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# Unconventional Lawfare: Operational Law in the War on Terror

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# Unconventional Warfare: Operational Law in the War on Terror

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POLS 491: Political Science Honors Thesis  
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## Table of Contents

Introduction: a War on Terror, Lawfare and Executive Bureaucracy	3
The Origins of the Warrior-Lawyer	8
The Bush Administration vs. The Warrior-Lawyer	24
An Internal Bureaucratic War Over Lawfare	57

## Introduction: a War on Terror, Lawfare and Executive Bureaucracy

*“The greatest danger to liberty lurks in the insidious encroachment by men of zeal, well-meaning but without understanding.”* - Justice Louis Brandeis *Olmstead v. United States* (1928)

*“Lawyer first, Soldier always.”* - The Motto of the U.S. Army JAG Corps

*“You have got to know your business inside and out and you have got to think like an operator. Your job as a military lawyer is not to prevent me from doing my job, your job as a military lawyer is to make it possible for me to do my job without breaking the law, without blowing up things I should not blow up, without killing people I should not kill...”* Lieutenant General Michael Short (2002)

It is in the inherent nature of a terrorist organization to combine sustained violence or the threat of violence with propaganda. Terrorists therefore reject being labeled as such and accuse their perceived oppressor of being the true terrorist as part of a broader propaganda campaign. A significant component of modern radical Islamic terrorist groups the United States is at war with today involves a particularly forceful subversive tactic that aims at labeling the United States as the real terrorists, through claims of violations for the laws of war. This tactic is called lawfare.

Today enemies, like al-Qaeda, al Shabaab, and ISIS, cannot match the United States military conventionally, and lawfare is one of many unconventional methods used by these groups to achieve a tactical victory. By hiding from gunfire in mosques or making bombs underneath a hospital, they describe the inevitable civilian casualties as war crimes, even when everything was done to avoid civilian deaths and the deaths that do occur are legally permissible as collateral damage under the rules of warfare.<sup>1</sup> Air Force Judge Advocate Brigadier General Charles Dunlap popularized the term lawfare and defined it as the “strategy of using or misusing law as a

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<sup>1</sup>Jack Goldsmith, *Terror Presidency: Law and Judgement Inside the Bush Administration*, (W.W. Norton Co.: New York, 2007), 58-59.

substitute for traditional military victories.”<sup>2</sup> Al-Qaeda training manuals advise terrorists to use this lawfare tactic.<sup>3</sup> This can have a negative effect on frontlines soldiers by causing them to second guess themselves and “freeze-up” when there is a need for action. Jack Goldsmith a former Deputy Assistant Attorney General, adequately sums up why lawfare is so effective by stating “Lawfare works because it manipulates something Americans value: respect for law.”<sup>4</sup>

The effects of lawfare are not limited to frontline soldiers. What makes lawfare tactics so threatening is their ability to influence the highest levels of leadership in Western liberal democracies, like the United States. The effects of lawfare are two-pronged. The first prong is international opinion, which has the potential to cause allies to back out of coalitions against terrorist groups, condemn the United States in the United Nations General Council or lead to prosecution in the International Criminal Court. The second prong is the ability of lawfare to distract an executive from legitimate military objectives by causing the legislative and judicial checks and balances inherent in liberal democracies to unduly constrain the executive.

Although lawfare has the potential to improperly restrain the president of the United States in a time of war, warfare has been permanently legalized and the president must be proactive in creating a defense against the rhetorical weapons of lawfare. The focus of the debates on lawfare has been of the “misuse of law.” However, the often-overlooked aspect in the definition, “the use of law,” can be just as powerful of a rhetorical weapon. Lawfare is both offensive and defensive. The superior military power will usually be on the offensive when it comes to military operations but on the defensive when it comes to lawfare, because the weaker military power will be more apt to use lawfare to level the playing field. It is the responsibility of the president of the United

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<sup>2</sup> Jack Goldsmith, *Terror Presidency*, 58.

<sup>3</sup> Jack Goldsmith, *Terror Presidency*, 58-59.

<sup>4</sup> Jack Goldsmith, *Terror Presidency*, 59.

States and his administration: through correct legal interpretations, presidential policy guidance, Congressional legislation, and Supreme Court precedents, to deflect lawfare attacks.

Although General Dunlap coined the term lawfare in 1999, the U.S. Department of Defense's Judge Advocate Generals' Corps had created an entire bureaucratic role dedicated to defending the U.S. military against the rhetorical weapons of lawfare after the Vietnam War. This bureaucratic role is called Operational Law. During the War on Terror terrorist groups attempted to tarnish the military of the United States through the use of lawfare. To counter this threat the JAG Corps used Operational Law and the institutionalized bureaucratic structure that developed around it to uphold the military's honor and create a better lawfare defense.

The legal work required to establish a sufficient lawfare defense is derived from executive bureaucracies, specifically the White House Counsel's office, the Department of Justice's Office of Legal Counsel (OLC), in conjunction with the Department of Defense Judge Advocate Generals' Corps (JAG Corps). The latter is the focus of this work. As previously stated, the JAG Corps had developed the field of Operational Law to address the lawfare attacks that faced the military. Operational Law has been institutionalized in the JAG Corps' bureaucracy, installing a self correcting entity within the military, that confirms lethal force was used lawfully. Mark Martins, a distinguished officer in the JAG Corps, sums up this point by stating, "when this process works legal advice does not constrain policy but rather confirms it."<sup>6</sup>

The following chapter will lay out how the JAG Corps developed into a well-entrenched bureaucracy with a moral mission to uphold the military's honor through laws in the 1980s and 1990s, and how it became the first line of defense against lawfare. The third chapter will

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<sup>6</sup> Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, (W.W. Norton Co.: New York, 2009), 138.

establish how the Bush administration chose to ignore the advice of the JAG Corps, thus sparking a bureaucratic battle. The fourth chapter will outline how the bureaucratic battle was fought domestically and how it relates to foreign policy. Although the bureaucratic battle between the Bush administration and the JAG Corps had the trappings of a turf war, it was instead fought over a moral sense of mission to uphold the military's honor and better defend against the rhetorical weapons of lawfare. The fifth chapter will blueprint how the Obama administration saw the early mistakes of the Bush administration's legal interpretations and cooperated with the JAG Corps to create a better lawfare defense. Finally, the conclusion will sum up role of the JAG Corps in the War on Terror and speculate on the best defense for future lawfare attacks that will inevitably occur against the Trump administration.

This case study of lawfare and the JAG Corps' role in the War on Terror synthesizes American foreign policy and American government, because the institutionalized mechanisms designed to defend against lawfare within the U.S. government relate to foreign policy. In this case, American anti-terror policy and the executive bureaucracy are intrinsically linked.

Therefore, the internal mechanisms of the Bush, Obama, and Trump administrations directly affect how lawfare is waged against the U.S. and how the U.S. defends against it. Like many aspects of the War on Terror, the United States will never achieve a clear victory. No matter what legal measures are implemented on the battlefield, terrorists will always cry foul. The best result the U.S. can achieve on the lawfare front is favorable domestic public opinion and particularly the favorable opinion of the elite public officials, specifically Congress and the Supreme Court. The measure of success in a lawfare defense is the executive branch's ability to create legal interpretations that successfully implement congressional legislation and Supreme Court cases, in order to prevent distractions from the military mission.

In order for the United States to keep current terrorist threats at bay and prevent new recruits, it must successfully defend against lawfare, while simultaneously continuing successful military operations in the War on Terror. The JAG Corps throughout the War on Terror has had the institutionalized goal of upholding the honor of the United States military and defending against lawfare. As we will see the Bush administration propounded an expansive interpretation of the power of the executive and sought to minimize the rights afforded detainees, sparking a bureaucratic battle with the JAG Corps. The Bush administration's policy initiatives did not provide a good defense to lawfare, thus his policies were gradually changed from decisions rendered by the Supreme Court and congressional action. The Obama administration cooperated with the JAG Corps and developed presidential policy guidance that created a better defense against the rhetorical weapons of lawfare than the Bush administration. It remains to be seen whether the Trump administration will learn from the mistakes caused by the overreach of the Bush administration and adhere to the successful procedures established during the Obama administration or repeat these mistakes.

## The Origins of the Warrior-Lawyer

*“One of the notable changes I had observed from my service in the Pentagon in the 1970s was the prevalence of lawyers--in almost every office and in nearly every meeting. By the time I returned as secretary in 2001, there were a breathtaking ten thousand lawyers, military and civilian, involved in nearly every level of the chain of command across the globe.”*<sup>7</sup>- Donald Rumsfeld

*“All personnel connected with military operations must understand that violations of legal constraints may adversely affect the overall accomplishment of U.S. policy objectives, even though the military objective is accomplished.”*<sup>8</sup>- LTC Gerald C. Coleman

### *A New Mission*

The Judge Advocate General’s Corps (JAG Corps) is a relatively small bureaucracy, compared to the sprawling executive branch of the twenty-first century. Each individual branch of the United States military has its own specific JAG Corps, which together form a coalition of military bureaucracies under the Joint Chief of Staff. The JAG Corps was created by General George Washington on July 29, 1775, following a long English Common Law tradition of having a separate judicial structure for the military; their mission was to maintain discipline and order.<sup>9</sup> The JAG Corps has sought to maintained this mission through its history and continues to carry out this duty today. During the late 1970s and through the 1980s the JAG Corps was given an additional mission, giving legal advice to combat commanders before and during active lethal force missions. This function became known as “Operational Law.” The new role would be

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<sup>7</sup> Donald Rumsfeld, *Known and Unknown*, (New York: Sentinel, 2011), 557.

