of MNF-1, the situation in Lebanon deteriorated sharply. Lebanese President-elect Bashir Gemayel, a popular Christian Phalange politician, was killed when a car bomb exploded at his party headquarters on September 14.¹³ On September 16, Phalangist militiamen entered the Palestinian refugee camps at Sabra and Shatila, which were guarded by Israeli forces. The Phalange militia killed between 800 and 2,400 people in the camps over the next two days. Israeli forces were alleged to have been complicit in the carnage; at the very least, they did nothing to stop it.¹⁴ The assassination of Gemayel and the massacres at the camps threw Beirut into turmoil. Shocking images of the atrocities at Sabra and Shatila generated international pressure for action. On September 20, President Reagan announced that, in consultation with French and Italian leaders, a decision had been reached to form a new

¹¹ Of particular note, Frank mentions that, under peacetime ROE, the Marines did not have magazines inserted in their weapons when they went ashore for MNF-1. Frank, 17.

¹² Long Commission, "Long Commission Report," 29; Hammel, *The Root*, 29; Frank, *U.S. Marines in Lebanon 1982-1984*, 21.

¹³ Long Commission, "Long Commission Report," 29.

¹⁴ Burnett, "Command Responsibility at Shatila and Sabra," 159. The subsequent Israeli investigation estimated the death toll at 800. The International Committee for the Red Cross estimated 2,400.

multinational force (MNF-2) in order to, “facilitate the restoration of Lebanese government sovereignty and authority, thereby bolstering its efforts to ensure the safety of persons in the area and bring an end to the violence.”¹⁵ The US Marines went back ashore in Beirut on September 29.

The haste with which MNF-2 was formed contributed to a lack of clarity as to its exact mission. As journalist Larry Pintak observed, “when the men of the Thirty-Second Marine Amphibious Unit (MAU) splashed ashore at the beach opposite Beirut International Airport on September 29, 1982, they were coming not to fight a war, but to administer first aid to a diplomatic black eye.”¹⁶ President Reagan’s letter to Congress explaining the Marines’ mission described them as an “interposition force” between Israeli forces and the populated areas of Beirut, and also indicated that they were to assist the Lebanese government and armed forces to restore sovereignty.¹⁷ The mission statement provided by the Joint Chiefs of Staff to the theater commander (USCINCEUR) read,

To establish an environment which will permit the Lebanese Armed Forces [LAF] to carry out their responsibilities in the Beirut area. When directed, USCINCEUR will introduce US forces as part of a multinational force presence in the Beirut area to occupy and secure positions along a designated section of the line from south of the Beirut International Airport to a position in the vicinity of the Presidential Palace; be prepared to protect US forces; and, on order, conduct retrograde operations as required¹⁸

¹⁵ Investigations Subcommittee of the House Armed Services Committee, 98th Congress, “Adequacy of U.S. Marine Corps Security in Beirut” (Washington, D.C.: United States Congress, December 19, 1983), 25.

¹⁶ Larry Pintak, *Beirut Outtakes: A TV Correspondent’s Portrait of America’s Encounter with Terror* (Lexington, MA, Toronto: Lexington Books, 1988), 75.

¹⁷ President Reagan letter to Congress, dtd 29 September 1982, as cited in Pintak, 82.

¹⁸ Long Commission, “Long Commission Report,” 35.

Much has been made in subsequent analyses of the mission to provide ‘presence.’ ‘Presence’ is not a mission defined in any Department of Defense references.¹⁹ Korbani captures a common critique in an observation by a former Pentagon desk officer that, “there was no definite objective....Secretary Weinberger and Chairman of the Joint Chiefs of Staff General [Vessey] were asking the following questions: What are the objectives? How do you plan to get out of this, and when do you plan to get out of it? How do we avoid being entangled in the Lebanese political situation?”²⁰ At the very least, the mission was interpreted differently by different levels of the chain of command.²¹

The presence mission, along with the direction to provide an interposition force between the Israelis and the populated portions of Beirut, drove the location of the Marines at the Beirut International Airport. Tactically, the location was undesirable. The airport sat on low ground, commanded by the Shouf Mountains which were occupied at the time by Israeli forces. The airport also sat along roads used as supply and patrol routes by Israeli, Lebanese government, and local militia forces, which increased the likelihood of interaction between the Marines and the contending forces, as well as the likelihood that the Marines would be caught in crossfire between them. According to the commander of the 32nd MAU at the time, Colonel James Mead, he was directed to assume the position at the airport in order avoid the perception that the Marines were protecting Israeli forces in the Shouf.²²

¹⁹ See, for example Brian Michael Jenkins, “The Lessons of Beirut: Testimony Before the Long Commission” (Santa Monica, CA: RAND Corp, February 1984), 5–6; Long Commission, “Long Commission Report,” 5–6, 35–44; See also Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms: With the NATO, CENTO, and IADB Glossaries Incorporated* (Washington, D.C.: Government Printing Office, 1979).

²⁰ Agnes G. Korbani, *US Intervention in Lebanon, 1958 and 1982: Presidential Decisionmaking* (New York, Westport, Connecticut, London: Praeger, 1991), 90.

²¹ Long Commission, “Long Commission Report,” 5.

²² “When you go in, you want to take the high ground, right? So that’s another thing. Man, I’m going to take the high ground. And this guy is never going to be known for a Dien Bien Phu shot. I’m too smart;

Although the number of Marines present in Beirut remained constant throughout the MNF-2 mission at about 1,200, the units providing the presence rotated periodically. This was due to the fact that the mission was fulfilled by the MAU assigned to the US Navy's Sixth Fleet, which did not have permanently assigned forces. Instead, ships and Marines deployed to the Sixth Fleet from the East Coast of the United States on a notional six-month cycle, resulting in approximately four or five months of on-station time for each unit. The duration of the deployment and on-station time were occasionally altered by a month or two due to competing commitments or issues in preparing the on-coming unit. Thus, the 32nd MAU, under the command of Colonel Mead was relieved in October 1982 by the 24th MAU led by Colonel Tom Stokes. The 24th MAU was relieved in February 1983 by the 22nd MAU (which was the same unit as the 32nd MAU that had deployed previously, now identified by a different numerical designation due to a change in the numbering of Marine forces) still under the command of Colonel Mead. The 22nd MAU was relieved by the 24th MAU, now commanded by Colonel Timothy Geraghty, in May, 1983. The 24th MAU was relieved by the 22nd MAU, now led by Colonel James Faulkner, in November 1983.²³ Although the unit designations changed, there

I've been to the Naval War College. I'm going up here. Habib says, 'King's X. Time out. Wrong. You can't. If you go here, what's the perception? The Israelis are now in your area. Therefore, you're protecting Israelis. Therefore, you're not pro-Lebanon; you're pro-Israeli. It won't wash. Take the low ground.' There it is, pal. That's where the mud is. So that's where you go. Once again, political-military interface. The politics of the situation puts you in an untenable--not untenable, but a very difficult military situation. So you see in the newscast, you see your guys down in the mud, that's why they're down in the mud. They can't get to the high ground.'" Colonel James M. Mead, Lebanon Briefing Session, December 1, 1982, 22, Marine Corps Oral History Program, Marine Corps History Center. While this explanation colorfully emphasizes the tension between military and political considerations, it is worth noting that the JCS mission statement to USCINCEUR, as cited in the report of the DoD Commission which investigated the bombing of the Marine barracks in October 1983 (Long Commission), dictated the location of the Marines at the airport; at the least, if an exchange such as the one described by Mead occurred, it was later institutionalized at the level of the JCS in their direction to CINCEUR.

²³ Frank, *U.S. Marines in Lebanon 1982-1984*, 149-53.

was never more than one MAU deployed on the ground Beirut, except during brief periods of overlap as a departing MAU turned over its responsibility to the incoming MAU.²⁴

The Marines established their presence at the airport and participated in training and patrolling with the Lebanese armed forces throughout the autumn and winter of 1982-1983. In late February 1983, a severe snowstorm left villagers in the mountains trapped without food, water, or access to medical care. Marines delivered assistance using helicopters and tracked vehicles.²⁵ Training activities with the Lebanese armed forces increased through the spring. As Colonel Mead stated,

The relationship with the Lebanese Army is still very, very close, because we're involved in training certain elements of the Lebanese Army, cross-training them. So that's been good. The respect between the Marines and the Lebanese are very good. So you just couldn't ask for a better situation in regards to that. But what's been interesting is the changing mission that we've had. It's been sinusoidal in nature. It could be quiet for about a week, and then we'd have some spectacular event, spectacular being into the mountains, the worst snowstorm in four years, and then we come back from that, we wind down just a bit and do our normal patrolling duties.²⁶

While the mission of training and assisting the Lebanese armed forces was framed by policy-makers as neutral support for the elected government of Lebanon, such a view ignored the fact that the Lebanese armed forces were simply one among many armed groups present in and around Beirut, including Syrian and Israeli government forces, Druze, Phalangist, and Amal militias, remnants of the PLO, and the French, Italian, and US forces of MNF-2. Many of the militias viewed the Lebanese armed forces as representing and protecting the confessional interests of Lebanese President Amin Gemayel (the elder brother of the assassinated Bashir

²⁴ Although they never went ashore, a second MAU (the 31st) was briefly deployed from Kenya to the waters off Beirut as a theater reserve in September, 1983. Frank, 88, 117–18.

²⁵ Hammel, *The Root*, 68–71.

²⁶ Colonel James M. Mead and Benis M. Frank, Marine Corps Oral History Program Interview with Colonel James M. Mead, USMC, January 13, 1983, 11–12, Marine Corps Oral History Program, Marine Corps History Center.

Gemayel), a Maronite Christian, rather than as a unifying national force.²⁷ Although the Marines' mission of 'presence' was invoked to dictate an undesirable tactical location based on maintaining the perception of even-handed neutrality, the other half of the mission—to train and assist Lebanese armed forces—resulted in the perception that the US was taking sides in the ongoing Lebanese civil war.

On April 18, 1983 the US embassy in Beirut was destroyed by a suicide bomber, resulting in the deaths of 63 people, including 17 Americans.²⁸ On May 7, in addition to their peacekeeping mission under MNF-2, the Marines assumed security duties for a combined US-UK embassy compound. Marines on security duty at the embassy had different ROE than those on duty at the headquarters of the Battalion Landing Team (BLT) at the airport, which while slightly more permissive, were still based on standing peacetime ROE.²⁹

Throughout the spring, summer, and early autumn of 1983, the Marines increasingly came under fire from various factions. The fire was initially characterized as crossfire, or 'spillover' fire aimed at Lebanese armed forces positions, rather than the Marines. By September, the Marines were receiving aimed sniper fire, as well as mortar and artillery fire clearly directed at their positions.³⁰ The Marines returned fire, escalating from warning illumination rounds (artillery-launched parachute flares, which would ignite above the position

²⁷ Hammel, *The Root*, 34.

²⁸ Frank, *U.S. Marines in Lebanon 1982-1984*, 60–61.

²⁹ Ralph A. Hallenbeck, *Military Force as an Instrument of US Foreign Policy: Intervention in Lebanon August 1982-February 1984* (New York, Westport, Connecticut, London: Praeger, 1991), 59; The principal difference between the ROE was that Marines on duty at the embassy compound were authorized to use force in defense of US or UK personnel at the compound, while those on duty at the BLT were limited to self-defense. Additionally, the embassy security ROE defined as hostile actions short of shooting at Marines, including attempts to breach the perimeter security barriers by vehicle or on foot. Frank, *U.S. Marines in Lebanon 1982-1984*, 64.

³⁰ Col. Timothy J. Geraghty, Marine Corps Oral History Program Interview with Colonel Timothy J. Geraghty, USMC, interview by Benis M. Frank, November 21, 1983, 5, Marine Corps Oral History Program, Marine Corps History Center.

of the forces shooting at the Marines, with the intention of communicating that the Marines knew where the fire was coming from and could retaliate with lethal force if they chose), to sniper and shore-based artillery rounds, and eventually naval gunfire support from ships offshore.³¹ In early September, Israeli forces withdrew from the Shouf mountains as part of a US-brokered agreement between the Israelis, Syrians, and Lebanese. Lebanese armed forces immediately became involved in bitter fighting with Syrian-backed militias for control of the high ground vacated by the Israelis, which provided a powerful position overlooking the Marines' headquarters at the airport. On September 19, the Marine commander directed US Navy ships to fire over 300 shells in defense of a Lebanese army position that was in danger of being overrun at the village of Suq-al-Gharb in the Shouf mountains.³²

On the morning of October 23 1983, a yellow Mercedes truck carrying a powerful bomb twice circled the parking lot in front of the Marine headquarters, and then accelerated toward the building. The driver sped through the security checkpoints, crashed into the building which housed most of the Marines, and detonated the bomb. The building was obliterated and 241 Marines and sailors were killed. A second suicide truck bomber attacked the headquarters of the French MNF contingent within a few minutes of the attack on the US position, killing 58 French paratroopers.³³ While US forces did not directly retaliate for the attack, the level of the Marines' response to incoming fire in the weeks and months after the barracks bombing increased markedly. An aircraft carrier and a battleship had been added to the armada of ships supporting

³¹ Pintak, *Beirut Outtakes*, 125.

³² Pintak, 166.

³³ For detailed treatment of the attacks, see Hammel, *The Root*, 292–392.

the Marines' presence, and the Marines called in both airstrikes and shore bombardment using the battleship's 16-inch guns in November and December.³⁴

Public and Congressional support for the Beirut mission had been flagging even before the bombing. Although the Marines reconstituted their force and remained ashore for a few months, by February 1984 it was clear that there was neither appetite among US policy-makers for continuing the mission, nor a sense of how a small force of Marines could improve the security situation in Beirut. President Reagan ordered the Marines to "re-deploy" from their position at the airport to ships offshore on February 7.³⁵ While the administration retained the option of conducting air or naval gunfire strikes, there was little reason to do so once the Marines were withdrawn. With the withdrawal of the Marines in February 1984, MNF-2 and the US intervention in Beirut effectively ended in failure.

Contested legitimacy: Mission, casualties, and context

The Marine presence in Beirut suffered from contested legitimacy, both domestically and internationally. Ironically, the deployment of MNF-1 received relatively high public support in the US despite being greeted cautiously by policy-makers.³⁶ The second deployment, which was spurred by public pressure to act in the wake of the massacres at Sabra and Shatila, never

³⁴ Fred Hiatt, "Use of 16-Inch Guns Authorized on Dec. 3; US Commander Had Been Restricted," *Washington Post*, December 15, 1983, Final edition, sec. A; Rick Atkinson and Fred Hiatt, "President Favored Use of Battleship on Syrians; Loss of Aircraft Stirs Pentagon," *The Washington Post*, December 11, 1983, Final edition, sec. A.

³⁵ Steven R. Weisman, "REAGAN ORDERS MARINES MOVED TO SHIPS OFF BEIRUT BUT WIDENS AIR AND; SEA ROLE; REBEL UNITS TAKE LAST OF MOSLEM SECTOR," *New York Times*, February 7, 1984, Late edition, <https://www.nytimes.com/1984/02/08/world/reagan-orders-marines-moved-ships-off-beirut-but-widens-air-sea-role-rebel.html>.

³⁶ See, for example, the photo captions accompanying a story on the broader question of Reagan's initiatives regarding Israel and Palestine: "PLO guerrillas head for Damascus: The Lebanese finally had a chance to reclaim Beirut"; and, "Weinberger with the Marines in Beirut: A brutal war produced a chance for peace." Mark Whitaker et al., "Reagan's 'Fresh Start,'" *Newsweek*, September 13, 1982, 25, News, Policy & Politics Archive.

received more than tepid public support: A September 1982 Newsweek poll found that just 52% of Americans approved of the decision to send the Marines to Beirut in a peacekeeping role, while 40% disapproved.³⁷ Residents of Beirut initially greeted the Marines warmly, but as the perception grew that the US was one more military force among many contending for power in Beirut rather than a group of neutral peacekeepers, support for their presence dropped as measured by hostility encountered while patrolling and incidents of violence directed against US forces.³⁸

Among the most salient audiences for whom the Marines' presence lacked legitimacy was Israel. Whereas the MNF-1 mission was conducted as part of an agreement reached between the US, Israel, and the PLO, the MNF-2 mission could be seen as a rebuke to the Israelis for the atrocities at Sabra and Shatila and an impediment to Israeli freedom of action in and around Beirut. Marines and Israeli forces had frequent confrontations, especially during the early months of the deployment; some of the incidents narrowly avoided escalation to violence.³⁹ The most high-profile instance occurred in February, 1983:

The confrontation [between US and Israeli forces] came to a head on 2 February at nine o'clock in the morning. Marine Captain Charles B. Johnson halted a column of three Israeli tanks headed directly toward his position at the Lebanese University library and denied them access. He asked to speak to the senior Israeli officer. A lieutenant colonel emerged from the lead tank and stated he was going to proceed despite the captain's refusal. The tanks began to move toward US positions. Johnson, his .45 pistol loaded and at the ready position, jumped atop

³⁷ Cited in comparison to poll numbers from a poll conducted a year later in David M. Alpern, John J. Lindsay, and Eleanor Clift, "A Newsweek Poll: Sharp Drop," *Newsweek*, September 12, 1983, News, Policy & Politics Archive.

³⁸ Geraghty, Geraghty Interview Nov 1983, 5 (shelling); 4, 25 (patrolling).

³⁹ See, for example, a description of a Marine helicopter being "jumped" by Israeli aircraft, Mead, Lebanon Briefing Session, 8.

the tank and told the officer to stop. After speaking to higher authority by radio, the Israeli lieutenant colonel backed down and ordered his tanks to depart.⁴⁰

This encounter resulted in considerable publicity in the US, typified by a political cartoon that ran in the Miami News showing an Israeli commander barking at a tank crew, “You retreated? The Israeli Army never retreats!! It was the odds, right? Syrian missiles, the Libyan Air Force, and at least 500,000 armed-to-the-teeth Palestinians, right? How many? How many were you up against??” The chastened tank crew in the cartoon replies, “One US Marine.”⁴¹ Over time, the Marines reached a *modus vivendi* with the Israelis and the frequency of such confrontations declined, but tension remained and coordination between the ostensible allies was never strong.⁴²

Domestically, the legitimacy of the Marines’ mission was marred by a lack of public understanding as to what, exactly, the Marines were on the ground in Beirut in order to achieve. In this regard, the image of the Marines as shock troops—forged in the amphibious landings of World War II—may have unintentionally undermined the domestic legitimacy of the Marines’ mission. As Tarrabain perceptively observed,

The firepower the American Marines had at their disposal became a handicap as the home constituency did not, or perhaps could not, understand the concept of an ‘interpositional force’ and when the Marines began to take casualties, politicians and policymakers were under pressure to explain either why they had so much firepower and failed to use it in retaliation, or act on the ground in a manner which satisfied the public clamour at home.⁴³

⁴⁰ Michael Petit, *Peacekeepers at War: A Marine’s Account of the Beirut Catastrophe* (Boston, London: Faber & Faber, 1986), 30.

⁴¹ Cartoon by Don Wright in the Miami News. Reprinted in Frank, *U.S. Marines in Lebanon 1982-1984*, 45.

⁴² See description of tensions and impact of Israeli withdrawal from the Shouf mountains in Bernard E. Trainor, Oral History Transcript Lieutenant General Bernard E. Trainor, US Marine Corps (Ret), interview by Benis M. Frank, 2015, 24, Marine Corps Oral History Program, Marine Corps History Center; See also, Hammel, *The Root*, 61–68.

⁴³ Ali M. Tarrabain, “The Four Powers Multinational Force in Lebanon 1982-84” (University of Kent at Canterbury, 1990), 268.

The Marines began taking casualties from the outset of their presence in Beirut. After landing on September 29, 1982, Marine corporal David Reagan was killed and three others were injured on September 30 while clearing unexploded ordnance from the landing beach adjacent to the Marines' position at the airport.⁴⁴ Throughout the first half of 1983, Marines suffered eight more wounded in action as a result of hostile fire. Casualties climbed in August—and began to claim the attention of the US public—when a combined rocket, mortar, and artillery attack struck Marine positions, killing two and wounding 14.⁴⁵ As Hammel reports, “On August 30 a disbelieving nation first heard the news [of Marine casualties] as it was offered by the press and the explanations as they were offered by stunned Reagan administration spokespeople”⁴⁶ The Marines increasingly became the targets of aimed sniper and artillery attacks in September and casualties continued to mount with two more Marines killed and 20 injured. In October the trend continued, with two Marines killed and 15 wounded by grenades, sniper fire, and shrapnel in the first three weeks of the month. The October 23 attack on the barracks killed 241 and wounded 75.⁴⁷ The Marines continued to take casualties after the barracks bombing. Nine more Marines would be killed and several wounded, and two US aircraft would be shot down with one pilot killed, one rescued, and one aircrew captured by Syria before the US withdrawal in February 1984.⁴⁸

As was the case in Korea, the public tolerance for casualties in Beirut was heavily influenced by a lack of confidence in the mission. Three political cartoons from the period

⁴⁴ Frank, *U.S. Marines in Lebanon 1982-1984*, 149.

⁴⁵ Frank, 150.

⁴⁶ Hammel, *The Root*, 135.

⁴⁷ Frank, *U.S. Marines in Lebanon 1982-1984*, 151–52.

⁴⁸ Frank, 152–53; Bernard E. Trainor, “’83 Strike on Lebanon: Hard Lessons for U.S.,” *New York Times*, August 6, 1989, National edition, <https://www.nytimes.com/1989/08/06/world/83-strike-on-lebanon-hard-lessons-for-us.html>.

illustrate the point. The first, from April 1983, shows a Marine in fatigues with a set of crosshairs from a gunsight superimposed on him. The caption reads: “Q: How are US Marines viewed in Lebanon?”⁴⁹ The second, from September 1983, is by the same cartoonist and reflects an increased level of frustration with the mission. It depicts two different ‘Marine Corps Memorials.’ The first, labeled ‘Iwo Jima 1945’ is a representation of the iconic photograph of the flag-raising on Iwo Jima, which is rendered in sculpture as the Marine Corps Memorial in Arlington, Virginia. The second, labeled ‘Beirut, 1983’ depicts a similar sculpture, but featuring shooting gallery ducks wearing helmets and parading on sandbags, rather than Marines raising a flag.⁵⁰ The final cartoon, also from September 1983 but by a different cartoonist, depicts two Marines ducking in a foxhole with shells bursting overhead (reminiscent of Bill Mauldin’s Willie and Joe cartoons from World War II) as one asks the other, “I wonder how much longer we’ll be here ‘keeping the peace?’”⁵¹

The skepticism and frustration captured in these cartoons was echoed in public opinion. A Newsweek poll conducted in late August 1983 showed an 11% drop in the number of Americans approving of the decision to send the Marines to Beirut as compared to a year earlier, from 52% in September 1982 to 41% in August 1983. The linkage to casualties is made explicit in the response to the question, “Now that US Marines have come under fire in Beirut and several have been killed or wounded, do you think the US force should be brought home, or should they stay and continue the peacekeeping mission?” 53% of respondents believed that the Marines should be brought home, while 41% advocated remaining.⁵²

⁴⁹ The cartoon is by Steve Kelly from the San Diego Union Tribune and is reprinted in Frank, *U.S. Marines in Lebanon 1982-1984*, 58.

⁵⁰ Steve Kelly San Diego Union Tribune 1983. Reprinted in Frank, 75.

⁵¹ The cartoon is by Vern Thompson of the Lawton Constitution and Press. It is reprinted in Frank, 76.

⁵² Alpern, Lindsay, and Clift, “A Newsweek Poll: Sharp Drop.”

As the domestic support for the peacekeeping mission waned, the Reagan administration began to cast the deployment in Cold War terms. Pintak relates that in September 1983,

After months of blaming Damascus for the trouble in Lebanon, Reagan decided the strings were being pulled from even farther away. “There is no question that there is influence by the Soviet Union, which has put people in there, and weapons systems, and is urging [Syria] to support--and they have supported and they are supporting--some of the internal Lebanese factions...with supplies and, we believe, sometimes with manpower,” he told a group of broadcasters at the White House.⁵³

Lebanese President Gemayel picked up on this theme, and declared in an interview with the Los Angeles Times that Soviet advisors were assisting Syrian forces in Lebanon.⁵⁴ President Reagan reprised the theme in his weekly radio address on October 8, 1983, in which he asked, “Can the United States or the Free World stand by and see the Middle East incorporated into the Soviet bloc?”⁵⁵

Despite Reagan’s effort to invoke the Soviet menace to justify the Marines’ continued presence in Beirut, Congress began to ask more and more-pointed questions about the mission. In August 1983, Congress determined that the environment in Beirut qualified the Marines for hostile fire pay.⁵⁶ While it was framed as a means of supporting the troops, this measure was also a shot across the President’s bow, since determining that the troops were involved in hostilities invoked the terms of the War Powers Act. On October 12, 1983, Congress passed Public Law 98-119, which provided in part,

The Congress determines that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983. ...as required by section 4.c. of the War Powers Resolution, the President shall report periodically to the Congress with respect to the situation in Lebanon, but in no event shall he

⁵³ Pintak, *Beirut Outtakes*, 171.

⁵⁴ Pintak, 171.

⁵⁵ Pintak, 172.

⁵⁶ Hallenbeck, *Military Force as an Instrument of US Foreign Policy*, 86.

report less often than once every three months. In addition to providing the information required by that section on the status, scope, and duration of hostilities involving United States Armed Forces, such reports shall describe in detail (1) the activities being performed by the Multinational Force in Lebanon; (2) the present composition of the Multinational Force in Lebanon, including a description of the responsibilities and deployment of the armed forces of each participating country; (3) the results of efforts to reduce and eventually eliminate the Multinational Force in Lebanon; (4) how continued United States participation in the Multinational Force in Lebanon is advancing United States foreign policy interests in the Middle East...⁵⁷

In light of the unpopular and ill-defined mission of the Marines, Congress was asserting its authority to consider limiting or ending the US intervention. Within two weeks of the passage of the law invoking the War Powers Act, the suicide attack on the Marine barracks resulted in the largest loss of life among Marines on a single day since World War II. The subsequent investigations and hearings made clear that the Congress and the public were unwilling to pay the high price in blood of the Marines' mission in Beirut. The intervention lacked domestic legitimacy or support. After a decent interval, the Marines were withdrawn.

Strengthening legitimacy through rule-based constraints on the use of force

Policy-makers and strategic commanders implemented rule-based constraints on the use of force by the Marines in Beirut in an effort to address legitimacy concerns among both domestic and international audiences. Domestically, the rules were intended to reinforce legitimacy by assuaging concerns that the Marines would become involved in a combat mission. Internationally, the rules sought to enhance legitimacy by emphasizing the Marines' neutrality.

⁵⁷ As reproduced in Tarrabain, "The Four Powers Multinational Force in Lebanon 1982-84," Appendix 14; On the pressure on the administration, see also Hammel, *The Root*, 219: "The Reagan administration was then coming under mounting pressure at home to end or at least reassess the Lebanon involvement. On September 8--the day Bowen first fired to support Druse artillery--Congressman Clarence Long opened a congressional debate on the War Powers Act, the law under which President Reagan had placed troops in Beirut, and under which the Congress could demand an active role in future events. Long also warned that funding for the MNF contingent was up for review on November 1 and that the law demanded a formal administration declaration of the mission of American troops in combat."

The starting point for evaluation of the rule-based regime of constraints on the Marines' use of force in Beirut must be the terms of the mission itself. As discussed in the chronological summary above, the mission of 'presence' was not defined in any DoD publications or doctrine.⁵⁸ The Marines' status as an "interposition force" raised questions as to what options were available to them when the forces between whom they were interposed began fighting. Retired Marine Lieutenant General Bernard Trainor captured the relationship between the unaccustomed and ill-defined mission and the rule-based regime of constraint:

The mission was never really defined. It always remained as a "presence" mission. Well, this is difficult for military people, you know; you always like to have a military mission with specific tasks. But we were able to live with uncertainty, and the way things were defined was more in the rules of engagement than in any mission statement. We were constantly revising the CINCEUR [Commander in Chief, U.S. European Command], who was the theater commander, as to what the rules of engagement were.⁵⁹

Although the mission guidance did not spell out precisely what the Marines were meant to do, it was explicit that they were not to engage in hostilities. Both President Reagan's letter to Congress explaining the Marines' mission and the guidance from the JCS to USCINCEUR were clear: The Marines were not in Beirut on a combat mission. Thus, peacetime ROE—which are focused on actions to be taken in self-defense—would apply.⁶⁰ These rules and any necessary modifications were debated extensively prior to the MNF-1 deployment, but received no modification or debate before the deployment of MNF-2. As reported by the Long Commission (which was formed by DoD to investigate the circumstances of the deadly October barracks bombing),

⁵⁸ See also Frank, *U.S. Marines in Lebanon 1982-1984*, 23.

⁵⁹ Trainor, Oral History Transcript Lieutenant General Bernard E. Trainor, US Marine Corps (Ret), 15.

⁶⁰ Pintak, *Beirut Outtakes*, 82; Long Commission, "Long Commission Report," 36.

The ROE developed by USCINCEUR are derived from US European Command Directive 55-47A, "Peacetime Rules of Engagement." They were tailored to the Lebanon situation by the adaptation of the ROE developed through the summer of 1982 for use in the evacuation of PLO elements in Beirut from 24 August to 10 September 1982. There had been extensive dialogue on ROE up and down the European Theater chain of command during July and August 1982. ...JCS guidance to USCINCEUR was that USMNF forces were not to engage in combat and would use normal USEUCOM peacetime ROE. Force was to be used only when required for self-defense against a hostile threat, in response to a hostile act, or in defense of LAF [Lebanese Armed Forces] elements operating with the USMNF. ...Reprisals or punitive measures were forbidden. USMNF elements were enjoined to seek guidance from higher authority prior to using armed force for self-defense unless an emergency existed.⁶¹

The MAU commanders, as the operational commanders responsible for translating the strategic guidance from JCS and CINCEUR into tactical guidance for their forces, created an ROE card for each Marine to carry at all times. It read:

The mission of the Multinational Force (MNF) is to keep the peace. The following rules of engagement will be read and fully understood by all members of the US contingent of the MNF:

- When on post, mobile or foot patrol, keep a loaded magazine in the weapon, weapons will be on safe, with no rounds in the chamber.
- Do not chamber a round unless instructed to do so by a commissioned officer unless you must act in immediate self-defense where deadly force is authorized.
- Keep ammunition for crew-served weapons readily available but not loaded in the weapon. Weapons will be on safe at all times.
- Call local forces to assist in all self-defense efforts. Notify next senior command immediately.
- Use only the minimum degree of force necessary to accomplish the mission.
- Stop the use of force when it is no longer required.
- If effective fire is received, direct return fire at a distinct target only. If possible, use friendly sniper fire.

⁶¹ Long Commission, "Long Commission Report," 44-45.

- Respect civilian property; do not attack it unless absolutely necessary to protect friendly forces.
- Protect innocent civilians from harm.
- Respect and protect recognized medical agencies, such as Red Cross, Red Crescent, etc.

These rules of engagement will be followed by all members of the USMNF unless otherwise directed.⁶²

After the Marines assumed responsibility for the protection of the embassy compound on May 7, 1983, a second ROE card was issued for Marines carrying out security duties at the embassy. While the first ROE card was printed on white paper, the second ROE card was printed on blue paper so that Marines could easily distinguish the two. The ‘blue-card’ ROE read:

Rules of Engagement for American and British Embassy External Security Forces:

1. Loaded magazines will be in weapons at all times when on post, bolt closed, weapon on safe. No round will be in the chamber.
2. Round will be chambered only when intending to fire.
3. Weapon will be fired only under the following circumstances:
 - a. A hostile act has been committed.

⁶² Quoted in Long Commission, 49; Also quoted in Frank, *U.S. Marines in Lebanon 1982-1984*, 50; It is often reported that the Marines on sentry duty at the Battalion Landing Team (BLT) headquarters at the airport on the morning of the bombing were prohibited by ROE from having magazines in their rifles. See Investigations Subcommittee of the House Armed Services Committee, 98th Congress, “Adequacy of U.S. Marine Corps Security in Beirut,” 34; See also Kevin J. McClung, “Law of Land Warfare and Rules of Engagement: A Review of Army Doctrine and Training Methodologies” (DTIC Document, 2004), 2, <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA423617>; If this was the case, it was not required by ROE. Hammel reports, based on interviews with the sentries, that they did have magazines in their weapons, but no round chambered, in accordance with the “white card” ROE. The House Investigative subcommittee indicated that magazines were not inserted into the weapons due to concerns over accidental discharges, which had allegedly injured six Marines (Adequacy of Security, op cit, at 34). The recollection of the sentries may be suspect, in light of the trauma which followed. Regardless, if such a measure was in place, it was not due to ROE. Hammel, *The Root*, 294.

(1) a hostile act is defined as rounds fired at the embassy, embassy personnel, embassy vehicle, or Marine sentries.

(2) the response will be proportional.

(3) the response will cease when the attack ceases.

(4) There will be no pursuit by fire.

(5) A hostile act from a vehicle is when it crosses the established barricade. First fire to disable the vehicle and apprehend the occupants. If the vehicle cannot be stopped, fire at the occupants.

(6) A hostile act from an individual or group of individuals is present when they cross the barricade and will not stop after warnings in Arabic and French. If they do not stop, fire at them.

4. Well aimed fire will be used; weapons will not be placed on automatic.

5. Care will be taken to avoid civilian casualties.⁶³

Both sets of ROE are substantially similar; the primary difference between the two is that the blue card ROE are more explicit in defining a hostile act. Attempts to breach the embassy perimeter security barriers in a vehicle or on foot despite warnings were defined as a hostile act under the blue-card ROE; the white-card ROE seemed to limit the Marines' ability to return fire to circumstances under which they had received "effective fire" or when they were required to act in immediate self-defense and deadly force was authorized. Whether conditions other than the receipt of effective fire warranted the authorization of deadly force in self-defense, and if so what those conditions might be, was not defined. The blue-card rules were more specific, but they allowed Marines on embassy security duty greater freedom of action in the decision to employ force, since they defined actions short of effective hostile fire as a hostile act. As will be discussed below, both sets of ROE reflected a rule-formalistic interpretation of the peacetime

⁶³ Quoted in Frank, *U.S. Marines in Lebanon 1982-1984*, 64.

ROE, and also spawned formalistic interpretation by commanders as the situation on the ground deteriorated.

Both policy-makers and Marine commanders were heavily influenced by the political nature of the presence mission in developing the rule-based regime of constraint. Mead, under whose command the initial location and security posture of the Marines was established, stated that while he felt he had the freedom to establish a fortress-like position if he so chose, to do so would undermine the requirements of the presence mission.⁶⁴ Similarly, in negotiating the ROE with higher headquarters prior to the MNF-1 deployment, he asked only for authority for proportional self-defense. According to his recollection, this formulation forestalled an effort by senior policy-makers to implement a more restrictive collection of rules:

The rules of engagement were kept very simple. They tried to give us a matrix of about 100 blocks, that, “If he shoots at you with a rifle, you come back at him with the same caliber rifle, if he shoots at you with this, you do that.” No. They gave us the rule of proportional force in the right of self-defense. We said, “We understand that. Don't give us any more. Trust us.” And that's what they gave us—the rules of engagement which each Marine could understand. The key to the whole thing—continuity. The second lieutenants, corporals, and staff NCOs doing their job throughout. None of them let us down in that heavy type of a press environment.⁶⁵

Mead's invocation of the 'heavy type of a press environment' highlights the strong consideration given to legitimacy in formulating the ROE. The focus on managing the perception of the Marines' mission as portrayed in the media frequently led the Marines to downplay the degree to which they were the targets of hostile fire as the deployment progressed. Hammel suggests that the constant messaging from the administration that the Marines were on a

⁶⁴ Investigations Subcommittee of the House Armed Services Committee, 98th Congress, “Adequacy of U.S. Marine Corps Security in Beirut,” 35.

⁶⁵ Mead, Lebanon Briefing Session, 48; See also a more detailed exposition using nearly identical language in Mead and Frank, Colonel Mead Interview Jan 1983, 49.

non-combat mission operating under peacetime ROE may have actually undercut the Marines' legitimacy when they began to return fire.

The Marines' tendency to mislead reporters [about the intensity of combat in Beirut] derived in large part from the Department of Defense's desire to minimize the American public's potential alarm over the daily heavy combat faced by Marines on the BIA [Beirut International Airport] perimeter line. The policy that had been transmitted to the Joint Public Affairs Bureau (JPAB) from above backfired a bit when news of the deaths of women and children at the hands of Marines was widely reported in the United States. The reports were erroneous, but the impact was heightened because the American public had not been adequately informed as to the full extent of the combat the Marines in Beirut were weathering. The news of sniper kills, real and alleged, was beyond the comprehension of an American public long lulled into a sense of well-being through what seems to have been a program of calculated misinformation or deliberate omission. The reports pierced a contented vacuum: sniper kills were in context, but reports of the killings were not.⁶⁶

Even as the Marines were the targets of increasingly deadly hostile fire and began to return fire in response, officials in Washington continued to emphasize that the deployment was not a combat mission.⁶⁷ To adopt combat ROE would acknowledge that the Marines were on a combat mission; to acknowledge that the Marines were on a combat mission would open the door to Congressional and public debate about the nature of the mission. By clinging to the fiction of a non-combat mission under peacetime ROE, policy-makers sought to preserve the domestic legitimacy of the intervention and avoid the invocation of the War Powers Act and a broader debate on US policy in Lebanon.

