

Lawfare Today: A Perspective

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Lawfare is a concept that is ever more frequently discussed in government, academic, and media circles. Regrettably, that discussion is not as informed as it might be. The purpose of this commentary is to clarify what lawfare means by discussing how it originated, how it is being used by opposing sides in modern conflicts, and what some of the challenges are as we look ahead. Although I've tinkered with the definition over the years, I now define "lawfare" as the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.¹ As such, I view law in this context much the same as a weapon. It is a means that can be used for good or bad purposes.

I started using "lawfare" in speeches and writings² beginning in the late 1990s because I wanted a "bumper sticker" term easily understood by a variety of audiences to describe how law was altering warfare. At that point, I had the hubris to think I invented the term; actually, it had been used a couple of times previously in a completely different context starting in the mid-1970s.³ I needed something to describe what I and others saw as a new relationship between law and war. General James L. Jones, then the commander of NATO, famously observed in a *Parade* magazine article:

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.⁴

The reasons for this phenomenon are several, but I think they are largely

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traceable to the growing importance of international law generally, a growth itself tied, in my judgment, to globalization. Today's international commerce requires an extensive legal architecture to function, and this fact operates to raise the "legal consciousness", so to speak, of the entire world community.⁵ As we have seen before,⁶ such trends in global affairs tend to spill over into warfare.

Lawfare can operate as a positive "good." Ideally, substituting lawfare methodologies for traditional military means can reduce the destructiveness of war, if not its frequency. An illustration: prior to starting our military operations in Afghanistan in the fall of 2001, military planners were concerned about the ready availability of high-resolution, near real-time commercial satellite imagery of the operational area – information of very obvious military value to our adversaries. One can imagine any number of orthodox military approaches that might have been used to stop such data from reaching enemy hands. Instead, a legal "weapon", that is, a contract, was launched to achieve the same effect. Specifically, exclusive rights to all the imagery were purchased, thus denying it to potential opponents.⁷ In this respect lawfare is an excellent example of what military strategists call *effects-based*⁸ operations where the effect created is the focus, *not* necessarily the means of obtaining it.

Law-oriented, effects-based operations have become a critical piece of our counterinsurgency strategy in Iraq. Specifically, General David Petraeus, the U.S. commander in Iraq,⁹ established a Rule of Law Complex in Baghdad, an innovation the *New York Times* called an "important element of the American campaign plan."¹⁰ The Complex is a fortified "Green Zone" for legal infrastructure designed, the *Washington Times* reports, to "bring police, judicial/jail functions to a secure environment."¹¹ This self-contained haven permits Iraqis to solve Iraqi problems in relative safety for themselves and their families. Supporting this effort is the Law and Order Task Force, staffed by judge advocates (JAGs) from all the services. After completing a tour of reserve duty with the Task Force last summer, Colonel Lindsey Graham – who is, incidentally, a U.S. senator – observes that building a fair legal system that holds all segments of the population accountable is "[o]ne way to kill the insurgency beyond [using] military force."¹²

Other aspects of lawfare are more complicated. As Yale Law School Professor Michael Riesman and Yale Law School alumnus Chris T. Antoniou explained in their 1994 book, *The Laws of War*:

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even

reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.¹³

Of course, belligerents have long sought to use the perception or fact of wrongdoing by their opponents as a means of catalyzing support among their own people, and eroding it among their foes. Modern information technologies have, however, vastly increased the scope, velocity, and effectiveness of such efforts. For example, recriminations about civilian casualties – often illustrated by horrific images – instantly fill the broadcasts of the 24-hour global news services, and rapidly appear on thousands of websites and in the blogosphere. Adversaries waging this form of lawfare see our adherence to law as something to exploit. Professor William Eckhart, well-known for having prosecuted the My Lai cases during his JAG service, observes that:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our 'center of gravity.'¹⁴

It is a mistake, however, to reduce "lawfare" to a mere component of a glorified propaganda campaign. In truth, it is a richer and far more complex concept – and one, lamentably, subject to misunderstanding.