<sup>8</sup> LTC Gerald C. Coleman, “Operational Law and Contingency Planning at the XVIII Airborne Corps,” *The Army Lawyer*, Department of the Army Pamphlet 27-50-183 (1988): 17.

<sup>9</sup> U.S. Army Website, “Army JAG Corps,” (<http://www.goarmy.com/jag/about/history.html>)

conducted at the lowest levels of the JAG Corps, under the title Staff Judge Advocates (SJA). The title creates a distinction between a Judge Advocate practicing military criminal law and one that practices Operational Law. All SJAs are members of the JAG Corps, but not everyone in the JAG Corps is an SJA.

The theories of James Q. Wilson, provide useful tools to categorize the many agencies of the United States executive branch. Organizational systems are comprised of “outputs” (day to day activities) and “outcomes” (the results). Using a local police force as an example, an “output” would be protect and serve the community and an outcome would be calls answered, areas patrolled, tickets issued, incidents investigated and arrests made.<sup>10</sup> Operational Law created a new organizational system within the JAG Corps. This organizational system supplemented but did not clash with the previous system that the JAG Corps had maintained since it was established in 1775.<sup>11</sup> The old organizational system, confined to offices and courtrooms, had easily measurable “outputs,” case research and trials and easily measurable “outcomes,” verdicts or the production of legal documents. The JAG Corps’ original system was designed to meet its original missions, which fits neatly into the category of a “production organization.”<sup>12</sup> The new organizational system of SJAs only operated outside the United States and with JAG officers embedded with combat troops--as opposed to the military criminal justice system that only occurred in American military courts. This new system had both outputs and outcomes that were difficult to measure due to the chaos of war and the need for instantaneous decisions, making it more like a “coping organization.”<sup>13</sup> Along with this new organizational system came a new

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<sup>10</sup> James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It*, (United States: Basic Books, 2000), 158.

<sup>11</sup> James Q. Wilson, *Bureaucracy*, 91-92.

<sup>12</sup> James Q. Wilson, *Bureaucracy*, 159.

<sup>13</sup> James Q. Wilson, *Bureaucracy*, 169.

organizational culture: the JAG Corps began to pride itself on being the protector of the honor of the U.S. military by preventing war crimes and international incidents from occurring.<sup>14</sup>

Eventually this new organizational structure and culture affected both the Bush and Obama administration's policies during the War on Terror. Each of the factors that created the Operational Law culture of the JAG Corps merit their own analysis due to the implications each one had in enlarging the JAG Corps' bureaucratic clout prior to the War on Terror.

Just prior to the rapid deployment of forces for the invasion of Grenada in Fall 1983, a memo called Joint Chiefs Memorandum 59 made important adjustments to the JAG Corps. Written in June of 1983, this memo effectively created the Department of Defense (DOD) Law of War Program. In this memorandum the Joint Chiefs of Staff mandated legal assistance in the planning and conduct of military operations, to ensure that the actions on the ground were in compliance with the Laws of Armed Conflict.<sup>15</sup> American military forces have fought many wars since the Revolutionary War without the benefit of legal advice from JAG officers. The logical question one might ask is: why did the Joint Chiefs want JAGs to be involved in the planning and conduct of combat for all future operations, when in every other conflict since the first attempt to codify rules of war JAGs were not considered necessary for this purpose?

There is no single event that explains why the U.S. Joint Chiefs deemed it necessary to add "Operational Law" to the JAG Corps list of responsibilities. Instead, the answer lies in several factors, including: the poor image of the U.S. military during and immediately after the Vietnam War; an aggressive post-Watergate media; perceived limits on the president's ability to use military force without congressional authorization; and a geopolitical environment that had

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<sup>14</sup> James Q. Wilson, *Bureaucracy*, 92.

<sup>15</sup> MAJ Rudolph C. Barnes Jr., "Operational Law, Special Operations and Reserve Support," *The Army Lawyer*, Department of the Army Pamphlet 27 -50-144 (1984): 3.

shifted to unconventional conflicts. As a result of the confluence of these factors, the United States Military implemented Operational Law haphazardly during the invasion of Grenada titled Operation Urgent Fury. The immediate success the JAG Corps experienced in this operation solidified their role in assisting the planning combat operations. Once the new mission of Operational Law was confirmed by the military and the President, the JAG Corps bureaucracy began to further cement itself in this new role, through new education, training and professional norms. Ultimately the JAG Corps' bureaucratic clout would extend its influence well beyond its own bureaucracy.

Although the term was not coined until 1999 by Major General Charles Dunlap, the field of Operational Law is under the umbrella of lawfare. As discussed in the introduction lawfare will be used later during the War on Terror as an asymmetric tactic, designed to damage or delegitimize a superior military force like the United States. Operational Law was created to protect against the rhetorical weapons of lawfare by providing a legal defense to the use of military force.

The study of the JAG Corps' impact on the War on Terror relates both to American government in the form of bureaucracies and International Relations in the form of American foreign policy. The study of American bureaucracy and the lawfare rhetoric used by terrorist groups are intrinsically connected. The JAG Corps will use the institutional mechanisms developed in the 1980s and 1990s to fight a bureaucratic battle to uphold the honor of the United States military and defending against lawfare.

#### *Reasons for Operational Law*

There are several explanations for the development of Operational Law. For one, the War in Vietnam, perhaps more than any other conflict in United States history, demonstrated that U.S.

military operations are “an extension of the political process,” and that “the political consequences of military operations can determine their success or failure.”<sup>16</sup> The Vietnam War damaged the military’s reputation, creating a less than honorable view of the military services. The U.S. military, and the Army in particular, sought to learn from the mistakes made in Vietnam. The My Lai Massacre occurred in the spring of 1968, but was only prosecuted after the Associated Press broke the story in the fall of 1969. The subsequent investigation and court martial found only one officer, Second Lieutenant Calley, guilty. Calley subsequently served only three years of a life sentence for his role in the massacre. To prevent future atrocities of this nature, JAG officers would give direct legal advice to the commander during the planning phase on whether an operation follows any applicable domestic or international law, or if it could potentially violate these laws, necessitating corrective action to revise the plans. This was to ensure that soldiers, when confronted with insurgents or unlawful combatants who did not abide by the Laws of War, would act with discipline and humanity, unlike the events that occurred in My Lai.<sup>17</sup>

Military commanders, prior to the extension of the JAG Corps officers into combat operations, also cited the media’s new aggressive journalistic tactics and the ease with which reports could be transmitted across the globe with satellite technology as major issues in conducting military operations.<sup>18</sup> After the Watergate scandal, media outlets developed a distrust for the executive branch, especially departments and agencies that can take covert action and keep information classified. The term “front page ready,” meaning every combat operation was

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<sup>16</sup> MAJ Barnes, “Operational Law, Special Operations and Reserve Support,” 6.

<sup>17</sup> LTC Marc L Warren, “Operational Law- A Concept Matures,” *Military Law Review*, No. 33 (1996): 58.

<sup>18</sup> LTC Coleman, “Operational Law and Contingency Planning at the XVIII Airborne Corps,” 17.

ready to be explained to the American public in the news, had not been coined in 1984; but the United States military was changing its standard operating procedures (SOP) to make military or peacekeeping operations front page ready because they were reviewed by an SJA.

In the past, a commander could violate a law or two with impunity, so long as the battle was won. Today, a thoughtless violation of law or policy can turn an otherwise successful operation into a media event. Because Commanders want to avoid unscheduled appearances on the nightly news, a competent SJA involved in the planning and conduct of operations is a good preventive measure.<sup>19</sup>

The perception that military leaders held in the aftermath of Watergate was that they were forced to deal with a hostile and overzealous media. These concerns over the media were being cited as the cause for a slower operational tempo and a more cautious approach to engaging in combat generally. Furthermore, the typical bilateral conventional conflicts the United States previously fought and was training for, against an enemy such as the Soviet Union, were becoming obsolete, due to geopolitical developments. Instead of these conventional (and straightforward) conflicts, the emerging threats were unconventional in nature. These types of asymmetric conflicts were categorized under the umbrella phrase “the spectrum of low intensity operations.”<sup>20</sup>

Operations like peacekeeping, foreign internal defense operations (training foreign militaries), supporting resistance movements, counter insurgencies and most significant to this work, counterterrorism operations, all fall under the spectrum of low intensity conflicts.

Operational Law was developed to respond to these new engagements because they often

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<sup>19</sup> MAJ Barnes, “Operational Law, Special Operations and Reserve Support,” 7.