⁶⁶ Hammel, *The Root*, 277.

⁶⁷ See, for example David M. Alpern, John J. Lindsay, and Eleanor Clift, "The War Powers Debate," *Newsweek*, September 12, 1983, 44, News, Policy & Politics Archive. "Despite the graphic images of battling in Beirut that flashed on the network news each night, top administration officials from Secretary of State George Shultz on down denied that the US Marines there were caught up in 'hostilities'"; See also Leslie H Gelb, "Lebanon Peacekeeping Sets Stage for War Powers Debate," *New York Times*, September 11, 1983, Late edition, sec. E, ProQuest Historical Newspapers. "...the Administration managed to work around the legal obligation to bring the issue of American forces in Lebanon before Congress. It simply denied that Marines were facing 'imminent hostilities'..."

In addition to seeking to influence domestic American audiences, rule-based constraints on the use of force were also meant to reassure international audiences—especially those in Beirut itself—that the Marines were neutral peacekeepers, rather than participants in the Lebanese civil war. Colonel Geraghty confirmed that legitimacy concerns, especially among the local population, figured prominently in keeping tight control over his forces.

... getting into August now, we're trying to have bite bait, i.e., to generate a large, heavy response inordinate to the threat--to fire into the villages where we would really injure a lot of women and children or people that really had nothing to do with the fight, they just happened to be there. And we were very conscious of that, sensitive to that fact. And I think maintain, generally, the of support of a lot of people in the village that we did not respond heavily to the stress.⁶⁸

At times, the emphasis on responding at the lowest possible level to positively identified targets who were engaged in shooting at Marines assumed a ludicrous dimension. Hammel relates,

Shooting at gunmen who were not actually firing their weapons was forbidden; all the Marines could do was watch as groups of three or four Moslem fighters walked with their personal weapons slung into buildings or bunkers fronting on Alpha Company's positions. Everyone knew that these men would fire on the company until they ran out of ammunition or grew bored. And everyone knew that the militiamen would then sling their weapons and walk in plain view—unmolested by Marine gunfire—to a café...⁶⁹

Recognizing that the Marines would not intentionally target women or non-combatants and that they would not shoot unless they were receiving effective fire, local militias began to use non-combatants as scouts to reconnoiter the Marines' positions.⁷⁰ While he recognized the

⁶⁸ Geraghty, Geraghty Interview Nov 1983, 7.

⁶⁹ Hammel, *The Root*, 123.

⁷⁰ "Women were sent into the street to reconnoiter the Marine and LAF positions. The most blatant of the scouts was a heavyset middle-aged woman--or a large man dressed in a woman's clothing--who made trip after trip across the end of the alley. One of the Marine riflemen reached the end of his tether late in the afternoon and dropped her in her tracks with one M-16 round. An Amal gunman who was duck-walking on the woman's ample hidden side scuttled for a nearby building when his cover fell to the street." Hammel, 154.

risk of exploitation posed by the strict rules constraining return fire, Geraghty continued to emphasize the importance of the rules in maintaining legitimacy among the local civilians and militias. In a message to the Commander of the Sixth Fleet on October 20, he reiterated, “an inappropriate response to any provocative act will destroy our credibility and place us in even greater danger. I shall continue to respond as we have in the past.”⁷¹

Traditional constraints: what role did military professionalism play?

The traditional constraints of military professionalism emphasize the importance of minimizing civilian casualties, but they place greater emphasis on the perspective of honor and chivalry, rather than rules and legitimacy. Given the extraordinary lengths to which the Marines in Beirut went to avoid or minimize civilian casualties and the degree of risk they were willing to accept in order to do so, it is reasonable to ask whether these efforts were motivated principally by legitimacy concerns and rule compliance, or whether they were grounded in more traditional military professional considerations, as well.

An example of the remarkable discipline displayed by the Marines in avoiding actions that might result in civilian casualties may be observed in the Marines’ response to the attack of August 29, which killed two Marines and injured 14. Pintak observes,

The day Ortega and Losey were killed, Geraghty maintained a tight rein on his men. The Marines were allowed to return fire with their personal weapons only when they had a confirmed target that was actually firing at them. Unless their lives were in jeopardy, approval to fire had to come from Geraghty himself. The Marine commander held back the heavy guns for fear of escalating the violence and spilling innocent blood.⁷²

⁷¹ Col. Timothy J. Geraghty, *Peacekeepers at War: Beirut 1983--The Marine Commander Tells His Story* (Washington, D.C.: Potomac Books, 2009), 88.

⁷² Pintak, *Beirut Outtakes*, 125.

Even after the barracks bombing, the Marines continued to show a high degree of sensitivity to civilian casualties in their responses. The battleship *New Jersey* arrived in September and approval to employ her 16-inch guns, which fired shells weighing nearly 2,000 pounds, was delegated to the MAU commander in December. Even so, a few weeks passed before the big guns were used, and then only against targets well removed from built-up areas due to concerns about potential civilian casualties resulting from the blast of the massive shells.⁷³

While such restraint and discipline is both admirable and consistent with military professionalism, the nature of the Marines' mission in Beirut made the application of traditional tenets of military professionalism murky and problematic. The norms of military professionalism regarding the use of force are meant to govern action by soldiers in combat. Although the Marines were in great danger from the combat going on around them, and eventually came to be seen by some factions in Beirut as combatants themselves, they did not have a combat mission. The assertion by the Reagan administration that the Marines were on a non-combat mission may be dismissed as self-interested and political, but from the perspective of the Marine commanders there was a practical distinction: If they were in combat they would have had a political and military objective that they could use force to achieve. 'Presence' and assisting the LAF in becoming a capable military did not lend themselves to achievement by the

⁷³ Hiatt, "Use of 16-Inch Guns Authorized on Dec. 3; US Commander Had Been Restricted." "The local U.S. commander in Lebanon was given authority less than two weeks ago to use the 16-inch guns of the battleship USS *New Jersey*, a major escalation of naval firepower there, Pentagon officials said yesterday. The *New Jersey* has been steaming off the coast of Lebanon since September, but until Dec. 3 the Sixth Fleet commander did not have permission to fire its big guns without approval from higher up in the chain of command, officials said. Some top officials feared that its huge shells, which one Navy officer said can 'cause damage in an area as big as a football field,' could harm civilians and further ensnare U.S. forces in Lebanese hostilities."

use of force.⁷⁴ Traditional military professional criteria regarding the use of force are rooted in the prospect of obtaining some military advantage by violence, and weighing that advantage against the harm likely to be done to civilian lives and property; to cause more harm than is warranted by the military advantage to be gained is dishonorable and unprofessional. Marine commanders in Beirut were more concerned with limiting their actions to the minimal level of force required for self-defense, rather than achieving another military goal.⁷⁵ The legitimacy of the Marines' presence thus became the goal in itself, rather than some other military objective.

In part, this may have been dictated by the Marines' relatively small presence on the ground. Geraghty, who was in command of the MAU during the period when the attacks on the Marines increased in frequency and lethality, seemed especially cognizant of the risk posed by adopting too aggressive a posture with a small force of 1,200 Marines in a tactically vulnerable location, even though supported by considerable firepower from ships and aircraft offshore.⁷⁶ But even if the emphasis on measured response was founded in part on a professional concern about retribution from adversaries who outnumbered him on the ground, it is notable that the Marines never asked for additional forces or had a request for defensive authority turned down by higher headquarters.⁷⁷

⁷⁴ See summary of mission in Dale A. Dye, "Keeping the Peace in Lebanon," *Marine Corps Gazette*, August 1983, 37; Investigations Subcommittee of the House Armed Services Committee, 98th Congress, "Adequacy of U.S. Marine Corps Security in Beirut," 26.

⁷⁵ See for example Frank, *U.S. Marines in Lebanon 1982-1984*, 24.

⁷⁶ Hammel, *The Root*, 134; Geraghty, *Peacekeepers at War*, 88.

⁷⁷ Investigations Subcommittee of the House Armed Services Committee, 98th Congress, "Adequacy of U.S. Marine Corps Security in Beirut," 32-33; Randolph relates that the Marines did request specific authority to target vehicles headed toward their position at the airport in a manner similar to what was permitted under the embassy security ('blue card') ROE. The request was reportedly turned down by CINCEUR, not because the Marines were not permitted to do so, but because the authority was considered to already be inherent in the self-defense ('white card') ROE in place. Stephen P. Randolph, "Rules of Engagement, Policy, and Military Effectiveness: The Ties That Bind" (AIR WAR COLL MAXWELL AFB AL, 1993), 22; See also Long Commission, "Long Commission Report," 50.

One means to evaluate whether the Marines were motivated by rule-based constraints (focused on legitimacy) or traditional military professionalism (focused on honor) in their measured responses to provocations and emphasis on civilian casualty avoidance is to view how the restrictions were promulgated and enforced. In Vietnam, as documented in the last chapter, even when a violation of the law of war occurred, it was often framed by commanders principally as a violation of military honor.⁷⁸ Traditional military professionalism values the classical advice of Agamemnon to Pyrrhus in *The Trojan Women*: “What the law does not forbid, then let shame forbid.”⁷⁹

Compare this to the anecdote related by one Marine about his instruction in ROE while embarked in an amphibious ship steaming toward Beirut:

Gunny Thorn began to pass out blue, wallet-sized Rules of Engagement cards, which the operations section had prepared.

‘These are your goddamned ROE cards,’ he croaked. ‘Read them and memorize them and don't fuckin' lose them.’... ‘These rules are designed to keep you from going over there and shooting anything and everything that moves. Suppose you're on patrol and a sniper shoots at you from a fourth-floor window. What are you going to do? Spray the whole goddamned building with machine gun fire?’

‘Damn right,’ someone said.

‘Bullshit! I was sitting in the back of a jeep in downtown Beirut last float [a Marine term for a deployment aboard amphibious ships]. A car was just passing us when I spotted a pistol in the back seat aimed right at me. I couldn't see who was holding it and I almost shit my skivvy drawers. A second later, a six-year-old kid popped up. I could have blown him away if I hadn't used a little restraint,

⁷⁸ Recall the anecdote of the soldier who had disfigured a Vietcong corpse. He was punished for a law of war violation, but his commanders emphasized to the company that he had disgraced the unit. MG Wilton B. Persons, Project 85-4 Wilton B. Persons, Major General, USA Retired Vol 1, interview by Colonel Herbert J. Green and Colonel Thomas M. Crean, 1985, 258, Box ID: Box Wilton B Persons Paper Box 1 of 2, Army Heritage and Education Center.

⁷⁹ Euripides, as cited in Joseph B. Kelly, “Legal Aspects of Military Operations in Counterinsurgency,” *Mil. L. Rev.* 21 (1963): 107.

and then where would I have been? Leavenworth for the next ten fucking years.’⁸⁰

A second indication of the priority placed on legitimacy in motivating the policy of measured response is provided by the explanation of why operational commanders seemed to prefer air strikes over the use of the battleship *New Jersey*'s 16-inch guns in responding to attacks on the Marines throughout December, 1983:

Many Pentagon officials defended the chosen tactics as being less likely to harm Lebanese civilians, saying the military would have been criticized much more harshly if the *New Jersey*'s guns had been used and just one of its heavy shells had gone astray. ... Pentagon defenders of the air strike said it was necessary for pilots to ‘eyeball’ the mobile targets before bombing to be sure they hadn't been moved. They said there also was a determination to cause as little collateral damage as possible.

“We do concern ourselves with headlines,” one retired Navy admiral said. “You want to remember that anytime you run an attack in any area, the only pictures that come out are of the schoolhouse or hospital that you bombed accidentally.”⁸¹

It seems likely that the emphasis by Marine commanders on minimizing or avoiding civilian casualties had foundations in both traditional military professionalism, focused on honor, and rule-based regimes of constraint, focused on legitimacy. In the absence of a traditional military mission, however, and with a great deal of press scrutiny on every US use of force, legitimacy concerns seem to have been foremost among the commanders' considerations.

Military legalism in Beirut

Marine commanders in Beirut operating under a regime of rule-based constraints designed to bolster the legitimacy of the US presence turned to formalistic interpretations of the

⁸⁰ Petit, *Peacekeepers at War*, 40–41. In fact, the ROE cards should have been white in color, unless they were specific to security duty at the embassy compound.

⁸¹ Atkinson and Hiatt, “President Favored Use of Battleship on Syrians; Loss of Aircraft Stirs Pentagon” (emphasis added).

rules and advocacy for their desired courses of action in order to accomplish their mission. The rules provided by policy-makers and strategic commanders governing the Marines' use of force did not change between August 1982 and November 1983, but the Marines interpreted the rules differently at different times depending on their perception of what the mission demanded, resulting in a wide variation in the type of force employed and the purposes for which it was used.⁸²

The most obvious examples of the formalistic interpretation of the rules and advocacy for a preferred course of action were related to the use of naval gunfire support from ships offshore as an escalatory response, beginning in September 1983. The Marines had a battery of six M-198 155-mm howitzers that had been emplaced at the airport in December 1982, but the combination of the terrain and the range of these guns made it difficult for this battery to reach some targets in the mountains above Beirut.⁸³ The Marines were also limited in the number of artillery shells they had in their position ashore. Many of the Navy ships offshore, however, were equipped with 5-inch (127 mm) naval guns with their own supply of ammunition. Although the range of the 5-inch guns was slightly less than that of the howitzers, the Navy ships

⁸² It is actually unclear from the declassified historical record whether the ROE formally changed in November. National Security Decision Directive 111 indicates on 28 Oct that the ROE for forces in Beirut "will be modified," in order to allow support to Lebanese Armed forces for the defense of strategic high ground controlling the Marines' position, "such as that currently authorized for Suq al Gharb." In fact, the authorization for the use of force in support of Lebanese forces at Suq al Gharb was explicitly formulated as an interpretation of existing ROE, rather than a modification to the ROE. The declassified record does not contain modified ROE for the Marines, even after November 1983, suggesting that the subsequent enhanced measures, such as employment of airstrikes and the 16-inch guns from the battleship all may have been based on interpretations of the peacetime ROE under which the Marines were previously operating. Although many secondary sources assert that the ROE were changed, none reference a specific ROE document. National Security Council, "National Security Decision Directive Number 111," October 28, 1983, 2, Digital National Security Archive, [/dc/dnsa/data/processing/xml/pdfs/edit/images/PD/01761gif.pdf](https://www.dnsa.gov/data/processing/xml/pdfs/edit/images/PD/01761gif.pdf).

⁸³ Frank, *U.S. Marines in Lebanon 1982-1984*, 149.

could maneuver in the waters off Beirut, which allowed them to position themselves so that they could strike targets unreachable by the Marines' artillery.

The first use of naval gunfire support occurred on September 8, when the frigate USS *Bowen* fired her 5-inch gun in concert with the Marine 155-mm battery at a Druze battery that was attacking the Marines' position at the airport. The Marines had been receiving artillery fire at the airport for weeks by this point. Frank describes the circumstances that led to the decision to add naval gunfire to the response:

Generals Miller (CG, FMFLANT) [Commanding General, Fleet Marine Forces Atlantic] and Gray (CG, 2d Marine Division) visited the MAU for three days beginning 7 September. At about 1130 on 8 September, three rocket rounds landed approximately 200 meters from where the Marine commanders were standing. In reply, a coordinated 155-mm howitzer volley and 5-inch salvo from the *Bowen* landed on the target, marking the first time that naval gunfire was actually employed in support of the Marines ashore. And it changed the MAU mission a bit more from one of peace-keeping presence to one of active participation.⁸⁴

Given that the target was reachable by the Marines' artillery battery, it seems likely that the inclusion of naval gunfire in the response to the attack was an escalation motivated principally by the near-miss on the visiting Generals. Geraghty, the MAU commander, did not detail in either his memoir or his weekly update to the Sixth Fleet commander the rationale behind his decision to include naval gunfire in his response to the attack, although he did indicate in his weekly update that he was worried about being perceived by local forces to be a participant in the hostilities rather than a neutral peacekeeper.⁸⁵ The response to the artillery attack on the Marines' position was clearly an act of self-defense, but the decision to escalate by

⁸⁴ Frank, 86.

⁸⁵ "I am concerned, however... that the involvement in the Lebanese internal struggle has exceeded our original mandate. We have, in fact, changed the rules and are now an active participant." [From 10 Sep weekly SITREP to COMSIXTHFLT] Geraghty, *Peacekeepers at War*, 68.

including naval gunfire in addition to the Marine artillery required at the very least a formalistic re-interpretation of what constituted ‘the minimum force required to accomplish the mission’ in accordance with the ROE. Geraghty had scrupulously withheld from his forces the authority to escalate force in response to previous attacks. It seems both likely and understandable that, provoked by the affront of two Generals nearly being killed by enemy fire while visiting his command, Geraghty was able to justify to himself the increased response, using a combination of formal interpretation of the rules regarding ‘minimum force’ (i.e., could he be certain that the Marine howitzers alone would mitigate the threat?) and advocacy (i.e., it was past time to retaliate effectively for previous attacks). In this instance, such justifications are the subject of conjecture; in later escalations, they are a matter of record.

Geraghty chose to use naval gunfire again a week later, this time in response to shelling of the Lebanese Ministry of Defense and areas near the American ambassador’s residence. Geraghty writes of the strike in his memoir simply, “During the night of September 16, heavy artillery fire fell on the Ministry of Defense and the US Ambassador's residence. The USS *Bowen* [FF 1079] and the USS *John Rogers* (DD 983) conducted six naval gunfire missions, expending a total of seventy-two rounds on six separate targets. The firing from these Muslim battery sites ceased.” This brief comment belies the importance of the event: It marked the first time US firepower had been used directly in support of a Lebanese government position.⁸⁶ Pintak, whose journalistic contacts gave him insight into the views of Marine officials, embassy officials, and militiamen, reports,

On the night of September 16, Geraghty ...employed his new authority to order the destroyer USS John Rogers, and the frigate USS Bowen to use their 5-inch guns to counter artillery batteries located, in the words of a Marine spokesman,

⁸⁶ Thomas L. Friedman, “US Warships Fire on Lebanon Area Held By Damascus,” *New York Times*, September 18, 1983, Late edition, sec. A, ProQuest Historical Newspapers.

‘deep inside Syrian-controlled areas of Lebanon.’ Warrant Officer Charles Rowe said the US ambassador's residence and the Defense Ministry had both been shelled, ‘thereby endangering American lives.’ The actual threat to the Americans, however, was questionable.

The new authority referenced in Pintak’s account was actually a new interpretation of the ROE endorsed by the highest levels of the US government. In early September, President Reagan authorized the Marine commander to use the force at his disposal in support of an LAF position at the village of Suq-al-Gharb in the mountains overlooking the airport. Rather than modifying the ROE, however, policy-makers characterized this measure as an “interpretation” of the existing self-defense ROE, based on the ability of forces in Suq-al-Gharb to threaten the Marines’ position.⁸⁷ As Trainor relates, operational commanders, including Geraghty, were uncomfortable with the implications of the new authority, and initially sought to interpret the rules more restrictively.

Geraghty was opposed to firing [on Suq-al-Gharb]...because if we started doing that, then they would really come under some fire. Now, it’s amazing how the system works because we squared the circle. The JCS never came on board in terms of firing to support the LAF—never did. They compromised with the idea that the Marines would be able to fire in self-defense of their positions, if—and it didn’t have to be an active threat—but if the situation was viewed as a threat to the Marines’ positions down there, then you could fire; naval gunfire could be employed, air could be employed, artillery already was being employed...it was an extension and an interpretation of the rules of engagement because the rules of engagement at that time allowed proportionate response to imminent threats.⁸⁸

Although Geraghty was reluctant to fire in direct support of the LAF position at Suq-al-Gharb, the increased leeway in the interpretation of ‘self-defense’ seems to have influenced his decision to use naval gunfire in response to the shelling near the Lebanese Ministry of Defense

⁸⁷ Pintak, *Beirut Outtakes*, 164.

⁸⁸ Trainor, Oral History Transcript Lieutenant General Bernard E. Trainor, US Marine Corps (Ret), 21 (emphasis added).

and US ambassador's residence. A formalistic re-interpretation of the existing ROE—the same interpretation that was being advocated and encouraged by policy-makers and strategic commanders regarding the position at Suq-al-Gharb—is necessary to justify using naval gunfire positions to silence artillery that was not providing 'effective fire' against the Marines and their positions. This is especially true in light of the previous restrictive interpretation of the ROE, which had prohibited shooting at armed fighters on their way to attack Marines and required a new ROE authorization for defense of the embassy compound, since the existing ROE were interpreted to apply only to defense of the Marines themselves. (Neither the Ministry of Defense nor the ambassador's residence were specifically covered by either the blue-card embassy ROE or the white-card airport ROE).

On the night of September 19, Geraghty learned that the LAF garrison at Suq-al-Gharb was in danger of being overrun. Somewhat reluctantly, he ordered two Navy ships to close the shore and provide gunfire support to the Lebanese forces. The cruiser USS *Virginia* and the destroyer USS *John Rogers* fired a total of over 330 shells, and the attack on Suq-al-Gharb was repulsed.⁸⁹ Geraghty later observed, "the firing we did in support of the LAF up at Suq-al-Gharb, that clearly changed our roles, in my opinion."⁹⁰ Many others agreed.⁹¹ While the active defense of LAF positions was a substantial change in the Marines' role, it was not accompanied by a change in the ROE.

⁸⁹ E.J. Dionne, "Shelling Is Heavy: Attack Aimed at Forces Threatening Troops in a Vital Village," *New York Times*, September 20, 1983, Late edition, sec. A1, ProQuest Historical Newspapers.

⁹⁰ Geraghty, Geraghty Interview Nov 1983, 11.

⁹¹ See, for example, the statement of William Dickinson in CHARLES E BENNETT et al., "The Use of Military Personnel in Lebanon and Consideration of Report from September 24-25 Committee Delegation to Lebanon," § Committee on Armed Services House of Representatives United States Congress (1983), 37.

The interpretation that made this change in mission possible was stated most clearly by the Chief of Naval Operations, Admiral James Watkins, in an exchange with Congressman Harold Ford, Sr. of Tennessee:

Admiral WATKINS. [Regarding the strikes on Suq-al-Gharb] All of the chain of command had been notified and all elements of the rules of engagement had been met.

Mr. FORD. To your knowledge, that is the only major review—I know you don't like to use the word reinterpretation—that is the only major review of what somebody might call an expansion of the rules of engagement during the course of--

Admiral WATKINS. The rules of engagement did not change. The rules of engagement deal with self-defense. The environment had changed to the point where we had to face the reality that, in this particular instance, and with Suq-al-Gharb only, Marines could be placed in jeopardy, in fact the entire MNF could be placed in jeopardy, by foreign backed forces. This was a new ball game, but the rules of engagement were self-defense and were unchanged and still are unchanged. I would not say it was a major change in the rules of engagement; it was a change in the interpretation of what constitutes a threat to our Marines, and this was a new threat because it had not been there before.⁹²

While the formalistic interpretation of the ROE to allow naval gunfire support was initiated at the suggestion of policy-makers and strategic commanders, the operational commander also faced pressure from his Marines to engage in formalistic interpretations of the rules. Hammel recounts at least one occasion in early September 1983 on which Geraghty agreed to re-interpret the rules in the face of advocacy from his Marines:

Sergeant Foster Hill put forth a plan aimed at achieving a balance more favorable to the Marines without endangering the lives of noncombatants. In Hill's opinion, it was not worth the expenditure of a great deal of ammunition to go after five or six militia fighters here and five or six there. Instead, grenadiers could force the small groups toward the alley fronting Cafe Daniel and the Armory, and the STA [Surveillance and Target Acquisition] snipers could pick them off, almost at their leisure.... Aided by spotters, the STA snipers had a field day. With the full concurrence of higher headquarters, Lieutenant Harris simply

⁹² BENNETT et al., 77.

reread the Rules of Engagement and decided that, as long as there was shooting going on, anyone caught with a weapon in his hands was fair game. This slight shift in the rules caught many hitherto untouchable militiamen off guard. Militia cowboys exiting the Armory with weapons were dropped without warning in the alley between it and Cafe Daniel.⁹³

In another example of military legalism, the Marines found that the LAF with whom they were frequently co-located were not limited by the same strictures on the use of force as US forces. Although the close relationship between the Marines and the LAF posed a risk in terms of ensuring the Marines' neutrality, it also posed an opportunity for Marines to engage in a formal interpretation of the rules which indirectly placed LAF resources at their disposal to respond to fire that did not cross the rigorous threshold established in the Marines' ROE for returning fire. Quoting again from Hammel,

If the Marines could not return the militia fire, the LAF could, with several tanks, armored cars, and APC's staged in and around the university compound. Lieutenant Marlow was approached during a trip through the Moat—a concrete trench that surrounded the library—by a machine gunner who complained about one particularly menacing sniper: 'Sir, we have to do something about that fire before someone gets hurt.' Marlow agreed but knew that he could do nothing. As he looked around, however, he saw an LAF tank commander sitting peacefully atop his tank, which was parked between the library and the next building. 'Corporal, do you see that guy sitting on the tank over there?' 'Uh, yes, sir.' 'Why don't you tell him about it?'⁹⁴

Within a few minutes, the Lebanese tank destroyed the building in which the sniper had been hiding. By a formal interpretation of the rules, the Marines themselves had not employed any force to achieve this end.

These incidents are tied together by a formalistic reading of the self-defense ROE, coupled with a push to take a preferred course of action. In the case of shelling in support of the LAF position at Suq-al-Gharb, policy-makers and strategic commanders initiated the

⁹³ Hammel, *The Root*, 261 (emphasis added).

⁹⁴ Hammel, 161.

reinterpretation, pushing for a more aggressive posture in support of the Lebanese government; the operational commander used his formalistic interpretation of the rules to exercise restraint, waiting longer than was desired by special envoy Ambassador Robert MacFarlane and other administration officials to come to the aid of the LAF.⁹⁵ In the other cases, the operational commander legalistically interpreted the rules to give himself more leeway than he had under previous interpretations, and either personally advocated a more forceful response, or responded favorably to advocacy for more aggressive measures than previous interpretations allowed.

In addition to specific use-of-force decisions, the Marines' interpretation of their mission and the lengths to which they went to emphasize its non-combatant character are also consistent with military legalism. One indication of this is the elaborate escalation-of-force ladder followed by the Marines in response to incoming fire. As Geraghty detailed in his weekly report to the Sixth Fleet commander in late August, 1983,

Direct attacks against the LAF are increasing and are placing the USMNF in a position where the demonstration of its neutrality is becoming more difficult. I have considered very carefully the steps to take in order to respond to the incoming fire, while at the same time limit the engagement. The Druze interpretation of our actions is always nebulous but I feel that our actions this week were appropriate and achieved the desired result. ...I feel, however, that if it serves their interest, they will directly attack the Marine positions at the airport, and 81mm mortar illumination rounds may not be sufficient to deter them next time. ...All of these deterrents are transitory, however, and once they feel they have the capability to deal with each threat, I believe they will become emboldened to take one more step. I am prepared to deal with each of their steps and am confident that our response will be proper and restrained, yet send them the appropriate signals. If they fail to understand the signals, I am prepared to deal with that, as well.⁹⁶

The escalatory steps Geraghty employed included warning shots, illumination rounds from mortars, illumination rounds from the 155-mm guns, aimed sniper fire, infantry weapons,

⁹⁵ Geraghty, *Peacekeepers at War*, 66.

⁹⁶ Geraghty, 50.

anti-tank weapons against sniper positions, mortar fire, 155-mm artillery fire, 5-inch naval gunfire, air strikes by carrier-based aircraft, and 16-inch naval gunfire. As mentioned above, he and previous MAU commanders also prohibited their Marines from shooting at anyone who was not actively shooting at them, even when it was apparent that they were preparing to shoot, or had just finished shooting. This careful approach reflected the operational commanders' formalistic interpretation of the peacetime ROE, as they advocated for a visible, restrained approach to achieve the mission of 'presence.' This approach is understandable in light of their understanding of the mission, but it was not required by the peacetime self-defense ROE.

Proportionality in self-defense is calculated according to the damage likely to be caused weighed against the threat that is posed.⁹⁷ Such considerations would prohibit responding to sniper fire in a populated area with 16-inch guns, for example, because the likely harm to civilian lives and property would be disproportionate. But proportionality and minimum force would not mandate the careful tit-for-tat measures the Marines engaged in for weeks after it became clear that they were targets of hostile fire. The origin of this legalistic interpretation constraining the Marines' use of force was hinted at by Mead:

If you went in and said, 'Hey, Israelis, watch the United States Marines,' or 'Hey, Syrians, take a look at this, we're going to man this position, we're going to threaten you, we're going to kick your ass if you do this.' That's the way Marines like to go in. You know, that's the way I'd love to go and do business, but you can't do that. Diplomatic is very sensitive, so you go in very low keyed and you go in, not unarmed, but you go in and do no provocative things. Don't give the diplomats a headache...⁹⁸

The Marines' legalistic interpretation of their mission extended to their emphasis on its non-combat nature, even after it became clear that they were becoming the targets of deadly

⁹⁷ See discussion in section 2.4.1.2 of Office of General Counsel Department of Defense, "Department of Defense Law of War Manual" (Department of Defense, June 2015), 61.

⁹⁸ Mead and Frank, Colonel Mead Interview Jan 1983, 49.

attacks. For weeks after the fire directed at the Marines became increasingly intense and lethal, Marine commanders continued to insist that the shooting was ‘spillover fire’ rather than being aimed specifically at the Marines. Finally, in September after several Marines had been killed by artillery and sniper fire, the Marines acknowledged what everyone already knew: The shooting was aimed at them.⁹⁹ Geraghty made clear in his memoir why he was so reluctant to admit that the Marines had become the targets of hostile fire:

Ambiguity is a useful weapon. ...The question the media asked me at this time was whether the firing at Marine positions was directed at us or was spillover fire directed at nearby LAF or allied positions. It was difficult at times to discern the difference, but I maintained the point that it becomes irrelevant as to who was firing and what their intentions were if peacekeepers, allies, or diplomats were killed or injured. If the firing had been determined to be directed at the USMNF, this finding would have triggered the imminent involvement in hostilities section of the War Powers Resolution. Further, the debate would have had to include whether Syria knew about the shelling (most of which was coming from Syrian-controlled territory) and, if the Syrians did, whether they had any control over it.¹⁰⁰

As with the decisions to employ naval gunfire support, snipers, and Lebanese tanks, Geraghty’s consideration in ambiguously characterizing whether the incoming fire was aimed at the Marines reflects rule formalism and advocacy. In this case, he formally interpreted the bounds of the presence mission, and displayed advocacy for the Marines’ continued presence without further Congressional authorization. Such conduct might be positively characterized as showing sensitivity to the diplomatic considerations that dominated the Beirut mission. But as the Investigative Subcommittee of the House Armed Services Committee observed in its investigation into the adequacy of the security measures at the Marine compound, the sensitivity

⁹⁹ Pintak, *Beirut Outtakes*, 160. “For the first time, Colonel Geraghty admitted that the Americans were the target. ‘The fires are specifically directed and are being adjusted at and over Marine positions,’ he told reporters.”

¹⁰⁰ Geraghty, *Peacekeepers at War*, 176–78.

shown by Geraghty and his predecessors in command of the MAUs to potential political repercussions resulted in the Marines interpreting the political and diplomatic constraints of the mission more restrictively than the diplomats. In the words of the subcommittee report, “The subcommittee is pleased that Ambassador Habib ‘didn’t try to be a general—not even a colonel.’ The subcommittee feels it would be better if the generals and colonels weren’t expected to be diplomats.”¹⁰¹

Beirut summary and analysis

The evidence from the Marines’ intervention in Beirut is consistent with the expectations generated by the explanation of military legalism developed in Chapter 3. Policy-makers confronted with contested legitimacy developed a rule-based regime of constraints that were aimed specifically at addressing the legitimacy concerns among both domestic and international audiences. Operational-level commanders responsible for mission accomplishment under this regime of constraint engaged in formalistic interpretations of the rules, and advocacy for their preferred interpretations in order to justify the courses of action they felt were most likely to be effective.

Some aspects of the military legalism displayed in the Beirut intervention were unique: The reinterpretation of the ROE to allow the use of force in defense of Suq-al-Gharb, for example, was suggested by policy-makers rather than by operational commanders. Once it had been suggested, however, the operational commander used similar logic to justify other actions he desired to take, even as he resisted shelling Suq-al-Gharb for several days.

¹⁰¹ Investigations Subcommittee of the House Armed Services Committee, 98th Congress, “Adequacy of U.S. Marine Corps Security in Beirut,” 37.

It is also noteworthy that the operational commanders on the ground in Beirut made their decisions without the advice of military lawyers. Military lawyers were involved in the development of the initial ROE, and in the review and approval of the MAU blue-card and white-card ROE, but there were no lawyers deployed on the ground with the MAU in Beirut. The integral involvement of military lawyers in decisions regarding the use of force is one indication of military legalism, but as demonstrated in Beirut, operational commanders may engage in legalistic reasoning on their own. The fact that the operational commanders engaged in a legalistic parsing of the rules governing their use of force even without lawyers present suggests that military professionalism in the wake of Vietnam was evolving to incorporate the tenets of military legalism.

The nature of the MNF-2 mission was unique. The Marines' presence on the ground was small, and the highly politicized mission tended to compress the strategic and operational levels of the chain of command. The JCS and theater commander sometimes acted as strategic commanders, sometimes as operational commanders, and sometimes seemed not to act at all, leaving the Marine commander on the ground in Beirut negotiating directly with senior civilian policy-makers. The next case study will examine whether these unique factors dictated the emergence of military legalism in Beirut, or whether it can manifest in larger conflicts, without them, as well.

Iraq: Modern military legalism in major combat operations

Military legalism figured prominently in operational decision making among US forces involved in the invasion and occupation of Iraq, Operation IRAQI FREEDOM (OIF). OIF suffered from contested legitimacy and was characterized by a dense regime of rule-based constraints. Military officers operating under this regime of constraints often engaged in

formalistic interpretations of the rules in order to advocate for their desired courses of action. This is consistent with the explanation offered in Chapter 3 for when military legalism is likely to emerge. It is apparent that this legalistic approach was ingrained in operational commanders during this campaign: Many commanders used rules to precisely define decisions that traditional military professionalism would address as matters of judgment, such as what combination of actions or indicators could be taken to constitute hostile intent. In situations in which a World War II-, Korea-, or Vietnam-era commander would likely have invoked his professional assessment of military necessity as a justification for action, operational commanders in OIF were more likely to create rules, which both guided the actions of subordinate commanders and served as pre-emptive justifications for their actions.

OIF ran from March, 2003 until the end of August, 2010 when it was succeeded by Operation NEW DAWN, a stabilization and transition mission that lasted until December, 2011.¹⁰² This analysis focuses on the time period from the initial invasion in March, 2003 through the end of December, 2004. This period was chosen because it encompasses major combat operations as well as the rise of the insurgency, and both major battles for the city of Fallujah. Although detention and interrogation issues are addressed to the extent that they contributed to contested legitimacy, this case study does not consider military legalism associated with detention and interrogation policy. Instead, it addresses military legalism in use-of-force decisions during combat operations only. (A brief discussion of military legalism in detention and interrogation policy is contained in Chapter 6).

¹⁰² Dates for the operations are taken from the DoD casualty statistics website, which categorizes casualties according to the official start and end dates for the named operations in which they occurred. Department of Defense, “Department of Defense Casualties in Operation IRAQI FREEDOM, Operation NEW DAWN, Operation ENDURING FREEDOM, and Operation FREEDOM’S SENTINEL,” April 18, 2018, <https://www.defense.gov/casualty.pdf>.

*A short history of Operation IRAQI FREEDOM 2003-2004*¹⁰³

The story of the US invasion of Iraq in 2003 begins with the US invasion of Iraq in 1991. In the wake of Operation DESERT STORM, the 1991 US-led fight to expel Iraqi forces from Kuwait, US and UN inspectors were disturbed to discover that Iraq had highly advanced programs to develop chemical and nuclear weapons.¹⁰⁴ The UN Security Council responded to this previously under-appreciated threat by passing Resolution 687, which required Iraq to dismantle its weapons of mass destruction (WMD) program, forbade it from pursuing any new WMD programs, and mandated a regime of international inspections and monitors to ensure compliance with the terms of the resolution.¹⁰⁵ Iraqi leader Saddam Hussein grudgingly complied with the terms of the resolution at first, but reluctant cooperation gave way to outright obstruction as the years passed. His government consistently delayed inspections, denied access to facilities, and provided records that were incomplete or appeared to be doctored.¹⁰⁶ This

¹⁰³ This summary is drawn from a number of sources. Particularly helpful were Kyle Crichton, Gina Lamb, and Rogene Fisher Jacquette, “Timeline of Major Events in the Iraq War,” accessed April 18, 2018, <https://archive.nytimes.com/www.nytimes.com/interactive/2010/08/31/world/middleeast/20100831-Iraq-Timeline.html?ref=middleeast>; “Timeline: Iraq War,” *BBC News*, July 5, 2016, sec. Middle East, <http://www.bbc.com/news/magazine-36702957>; “The Iraq War,” Council on Foreign Relations, accessed April 18, 2018, <https://www.cfr.org/timeline/iraq-war>; Anthony H Cordesman, *The Iraq War: Strategy, Tactics, and Military Lessons*, CSIS Significant Issues Series, 5 Vol 25 (Washington, D.C.: The CSIS Press, 2003); Center for Law and Military Operations, *Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations* (Charlottesville, VA: The Judge Advocate General’s School and Legal Center, U.S. Army, 2004); Center for Law and Military Operations, *Legal Lessons Learned from Afghanistan and Iraq: Volume II Full Spectrum Operations (2 May 2003-30 June 2004)* (Charlottesville, VA: The Judge Advocate General’s School and Legal Center, U.S. Army, 2004); Gregory Fontenot, E. J. Degen, and David Tohn, *On Point: The United States Army in Operation Iraqi Freedom*: (Fort Belvoir, VA: Defense Technical Information Center, 2004), <https://doi.org/10.21236/ADA524388>; Dr Donald P Wright and COL Timothy R Reese, *On Point II: Transition to the New Campaign: The United States Army in Operation IRAQI FREEDOM May 2003 - Jan 2005* (Fort Leavenworth, KS: Combat Studies Institute Press, 2008).