Among other things, concern from the public, NGOs, academics, legislatures, and the courts about the behavior of militaries is more than simply a public relations problem; it is a legitimate and serious activity that is totally consistent with adherence to the rule of law, democratic values, and – for that matter - lawfare. Accordingly, I disagree with Mr. Scott Horton when he charged in the July 2007 issue of *Harper's Magazine* that "lawfare theorists" – and I guess I'm one of them - reason that lawyers who present war-related claims in court "might as well be terrorists themselves."¹⁵ That is absurd. He apparently wants to endow lawfare with a kind of intrinsic evilness that it simply does not and *cannot* possess. As I say, lawfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why.

To be clear, I condemn any interpretation of lawfare which would cast terrorists as those legitimately using the courts to challenge any governmental action. As a matter of fact, the use of the courts is something I advocate as a

vitaly important lawfare measure. Why? Courts can help suppress criminal behavior which, especially in today's environment, operates to create effects indistinguishable from conventional battlefield defeats. It is no surprise that Lt. Gen. Ricardo Sanchez, then the senior American commander in Iraq, used customary military terminology in saying that Abu Ghraib was "clearly a defeat."¹⁶ Thus, wholly apart from abstract notions of justice, there are *pragmatic*, purely *military* reasons for using the courts. Commanders are keenly aware that if behavior like that at Abu Ghraib is allowed to flourish, the military task becomes vastly more difficult, and requires significantly more reliance upon costly military force.

Obviously, judicial action can help deter such damaging misconduct from occurring in the future. However, the legitimacy of the process requires the zealous efforts of all, including defense counsel. Recourse to the courts is a facet of lawfare to be encouraged, not discouraged. Of course, there are nefarious uses of lawfare. These would include those who would manipulate respect for the law to achieve a military advantage. An illustration is the frequency with which insurgents use mosques as armories, assembly points for fighters, and command and control centers. They are trying to take advantage of the protections normally accorded religious sites under the law of armed conflict.¹⁷ Even more despicable, our adversaries commonly hide among noncombatants in order to shield themselves from attack or, if attacked, propagandize any civilian losses that may occur. Unfortunately, this can drive the militaries of democracies to take well-meaning but ill-considered steps that ultimately play into enemy hands.

Consider how reports about NATO airstrikes allegedly causing civilian casualties were handled by the International Security Assistance Force (ISAF) in Afghanistan. As I wrote in a *Washington Times* op-ed last August,¹⁸ ISAF responded to queries about a report of such deaths by proclaiming that "NATO would not fire on positions if it knew there were civilians nearby."¹⁹ Sadly, such rules encourage the enemies to do exactly what we do not want them to do. That is, they surround themselves with innocents so as to immunize themselves almost entirely from attack.

As these examples show, lawfare – in both positive and negative forms – is now a fact of modern war. A recent web search of the term produced over 51,000 "hits" – a stupendous increase from the handful in 2001. The rise of lawfare has stimulated something of a "revolution in military legal affairs"²⁰ that has made JAGs an indispensable part of a commander's warfighting team. Because JAGs are members of the brotherhood of arms, commanders are naturally comfortable with them. Moreover, the military training JAGs

receive helps them understand the weapons, strategies, and command and control processes of modern war.

Knowing the military client's "business," so to speak, is *essential* for lawfare practitioners. Candidly, I find that many of our civilian colleagues, especially in academia, just do not know enough about today's high-tech military to be as expert as they might want to be. More than specialized technical expertise shapes the JAGs approach to legal issues. A fascinating essay by Professor Richard Schragger of the University of the Virginia Law School contrasts JAG conceptions from those of other government attorneys. He notes that:

Military lawyers seem to conceive of the rule of law differently [than civilian government lawyers]. Instead of seeing law as a barrier to the exercise of the client's power, these attorneys understand the law as a prerequisite to the meaningful exercise of power...Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.²¹

Not everyone, however, appreciates the new role of uniformed lawyers in contemporary lawfare-intense conflicts. I'd like to take a few minutes to discuss this criticism because I believe it is a crucial issue not just in the context of lawfare, but for national security law in general.