<sup>20</sup> MAJ Gary L. Walsh, “Role of Judge Advocates in Special Operations,” *Army Lawyer*, Department of the Army Pamphlet 525-34 (1989): 1.

involved a hybridity of politics, law enforcement, intelligence and the military. Terrorism had historically been addressed as a law enforcement issue, but as the destructive capabilities of terrorism increased, the military's resources were needed to address the threats.<sup>21</sup> The U.S. military was slowly adapting to these new conflicts with the omnipresent concern that one misstep would be broadcast across the world in a matter of minutes. Missteps were deemed more probable with unclear battle lines and non-state actors involved, because the nature of these types of conflicts creates additional confusion on the battlefield and the enhanced danger of unintended casualties. Low intensity operations precipitated the expanding integration of the JAG Corps into the military decision making process.

Operational Law becomes even more important when working with the Joint Special Operations. Often the most successful strategy in addressing the rise of unconventional low intensity conflicts was the use of unconventional Special Forces units. Covert and clandestine Special Forces involve more significant political implications and can often become political pitfalls if the operation goes awry. This frequently causes the legal and political implications to outweigh conventional military considerations in battle planning. Furthermore, Special Forces do not fit into a neat legal framework. Conventional Operations, like Operation Desert Storm in 1991, were much easier to validate legally because of the Laws of War precedents that had gradually accumulated in the decades since laws of war were first codified. Low intensity conflicts conducted by Special Operations during the 1980s did not have much precedent. This was especially true of the anti-terror operations. America's first military anti-terror unit, 1<sup>st</sup> Special Forces Group, Detachment Delta, was created in 1977, and the legal precedent developed for most of the instances of Special Forces' use of lethal force and capture was developed in the

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<sup>21</sup> Bruce Hoffman, *Inside Terrorism*, (New York: Columbia University Press, 1998), 93.

1980s and 1990s.<sup>22</sup> This legal foundation provided the military-law status quo that the Bush administration would encounter after 9/11.

Traditionally, units were given legal representation based on their size, and since Special Forces Units--especially the anti-terror units--were so small, they lacked SJAs that were able to work directly with their planning staff.<sup>23</sup> It was determined during the Reagan administration that Special Forces groups would receive more SJAs at their command centers, due to the nature of their activities. Ultimately, this further expanded the JAG Corps' role in the Joint Special Operations command, the organization that was and still is customarily called upon to conduct "hunter-killer" raids and drone strikes in areas of undeclared hostility during the War on Terror.

The sensitivity of special operations can be more fully appreciated against the backdrop of the War Powers Resolution of 1973. The final factor contributing to the creation and growth of Operational Law during the 1980s was the Reagan administration's interpretation of the War Powers Resolution. His administration deemed it to be an unconstitutional and an invalid check on his executive power. President Bush would also question its constitutionality. Despite the denial of its constitutional validity, Reagan made the decision to act "consistent with (but not pursuant to)" the War Powers Resolution during peacekeeping operations conducted by U.S. Marines in Lebanon in 1983.<sup>24</sup> Ultimately, the JAG Corps was assigned the critical job of ensuring the commanders on the ground minimized the requirement to report clandestine operations to Congress through the drafting of appropriate Rules of Engagement (ROE).

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<sup>22</sup> Stew Smith, "Delta Force: Missions and History," *Military*, <http://www.military.com/special-operations/delta-force.html> (accessed Jan. 19, 2017).

<sup>23</sup> MAJ Barnes, "Operational Law, Special Operations and Reserve Support," 6.

<sup>24</sup> Vincent A. Auger, "The War Powers Resolution and U.S. Policy in Lebanon, 1982-1984," *Georgetown Institute for the Study of Diplomacy*, 2.

For example, a common low-intensity mission conducted by Special Forces deployed overseas is a Foreign Internal Defense operation, in which elite teams train and equip foreign militaries. Foreign Internal Defense missions have increased during the War on Terror to assist foreign militaries in the capturing and killing of terrorists and removing terrorist safe havens, while operating with a “light footprint.” From a military standpoint, these types of missions are most successful when there is low visibility of the mission, because they’re usually covert and any media attention can compromise the operation.

Under the War Powers Resolution, the President is required to notify the Speaker of the House of Representatives and the President Pro Tempore of the Senate within forty-eight hours of the use of military force and to provide reasons for the deployment. Exceptions are made for “deployments which relate solely to the supply, replacement, repair or training of such forces,” so long as there is no threat of “imminent involvement in hostilities.”<sup>25</sup> Reporting a deployment to Congress can change a low-visibility operation into a high-visibility political issue, potentially damaging the military mission. The reasons for the deployment could be based on classified information that has a higher likelihood of being leaked if briefed to Congress or given Congress’s deliberative nature, a time sensitive military objective could be missed due to prolonged debate. Furthermore, under those presidential administrations that questioned the constitutionality of the War Powers Resolution, (such as President Bush’s administration), avoiding a report to Congress restored the executive branch’s war powers.

To avoid reporting operations to Congress it is important in Foreign Internal Defense missions to prevent “mission creep,” meaning preventing a mission with no imminent hostilities from slowly creeping into a mission that might involve hostilities and lethal force. Something as

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<sup>25</sup> Vincent A. Auger, “The War Powers Resolution and U.S. Policy in Lebanon, 1982-1984,” 1.

simple as carrying a more lethal weapon, such as an M-4 rifle as opposed to an M-9 pistol, a relatively minor legal infraction, can have significant implications if the host nation's citizens perceive an increased threat from U.S. forces. Meticulously drafted ROE and competent legal and political support from the JAG Corps can minimize the chance of hostilities, which in turn reduces the potential risk of turning a military mission into a political issue.<sup>26</sup>

President Bush would not receive a formal declaration of war but did receive the Authorization for the Use of Military Force (AUMF) in 2001 for the War against al-Qaeda and another AUMF in 2002 to support the use of military forces in Iraq. President Obama would inherit the 2001 AUMF and utilize it with the assistance of the JAG Corps to geographically expand the War on Terror without the burden of additional congressional Authorization.

*The First Use of Operational Law: Urgent Fury*

On October 19, 1983, Grenada's leftist government was removed by a coup d'état, and replaced by militant Stalinists. The Reagan administration responded six days later by engaging the military's Rapid Deployment Force, a joint force utilizing the capabilities of Army Special Forces, Army Rangers, the Army's 82<sup>nd</sup> Airborne Paratroopers, Navy SEALs and Marines. The title Rapid Deployment Force adequately represents its ability to quickly infiltrate foreign countries through airborne, air assault or amphibious operations. For the first time in U.S. military history, SJAs were among the U.S. Forces forwardly deployed in Grenada. SJAs air landed with the 82<sup>nd</sup> Airborne Divisions assault command post.<sup>27</sup> (An assault command post is comprised of only twenty-six personnel, both staff officers and non-commissioned officers, and they all must be air-deployable--meaning they have the training to jump out of an airplane over

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<sup>26</sup> MAJ Barnes, "Operational Law, Special Operations and Reserve Support," 5-6.

<sup>27</sup> LTC Marc L. Warren, "Operational Law- A Concept Matures," 39.

hostile territory.) The decision to include a Judge Advocate as part of the assault command personnel demonstrates the emphasis placed on embedding a JAG officer as close to the front as possible.<sup>28</sup> The inclusion of SJA within this small unit was a decisive military development.

Prior to the conflict in Grenada there was a consensus among the Judge Advocate Generals (the highest ranking military members of the JAG Corps) that more needed to be done to address the legal issues presented by combat (lethal) and peacetime (non-lethal) overseas operations. The new role of the JAG Corps in advising commanders as to when it was legally permissible to use lethal force and to what extent such force could be used was deemed especially vital. The significance of this change was not foreseen at the time due to the sudden nature of the conflict, but Operation Urgent Fury solidified the emerging concept of “Operational Law” after its use in combat.<sup>29</sup> Judge Advocates were no longer to be found exclusively in courtrooms and offices. Instead, Judge Advocates would thereafter also be found near the frontlines of battlefields advising commanders on permissible combat operations.

#### *Adjusting to the “Forward Deployment” of Operational Law*

This new role for Judge Advocates in the Grenada conflict hastened the need to define Operational Law. The concept was not fully delineated until the After-Action Report (AAR) for Operation Urgent Fury was prepared. This report, written by the commanders of the 82<sup>nd</sup> Airborne Division, identified in detail the diverse number of legal issues SJAs successfully assisted them with in navigating the applicable laws. The report called for the continuation of

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<sup>28</sup> U.S. Army, *Field Manual 71-100-2 Infantry Division Operations: Tactics, Techniques and Procedures*, Department of the Army, 1996, 83.

<sup>29</sup> MAJ Rudolph C. Barnes Jr., “Operational Law, Special Operations and Reserve Support,” 7.

SJAs as far forwardly deployed as feasible.<sup>30</sup> The definition that was subsequently created has guided the implementation of Operational Law ever since:

the body of Domestic and International law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, pre-deployment preparations, deployment, overseas procurement, the conduct of military and combat operations, anti- and counter-terrorist activities, status of forces agreements, operations against hostile forces and civil affairs operations.<sup>31</sup>

This definition was included in the first Operational Law Handbook written in 1984, and followed a series of recommendations by the Generals in the JAG Corps. By 1987, the definition was implemented into the curriculum at the Judge Advocate Generals Legal Center and School. The training Judge Advocates receive in Operational Law is absorbed and filtered through a unit's commander and affects how soldiers are trained at the lowest levels. Within the Reagan administration and all subsequent administrations there have been internal debates regarding whether the Judge Advocate General's Corps should even be involved in the planning of operations and if so, to what extent. Since Operation Urgent Fury, Operational Law as interpreted by the JAG Corps has slowly broadened and thus, so has the JAG Corps' influence on determining when lethal force is legal or illegal.