¹⁰⁴ See generally Kalpana Chittaranjan, “Iraq’s Nuclear Weapons Programme,” *Strategic Analysis* 23, no. 3 (June 1999): 407–22, <https://doi.org/10.1080/09700169908455056>.

¹⁰⁵ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 18.

¹⁰⁶ See discussion in Chittaranjan, “Iraq’s Nuclear Weapons Programme,” 487 ff.

behavior led many to believe that he was concealing a resurgent WMD program. Saddam completely broke off cooperation with UN weapons inspectors and evicted them from Iraq in September 1998. The US responded with cruise missile strikes in December 1998 against suspected WMD facilities (Operation DESERT FOX). The UN also imposed a sanctions regime.¹⁰⁷

Separately from the response to suspected WMD, the US also instituted two no-fly zones over Iraq following the 1991 Gulf War: One in northern Iraq intended to limit Saddam's oppression of Iraqi Kurds (Operation NORTHERN WATCH), and one in southern Iraq intended to limit his oppression of Shi'ite Muslims (Operation SOUTHERN WATCH). In September 1996 the US launched cruise missile strikes against targets in Iraq in response to attacks by Iraqi forces against Kurds in the north (Operation DESERT STRIKE).

Throughout the period from 1999-2002, Saddam continued to refuse access to international weapons inspectors, obstructing UN efforts to enforce the terms of Resolution 687. After the September 11, 2001 terrorist attacks against the United States, some expressed fear that Saddam might be developing WMD with the intent of providing them to terrorists to strike against the US.¹⁰⁸ Rumors of Iraqi support for the September 11 hijackers (which proved to be unfounded) strengthened this concern.¹⁰⁹ Throughout the summer and autumn of 2002, US officials expressed growing worry about the state of Saddam's WMD program, and began to advocate for military action. As the prospect of war grew more likely, the US began to prepare by degrading Iraqi defensive capabilities under already-existing authorities: Beginning in the

¹⁰⁷ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 19.

¹⁰⁸ Michael R. Gordon and Judith Miller, "US Says Hussein Intensifies Quest for A-Bomb Parts: Effort Spans 14 Months. New Information Is Central to White House Argument for Urgent Action on Iraq," *New York Times*, September 8, 2002, National edition, sec. 1, ProQuest Historical Newspapers.

¹⁰⁹ Chris Hedges, "Defectors Cite Iraqi Training Camp for Terrorism," *New York Times*, November 8, 2001, National edition, sec. A1.

summer of 2002, US forces enforcing the northern and southern no-fly zones interpreted their ROE more liberally than before, attacking a significant portion of Saddam's air defense network in response to violations such as illuminating aircraft conducting no-fly zone operations with fire control radars, or shooting at them with surface-to-air missiles.¹¹⁰

US President George W. Bush addressed the UN General Assembly on the question of Iraqi non-compliance with WMD inspections in September, 2002. In his speech, he clearly signaled the intent of the US to act unilaterally if UN authorization for the use of force was not forthcoming. He declared, "If Iraq's regime defies us again, the world must move deliberately, decisively to hold Iraq to account. We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The [existing] Security Council resolutions will be enforced—the just demands of peace and security will be met—or action will be unavoidable."¹¹¹ Further strengthening the message that the US was prepared to take unilateral action, Congress passed a Joint Resolution authorizing the use of force against Iraq on October 10. The UN Security Council passed Resolution 1441 in early

¹¹⁰ Cordesman reports that US forces destroyed 20-33 percent of Iraqi surface-to-air missile launchers and major radars in no-fly zone enforcement actions prior to the initiation of combat in OIF. Cordesman, *The Iraq War*, 35, 58–60; An aviator with extensive experience in the no-fly zones described the ROE relaxations in an e-mail to the author: "Essentially, the Iraqis had to first either shoot at or illuminate aircraft. That would 'trigger' the ROE (they called it an 'ROE trip') in which enforcing aircraft had a 10 minute window to respond. Initially it was only to the system that shot at or illuminated the aircraft, but then subsequently changed to where the ROE response could be against any air defense system within the NFZ. That did help to degrade the Iraqi IADS as the US ramped up for the invasion. Though none of the ROE responses were outside the NFZ, so from the 33rd to the 36th parallel went untouched until the war kicked off in March 2003." Lt. Col. (Ret) Scott Cooper to Doyle Hodges, "No-Fly Zone Fact Check," April 22, 2018.

¹¹¹ President Bush speech to UN General Assembly 12 Sep 2002, found at at <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>, cited in Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 20.

November, which authorized “serious consequences” if Iraq failed to meet its obligations under Resolution 687, but failed to specify precisely what those consequences might be.¹¹²

In response to international pressure, Saddam re-admitted UN weapons inspectors in mid-November 2002 but almost immediately threw up obstacles to their work.¹¹³ By February 2003, the US had made clear that it planned to use force in response to what it perceived as an ongoing Iraqi WMD program in violation of Resolution 687. An attempt to gain a new UN Security Council Resolution authorizing the use of force fell short of the required votes. Relying instead on the 12-year-old authority of Resolution 687 and the ambiguous authority of Resolution 1441, the US and several coalition partners invaded Iraq on March 19, 2003.

The early combat operations of OIF were intense, brutal, and short. Ground forces advanced rapidly into southern Iraq after initial cruise missile and air strikes against leadership targets (which US planners hoped might kill Saddam).¹¹⁴ Within four days, US forces had advanced over 200 kilometers and were within 100 kilometers of Baghdad. In a measure of both the speed of the US advance and the disparity in casualties suffered, March 23rd was labeled in many contemporary US accounts as ‘the worst day of the war’: US forces suffered 26 killed in combat, bringing the total number of US killed in action to 35, and the advancing ground forces were considerably slowed by stubborn Iraqi opposition. By comparison, Iraqi casualties by this point likely exceeded 3,000 killed.¹¹⁵ The next several days saw intense sandstorms, which

¹¹² Max Hilaire, “International Law and the United States Invasion of Iraq,” *Military Law and Law of War Review* 44 (2005): 89.

¹¹³ Julia Preston, “Iraq Tells the UN Arms Inspections Will Be Permitted,” *New York Times*, November 14, 2002, National edition, sec. A1, ProQuest Historical Newspapers.

¹¹⁴ Cordesman, *The Iraq War*, 61. Information on the desire to kill Saddam with the strikes derived from the author’s personal experience as Operations officer of one of the back-up cruise missile firing units in the March 19 attacks.

¹¹⁵ Fontenot, Degen, and Tohn, *On Point*, 89; Cordesman, *The Iraq War*, 72; Iraqi casualty data estimated from the website Iraq Body Count. Their data show 992 killed the week of 16 Mar and over 2,300 killed

made ground and low-altitude air operations difficult. High altitude air operations continued during this period, and US aircraft destroyed hundreds of Iraqi military vehicles and likely killed thousands of Iraqi troops as elite Iraqi Republican Guard forces tried unsuccessfully to reposition under the cover of the weather.¹¹⁶ By the time the weather cleared on March 28, US forces had taken advantage of the pause to resupply, while Iraqi forces had been further reduced by relentless air attacks. Army and Marine ground forces resumed the advance toward Baghdad and focused their attacks on Saddam's Republican Guard. A Brigade Combat Team (BCT) from the Army's 173rd Airborne Brigade parachuted into northern Iraq on March 28, opening an additional front.¹¹⁷

On April 5, a US armored column entered Baghdad on a "thunder run," a term used to describe a high-speed armed reconnaissance raid.¹¹⁸ On April 6, the coalition declared that it had achieved air supremacy—such complete control of the skies that opposing air forces were incapable of effective interference.¹¹⁹ A second armored column conducted a "thunder run" into the center of Baghdad during the early morning hours of April 7 and remained, occupying portions of the city. After further fighting in and around Baghdad on April 8, as Cordesman observed, "The regime in Baghdad effectively ceased to function on April 9."¹²⁰ A particularly iconic image from that day is a photograph of US troops in an M1A1 Abrams tank assisting Iraqi crowds in pulling down a statue of Saddam Hussein in Baghdad.¹²¹

the week ending 23 Mar 03. "Iraq Body Count," accessed April 20, 2018, <https://www.iraqbodycount.org/database/>.

¹¹⁶ Cordesman, *The Iraq War*, 75–79.

¹¹⁷ Cordesman, 79.

¹¹⁸ Fontenot, Degen, and Tohn, *On Point*, 342.

¹¹⁹ Cordesman, *The Iraq War*, 104; Department of Defense, *The Dictionary of Military Terms: The US Department of Defense* (Skyhorse Publishing Inc., 2009), 17.

¹²⁰ Cordesman, *The Iraq War*, 112.

¹²¹ Crichton, Lamb, and Jacquette, "Timeline of Major Events in the Iraq War."

The US declared an end to major military operations in Iraq on April 14, less than a month after they had begun. Victoria Clarke, a Pentagon spokeswoman said, “The regime is at its end and its leaders are either dead, surrendered, or on the run.”¹²² Listing the eight objectives of the invasion, previously laid out by Defense Secretary Donald Rumsfeld in a news conference on March 21, Clarke asserted that all either had been met or were in the process of being met:¹²³ Saddam’s regime had been eliminated; terrorists had lost a major state sponsor; intelligence on Iraq’s support for terrorism was being collected; US forces had “begun the long process of exploring sites, sifting through documents, and encouraging Iraqis to come forward with information” regarding WMD; this, in turn, would lead to the seizure and destruction of Iraqi WMD; Iraqi oil fields were secure; humanitarian aid was beginning to flow into the country; and, the US was prepared to help the Iraqi people to establish a representative government.¹²⁴ As subsequent events would show, this optimistic assessment was premature.

The scope of the US effort during the initial combat operations was impressive. According to Air Force figures, the US flew over 47,000 total sorties, of which approximately one third—over 17,200—were strike missions. US aircraft dropped more than 19,000 munitions on Iraqi targets; 66 percent of those were precision-guided munitions (PGM’s) (in urban areas, the proportion of PGM’s exceeded 90%).¹²⁵ At the height of the initial combat, over 170,000 US and coalition troops were on the ground in Iraq.¹²⁶ The strength of Iraqi ground forces is more difficult to accurately assess: Estimates vary between 400,000 and 600,000 soldiers.¹²⁷ Although the speed of the US ground campaign and the disparity in casualties—100 US killed in action

¹²² Cordesman, *The Iraq War*, 127.

¹²³ Cordesman, 65.

¹²⁴ Cordesman, 128.

¹²⁵ Cordesman, 143.

¹²⁶ Cordesman, 69.

¹²⁷ Cordesman, 44–46.

prior to April 20, with another 34 non-combat deaths, compared to Iraqi deaths estimated at 7,000 by the same point—could give the impression that the campaign was a ‘cakewalk’, US troops encountered stiff opposition in places, and US forces incurred significant risks.¹²⁸ But the coordination and rapid pace of combined air and ground operations proved overwhelming for Iraqi defenses. The US military was extraordinarily well-prepared to wage combined arms warfare at a level of proficiency never before seen.

If US forces were extraordinarily well-prepared to deal with the challenges of combat, they were extraordinarily ill-prepared to maintain order after toppling Saddam’s regime. Rather than surrendering, the Iraqi regime simply ceased to exist. As a consequence, the responsibility for maintaining basic order and security—functions that had previously been carried out by Saddam’s military and police forces—now fell to US and coalition forces. During major combat operations, airpower served to offset the numerical superiority of Iraqi troops and give US forces disproportionate striking power, but such weaponry was of little use in restoring basic services, deterring looting, and maintaining order. These tasks required boots on the ground. A brigade commander in Baghdad in April 2003 observed,

I think probably the most challenging situation for [our Soldiers], quite frankly, was when the populace began to take advantage of their own people in terms of looting. That put our Soldiers in a position of forcing them to be policemen, which we clearly had not done a lot of training on.¹²⁹

The problem of looting impacted the provision of basic services. The official US Army history of OIF reports that looters damaged electrical, sewage, and water infrastructure, and

¹²⁸ On US casualties, see Cordesman, 142; On Iraqi casualties, see “Iraq Body Count.” The data was obtained by searching for all Iraqi casualties including government forces by week, from March 19-April 20.

¹²⁹ Colonel Daniel Allyn, commander 3rd Brigade Combat Team, 3rd Infantry Division, quoted in Wright and Reese, *On Point II*, 90–91.

“wreaked over \$900 million of havoc on Iraq’s oil systems.”¹³⁰ US commanders simply had too few troops to disrupt or deter the looters, or to meet many of their other missions. Quoting again from the official Army history,

The Coalition’s inability to prevent looting, to secure Iraq’s borders, and to guard the vast numbers of munitions dumps in the early months after Saddam’s overthrow are indicative of the shortage [of ground troops]. ...Furthermore, by the time the Saddam regime fell, most Iraqis had yet to see a Coalition soldier. Unlike Axis military forces and their citizenry in 1945, who had no doubts about their utter defeat and who accepted the imposition of far-reaching political and social changes by the victorious Allies, Iraqis not favorably inclined toward the Coalition’s post conflict goals had much less reason to passively accept fundamental change.¹³¹

In addition to lacking numbers, US troops in the first months after the collapse of the Iraqi government lacked the legal authority to maintain civil order. The operations plan for the invasion, OPLAN 1003V, contained detailed guidance, including ROE for the phases of the war up to and including major combat operations. The period after combat, referred to in DoD doctrine as Phase IV, was not spelled out in any detail. This left US forces operating for a brief time under self-defense ROE, which authorized them to protect themselves, but not to protect Iraqi property.¹³² Faced with this vacuum, some local commanders improvised and asserted authority. As one senior JAG observed,

We looked first to our higher headquarters for authority, guidance, a plan; but those things were only supplied in the broadest terms. There was no detailed plan for Phase IV operations (post-major combat) when coalition forces took Baghdad. ...Thus, we were left to either sit and wait for someone to tell us what to do or to act within the broad guidance we had been given, with grounding in international law. It was no real challenge to determine this matter. We knew we had to do something. We knew our window of opportunity was closing. We also knew that we had a responsibility under the Geneva and Hague Conventions to do certain things to ensure public order and safety for the Iraqi people. ...We

¹³⁰ Wright and Reese, 386.

¹³¹ Wright and Reese, 573.

¹³² Wright and Reese, 90.

knew that whatever Phase IV plan was eventually issued, it would have to be based on this law. Therefore, our decision to act with international law as our base line plan was no real decision at all – it was the only logical, legal and responsible thing to do.¹³³

On May 1, 2003, President Bush landed aboard the aircraft carrier USS *Abraham Lincoln* and spoke from the flight deck, declaring an end to the ‘military phase’ of operations in Iraq.¹³⁴ Behind him, a banner proclaimed, “Mission Accomplished.” On the ground in Iraq, however, the mission appeared to be unraveling. Attacks on US troops and Iraqi civilians were steadily increasing: 66 US service personnel were killed by hostile action between May and August 2003, with over 600 wounded.¹³⁵ Iraqi civilian deaths, estimated at around 800 per month in May, June, and July, and spiked to nearly 1,300 in August.¹³⁶ The commander of US Central Command (CENTCOM) observed in July 2003 that US forces in Iraq were facing, “the beginnings of a classical guerrilla-type campaign.”¹³⁷

One of the most significant US choices that contributed to the rising violence was the decision on May 23, 2003 by Ambassador Paul Bremer, the head of the US Coalition Provisional Authority (CPA), to disband the Iraqi Army. The Council on Foreign Relations observed that this decision, “[sent] hundreds of thousands of well-armed men into the streets.”¹³⁸ A week earlier, Bremer had surprised military commanders with an order that disbanded the Ba’ath party

¹³³ Comments of Lt. Col. Mark Nance, JAGC, USA, as cited in Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 2*, 40–41. Nance notes especially the role of V Corps JAG, Colonel Marc Warren in pushing through legal authorities to restore order.

¹³⁴ Crichton, Lamb, and Jacquette, “Timeline of Major Events in the Iraq War”; David E. Sanger, “President Says Military Phase in Iraq Has Ended,” *The New York Times*, May 2, 2003, <https://www.nytimes.com/2003/05/02/international/worldspecial/president-says-military-phase-in-iraq-has-ended.html>.

¹³⁵ Defense Manpower Data Center, “DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month,” April 21, 2018, https://dcas.dmdc.osd.mil/dcas/pages/report_oif_month.xhtml.

¹³⁶ Michael E. O’Hanlon and Ian Livingston, “Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq” (Washington, D.C.: Brookings, January 31, 2011), 3.

¹³⁷ Wright and Reese, *On Point II*, 114.

¹³⁸ “The Iraq War”; See also Wright and Reese, *On Point II*, 97.

and excluded those who had held senior level Ba'ath membership from public office.

Additionally, any public official serving at the time who had been full members of the party at any level were to be removed from office, pending review of their status by the CPA.¹³⁹ The combined effect of these two orders was to upend the pillars that had supported societal order in Iraq for 30 years. As one Iraqi observed, “to dismantle the Party, the Army, and the other structure of the state was only to replace them with chaos.”¹⁴⁰

A suicide bomber attacked the UN headquarters compound on August 19, 2003, killing 17 people including UN Special Representative Vieira de Mello, and wounding over 100.¹⁴¹ The attack, the deadliest on civilian aid workers in UN history, caused the UN to withdraw all non-essential employees and limited the scope of foreign civilian relief operations.¹⁴² Despite the developing insurgency and the attacks on civilian relief organizations, the US administration was eager to draw down the number of US troops in Iraq. Nearly 20,000 US troops had been withdrawn by September, bringing the overall US troop strength to 132,000.¹⁴³ US and coalition commanders increasingly had to deal with a deteriorating security situation while simultaneously performing reconstruction tasks with a relatively small—and declining—number of troops.

US troops in Iraq were concerned not only with security and reconstruction, but also with finding evidence of the Iraqi WMD program and hunting down senior members of Saddam's government who had gone into hiding. US troops located and trapped Saddam's sons Uday and

¹³⁹ Wright and Reese, *On Point II*, 94.

¹⁴⁰ Wright and Reese, 96.

¹⁴¹ Crichton, Lamb, and Jacquette, “Timeline of Major Events in the Iraq War”; Dexter Filkins and Richard A. O'Connell Jr., “After the War: Truck Bombing; Huge Suicide Blast Demolishes U.N. Headquarters in Baghdad; Top Aid Officials Among 17 Dead,” *The New York Times*, August 20, 2003, sec. World, <https://www.nytimes.com/2003/08/20/world/after-war-truck-bombing-huge-suicide-blast-demolishes-un-headquarters-baghdad.html>.

¹⁴² “The Iraq War.”

¹⁴³ O'Hanlon and Livingston, “Iraq Index,” 13.

Qusay in Mosul in July; both men were killed in the ensuing gunfight.¹⁴⁴ Saddam himself was captured in December, found hiding in a spider hole in a building near Tikrit.¹⁴⁵ The search for WMD was less successful. Despite intensive efforts by the Iraq Survey Group (ISG), former chief UN weapons inspector David Kay, who also headed the ISG, reported to the Senate Armed Services Committee in January 2004 that no WMD had been found in Iraq.¹⁴⁶

Violence continued to increase as the Iraqi insurgency grew during the autumn and winter of 2003-2004. 70 US soldiers were killed in action during the month of November 2003.¹⁴⁷ In February 2004, insurgents firing rocket-propelled grenades (RPG's) ambushed a convoy carrying the CENTCOM commander, General John Abizaid, and the commander of the 82nd Airborne Division, Major General Charles Swannack near Fallujah. Although neither General was injured, the attack epitomized the dangerous security environment in Iraq generally, and around the city of Fallujah in particular. Four US private security contractors were killed in their vehicle outside Fallujah on March 31. Their bodies were dragged from their vehicle, burned, and hung from a bridge; the moment was captured in disturbing photographs, which led news stories around the world.¹⁴⁸

Responding to pressure from the White House, the commander of US forces in Iraq, Lieutenant General Ricardo Sanchez, ordered Marines from the First Marine Expeditionary Force (I MEF), commanded by Lieutenant General James Conway, to attack Fallujah and restore

¹⁴⁴ "The Iraq War."

¹⁴⁵ Wright and Reese, *On Point II*, 57.

¹⁴⁶ Wright and Reese, 625; Crichton, Lamb, and Jacquette, "Timeline of Major Events in the Iraq War"; James Risen, "THE STRUGGLE FOR IRAQ: INTELLIGENCE; Ex-Inspector Says C.I.A. Missed Disarray in Iraqi Arms Program," *The New York Times*, January 26, 2004, sec. World, <https://www.nytimes.com/2004/01/26/world/struggle-for-iraq-intelligence-ex-inspector-says-cia-missed-disarray-iraqi-arms.html>.

¹⁴⁷ Defense Manpower Data Center, "DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month."

¹⁴⁸ Crichton, Lamb, and Jacquette, "Timeline of Major Events in the Iraq War"; "The Iraq War."

US control. The Marines began their first assault on the city on April 4, despite having protested that the tight timeline did not give them sufficient time to prepare the city and take measures to evacuate civilians.¹⁴⁹ Although the Marines tried to minimize collateral damage, civilians were inevitably caught in the crossfire.¹⁵⁰ On April 9, CPA head Bremer ordered a unilateral cease-fire, responding to pressure from members of the Iraqi Governing Council, who described the assault on Fallujah as, “unacceptable and illegal,” due to the perception of massive civilian casualties.¹⁵¹ Insurgents broke the cease-fire on April 27, but rather than re-engaging directly, the Marines withdrew to a nearby camp, leaving the bulk of the fighting to the newly-formed Iraqi Fallujah brigade under the command of a former Ba’athist General, Jasim Mohammed Saleh. As an Air Force historian reports,

Several days later, it became clear that Saleh could not be trusted. Indeed, Coalition intelligence had discovered that he had been involved in military actions against Shi’ites during Saddam Hussein’s rule and intended to use his shiny new American weapons in this task again. To stop this potential conflict, U.S. leaders announced that Muhammed Latif would assume control of the Brigade. The entire effort proved to be a debacle. By September, the group had dissolved and handed over all the American weapons to the insurgents.¹⁵²

Around the same time the Marines were attacking Fallujah in early April, an anti-American Shia cleric, Muqtada al Sadr, called on his 10,000-man militia, the Mahdi Army, to

¹⁴⁹ Richard H. Shultz, Jr., *The Marines Take Anbar: The Four-Year Fight Against Al Qaeda* (Annapolis, Md.: Naval Institute Press, 2013), 79; See also Rajiv Chandrasekaran, “Key General Criticizes April Attack In Fallujah (Washingtonpost.Com),” *The Washington Post*, September 13, 2004, sec. A 17, <http://www.washingtonpost.com/wp-dyn/articles/A16309-2004Sep12.html>: “Conway said he resisted calls for revenge, and instead advocated targeted operations and continued engagement with municipal leaders. ‘We felt like we had a method that we wanted to apply to Fallujah: that we ought to probably let the situation settle before we appeared to be attacking out of revenge,’ he said in an interview with four journalists after the change-of-command ceremony. ‘Would our system have been better? Would we have been able to bring over the people of Fallujah with our methods? You’ll never know that for sure, but at the time we certainly thought so.’”

¹⁵⁰ William Head, “The Battles of Al-Fallujah: Urban Warfare and the Growth of Air Power,” *Air Power History* 60, no. 4 (Winter 2013): 37.

¹⁵¹ Head, 37.

¹⁵² Head, 38.

openly rebel against the US occupation.¹⁵³ In response, US forces from the 1st Armored Division launched extensive operations south of Baghdad in the cities of Najaf, Diwaniyah, Al Kut, and Karbala to combat the Mahdi Army.¹⁵⁴ Iraqi civilian deaths averaged over 1,000 per month during the spring and summer, surging to nearly 2,000 in April with the first battle of Fallujah.¹⁵⁵ Over 300 US soldiers were killed in action and more than 4,000 wounded between April and August 2004.¹⁵⁶

In late April 2004, the US publicly acknowledged the sadistic abuse of Iraqi prisoners in the military detention facility at Abu Ghraib by US military personnel, and released shocking photographs taken by the perpetrators, which documented the abuse.¹⁵⁷ The release of the Abu Ghraib photos served to galvanize insurgents in their opposition to the US occupation.¹⁵⁸ Investigations into Abu Ghraib uncovered evidence of a systematic program of harsh interrogation amounting to torture by US troops and intelligence agencies.¹⁵⁹ The abuses at Abu Ghraib and US detention and interrogation policies more generally fueled resentment, which strengthened the insurgency. As documented in one report,

... after the release of the Abu Ghraib photos, a reporter asked a young Iraqi man about the reasons for the rise in violence against U.S. soldiers. His response

¹⁵³ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 2*, 12.

¹⁵⁴ Center for Law and Military Operations, 13.

¹⁵⁵ O'Hanlon and Livingston, "Iraq Index," 3.

¹⁵⁶ Defense Manpower Data Center, "DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month."

¹⁵⁷ Crichton, Lamb, and Jacquette, "Timeline of Major Events in the Iraq War"; Thom Shanker and Jacques Steinberg, "THE STRUGGLE FOR IRAQ: CAPTIVES; Bush Voices 'Disgust' at Abuse of Iraqi Prisoners," *The New York Times*, May 1, 2004, sec. World, <https://www.nytimes.com/2004/05/01/world/the-struggle-for-iraq-captives-bush-voices-disgust-at-abuse-of-iraqi-prisoners.html>.

¹⁵⁸ Wright and Reese, *On Point II*, 41.

¹⁵⁹ Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004, <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>; Constitution Project (Georgetown Public Policy Institute), Task Force on Detainee Treatment, and Constitution Project (Georgetown Public Policy Institute), *The Report of the Constitution Project's Task Force on Detainee Treatment*, 2013.

emphasized the imperative for revenge: ‘It is a shame for foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. ... This is a great shame for the whole tribe. It is the duty of that man, and of our tribe, to get revenge on that soldier — to kill that man. Their duty is to attack them, to wash the shame. The shame is a stain, a dirty thing — they have to wash it. We cannot sleep until we have revenge.’¹⁶⁰

US authorities formally dissolved the CPA on June 28, 2004, vesting sovereignty in an Interim Iraqi Government until elections could be held the following year.¹⁶¹ In a great irony, the ceremony was moved up two days and conducted in secrecy out of fear that the event would become a target for insurgent violence.¹⁶² It was clear that the new Iraqi government lacked the strength or legitimacy to maintain order. In fact, US troop levels in Iraq increased slightly immediately after the transfer of sovereignty, from 138,000 in May and June to 140,000 in July and August.¹⁶³ At the same time, the number of Iraqi security forces dropped from 145,000 in June to just over 95,000 in July.¹⁶⁴ While sovereign in name, Iraq was dependent on US and coalition military forces for security.

The US passed a grim milestone in September 2004, when the 1,000th US soldier was killed by hostile action in Iraq.¹⁶⁵ At a news conference in early September, the US was forced to concede that “insurgents controlled important parts of central Iraq and...it [is] unclear when

¹⁶⁰ From Mark A. Costanzo and Ellen Gerrity, “The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate,” 3 SOC. ISSUES & POL’Y REV. 179, 202 (2009) Cited in Constitution Project (Georgetown Public Policy Institute), Task Force on Detainee Treatment, and Constitution Project (Georgetown Public Policy Institute), *The Report of the Constitution Project’s Task Force on Detainee Treatment*, 267 (internal citation omitted).

¹⁶¹ Crichton, Lamb, and Jacquette, “Timeline of Major Events in the Iraq War.”

¹⁶² Dexter Filkins, “Transition in Iraq: The Turnover; U.s. Transfers Power to Iraq 2 Days Early,” *The New York Times*, June 29, 2004, sec. World, <https://www.nytimes.com/2004/06/29/world/transition-in-iraq-the-turnover-us-transfers-power-to-iraq-2-days-early.html>.

¹⁶³ O’Hanlon and Livingston, “Iraq Index,” 12.

¹⁶⁴ O’Hanlon and Livingston, 17.

¹⁶⁵ Crichton, Lamb, and Jacquette, “Timeline of Major Events in the Iraq War.”

American and Iraqi forces would be able to secure those areas.”¹⁶⁶ One of the areas firmly under insurgent control was the city of Fallujah. Since the Marines’ withdrawal in April, insurgents led by Abu Musab al-Zarqawi had turned Fallujah into a stronghold for opposition forces and a symbol of resistance to the Iraqi government. US forces were determined to break the insurgent hold on Fallujah and wanted to do so before the scheduled national elections in January 2005.¹⁶⁷

In contrast to the April battle for the city, the Marines attacking Fallujah in November 2004 had ample time to prepare, which included making provisions to evacuate civilians and developing detailed intelligence about the location of insurgent forces, so that they could employ force more precisely and with less risk of harming civilians.¹⁶⁸ Backed by significant airpower, Marines of I MEF, now under the command of Lieutenant General John Sattler, began their assault on November 7. The Marines gained control of most of the city within a week, but the slow, bloody, difficult process of house-to-house sweeps to clear the city of insurgents continued until late December. The battle was costly: 70 Americans were killed and over 600 were wounded in the fighting.¹⁶⁹ The International Committee of the Red Cross estimated that 800 civilians were killed, and nearly 200,000 of the city’s 300,000 residents were displaced from their homes.¹⁷⁰ But in contrast to the inconclusive and bloody fighting that had cost more than

¹⁶⁶ Eric Schmitt and Steven R. Weisman, “U.S. Conceding Rebels Control Regions of Iraq,” *The New York Times*, September 8, 2004, sec. Politics, <https://www.nytimes.com/2004/09/08/politics/us-conceding-rebels-control-regions-of-iraq.html>.

¹⁶⁷ Head, “The Battles of Al-Fallujah,” 41; See also John P. Abizaid, An Exit Interview with General John P. Abizaid, interview by Colonel James Embrey and Colonel Thomas Reilly, 2007, 28: “However, things weren’t ever moving fast enough for our national levels of leaders as you could expect. Again I’m not saying that it’s right or that it’s wrong, but with our newspapers saying Fallujah’s turning into a safe-haven, and there is a need for immediate action.”

¹⁶⁸ See discussion in John R. Ballard, *Fighting for Fallujah: A New Dawn for Iraq* (Westport, CT, London: Praeger Security International, 2006); John Sattler, Interview with Lieutenant General John Sattler, USMC (Ret), interview by Doyle Hodges, April 9, 2018.

¹⁶⁹ Head, “The Battles of Al-Fallujah,” 43; Ballard, *Fighting for Fallujah*.

¹⁷⁰ Head, “The Battles of Al-Fallujah,” 46.

700 American and 11,000 Iraqi lives over the course of the year, the second battle for Fallujah ended 2004 with a clear victory for US and coalition forces.¹⁷¹

Contested legitimacy: Cause, conduct, and casualties

OIF suffered from contested legitimacy, both domestically and internationally. Domestically, the war began with relatively strong support, which briefly increased as combat operations proved swifter and less costly to US forces than many analysts projected, but then diminished as the war progressed.¹⁷² International support for the operation was tenuous from the start, and only decreased as the security situation in Iraq deteriorated.

One prominent cause of this contested legitimacy, both domestically and internationally, was doubt over the Bush administration's claims regarding Iraqi WMD and the necessity of invading Iraq in response. As early as March 2003 when over 85% of Americans felt the war was going either "very favorably" or "moderately favorably" for the US, 31% still thought the Bush administration had deliberately misled the American public about Iraq's WMD.¹⁷³ By October 2004, the number of Americans who believed they had been deliberately deceived regarding WMD had jumped to 47%, which precisely matched the proportion who believed the Iraq war was a mistake.¹⁷⁴ 54% of those polled that same month believed that "it was not worth going to war in Iraq."¹⁷⁵

¹⁷¹ US casualties from Defense Manpower Data Center, "DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month"; Iraqi casualties from "Iraq Body Count."

¹⁷² 75% of Americans polled supported the war in March 2003, a figure which grew to 85% on April 9, the day that Baghdad fell. Gallup Inc, "Iraq: Historical Trends," Gallup.com, accessed April 22, 2018, <http://news.gallup.com/poll/1633/Iraq.aspx>; Regarding projected casualties, defense analyst Mike O'Hanlon projected US casualties would likely be between 100 and 5,000 killed, with the lower half of that range being the most likely. Michael O'Hanlon, "Estimating Casualties in a War to Overthrow Saddam," *Orbis* 47, no. 1 (Winter 2003): 21–40, [https://doi.org/10.1016/S0030-4387\(02\)00172-2](https://doi.org/10.1016/S0030-4387(02)00172-2).

¹⁷³ Gallup Inc, "Iraq: Historical Trends."

¹⁷⁴ Gallup Inc.

¹⁷⁵ Gallup Inc.

Internationally, doubt over whether Iraq possessed WMD was amplified by disagreement as to whether the US was justified in using force, even if a WMD program existed. The position that force was not justified was powerfully summarized by international lawyer Max Hilaire:

The United States invasion of Iraq was a blatant violation of international law and the Charter of the United Nations. There was no legal justification for the invasion of Iraq, even if Iraq possessed weapons of mass destruction. The issue of Iraq's non-compliance with Security Council resolutions was on the agenda of the Council. Any decision to punish Iraq for its failure to comply with the demands of the Security Council had to be decided by the Council itself, not by an individual member state. The United States and the United Kingdom cannot act on behalf of the Security Council without the Council's authorization.¹⁷⁶

A Congressional Research Service report put the case against the use of force in more temperate terms, but still concluded that there was no clear-cut justification under international law:

Iraq has become an occasion to revisit the issue [of the preemptive use of force]. Iraq had not attacked the U.S., nor did it appear to pose an imminent threat of attack in traditional military terms. As a consequence, it seems doubtful that the use of force against Iraq could be deemed to meet the traditional legal tests justifying preemptive attack. But Iraq may have possessed WMD, and it may have had ties to terrorist groups that seek to use such weapons against the U.S. If evidence is forthcoming on both of those issues, then the situation necessarily raises the question that the Bush Administration articulated in its national security strategy, i.e., whether the traditional law of preemption ought to be recast in light of the realities of WMD, rogue states, and terrorism.¹⁷⁷

In what some have portrayed as a deliberate effort to bolster flagging domestic legitimacy for the war, concerns over potential Iraqi involvement in the September 11 terrorist attacks figured prominently in the minds of many Americans leading up to the war.¹⁷⁸ In March 2003,

¹⁷⁶ Hilaire, "International Law and the United States Invasion of Iraq," 116.

¹⁷⁷ David M Ackerman, "International Law and the Preemptive Use of Force Against Iraq," CRS Report for Congress (Washington, D.C.: Congressional Research Service, April 11, 2003), 6.

¹⁷⁸ Sheldon Rampton and John Stauber, *Weapons of Mass Deception: The Uses of Propaganda in Bush's War on Iraq* (New York: Jeremy P. Tarcher/Penguin, 2003), 78.

51% of Americans polled believed that Saddam Hussein was personally involved in the September 11 attacks. An April 2003 poll found that 58% of Americans believed that OIF had made them safer from terrorism. By the following year, both had shifted in the opposite direction, with 51% of Americans believing that Saddam was not involved in September 11, and 55% believing that the Iraq war had made them less safe.¹⁷⁹

The domestic legitimacy concerns over the Iraq war were well-captured in an August 2003 political cartoon by Pulitzer Prize-winning cartoonist Matt Davies. In it, President Bush sits at his desk in the Oval Office, while a pollster holding a sheaf of papers marked ‘2004 Strategy’ points at a whiteboard on which is written: “No WMD’s; Daily US casualties; Lousy post-war planning; Massive costs; No al-Qaeda link.” “Now Iraq is a threat,” explains the pollster to Bush.¹⁸⁰ The concerns expressed in the cartoon match those revealed in the polling data.

Revelations of detainee abuse in the spring of 2004 also dealt a blow to both domestic and international legitimacy. Rumsfeld was shouted down by protesters demanding his firing over Abu Ghraib during May 2004 testimony before the US Senate.¹⁸¹ According to CNN, the Abu Ghraib photographs had a significant impact on domestic support for the war.

A CNN/USA Today/Gallup poll immediately after the photos were released showed that nearly three-quarters of Americans said the mistreatment of the detainees was unjustified under any circumstances. Bush's overall performance rating sank to what was then the lowest of his presidency, 46 percent. The poll

¹⁷⁹ Gallup Inc, “Iraq: Historical Trends.”