Consider the article that Professor John Yoo co-authored in the August issue of the *UCLA Law Review*. Yoo, I am sure you recall, was involved in some of the most troubling national security law legal opinions in recent years. Jack Goldsmith's recent book discusses several of them.²² In his article Professor Yoo attacks military lawyers as being much responsible for what he considers a "breakdown" in civil-military relations.²³ Professor Yoo's motivation for lashing out at JAGs is not difficult to discern: as Charlie Savage's new book reports,²⁴ JAGs opposed, with some success, several of the legal propositions Yoo touted when he worked in government.

Professor Yoo contends that the JAG legal opinions amounted to no more than simply "policy preferences" that should have yielded to his concept of the "unified decisionmaking" of the executive branch. I beg to differ. JAG opposition to harsh physical interrogation techniques was a reflection of an analysis of the fundamental principles of human decency that underpin law in this country, not to mention around the globe. Likewise, opposition to an evidentiary scheme for military commissions that would have allowed an accused to be convicted and sentenced to death based upon evidence he never saw is not a mere "policy preference" as Yoo would have it, but rather

insistence upon the most basic elements of due process common to every system of jurisprudence in the free world.

These are *legal* interpretations, and it is wrong to trivialize them into mere “preferences.”

In any event, Professor Yoo’s solution to the “breakdown” - as he calls it - in civil-military relations involves creating a “principal-agent” model in which, as I understand it, the legal advice of JAGs would have to conform with that of the executive branch’s politically-appointed lawyers. This would create a number of problems, including ethical ones. Our Air Force Rules of Professional Conduct, which are largely identical to the ABA Model Rules of Professional Conduct, state that military lawyers “shall exercise independent professional judgment and render candid advice.”²⁵

Professor Yoo also sees the courts as a disruptive influence on civil-military relations. Here’s the way he put it:

JAG attorneys representing enemy combatants...challenged the legality of their clients’ detention in federal court. Military officers with different policy preferences sought to introduce the judiciary as another actor to disrupt the unified decisionmaking of the principal.²⁶

yoo contends that the jag opinions amounted to no more than "policy preferences" that should have yielded to his concept of "unified decisionmaking." i beg to differ.

Amazingly, Professor Yoo is even unhappy with JAGs counseling commanders about warfighting legal issues. He disapproves of the idea that “American combat officers must now seek out JAGs for rulings on the incorporation of the law of armed conflict into their ongoing operations.”²⁷ In fact, he rebukes

civilian leaders for allowing “a regime to arise in which the JAGs advise, within the confines of the law, the best means of achieving military objectives.”²⁸ In my opinion, such advising is *exactly* what JAGs ought to do in the lawfare era.

What does Professor Yoo want to do about the JAGs he sees as “disruptive”? Punish them. Indeed, he castigates the “reluctance of civilian leaders to sanction military officers” who have, to his way of thinking, “undermined [civilian leaders’] decisions.”²⁹ As to the structure Professor Yoo advocates,

in my opinion it is at odds with that our Constitution provides. That document wisely assigns civilian-control-of-the-military responsibilities not just to the executive but to all three branches of government.