Operational Law was professionally implemented through the JAG Corps' school. The JAG Corps' school systematically "inculcates points of view, attitudes, and loyalties to the

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<sup>30</sup> LTC Coleman, "Operational Law and Contingency Planning at the XVIII Airborne Corps," 19.

<sup>31</sup> LTC David E. Graham, "Operational Law- A Concept Comes of Age," *Army Lawyer*, Department of the Army Pamphlet 27-50-175 (1987): 10.

organization.<sup>32</sup> The inclusion of Operational Law in the JAG Corps' curriculum created an organizational culture of insuring wars were fought from a moral high ground that would remain in place at the beginning of the War on Terror.<sup>33</sup>

Additionally, in order to draft an accurate ROE, the SJA must be close enough to the frontlines to work in an assault command post. Being a component of an assault command post requires a basic level of tactical knowledge, including knowing how to jump out of airplanes or repel out of helicopters carrying a combat load. Though Judge Advocates are not kicking in doors and clearing rooms with the infantry, tactical training schools like Airborne, Air Assault, Ranger School and the Special Warfare Center were opened to SJAs for the first time in 1984.<sup>34</sup> Additionally, there was a new emphasis on the physical fitness of SJAs. SJAs needed not only to carry their weight but do so in a way that gains the trust of the commanding officer in charge of putting soldiers in harm's way.<sup>35</sup> Many of the changes in training were designed to increase SJAs knowledge of operations and weapons systems in general, thus building increased rapport with commanders that ensures they heed the SJA's advice. Ultimately, the increased tactical training given to SJAs expanded not only the budget of the JAG Corps but also their professional standards and their ability to influence decision-making beyond their ranks.

During the Bush administration, in the early 2000s, the JAG Corps did not have the direct power to force their legal positions on other members of the executive branch. However, the influence they were imbued with in the 1980s will only grow as their Operational Law role becomes more established, creating enough clout to allow them to persuade the rest of the

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<sup>32</sup> James Q. Wilson, *Bureaucracy*, 92.

<sup>33</sup> James Q. Wilson, *Bureaucracy*, 91-92.

<sup>34</sup> MAJ Barnes, "Operational Law, Special Operations and Reserve Support," 4.

<sup>35</sup> MAJ Barnes, "Operational Law, Special Operations and Reserve Support," 4.

executive branch to listen to their views; take them very seriously; and defy them only at considerable peril. In the process, the JAG Corps even acquired the ear of the other two branches of government, magnifying their influence even further.

### *An Entrenched Bureaucracy*

The power of the JAG Corps is extremely difficult to quantify. What we know after Operation Urgent Fury is that SJAs had established a role advising the commanding officer whether his plan was or was not legally valid under the Universal Code of Military Justice (the domestic codified law of the U.S, Military), Geneva Conventions and any other applicable international law. Most commanding officers do not want to be on the wrong side of a war crime and a court-martial, so they often implement the advice given by the assigned Judge Advocates.<sup>36</sup>

It is important to understand the origins of Operational Law, which led to the expansion of the JAG Corps' bureaucracy, in terms of both funding and the influence the organization now had on the battlefield leading up to the War on Terrorism. Returning to the categories laid out by James Q. Wilson, the JAG Corps' organizational structure is twofold: that of a "production organization" domestically, and "coping organization" when in combat zones.<sup>37</sup> Using the chain of command structure articulated by Wilson, "operators," in the case of the SJAs, usually holding the rank of Captain, are the lowest level rank and file employees of the JAG Corps. Operators work under their "manager," a more senior level JAG officer, usually holding the rank of Lieutenant Colonel. The "operators" receive distinct professional training from the JAG Corps school, have high expectations from peers and the impetus to carry out their duty from higher ranking JAG Officers.<sup>38</sup>

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<sup>36</sup> LTC David E. Graham, "Operational Law- A Concept Comes of Age," 4.

<sup>37</sup> James Q. Wilson, *Bureaucracy*, 159-169.

<sup>38</sup> James Q. Wilson, *Bureaucracy*, 27.

Domestically, operator-level JAG officers practice criminal law, working in offices or courtrooms to prosecute or defend soldiers under the Universal Code of Military Justice, which is the military's means of internal discipline. These JAG officers have observable "outputs," toiling away in their offices, leaving clearly defined paper trails. The final "outcome" --a trial victory, defeat, or settlement--is both observable and measurable.<sup>39</sup> This is the function JAG officers had carried out since their inception under General George Washington's orders in 1775. It was only after being tasked with practicing operational law that the JAG Corps added a separate, unrelated organizational structure abroad, in combat zones.

Unlike traditional JAGs, SJAs comprise a coping organization, when tasked with advising commanders in a combat zone. Operators, in this case lower-level SJAs working with combat commanders, engage in outputs or activities that are hard to observe.<sup>40</sup> An SJA works with a battalion commander (military leader in charge of roughly 800 personnel) and even lower ranking officers in the chain of command, if the mission is unconventional or deemed sensitive, giving legal advice on fluid combat operations. Commanders are often in need of timely advice and it is difficult to observe an oral exchange of legal advice. Additionally, battalion-sized military elements often have areas of operations that can be hundreds of miles apart, with restricted flight and ground travel, all with a risk of enemy attack. Unconventional missions possess even more dangers. Due to the physical separation, risk of travel, and issues observing the oral exchange of combat legal advice, the JAG Corp's outputs are troublesome to observe.

In addition to the outputs it is difficult to measure the SJA's outcomes when conducting Operational Law, because it is impossible to know how many violations of the Laws of War or

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<sup>39</sup> James Q. Wilson, *Bureaucracy*, 160.

<sup>40</sup> James Q. Wilson, *Bureaucracy*, 169.

international incidents were prevented by SJAs. Wilson asserts that in coping organizations the managers seem to “make a difference,” that good managers are somehow able to recruit, keep and motivate the “operators.”<sup>41</sup> Wilson does not come to any conclusions about how good managers can identify good operators, but Wilson does place a greater emphasis on the managers of coping organizations than the other categories. Ascending higher in Wilson’s chain of command are “executives,” the Judge Advocate Generals of each military service. Despite the lack of measurable outcomes, the executives, the Judge Advocate Lieutenant Generals (three star Generals) of each military branch implemented an organizational culture behind Operational Law. A Lieutenant Colonel (officer often with twenty plus years’ experience) in the Infantry stated:

As the Army marches towards Force XXI [the objective is to win the information war], the Operational Law role of the judge advocate becomes even more critical. Smaller, more lethal forces require capable staff officers who are able to process and exploit information. Judge Advocates can serve as multifunctional staff officers. They possess the education and experience, judgment and maturity, and mental acuity and flexibility to cope with the complexities and pace of tomorrow.<sup>42</sup>

Quotes like the one above illustrate just how much pressure was being placed on the JAG Corps to make the correct legal call quickly. Additionally, the Lieutenant Colonel was correct, SJAs would be relied upon more and more. The SJAs conducting Operational Law began to develop a unique organizational culture that is coupled with both “pride and commitment,” especially in combat zones.<sup>43</sup> This creates a sense of mission for SJAs. Although, bureaucratic culture is a vague concept, it is no less real than a “national culture or a human personality.”<sup>44</sup>

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<sup>41</sup> James Q. Wilson, *Bureaucracy* 169.

<sup>42</sup> LTC Warren, “Operational Law- A Concept Matures,” 70.

<sup>43</sup> James Q. Wilson, *Bureaucracy* 91-93.

<sup>44</sup> James Q. Wilson, *Bureaucracy* 91-93.

Through the analysis of the origins of the JAG Corps' culture, observers can note an enthusiastic adherence to the letter of the Laws of War, seeking to protect the honor of the U.S military. This is a useful tool to speculate about how the JAG Corps will react to future military crises. Like human personalities, enduring traits of the JAG Corps will lead them to respond to the same stimuli differently than another bureaucracy.<sup>45</sup> As we will see, the JAG Corps' response to the War on Terror was different than the response of civilians appointed to the Bush administration's executive legal councils.

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<sup>45</sup> James Q. Wilson, *Bureaucracy* 91-93.