¹⁸⁰ The cartoon, which appeared in the August 15 White Plains Journal News, may be viewed at The Pulitzer Prizes, “Pulitzer Prize Winners: Matt Davies of the Journal News, White Plains, NY,” accessed April 22, 2018, <http://www.pulitzer.org/winners/matt-davies>.

¹⁸¹ Nick Carbone, “When Protesters Interrupt: John Brennan and Seven Other Speeches Disrupted by Demonstrators,” *Time*, accessed April 22, 2018, <http://newsfeed.time.com/2012/12/21/when-protesters-interrupt-speeches-disrupted-by-hecklers/slide/donald-rumsfeld-vs-abu-ghraib-protesters/>.

also showed support for the war at its lowest since before it began, with only 44 percent saying they believed it was worthwhile.¹⁸²

As documented in the history section above, many Iraqis felt honor-bound to avenge the shame visited on them by the abuses. Violent attacks against US and coalition forces spiked from roughly 250 per week from January through early April of 2004 to closer to 500 per week in the 12 weeks that followed the release of the Abu Ghraib photos.¹⁸³ A public opinion poll conducted by IIACS (an Iraqi survey firm functioning as the sole representative of Gallup International in Iraq) from May 14-23 2004 found that 54% of Iraqis surveyed believed that US soldiers' behavior at Abu Ghraib was representative of all Americans; 61% believed no one would be punished for the abuses; and, 71% reported a "better" or "much better" opinion of anti-American cleric Muqtada al Sadr, as compared to three months earlier.¹⁸⁴

Curiously, unlike previous conflicts, mounting US casualties do not appear to correlate with declining domestic public approval of OIF during the period 2003-2004. The two bloodiest months of fighting for US forces during this period were March and November 2004, both of which saw 126 US soldiers killed in action.¹⁸⁵ Opinion polls taken around these periods show little change from previous months in response to the questions, "do you feel the Iraq war was a mistake?" and "was the Iraq war worth it?"¹⁸⁶

¹⁸² "Abu Ghraib Photos Were 'Big Shock,' Undermined U.S. Ideals - CNN.Com," accessed April 22, 2018, <http://edition.cnn.com/2009/WORLD/meast/05/18/detainee.abuse.lookback/index.html>.

¹⁸³ See chart in O'Hanlon and Livingston, "Iraq Index," 4.

¹⁸⁴ IIACS, "Public Opinion in Iraq: First Poll Following Abu Ghraib Revelations" (IIACS, June 15, 2004), <https://www.globalpolicy.org/images/pdfs/06iiacss.pdf>. Page numbers from pdf report: View of Americans (46); Likelihood of punishment (47); View of al Sadr (14).

¹⁸⁵ Defense Manpower Data Center, "DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month."

¹⁸⁶ Responses to the question of whether the war was worth it show an increase from 49% answering yes in January 2004 to 56% answering yes in March, which drops back down to 50%-52% in April; The "worth it" question was not asked consistently from October 2004 to January 2005, but the question of whether the war was a mistake was. As with the "worth it" question, opinion moves only slightly. Gallup Inc, "Iraq: Historical Trends."

Concern over mounting Iraqi casualties appears to have played a role in undermining international legitimacy and deepening the opposition of those already opposed to the war in the US. As Larson and Savych report,

In June 2003, the Associated Press estimated at least 3,240 civilian deaths based on a survey of 60 Iraqi hospitals. In October 2003, the Project on Defense Alternatives estimated between 3,200 and 4,300 civilian deaths. In October 2003, Human Rights Watch claimed that thousands of Iraqi civilians had been killed in the war, basing this on estimates that there were 678 deaths in three Iraqi towns where hospital records were examined. In November 2003, a British group called Medact used Iraq Body Count's estimate that between 5,708 and 7,356 Iraqi civilians had been killed during the invasion, and between 7,757 and 9,565 Iraqi civilians had been killed through October 20, 2003. Before being captured, Saddam Hussein charged that somewhere between 13,000 and 45,000 Iraqi civilians had died as a consequence of the U.S. attack.

Our analyses suggest that despite the prominence of the issue in media reporting and public opinion questions, Iraqi civilian deaths did not particularly affect Americans' support for or other key attitudes toward the war, though they may have strengthened preexisting opposition to the war among American war opponents and foreign audiences.¹⁸⁷

Although US audiences may not have been moved by reports of Iraqi casualties, there is evidence that insurgents seeking to undermine US legitimacy actively tried to increase the perception that US actions were harming civilians. Sattler, the I MEF commander during the second battle of Fallujah, recalled that the Marines had been hampered in the first battle by a coordinated publicity campaign waged by the insurgents in al Jazeera and other Arab media.¹⁸⁸ The Marines nicknamed the insurgent spokesman "Baghdad Bob" after the nickname given to former Iraqi Information Minister Muhammad Saheed al-Sahhaf, who famously made outlandish claims of Iraqi battlefield success and impending American defeat during the initial invasion.¹⁸⁹

¹⁸⁷ Eric V. Larson and Bogdan Savych, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*, Proquest ebrary (Santa Monica, CA: RAND Corp., 2007), 159.

¹⁸⁸ Shultz, Jr., *The Marines Take Anbar*, 79.

¹⁸⁹ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret); For examples of Sahhaf's more memorable lines, see epigraphs in Fontenot, Degen, and Tohn, *On Point*. To give but one example, when

Typical of the insurgents' media campaign during the first battle of Fallujah was the following anecdote, related by Ballard:

In one case an ambulance from the hospital was used to ferry weapons inside the city during a feint. As the ambulance, when used uniquely to transport weapons, was a lawful target, the MEF commander approved a strike on the vehicle. The insurgents later showed photos of a bullet-ridden ambulance with many wounded Iraqis, when, in actuality, the weapon used to strike the ambulance was a laser-guided bomb.¹⁹⁰

By his own account, Conway, I MEF commander during the April assault, was frustrated by the success of the insurgent media campaign.

Conway was irate over how the Marines were portrayed: 'Al Jazeera and some other Arab media had worked their way into the city and they were reporting that we were killing hundreds of women and children and old people when in fact just the opposite was true.' Given the nature of the battle, he conceded that 'some women and children did die. We were dropping bombs and shooting artillery, counter battery into Fallujah, no question about it. But we were being very careful. We were checking all of those missions to try to make sure that collateral damage was absolutely minimized.'¹⁹¹

Despite the Marines' efforts, the perception that they were causing massive civilian deaths contributed significantly to the undermining of their legitimacy among Iraqi leaders, causing Bremer to order the unilateral cease-fire less than a week into the operation.¹⁹²

Strengthening legitimacy through rule-based constraints on the use of force

US forces in OIF operated under a dense regime of rule-based constraints, many of which were intended to address concerns over the contested legitimacy of the operation. Throughout

informed that Americans tanks had entered Baghdad, Sahhaf responded, "They are coming to surrender or be burned in their tanks."

¹⁹⁰ Ballard, *Fighting for Fallujah*, 44.

¹⁹¹ Shultz, Jr., *The Marines Take Anbar*, 80.

¹⁹² Head, "The Battles of Al-Fallujah," 37; See also Abizaid, Abizaid Exit Interview, 27. "In the early stage of the first battle of Fallujah, there was always a problem associated with the way it was being portrayed in the region which was driving up a very high degree of anti-Americanism throughout the theatre. In a way, that was probably the worst that I've seen it in the initial stages. There was great concern on Ambassador Bremer's part that the Iraqi Governing Council would fall."

the campaign, US efforts were countered by a conscious effort on the part of both Saddam's forces and insurgents to provoke incidents that would cause civilian casualties and undermine legitimacy. Retired Air Force JAG Charles Dunlap observed,

We live in an age where adversaries increasingly seek to employ the fact or perception of illegalities, to especially include allegations of excessive civilian casualties, as a means of offsetting not just US airpower, but America's overall military prowess. Law professor and veteran William Eckhardt points out that that today "our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the 'law of war' making law, in essence, a 'center of gravity' in modern conflicts."¹⁹³

In response to this concentrated effort to undermine legitimacy, US policy-makers and operational commanders placed great emphasis on the rule-based regime of constraints regarding the use of force. The most visible forms of rule-based constraint in OIF were the ROE and other measures taken to avoid or minimize civilian casualties. Especially in the early months of OIF when public support was quite high, these measures were not adopted in response to a specific concern about contested domestic legitimacy, but more as a prophylactic measure to help assure continued support. As Larson and Savych found in an analysis of the effect of civilian casualties on public support,

...while avoiding civilian casualties is important to the American public, they have much more realistic expectations about the actual possibilities for avoiding casualties than most understand. Large majorities of the American public consistently say that efforts to avoid civilian casualties should be given a high priority and have indicated that their prospective support for U.S. military operations is at least in part contingent on minimizing civilian deaths. Very large majorities, however, consistently stated their belief that civilian casualties in these wars were unavoidable accidents of war....

While the prospect of civilian casualties can affect support prior to the onset of a military operation, during armed conflict it is not so much beliefs about the numbers of civilian casualties that affect support for U.S. military operations as

¹⁹³ Charles J Dunlap, "Come the Revolution: A Legal Perspective on Air Operations in Iraq since 2003," *International Law Studies* 86 (2010): 145.

the belief that the United States and its allies are making enough effort to avoid casualties. Substantial majorities of Americans typically subscribe to this view. Our multi-variate statistical models, which have a good record of predicting individual-level support and opposition in past military operations, showed that beliefs about the number of civilian casualties typically did not attain statistical significance. Importantly, however, when variables for beliefs about the adequacy of the U.S. military's efforts to avoid civilian deaths were included in our models, the variables for civilian casualties frequently attained statistical significance. An analysis of aggregate data on foreign attitudes and a cross-tabulation of Iraqi attitudes suggested a similar relationship in foreign publics as well.¹⁹⁴

Recognizing the important role that efforts to mitigate harm to civilians played in assuring public support, policy-makers engaged in a deliberate publicity campaign to emphasize the care that was taken to minimize collateral damage. As part of this effort, the Pentagon held a press briefing on March 19, the first day of combat, at which the head of the effects-based operations division described the rules surrounding the targeting process:

Every one of [the] targets is examined for collateral damage. We first look to ensure that the target is directly tied to an objective. ...We choose the right weapon to create the desired effect. We then do a clear examination not only of the collateral damage potential, but also of law of armed conflict potential, and those types of issues, the legal implications of striking that target. And then we do everything we can do in the planning factor in adjusting the weaponeering and providing the tasking to air crews to enable us to most effectively achieve the desired effect with the minimum damage—minimum potential for collateral damage for civilian casualties.... But in each case where civilian—the potential for civilian casualty exists, potential for collateral damage, those targets are all reviewed by the senior commanders.¹⁹⁵

Rule-based constraints played a more immediate role in preserving international legitimacy, both among coalition partners and Iraqis, than in preserving domestic legitimacy. In

¹⁹⁴ Larson and Savych, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*, xx–xxi.

¹⁹⁵ DoD press briefing by Col Gary Crowder, quoted in Cordesman, *The Iraq War*, 267. Cordesman lists the briefing as being available at www.defenselink.mil/news/March2003/t03202003_t0319effects.html. As of 10 April 2018, this link was inoperative. The briefing can also be found at <https://www.c-span.org/video/?2175608-1/effects-based-operations>.

addition to emphasizing compliance with the law of war, US, British, and Australian leaders were concerned with the number of anticipated civilian casualties from any single attack. Any attack projected to result in a death toll of 30 civilian casualties or more required approval from US Secretary of Defense Rumsfeld.¹⁹⁶ According to the commander of Central Command Air Forces, Lieutenant General Michael Moseley, only about 50 such strikes were proposed in the first two months of combat operations, and all were approved by Rumsfeld. British and Australian officials raised concerns about the high level of civilian casualties associated with other targets, which kept them from ever being proposed.¹⁹⁷ Cordesman notes that targets struck by British forces or by US forces operating from British bases were subject to intense political review, and a heightened attention to the need to minimize civilian casualties.¹⁹⁸ Sattler, who served as the CENTCOM operations officer (J-3) before assuming command of I MEF, corroborated both the increased approval authority for targets with more than 30 anticipated civilian casualties, and that the UK placed strict constraints on targets to be struck by aircraft flying out of the base on the British island of Diego Garcia.¹⁹⁹

As noted in the history section above, Iraqi anger over civilian casualties threatened the stability of the Iraqi Governing Council and ultimately led the CPA head, Bremer, to order a unilateral cease-fire during the first battle of Fallujah in April 2004.²⁰⁰ Minimizing civilian casualties was also important from the perspective of building and maintaining support among ordinary Iraqis. A *New York Times* report from September 2004 quoted a young Iraqi as saying,

¹⁹⁶ Cordesman, 275; Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

¹⁹⁷ Cordesman, *The Iraq War*, 275.

¹⁹⁸ Cordesman, 228. Quoting from a UK MoD report: “The process for approving all targets for UK aircraft, submarine-launched cruise missiles, or for coalition aircraft using UK facilities was conducted with appropriate political, legal, and military oversight at all levels. We also influenced the selection and approval of other coalition targets.”

¹⁹⁹ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²⁰⁰ Ballard, *Fighting for Fallujah*, 18.

“When the Americans fire back, they don't hit the people who are attacking them, only the civilians. This is why Iraqis hate the Americans so much. This is why we love the mujahedeen.”²⁰¹

The heavy emphasis placed on rules to avoid civilian casualties was evident during the second battle of Fallujah. Sattler related an instance during the battle in which, after appropriate analysis and weaponeering, he gave approval to strike a building where credible intelligence indicated several high-level insurgent leaders were located, and for which the collateral damage estimation process yielded a result nine to 11 anticipated civilian casualties. An overhead reconnaissance aircraft provided real-time video coverage of the strike to Sattler in his command center. As the strike aircraft rolled in on its attack run, the door of a nearby building opened and several small children ran out into the street in front of the target. Sattler reached for the radio to call off the strike, but before he could key the microphone, the pilot's voice came over the speaker in the command center: “I saw the kids. I'm waving off [aborting the strike].”²⁰²

Iraqi forces, both Saddam's troops and insurgents, were aware of the US priority to minimize civilian casualties and sought to exploit it. During the conventional fighting in As Samawah, a brigade commander observed that Saddam's forces, “used mosques, fired from hospitals, used ambulances to resupply. They would surrender with a white flag and then duck behind a vehicle and fire. They took civilians and used them as hostages.”²⁰³ With the emergence of the Fedayeen Saddam, a paramilitary group that fought especially fiercely in April

²⁰¹ “Osama”, a 24-year old Iraqi quoted by Dexter Filkins, NYT 14 September 2004, as cited in Luke N. Condra and Jake Shapiro, “Who Takes the Blame? The Strategic Effects of Collateral Damage,” *American Journal of Political Science* 56, no. 1 (2012): 167.

²⁰² Sattler, Interview with Lieutenant General John Sattler, USMC (Ret). As Sattler noted, “I'm still not sure why those kids were running out the door at two-o'clock in the morning, but I was impressed that this pilot, who was eager to drop on bad guys, understood that he needed to pull back.”

²⁰³ Colonel Arnie Bray, commander of the 2nd Brigade, 82nd Airborne Division, quoted in Fontenot, Degen, and Tohn, *On Point*, 277–78.

2003, Iraqi use of these tactics increased. An Army commander indicated that the Fedayeen loaded civilians into trucks from which they would attack US forces, and also disguised themselves as desert nomads. “The law of land warfare was completely thrown out the window by the enemy when they were masquerading as Bedouins [generally a term used to refer to Arab nomadic pastoral peoples] and hiding under tents and attacking.”²⁰⁴ Marines in An Nasiriyah encountered similar tactics. As one historian observed,

To the paramilitary fighters, violating the Law of War became a shield they could use to exploit the Rules of Engagement (ROE) of the well-disciplined Marines. They set up their command posts and operating bases in mosques, stored their weapons in schools, wore civilian clothing to hide among the civilian population, and forced the local population to fight the Americans through intimidation and murder.²⁰⁵

Insurgent forces made a concerted effort to exploit US compliance with the law of war and desire to minimize civilian casualties in the second battle for Fallujah, as they had done in the first. Among the locations the insurgents used as headquarters were the Hydra Mosque and the Fallujah General Hospital. In an attempt to avoid offending local sensitivities the Marines assigned responsibility for attacking military targets in mosques and other religious structures to Iraqi forces, so that non-Muslims would not enter these holy sites.²⁰⁶ After the negative media messaging experienced during the first battle of Fallujah, Sattler made a conscious choice to embed reporters (including local Arab media) with his forces during the second battle to highlight the US forces’ discipline in following procedures to protect civilians, and the

²⁰⁴ Kathleen A. Gavle, Operation Iraqi Freedom: An Oral History of Lieutenant Colonel Kathleen A. Gavle, USA, interview by LTC Annette L. Torrisi, 2006, 87–88, Oral, Army Heritage and Education Center.

²⁰⁵ Lt. Col. Michael S. Groen, “With the 1st Marine Division in Iraq, 2003: No Greater Friend, No Worse Enemy,” Occasional Paper (Quantico, Virginia: Marine Corps University, 2006), 179; See also Walter Perry et al., *Operation IRAQI FREEDOM: Decisive War, Elusive Peace* (RAND Corporation, 2015), 80, <https://doi.org/10.7249/RR1214>.

²⁰⁶ Ballard, *Fighting for Fallujah*, 57.

insurgents' deliberate exploitation of these rules.²⁰⁷ The campaign was largely successful, as were the Marines' efforts to minimize harm to civilians.²⁰⁸ In an example of the care that was taken to avoid civilian casualties, the 1st Marine Division Commander, Major General Richard Natonski recalled,

Sixty preplanned target [had been identified]... Because of collateral damage and positive ID limitations, we could not hit as many targets as we wanted...we were not able to hit, I think, somewhere in the neighborhood of a dozen... You had to definitely ascertain that there were enemy there. So that really limited what we could hit, even though we knew there were insurgents in there. I think that it was validated that... targets we had identified before but were limited from attacking ... turned out to be insurgent strongholds which we ended up destroying when troops came in contact. So, sometimes the ROE in an effort to protect the people, worked against us, and maybe it was good but as we came to find out, the only people in Fallujah when we went in were insurgents. Very, very few civilians.²⁰⁹

The regime of rules constraining the use of force in Iraq during this period was cumbersome at times. The ROE card distributed to troops of the 101st Airborne Division in March 2003 included the following requirements:

FIRING AT COMBATANTS

1. Fire at all members of forces DECLARED HOSTILE. You may immediately fire upon any force that you know to be hostile.
2. You may use necessary force, including deadly force, against any person, vehicle, or aircraft that commits a hostile act, or exhibits hostile intent.
3. Employ only observed fire, unless unobserved fire is necessary for the immediate defense of friendly forces receiving fire or is approved by designated authority (See ROE Annex).
4. Do not use incendiary weapons such as napalm or white phosphorous against targets in populated areas. Tracer and illumination rounds and smoke are authorized in all areas.

²⁰⁷ John Sattler, Sattler interview 2, interview by Doyle Hodges, April 16, 2018.

²⁰⁸ Ballard, *Fighting for Fallujah*, 101.

²⁰⁹ Quoted in Shultz, Jr., *The Marines Take Anbar*, 95.

5. You may employ command-detonated claymores when authorized by the Division Commander. Keep claymores under continuous observation, and remove them when no longer necessary.
6. You may use Riot Control Agents (RCA), i.e., pepper spray or CS, when authorized by your Brigade Commander. Only use RCA in noncombatant situations, such as riot control against civilians, or when civilians are used as human shields, or to control EPWs in rear areas.

USING FORCE AGAINST CIVILIANS

You may stop civilians and check their identities, search for weapons and seize any found. Detain civilians when necessary to accomplish your mission or for their own safety. Use the Four S's when dealing with civilians demonstrating some form of hostile intent.

1. **SHOUT** verbal warning to halt!

In English: "HALT! DON'T MOVE! HANDS UP!"

In Farsi: "Askaree Amriekk. Dresh ya fire may kenoom!"

In Urdu: "Amriki Forge. Ruck Jow! Warna goli ma-roongo!"

In Arabic: "Al Kawat al Amrikiya. Kef ow atlook al nar!"

2. **SHOW** weapon and intent to use it.

3. **SHOVE** Use non-lethal physical force.

4. **SHOOT** to eliminate the threat. Fire only aimed shots. Stop firing when the threat is neutralized.²¹⁰

These rules for soldiers were relatively complex, and would have been so even in an environment where the distinction between combatants and civilians was clear. Given the deliberate effort by Iraqi forces to blur that distinction, the rules became even more difficult to interpret in the heat of the moment. Furthermore, although based on the same ROE, each major unit drafted its own ROE cards for its soldiers. The card provided to soldiers of the 507th

²¹⁰ Reproduced in Annex B-1 Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 315. The back side of the card lists example scenarios for rules governing the use of force.

Maintenance Company, which was ambushed on March 23, 2003 resulting in the capture of Private First Class Jessica Lynch and five other soldiers by Iraqi forces, had 13 sections detailing when US troops could fire their weapons.²¹¹ As the official Army history of OIF observed,

...the ROE card concluded with the guidance to ‘attack enemy forces and military targets.’ These ROE are clear enough when soldiers are well rested and when one is certain he is in hostile territory, but if the situation is ambiguous and soldiers become tired and lost, then they might, as those in the 507th did, choose not to fire.²¹²

For planners making and approving targeting decisions, the ROE were even more complex than for soldiers on the ground. Sattler reported that the applicable ROE for target approval during his time as the CENTCOM J-3 were “a couple of inches thick.”²¹³ Although the specific ROE remain classified, the Army’s Center for Law and Military Operations (CLAMO) published a legal lessons-learned, which summarized the rules governing the targeting process:

Under the...OIF ROE, certain categories of targets could not be engaged without the approval of certain high levels of command. The categories and approval levels are classified. The CENTCOM CDEM [Collateral Damage Estimation Methodology] ...set forth a targeting methodology that, in its simplest form, distilled targeting decisions into five unclassified, sequential questions, the fifth of which represents the issue at hand.

1. Can I positively identify the object or person I want to attack as a legitimate military target authorized for attack by the current rules of engagement?
2. Is there a protected facility (i.e. No Strike), civilian object or people, or significant environmental concern within the effects range of the weapon I would like to use to attack the target?
3. Can I avoid damage to that concern by attacking the target with a different weapon or with a different method of approach?
4. If not, how many people do I think will be injured/killed by my attack?

²¹¹ Fontenot, Degen, and Tohn, *On Point*, 412.

²¹² Fontenot, Degen, and Tohn, 413.

²¹³ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

5. Do I need to call my higher commander for permission to attack this target?²¹⁴

While such rules served a valuable purpose in protecting legitimacy by minimizing harm to civilians, it is little wonder that the combination of restrictions and varying levels of approval led an artillery commander to ask, “How can we engage a target in single digit minutes as opposed to 30 or 45 minutes or an hour?”²¹⁵

Perhaps unsurprisingly, the voluminous ROE generated a reluctance on the part of some soldiers and commanders to engage out of fear of causing civilian casualties, even in circumstances when their forces were under attack. An aviation brigade commander reported that he had to specifically order his pilots to shoot back when they were shot at:

I also put out the word to shoot everybody who was shooting at them. I told them not to be concerned about collateral damage, but engage the enemy aggressively so they were less likely to shoot at follow-on aircraft. I was concerned because I didn't see a lot of fire coming from the other aircraft, and I knew I was shooting at everything myself. I put a burst of 10 in everybody who engaged us. I attribute [the lack of firing] to...the fact that it had been hammered over and over into our heads that we had to be able to recognize capitulating forces and we needed to minimize collateral damage. If we didn't do those things, the regimental commander told us that, “Your tapes will be reviewed at the highest levels.” I found out later after the mission, from talking to some of my young co-pilot gunners, that that had been so ingrained in their brain, that they figured they should shoot only as a last resort.²¹⁶

The commander of an armored personnel carrier in the initial march toward Baghdad similarly reported that he believed he could not open fire on enemy forces until they had fired at him.²¹⁷ A Marine commander reported that his air support helicopters could not open fire on a suspicious vehicle because of ROE restrictions, resulting in his troops coming under withering

²¹⁴ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 103.

²¹⁵ COL Thomas Torrance, Interview with COL Thomas Torrance, interview by Lynne Chandler Garcia, November 1, 2005, 10, Contemporary Operations Study Team, Combined Arms Research library.

²¹⁶ Colonel Michael Barbee, Interview with COL Michael Barbee, interview by Gary Morea, April 3, 2007, 7, Operational Leadership Experiences, Combined Arms Research library.

²¹⁷ Fontenot, Degen, and Tohn, *On Point*, 129.

fire moments after the vehicle had disappeared from view.²¹⁸ A RAND report indicated that helicopter pilots were, “hesitant to respond to ground fire without positively identifying targets, but positive identification was seldom possible. They could see where fire was originating but not what was located at that spot or whether there was danger of collateral damage.”²¹⁹

Colonel Marc Warren, the V Corps JAG, summarized the challenges that such keen sensitivity to rules premised on preservation of legitimacy posed to operations:

The emphasis on discrimination had an insidious effect on interpretations of proportionality. Increasingly, proportionality was viewed as requiring a near-mathematical or ratio analysis of each particular target, rather than a balancing of the damage relative to the military advantage from a larger perspective. This played out for the most part in preplanned strikes from fixed-wing aircraft. After the march to Baghdad, an inordinate amount of command and staff activity was expended in convincing the combined air operations center that a strike was appropriate and that the ground commander would take responsibility for any unintended damage (i.e., “own the bomb”), even in cases where the strike was merely a bomb dropped in the desert nowhere near civilians as part of a show of force.²²⁰

Traditional constraints: the role of military professionalism

Operational commanders fighting in OIF appealed to the traditional constraints of military professionalism and chivalry alongside rule-based constraints. Perhaps the most well-known example of this is the letter then-Major General James Mattis, Commander of the 1st Marine Division, distributed to his Marines on the eve of their entry into Iraq. It read, in part:

While we will move swiftly and aggressively against those who resist, we will treat others with decency, demonstrating chivalry and soldierly compassion for people who have endured a lifetime under Saddam's oppression. ...Engage your brain before you engage your weapon. ...For the mission's sake, for our country's

²¹⁸ Groen, “With the 1st Marine Division in Iraq, 2003: No Greater Friend, No Worse Enemy,” 183.

²¹⁹ Perry et al., *Operation IRAQI FREEDOM*, 84.

²²⁰ Marc Warren, “The ‘Fog of Law’: The Law of Armed Conflict in Operation Iraqi Freedom,” *International Law Studies* 86 (2010): 171.

sake, and the sake of the men who carried the Division's colors in past battles...carry out your mission and keep your honor clean²²¹

In a striking example of valuing professional judgment over strict rule-compliance, Sattler related an incident in which he had approved a target to be struck while serving as the CENTCOM J-3. Although all of the rule-based conditions for approval were in place, the two-star Air Force commander on watch at the Combined Air Operations Center declined to strike the target, telling Sattler, “I don’t think it’s the type of target you would normally approve.” Sattler recalled that the two men argued over the decision at the time, but in retrospect, “I was glad he did it, because he was right. We didn’t need to hit that target that night. We could get those guys later with less risk of hurting civilians.”²²²

In the midst of high intensity combat operations, troops often displayed a concern about civilian casualties that stemmed from discipline and professionalism as much as it did from a desire to obey the rules. During the armored ‘thunder run’ into Baghdad, a company commander observed his men trying to sort civilian vehicles from military vehicles:

He thought his men were showing restraint, holding their fire and waving away errant civilians or firing warning shots. But now they had to deal with gunmen in civilian clothes pretending to surrender. Burriss [the company commander] was determined to bring all 160 men in his company back home alive. He realized that the enemy tactics were putting both Iraqi civilians and American soldiers at risk, and that angered him.²²³

Commanders often fell back on their professional judgment when a situation fell into a gray area under the existing rules. Colonel Eric Schwartz, commander of the armored brigade combat team involved in the April 7 raid on Baghdad related such an incident. Following a near-

²²¹ James Mattis “Commanding General’s Message to All Hands” March 2003, cited in Shultz, Jr., *The Marines Take Anbar*, 59 (emphasis in original).

²²² Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²²³ David Zucchino, *Thunder Run: The Armored Strike to Capture Baghdad* (New York: Atlantic Monthly Press, 2004), 32.

miss from Iraqi artillery, one of the members of his task force analyzed the crater from the shell to determine where the enemy artillery was located.

I looked at his map and mine for the possible location of the enemy and was hesitant to tell him to work up a fire mission. The area that he recommended shooting into was near a protected site. I made the judgment call to fire the mission. As it turned out, the protected area had been turned into an artillery park complete with caches of ammunition and eight artillery guns. The fire mission silenced the Iraqi guns.²²⁴

Such incidents occurred hundreds of times on the battlefield, as operational commanders from every service used judgment informed by decades of experience to guide their decisions and their interpretations of the rules.

Frequently, the dictates of military professionalism and rule-based constraints aligned. Dunlap relates that air planners were particularly sensitive to the destruction of infrastructure out of both moral and practical concerns:

The targeting restraint demonstrated not only a better understanding of legal and moral imperatives, but also the practicalities of twenty-first-century operations. For example, one aviator observed that “[a] lot of care was put into selecting only those valid military targets that were absolutely essential to assist in taking Baghdad and securing the country” because planners knew that “anything destroyed from the air, like Iraqi roads, bridges, and power-generating stations, would have to be rebuilt during the post-war period.” It appears that this pragmatic mindset, along with the revolutionary new munitions technologies, helped OIF air operations adhere to LOAC [law of armed conflict].²²⁵

One of the interesting developments in OIF was the extent to which compliance with ROE and rules governing the use of force became identified with military professionalism, rather than as an alternative to it. A May 2004 memorandum entitled “Proper Conduct in Combat Operations” issued by the commander of coalition forces, Lieutenant General Sanchez, provides

²²⁴ Eric Schwartz, Interview with COL Eric Schwartz, interview by Robert Cameron, April 21, 2007, 10, Operational Leadership Experiences, Combined Arms Research library.

²²⁵ Dunlap, “Come the Revolution,” 139.

an example of this: “Respect for others, humane treatment of all persons, and adherence to the law of war *and rules of engagement* is a matter of discipline and values. It is what separates us from our enemies.”²²⁶ While respect, humanity, and adherence to the law of war are traditional virtues of military professionalism, rules of engagement are tools of both law and policy. By elevating ROE to a status alongside respect, humanity, and law, the memo completely embraces the post-My Lai view that ROE are normative professional constraints rather than simply policy limitations.

Sattler emphasized the conjunction of military professionalism and rule-based constraints, as well. In his view, the rule-based regime of constraints complemented his professional judgment, rather than limiting his options. He related that tactical commanders frequently sought to push their authorities to the edge of what was allowed by the rules in an effort to fight as aggressively as possible. As a senior operational commander, he viewed his job as exercising professional judgment in order to ensure that, for example, the authority to strike targets with fewer than 30 anticipated civilian casualties without informing the Secretary of Defense, did not come to be interpreted as ‘killing 30 people is always OK.’ He indicated that he frequently disapproved strikes, even when the anticipated number of civilian casualties was below 30 because he was not convinced that the military advantage to be gained by the strike justified the number of anticipated civilian casualties.²²⁷ While this behavior is solidly grounded in traditional military professionalism and professional military ethics, the fact that the strikes in question had to come to him for approval as the MEF commander, rather than being approved at

²²⁶ Lt. General Ricardo Sanchez, “Proper Conduct in Combat Operations” May 2004. Cited in Wright and Reese, *On Point II*, 260 (emphasis added).

²²⁷ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

a lower level, is grounded in the regime of rule-based constraints intended to address legitimacy concerns.

Military legalism in OIF

Operational-level commanders in OIF, bound by a dense regime of rules governing their use of force, often turned to formalistic interpretations of those rules, and advocacy for their desired courses of action. In some cases, the military legalism of operational commanders justified expanding their freedom of action. In other cases, commanders legalistically interpreted rules in what seems to have been an effort to diffuse responsibility by requiring explicit legal approval for their actions. Some commanders used the tenets of military legalism without seeming to be aware that they were being legalistic by expounding their own military judgment through formal rules for subordinate commanders.

As mentioned in the example of military legalism provided in Chapter 1, one of the clearest ways in which the formal interpretation of rules was used to expand commanders' freedom of action was in the different criteria applied to pre-planned fires, as opposed to self-defense. The Army's legal lessons-learned document records that this distinction was applied at the staff planning level, as well, to exempt self-defense targets from the elaborate collateral damage estimation procedures that were required for other targets. Not only could targets be struck in self-defense without higher headquarters approval even when the anticipated number of civilian casualties exceeded the threshold, commanders were relieved of the requirement to perform a formal estimate of civilian casualties for self-defense targets:

At CFLCC's [Combined Forces Land Component Commander's] request to CENTCOM, the collateral damage methodology did not apply to immediate target engagements under the inherent right of self-defense. This exception, like that in the ROE, permitted the ground commander to approve strikes as necessary in self-defense. This exception did not, however, eliminate the

requirements to positively identify all targets, use force proportional to the threat and minimize collateral damage to the extent feasible, given the situation at the time. If a target did not satisfy the self-defense exception or if approval was required by a higher commander, the ground commander was required to request approval from the commander or government official with the strike authority.

Like the ROE self-defense exception, this [the CDEM self-defense exception] was an area that caused some confusion and consternation among commanders. Primarily, the confusion stemmed from the imprecise nature of this concept and the lack of defined parameters. This is an area of the targeting process that needs to be refined for future conflicts.²²⁸

From the concerns expressed by military lawyers, it is evident that some commanders appear to have interpreted two specific types of self-defense justifications particularly broadly with the result of increasing their own freedom of action: ‘Troops in contact’ and ‘time sensitive targets.’ As noted in the CLAMO lessons-learned document, ‘troops in contact’ was not a doctrinally-defined term.²²⁹ Commanders were thus free to use broad leeway in determining what constituted being ‘in-contact’:

Forces in contact can always engage the enemy under the inherent right of self-defense even if the authority to strike a certain target is withheld to a higher commander. The problem, as is often the case, lies in the interpretation of “in contact.” What are the boundaries for self-defense fires, and how should “in contact” be defined? Naturally, if you are being fired upon, you can return fire. But what if the enemy is not firing at you but you are within range? More likely than not, you can engage the enemy.

However, what if the enemy is within range, not firing at you and located next to a protected site that is on a restricted target list and cannot be struck without higher command approval? This is a difficult question that must be answered by the commander on the ground, using his best judgment as to whether or not to seek approval from higher headquarters to conduct the strike or approve the strike under the inherent right of self-defense.²³⁰

²²⁸ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 104.

²²⁹ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 2*, 135.

²³⁰ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 105 (emphasis added).

Some commanders apparently interpreted the rules governing ‘troops in contact’ to apply any time their forces were within enemy weapons range.²³¹ Since the infantry and artillery weapons used by both sides had similar ranges, these commanders interpreted the rule to mean that they were exempt from the requirement to obtain higher headquarters approval to strike any target within their own weapons range where Iraqi forces were located, unless they knew that the Iraqis lacked weapons with the range to reach friendly forces. This interpretation effectively removed most higher headquarters approval requirements. Such a broad interpretation was ultimately held by the CENTCOM commander to be flawed, since it, “failed to follow the plain reading under the field manual which requires a physical engagement of the enemy and failed to follow the intent of the USCENTCOM OIF collateral damage estimation methodology.”²³² Although the strategic commander rejected this broad interpretation, no definitive interpretation was provided in its place, leaving operational commanders with broad discretion as to how they interpreted the rules.

A similar phenomenon developed with the issue of time sensitive targets. Quoting again from the CLAMO lessons-learned:

In both Afghanistan and Iraq there were many reports of confusion over exactly what constituted a time sensitive target (TST). The reason why this is significant is that under both OEF and OIF ROE, true TSTs could trigger certain supplemental ROE provisions designed to expedite the servicing of TSTs. [The doctrinal definition of TST’s follows] ...

During major combat operations, the TST process seemed to work well. However, as time went on and the number of pure doctrinal TSTs dwindled and the number of insurgent targets increased there was a tendency to stray from the doctrinal definition and the doctrinal TST process in order to prosecute the new emerging target sets as TSTs and take advantage of the benefits of working a

²³¹ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 2*, 135.

²³² Center for Law and Military Operations, 135.

target as a TST. The further from doctrine commanders and staff strayed, the more confusion and friction entered into the TST process.²³³

Another area in which some commanders interpreted the rules formalistically to provide greater freedom of action regarded the use of warning shots. A memorable epigram in the CLAMO lessons-learned report reads, “What do you mean you’re requesting bombs on deck as warning shot?” The section goes on to say, “During full spectrum operations in Iraq there was a novel interpretation of the term ‘warning shot.’”²³⁴ Apparently, some commanders used bombs as a means to deter ‘potentially hostile’ forces from acting against their troops by dropping them near the forces in question. Since such bombs were not dropped on targets *per se*, but were characterized as a warning mechanism short of lethal force, commanders employing this technique bypassed normal target approval procedures and were able to employ ordnance without triggering the collateral damage estimation requirements that accompanied normal targeting. Some lawyers expressed concern that this technique could be used to terrorize the local population, or result in unintended harm to civilians or their property. The procedure was ultimately prohibited.²³⁵

Even when commanders were not formalistically interpreting terms to advocate for expedited approval or approval at a lower level in the chain of command, they were sensitized to the need to be very formal in their use of language when requesting approval for certain targets. A JAG who worked with Special Forces teams in both Afghanistan and Iraq observed,

The most difficult part of training...ROE to the special forces teams was the idea that targeting authority was not based on the identity of the particular targets so much as the team’s situation vis- à-vis the target. Reservations of targeting authority to higher levels made it extremely important for team members calling for fires to use the right terms in order to avoid any delays. In addition to using

²³³ Center for Law and Military Operations, 139 (emphasis added).