What is more is that our very strong Constitutional tradition seeks to keep the armed forces nonpartisan. Indeed, in *Greer v. Spock*,³⁰ the Supreme Court unequivocally insisted that the military be “insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes.” In the 2005 National Defense Authorization Act³¹ Congress acted to ensure that commanders and senior civilian leaders would have access to independent, nonpartisan legal advice from military lawyers. That landmark piece of legislation designated the Judge Advocate Generals as “the”³² legal advisors of their respective military departments, and their authority to render “independent legal advice” was enshrined in law.³³

Perhaps most importantly, the law now forbids anyone in the Department of Defense not only from interfering with the rendering of independent legal advice, but also from taking any action infringing upon the “ability” to do so.³⁴ It is important to emphasize that relations between military lawyers and the vast majority of our civilian counterparts are typically warm and professional. Still, as you may imagine, there remain a few who, like Professor Yoo, seem to fume about the role Congress has given JAGs, and seek to diminish it – and not all of them are academics outside of government. Yet the imperatives of today’s lawfare environment require much of JAGs. Accordingly, we continue – when necessary – to do our best to “speak truth to power,”³⁵ even when doing so is disquieting to those who may hear it.

Political appointees certainly have a right to put in place ideologically-driven policies so long as doing so comports with the law. And I agree that the proper public role of serving officers in debates about policy is currently the subject of much-needed discussion.³⁶ That said, should we not strive to make determining the “law” in a given situation a politically-neutral task? In my mind there is a real distinction between debating policy and determining the law. Healthy civil-military relations are vital to a democracy.³⁷ JAGs work hard to do their duty yet not overstep the proper bounds - a rather tricky proposition in a place like Washington where everything seems to have a partisan dimension these days. The support – and vigilance – of the American public is needed to ensure the appropriate balance is maintained.

Allow me to close with another plea. Today more than ever our nation needs the synergistic efforts of the entire government, both military and civilian, to succeed in today’s complex lawfare milieu. Let us work together – ag-

gressively – to maximize mutual respect in the dialogue. This is a critical challenge for the entire national security law community. ▣

-William Ko served as lead editor for this article.