## The Bush Administration vs. The Warrior-Lawyer

*“Operational flexibility: This is a highly classified area. All I want to say is that there was ‘before’ 9/11 and ‘after’ 9/11. After 9/11 the gloves come off.”* – Cofer Black, Director of the CIA’s Counter-Terrorism Center (CTC), addressing the Senate Intelligence Committee on September 26, 2002.<sup>46</sup>

*“We were warning them that we had a long tradition of military justice, and we didn’t want to tarnish it. The treatment of detainees was a huge issue. They didn’t want to hear it.”* – Rear Admiral Donald Gutter, the Judge Advocate General for the Navy from 2000-2002.<sup>47</sup>

In order to articulate the complex bureaucratic function the JAG Corps fulfilled in the War on Terror, it is imperative to analyze the underlying cause of the conflict, the decision to use military force, and the significant bureaucratic innovations that were (and were not) made to fight a War on Terrorism. Examination of the SJAs, and the larger JAG Corps’ role in shaping and implementing the policies under President Bush’s and Obama’s respective administrations, requires more than a review of the executive branch. It also requires a review of constitutional separation of powers issues. Finally, the bureaucratic interaction between the JAG Corps and a presidential administration is intrinsically linked to a successful defense against the inevitable “lawfare” attacks that are waged on top of the military conflict in the War on Terror. As previously mentioned in the introduction, terrorists use lawfare as an asymmetric tactic, designed to damage or delegitimize a superior military force like the United States. Furthermore, lawfare

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<sup>46</sup> Cofer Black, Joint Intelligence Committees, *Investigation on Post-9/11 CIA and Military Intelligence: CIA Director of Counterterrorism Center, hearing before Joint Intelligence Committees*, 107th Cong., September 26, 2002, 2.

<sup>47</sup> Quoted in Jane Mayer, *The Dark Side: the inside story of how the War on Terror Turned into a war on American ideals*, (New York: Double Day Publishing, 2008), 88-89.

attacks are not limited to the rhetoric of a terrorist group or a nation-state. Lawfare is incredibly more dangerous to western style liberal democracies because the internal mechanisms can erode an anti-terror strategy, that is best implemented through a unitary executive. An insufficient defense against lawfare can cause Congress to lose faith and legislate against the executive's legal interpretations or the Supreme Court to put national security cases on the docket and decide against the executive. The deliberative and cautious nature of the other two branches of government costs the President the "decision, activity, secrecy and dispatch," that is prescribed for the executive in the Federalist Papers.<sup>48</sup> Although seeking congressional authorization through war related legislation may lose secrecy and speed in the short term, it also creates a domestic lawfare defense that helps in the future can avoid the internal mechanisms of a liberal democracy from unduly restricting the executive's anti-terror strategy. If the attacks of lawfare are addressed directly, it enhances the use of military force by validating it through law.

It ultimately falls on the president of the United States to guide the executive bureaucracies to successfully defend against lawfare attacks. The lack of coordination between the Bush administration's senior lawyers and the JAG Corps ultimately undermined the Bush administration's legal policies and demonstrated a weak lawfare defense. The Bush administration's radical expansion of the executive branch through misguided legal interpretations of the Constitution and International Law made the Bush administration's War on Terror less effective than it otherwise could have been. As we will see in the Obama Chapter, the lack of internal strife between the JAG Corps and Obama administration's civilian attorneys and

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<sup>48</sup> Alexander Hamilton, *The Federalist Papers*, "No. 70 The Executive Department Further Considered," (New York: Signet Classics, 1961), 422.

the correct interpretations of Constitution and International Law enhanced the effectiveness of the War on Terror.

After the attacks on 9/11, the Bush administration was able, in the short-term, to skirt the Operational Law precedents established by the JAG Corps in the 1980s and 1990s. In the immediate aftermath of this catastrophic event, the changed political landscape resulting from the unprecedented nature of the attack, made it possible for the Bush administration to impose new rules for detention, interrogation, and global targeted killing that were not consistent with the precedents previously established by the Operational Law professionals in the JAG Corps. What ensued thereafter was an internal bureaucratic battle, with the JAG Corps trying to implement legal interpretations that were consistent with the professional norms they had developed in the 1980s and 1990s; while the Bush administration's legal team was fighting to override the JAG Corps to implement the legal interpretations they deemed necessary. By 2008, most of the Bush administration's policies that exceeded the established precedents established by the JAG Corps were either rescinded or altered to make them much more consistent with customary legal standards. The JAG Corps accomplished this feat of bureaucratic warfare by exploiting mistakes made under the extralegal ad hoc rules promoted by those in the Bush administration and through soliciting assistance in thwarting the administration's overreach from the media, Congress and the Supreme Court.

The Bush administration's frustration with the JAG Corps' resistance to their legal interpretations culminated in 2007, with a proposed regulation requiring coordination with politically-appointed civilian Pentagon lawyers before the promotion of every member of the

JAG Corps' 4,000 uniformed lawyers.<sup>49</sup> This proposal diverged from more than 225 years of military precedent that promotions come from within the military, until reaching the rank of General. The proposal to change this by having promotions coordinated through the President or civilian attorneys selected by the President would radically depart from the tradition that all lower-level officers were promoted internally down the chain of command. The proposal advanced by the Bush administration did not cover the military services universally; instead, the administration singled out only the JAG Corps for this alternate promotion process.

This policy proposal was a last-ditch effort by the Bush administration to impose greater control over the JAG Corps. An extraordinary effort by the administration to exercise control over only one portion of the military, the move stemmed from the continuing disagreements between the JAG Corps and certain civilian attorneys in the Bush administration. These civilian attorneys asserted that the President had the right to bypass the Geneva Conventions and other legal protections for captured enemies as well as the power to dictate how military commissions were to be organized without a declared war or explicit Congressional approval. Ultimately, this proposal to seek civilian control over promotions involving every rank of JAG Officers was unsuccessful and it was never implemented, because of congressional backlash from prominent Senators, including John McCain (AZ-R) and Lindsey Graham (SC-R).<sup>50</sup>

How did one relatively small bureaucracy within each branch of the military services make such a significant contribution towards thwarting the Bush administration's legal demands for certain war powers it deemed necessary to fight the War on Terror effectively? Does the JAG

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<sup>49</sup> Charlie Savage, "Bush seeks to limit military lawyers' independence," *The New York Times*, Nov. 15 2007.

<sup>50</sup> Charlie Savage, "Bush seeks to limit military lawyers' independence," *The New York Times*, Nov. 15 2007.

Corps constitute an appropriate internal check on the president's war powers as the Commander in Chief? Alternatively, does the JAG Corps place an undue burden on the president's ability to control the military and to work with the "secrecy and dispatch" called for in Federalist Paper No. 70?<sup>51</sup> Finally, was the Bush administration able to win the lawfare battle domestically and abroad? Do presidents even need to care about lawfare? These are the questions at the heart of this chapter.

An investigation of the JAG Corps, as one of many bureaucracies contained within the Bush administration, supports the following conclusions. A relatively low-level executive bureaucracy that claims an exclusive subject matter expertise on an issue can impose its policy design on the rest of the executive branch, even the president, over an extended period of heightened tensions following a major terrorist attack. The chances of the lower level executive bureaucracy succeeding against the will of a constitutionally superior bureaucracy increases if the organization has a distinct "moral viewpoint" and has developed a "sense of mission."<sup>52</sup> This sense of duty held by the JAG Corps to uphold the honor of the military through proper interpretation of the laws of war was instilled in JAG officers in the aftermath of the My Lai massacre during the Vietnam War.

The JAG Corps' opposition to the Bush administration's policies on detention, prosecution, and lethal direct action, and the bureaucratic warfare that ensued, all have an impact on the lawfare battle behind the War on Terror. It cannot be emphasized enough that detention, and prosecution are intertwined with lethal direct action, despite their appearance otherwise

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<sup>51</sup> Hamilton, Federalist No. 70, "The Executive Department Further Considered," (New York: Signet Classics, 1961), 423.

<sup>52</sup> James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It*, (United States: Basic Books, 2000), 91-92.

because they all fall under the broader umbrella of Operational Law. As we know from the previous chapter, this is an area of military law the JAG Corps felt like they had exclusive rights to interpret. An entire thesis could be dedicated to the Bush administration's legal policies on "enhanced interrogation" or torture, and the connection between these policies and the abuses at Abu Ghraib and Guantanamo Bay Prison; in fact, entire books are dedicated to the sole study of these issues. A full analysis of these issues is well beyond the scope of this thesis, but they are tangentially related. The issues of detention and the procedural rights of the accused--and the resistance that mobilized against the Bush administration's novel interpretations of what was lawfully permitted in these areas--changed the bureaucratic landscape by alienating the JAG Corps and other key figures within the Bush administration.

This new landscape of conflict ultimately favored the arguments advanced by the "executives" of the JAG Corps, thus uniting them with powerful allies in Congress and the courts. Staff Judge Advocates (SJAs) are the compartment of the JAG Corps that practices Operational Law at the "operator" and "manager" level. However, it was the "executives" that would play the major role in the bureaucratic battle that ensued during the Bush administration. It is important to note that by 2001 the Generals in the JAG Corps were at the "operator" level during the 1980s and 1990s, when their moral mission was first institutionalized. To understand the current bureaucratic situation between the JAG Corps and civilian appointees regarding lawfare, and speculate on future trends in this area, one must first understand the issues that led to today's legal policies on anti-terror operations.