²³⁴ Center for Law and Military Operations, 138.

²³⁵ Center for Law and Military Operations, 138.

terms like “positively identified” and “likely and identifiable threat” in the request, the team members needed to indicate the situation requiring the fires so that approval was obtained at the most immediate level possible.²³⁶

The differing criteria applied to different types of targets led to operational commanders increasingly relying on JAG’s for interpretative advice. Dunlap reports that a JAG, “sat at a console in the elevated platform in the center of the [Air Operations Center] floor next to the chief of combat operations.”²³⁷ A JAG who worked with both Special Operations and conventional forces confirmed the important role played by JAG’s in helping commanders to interpret the rules:

I think you'll find that most commanders who get to full colonel become more lawyer friendly. Some people will say that's an unfortunate consequence of modern war; that it's become more legal in nature. That's fine. Be upset about it but also deal with it in a productive manner. The reason why you have two JAGs at a BCT [Brigade Combat Team] or five to six with a SFG [Special Forces Group] is because the US Army wants to make sure we provide the best possible legal support to our operational units.²³⁸

Not all commanders who formalistically interpreted the rules governing the use of force were pushing for more freedom of action. A RAND report documents that differing interpretations of the draft Joint Publication on close air support resulted in differing practices among the commanders of the Marine Tactical Air Operations Center (TAOC) and the Army Air Support Operations Center (ASOC) regarding the leeway to conduct “killbox” operations.²³⁹

²³⁶ “Whitford (5th SF Group) OEF/OIF after action report” Quoted in Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 106 n. 91 (emphasis added).

²³⁷ Dunlap, “Come the Revolution,” 144.

²³⁸ LTC Oren McKnelly, Interview with LTC Oren McKnelly, interview by Jenna Fike, February 22, 2011, 15, Operational Leadership Experiences, Combined Arms Research library.

²³⁹ A “killbox” is a fire support coordination measure, which defines an area within which friendly aircraft are operating. Perry et al., *Operation IRAQI FREEDOM*, 160. Killboxes may be either “open” or “closed.” According to the report, “An aircraft operating in a closed killbox was permitted to engage ground targets only when cleared by a terminal air controller on the ground or an airborne forward air controller. An aircraft operating in an open killbox was permitted to attack with- out terminal control. During OIF, killboxes short of the fire support coordination line (FSCL) were considered closed unless

Army controllers at the ASOC interpreted the publication to require positive control of all aircraft operating short of the Fire Support Coordination Line (FSCL—a line beyond which air assets are free to engage any forces; short of the FSCL, friendly forces may be present) by a tactical air controller who was physically present on the ground. Marine controllers at the TAOC interpreted the instruction to allow airborne controllers to fill this function in some areas short of the FSCL, enabling one aircraft to conduct strikes while a second aircraft ensured that the strikes fell only on enemy forces. The formalistic (and more restrictive) interpretation adopted by the ASOC commander protected Army controllers from responsibility for possible fratricide incidents, but it resulted in a less efficient use of air support assets, and “provided [the enemy] a degree of sanctuary short of the FSCL”.²⁴⁰

As mentioned in the history section above, a formalistic interpretation of the ROE also kept US forces from using force to prevent looting in April and May 2003. The Army’s official history of OIF records,

The rapidly changing command structure in May 2003 created confusion about which phase of the OIF campaign plan Coalition forces were conducting. Much more than a semantic difference, this issue had significant effects at all levels. The phase of the operation influenced the task organization, the type of missions US forces would conduct, and the rules of engagement (ROEs) under which US forces would operate.²⁴¹

Concern over exceeding the strict bounds of the ROE even in the face of clear security threats likely stemmed from a desire to obtain a formal legal blessing before using force against civilians engaged in looting.

opened by a ground commander. Killboxes beyond the FSCL were considered open unless closed by a ground commander.’

²⁴⁰ See discussion in Perry et al., 165–68.

²⁴¹ Wright and Reese, *On Point II*, 148.

One of the most interesting development in OIF is the degree to which some military commanders employed military legalism while believing that their behavior embodied traditional military professionalism. An infantry brigade commander related his experience in inculcating compliance with the rule-based regime of constraints among his troops:

I think the rules of engagement were clear. I think soldiers aren't comfortable with it when they initially get into theater. But they quickly become comfortable with it over the course of the time they're there. Initially soldiers see it as restrictive, I think, when they get into theater, and then it becomes permissive in nature at some point as they get comfortable with it. They see it as, "Yes I can engage here," rather than, "No this won't let me engage." ...I thought the soldiers were incredibly disciplined.²⁴²

The evolution from perceiving rules as restrictive to perceiving them as permissive is precisely the outcome expected under military legalism: Once rules are parsed and interpreted, they can be used to advocate for desired courses of action. Yet in the mind of this commander, the evolution from perceiving the rules as restrictive to perceiving them as permissive represented military discipline, a virtue of traditional military professionalism.

Sattler related two examples that confirm this trend. The first concerned the criteria for using force while preparing to attack Fallujah in November 2004. He indicated that he provided specific rules to Marine snipers defining what constituted hostile intent and justified the use of force.²⁴³ This is significant because the demonstration of hostile intent is a threshold, which justifies (and requires) the use of force in self-defense.²⁴⁴ By specifying rules that defined hostile

²⁴² James Pasquarette, *An Oral History of Colonel James Pasquarette*, interview by LTC John Dolan, 2008, 29, Oral Histories, Army Heritage and Education Center.

²⁴³ Specifically, he told them that anyone carrying a weapon larger than an AK-47 (e.g. a machine gun), anyone carrying artillery ammunition or RPG's, and anyone leaning out of a window to use a cell phone was demonstrating hostile intent. Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²⁴⁴ See, for example, the second condition governing the use of force in the 101st Airborne Division ROE in Appendix B-1 of Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 315 (reproduced at p. 80, supra).

intent, Sattler was formally interpreting the broader ROE in order to advocate for a policy that would strike a balance between restraint and mission accomplishment, in order to protect the legitimacy of his operation. This approach is consistent with military legalism, yet he viewed his actions as an example of professionalism and adherence to professional military ethics.²⁴⁵

The second example had to do with investigations of use of force incidents. By 2004, coalition policy required that any use of force resulting in the death of an Iraqi civilian would be the subject of a command investigation.²⁴⁶ The soldiers or Marines whose actions were being investigated were routinely read their rights under Article 31(b) of the UCMJ, in case any wrongdoing was found. While intended to protect their rights, this approach almost inevitably left the troops with the sense that their actions were being second-guessed with a presumption of wrong-doing. Sattler related that, in order to combat this impression, he told his Marines, “I will not court-martial you as long as you were following the procedures. But I will court-martial you if you fail to use force when the procedures call for it.”²⁴⁷ In so doing, Sattler conveyed to his force a reliance on the rules governing use of force, not only to constrain their use of force, but also to justify and even compel it. Such an approach, while intended to convey a confidence in his Marines’ judgment and allay fears of second-guessing, consistent with traditional military professionalism, also incentivizes a formalistic interpretation of the rules in the event something goes wrong.

Finally, an example of unconsciously blending military legalism with traditional military professionalism may be found in guidance for dealing with Iraqi forces attempting to exploit US

²⁴⁵ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²⁴⁶ Pasquarette, Pasquarette Oral History, 25; Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²⁴⁷ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret); Sattler, Sattler interview 2.

respect for the law of armed conflict, either to gain tactical advantage, or to undermine US legitimacy. The CLAMO lessons-learned report deals with one aspect of this:

No discussion of OEF and OIF ROE would be complete without reviewing a few examples of scenarios in which service members took fire from a mosque. Military commanders have the inherent right and obligation to “use all necessary means available and to take all appropriate actions to defend that commander’s unit and other US forces in the vicinity.” The take away from all of the discussion papers and FRAGOs written on the subject is that if a mosque is being used for a military purpose rather than a religious or cultural purpose, it loses its protected status and therefore may become a legitimate military objective when adequate military intelligence indicates it is being used for military purposes.²⁴⁸

This approach is entirely consistent with traditional military professionalism, but also invokes the protection of rules, which serve to validate the legitimacy of US actions. While protected sites presented one type of challenge, a more difficult dilemma was posed when enemy forces used civilians, especially children, either as human shields or as active participants in the conflict. An ROE training scenario attempted to prepare soldiers to deal with such a situation from a legal perspective:

Scenario: You and your squad are attempting to conceal your approach on foot toward a building that you have been ordered to clear. As you stoop behind a wall to avoid being seen by the enemy soldiers defending the building, a young boy approaching from the other direction sees one of your squad mates and begins shouting and pointing toward his location. The enemy soldiers defending the building begin to fire at your squad mate. The boy then sees you and is about to begin shouting and pointing in your direction. What do the ROE allow you to do?

Response: Under the CFLCC ROE Card, you must not harm civilians unless necessary to defend yourself or others or to protect designated property. Civilians are protected from intentional targeting so long as they do not take an active part in the hostilities. Here the boy is directing enemy fire on friendly

²⁴⁸ Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 2*, 135 (internal citations omitted).

forces. He has made himself a legitimate target and you may fire at him just as you would an enemy soldier.²⁴⁹

In practice, such rule-based reassurances might not suffice, as a JAG with the 101st Airborne Division acknowledged:

The 11th Attack Helicopter Regiment went into Najaf and got shot up pretty badly. There were civilians with rocket-propelled grenades (RPGs) on rooftops; and the reports back were that they were literally holding the hand of their son or daughter, with an RPG in the other hand. Americans are good people and they don't shoot little kids. So a lot of the issues were, "I didn't know if I could shoot or not." I was like, "Well, unfortunately, you could shoot. There's nothing unlawful about that." That's an issue beyond the law. There's nothing unlawful about it, but that doesn't mean you're not going to feel rotten about it.²⁵⁰

OIF summary and analysis

US operational-level commanders in OIF frequently employed military legalism. Governed by a regime of rule-based constraints on the use of force intended to bolster the challenged legitimacy of the operations, they routinely interpreted rules formalistically and advocated for their desired courses of action. On occasion, his behavior came to be so common that it appears to have been accepted as a part of traditional military professionalism.

The evidence from the major combat operations phase of OIF suggests that military legalism is not a phenomenon limited to small wars or counterinsurgency. Any time operational commanders operate under a dense regime of rules constraining their use of force, an incentive exists to formally interpret those rules in order to make it easier accomplish their mission, or to diffuse responsibility for actions they are concerned will result in legal or professional liability. Policy-makers are likely to implement such regimes of constraint whenever the legitimacy of a

²⁴⁹ Appendix B, Scenario 20 Center for Law and Military Operations, *Legal Lessons from Afghanistan and Iraq Volume 1*, 325.

²⁵⁰ MAJ Susan Arnold, Interview with MAJ Susan Arnold, interview by John McCool, January 25, 2006, 5, Operational Leadership Experiences, Combined Arms Research library.

conflict is contested. In modern conflicts in which adversaries have learned to leverage the media in order to exploit legitimacy concerns related to civilian casualties, this is likely to occur whether the scale of the conflict is large or small.

The most intriguing aspect of military legalism in OIF is the degree to which reasoning consistent with military legalism became entwined with traditional military professionalism. Sattler, in discussing the role of his JAG, declared, "I told my lawyer that he owned the black and the white; I owned the gray."²⁵¹ In other words, the lawyer's job was to tell him if his interpretations exceeded the bounds of law or policy, but the interpretation of the rules was his purview as the military commander. One JAG confirmed that such blending of legal and professional judgment was a goal of their training:

What has often happened -- and I think criticism is rightfully leveled -- in times past ROE have been written in a legalistic manner. Remember, they are the commander's rules for his forces. The commander signs off on the ROE but sometimes I think we become overly legalistic in how we explain certain things. The standing ROE -- they've done a much better job at explaining certain terms but then you have to get it down to the 18 to 24-year-old's level. Vignettes, lanes training--realistic lanes training during the pre-deployment cycle is what you need. What we did at JRTC [Joint Readiness Training Center in Fort Polk, LA] was have these lanes where ROE issues would come up. I would support the maneuver officers—the combat arms officers—during the AAR where the ROE issue would be discussed. "That individual had on bulky clothing and looked like it might be a suicide bomber." Or, "This vehicle was approaching at a high rate of speed. This person was implanting X, Y, Z on the road side. How did you react to that? This was the ROE training you received before you came to the rotation. Did it confuse you? Was your act instinctual?"²⁵²

“Instinctual” in this case is probably the wrong word: The instincts governing the use of force are fight or flight, both of which military professionalism seeks to moderate. Instead, the process described by the JAG is a process of interpretation, conditioned by the expectations

²⁵¹ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

²⁵² McKnelly, McKnelly Interview, 16.

placed upon each soldier by their status as a member of the military profession. In other words, military professionalism is changing to incorporate the tenets of military legalism.

Overall summary and analysis

Operational-level commanders in both Beirut and OIF showed evidence of employing military legalism. Governed by rule-based regimes of constraints on their use of force that were put into place by policy-makers concerned over the contested legitimacy of the conflicts, commanders employed a formalistic interpretation of the rules to advocate for actions they felt were appropriate. Although the conflicts were separated by two decades, the end of the Cold War, and the September 11 terrorist attacks, there are more commonalities in the way in which commanders in Beirut and OIF justified their uses of force than there are commonalities in the approach of commanders in Beirut and Vietnam, less than 10 years before.

The two conflicts were different in almost every other way: The Beirut intervention never exceeded 1,200 personnel on the ground, while OIF involved over 170,000 ground troops plus thousands of aviators and Sailors. Beirut involved only the Marine Corps with support from the Navy; OIF included servicemembers from all military services, Reserves, National Guard, and support from other government agencies. Beirut was fought in the context of the Cold War with the Soviet Union; OIF was fought after the US victory in the Cold War, and in the context of a new threat posed by the conjunction of non-state actors and states that were unaccountable to the international system. Yet, despite these differences, US military commanders used a similar process of formally interpreting rules to advocate for desired courses of action in order to justify their decisions regarding the use of force.

Traditional professional military values did not disappear in either conflict. Honor, chivalry, and professional military judgment were still prominent. To suggest that commanders

formally interpreted rules is not to suggest that they did so with anything other than honorable intentions, or that they sought to circumvent the requirement to protect civilians from harm. If anything, the focus on rules served to improve the protection of civilians as compared to previous conflicts. Even if civilians still suffered widespread and grievous harm in Beirut and (more especially) OIF, efforts to protect civilians appeared to be taken more seriously in these conflicts than they were in World War II, Korea, or Vietnam.

The permeation of military legalism into the thinking of officers who would not have characterized their actions as being legalistic suggests that the values of military legalism may be becoming ingrained into the US professional military ethic. The implications of such a development will be discussed in the next chapter.

Chapter 6: The Implications and Future of Military Legalism

Shameful deeds ought not to be committed, even for the sake of one's country.

Hugo Grotius¹

The previous chapters addressed the questions, ‘what is military legalism?’ and ‘what causes military legalism?’; this chapter addresses the question, ‘why does it matter?’ After summarizing the arguments from the previous chapters, it first examines the normativity of military legalism and then briefly explores the implications of military legalism in three areas: civil-military relations, the efficacy of international humanitarian law, and the way the US is likely to fight future conflicts. A final section offers policy recommendations.

Summary of the argument

Military professionalism in the US military has changed over the last 50 years. Military officers before Vietnam justified decisions regarding the use of force almost exclusively in terms of their own professional judgment, which incorporated concepts such as honor, chivalry and military necessity. In addition to those motivations, today's military officers also frequently invoke a formalistic interpretation of the rules governing the use of force in order to advocate for actions they see as necessary or appropriate. This legalistic frame of mind among military officers has evolved in response to an increasing tendency by policy-makers to govern the use of force with strict rules, which reflect the dictates of international law as well as policy goals. The

¹ Hugo Grotius, *De Jure Belli Ac Pacis*, ed. James Brown Scott, Classics of International Law (Oxford: Clarendon Press, 1925), 17, <https://ia801409.us.archive.org/26/items/hugonisgrottiide00grotuoft/hugonisgrottiide00grotuoft.pdf>. Grotius attributes the comment to Cicero.

development of rule-based constraints on the use of force originated with the desire of policy-makers in the Korean war to limit the risk of escalation. Military commanders in Korea frequently ignored or disregarded such rules, and continued to show little regard for rule-based constraints on the use of force well into the Vietnam war. After the My Lai massacre, however, military commanders relied on the rules of engagement as evidence that they were taking appropriate measures to prevent war crimes, and subsequently imbued these rules with additional normative weight by requiring that they be reviewed for compliance with international law.

The transformation of rules governing the use of force from policy tools, which military commanders often resented as an intrusion into their area of expertise, to legal standards, which incorporated principles of proper conduct long associated with military professionalism, occurred at the same time that the legitimacy of US military conflicts was increasingly being contested. These challenges to legitimacy stemmed partly from the disparity of power between US forces and their adversaries, and partly from deliberate attempts by adversaries to exploit US concern for the law of war and minimizing civilian casualties.

Policy-makers faced with challenges to the legitimacy of decisions about whether or not to use force (*jus ad bellum*) found that strict rules governing how force could be used (*jus in bello*) helped them to reclaim legitimacy. While an illegitimate war cannot be fully redeemed by being fought well, careful discretion as to how force is employed—especially efforts to minimize harm to civilians—may tend to lower the threshold for the acceptable use of force in popular opinion or otherwise enhance legitimacy. In Beirut, the connection between the rules governing force and the desire to maintain the legitimacy of the mission at home and abroad was evident in the continued use of ROE based on peacetime restrictions on the use of force, even after the Marines began to come under intense hostile fire. Adopting combat ROE risked domestic

legitimacy by characterizing the operation as a combat mission, potentially setting up a confrontation between Congress and the President over war powers; it risked international legitimacy by suggesting that the Marines were not neutral peacekeepers. In OIF, the rules were often focused on preventing or carefully managing actions that might spark outrage, such as requiring high-level political approval to strike targets that would result in 30 or more anticipated civilian casualties; these types of constraints addressed both domestic and international legitimacy concerns by attempting to demonstrate a due regard for minimizing harm to civilians.

Military commanders after Vietnam appear to have given greater weight to ROE than prior to or during that conflict. Rather than being ignored as they often were in Korea and Vietnam, rules governing the use of force carried such weight that US forces in Beirut and Iraq showed forbearance in using force, even in circumstances that plainly seemed to call for it. As military commanders paid increased attention to the rules governing the use of force after Vietnam, they also began to interpret the rules in sometimes-surprising ways, which allowed them more freedom of action than was envisioned when the rules were first drafted. In Beirut, this process of interpretation had the counter-intuitive result that the same set of rules were interpreted at different times to prohibit Marines from shooting at gunmen who were traveling to or from positions from which they fired at Marine forces, since they were not actively shooting at the Marines during this commute to combat, and also to allow the Marines to call in hundreds of rounds of artillery from ships offshore in defense of a Lebanese army outpost where no Marines were present. In Iraq, rules that freed local commanders acting in self-defense from the requirement to have targets reviewed and approved by higher headquarters were sometimes interpreted so broadly as to nearly render the requirement meaningless.

The military legalism shown by US commanders after Vietnam is consistent with the expected preferences of the military under Feaver's agency theory of civil-military relations. Military commanders show obedience to the requirements of civilian policy makers when they emphasize the degree to which their actions comply with the rules policy-makers have put in place; if they were to rely on professional judgment and military necessity alone to justify their choices about the use of force, their actions would likely be seen as arcane or not responsive to civilian direction. But legal reasoning has not replaced traditional military judgment entirely. For example, Lieutenant General Sattler observed that subordinate commanders who came to him requesting approval for an action knew that they would be required to show that the action was within the authorities granted by the rules (i.e. the target was a legitimate target, the anticipated number of casualties was below the threshold that could be approved in theater, etc.). But unless an action plainly did not comply with the rules, his responses to the subordinate making the request would be framed in the context of professional judgment, rather than in the context of rule compliance, specifically focusing on the military advantage to be gained weighed against the harm likely to be caused to civilians. Similarly, when he had to request approval for an action from strategic-level commanders or policy-makers, he made sure that he framed his request in terms of being compliant with the authorities granted him by the rules, since he knew that would be among the first questions asked.² This approach is consistent with the explanation

² Sattler frequently described the harm likely to be cause to civilians as “the risk to life, limb, or eyesight.” In an example of a time when he denied permission for an action based on a lack of rule compliance, he related an incident from his time as the CENTCOM J-3 when Special Operations forces had pursued a group of suspected Taliban across the border into Pakistan. In the course of the pursuit, they briefly lost contact with the forces, but regained it shortly. The rules for entry into Pakistan required “continuous and uninterrupted contact.” Sattler asked the SOF commander if he had continuous and uninterrupted contact. The commander said that he did not, but that he was certain the group he was targeting was the same group he had pursued from Afghanistan. Because the criteria of continuous uninterrupted pursuit had not been met, Sattler denied permission for the strike. John Sattler, Interview with Lieutenant General John Sattler, USMC (Ret), interview by Doyle Hodges, April 9, 2018.

that military legalism satisfies policy-makers' desires for the military to be responsive to the conditions they have established governing the use of force. In Feaver's terms, this is 'working' behavior, which is likely to reduce the perceived need for intrusive monitoring of the military by policy-makers. This meets the military's institutional preference for greater autonomy.

A strict and formal interpretation of the rules may also diffuse the responsibility of military commanders in the event that an action has negative consequences. The evidence for this explanation is less strong than that for satisfying policy-makers' preferences. The differing interpretations of the rules governing "killbox" operations, for example, may plausibly be interpreted as an effort to limit or diffuse liability in the event of fratricide, or it may be seen as lack of trust by ground commanders in the ability of airborne controllers to prevent such incidents. The effect of diffusing responsibility seems more pronounced at the strategic level than at the operational level: The US military enjoys extraordinarily high esteem among the US public, greater than any other institution in US society.³ This is curious since the success of the US military in winning wars over the past two decades has been mixed, at best. In part, this high level of esteem is due to the consciously-cultivated reputation of the military for the precise and disciplined application of force. This image is bolstered by the idea that the military delivers force in careful compliance with the rules developed by politicians. Under these conditions the military may benefit from an argument similar to that employed by the soldier Bates in Shakespeare's *Henry V*, that, "if [the] cause be wrong, our obedience...wipes the crime of it out of us."⁴ Compliance with rules developed by policy-makers may serve to mitigate the degree to which the military is held accountable by public opinion for a lack of strategic success.

³ Gallup Inc, "Confidence in Institutions," Gallup.com, accessed February 10, 2016, <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx>.

⁴ William Shakespeare, "Henry V. Act IV. SCENE I. The English Camp at Agincourt.," accessed November 29, 2016, <http://shakespeare.mit.edu/henryv/henryv.4.1.html>.

US military commanders clearly approach decisions about the use of force differently than they did in conflicts prior to the Vietnam war. The next sections will examine the normative implications of this change, as well as its impacts on civil-military relations, law, and policy.

Why does military legalism matter?

Normative implications of military legalism

Military legalism itself is neither good nor bad. The consequences of military legalism may be either good or bad, depending largely on the degree to which legal reasoning complements traditional considerations of military professionalism, such as professional military ethics, or supplants those considerations. When legal reasoning complements traditional professional military ethics, the likely result is increased concern over issues such as the protection of civilians with an overall positive outcome. The focus on legal reasoning in the development and implementation of counterinsurgency doctrine provides a good example of this. When legal reasoning supplants traditional professional military ethics, legal sufficiency alone constitutes permission to act, and considerations of honor and professional military ethics may be set aside or minimized. This was evident in US detention and interrogation policy in Iraq and Afghanistan.

In an example of the positive impact of military legalism, McLeod documents the way in which a legalistic approach suffused the drafting of the 2006 US counterinsurgency manual (FM 3-24). The drafting process for the field manual involved a “vetting conference” in February 2006, which included representatives from human rights non-governmental organizations (NGO’s), journalists, academics, and lawyers, in addition to the expected counterinsurgency

experts and military officers.⁵ The writing team received “hundreds of thousands of words of feedback” from the vetting conference. Among the changes implemented as a result of this feedback were sections dealing with the justification of the use of force. Specifically, McLeod records the addition of the following sections:

1-132. Illegitimate actions are those involving the use of power without authority...such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial...US forces must follow United States law, including domestic law, treaties to which the United States is a party, and certain [host nation] laws. Any human rights abuses or legal violations committed by US forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long-term and short-term [counterinsurgency] efforts.

1-133. Every action by counterinsurgents leaves a ‘forensic trace’ that may be required sometime later in a court of law. Counterinsurgents document all their activities to preserve, wherever possible, a chain of evidence.⁶

Shortly after the release of the counterinsurgency field manual in December 2006, US Joint Forces Command released a *Rule of Law Handbook* in July 2007, which was intended to complement the doctrine in the counterinsurgency field manual. The fourth edition of the Rule of Law Handbook, released in 2010, makes explicit reference to the importance of strict compliance with a rule-based regime: “A command’s ability to establish the rule of law within its area of control largely depends on its own compliance with legal rules, including the capacity to eliminate the seemingly arbitrary use of force.”⁷

While the approach described by McLeod is strong on legal reasoning, it is also evident that traditional military professionalism, including professional military ethics, continued to play a large role in the doctrinal approach to counterinsurgency. The COIN Field Manual makes this

⁵ Travers McLeod, *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan* (Oxford and New York: Oxford University Press, 2015), 97.

⁶ McLeod, 116–18 (emphasis added).

⁷ Rule of Law Handbook (2010), as cited in McLeod, 132.

clear—an entire chapter is devoted to “Leadership and Ethics for Counterinsurgency.” As the concluding pages of the chapter emphasize:

Senior leaders must model and transmit to their subordinates the appropriate respect for professional standards of self-discipline and adherence to ethical values. Effective leaders create command climates that reward professional conduct and punish unethical behavior. They also are comfortable delegating authority. However, as always, accountability for the overall behavior and performance of a command cannot be delegated. Commanders remain accountable for the attainment of objectives and the manner in which they are attained.⁸

In another interesting example of professional ethics suffusing counterinsurgency, in 2009 two American officers wrote a contemporary version of the counterinsurgency classic, *The Defense of Duffer's Drift*, first published by a British officer during the Boer War. The modern adaptation, *The Defense of Jisr al-Doreaa*, is set in Iraq around 2008. In it, as in the original pamphlet, an officer experiences a number of dreams, each of which details a lesson in how counterinsurgency operations may go wrong. While the lessons conveyed in the dreams place strong emphasis on honor and the protection of civilians, no reference at all is made to law or legal reasoning.⁹ The pamphlet is an evocative way to emphasize that successful counterinsurgency requires the exercise of timeless military virtues and professional military ethics.

The COIN field manual represented a doctrinal approach to counterinsurgency that focused on rule of law including careful compliance with ROE and other constraints on the use of force, but which also emphasized the importance of traditional military professionalism and professional military ethics. The implementation of the field manual's doctrinal provisions was

⁸ Headquarters, Department of the Army, “FM 3-24: COUNTERINSURGENCY” (Department of the Army, 2006), 7–9.

⁹ Michael L. Burgoyne and Albert J. Marckwardt, *The Defense of Jisr Al-Doreaa* (Chicago: University of Chicago Press, 2009).

characterized by military legalism. As has previously been discussed, General McChrystal's 2009 tactical directive on indirect fires applies the principles of the field manual that, "Sometimes, the more force is used, the less effective it is," and, "the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted."¹⁰ The order was intensely legalistic. Most of the interviews cited by McLeod confirm the extent to which commanders were aware of and incorporated more restrictive standards of the tactical directive into their operational planning in support of the principles articulated in the COIN field manual in both Iraq and Afghanistan. In one interview, a senior officer in the Special Operations community observed, "legal considerations—as opposed to intelligence—now *drive* operations."¹¹

The shameful US experience with torture provides the most persuasive example of the potential negative influence of military legalism.¹² The photographs of wanton and sadistic abuse of prisoners by US Army personnel at Abu Ghraib in 2004 shocked many people and harmed America's image around the world.¹³ Defense Secretary Donald Rumsfeld dismissed the abuses as the work of a "few bad apples" and former Defense Secretary James Schlesinger in a subsequent investigation characterized the abuses as the consequence of "Animal House on the night shift."¹⁴ Technically the Secretaries were correct: the Soldiers in the photographs had no

¹⁰ Headquarters, Department of the Army, "FM 3-24," 1–27.

¹¹ McLeod, *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan*, 220 (emphasis in original).

¹² For characterization of detainee treatment and interrogation policies as torture, see Constitution Project (Georgetown Public Policy Institute), Task Force on Detainee Treatment, and Constitution Project (Georgetown Public Policy Institute), *The Report of the Constitution Project's Task Force on Detainee Treatment*, 2013.

¹³ Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004, <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

¹⁴ Phillip Carter, "The Road to Abu Ghraib," *The Washington Monthly*, November 2004, <http://www.washingtonmonthly.com/features/2004/0411.carter.html>.

orders to commit these abuses. The Soldiers were not trained interrogators and the detainees in the photographs were never subjects of intelligence interrogation, so no one in the chain of command had ever proposed or approved an interrogation plan using harsh techniques (or any techniques at all) on those detainees.¹⁵ They appeared to be random victims of recreational sadism by Soldiers who were poorly supervised, trained, and officered.

But while the victims of the Abu Ghraib abuse appeared to be random, the abuses themselves were not. Several subsequent investigations revealed that some of the particular degradations—such as the use of nudity, dogs, and stress positions—were perversions of techniques that had been approved for use as “enhanced interrogation” measures on specific detainees who were being interrogated at Abu Ghraib and elsewhere.¹⁶ While the enhanced interrogation techniques were shocking to many people’s sensibility and subsequently were judged to have crossed the boundary between interrogation and torture, enhanced interrogation, unlike the abuses photographed at Abu Ghraib, was not a case of a military run amok and acting without regard for the law. Instead, the interrogation policies and techniques had been intensely scrutinized and legalistically justified by senior civilian and military lawyers.¹⁷ Thus, although

¹⁵ Albert T. Church III, “Review of Department of Defense Detention Operations and Detainee Interrogation Techniques” (Naval Inspector General, March 7, 2005), 15, https://www.aclu.org/sites/default/files/images/torture/asset_upload_file625_26068.pdf.

¹⁶ On the use of these techniques at Abu Ghraib, see Antonio Taguba, “Article 15-6 Investigation of the 800th Military Police Brigade,” 2004, 16, 17, 19, http://www.supremelaw.org/cc/titan/Al_Rawi_v_Titan_Complaint.pdf; For examples of these techniques being authorized in other circumstances, see Ricardo Sanchez, “CJTF-7 Interrogation and Counter-Resistance Policy,” September 10, 2003, https://www.thetorturedatabase.org/files/foia_subsite/17._memorandum_for_combined_joint_task_force_seven--c05951351.pdf. For the specific conclusion that the abuses at Abu Ghraib mirrored the use of approved techniques without appropriate safeguards, see the Fay report summarized in Deputy Inspector General for Intelligence, “Review of DoD-Directed Investigations of Detainee Abuse” (Washington, D.C.: Department of Defense Inspector General, August 25, 2006), 48, 49.

¹⁷ On approval by civilian lawyers, see John Yoo, “Memorandum for William J. Haynes II, General Counsel of the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States,” 2003, <http://www.blackvault.com/documents/terrorism/OLCmemo14mar2003.pdf>; On approval by military

the abuses inflicted by the Soldiers at Abu Ghraib were violations of the law, they were a distorted reflection of a legalistic interpretation of the law that allowed the use of nudity, dogs, and stress positions (among other techniques) by different soldiers on different detainees with safeguards that had been carefully and precisely parsed.

The numerous official investigations that followed the release of the Abu Ghraib photographs reached a consensus: the dissemination of legal guidance and implementation of oversight on detention and interrogation was inadequate, disjointed, and confusing, but this did not excuse the behavior.¹⁸ The majority of soldiers did not take advantage of confusing guidance to commit abuses. The Army Inspector General observed, “leaders and Soldiers in Afghanistan and Iraq were determined to do what was legally and morally right for their fellow Soldiers and the detainees under their care. We found numerous examples of military professionalism, ingrained Army Values, and moral courage in both leaders and Soldiers.”¹⁹ As for the abuses, “These incidents ... resulted from the failure of individuals to follow known standards of discipline and Army Values and, in some cases, the failure of a few leaders to enforce those standards of discipline.”²⁰

The distinction between “Army Values” and the behavior enabled by the intensely parsed and highly specific approved interrogation plans is telling. In this case, the migration of the norms and processes of the legal profession into the military decision making process allowed

lawyers, see Carl Levin, “The Treatment of Detainees in U.S. Custody,” § Committee on Armed Services (2008), 5, 6, passim, [HTTP://congressional.proquest.com.ezproxy.princeton.edu/congressional/docview/t29.d30.hrg-2008-sas-0029?accountid=13314](http://congressional.proquest.com.ezproxy.princeton.edu/congressional/docview/t29.d30.hrg-2008-sas-0029?accountid=13314).

¹⁸ See, generally, Deputy Inspector General for Intelligence, “Review of DoD-Directed Investigations of Detainee Abuse.”

¹⁹ Paul T. Mikolashek, “Detainee Operations Inspection” (Department of the Army The Inspector General, July 21, 2004), iii.

²⁰ Mikolashek, iv.

soldiers to engage in activities that violate the core ethos of soldiering. Although the extensive legal review in the case of the interrogation techniques gave the imprimatur of legality and thus legitimacy through rule compliance, soldiers who engaged in similar activities absent such review were convicted of abuse. Rather than being an argument in favor of letting the Abu Ghraib offenders off lightly, this is an argument in favor of re-examining the notion of legitimacy through rule compliance. As Luban has asked, “what [is the] point of morality if moral action no longer has any connection with elemental decency?”²¹

Military legalism and civil-military relations

Military legalism represents a change in military professionalism. As defined in Chapter 1, military professionalism is the means by which the military defines and differentiates its scope of knowledge and expertise, and regularizes and institutionalizes its desired behaviors, including subordination to civilian authority. By changing the way in which military officers interact with guidance from civilian policy-makers, military legalism has an important impact on civil-military relations.

The evolution of constraints on the use of force from World War II through OIF may be seen as an ongoing exchange between civilian policy-makers and military commanders about their preferred way of controlling military action. World War II was characterized by broad military autonomy. In Korea and Vietnam, civilian policy-makers began to exert more control over the military through rules; the military complied reluctantly with the rules in those conflicts. After Vietnam, the conversation between the civilians and the military changed: The rules which had previously been seen mostly as micromanagement now were seen as a way to bolster

²¹ David Luban, *Torture, Power, and Law* (Cambridge ; New York: Cambridge University Press, 2014), 103.

legitimacy. But military commanders still desired the autonomy to fight the way they felt was best. Military legalism offers a way for them to regain autonomy by interpreting the rules so as to allow the actions they feel are necessary.

In restoring that autonomy, military legalism subtly challenges the strength of civilian control of the military. It is difficult, for example, to characterize the creative interpretations of ‘self-defense’ described during OIF, which freed commanders from the requirement to submit targets for review by strategic commanders and policy-makers, as anything other than an attempt to reduce the intrusiveness of civilian oversight. Officers accustomed to formally interpreting rules to justify their desired course of action may well look for loopholes or alternative interpretations when given orders they find objectionable for policy reasons, as well.

This study has focused on the operational level of war in its analysis of military legalism, since it is at that level that military legalism can best be evaluated as a transformation of military professionalism, free of the “noise” caused by political considerations at the strategic level or the urgency of survival at the tactical level. But military legalism is not limited to the operational level of war. Officers who have grown up accustomed to pushing for permission to conduct action right up to the edge of what is allowed by the rules at the tactical level, or interpreting rules in order to enhance their freedom of action at the operational level, may well bring a similar approach as they become more senior and occupy strategic level positions. The risk to civilian control posed by a strategic commander engaging in casuistic interpretation of orders from civilian policy-makers is different and more significant than that of the battlefield interpretations seen to date.

The final challenge to civil-military relations posed by military legalism is the choice between bad options that may be inherent in governing the use of military force principally

through a set of highly-specified rules. On the one hand, when military commanders engage in formalistic interpretations of the rules in order to pursue the actions they feel are best, this risks diminishing civilian control; on the other hand, if officers were to simply follow the rules without applying their own professional judgment, this risks the military evolving from Huntington's experts in the management of violence—an expertise that is grounded in a professional ethos, which includes professional military ethics—to what Janowitz called “mere military technician[s].”²² The more military commanders engage in casuistic interpretations that frustrate policy-makers' intent, the more likely policy-makers are to become increasingly specific in crafting the rules to prevent such a development. Yet the more specific and the less susceptible to interpretation the rules become, the less military officers act as professionals applying a body of expert knowledge, and the more they become tradesmen in destruction of lives and property.