NOTES

- ¹ *Lawfare*, The Reporter, Keystone Edition, 2005, at 95.
- ² *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited Jan. 3, 2008).
- ³ John Carlson and Neville Yeomans, *Whither Goes the Law – Humanity or Barbarity*, in *The Way Out - Radical Alternatives in Australia* (M. Smith and D. Crossely, eds., 1975) available at <http://www.laceweb.org.au/whi.htm> (last visited Jan. 3, 2008).
- ⁴ Lyric Wallwork Winik, *A Marine's Toughest Mission* (Gen. James L. Jones), *Parade Mag.*, Jan. 19, 2003, available at http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones (last visited Jan. 3, 2008) General Jones was the Supreme Allied Commander, Europe.
- ⁵ See e.g., *Globalization of Law*, Global Policy Forum, available at <http://www.globalpolicy.org/globaliz/law/index.htm> (last visited Jan. 3, 2008).
- ⁶ For a discussion of how the changing economic and technological environment influences war, see generally Alvin and Heidi Toffler, *War and Anti-War: Survival at the Dawn of the 21st Century* (Little, Brown and Company, 1993).
- ⁷ See John J. Lumpkin, *Military Buy's Exclusive Rights to Space Imaging's Pictures of Afghanistan War Zone*, *Space.com*, Oct. 15, 2001, available at http://www.space.com/news/dod_spaceimaging_011015.html (last visited Jan. 3, 2008)..
- ⁸ For more information about effects-based operations see generally Department of the Air Force, *Air Force Doctrine Document (AFDD) 1, Air Force Basic Doctrine*, 17 Nov. 2003, available at http://www.dtic.mil/doctrine/jel/service_pubs/afdd1.pdf . (last visited Jan. 3, 2008).
- ⁹ For a biography of General Petraeus see, *Multi-National Force – Iraq (MNF-I), MNF-I Commanding General*, Mar. 8, 2007, available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=23&Itemid=16 (last visited Mar. 29, 2007).
- ¹⁰ Michael Gordon, *In Baghdad, Justice Behind the Barricades*, *New York Times*, July 20, 2007 available at <http://www.nytimes.com/2007/07/30/world/middleeast/30military.html?ref=world> .
- ¹¹ *The New Iraq Justice Center*, *Washington Times*, Apr. 10, 2007, at A14 (editorial).
- ¹² Sharyl Attkisson, *Senator's Secret Mission*, *CBS News*, May 7, 2007, available at <http://www.lindseygraham.com/news/Read.aspx?ID=42> (last visited Jan. 3, 2008).
- ¹³ W. Michael Reisman and Chris T. Antoniou, *The Laws of War* xxiv (1994).
- ¹⁴ William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 *Chi J Intl L* 431 (2003).
- ¹⁵ Scott Horton, *State of exception: Bush's war on the rule of law*, *Harpers Mag*, July 2007, available at <http://www.harpers.org/archive/2007/07/0081595> (last visited Jan. 3, 2008).
- ¹⁶ Tom Brokaw, *Gen. Sanchez: Abu Ghraib 'Clearly a Defeat'*, *MSNBC.com*, Jun. 30, 2004, available at <http://msnbc.msn.com/id/5333895/> (last visited Nov. 5, 2007).
- ¹⁷ See generally, Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for the Moral High Ground*, 56 *A.F. Law Rev.* 1, Winter, 2005, available at http://findarticles.com/p/articles/mi_m6007/is_56/ai_n14700122 (last visited Jan. 3, 2008).
- ¹⁸ Charles J. Dunlap, Jr., *Lawfare amid Warfare*, *Washington Times*, Aug. 3, 2007, at A19 available at <http://washingtontimes.com/article/20070803/EDITORIAL/108030004/1013> (last visited Nov. 7, 2007).
- ¹⁹ Noor Kahn, *Afghan Civilians Said Killed in Clash*, *Yahoo! News*, Jun. 30, 2007, available at http://news.yahoo.com/s/ap/20070630/ap_on_re_as/afghanistan (last visited Jul. 10, 2007).
- ²⁰ *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 *A.F. L. Rev.* 293 (2001).
- ²¹ Richard C. Schragger, *Cooler Heads: The Difference between the President's Lawyers and the Military's*, *Slate.com*, Sept. 20, 2006, available at <http://www.slate.com/id/2150050/?nav/navoa> (last visited Jan. 3, 2008).
- ²² Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton, 2007).
- ²³ John Yoo and Glenn Sulmasy, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 *UCLA Law Review* 1815 (2007).
- ²⁴ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown & Co., 2007).
- ²⁵ Department of the Air Force, *The Judge Advocate General (JAG) Policy Memorandum, TJAGC Standards - 2, Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct, attachment 1, Rule 2.1, Advisor*, Aug 2005.
- ²⁶ Yoo and Sulmasy, *supra*, note 23, at 1833.

²⁷ *Id.*

²⁸ *Id.*, at 1844.

²⁹ *Id.*

³⁰ Greer, et al. v. Spock, 424 U.S. 828 (1976) available at <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/greer.html>.

³¹ Codified for the Air Force in 10 USC §8037 (2004).

³² 10 USC §8037 (c) (1).

³³ 10 USC §8037 (f) (1).

³⁴ *Id.*

³⁵ For an interpretation of the source of this phrase, see Larry Ingle, *Living the Truth, Speaking to Power*, Religious Society of Friends, available at http://www2.gol.com/users/quakers/living_the_truth.htm (last visited Nov. 3, 2007).

³⁶ For a discussion about the role of general officers in public debates, see Charles J. Dunlap, Jr., *Voices from the Stars: America's Generals and Public Debates*, ABA National Security Law Report, Nov. 2006, at 8 available at http://www.abanet.org/natsecurity/nslr/2006/NSL_Report_2006_11.pdf (last visited Nov. 7, 2007).

³⁷ See e.g., Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 Wake Forest L. Rev. 334 (1994) and Charles J. Dunlap, Jr., *Melancholy Reunion: A Report from the Future on the Collapse of Civil-Military Relations in the United States*, *Airpower J.*, Winter 1996, at 93, available at <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj96/win96/dunlap.html> (last visited Jan. 3, 2008).