### *The Initial Fear*

The coordinated terrorist attacks on September 11, 2001, resulted in 2,996 Americans dead and roughly 6,000 injured.<sup>53</sup> The attack was conducted by an Islamic terrorist group named al-Qaeda, orchestrated by a Saudi financier, Osama bin Laden. America had suffered surprise attacks before, from the Japanese at Pearl Harbor. However, the 9/11 attacks were different: never had such devastating attacks been perpetrated on thousands of American non-combatants. Also jarring was the fact that these attacks were conducted by nineteen men who disguised themselves as civilians to hijack airplanes and use them as weapons to hit financial, political and military centers within the United States. The attackers deliberately targeted civilians. Their purpose was to cause as many deaths as possible. The group responsible for these attacks, al-Qaeda, is a stateless organization. At the time of these attacks in 2001, it was primarily located in the failed state of Afghanistan, sheltered by the brutal Islamic Taliban regime. The exceptional nature of this attack would give power to the arguments in favor of the aggressive actions President Bush and his cabinet took in response to 9/11.

After the attacks, the White House and the American people shared a very real sense of uncertainty and fear. Fifty-nine percent of Americans at the end of 2001 were very/somewhat worried about themselves or a member of their family being a victim of a terrorist attack.<sup>54</sup> This fear was magnified by the subsequent Anthrax attacks later in October of 2001. Anthrax, an incredibly lethal airborne biological weapon, was sent to various media outlets and two U.S. senators. These attacks were actually perpetrated by a U.S. citizen Bruce Ivins, with no clear

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<sup>53</sup> 9/11 Commission Report, *Final Report of the National Commission On Terrorist Attacks*, 107th and 108th Cong., 2004, 285.

<sup>54</sup> Gallup Poll, "Terrorism Within the United States," (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx>)

radical jihadist motive, but this heightened the fears even more. The United States, a world superpower had been attacked on its own soil by a group of radical Islamic terrorists to promote their ideological goal of overthrowing the non-Muslim capitalistic influence of America, in the Middle East and beyond. Even ten years later, fifty-eight percent of Americans feel the September 11th terrorist attacks have permanently changed the way they live.<sup>55</sup>

If the attack had been conducted by a spy agency of a nation-state, the United States would have, without a doubt, declared a retaliatory war against the country.<sup>56</sup> Yet in the days after 9/11, there was uncertainty concerning how the United States should respond, as al-Qaeda was a stateless group. President Bush had to make a choice between seeking a criminal justice solution or a military response. Historically, terrorism had been mostly treated as a crime. However, no terrorist attack had ever been as deadly, or had as consequential an effect on the national psyche, as the 9/11 attacks. The President ultimately chose a military response and began a War on Terrorism, due to the exceptional attributes of the 9/11 attacks and the organization that perpetrated them.

Bush's decisions to use military force and to reinterpret existing treaties on the laws of armed conflict were made with legal advice from his executive council and the Justice Department's Office of Legal Counsel. John Yoo, the Deputy Assistant U.S. Attorney General working in the Office of Legal Counsel, asserted in his book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*:

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<sup>55</sup> Gallup Poll, "Terrorism Within the United States: permanently changed the way you live, or not?," (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx>)

<sup>56</sup> John Yoo, *War By Other Means: An Insider's Account of the War on Terror*, (New York: Atlantic Monthly Press, 2006), 5.

The practice of unilateral presidential war making falls within the permissible bounds of discretion granted to the political branches. With large militaries designed to project overwhelming force throughout the world at his disposal, the president as commander in chief holds the initiative to use force abroad... Thus, in the setting of foreign policy, the interpretation of treaties and international law, and the termination of international agreements, the president may enjoy the initiative due to the formal and functional presumption that the unenumerated foreign affairs power rest with the executive.<sup>57</sup>

The legal opinion advanced by Yoo and other civilian attorneys within the Bush administration was the executive branch has the exclusive right to initiate wars, and to dictate the rules the war would be fought under. This result would be achieved by interpreting treaties such as the Geneva Conventions, as far from settled law, and invoking several constitutional separations of powers dilemmas through unilateral executive action or broad interpretations of the 2001 AUMF. The latter portion of the above quotation, that the executive has the ability to “interpret treaties,” was one of the two major points of contention with the JAG Corps. The JAG Corps as an organization saw it as their moral mission to uphold the Geneva Conventions regardless of the type of conflict, to prevent another mark against the honor of the military. Eventually, the JAG Corps’ “executives” would utilize the separation of powers quandaries inherent in the Bush administration’s novel reinterpretation of the constitutional boundaries to their advantage to promote their policies over those of President Bush and his civilian appointees.<sup>58</sup> Additionally, the reasons for the use of military force and the manner in which the President and his cabinet wanted to use the military have several implications for the JAG Corps, which will be discussed later in the chapter.

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<sup>57</sup> John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, (Chicago: University of Chicago Press, 2008), 294.

<sup>58</sup> John Yoo, *War By Other Means*, 22.

### *The War Council*

As previously mentioned, John Yoo was a key supporter of expansive presidential war powers. He was not the only one within President Bush's administration that held these beliefs; he shared them with David Addington, Alberto Gonzales, Timothy Flanigan, and Jim Haynes. David Addington, Vice-President Cheney's Chief Legal Counsel, was known to "crush bureaucratic opponents," with over thirty years of legal experience in the executive branch.<sup>59</sup> Alberto Gonzales was White House Counsel at this time, although he later became Attorney General. Timothy Flanigan was an attorney in the White House Counsel's Office. Jim Haynes held the position of General Counsel to the Pentagon. Haynes was specifically chosen to transform military law and the JAG Corps, in much the same way as his boss, Secretary of Defense Donald Rumsfeld, was chosen to innovate the Department of Defense.<sup>60</sup> Together these five men created an unorthodox and unofficial bureaucracy, self-titled "The War Council."<sup>61</sup> They were all political appointees, who graduated from the nation's top law schools but had "no experience in law enforcement, military service, counterterrorism or the Muslim world."<sup>62</sup>

The War Council provided unwavering approval for the positions advanced by Vice President Cheney and Secretary of Defense Rumsfeld. Both men advocated for the use of harsh interrogation techniques, detention of enemy combatants in secret prisons operated by the CIA in friendly foreign countries, and targeted killings. The War Council was fearful of the creeping influence of international law into domestic law, because it enhanced the ability of other nations to influence the United States; in this case through the rhetoric of lawfare. Comparatively, when

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<sup>59</sup> Jack Goldsmith, *Terror Presidency: Law and Judgement Inside the Bush Administration*, (W.W. Norton Co.: New York, 2007), 27.

<sup>60</sup> John Yoo, *War By Other Means*, 32.

<sup>61</sup> Jane Mayer, *The Dark Side*, 44-66.

<sup>62</sup> Jane Mayer, *The Dark Side*, 66.

viewed from the perspective of their position in the chain of command, with the President as Commander in Chief, the War Council were near to the highest echelons of power and had direct access to the decision makers (Cheney, Rumsfeld and Bush) in the executive branch. In fact, the War Council were significantly higher in stature and far more powerful than the Judge Advocate Generals in charge of each of the military services' JAG Corps, because civilian appointees are constitutionally placed in charge of the military and they have a direct ear to the President.

President Bush and Vice President Cheney were unabashedly determined to be as aggressive in the prosecution of the War on Terrorism as legally possible. The overarching objectives were staked out at the highest levels of the administration, but it was the task of the War Council to provide the legal justification for these extreme positions and fill in the details.<sup>63</sup> The War Council was driven by an immense pressure to rid the nation of fear and protect the United States from the external threat of terrorism. Their goal was clearly noble, but their interpretation of the legal means to achieve this end ran completely counter to the organizational culture the JAG Corps had developed through practicing Operational Law in the 80s and 90s. The JAG Corps' sense of mission was to protect the honor of the military abroad, and they cared deeply about the way in which any military conflict, big or small, was to be fought.<sup>64</sup>

Although the War Council was not a formal bureaucracy, we might nevertheless see it as an example of what Wilson calls a "coping organization," like that of SJAs conducting Operational Law abroad.<sup>65</sup> Like SJAs giving legal advice to a commander, their outputs (legal advice regarding combat operations) were done in secret and were highly classified. The

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<sup>63</sup> Jane Mayer, *The Dark Side*, 55.

<sup>64</sup> Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, (W.W. Norton Co.: New York, 2009), 127.

<sup>65</sup> James Q. Wilson, *Bureaucracy*, 168-169

outcomes (war crimes or adverse media attention that was avoided through their legal guidance) of their advice were unmeasurable. Unlike SJAs, however, the War Council did not have the organizational goal of upholding the honor of the United States military; their goal was to destroy al-Qaeda and kill/capture Osama bin Laden, by any means necessary. The War Council's high classification levels and its ad hoc collection of multiple high level bureaucratic legal counsel made it a "coping organization" to the extreme.<sup>66</sup> This is illustrated by the following quote from former Assistant Attorney General Jack Goldsmith: "The top Bush administration officials had dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for operations."<sup>67</sup>

The fundamental difference between the secret work of the War Council and the secret work of JAG Corps is the JAG Corps' "moral factor." The JAG Corps as an organization felt that it must remain loyal to their interpretations of Geneva Conventions and the fundamental attitudes towards the rule of law applying to armed conflict that had been built since the invasion of Grenada.<sup>68</sup> The JAG Corps would not bend to the War Council's interpretation. General William Peers, during the aftermath of Vietnam concluded that a major factor in the My Lai massacre was the lack of implementation of the Geneva Conventions. The JAG Corps was stung by this criticism, and committed itself to upholding the Geneva Conventions, no matter what the circumstances.<sup>69</sup> This event is one of many factors that influence the professional norms of the JAG Corps. The War Council's professional norms are inherently different because they are

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<sup>66</sup> James Q. Wilson, *Bureaucracy* 168-169.