This challenge highlights that the civil-military questions raised by military legalism are really questions about the use of a regime of rule-based constraints as the primary mechanism for civilians to control the actions of military commanders. Feaver's agency theory of civil-military relations focuses on the use of oversight mechanisms to ensure that the military complies with civilians' expectations and desires.²³ Rules governing the use of force, when coupled with processes to identify and punish violations of the rules, are one example of such a mechanism. This approach to the control of military force is grounded in a logic of consequence—any soldier or commander caught violating the rules can expect to face negative repercussions.²⁴ One

²² Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (United States of America: The Free Press of Glencoe, 1960), 12.

²³ See discussion in Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge, Massachusetts; London, England: Harvard University Press, 2003), 76–95.

²⁴ For a discussion of the logic of consequence and logic of appropriateness, see James G. March and Johan P. Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *The American*

expected response to such a regime of control is that the military may begin to place a priority on not being caught violating the rules, rather than on obeying the rules. Feaver's theory anticipates such a response and suggests increasingly intrusive mechanisms of oversight to guard against it by detecting violations, as well as the implicit promise that oversight will become less intrusive as incidents of violation decrease, thus holding out limited autonomy as a reward for compliance. Military legalism poses a new type of challenge to this mechanism of control: Rather than outright disobedience, military commanders may engage in creative interpretation to give the impression of obedience, while actually pursuing their own goals. Behavior that qualifies as 'shirking' can be re-cast as 'working' behavior through military legalism.²⁵

An alternative view of the civil-military relationship is offered by Cohen's "unequal dialogue" approach to civil-military relations.²⁶ Drawing from the experiences of Lincoln, Clemenceau, Churchill, and Ben-Gurion in leading their respective countries during war, Cohen observes, "...none of these men dictated to their subordinates. They might coax or bully, interrogate or probe, but rarely do we see them issuing orders or acting like a generalissimo." At the same time, "[the generals] found themselves being managed by a civilian leader who treated military advice as just that—advice, not a course of action to be ratified with no more than

Political Science Review, 1984, 734–749; The concept is more fully developed in James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders," *International Organization* 52, no. 4 (October 1, 1998): 943–69.

²⁵ To review the definitions of working and shirking, "The agent is said to work perfectly when it does what it has contracted with the principal to do, how the principal has asked it to, with due diligence and skill, and in such a way as to reinforce the principal's superior role in making the decisions and drawing the lines of any delegation. The military agent is said to shirk when, whether through laziness, insolence, or preventable incompetence, it deviates from its agreement with the civilians in order to pursue different preferences, for instance, by not doing what the civilians have requested, or not in the way the civilians wanted, or in such a way as to undermine the ability of the civilians to make future decisions." Feaver, *Armed Servants*, 68.

²⁶ Eliot A. Cohen, *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* (New York: Free Press, 2002), chap. 7.

formal consideration.”²⁷ While Cohen’s unequal dialogue still has room for a logic of consequence—insubordination or disobedience is likely to result in dismissal, for example—it also values the input of military leaders, incentivizing them to operate according to a logic of appropriateness. Rather than acting so as to avoid punishment, military leaders acting according to a logic of appropriateness act in the manner they feel is best according to their responsibilities for mission accomplishment and subordination to civilian authority. This creates an opportunity for traditional professional judgment, including professional military ethics, to play a greater role. A model of civilian control less-reliant on rules and yet still respectful of the supreme authority of civilian leaders might remove much of the incentive for military legalism by reducing the reliance on strictly specified rules. Whether and how this could be achieved will be discussed in the section on policy recommendations, below.

Military legalism and the law of war

The likely effects of military legalism on the efficacy of the law of war are mixed: Legalistic interpretations of law of war requirements may be used to justify behavior that satisfies the letter but violates the spirit and intent of the law, as typified by the US position on torture and unlawful combatants. At the same time, military legalism requires that at least some consideration be given to legal principles in justifying a course of action. During the course of the development of the International Committee of the Red Cross’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, for example, substantial disagreement resulted among the participants as to what qualified a civilian to be considered to be “directly participating in hostilities,” and thus legally targetable under

²⁷ Cohen, 208–9.

international humanitarian law.²⁸ While delegates could not agree on specifics as to what constituted direct participation, such as whether assembling an improvised explosive device (IED) was similar to working in a munitions factory far removed from the battlefield for purposes of liability to targeting, they were in complete agreement with the principle that civilians who are not directly participating in hostilities may not be legally targeted or subjected to harm.²⁹ Much as “hypocrisy is the tribute that virtue pays to vice,” legalistic interpretations of the rules governing the use of force at least acknowledge that the rules themselves have normative value and authority.

The potential negative impact of military legalism on the efficacy of international humanitarian law is self-limited by the focus of military legalism on legitimacy. As discussed in Chapter 3, legitimacy is the result of a value judgment made by a community. While rule-compliance helps to make the case for legitimacy, it is unlikely to overcome common moral intuition. In the case of US interrogation policy, legal arguments that sleep deprivation, the use of dogs, and forced nudity did not rise to a level constituting torture failed to redeem the legitimacy of those morally reprehensible actions. Similarly, at the strategic level, the US argument that UN Security Council Resolutions 697 and 1441 provided authority for the

²⁸ For the guidance document itself, see ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009,” *International Review of the Red Cross* 90, no. 872 (December 2008): 991–1047; For commentary on the disagreements see Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,” in *Essays on Law and War at the Fault Lines* (Springer, 2012), 513–546, http://link.springer.com/chapter/10.1007/978-90-6704-740-1_10; Dominic McGoldrick, Sarah Williams, and Dapo Akande, “II. CLEARING THE FOG OF WAR? The ICRC’S INTERPRETIVE GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES,” *International and Comparative Law Quarterly* 59, no. 01 (January 2010): 180, <https://doi.org/10.1017/S0020589309990133>; Shannon Bosch, “The International Humanitarian Law Notion of Direct Participation in Hostilities-A Review of the ICRC Interpretive Guide and Subsequent Debate,” *PER: Potchefstroomse Elektroniese Regsblad* 17, no. 3 (2014): 01–51.

²⁹ Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities,” 31.

invasion of Iraq had merit according to a strict, legalistic interpretation, but failed to persuade the international community that the invasion was legitimate.³⁰ Military legalism may frustrate the realization of the grandest ambitions of international humanitarian law by enabling military commanders to creatively interpret the “gray space,” resulting in more or more-violent action directed at different targets than a plain reading of the law might allow, but it also serves to strengthen the role of international humanitarian law in creating a minimum standard of acceptable conduct.

Military legalism and the future of US warfare

The evidence examined in Chapter 5 suggests that military legalism is not a phenomenon unique to small wars or the post-September 11 security environment. US forces showed evidence of legalistic reasoning during the Cold War in Beirut, as well as in recent major combat operations in Iraq. Any time military forces are governed by a strict regime of rule-based constraints on the use of force, military legalism is a likely result. This raises the question of whether and how military legalism is likely to influence future US military operations.

In the case of future operations to counter violent extremists, such as battles against ISIS or Al Qaeda affiliates, there is little reason to expect a change: The same considerations of legitimacy that led policy-makers to implement strict rule-based regimes of constraint in Iraq and Afghanistan are likely to persist, or perhaps to grow stronger. Military officers operating under these rules are likely to employ formal interpretations of the rules to advocate for their preferred

³⁰ In a similar example, Israeli efforts to deploy teams of international lawyers to argue the legality of their interception of a Turkish flotilla bound to deliver supplies to Gaza by breaking an Israeli blockade failed to change international opinion. As Craig writes: “Having constructed the legal framework for the interception, the lawyers seemed to have come up with a formula for mitigating the legitimacy costs. The lesson learned was that the change from an informal to a lawful maritime security regime only went so far in legitimizing the exercise of violence.” Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Lanham, MD: Lexington Books, 2013), 227.

courses of action and to maximize their autonomy. It is worth noting that, although President Trump's campaign rhetoric advocated bombing terrorists' families or subjecting terrorists to torture, both of which would be clear violations of international humanitarian law, the actual measures adopted by the Pentagon to provide increased latitude in counterterror operations involved legalistic interpretations of existing ROE, such as designating particular regions as "areas of active hostilities," which gave military commanders broader authority to act within those areas.³¹ So, despite rhetoric that appears to disregard considerations of legitimacy, the current administration still seems to give regard to legitimacy considerations, resulting in legalistic interpretations of the rules governing the use of force by military commanders.

The question of whether and how military legalism might influence a war with a peer competitor like China is more difficult to answer. The legitimacy concerns of policy-makers in a fight against an adversary with the demonstrated ability to pose an existential threat to the US are likely to be very different than those in a fight against a less-capable adversary.³² In such a case, concerns over escalation are likely to be shared by policy-makers, military commanders, and the public. But it is less clear whether such concerns would pull policy-makers in the direction of more or fewer constraints on the use of force.

³¹ Charlie Savage and Eric Schmitt, "Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules," *New York Times*, March 13, 2017, National edition, sec. A 15, ProQuest Digitized Newspapers.

³² How legitimacy concerns might influence policy-makers in the case of a war with North Korea is even more difficult to predict, since North Korean nuclear weapons do not pose an existential threat to the US, but do have the capacity to kill thousands of people in South Korea or Japan, and possibly some US West Coast cities. Despite this, some policy-makers still agitate for an aggressive pre-emptive attack on North Korean nuclear facilities. See David Nakamura and Greg Jaffe, "The White House's 'Bloody Nose' Strategy on North Korea Sounds Trumpian. So Why Do His Aides Hate It?," *Washington Post*, February 26, 2018, sec. National Security, https://www.washingtonpost.com/world/national-security/the-white-houses-bloody-nose-strategy-on-north-korea-sounds-trumpian-so-why-do-his-aides-hate-it/2018/02/26/9ec20744-18b5-11e8-b681-2d4d462a1921_story.html.

The only historical precedent for direct US military confrontation with a nuclear-armed adversary is the Cuban Missile Crisis, which offers limited support for both views. Military commanders urged fewer constraints, advocating a pre-emptive air strike and invasion, while civilian policy-makers prevailed in their desire for more constraint, with the adoption of a naval quarantine.³³ The formulation of the naval intervention as a ‘quarantine’ rather than a blockade was an example of legalistic reasoning, since a blockade would have been an act of war, while a quarantine was not defined under international law. But the usefulness of this historical analogy to a modern conflict is severely limited: The security situation of the US in relation to Russia and China today, the personalities involved in the leadership of the countries, and the role played by the media in shaping crises and perceptions of legitimacy are all fundamentally different than the conditions in 1962. Additionally, US military commanders in 1962 had not yet gone through the experience of Vietnam, which played a critical role in the development of military legalism. Finally, because the crisis did not ultimately involve fighting between US and Soviet forces, it offers little insight into what factors might influence use-of-force decisions if such a crisis were to boil over into a full-scale war.

Further complicating the picture, the contemporary conflicts in which military legalism has developed have almost all been ground-centric. Even conflicts that were waged exclusively as an air campaign, such as the 1999 intervention in Kosovo or the 2012 support to operations in Libya, faced little or no opposition from adversary air forces. Instead, they were focused on the air delivery of weapons to influence events on the ground. Similarly, Operation PRAYING MANTIS in April 1988, in which US Navy forces sank two Iranian warships and damaged a third, as well as destroying two oil platforms used to support Iranian special operations forces, is

³³ See generally Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little, Brown, and Co., 1971).

the only significant sea battle fought by the US Navy since World War II.³⁴ Air-to-air combat and war at sea have largely been assumed to be “clean” environments that do not raise the types of specific questions regarding the protection of civilians that have arisen during five decades of ground-centric warfare. Walzer suggests that a war at sea or in the desert could likely be fought without endangering nearby civilians; the same may be true of aerial dogfights.³⁵ Yet China’s practice of incorporating armed fishing boats into their intelligence and surveillance network, and the ability to kill aircraft from well beyond visual range may complicate this picture.³⁶

Despite these uncertainties, it seems likely that the first instinct of US military commanders in such a war would be to employ legal reasoning to justify their uses of force. Based on the degree to which military legalism appears to have become inherent in the US military’s concept of professionalism, it is unlikely that military commanders would immediately revert to a World War II version of professionalism, even in the face of a threat similar in scale to World War II. Practically, this might mean, for example, that engagement of Chinese Maritime Militia forces would be carefully regulated by rules seeking to distinguish them from ordinary fishing boats; Naval commanders might be incentivized to interpret those rules in such a way as to have greater leeway to engage any suspect vessel. Beyond-visual-range aerial engagements would also likely be governed by rules designed to ensure positive identification and avoid the possibility of shooting down a civilian aircraft; such rules would likely be subject

³⁴ CAPT J.B. Perkins III, “Operation Praying Mantis: The Surface View,” *Naval Institute Proceedings* 115, no. 5 (May 1989): 1035.

³⁵ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 1977), 153.

³⁶ On the Chinese Maritime Militia, see Andrew S. Erickson, “The South China Sea’s Third Force: Understanding and Countering China’s Maritime Militia,” *Hampton Roads International Security Quarterly*, no. 119 (January 1, 2017), <https://search-proquest-com.ezproxy.princeton.edu/docview/1854639508?accountid=13314>.; Andrew S Erickson and Conor M Kennedy, “China’s Maritime Militia” (Arlington, VA: Center for Naval Analyses, n.d.), https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf.

to formalistic interpretation by Air Force commanders, as well. The initial phases of such a war might also include strategic debates over the legal characterization of China's artificially-constructed islands on maritime features in the South China Sea. China has claimed in the past that these bases are intended to support scientific research, yet they feature runways, aircraft shelters, and ports with clear military potential and significant defensive weapons systems.³⁷ US commanders would likely push to characterize these bases as military in nature and to target them.

Whether military legalism would persist if a war with China became protracted and involved heavy US losses is a different story. Intuitively, domestic concerns about the legitimacy of US military action are likely to diminish if the US feels threatened by significant losses of ships, planes, and people. Under such circumstances, it is possible that the justification for military action might revert back to a model of professional judgment informed by military necessity, as seen in World War II. Regardless, a war with a nuclear-armed peer competitor is likely to be such a significant event that the norms that emerge during such a war would profoundly shape military professionalism for generations to come, assuming of course that escalation control could be maintained and there were, in fact, generations to come.

Policy recommendations

The previous sections reviewed the definition of military legalism and the conditions that make it likely, and explored some of its implications for civil-military relations, international humanitarian law, and the way in which the US fights. The final question remaining is, "what, if

³⁷ For specific analysis of the defensive weapons systems on these features, see "China's New Spratly Island Defenses," Asia Maritime Transparency Initiative, accessed April 28, 2018, <https://amti.csis.org/chinas-new-spratly-island-defenses/>; For a collection of broader coverage of them, see "Island Tracker Archive," Asia Maritime Transparency Initiative, accessed April 28, 2018, <https://amti.csis.org/island-tracker/>.

anything, ought to be done about military legalism?” This section offers three policy recommendations.

1. Explicitly integrate military legalism into the military’s understanding and teaching of military professionalism.
2. Emphasize that rule-compliance is a necessary, but not sufficient condition for justifying the use of force.
3. Require military commanders to use their judgment by giving them fewer rules, and hold them accountable for their judgment.

First, military legalism ought to be explicitly addressed in any setting where military professionalism is taught and developed, such as professional military education, doctrine development, and officer accession programs. Current approaches to military professionalism frequently contrast rule-compliance with military professionalism in a way that suggests that rule-compliance is inferior to professional judgment. For example, the Army’s doctrine publication on *The Army Profession* begins by contrasting bureaucracies—characterized by rules and procedures—unfavorably with professions, which are characterized by expert knowledge. It then goes on to say,

...Professions earn and maintain the trust of society through ethical, effective, and efficient application of their expertise on society’s behalf. The profession’s ethic establishes the moral principles that guide the application of service on behalf of society. If a profession violates its ethic and loses trust with the society it serves, it becomes subject to increased oversight and control.³⁸

Such a view of military professionalism makes clear that professional ethics, not rule-compliance, are the foundation of societal trust. Yet as has been shown, contemporary military commanders frequently appeal to rule-compliance alongside professional military ethics in

³⁸ Department of the Army, “ADRP 1 The Army Profession” (Department of the Army, June 14, 2015), 1-1.

justifying uses of force; they even configure their command centers so their lawyer is right beside them as they make decisions about targeting.³⁹ Are these commanders unprofessional? Based on the concerns over mission accomplishment and military virtue voiced by the commanders from Beirut and Iraq in Chapter 5 they do not seem to be. But they are operating in an environment in which their conduct is governed not only by professional military ethics, but also by a dense regime of rules.

While rule-compliance is an inadequate substitute for professional ethics, simply asserting that an action is compliant with professional ethics is an equally inadequate substitute for rule-compliance. Some rules may lack inherent ethical value, but military obedience to legitimate rules is a good in itself. There is no inherent ethical goodness, for example, in a rule requiring high-level civilian approval of a strike projected to kill 31 civilians—the deaths of the civilians cannot be changed from justified to unjustified by the seniority of the approval authority. But there is inherent ethical badness in deliberately disobeying or skirting such a rule if it exists, since to do so diminishes civilian control of the military.

When a gap exists between professionalism as it is taught and professionalism as it is practiced, individual soldiers and commanders are likely to fill in the gap between the two with their own interpretation of what is appropriate. If rule-compliance is denigrated as less professional than military judgment, this may serve as an invitation for a commander to engage in legalistic interpretations of the rules to rationalize a course of action which meets her own ethical standard, but which might not pass muster if openly articulated to the group. A more accurate and realistic portrayal of military professionalism would acknowledge the positive role

³⁹ Charles J Dunlap, “Come the Revolution: A Legal Perspective on Air Operations in Iraq since 2003,” *International Law Studies* 86 (2010): 144; See also John Sattler, Sattler interview 2, interview by Doyle Hodges, April 16, 2018. “I wanted the JAG’s office to be touching mine.”

played by rules, lawyers, and legal reasoning in satisfying the expectations of policy-makers and ensuring compliance with international humanitarian law, alongside the importance of professional military ethics.

This leads into the second recommendation: Emphasize that rule-compliance is a necessary, but not sufficient condition to justify the use of force. The blending of rule-based and traditional constraints seen in Beirut and OIF suggests that many operational level commanders already understand this point. As was discussed above, when compliance with rules governing the use of force is used to complement traditional military judgment, the outcome is frequently an enhanced awareness of the need to observe the requirements of international humanitarian law, such as protecting civilians from harm, and refraining from strikes on protected sites. But if rule-compliance is considered sufficient, then permission may substitute for judgment, as was the case in the military's use of abusive interrogation techniques on detainees. Sattler related an anecdote in which he stopped a young platoon commander from calling in an air strike with a 2,000-pound bomb on a mosque from which a sniper was shooting at his platoon. The mosque was being used for a military purpose, and had thus lost its status as a protected site under the rules governing the use of force, yet the bomb would have surely destroyed the entire mosque, generating outrage in the community. Instead, Sattler called up a squad with an anti-tank weapon, and they destroyed only the minaret from which the sniper was shooting, leaving the rest of the mosque intact.⁴⁰ Rule-compliance was necessary in this example—it would have been wrong to fire on the mosque if it were not being used for a military purpose—but it was no substitute for the judgment of a seasoned commander in deciding how much force was appropriate. The challenge faced by operational commanders is to communicate this priority to

⁴⁰ Sattler, Interview with Lieutenant General John Sattler, USMC (Ret).

lower levels in their chain of command so that tactical commanders are requesting permission for action are informed by both rules and professional ethics, rather than simply advocating for an action because it is allowed by the rules.

The final policy recommendation deals with how to reduce the incentive for military legalism to begin with: Reduce the number and specificity of rules governing the use of force by military commanders, and hold commanders accountable for the judgment they show in using force. Such an approach is more in keeping with Cohen's 'unequal dialogue' than with Feaver's agency theory of civil-military relations. Obviously, not all rules governing the use of force can be discarded: Those founded in legal requirements or intended to prevent a dangerous escalation of a conflict are both appropriate and necessary. But rules intended to replace the judgment of a junior commander with that of a more senior commander or civilian policy-maker invite military legalism, since junior commanders desire autonomy, and perceive urgent pressure from the exigencies of combat. Instead of proscribing their actions with rules, an alternative approach might be to clearly explain the policy-makers' intent and concerns, and then to hold commanders accountable for meeting that intent in a way that respects the concerns, and responds to both the tenets of military professionalism and the situation at hand. If an action seems to violate the intent or be heedless of the concerns, or be unprofessional, the commander should be called on to explain her actions. If the failure is deliberate or showed poor judgment, she should be subject to discipline, commensurate with the magnitude of the failure.

For example, instead of requiring civilian approval for targets projected to cause more than 30 civilian casualties, a policy-makers could instruct a military commander, "I am concerned that any action that seems to show disregard for civilian lives will harm our legitimacy. Be conservative in your weighing of military advantage versus likely harm and

avoid actions that will cause excessive numbers of civilian casualties.” Such direction leaves much room for discretion: How many civilian casualties is excessive? What does it mean to be conservative in balancing military advantage versus harm? But the commander has spent the previous decades of her career developing judgment for just this type of scenario. The commander can translate this guidance into appropriate direction to her subordinate commanders by formulating her commander’s intent, rather than by prescribing specific rules. By avoiding a specific rule that defines how many civilian casualties are too many, two risks are mitigated: First, there is no reason to have separate rules for self-defense versus deliberate targets, and thus no opportunity to willfully exploit a different set of conditions. Second, it is impossible for any subordinate to take away the message that they are always authorized to kill up to 30 civilians in attacking a target.

With judgment comes risk. The commander or any of her subordinate commanders may apply a standard that the civilian policy-maker finds excessive. If this occurs, she should be required to explain her actions, and should be punished if the explanation is insufficient. The obvious objection to this approach is that the actions of even very junior soldiers can have strategic impact, as was the case with Abu Ghraib, and punishment may come too late to deter or prevent the harmful act. The soldiers at Abu Ghraib were governed by a dense regime of rules that did not deter or prevent their actions; to some extent, it supplied inspiration for their cruelty. Further, the actions of senior policy-makers can be equally disastrous, as was the case with Bremer’s decision to dissolve the Iraqi Army and implement an aggressive program of de-Ba’athification. If instead of telling the military how to go about de-Ba’athification, Bremer had outlined goals to be achieved and left the specifics to subordinate commanders, the result might have been less catastrophic.

This final recommendation really amounts to a charge to improve trust and understanding between civilian policy-makers and the military. While such a goal is laudable, it also seems unlikely to be pursued broadly or seriously, particularly in the current administration. As a consequence, the first two policy recommendations, if they were implemented, would be much more likely to mitigate the negative impacts of military legalism.

Summary and conclusion

Military professionalism in the US military has changed over the last 50 years to incorporate legal norms and reasoning alongside traditional professional military judgment. While this military legalism is neither inherently good nor bad, it has the potential to alter the civil-military relationship in a way that weakens civilian control. Military legalism serves to reinforce the minimum standards of international humanitarian law, yet also invites creative interpretation as to exactly when international humanitarian law applies and what it requires. This approach has become ingrained in US military commanders to the point where it is likely to be evident in both small wars and big wars, although a large enough war with a peer competitor might alter the reliance on legalistic reasoning.

The most important thing the military can do regarding military legalism is to acknowledge it. By acknowledging that neither traditional military professionalism nor rule compliance alone are sufficient to justify the use of force, military leaders would provide a more accurate and helpful portrayal of the relationship between rules governing the use of force and professional military ethics. A concept of military professionalism that explicitly acknowledges both types of constraint as equally legitimate and necessary would reduce the risk of individual commanders disregarding or exploiting rules in service of their own vision of what is ethically appropriate.

Military service is a noble profession. Members of the military expose themselves to physical danger and take on the moral burden of killing and harming others in service to our society. At the same time, it is a profession in which the consequences of misbehavior are more serious than in almost any other. Military legalism represents an evolution of how behavior in the military is judged and regulated that deserves to be more broadly understood and acknowledged, both within the military and the society it serves.

Appendix A: A brief primer on military justice and discipline

“Military justice” is a term, which refers to the administration of discipline and punishment in the military through both judicial and non-judicial punishments. The differences between different types of military justice proceedings, and the role of JAG’s in each of them, is described briefly below.

The most common and least serious form of formal military discipline since 1963 is non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ). Prior to that time, the only formal mechanism for military discipline and justice was the court martial, but in 1963, the power of commanding officers to impose punishment for minor offenses under Article 15 was significantly expanded. (The impact of that expansion is difficult to precisely quantify between 1963 and 1977, since the services did not begin consistently reporting Article 15 disciplinary data until 1977.¹ One indication of the impact of expanded Article 15 authority, however, is a marked decline in the court martial rate across all services after 1963.²) The punishments which may be imposed at Article 15 proceedings, sometimes referred to as non-judicial punishment (NJP) or Captain’s Mast in the sea services and “office hours” in the Marine

¹ “Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury Pursuant to the Uniform Code of Military Justice for the Period June 1, 1962 to December 31, 1963.” (Government Printing Office, 1963), 66, Report of Army Judge Advocate General, http://www.loc.gov/rr/frd/Military_Law/pdf/Annual-report-USCMA-1966.pdf; Somewhat iconoclastically, the Air Force reported Article 15 data every year from 1963-2015. The Army reported Article 15 data for the first 3 months of the expanded Article 15 authority in 1963, and then did not resume reports until 1977. The Navy did not report any Article 15 data until 1977, at which time the Judge Advocate General of the Navy commenced combined reports for the Navy and Marine Corps. Hodges, “Legal Officers and Courts Martial Rates, 1960-2015.”

² In the Army, the court-martial rate dropped by 25% between 1963 and 1964; in the Navy, it dropped by 36%. The Air Force experienced a more modest drop of just under 20%. Hodges, “Legal Officers and Courts Martial Rates, 1960-2015.”

Corps, are relatively minor. They include reduction in rank by no more than one paygrade, limited periods of additional duty or restriction, and fines of no more than ½ month's pay for two months.³ While JAGs may play a role in advising a commander on the imposition of Article 15 punishment and assisting the commander with review of any Article 15 cases that are appealed, the role of JAG's in Article 15 proceedings is minimal.

JAG's play a more significant role in courts martial, especially since the passage of the Military Justice Act of 1968, which mandated that the accused at special or general courts martial be represented by a lawyer.⁴ Courts martial come in several varieties, and the extent of JAG involvement varies, depending on which variety of court martial is convened.

A summary court martial is very similar to Article 15 proceedings. Summary courts martial may be convened by relatively junior officers in command, and consist of a single member in the rank of Captain in the Army or Air Force (Lieutenant in the Navy), or higher, who acts as both judge and jury. Unlike an Article 15 proceeding, the commanding officer does not determine the guilt or innocence of the accused, or the punishment if the accused is found guilty. Instead, those determinations are made by the member, who is protected by law from retaliation by the commander for any determination made.⁵ The officer appointed as a summary court martial member is not normally a lawyer. The Manual for Courts Martial (MCM) specifically limits the role of lawyers in summary courts martial: "A summary court-martial may seek advice from a judge advocate or legal officer on questions of law, but the summary court-martial may

³ Joint Service Committee on Military Justice, *Manual for Courts-Martial United States*, 2012 Edition (Department of Defense, 2012), chap. V.

⁴ "Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury Pursuant to the Uniform Code of Military Justice for the Period January 1, 1968 to December 31, 1968." (Government Printing Office, n.d.), Report of Judge Advocate General of the Army, 26.

⁵ Joint Service Committee on Military Justice, *Manual for Courts-Martial United States*, sec. RCM 104.

not seek advice from any person on factual conclusions which should be drawn from evidence or the sentence which should be imposed, as the summary court-martial has the independent duty to make these determinations.”⁶ A summary court martial has the ability to impose more severe punishment than an Article 15 proceeding, including reductions in rank by more than one paygrade for junior personnel, stiffer fines than those that can be awarded at NJP, and brief periods of confinement.⁷ Accordingly, the accused at summary courts martial are provided more protections than those at NJP, including the use of sworn testimony and the application of military rules of evidence, but not including the right to counsel.⁸

Special courts martial may be convened by more senior officers in command, and require at least three members (equivalent to a jury in a civilian court).⁹ Special courts martial may impose more serious punishments than a summary court martial, including confinement for up to one year, forfeiture of pay for up to one year, and a bad conduct discharge.¹⁰ A useful, though not entirely precise, analogy is to think of special courts martial as focused on the equivalent of civilian misdemeanor offenses. By contrast, Article 15 and summary courts martial are mostly used for uniquely military offenses, such as sleeping on duty, or minor

⁶ Joint Service Committee on Military Justice, sec. RCM 1301(b).

⁷ Joint Service Committee on Military Justice, sec. RCM 1301(d). The authority to reduce rank by more than one paygrade is limited to imposition on personnel serving in the four most junior enlisted paygrades.

⁸ For specific protections, procedures, and limitations of a summary court martial, see Joint Service Committee on Military Justice, chap. XIII. To compare these procedures with Article 15 non-judicial punishment, see Chapter V. Briefly, the most significant differences are that non-judicial punishment is not a trial by a court; a finding of wrongdoing is not a conviction; and military rules of evidence (e.g. excluding hearsay testimony or evidence obtained without a search order) do not apply at NJP. A limited set of protections similar, but not identical, to the Miranda rights are guaranteed at both NJP and court martial under Article 31(b) of the UCMJ. Military personnel have the right to refuse punishment under Article 15 and to request trial by Court Martial instead, except personnel assigned to sea duty, where it may be impractical to convene a Court Martial due to the unavailability of lawyers and other resources. Military personnel can also refuse summary court martial and instead request a Special or General Court Martial where more stringent protections apply, but more severe punishments may be imposed.

⁹ Joint Service Committee on Military Justice, sec. RCM 501(a)(2).

¹⁰ Joint Service Committee on Military Justice, sec. RCM 201(f)(1)(B).

disciplinary infractions, such as recreational drug use. (Although both Article 15 and summary courts martial are sometimes used to process more serious offenses, such as sexual assault, the punishment they can impose is limited by the nature of the proceeding, not the seriousness of the offense.) When a special court martial is empowered to award a bad conduct discharge or forfeiture of pay for greater than six months, the accused must be represented by counsel, and there must be a military judge in addition to the three members; the accused also has the option of forgoing the members and appearing only before the judge.¹¹ Military rules of evidence and criminal procedure apply at special courts martial, providing more protection of the rights of the accused than at Article 15 or summary court martial.

A general court martial must be convened by a flag or general officer and is most similar to a felony trial in civilian courts. General courts martial are empowered to award any punishment authorized under the MCM for the charged offense, up to and including capital punishment.¹² A general court martial consists of a military judge and at least five members, except in capital cases, which require 12.¹³ (As with a special court martial, the accused may elect a judge-only trial). General courts martial are used to try the most serious and complex cases. All accused at general courts martial are represented by counsel. Military rules of evidence and criminal procedure apply.

¹¹ Joint Service Committee on Military Justice, sec. RCM 201(f)(2)(B)(ii)(a); While Rule 201(f)(2)(B) opens the possibility that an accused could be taken to special court martial without counsel as long as the special court martial was not empowered to award a bad conduct discharge, RCM 506 creates a right to counsel at both general and special courts martial without qualification. A special court martial not empowered to award a bad conduct discharge can be convened of three officers without a military judge, but the accused would still be entitled to counsel. Joint Service Committee on Military Justice, sec. RCM 506.

¹² Joint Service Committee on Military Justice, *Manual for Courts-Martial United States*, sec. RCM 501, RCM 1003.

¹³ Joint Service Committee on Military Justice, sec. RCM 501(a)(1).

Selected bibliography

General

- “About Lawfare: A Brief History of the Term and the Site.” *Lawfare* (blog), October 24, 2015.
<https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site>.
- Amore, Christopher D. “Rules of Engagement: Balancing the (Inherent) Right and Obligation of Self-Defense with the Prevention of Civilian Casualties.” *Nat’l Sec. LJ* 1 (2013): 39.
- Andresen, Joshua P. “Transparency, Review, and Relief: The Far-Reaching Implications of the Kunduz Report.” *Just Security* (blog), May 13, 2016.
<https://www.justsecurity.org/31056/transparency-kunduz-report/>.
- Bagwell, Randall. “The Threat Assessment Process: The Evolution of Escalation of Force.” *The Army Lawyer*, April 2008.
- Baker, William D., and John R. Oneal. “Patriotism or Opinion Leadership? The Nature and Origins of the ‘Rally’round the Flag’ Effect.” *Journal of Conflict Resolution* 45, no. 5 (2001): 661–687.
- BARROS, ANDREW. “STRATEGIC BOMBING AND RESTRAINT IN ‘TOTAL WAR’, 1915–1918.” *The Historical Journal* 52, no. 02 (2009): 413–431.
- Bartman, Christi Scott. “Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us.” *Case Wester Res Journ Int Law* 43, no. 1/2 (2010): 423–47.
- . *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments*. Newcastle upon Tyne: Cambridge Scholars Publishing, 2010.
- Bass, Gary J. “Atrocity & Legalism.” *Daedalus*, 2003, 73–82.
- . *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton and Oxford: Princeton University Press, 2000.
- Baxter, Richard R., Major. “So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs.” *British Yearbook of International Law* 28 (1951): 323–60.
- Bayer, Colonel Peter C. “The Lessons of War: A Division G-3’s Thoughts on Operation IRAQI FREEDOM.” US Army War College, 2004. Root Hall Library. US Army Heritage and Education Center.
- Bennett, Andrew, and Colin Elman. “Complex Causal Relations and Case Study Methods: The Example of Path Dependence.” *Political Analysis* 14, no. 03 (2006): 250–67.
<https://doi.org/10.1093/pan/mpj020>.

Blechman, Barry M., and Stephen S Kaplan. *Force Without War: US Armed Forces as a Political Instrument*. Washington, D.C.: The Brookings Institution, 1978.

Bletz, Donald F. *The Role of the Military Professional in US Foreign Policy*. Westport, CT: Praeger, 1972.

Borch, Frederic L. *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*. Washington, D.C.: Office of the Judge Advocate General and Center of Military History United States Army, 2001.

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.352.9121&rep=rep1&type=pdf>.

———. “Targeting after Kosovo: Has the Law Changed for Strike Planners.” *Naval War College Review* 56, no. 2 (Spring 2003): 64–81.

Brunnée, Jutta, and Stephen J. Toope. *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge ; New York: Cambridge University Press, 2010.

Bush, George W. “Humane Treatment of Taliban and Al Qaeda Detainees,” February 7, 2002. http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

Butler, Michael J. *Selling a “Just” War: Framing, Legitimacy, and US Military Intervention*. New Haven and London: Palgrave Macmillan, 2012.

Carty, Victoria, and Jake Onyett. “Protest, Cyberactivism and New Social Movements: The Reemergence of the Peace Movement Post 9/11.” *Social Movement Studies* 5, no. 3 (2006): 229–249.

Cayce, Col. Lyle W. “Operation IRAQI FREEDOM: An SJA’s Perspective.” US Army War College, 2004. Personal Experience Monograph Collection. US Army Heritage and Education Center.

“Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors.” Lawfare. Accessed October 21, 2016. <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors>.

Cerami, Joseph R. “Presidential Decisionmaking and Vietnam: Lessons for Strategists.” *Parameters* 26, no. 4 (Winter /97 1996): 66–80.

“Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.” Accessed March 23, 2015. <http://www.un.org/en/documents/charter/chapter7.shtml>.

Clark, Ian. *Legitimacy in International Society*. Oxford: Oxford University Press, 2005.

Clark, Wesley K. *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*. New York: Public Affairs, 2001.

Clausewitz, Carl von. *On War*. Edited and translated by Michael Howard and Peter Paret. Indexed. Princeton, New Jersey: Princeton University Press, 1984.

Coleman, Stephen. *Military Ethics: An Introduction with Case Studies*. New Brunswick and Oxford: Oxford University Press, 2013.

Corley, Christopher L. "Acts of Atrocity Effects on Public Opinion Support during War or Conflict." Monterey, California. Naval Postgraduate School, 2007.

Craig, Alan. *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military*. Lanham, MD: Lexington Books, 2013.

Defense, Department of. *The Dictionary of Military Terms: The US Department of Defense*. Skyhorse Publishing Inc., 2009.

Department of Defense. "DoD Program for the Implementation of the Law of War (Short Title: DoD Law of War Program) (DODD 5100.77)." Department of Defense, November 5, 1974. National Archives Online. <https://catalog.archives.gov/id/26048945>.

Department of the Army. "ADRP 1 The Army Profession." Department of the Army, June 14, 2015.

———. "FM 27-100 Legal Support to Operations." Headquarters, Department of the Army, March 1, 2000.

Department of the Navy. Office of the Chief of Naval Operations. *The Commander's Handbook on the Law of Naval Operations*. July 2007. NWP 1-14M. Washington, D.C., 2007.

Dickinson, Laura. "Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance." *American Journal of International Law* 104, no. 1 (2010). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628658.

Dunlap, Charles J. "A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields." *Just Security* (blog), December 15, 2016. <https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/>.

Dunlap Jr, Charles J. "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts." Washington, D.C.: Carr Center for Human Rights Policy Kennedy School of Government, Harvard University, 2001. http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship.

———. "Lawfare: A Decisive Element of 21st-Century Conflicts?" DTIC Document, 2009. <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA515192>.

———. "Lawfare Today: A Perspective." *Yale J. Int'l Aff.* 3 (2008): 146.

Elkins, Richard, Jonathan Morgan, and Tom Tugendhat. *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat*. London: Policy Exchange, 2015. http://books.google.com/books?hl=en&lr=&id=PSshpbwti_3EC&oi=fnd&pg=PR8&dq=%22inquiry+%E2%80%99CUK+Armed+Forces+Personnel+and+the+Legal+Framework%22+%22period+of+active+service+was+as+Military+Assistant+to+the+Chief+of+the%22+%22Islamic+Studie

s+at+Cambridge+University.+He+is+the+Conservative+candidate%22+&ots=RqlxnxUotz&sig=TELWfyXjW74Ijfp5exCmMBkJAqA.

Faust, Drew Gilpin. *This Republic of Suffering: Death and the American Civil War*. New York: Vintage Books, 2008.

Feaver, Peter D. *Armed Servants: Agency, Oversight, and Civil-Military Relations*. Cambridge, Massachusetts; London, England: Harvard University Press, 2003.

Fontana, David. "Executive Branch Legalisms." *Harv. L. Rev. F.* 126 (2012): 21.

Fountain, Ben. *Billy Lynn's Long Halftime Walk*. Kindle Epub. New York: Harper Collins, 2012.

Franck, Thomas M. *The Power of Legitimacy Among Nations*. New York and Oxford: Oxford University Press, 1990.

Frederick, Jim. *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death*. New York: Harmony Books, 2010.

Freedman, Lawrence. "War in Iraq: Selling the Threat." *Survival* 46, no. 2 (Summer 2004): 7–50.

Freedman, Monroe H. "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions." *Michigan Law Review* 64, no. 8 (June 1966): 1469.
<https://doi.org/10.2307/1287199>.

French, Shannon E. *The Code of the Warrior: Exploring Warrior Values Past and Present*. Lanham, MD: Rowman & Littlefield Publishers, 2005.

Fuller, Lon L. "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (February 1958): 630. <https://doi.org/10.2307/1338226>.

———. *The Morality of Law*. New Haven: Yale University Press, 1969.

Galanter, Marc. "READING THE LANDSCAPE OF DISPUTES: WHAT WE KNOW AND DON'T KNOW (AND THINK WE KNOW) ABOUT OUR ALLEGEDLY CONTENTIOUS AND LITIGIOUS SOCIETY." *UCLA L. Rev.* 31, no. 4 (1983): 4–71.

———. "Real World Torts: An Antidote to Anecdote." *Md. L. Rev.* 55 (1996): 1093.

———. "The Hundred-Year Decline of Trials and the Thirty Years War." *Stanford Law Review*, 2005, 1255–1274.

Gallup Inc. "Confidence in Institutions." Gallup.com. Accessed February 10, 2016.
<http://www.gallup.com/poll/1597/Confidence-Institutions.aspx>.

———. "On 10th Anniversary, 53% in U.S. See Iraq War as Mistake." Gallup.com. Accessed November 1, 2017. <http://news.gallup.com/poll/161399/10th-anniversary-iraq-war-mistake.aspx>.

- . “Trust in Government.” Gallup.com. Accessed January 29, 2018.
<http://news.gallup.com/poll/5392/Trust-Government.aspx>.
- Gent, Terrie M. “The Role of Judge Advocates in a Joint Air Operations Center.” *Airpower Journal* 13, no. 1 (Spring 1999): 40–55.
- Gillespie, Marie. “Security, Media, Legitimacy: Multi-Ethnic Media Publics and the Iraq War 2003.” *International Relations* 20, no. 4 (2006): 467–486.
- Goedecke, Robert. “Legal Formalism vs. Legal Pragmatism.” *The Journal of Value Inquiry* 3, no. 4 (Winter 1969): 243–57.
- Golby, Jim. “Improving Advice and Earning Autonomy: Building Trust in the Strategic Dialogue.” *The Bridge* (blog). Accessed October 3, 2017. <https://thestrategybridge.org/the-bridge/2017/10/3/improving-advice-and-earning-autonomy-building-trust-in-the-strategic-dialogue>.
- Goldsmith, Jack, and Eric A. Posner. *The Limits of International Law*. New York: Oxford University Press, USA, 2005.
- Graham, Colonel David E. “My Lai and Beyond: The Evolution of Operational Law.” In *The Real Lessons of the Vietnam War: Reflections Twenty-Five Years After the Fall of Saigon*, edited by John Norton Moore and Robert F. Turner. Durham, North Carolina: Carolina Academic Press, 2002.
- Gross, Michael. *The Ethics of Insurgency: A Critical Guide to Just Guerrilla Warfare*. Cambridge: Cambridge University Press, 2015.
- Haas, Richard N. *War of Necessity : War of Choice. A Memoir of Two Iraq Wars*. Paperback. New York: Simon and Schuster, 2010.
- Hansen, Victor. “Military Justice Reform: An Overview.” *Federal Sentencing Reporter* 27, no. 2 (December 2014): 88–90. <https://doi.org/10.1525/fsr.2014.27.2.88>.
- Hathaway, Oona Hathaway. “The Law of War Manual’s Threat to the Principle of Proportionality.” *Just Security*, June 23, 2016. <https://www.justsecurity.org/31631/lowm-threat-principle-proportionality/>.
- Headquarters, Department of the Army. “FM 3-24: COUNTERINSURGENCY.” Department of the Army, 2006.
- Henckaerts, Jean-Marie, Louise Doswald-Beck, Carolin Alvermann, and International Committee of the Red Cross, eds. *Customary International Humanitarian Law*. Cambridge ; New York: Cambridge University Press, 2005.
- Hersh, Seymour. “Torture at Abu Ghraib.” *The New Yorker*, May 10, 2004.
<http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

- Hodges, Doyle. "Legal Officers and Courts Martial Rates, 1960-2016," February 6, 2017.
- "Honor, Not Law." Accessed April 4, 2015. <http://www.armedforcesjournal.com/honor-not-law/>.
- Hornfischer, James D. *The Fleet at Flood Tide: America at Total War in the Pacific*. Kindle. New York: Bantam Books, 2016.
- Huntington, Samuel P. *The Soldier and the State: The Theory and Politics of Civil-Military Relations*. Cambridge, Massachusetts; London, England: Harvard University Press, 1957.
- ICRC. "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009." *International Review of the Red Cross* 90, no. 872 (December 2008): 991–1047.
- Ignatieff, Michael. *The Warrior's Honor: Ethnic War and the Modern Conscience*. New York: Henry Holt and Company, 1997.
- Ikenberry, G. John, Michael Mastanduno, and William C. Wohlforth. "Unipolarity, State Behavior, and Systemic Consequences." *World Politics* 61, no. 01 (2009): 1–27.
- Jackson, Col. Dick. Interview with Colonel Dick Jackson, JAGC, US Army (Ret): The Drafting and Adoption of the Department of Defense Law of War Manual. Interview by Doyle Hodges, October 12, 2016.
- Janowitz, Morris. *The Professional Soldier: A Social and Political Portrait*. United States of America: The Free Press of Glencoe, 1960.
- Kagan, Robert A. "Adversarial Legalism and American Government." *Journal of Policy Analysis and Management* 10, no. 3 (1991): 369. <https://doi.org/10.2307/3325322>.
- Karagiannis, Emmanuel. "The Russian Interventions in South Ossetia and Crimea Compared: Military Performance, Legitimacy and Goals." *Contemporary Security Policy* 35, no. 3 (September 2, 2014): 400–420. <https://doi.org/10.1080/13523260.2014.963965>.
- Keele, Luke. "Social Capital and the Dynamics of Trust in Government." *American Journal of Political Science* 51, no. 2 (2007): 241–254.
- Kinnard, Douglas. *The War Managers*. Hanover, NH: University Press of New England, 1977.
- Kittrie, Orde F. "Lawfare and US National Security." *Case Western Reserve Journal of International Law* 43 (2011): 393.
- . *Lawfare: Law as a Weapon of War*. Oxford and New York: Oxford University Press, 2016.
- Kohn, Richard H. "First Priorities in Military Professionalism." *Orbis* 57, no. 3 (June 2013): 380–89. <https://doi.org/10.1016/j.orbis.2013.05.005>.

- Kohut, Andrew, Kimberly Parker, Gregory Flemming, and Molly Sonner. "Deconstructing Distrust: How Americans View Government." Washington, D.C.: Pew Research Center, March 10, 1998.
- Krauthammer, Charles. "The Unipolar Moment." *Foreign Affairs* 70, no. 1 (1990): 23. <https://doi.org/10.2307/20044692>.
- Krepinevich, Andrew F. *Cavalry to Computer: The Pattern of Military Revolutions*. National Affairs, 1994. http://people.reed.edu/~ahm/Courses/Reed-POL-359-2011-S3_WTW/Syllabus/EReadings/02.2/02.2.Krepinevich1994Cavalry.pdf.
- Kyl, Jon, Douglas J. Feith, and John Fonte. "The War of Law: How New International Law Undermines Democratic Sovereignty." *Foreign Affairs* 92 (2013): 115.
- Larson, Eric V., and Bogdan Savych. *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*. Proquest ebrary. Santa Monica, CA: RAND Corp., 2007.
- Lazar, Seth. "Just War Theory: Revisionists Versus Traditionalists." *Annual Review of Political Science* 20 (2017): 37–54.
- Lederman, Marty. "Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual." Just Security, June 27, 2016. <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/>.
- Lewis, Michael W., and Emily Crawford. "Drones and Distinction: How IHL Encouraged the Rise of Drones." *Geo. J. Int'l L.* 44 (2012): 1127.
- Luban, David. *Lawyers and Justice: An Ethical Study*. Princeton: Princeton University Press, 1988.
- . *Torture, Power, and Law*. Cambridge ; New York: Cambridge University Press, 2014.
- Mandelbaum, Michael. "Vietnam: The Television War." *Daedalus*, 1982, 157–169.
- Martinez, J. Michael. "Law versus Ethics Reconciling Two Concepts of Public Service Ethics." *Administration & Society* 29, no. 6 (1998): 690–722.
- Martins, Mark. "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering." LLM, The Judge Advocate General School, 1994.
- McChrystal, Stanley. "Memorandum Re: Tactical Directive," 2009.
- McLeod, Travers. *Rule of Law in War: International Law and United States Counter-Insurgency in Iraq and Afghanistan*. Oxford and New York: Oxford University Press, 2015.
- McMahan, Jeff. "The Ethics of Killing in War." *Ethics* 114, no. 4 (July 2004): 693–733. <https://doi.org/10.1086/422400>.
- McNeal, Greg. "Drones: Legitimacy and Anti-Americanism." *Parameters* 42/43, no. Winter 2012/2013 (2012): 25–28.

- Merriam, John Merriam. “Must Military Medical and Religious Personnel Be Accounted for in a Proportionality Analysis?” *Just Security*, July 8, 2016.
<https://www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis/>.
- Metz, Steven. “The Internet, New Media, and the Evolution of Insurgency.” *Parameters* 42, no. 3 (2012): 80.
- “MILITARY JUSTICE FACT SHEETS.” Accessed April 4, 2015.
[http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS\[1\].html](http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS[1].html).
- “Model Rules of Professional Conduct: Preamble & Scope | The Center for Professional Responsibility.” Accessed May 6, 2016.
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.
- Montalvo, Eric D. “When Did Imminent Stop Meaning Immediate; Jus in Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency.” *Army Law.*, 2013, 24.
- Morgan, Kenneth O. “The Boer War and the Media (1899-1902).” *Twentieth Century British History* 13, no. 1 (2002): 1–16.
- Morkevicius, Valerie. “Why We Need a Just Rebellion Theory.” *Ethics & International Affairs* 27, no. 4 (2013): 401–411.
- Morrow, James D. “The Laws of War, Common Conjectures, and Legal Systems in International Politics.” *The Journal of Legal Studies* 31, no. S1 (January 2002): S41–60.
<https://doi.org/10.1086/340810>.
- . “When Do States Follow the Laws of War?” *American Political Science Review* 101, no. 03 (July 26, 2007): 559. <https://doi.org/10.1017/S000305540707027X>.
- Nachbar, Thomas. “Counterinsurgency, Legitimacy, and the Rule of Law.” *Parameters, Spring*, 2012.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242014.
- Nix, Dayne. “American Civil-Military Relations: Samuel P. Huntington and the Political Dimensions of Military Professionalism.” *Naval War College Review* 65, no. 2 (Spring 2012): 89–104.
- NJ2. NJ2 Interview. Interview by Doyle Hodges, June 14, 2016.
- Office of General Counsel Department of Defense. “Department of Defense Law of War Manual.” Department of Defense, June 2015.
- O’Hanlon, Michael E., and Ivo H. Daalder. *Winning Ugly: NATO’s War to Save Kosovo*. Washington, D.C.: Brookings Institution Press, 2004.

- O'Loughlin, Ben. "Images as Weapons of War: Representation, Mediation and Interpretation." *Review of International Studies* 37, no. 01 (January 2011): 71–91. <https://doi.org/10.1017/S0260210510000811>.
- Orend, Brian. *The Morality of War*. Toronto, Canada: Broadview Press, 2006.
- Ornstein, Norman J., Thomas E. Mann, and Michael J. Malbin. *Vital Statistics on Congress 2008*. Brookings Institution Press, 2009.
- Osiel, Mark J. *Obedying Orders: Atrocity, Military Discipline and the Law of War*. New Brunswick and London: Transaction Publishers, 2002.
- Overy, Richard. *Why the Allies Won*. Paperback. New York, London: W.W. Norton & Company, 1997.
- "Paper Trail - E-Mail From Cpt. William Ponce | The Torture Question | FRONTLINE | PBS." Accessed July 22, 2015. <http://www.pbs.org/wgbh/pages/frontline/torture/paper/ponce.html>.
- Petraeus, David. "The American Military and the Lessons of Vietnam: A Study of Military Influence and the Use of Force in the Post-Vietnam Era." Princeton University, 1987.
- Pew Research Center for the People and the Press. "Public Trust in Government: 1958-2017." Pew Research Center for the People and the Press, May 3, 2017. <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>.
- Philipps, Dave. "Shared Mission to Pardon U.S. Soldiers Who Killed Civilians." *The New York Times*, May 19, 2016, sec. U.S. <https://www.nytimes.com/2016/05/20/us/clemency-war-crimes.html>.
- Popple, Simon. "'Fresh From the Front': Performance, War News and Popular Culture during the Boer War." *Early Popular Visual Culture* 8, no. 4 (November 2010): 401–18. <https://doi.org/10.1080/17460654.2010.513821>.
- Reichberg, Gregory M., Henrik Syse, and Endre Begby, eds. *The Ethics of War: Classic and Contemporary Readings*. Malden, GA: Blackwell Publishing, 2006.
- "Ronald Reagan: Election Eve Address 'A Vision for America.'" Accessed November 1, 2017. <http://www.presidency.ucsb.edu/ws/?pid=85199>.
- Rostker, Bernard. *I Want You!: The Evolution of the All-Volunteer Force*. Santa Monica, CA: RAND, 2006.
- Rutenberg, Jim, and Robin Toner. "A NATION AT WAR: THE NEWS MEDIA; Critics of Iraq War Say Lack of Scrutiny Helped Administration to Press Its Case." *The New York Times*, March 22, 2003, sec. U.S. <https://www.nytimes.com/2003/03/22/us/nation-war-media-critics-iraq-war-say-lack-scrutiny-helped-administration-press.html>.

- Sartori, Giovanni. "Comparing and Miscomparing." *Journal of Theoretical Politics* 3, no. 3 (1991): 243–57.
- Savage, Charlie, and Elisabeth Bumiller. "Haditha Massacre Case." *The New York Times*, January 27, 2012. <http://www.nytimes.com/2012/01/28/us/an-iraqi-massacre-a-light-sentence-and-a-question-of-military-justice.html>.
- Scott, Shirley V., and Olivia Ambler. "Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq." *European Journal of International Relations* 13, no. 1 (2007): 67–87.
- Sherrill, Robert. *Military Justice Is to Justice as Military Music Is to Music*. New York: Harper Colophon, 1970.
- Shklar, Judith N. "In Defense of Legalism." *Journal of Legal Education* 19, no. 1 (1966): 51–58.
- . *Legalism*. Cambridge, Mass.: Harvard University Press, 1964.
- Skerker, Michael. "Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones." *Journal of Military Ethics* 3, no. 1 (March 2004): 27–39. <https://doi.org/10.1080/15027570310004636>.
- Sloane, Robert D. "The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War." *Yale J. Int'l L.* 34 (2009): 47.
- Snider, Don M. *The Army's Professional Military Ethic in an Era of Persistent Conflict*. Professional Military Ethics Monograph Series 1. Carlisle, PA: Strategic Studies Institute, U.S. Army War College, 2009.
- Snider, Don M, John A Nagl, Tony Pfaff, War College (Carlisle Barracks), and Strategic Studies Institute. *Army Professionalism, the Military Ethic, and Officership in the 21st Century*. Carlisle Barracks PA: U.S. Army War College, 1999.
- Soafer, Abraham D. *The Best Defense? Legitimacy and Preventive Force: Report of the Stanford University Task Force on Preventive Force*. Stanford, CA: Hoover Institution Press, 2010.
- Solis, Gary D. Interview w/ Prof Gary D. Solis. Interview by Doyle Hodges, August 8, 2016.
- . *Son Thang: An American War Crime*. Annapolis, Md.: Naval Institute Press, 1997.
- Stewart, Richard W., ed. *American Military History: The United States Army in a Global Era, 1917-2003*. Vol. II. Army Historical Series. Washington, D.C.: Center of Military History, United States Army, 2005.
- Thomas, Ward. *The Ethics of Destruction: Norms and Force in International Relations*. Ithaca and London: Cornell University Press, 2001.

Tocqueville, Alexis de. *Democracy in America*. Edited by J.P. Mayer and George Lawrence. First Perennial Classics. New York: Harper Collins, 2000.

“Total National Lawyer Population 1878-2017.Authcheckdam.Pdf.” Accessed November 10, 2017. https://www.americanbar.org/content/dam/aba/administrative/market_research/Total%20National%20Lawyer%20Population%201878-2017.authcheckdam.pdf.

“Trends in U.S. Military Spending.” Council on Foreign Relations. Accessed October 16, 2017. <https://www.cfr.org/report/trends-us-military-spending>.

Tribune, James Pringle, International Herald. “Meanwhile : The Quiet Town Where the Vietnam War Began.” *The New York Times*, March 23, 2004. <http://www.nytimes.com/2004/03/23/opinion/meanwhile-the-quiet-town-where-the-vietnam-war-began.html>.

US Census Bureau, Census History Staff. “Fast Facts - History - U.S. Census Bureau.” Accessed November 10, 2017. https://www.census.gov/history/www/through_the_decades/fast_facts/.

“US Congress Opts for ‘Freedom Fries.’” *BBC News*. March 12, 2003. <http://news.bbc.co.uk/2/hi/americas/2842493.stm>.

Van Engeland, Anicée. *Civilian or Combatant? A Challenge for the 21st Century*. Terrorism and Global Justice. Oxford and New York: Oxford University Press, 2011.

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 3rd ed. New York: Basic Books, 1977.

Warshaw, S.A. *Guide to the White House Staff*. Washington, D.C.: SAGE Publications, 2013.

Weber, Max. *From Max Weber: Essays in Sociology*. Translated by H. H. Gerth and C. Wright Mills. New York: Oxford University Press, 1946.

Werrell, Kenneth P. “Across the Yalu: Rules of Engagement and the Communist Air Sanctuary During the Korean War.” *The Journal of Military History* 72, no. 2 (April 2008): 451–76.

Witt, John Fabian. *Lincoln’s Code: The Laws of War in American History*. New York: Free Press, 2012.

Empirical indications

Ball, Harry P. *Of Responsible Command: A History of the US Army War College*. Carlisle Barracks PA: Alumni Association of the US Army War College, 1983.

Borch, Fred L. “Clamo at 25: The Center for Law and Military Operations Celebrates Twenty-Five Years.” *Mil. L. Rev.* 217 (2013): 193.

Borch, Frederic L. *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*. Washington, D.C.: Office of the Judge Advocate General and Center of Military History

United States Army, 2001.
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.352.9121&rep=rep1&type=pdf>.

Bozeman, John R. Bozeman Oral History. Interview by Michelle Crawford and Rich Meyer, 2002. The Judge Advocate General Legal Center and School.

Carey, Neil, Don Birchler, Veronica De Allenda, and Jim Gasch. "An Analysis of Navy JAG Corps Future Manpower Requirements, Part 2: OJAG, Embedded SJAS, NJS, and Reservists." Alexandria, VA: Center for Naval Analyses, April 2008.

"Courses :: Department of Leadership, Ethics, and Law :: USNA." Accessed January 13, 2014.
<http://www.usna.edu/LEL/Courses/>.

Department of the Army. "FM 27-100 Legal Support to Operations." Headquarters, Department of the Army, March 1, 2000.

Feaver, Peter D. *Armed Servants: Agency, Oversight, and Civil-Military Relations*. Cambridge, Massachusetts; London, England: Harvard University Press, 2003.

Gent, Terrie M. "The Role of Judge Advocates in a Joint Air Operations Center." *Airpower Journal* 13, no. 1 (Spring 1999): 40–55.

Goldie, L.F.E. "International Law at the War Colleges." *American Journal of International Law* 66, no. 1 (January 1972): 124–26.

Graham, Colonel David E. Interview with "The Father of Operational Law." Interview by Doyle Hodges, February 2, 2017.

———. "My Lai and Beyond: The Evolution of Operational Law." In *The Real Lessons of the Vietnam War: Reflections Twenty-Five Years After the Fall of Saigon*, edited by John Norton Moore and Robert F. Turner. Durham, North Carolina: Carolina Academic Press, 2002.

Grimaldi, James V. "Army's JAG Corps Deals With Reality Of War in Iraq." *The Washington Post*, November 17, 2003. https://www.washingtonpost.com/archive/business/2003/11/17/armys-jag-corps-deals-with-reality-of-war-in-iraq/470cb052-8d67-4227-858b-df90a5b04ee0/?utm_term=.c0f171ce4ddf.

Grunawalt, Richard J. Memorandum for the President, Naval War College. "Operational Law Instruction in Support of CINCPACFLT; REPORT OF." Memorandum for the President, Naval War College, February 14, 1989. Grunawalt papers MS Coll 114 Box 2; Series 3, Folder 19. US Naval War College.

Hamilton, Milton H. "Legal Services: Rules of Professional Conduct for Lawyers." DEPARTMENT OF THE ARMY WASHINGTON DC, 1992.

Hodges, Doyle. "Legal Officers and Courts Martial Rates, 1960-2016," February 6, 2017.

———. "Professional and Legal Journal Content Analysis, 1957-2016," 2016.

- “Honor, Not Law.” Accessed April 4, 2015. <http://www.armedforcesjournal.com/honor-not-law/>.
- Huntington, Samuel P. *The Soldier and the State: The Theory and Politics of Civil-Military Relations*. Cambridge, Massachusetts; London, England: Harvard University Press, 1957.
- Ignatieff, Michael. *The Warrior’s Honor: Ethnic War and the Modern Conscience*. New York: Henry Holt and Company, 1997.
- Ingold, Major Bernard P. “An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers.” *Military Law Review* 124 (1989): 1.
- “JURIST - Pulling Rank: Reinforcing an Independent JAG Corps.” Accessed February 6, 2017. <http://www.jurist.org/forum/2008/02/pulling-rank-reinforcing-independent.php>.
- Kerns, Patricia A. *The First 50 Years: US Air Force Judge Advocate General’s Department*. Government Printing Office, 2004. <https://babel.hathitrust.org/shcgi/pt?id=uiug.30112075660339;view=1up;seq=9>.
- “Law 220S Syllabus: Law for Air Force Officers 2004-2005.” US Air Force Academy Department of Law, 2004. US Air Force Academy Department of Law.
- “Law 400 Syllabus Spring 1972.” US Air Force Academy Department of Law, 1972. US Air Force Academy Department of Law.
- “Law 452 Syllabus: International Law and Organizations 1959.” US Air Force Academy Department of Law, 1959. US Air Force Academy Department of Law.
- Luban, David. “Indefensible: Why Guantánamo Defense Lawyers Can’t Ethically Participate Any Longer.” *Just Security* (blog), October 15, 2017. <https://www.justsecurity.org/45963/indefensible-guantanamo-defense-lawyers-cant-ethically-participate-longer/>.
- Miller, Ralph F. “The Lost Battalion.” *Marine Corps Gazette* 91, no. 1 (January 2007): 53–55.
- “Model Rules of Professional Conduct: Preamble & Scope | The Center for Professional Responsibility.” Accessed May 6, 2016. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.
- Nardotti, Michael. Oral History Nardotti. Interview by Kevin Boyle and Michael McHugh, May 2000. The Judge Advocate General Legal Center and School.
- “Naval War College: Syllabus for Elective Course Program, 1967-1968.” Naval War College, 1967. Elective Program Record Group 11 Sub Group II Box 1; Series 2; Folder 1. US Naval War College.
- “Navy Judge Advocate General Command History Report 2003.” US Navy Office of the Judge Advocate General, March 31, 2004. Box: Post 1990 Command File Judge Advocate General CH

1995 to Kamisela Naval Security Group Activity CH 1990 492; Folder: Judge Advocate General (JAG) CH 2003. Navy History and Heritage Command.

NJ1. NJ1 Interview. Interview by Doyle Hodges, May 9, 2016.

Pappas, George S. *Prudens Futuri: The US Army War College 1901-1967*. Marceline, MO: Walsworth Publishing Company, 1967.

Roach, Ashley, Richard J. Grunawalt, and James Brush. "Elective WE 211 1986-1987: Rules of Engagement: Crisis Management and Conflict Control." US Naval War College, 1986. RG 11 Subgroup II Electives 1984-88 Box 2 Series 2 Folder 8. US Naval War College.

Rubel, CAPT, USN (Ret), Rick. "NE 203: Moral Reasoning for Naval Leaders Syllabus Spring 2014," 2014.

Schuller, Lt. Col. Alan, John Dehn, Maj. Jeffrey Biller, and (name withheld) G. Stockton Center Interview. Interview by Doyle Hodges, September 26, 2016.

Siegel, Jay M. *Origins of the United States Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775-1967*. Washington, D.C.: U.S. Navy Judge Advocate General's Corps, 1997.

Smawley, LTC George R. "The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Ret) (1969-1997)." *Military Law Review* 168 (2001): 1.

Solis, Gary D. Interview w/ Prof Gary D. Solis. Interview by Doyle Hodges, August 8, 2016.

Stiehm, Judith Hicks. *The US Army War College: Military Education in a Democracy*. Philadelphia: Temple University Press, 2002.

"The United States Air Force Academy - Law (Law)." Accessed January 10, 2017.
<http://usafa.smartcatalogiq.com/en/2015-2016/Catalog/Courses/Law-Law-Law>.

Turner, LTC, AG, Michael E. "Syllabus and Class Schedule: SS472 The State and the Soldier (5 Feb 2014)." US Military Academy Center for the Professional Military Ethic, n.d.

United States Army Judge Advocate General's Corps. *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*. Superintendent of Documents, US Government Printing Office, 1975.

US EPA, OA. "EPA History." Collections and Lists. US EPA, October 13, 2016.
<https://www.epa.gov/history>.

Wallace, David A. Roundtable with U.S. Military Academy Law Department. Interview by Doyle Hodges, March 9, 2016.

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 3rd ed. New York: Basic Books, 1977.

Warren, Marc. Warren Oral History. Interview by Macias Stewart, Laura O'Donnell, and Gilman, 2015. The Judge Advocate General Legal Center and School.

Whitlock, Craig, and Kevin Uhrmacher. "Prostitutes, Vacations and Cash: The Navy Officials 'Fat Leonard' Took Down." *Washington Post*, August 23, 2017.
<https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>.

Wrage, Stephen. "Major Knight and Cambodia." In *Case Studies in Ethics for Military Leaders*, 105–7; 221–25. Boston, MA: Pearson, 2011.

World War II:

Allied Force Headquarters. "Lessons of Operation TORCH." Staff Memorandum, January 19, 1943. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/63/rec/1>.

Assistant Chief of Air Staff, Intelligence, Historical Division. "Ninth Air Force in the European Theater of Operations, 16 Oct 1943 to 16 Apr 1944." Army Air Forces Historical Studies, 1945. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3303/rec/1>.

Bess, Michael. *Choices Under Fire: Moral Dimensions of World War II*. New York: Alfred A. Knopf, 2006.

Best, Geoffrey. "Restraints on War by Land before 1945." In *Restraints on War: Studies in the Limitation of Armed Conflict*, edited by Michael Howard, 17–39. Oxford: Oxford University Press, 1979.

Dyer, George. *XII Corps: Spearhead of Patton's Third Army*. Headquarters, XII US Army Corps: XII Corps History Association, 1947.
<http://cgsc.contentdm.oclc.org/cdm/compoundobject/collection/p4013coll8/id/3147/rec/3>.

Goda, Paul J. "The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War." *Mil. L. Rev.* 33 (1966): 93.

Headquarters 12th Army Group. "Headquarters 12th Army Group Final After Action Report (Vol I Summary)." Headquarters, 12th Army Group, July 31, 1945. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3141/rec/3>.

Headquarters, Northwest African Air Forces. "Tables of Operations: 31st July/1st August-14th August 1943." Headquarters, Northwest African Air Forces, 1943. World War II Operational

Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4494/rec/1>.

Howard, Michael, ed. *Restraints on War: Studies in the Limitation of Armed Conflict*. Oxford: Oxford University Press, 1979.

HQ 1st Tank Battalion. "Combat Lessons Learned: HQ 1st Tank Battalion 11 August 1944." Headquarters Army Ground Forces, August 11, 1944. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4019/rec/2>.

Joint and Combined Chiefs of Staff. "Proceedings of the American-British Joint Chiefs of Staff Conferences Held in Washington, DC on Twelve Occasions Between December 24, 1941 and January 14, 1942." Joint History Office, 2003. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3686/rec/2>.

Joint War Plans Committee. "Plan for Seizure of the Ryukyus." Joint War Plans Committee, November 6, 1944. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3044/rec/1>.

Judge Advocate General's Department. "Army Extension Courses Special Text No. 294: Staff and Logistics." Judge Advocate General of the Army, 1939. JAG School and Corps Collection School Collection 1939-1 Dec 1943 Box 1 of 4. Army Heritage and Education Center.

McLain, Maj. Gen. Raymond S. "Standard Operating Procedure XIX Corps." Headquarters XIX Corps, US Army, November 1944. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2387/rec/1>.

"Notes on the Planning and Assault Phases of the Sicilian Campaign." Whitehall, London: Combined Operations Headquarters, October 1943. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/60/rec/1>.

Office of the Judge Advocate General Army Service Forces. "Judge Advocates Conference." Conference Proceedings. Law Quadrangle: University of Michigan, May 22, 1945. JAG School and Corps Collection School Collection Box 2 of 4. Army Heritage and Education Center.

Office of the Secretary of Defense. "Fire Effects of Bombing Attacks." National Security Resources Board. Washington, D.C., 1950. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2040/rec/1>.

Office, US Secretary of the Combined Chiefs of Staff. "CASABLANCA Conference January 1943 Papers and Minutes of Meetings." Office, US Secretary of the Combined Chiefs of Staff, 1943. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3688/rec/2>.

- . “Papers and Minutes of Meetings ARGONAUT Conference January-February 1945.” Office, US Secretary of the Combined Chiefs of Staff, 1945. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3687/rec/1>.
- . “SEXTANT Conference November-December 1943 Papers and Minutes of Meetings.” Office, US Secretary of the Combined Chiefs of Staff, 1943. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3691/rec/1>.
- . “TERMINAL Conference July 1945 Papers and Minutes of Meetings.” Office, US Secretary of the Combined Chiefs of Staff, 1945. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3692/rec/1>.
- “Operations Plan Neptune.” Headquarters, V Corps, March 26, 1944. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/compoundobject/collection/p4013coll8/id/1027/rec/1>.
- “Report by Special Staff Officers on Forager.” San Francisco: Headquarters Expeditionary Troops Task Force 56, October 1944. World War II Operational Documents. Combined Arms Research library. <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/4450/rec/3>.
- Roberts, Adam. “Land Warfare: From Hague to Nuremberg.” In *The Laws of War: Constraints on Warfare in the Western World*, edited by Michael Howard, George J. Andreopoulos, and Mark R. Shulman. New Haven and London: Yale University Press, 1994.
- Savarese, Laura Ford, and John Fabian Witt. “Strategy & Entailments: The Enduring Role of Law in the U.S. Armed Forces.” *Daedalus* 146, no. 1 (January 2017): 11–23.
https://doi.org/10.1162/DAED_a_00419.
- Shaw, Thomas J. *World War II Law and Lawyers: Issues, Cases, and Characters*. Chicago: American Bar Association, 2013.
- The Infantry School. *Special Text 31-20-1: Operations Against Guerrilla Forces*. Fort Benning, Georgia: The Infantry School, 1950.
<http://cgsc.contentdm.oclc.org/utills/getdownloaditem/collection/p4013coll9/id/908/filename/909.pdf/mapsto/pdf/type/singleitem>,
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll9/id/908/rec/77>.
- The Judge Advocate General’s School. *Law of Land Warfare*. J.A.G.S., Text No. 7. Ann Arbor, Michigan: United States Army Judge Advocate General’s School, 1943.
- Trainin, A.N., and A.Y. Vishinsky. “The Criminal Responsibility of the Hitlerites.” Moscow: Law Institute, Academy of Science, USSR, 1944. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/compoundobject/collection/p4013coll8/id/2366/rec/1>.

- United States Army. *Rules of Land Warfare*. Vol. VII. Basic Field Manual. Washington, D.C.: Government Printing Office, 1940.
<http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll9/id/879/filename/880.pdf/mapsto/pdf/type/singleitem>,
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll9/id/879/rec/9>.
- United States Marine Corps. *Staff Manual (NAVMC--1022 DPP)*. Washington, D.C.: Headquarters, US Marine Corps, 1944.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/2414/rec/1>.
- USAF Historical Division, Air University. "Development of Night Air Operations, 1941-1952." US Air Force Historical Study. Maxwell Air Force Base, Ala.: Air University, 1953. World War II Operational Documents. Ike Skelton Combined Arms Research Library Digital Collection.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll8/id/3304/rec/1>.
- War Department: Office of the Chief of Staff. *Rules of Land Warfare*. Washington: Government Printing Office, 1914.

Korea

- Acheson, Dean. "Document 656: Memorandum by the Secretary of State." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d656>.
- Austin, Warren. "Document 145: The United States Representative at the United Nations (Austin) to the Secretary of State." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States.
<https://history.state.gov/historicaldocuments/frus1950v07/d145>.
- Baldwin, Gordon B. "A New Look at the Law of War: Limited War and Field Manual 27-10." *Mil. L. Rev.* 4 (1959): 1.
- Bellamy, Ronald B. "Sanctuary in the Korean War: A Manifestation of Political Restraint." ARMY COMMAND AND GENERAL STAFF COLL FORT LEAVENWORTH KS SCHOOL OF ADVANCED MILITARY STUDIES, 2012.
- Boose, Donald W. "Fighting While Talking: The Korean War Truce Talks." *OAH Magazine of History* 14, no. 3 (2000): 25–29.
- Booth, Christopher D. "Prosecuting the Fog of War—Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by US Forces during the Opening Days of the Korean War in the Village of No Gun Ri." *Vand. J. Transnat'l L.* 33 (2000): 933.
- Casey, Steven. "Casualty Reporting and Domestic Support for War: The US Experience during the Korean War." *Journal of Strategic Studies* 33, no. 2 (April 2010): 291–316.
<https://doi.org/10.1080/01402391003590689>.

Choi, Suhi. "The Repertoire, Not the Archive: The 1950 Life and Time Coverage of the Korean War." *Media, War & Conflict* 8, no. 2 (2015): 264–280.

Department of the Army. "Field Service Regulations: Operations (FM 100-5)," 1954.

———. "FM 27-10 The Law of Land Warfare." Department of the Army, July 1956.

———. "FM 44-1 Air Defense Artillery Employment." Headquarters, Department of the Army, May 1959. Obsolete Military Manuals. Ike Skelton Combined Arms Research Library Digital Collection.

<http://cgsc.contentdm.oclc.org/utills/getdownloaditem/collection/p15040coll1/id/85/filename/86.pdf/mapsto/pdf/type/singleitem>,

<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p15040coll1/id/85/rec/3>.

Downey, William Gerald. "The Law of War and Military Necessity." *The American Journal of International Law* 47, no. 2 (April 1953): 251. <https://doi.org/10.2307/2194822>.

Emme, Eugene M., and Robert E. Osgood. "Limited War: The Challenge to American Strategy." *Military Affairs* 22, no. 1 (1958): 42. <https://doi.org/10.2307/1985485>.

Evans, Lt Col Jack C. "Atomic Air Defense." *Military Review* XXXVIII, no. 1 (April 1958): 21–32.

Fehrenbach, T.R. *This Kind of War: The Classic Military History of the Korean War*. Kindle--50th Anniversary Edition. New York: Open Road Media, 2014.

Field, Jr., James A. *History of United States Naval Operations: Korea*. Washington: US Government Printing Office, 1962.

Futrell, Robert F. *The United States Air Force in Korea 1950-53*. Washington, DC: Office of Air Force History, 1983.

Garnett, John C. "Limited 'Conventional' War in the Nuclear Age." In *Restraints on War: Studies in the Limitation of Armed Conflict*, edited by Michael Howard, 79–102. Oxford: Oxford University Press, 1979.