<sup>67</sup> Jane Mayer, *The Dark Side*, 70.

<sup>68</sup> James Q. Wilson, *Bureaucracy* 92.

<sup>69</sup> Jack Goldsmith, *Power and Constraint*, 126.

outside the JAG Corps system of education and standard operating procedures. The War Council's direct overseers, the President, Vice-President and Secretary of Defense, sought a radical expansion of power to wage war on their own terms and without affording legal protections to the enemy combatants who were captured. In this the policymakers were acting more like promoters, encouraging their legal team to invent legal arguments which they believed would advance their anti-terrorism policies. The lawyers in the War Council, were the antithesis of prudent and judicious lawyers, as "lawyers sometimes say no."<sup>70</sup> The infamous phrase uttered by Vice President Cheney to Tim Russert on *Meet the Press* the Sunday after 9/11--that "[w]e also have to work... the dark side, if you will" --in many ways embodies how the War Council operated.<sup>71</sup>

As previously stated, the War Council believed congressional approval for the use of military force was not necessary. However, the Bush administration received additional political support from Congress with the Authorization of the Use of Military Force (AUMF), signed into law September 14, 2001, just three days following 9/11. In pertinent part, it reads as follows:

The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future actions of international terrorism against the United States by such nations, organizations or persons.<sup>72</sup>

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<sup>70</sup> Jane Mayer, *The Dark Side*, 70.

<sup>71</sup> Jack Goldsmith, *Power and Constraint*, 56.

<sup>72</sup> Joint Resolution of Congress, *To Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*, 107th Cong., September 14, 2001, 1.

The language of various phrases within this law would subsequently be construed to authorize multiple expansions of executive war power during both the Bush and the Obama administrations. The phrase this chapter is concerned with is “use of all necessary and appropriate force.” Mr. Yoo, one of the most opinionated members of the War Council, (and the one with the most extensive background in national security law), articulated his opinion that the President had the authority to dictate the way in which the War on Terror was to be fought, pursuant to his powers as the Commander in Chief.<sup>73</sup> Yoo, firmly believed that the Commander in Chief could ignore or outright defy statutes passed by Congress and International Law if it conflicted with the way in which the Commander in Chief’s wanted to exercise this authority. However, the manner in which Bush wanted to conduct this war and collect intelligence was fundamentally opposed by all levels of the JAG Corps because of the President’s decision to disregard certain aspects of the Geneva Conventions and establish new rules for prosecuting detainees before military commissions without consulting the JAG Corps.

#### *A Secret Bureaucratic War on Two Fronts*

The analogy of a two-front war is particularly useful when describing the battle within the executive branch. The first front was the decision to adjudicate cases through military commissions. This policy was developed a few months before the legal interpretation that Geneva Conventions Common Article III would not be construed to apply to al-Qaeda or the Taliban, which constitutes the second front. Although each of these two “fronts” present separate and distinct issues, they would be combatted by the JAG Corps with the same bureaucratic weapons and fervor.

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<sup>73</sup> John Yoo, *War By Other Means*, 12.

Immediately after the signing of the AUMF in 2001, every Staff Judge Advocate (SJA) tasked with Operational Law and the use of lethal force in combat operations abroad began to analyze how this law would be implemented on the battlefield. The AUMF had direct consequences affecting military forces while conducting detention operations and in the context of a war against a terrorist organization. The JAG Corps did not wait for guidance on how military and detention operations were to be conducted in the wake of the enactment of the first AUMF, as they had years of precedent established in a full spectrum of conflicts since Operation Urgent Fury in 1983. Armed with detailed knowledge on the intricacies of using military force abroad, the JAG Corps, from the top of the chain of command down to operators, waited for their expertise to be called upon to assist the war effort.

Soon after the 2001 AUMF was passed, the Bush administration made two controversial legal decisions as part of the War on Terror. The first one was the Military Order on “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” signed by President Bush on November 13, 2001. This order called for military commissions to try terrorists outside the United States in Guantanamo Bay. The second decision, made in early 2002, involved the determination by the Bush administration to deny captured al Qaeda and Taliban members Prisoner of War (POW) status under Common Article III of the Geneva Conventions, without a “status determination hearing.”<sup>74</sup> (The term “Common” reflects that the language of Article III has not changed throughout each of the various iterations of the Geneva Conventions.) The determination by the Bush administration’s civilian attorneys that Common Article III did not

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<sup>74</sup> The Geneva Conventions, Common Article III, *International Committee of the Red Cross*, (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590006?OpenDocument>)

apply to this conflict, subsequently voids Article IV and V of the Geneva Conventions. Instead of treating them as POWs, they would be treated as “unlawful combatants.

The Joint Judge Advocate Generals were included in meetings held to decide whether the requirements of the Geneva Conventions should be invoked. However, they had absolutely no warning or participation in meetings with the Bush administration on military commissions-- even though the job of prosecuting unlawful combatants for the executive branch would fall to Judge Advocates. Legal advice is particularly hard to quantify, but the Judge Advocate Generals would come to view the decisions made by the War Council without their input as a violation of their bureaucratic “turf.” However, this bureaucratic battle goes well beyond a mere skirmish over turf. The importance of this disagreement over policy between the Judge Advocate Generals and the Bush administration was magnified by the “morals” or “sense of mission” taken on by the JAG Corps. Never had the JAG Corps so thoroughly disagreed with civilian officials during a war over legal matters.<sup>75</sup> The Judge Advocate Generals and the rest of the JAG Corps felt as if they were excluded from important decisions on matters that they believed clearly fell within their bureaucratic expertise. Ultimately, these two decisions created a major rift between the JAG Corps bureaucracy and the War Council, and both sides would try to maneuver around the other to impose their policy designs and seek to protect what they deemed as their legitimate area of authority.

The consequences from these legal decisions regarding detention, interrogation, and prosecution--and the process by which they were made--would create an intense internal battle between the War Council and the JAG Corps. Although these policy decisions based off of legal interpretations having no direct impact on the legality of the lethal use of military force during

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<sup>75</sup> Jack Goldsmith, *Power and Constraint*, 176.

airstrikes or raids, they did have significant indirect impacts on these operations. A conflict of this nature between two highly classified executive agencies creates several problems for anyone who wishes to investigate and write about the disagreements between the two agencies.

Fortunately, despite the highly-classified nature of these agencies, there are a few ways to unearth some of the details regarding the internal battle in order to gain an understanding of what happened.

John Yoo provides a defense of and insight into the Bush administration's rationale for its legal policies and constitutional interpretations. There is no shortage of journalists, academics and politicians who provide counter-arguments and critiques of these policies and constitutional interpretations in articles, books and law reviews. Finally, Assistant Attorney General Jack Goldsmith, who headed the powerful Office of Legal Counsel (commonly referred to as "OLC") from October 2003 to July 2004, and who took the place on the War Council of the position previously held by Jay Bybee, provides enlightening insights into the War Council's operation.<sup>76</sup> Goldsmith's ten months in one of the highest legal positions in the executive branch makes him one of the few non-original War Council members to obtain such a high level of access to the secretive meetings of this bureaucracy.

Goldsmith provides a particularly useful perspective and assessment of the JAG Corps' battle with the War Council. He often takes a middle ground between John Yoo and critics of the Bush administration. It is evident from the multiple sources available on the subject that Jack Goldsmith and his published works serve as the best articulation of the clash between JAGs and the War Council, and most accurately describe the legal and ethical issues at stake. Still, reference to all these sources will be needed to decipher how two highly classified bureaucracies

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<sup>76</sup> Jack Goldsmith, *Terror Presidency*, 18

fought an ideological war within the sprawling executive branch and how the JAG Corps eventually succeeded in getting the policies they wanted adopted by the end of Bush's second term.