General Headquarters Military Intelligence Section, General Staff Combined Command for Reconnaissance Activity Korea. "Enemy Activity West Coast." GHQ, December 29, 1951. Ike Skelton Combined Arms Research Library Digital Collection.

<http://cgsc.contentdm.oclc.org/utills/getdownloaditem/collection/p4013coll11/id/1582/filename/1583.pdf/mapsto/pdf/type/singleitem>,

<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1582/rec/7>.

Goldberg, Alfred, Roger Trask, Doris Condit, Steve Rearden, and MatloffMaurice. "Interview with General Lawton J. Collins And," July 2, 1981. Ike Skelton Combined Arms Research Library Digital Collection.

<http://cgsc.contentdm.oclc.org/utills/getdownloaditem/collection/p4013coll11/id/1645/filename/1646.pdf/mapsto/pdf/type/singleitem>,

<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1645/rec/160>.

Heller, Francis H., ed. *The Korean War: A 25-Year Perspective*. Lawrence, KS: The Regents Press of Kansas, 1977.

Hodson, MG Kenneth J. *Conversations Between Major General Kenneth J. Hodson and Lieutenant Colonel Robert E. Boyer Volume I. Interview by LTC Robert E. Boyer, 1972. Kenneth J. Hodson Papers Recollections and Reflections: Transcripts of the Debriefing of MG Kenneth J. Hodson by LTC Robert E. Boyer, 1971-1972 Volume II Only Box 2. Army Heritage and Education Center.*

Jackson, Robert. *Air War Over Korea*. New York: Charles Scribner's Sons, 1973.

Johnson, Louis. "Document 454: The Secretary of Defense (Johnson) to the Secretary of State." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d454>.

Joint Chiefs of Staff. "Document 758: The Joint Chiefs of Staff to the Commander in Chief, Far East (MacArthur)." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d758>.

Kennan, George F. "Document 425: Memorandum by the Counselor (Kennan) to the Secretary of State." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d425>.

Kim, Dong Choon. "Forgotten War, Forgotten Massacres—the Korean War (1950–1953) as Licensed Mass Killings." *Journal of Genocide Research* 6, no. 4 (December 2004): 523–44. <https://doi.org/10.1080/1462352042000320592>.

Kim, Myung-Ki. *The Korean War and International Law*. Claremont, California: Paige Press, 1991.

Kirk, Alan Goodrich. "Document 72: The Ambassador in the Soviet Union (Kirk) to the Secretary of State 25 Jun 1950." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d72>.

Kuehl, Dale C. "What Happened at No Gun Ri? The Challenge of Civilians on the Battlefield." Masters of Military Art and Science, U.S. Army Command and General Staff College, 2003. Combined Arms Research library. <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll2/id/76/filename/77.pdf/mapsto/pdf/type/singleitem>, <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll2/id/76/rec/133>.

Levie, Howard S. Oral History Levie. Interview by Thomas Dougall and Richard Gordon, April 1987. The Judge Advocate General Legal Center and School.

Lewis, Walter L. "The Jag In the Korean War." *Reporter*, 1983, 2.

- Lineer, Maj Thomas A. "The Evolution of Cold War Rules of Engagement: The Soviet Combat Role in the Korean War, 1950-53." Masters of Military Art and Science, U.S. Army Command and General Staff College, 1993. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll2/id/1214/filename/15.pdf/mapsto/pdf/type/singleitem>.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll2/id/1214/rec/54>.
- Lovett, Robert A. "Document 743: The Deputy Secretary of Defense (Lovett) to the Secretary of State." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d743>.
- MacArthur, Douglas, and George C Marshall. "Testimony of Douglas MacArthur. Reprinted by Permission from Korea: Cold War and Limited War, Second Edition, Edited and with an Introduction by Allen Guttman Pp. 26-52. Copyright © 1972 by D. C. Heath and Company. Published by D. C. Heath and Company.,” May 1951, 29.
- Marshall, S.L. A. "Commentary on Infantry Operations and Weapons Usage in Korea." Operations Research Report. Chevy Chase, MD: Operations Research Office, The Johns Hopkins University, 1951. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll11/id/1350/filename/1345.pdf/mapsto/pdf/type/singleitem>.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1350/rec/103>.
- Matloff, Maurice. Oral History Interview with General M.B. Ridgway Commander-in-Chief, Far East Command and UN Command, 1951-52; Supreme Commander, Allied Powers Europe, 1952-53; Army Chief of Staff, 1953-55, April 18, 1984. Ike Skelton Combined Arms Research Library Digital Collection. <http://cgsc.contentdm.oclc.org/utis/getdownloaditem/collection/p4013coll11/id/1645/filename/1646.pdf/mapsto/pdf/type/singleitem>.
<http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll11/id/1645/rec/160>.
- Matthews, H. Freeman. "Document 421: Memorandum by the Deputy Under Secretary of State (Matthews)." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States. <https://history.state.gov/historicaldocuments/frus1950v07/d421>.
- McCarthy, Michael J. "Uncertain Enemies: Soviet Pilots in the Korean War." *Air Power History*, Spring 1997.
- Monteverde, Lt. Col. Miguel E. "Lieutenant General William P. Ennis, Jr., USA, Retired Oral History." US Army Military History Institute, 1984. Army Heritage and Education Center.
- National Security Council. "National Security Council Report, NSC 81/1, "United States Courses of Action with Respect to Korea," September 9, 1950. History and Public Policy Program Digital Archive. Truman Presidential Museum and Library. <http://digitalarchive.wilsoncenter.org/document/116194>.

- O'Neill, Mark. "Soviet Involvement in the Korean War: A New View from the Soviet-Era Archives." *OAH Magazine of History* 14, no. 3 (2000): 20–24.
- Owen, Col. Dean M. "Project 83-3 Volney F. Warner General, USA Retired." US Army Military History Institute, 1983. Army Heritage and Education Center.
- Ryoo, Moo Bong. "No Gun Ri Incident: Implications for the US Army." Monograph, U.S. Army Command and General Staff College, 2001.
- SAHR CONWAY-LANZ. "Beyond No Gun Ri: Refugees and the United States Military in the Korean War." *Diplomatic History* 29, no. 1 (2005): 49–81.
- Sidman, Andrew H., and Helmut Norpoth. "Fighting to Win: Wartime Morale in the American Public." *Electoral Studies* 31, no. 2 (June 2012): 330–41.
<https://doi.org/10.1016/j.electstud.2012.01.008>.
- Smith, William Y. "Korean War Diary." *Air Power History* 55, no. 2 (2008): 28.
- Solf, Waldemar. Solf Oral History. Interview by Bradley Bodager and Andrew Stewart, April 1986. The Judge Advocate General Legal Center and School.
- Stratemeyer, George. *The Three Wars of Lt. Gen. George E. Stratemeyer: His Korean War Diary*. Edited by William T. Y'Blood. Washington, DC: Air Force History and Museums Program, 1999.
- Taubenfeld, Howard J. "International Armed Forces and the Rules of War." *The American Journal of International Law* 45, no. 4 (October 1951): 671. <https://doi.org/10.2307/2194248>.
- Tirman, John. *The Deaths of Others: The Fate of Civilians in America's Wars*. Oxford University Press, 2011.
- United Nations Security Council. "Document 84: Resolution Adopted by the United Nations Security Council June 25, 1950." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States.
<https://history.state.gov/historicaldocuments/frus1950v07/d84>.
- . "Document 130: Resolution Adopted by the United Nations Security Council June 27, 1950." Edited by Glennon, John. Government Printing Office, 1976. 1950, Korea, Volume VII. Foreign Relations of the United States.
<https://history.state.gov/historicaldocuments/frus1950v07/d130>.
- Werrell, Kenneth P. "Across the Yalu: Rules of Engagement and the Communist Air Sanctuary During the Korean War." *The Journal of Military History* 72, no. 2 (April 2008): 451–76.
- Woodhouse, Dale B. "Operational Lessons Learned in the Korean War." ARMY COMMAND AND GENERAL STAFF COLL FORT LEAVENWORTH KS SCHOOL OF ADVANCED MILITARY STUDIES, 2011.

Vietnam

Addicott, Jeffrey F., and William A. Hudson Jr. "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons." *Mil. L. Rev.* 139 (1993): 153.

BIGART, HOMER. "Defense Says Calley Regarded Victims as an Enemy." *New York Times*. February 18, 1971, sec. A 10. ProQuest Historical Newspapers.

———. "Psychiatrist Ousted as Calley Witness And All of His Testimony Is Expunged." *New York Times*. February 20, 1971, sec. A 10. ProQuest Historical Newspapers.

———. "SANITY UNIT FINDS CALLEY 'NORMAL': ARMY PANEL RULES ON OFFICER CHARGE." *New York Times*. February 17, 1971, sec. A 8. ProQuest Historical Newspapers.

———. "TRIAL OF CALLEY RESUMING TODAY: HE IS EXPECTED TO TAKE THE STAND SOON." *New York Times*. February 16, 1971, sec. A 7. ProQuest Historical Newspapers.

———. "Two Doctors Say Calley Lacked Ability to Premeditate Slayings." *New York Times*. February 19, 1971, sec. A 6. ProQuest Historical Newspapers.

Borch, Frederic L. *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia 1959-1975*. Fort Leavenworth, KS: U.S. Army Command and General Staff College Press, 2003.

Cockerham, William C., and Lawrence E. Cohen. "Obedience to Orders: Issues of Morality and Legality in Combat Among U.S. Army Paratroopers." *Social Forces* 58, no. 4 (June 1980): 1272-88.

Department of Defense. "DoD Program for the Implementation of the Law of War (Short Title: DoD Law of War Program) (DODD 5100.77)." Department of Defense, November 5, 1974. National Archives Online. <https://catalog.archives.gov/id/26048945>.

Gibb, Steven P. "Applicability of the Laws of Land Warfare to US Army Aviation." *Mil. L. Rev.* 73 (1976): 25.

Guttman, Allen. "Protest against the War in Vietnam." *The Annals of the American Academy of Political and Social Science* 38 (March 1969): 55-63.

Hammer, Richard. "Calley Trial: 'Doctor, Assume the Following to Be True...'" *New York Times*. February 21, 1971, sec. E2. ProQuest Historical Newspapers.

Harper, Stanley I. "Reports of Survey: The Roll of the Staff Judge Advocate." *USAF JAG Bull.* 4 (1962): 29.

Hodson, MG Kenneth J. Conversations Between Major General Kenneth J. Hodson and Lieutenant Colonel Robert E. Boyer Volume I. Interview by LTC Robert E. Boyer, 1972. Kenneth J. Hodson Papers Recollections and Reflections: Transcripts of the Debriefing of MG Kenneth J.

Hodson by LTC Robert E. Boyer, 1971-1972 Volume II Only Box 2. Army Heritage and Education Center.

Jackson, Robert Houghwout. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945: A Documentary Record of Negotiations of the Representatives of the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, Culminating in the Agreement and Charter of the International Military Tribunal*. Vol. 3080. US Government Printing Office, 1949.

Kelly, Joseph B. "Legal Aspects of Military Operations in Counterinsurgency." *Mil. L. Rev.* 21 (1963): 95.

Kinnard, Douglas. *The War Managers*. Hanover, NH: University Press of New England, 1977.

Livsey, William J. An Oral History of General William J. Livsey, USA (Ret). Interview by Michael A. Canavan, 1990. Oral Histories. Army Heritage and Education Center.
[http://cdm16635.contentdm.oclc.org/utills/getdownloaditem/collection/p16635coll26/id/167/type/singleitem/filename/168.pdf/width/0/height/0/mapsto/pdf/filesize/7127334/title/An%20oral%20history%20of%20GEN%20William%20J.%20Livsey,%20USA%20\(Ret.\),
http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/167/rec/15](http://cdm16635.contentdm.oclc.org/utills/getdownloaditem/collection/p16635coll26/id/167/type/singleitem/filename/168.pdf/width/0/height/0/mapsto/pdf/filesize/7127334/title/An%20oral%20history%20of%20GEN%20William%20J.%20Livsey,%20USA%20(Ret.),http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/167/rec/15).

Parks, W. Hays. "The United States Military and the Law of War: Inculcating an Ethos." *Social Research* 69, no. 4 (Winter 2002): 981–105.

Paust, Jordan J. "My Lai and Vietnam: Norms, Myths and Leader Responsibility." *Mil. L. Rev.* 57 (1972): 99.

Persons, MG Wilton B. Project 85-4 Wilton B. Persons, Major General, USA Retired Vol 2. Interview by Colonel Herbert J. Green and Colonel Thomas M. Crean, 1985. Box ID: Box Wilton B Persons Paper Box 1 of 2. Army Heritage and Education Center.

Prugh, George S. *Law at War: Vietnam 1964-1973*. Vietnam Studies. Washington, D.C.: Department of the Army, 1991.

———. "Law Practice in the Vietnam War." *Mil. L. & L. War Rev.* 7 (1968): 147.

Solis, Gary D. *Son Thang: An American War Crime*. Annapolis, Md.: Naval Institute Press, 1997.

"The Judge Advocate General's Conference 9-12 September 1963." The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, September 9, 1963. Box ID: Judge Advocate General's School and Corps Collection School Collection 22 May 1945, 1952-1 Jul 1955, May 1963-Jun 1971 Box 2 of 4. Army Heritage and Education Center.

"The Truth About My Trip To Hanoi | Jane Fonda." Accessed March 26, 2018.
<http://www.janefonda.com/the-truth-about-my-trip-to-hanoi/>.

Warner, Volney F. Volney F. Warner, General, USA (Ret) Oral History Interviewed by Dean M. Owen, Colonel, USA. Interview by Col. Dean M Owen, 1983.

Westerman, George F. "A New Approach in Disseminating the Geneva Conventions." *Mil. L. Rev.* 45 (1969): 99.

Westmoreland, General William C. Interview with General William C. Westmoreland (Vol 2). Interview by Martin L. Ganderson, 1982. William C. Westmoreland Collection Box 70 Folder 2. Army Heritage and Education Center.

———. Interview with General William C. Westmoreland (Vol I). Interview by Martin L. Ganderson, 1982. William C. Westmoreland Collection Box 69 Folder 5. Army Heritage and Education Center.

Young, George H. An Oral History of BG George H. Young. Interview by E.A. Tivol, 1985. Oral Histories. Army Heritage and Education Center.

<http://cdm16635.contentdm.oclc.org/utis/getdownloaditem/collection/p16635coll26/id/188/type/singleitem/filename/189.pdf/width/0/height/0/mapsto/pdf/filesize/1262688/title/An%20oral%20history%20of%20BG%20George%20H.%20Young>

<http://cdm16635.contentdm.oclc.org/cdm/singleitem/collection/p16635coll26/id/188/rec/13>.

Beirut

"A Majority of Americans Think U.S. Marines Should Be..." *UPI*. Accessed April 8, 2018.

<https://www.upi.com/Archives/1983/09/04/A-majority-of-Americans-think-US-Marines-should-be/2172431496000/>.

Alpern, David M., John J. Lindsay, and Eleanor Clift. "A Newsweek Poll: Sharp Drop." *Newsweek*, September 12, 1983. News, Policy & Politics Archive.

———. "The War Powers Debate." *Newsweek*, September 12, 1983. News, Policy & Politics Archive.

Atkinson, Rick, and Fred Hiatt. "President Favored Use of Battleship on Syrians; Loss of Aircraft Stirs Pentagon." *The Washington Post*. December 11, 1983, Final edition, sec. A.

BENNETT, CHARLES E, SAMUEL S STRATION, BILL NICHOLS, DAN DANIEL, WILLIAM L DICKINSON, G WILLIAM WHITEHURST, FLOYD SPENCE, et al. The Use of Military Personnel in Lebanon and Consideration of Report from September 24-25 Committee Delegation to Lebanon, § Committee on Armed Services House of Representatives United States Congress (1983).

Burnett, Weston D. "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra." *Mil. L. Rev.* 107 (1985): 71–192.

Clymer, Adam. "The Nation's Mood." *New York Times*. December 11, 1983, Late edition, sec. SM 47. ProQuest Historical Newspapers.

Dionne, E.J. "Shelling Is Heavy: Attack Aimed at Forces Threatening Troops in a Vital Village." *New York Times*. September 20, 1983, Late edition, sec. A1. ProQuest Historical Newspapers.

Dye, Dale A. "Keeping the Peace in Lebanon." *Marine Corps Gazette*, August 1983.

Frank, Benis M. *U.S. Marines in Lebanon 1982-1984*. Washington, D.C.: History and Museum Division, Headquarters, US Marine Corps, 1987.

Friedman, Thomas L. "US Warships Fire on Lebanon Area Held By Damascus." *New York Times*. September 18, 1983, Late edition, sec. A. ProQuest Historical Newspapers.

Gelb, Leslie H. "Lebanon Peacekeeping Sets Stage for War Powers Debate." *New York Times*. September 11, 1983, Late edition, sec. E. ProQuest Historical Newspapers.

Geraghty, Col. Timothy J. Marine Corps Oral History Program Interview with Colonel Timothy J. Geraghty, USMC. Interview by Benis M. Frank, November 21, 1983. Marine Corps Oral History Program. Marine Corps History Center.

———. *Peacekeepers at War: Beirut 1983--The Marine Commander Tells His Story*. Washington, D.C.: Potomac Books, 2009.

Geraghty, Col. Timothy J., and Benis M. Frank. Marine Corps Oral History Collection: Colonel Timothy J. Geraghty, USMC, May 28, 1983. Marine Corps Oral History Program. Marine Corps History Center.

Hallenbeck, Ralph A. *Military Force as an Instrument of US Foreign Policy: Intervention in Lebanon August 1982-February 1984*. New York, Westport, Connecticut, London: Praeger, 1991.

Halloran, Richard. "Rules Covering the Marines Are Reported Under Review." *New York Times*. October 19, 1983, Late Edition edition, sec. A 6.

Hammel, Eric. *The Root: The Marines in Beirut August 1982-February 1984*. San Diego, New York, London: Harcourt Brace Jovanovich, 1985.

Hiatt, Fred. "US Initiates 'Instant Retaliation' Policy in Mideast." *Washington Post*. December 14, 1983, Final edition, sec. A.

———. "Use of 16-Inch Guns Authorized on Dec. 3; US Commander Had Been Restricted." *Washington Post*. December 15, 1983, Final edition, sec. A.

Investigations Subcommittee of the House Armed Services Committee, 98th Congress. "Adequacy of U.S. Marine Corps Security in Beirut." Washington, D.C.: United States Congress, December 19, 1983.

- . “Adequacy of U.S. Marine Corps Security in Beirut.” *Terrorism* 7, no. 3 (January 1984): 341–45. <https://doi.org/10.1080/10576108408435583>.
- Jenkins, Brian Michael. “The Lessons of Beirut: Testimony Before the Long Commission.” Santa Monica, CA: RAND Corp, February 1984.
- Joint Chiefs of Staff. *Department of Defense Dictionary of Military and Associated Terms: With the NATO, CENTO, and IADB Glossaries Incorporated*. Washington, D.C.: Government Printing Office, 1979.
- Korbani, Agnes G. *US Intervention in Lebanon, 1958 and 1982: Presidential Decisionmaking*. New York, Westport, Connecticut, London: Praeger, 1991.
- Long Commission. “Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983.” Washington, D.C.: Department of Defense, December 20, 1983.
- Mead, Colonel James M. Lebanon Briefing Session, December 1, 1982. Marine Corps Oral History Program. Marine Corps History Center.
- Mead, Colonel James M., and Benis M. Frank. Marine Corps Oral History Program Interview with Colonel James M. Mead, USMC, January 13, 1983. Marine Corps Oral History Program. Marine Corps History Center.
- National Security Council. “National Security Decision Directive 117,” December 5, 1983. Digital National Security Archive. [/dc/dnsa/data/processing/xml/pdfs/edit/images/PD/01772gif.pdf](https://dc/dnsa/data/processing/xml/pdfs/edit/images/PD/01772gif.pdf).
- . “National Security Decision Directive Number 111,” October 28, 1983. Digital National Security Archive. [/dc/dnsa/data/processing/xml/pdfs/edit/images/PD/01761gif.pdf](https://dc/dnsa/data/processing/xml/pdfs/edit/images/PD/01761gif.pdf).
- Petit, Michael. *Peacekeepers at War: A Marine’s Account of the Beirut Catastrophe*. Boston, London: Faber & Faber, 1986.
- Pintak, Larry. *Beirut Outtakes: A TV Correspondent’s Portrait of America’s Encounter with Terror*. Lexington, MA, Toronto: Lexington Books, 1988.
- SHRIBMAN, DAVID. “Poll Shows Support for Presence of U.S. Troops in Lebanon and Grenada.” *New York Times*. October 29, 1983. ProQuest Historical Newspapers.
- Sloane, Robert L. “Introduction.” *Small Wars & Insurgencies* 1, no. 2 (August 1990): 95–96. <https://doi.org/10.1080/09592319008422947>.
- SMITH, HEDRICK. “REAGAN UPGRADING LEBANON PRESENCE.” *New York Times*. September 13, 1983, Late (East Coast) edition, sec. A.
- Tarrabain, Ali M. “The Four Powers Multinational Force in Lebanon 1982-84.” PhD dissertation, University of Kent at Canterbury, 1990.
- Thompson, P. L. “Back from Beirut.” *Leatherneck*, August 1984.

THURMOND, STROM, South Carolina, BARRY GOLDWATER, JOHN W WARNER, GORDON F HUMPHREY, WILLIAM S COHEN, ROGER W JEPSEN, et al. *The Situation in Lebanon*, § Committee on Armed Services United States Senate (1983).

Trainor, Bernard E. “’83 Strike on Lebanon: Hard Lessons for U.S.” *New York Times*. August 6, 1989, National edition. <https://www.nytimes.com/1989/08/06/world/83-strike-on-lebanon-hard-lessons-for-us.html>.

———. Oral History Transcript Lieutenant General Bernard E. Trainor, US Marine Corps (Ret). Interview by Benis M. Frank, 2015. Marine Corps Oral History Program. Marine Corps History Center.

Watson, Russell, John Walcott, Theodore Stanger, and James Pringle. “The Marines Pay the Price: Two Americans Die in Beirut as US Policy in the Mideast Reaches a Dead End.” *Newsweek*, September 12, 1983. News, Policy & Politics Archive.

Weisman, Steven R. “REAGAN ORDERS MARINES MOVED TO SHIPS OFF BEIRUT BUT WIDENS AIR AND; SEA ROLE; REBEL UNITS TAKE LAST OF MOSLEM SECTOR.” *New York Times*. February 7, 1984, Late edition. <https://www.nytimes.com/1984/02/08/world/reagan-orders-marines-moved-shiops-off-beirut-but-widens-air-sea-role-rebel.html>.

Whitaker, Mark, John Walcott, Eleanor Clift, Theodore Stanger, and Ray Wilkinson. “Reagan’s ‘Fresh Start.’” *Newsweek*, September 13, 1982. News, Policy & Politics Archive.

Operation Iraqi Freedom

Abizaid, John P. An Exit Interview with General John P. Abizaid. Interview by Colonel James Embrey and Colonel Thomas Reilly, 2007.

“Abu Ghraib Photos Were ‘Big Shock,’ Undermined U.S. Ideals - CNN.Com.” Accessed April 22, 2018. <http://edition.cnn.com/2009/WORLD/meast/05/18/detainee.abuse.lookback/index.html>.

Ackerman, David M. “International Law and the Preemptive Use of Force Against Iraq.” CRS Report for Congress. Washington, D.C.: Congressional Research Service, April 11, 2003.

Arnold, MAJ Susan. Interview with MAJ Susan Arnold. Interview by John McCool, January 25, 2006. Operational Leadership Experiences. Combined Arms Research library.

Baker, Colonel Ralph. Interview with COL Ralph Baker. Interview by Pete Connors, November 1, 2005. Operational Leadership Experiences. Combined Arms Research library.

Ballard, John R. *Fighting for Fallujah: A New Dawn for Iraq*. Westport, CT, London: Praeger Security International, 2006.

Barbee, Colonel Michael. Interview with COL Michael Barbee. Interview by Gary Morea, April 3, 2007. Operational Leadership Experiences. Combined Arms Research library.

- Barno, David W. An Exit Interview with Lieutenant General David W. Barno. Interview by Michael Knapp, December 2006. Oral Histories. Army Heritage and Education Center.
- Bayer, COL Peter B. Interview with COL (P) Peter Bayer, August 13, 2007. Operational Leadership Experiences. Combined Arms Research library.
- Boyne, Walter J. *Operation Iraqi Freedom: What Went Right, What Went Wrong, and Why*. New York: Tom Doherty Associates, 2003.
- Carbone, Nick. "When Protesters Interrupt: John Brennan and Seven Other Speeches Disrupted by Demonstrators." *Time*. Accessed April 22, 2018. <http://newsfeed.time.com/2012/12/21/when-protesters-interrupt-speeches-disrupted-by-hecklers/slide/donald-rumsfeld-vs-abu-ghraib-protesters/>.
- Casey, General George W. An Oral History of General George W. Casey, Jr. Interview by Charles Allen and Brent C. Bankus, 2013. Oral Histories. Army Heritage and Education Center.
- Center for Law and Military Operations. *Forged in the Fire, Legal Lessons Learned During Military Operations, 1994-2008*. Charlottesville, VA: The Judge Advocate General's School and Legal Center, U.S. Army, 2008.
- . *Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations*. Charlottesville, VA: The Judge Advocate General's School and Legal Center, U.S. Army, 2004.
- . *Legal Lessons Learned from Afghanistan and Iraq: Volume II Full Spectrum Operations (2 May 2003-30 June 2004)*. Charlottesville, VA: The Judge Advocate General's School and Legal Center, U.S. Army, 2004.
- Chandrasekaran, Rajiv. "Key General Criticizes April Attack In Fallujah (Washingtonpost.Com)." *The Washington Post*. September 13, 2004, sec. A 17. <http://www.washingtonpost.com/wp-dyn/articles/A16309-2004Sep12.html>.
- Chittaranjan, Kalpana. "Iraq's Nuclear Weapons Programme." *Strategic Analysis* 23, no. 3 (June 1999): 407–22. <https://doi.org/10.1080/09700169908455056>.
- Condra, Luke N., and Jake Shapiro. "Who Takes the Blame? The Strategic Effects of Collateral Damage." *American Journal of Political Science* 56, no. 1 (2012): 167–87.
- Cooper, Lt. Col. (Ret) Scott. Letter to Doyle Hodges. "No-Fly Zone Fact Check," April 22, 2018.
- Cordesman, Anthony H. *The Iraq War: Strategy, Tactics, and Military Lessons*. CSIS Significant Issues Series, 5 Vol 25. Washington, D.C.: The CSIS Press, 2003.
- Corn, Geoffrey S, Victor Hansen, Richard Jackson, Chris Jenks, Eric Talbot Jensen, and James A. Schoettler, Jr. *The Law of Armed Conflict: An Operational Approach*. Aspen Casebook. New York: Wolters Kluwer, 2012.

- Crichton, Kyle, Gina Lamb, and Rogene Fisher Jacquette. "Timeline of Major Events in the Iraq War." Accessed April 18, 2018.
<https://archive.nytimes.com/www.nytimes.com/interactive/2010/08/31/world/middleeast/20100831-Iraq-Timeline.html?ref=middleeast>.
- Dale, Catherine. "Operation Iraqi Freedom: Strategies, Approaches, Results, and Issues for Congress." CRS Report for Congress. Washington, D.C.: Congressional Research Service, February 17, 2009.
- Defense Manpower Data Center. "DCAS Reports - Operation Iraqi Freedom (OIF) Casualty Summary by Month," April 21, 2018.
https://dcas.dmdc.osd.mil/dcas/pages/report_oif_month.xhtml.
- Department of Defense. "Department of Defense Casualties in Operation IRAQI FREEDOM, Operation NEW DAWN, Operation ENDURING FREEDOM, and Operation FREEDOM'S SENTINEL," April 18, 2018. <https://www.defense.gov/casualty.pdf>.
- Dubik, James. An Oral History of LTG James M. Dubik, USA Retired. Interview by Robert M. Mages, 2008. Oral Histories. Army Heritage and Education Center.
- Dunlap, Charles J. "Come the Revolution: A Legal Perspective on Air Operations in Iraq since 2003." *International Law Studies* 86 (2010): 16.
- Filkins, Dexter, and Richard A. Oppel Jr. "After the War: Truck Bombing; Huge Suicide Blast Demolishes U.N. Headquarters in Baghdad; Top Aid Officials Among 17 Dead." *The New York Times*, August 20, 2003, sec. World. <https://www.nytimes.com/2003/08/20/world/after-war-truck-bombing-huge-suicide-blast-demolishes-un-headquarters-baghdad.html>.
- Fontenot, Gregory, E. J. Degen, and David Tohn. *On Point: The United States Army in Operation Iraqi Freedom*: Fort Belvoir, VA: Defense Technical Information Center, 2004.
<https://doi.org/10.21236/ADA524388>.
- Gallup Inc. "Iraq: Historical Trends." Gallup.com. Accessed April 22, 2018.
<http://news.gallup.com/poll/1633/Iraq.aspx>.
- Gass, COL Gregory. Interview with COL Gregory Gass. Interview by Catherine Shadid Small, October 31, 2005. Contemporary Operations Study Team. Combined Arms Research library.
- Gavle, Kathleen A. Operation Iraqi Freedom: An Oral History of Lieutenant Colonel Kathleen A. Gavle, USA. Interview by LTC Annette L. Torrissi, 2006. Oral. Army Heritage and Education Center.
- Gordon, Michael R., and Judith Miller. "US Says Hussein Intensifies Quest for A-Bomb Parts: Effort Spans 14 Months. New Information Is Central to White House Argument for Urgent Action on Iraq." *New York Times*. September 8, 2002, National edition, sec. 1. ProQuest Historical Newspapers.

- Groen, Lt. Col. Michael S. "With the 1st Marine Division in Iraq, 2003: No Greater Friend, No Worse Enemy." Occasional Paper. Quantico, Virginia: Marine Corps University, 2006.
- Head, William. "The Battles of Al-Fallujah: Urban Warfare and the Growth of Air Power." *Air Power History* 60, no. 4 (Winter 2013): 32–51.
- Hedges, Chris. "Defectors Cite Iraqi Training Camp for Terrorism." *New York Times*. November 8, 2001, National edition, sec. A1.
- Hilaire, Max. "International Law and the United States Invasion of Iraq." *Military Law and Law of War Review* 44 (2005): 85–140.
- Hosmer, Stephen T. *Why the Iraqi Resistance to the Coalition Invasion Was so Weak*. Santa Monica, CA: Rand Corporation, 2007.
- Huntoon, David H. End-of-tour Interview Major General David H. Huntoon, Jr., Commandant, US Army War College. Interview by LTC Thomas L. Hendrix, January 14, 2008. Oral Histories. Army Heritage and Education Center.
- IIACS. "Public Opinion in Iraq: First Poll Following Abu Ghraib Revelations." IIACS, June 15, 2004. <https://www.globalpolicy.org/images/pdfs/06iiacss.pdf>.
- Inc, Gallup. "Seventy-Two Percent of Americans Support War Against Iraq." Gallup.com. Accessed April 22, 2018. <http://news.gallup.com/poll/8038/SeventyTwo-Percent-Americans-Support-War-Against-Iraq.aspx>.
- "Iraq Body Count." Accessed April 20, 2018. <https://www.iraqbodycount.org/database/>.
- Keegan, John. *The Iraq War*. New York: Alfred A. Knopf, 2004.
- Larson, Eric V., and Bogdan Savych. *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime*. Proquest ebrary. Santa Monica, CA: RAND Corp., 2007.
- Lundy, Colonel Michael D., and LTC Annette L. Torrissi. *Operation Iraqi Freedom: An Oral History of Colonel Michael D. Lundy, USA*, 2007. Oral Histories. Army Heritage and Education Center.
- McKiernan, General David D. An Exit Interview with General David D. McKiernan. Interview by Colonel James A. Helis, 2010. Oral Histories. Army Heritage and Education Center.
- McKnelly, LTC Oren. Interview with LTC Oren McKnelly. Interview by Jenna Fike, February 22, 2011. Operational Leadership Experiences. Combined Arms Research library.
- Murphy, John F. "Iraq and the 'Fog of Law.'" *International Law Studies* 86 (2010): 23.
- Murray, COL J Mike. Interview with Colonel J. Mike Murray. Interview by Dennis Van Wey, December 8, 2005. Contemporary Operations Study Team. Combined Arms Research library.
- O'Hanlon, Michael. "Estimating Casualties in a War to Overthrow Saddam." *Orbis* 47, no. 1 (Winter 2003): 21–40. [https://doi.org/10.1016/S0030-4387\(02\)00172-2](https://doi.org/10.1016/S0030-4387(02)00172-2).

- O'Hanlon, Michael E., and Ian Livingston. "Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq." Washington, D.C.: Brookings, January 31, 2011.
- Pasquarette, James. An Oral History of Colonel James Pasquarette. Interview by LTC John Dolan, 2008. Oral Histories. Army Heritage and Education Center.
- Perrone, LTC Paul. Interview with LTC Paul Perrone. Interview by Laurence Lessard, n.d. Operational Leadership Experiences. Combined Arms Research library.
- Perry, Walter, Jefferson Marquis, Richard Darilek, Walter Perry, Laurinda Rohn, Andrea Mejia, Jerry Sollinger, et al. *Operation IRAQI FREEDOM: Decisive War, Elusive Peace*. RAND Corporation, 2015. <https://doi.org/10.7249/RR1214>.
- . *Operation IRAQI FREEDOM: Decisive War, Elusive Peace*. RAND Corporation, 2015. <https://doi.org/10.7249/RR1214>.
- Preston, Julia. "Iraq Tells the UN Arms Inspections Will Be Permitted." *New York Times*. November 14, 2002, National edition, sec. A1. ProQuest Historical Newspapers.
- Rampton, Sheldon, and John Stauber. *Weapons of Mass Deception: The Uses of Propaganda in Bush's War on Iraq*. New York: Jeremy P. Tarcher/Penguin, 2003.
- Risen, James. "THE STRUGGLE FOR IRAQ: INTELLIGENCE; Ex-Inspector Says C.I.A. Missed Disarray in Iraqi Arms Program." *The New York Times*, January 26, 2004, sec. World. <https://www.nytimes.com/2004/01/26/world/struggle-for-iraq-intelligence-ex-inspector-says-cia-missed-disarray-iraqi-arms.html>.
- Sanger, David E. "President Says Military Phase in Iraq Has Ended." *The New York Times*, May 2, 2003. <https://www.nytimes.com/2003/05/02/international/worldspecial/president-says-military-phase-in-iraq-has-ended.html>.
- Sattler, John. Interview with Lieutenant General John Sattler, USMC (Ret). Interview by Doyle Hodges, April 9, 2018.
- . Sattler interview 2. Interview by Doyle Hodges, April 16, 2018.
- Schwartz, Eric. Interview with COL Eric Schwartz. Interview by Robert Cameron, April 21, 2007. Operational Leadership Experiences. Combined Arms Research library.
- Scott, Shirley V., and Olivia Ambler. "Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq." *European Journal of International Relations* 13, no. 1 (2007): 67–87.
- Shanker, Thom, and Jacques Steinberg. "THE STRUGGLE FOR IRAQ: CAPTIVES; Bush Voices 'Disgust' at Abuse of Iraqi Prisoners." *The New York Times*, May 1, 2004, sec. World. <https://www.nytimes.com/2004/05/01/world/the-struggle-for-iraq-captives-bush-voices-disgust-at-abuse-of-iraqi-prisoners.html>.

Shultz, Jr., Richard H. *The Marines Take Anbar: The Four-Year Fight Against Al Qaeda*. Annapolis, Md.: Naval Institute Press, 2013.

“The Iraq War.” Council on Foreign Relations. Accessed April 18, 2018.
<https://www.cfr.org/timeline/iraq-war>.

The Pulitzer Prizes. “Pulitzer Prize Winners: Matt Davies of the Journal News, White Plains, NY.” Accessed April 22, 2018. <http://www.pulitzer.org/winners/matt-davies>.

“Timeline: Iraq War.” *BBC News*, July 5, 2016, sec. Middle East.
<http://www.bbc.com/news/magazine-36702957>.

Torrance, COL Thomas. Interview with COL Thomas Torrance. Interview by Lynne Chandler Garcia, November 1, 2005. Contemporary Operations Study Team. Combined Arms Research library.

Warren, Marc. “The ‘Fog of Law’: The Law of Armed Conflict in Operation Iraqi Freedom.” *International Law Studies* 86 (2010): 40.

Williams, Tanner. “Rules Of Engagement: Seeking Moral and Legal Sufficiency in the 21st Century.” *Global Tides* 2, no. 1 (2008): 4.

Wright, Dr Donald P, and COL Timothy R Reese. *On Point II: Transition to the New Campaign: The United States Army in Operation IRAQI FREEDOM May 2003 - Jan 2005*. Fort Leavenworth, KS: Combat Studies Institute Press, 2008.

Young, Colonel Don C. Interview with Colonel Don C. Young. Interview by Dennis Van Wey, April 10, 2006. Contemporary Operations Study Team. Combined Arms Research library.

Zucchini, David. *Thunder Run: The Armored Strike to Capture Baghdad*. New York: Atlantic Monthly Press, 2004.