### *The Military Commission Front*

To apprehend why the JAG Corps felt excluded from an area that fell under their jurisdiction, and that caused the JAG Corps to become so resolute in its resistance to the War Council's legal interpretations, it is first necessary to articulate the War Council's argument for these interpretations. John Yoo expressed the view that the President had the authority to establish military commissions based upon the existence of a national emergency. This policy of creating military commissions in a time of national emergency was based upon the precedent established by *Ex Parte Quirin*, a case concerning President Franklin D. Roosevelt's executive orders to create military commissions to conduct a trial of eight captured Nazi saboteurs.<sup>77</sup> The petitioners in *Ex Parte Quirin* argued that the President overstepped his power: by creating rules for the military commission, instead of using a criminal trial in federal court or a more codified court-martial, Roosevelt had denied the saboteurs the rights provided by Article III of the Constitution and the Fifth and Sixth Amendments to the U.S. Constitution. These rights include trial by jury, searching and seizing property with a lesser standard than "probable cause," and most significant to *Quirin*, being deprived of life, liberty, or property, without due process of law. Seven out of the eight alleged saboteurs filed for a Writ of Habeas Corpus. The District Court denied the petitioners' leave to file petitions for habeas corpus. This denial was appealed to the Supreme Court, after eighteen days of a secret trial conducted by the military

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<sup>77</sup> John Yoo, *War By Other Means*, 224-225.

commission.<sup>78</sup> In an expedited summer session the Supreme Court delivered a per curiam decision that the President had not overstepped his powers by creating a military commission and forcing the petitioners to be tried in this forum without some of the legal protections afforded to criminal defendants in federal courts. Chief Justice Stone's opinion cited the violations of the laws of war – i.e. their removal of their uniform and plans to attack civil targets and Congress's Declaration of War against Nazi Germany.<sup>79</sup>

The War Council believed it was still well within the president's war powers to create military commissions and did not want to risk the dilution of these powers by seeking congressional approval for these military commissions. The War Council contended that congressional approval was implied through the 2001 AUMF. John Yoo argued that "because the Bush administration patterned its order on FDR's, the critics of the military commission have only FDR to blame."<sup>80</sup> Yoo and the War Council's argument for military commissions was not specious, clearly erroneous or a gross overstep of executive power, based upon the precedent established in *Ex Parte Quirin*. Instead, it presents a valid argument for the use of military commissions as a tool to combat terrorism justly. The rules of military commissions and who can be subjected to military commissions have been successfully contested prior to the War on Terror, in the civil war case on an armed confederate sympathizer *Ex Parte Milligan*. However, military commissions themselves were affirmed by the courts in *Milligan and Quirin*. The War Council firmly believed that military commissions were the best compromise of speed, secrecy and guilty verdicts.<sup>81</sup> Members of the JAG Corps would likely agree with the President's right to

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<sup>78</sup> *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942)

<sup>79</sup> *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942)

<sup>80</sup> John Yoo, *War By Other Means*, 224-225.

<sup>81</sup> John Yoo, *War By Other Means*, 229.

create military commissions following a formal declaration of war.<sup>82</sup> This support for military commissions within the JAG Corps would also be true following an express authorization of military force by Congress, although in this latter instance there is less solid constitutional footing.

The previous chapter outlined the advancements the JAG Corps made as a bureaucracy expanding into a new role and taking on a moral mission to uphold the honor of the military. In the aftermath of these advancements, the JAG Corps regarded themselves as the absolute experts in all aspects of the laws of armed conflict and believed that they would take the lead in drafting the appropriate rules. Instead, huddled in top-secret secure information rooms, the War Council would instead “write the order.”<sup>83</sup> The meetings and internal memos were sometimes tense and expressed the JAG Corps’ disapproval. The JAG Corps saw themselves as the real experts on the laws of war, and “they believed that the rules as drafted would violate the Geneva Conventions and lacked sufficient due process.”<sup>84</sup>

The War Council launched the equivalent of a bureaucratic surprise attack by notifying the JAG Corps that military commissions would be used during the War on Terror, and that they had already drafted an outline of the proposed rules. The JAG Corps’ “executives,” Rear Admiral Donald Guter (the Navy Judge Advocate General), and Major General Thomas Romig (the Army Judge Advocate General), were both blindsided when they first learned of the proposed military order days before it was signed by the President on November 13, 2001. With no prior notification that military commissions would be used in the War on Terror, JAG Corps

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<sup>82</sup> Jack Goldsmith, *Power and Constraint*, 160.

<sup>83</sup> Charlie Savage, *Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy* (Little, Brown and Co.: New York, 2007), 138.

<sup>84</sup> Charlie Savage, *Takeover*, 138.

personnel were nonetheless quickly forced to work together with members of the War Council to complete the drafting details of the military commission rules.<sup>85</sup> The Judge Advocates General immediately coalesced into a unified effort against the War Council, to rein in some of the more egregious rules in the original draft, including the absence of protections against self-incrimination through the right to remain silent; no protections against evidence obtained through physical coercion being admissible at a trial; and that only a preponderance of the evidence was required to establish guilt, rather than a higher standard, such as proof beyond a reasonable doubt, a standard more acceptable and consistent with their professional norms.<sup>86</sup> Despite their best efforts, the final draft was largely viewed by the JAG Corps as both unjust and immoral, and they felt that their area of expertise had been violated.<sup>87</sup>

Maj. Gen. Romig expressed that the United States would be perceived as unfair in the world of public opinion based on the military commission rules drafted by the War Council. Romig saw them as “very draconian, which among other things, could convict defendants under a low standard of proof” and “would deny them the right to have outside civilian defense attorneys.”<sup>88</sup> The JAG Corps fought for and won concessions from the original draft prepared by the War Council on the rights afforded enemy combatants in these prosecutions by convincing senior members in the Department of Defense and the State Department that these minor concessions were in the nation’s best interest.<sup>89</sup> Among these concessions were “established rules on the admissibility of evidence, the right of cross-examination, the right against self-incrimination, proof beyond a reasonable doubt as the standard for conviction, and the right of

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<sup>85</sup> Charlie Savage, *Takeover*, 137-138.

<sup>86</sup> Jane Mayer, *The Dark Side*, 87.

<sup>87</sup> Charlie Savage, *Takeover*, 138.

<sup>88</sup> Charlie Savage, *Takeover*, 138.

<sup>89</sup> Jack Goldsmith, *Terror Presidency*, 121.

defense counsel.”<sup>90</sup> In addition, the JAG Corps also succeeded in imposing a requirement that a unanimous vote was necessary to sentence an unlawful combatant to death.<sup>91</sup> Despite the improvements in the procedural rules relating to prosecutions before military commissions the JAG Corps achieved, the final result was far from an acceptable compromise to the JAG Corps. The final version of these rules were still objectionable to the JAG Corps based on today’s standards of international and domestic law, like “universal jurisdiction which allows an official of another country” to be prosecuted for war crimes and higher standards of admissibility of evidence.<sup>92</sup> The “executives” of the JAG Corps notified their subordinates that these military commissions were not “designed from scratch” by the JAG Corps--this was the rattling of sabers down the chain of command--that their bureaucratic “turf” was being overtaken by civilians who were not experts in military law.<sup>93</sup> This is evidenced by a uniformed lawyer assigned to defend a Guantanamo detainee, a Marine Major Dan Mori stating:

It was a political stunt the administration clearly didn’t know anything about military law or the laws of war. I think they were clueless that there even was a UCMJ and a Manual for Courts Martial!<sup>94</sup>

The War Council, on the other hand, “saw the JAGs as close minded and stuck in their way of doing things.”<sup>95</sup> However, the War Council in its initial draft of the rules for the military commissions had ignored over half a century of developments in international law that had taken

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<sup>90</sup> John Yoo, *War By Other Means*, 224.

<sup>91</sup> John Yoo, *War By Other Means*, 224.

<sup>92</sup> Jack Goldsmith, *Power and Constraint*, 130.

<sup>93</sup> Charlie Savage, *Takeover*, 139.

<sup>94</sup> Jane Mayer, *The Dark Side*, 89.

<sup>95</sup> Charlie Savage, *Takeover*, 138

place since *Ex Parte Quirin*. The War Council had formulated its initial plan unilaterally and in secret, offering little room to negotiate.<sup>96</sup>

The JAG Corps proposed the use of military courts-martial, as prescribed by the Uniform Code of Military Justice (UCMJ) enacted into law by Congress in 1951. Congress had created the UCMJ to modernize and further codify military law to avoid the ad hoc situation that developed in *Ex Parte Quirin*.<sup>97</sup> The JAG Corps preferred the court-martial approach because the additional rights given to the accused put the proceedings on a firmer legal foundation, both based on military law and international law. There were years of uninterrupted precedents since 1951. The JAG Corps specifically favored the rights provided an accused in the sub-chapter on pre-trial procedures, like Article 30, making the accused clear on the charges and specifications pending, and Article 31, prohibiting compulsory self-incrimination.<sup>98</sup> This preference for additional rights is not driven from sympathy towards the enemy, but a moral obligation and mission to uphold the military's honor through law. The JAG Corps felt like if their interpretations of military commissions were not implemented that the United States would lose the moral high ground in the War on Terror and that terrorists could use the rules of military commissions as a weapon of lawfare against the United States. The JAG Corps' position was indeed correct that the Bush administration's legal interpretations would inhibit the effectiveness of the War on Terror.

The original military commissions under the Bush administration would provide an accused enemy combatant no such rights. The JAG Corps realized that the U.S. military and the

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<sup>96</sup> Charlie Savage, *Takeover*, 138.

<sup>97</sup> Jane Mayer, *The Dark Side*, 81.

<sup>98</sup> Universal Code of Military Justice, 81<sup>st</sup> Cong., *UCMJ Online*, (<http://www.ucmj.us/sub-chapter-6-pre-trial-procedure/831-article-31-compulsory-self-incrimination-prohibited>)

United States as a whole would be portrayed as hypocritical for criticizing other nations like the Soviet Union, China, and many Middle Eastern nations for unjust legal procedures while prosecuting enemy combatants before military commissions under a reduced level of legal protections. The influence of international law and the JAG Corps' sense of mission emphasized the importance for SJAs to maintain these "procedural protections for prisoners' rights."<sup>99</sup> The opinion of the JAG Corps was that unilateral executive action founded on the implied powers of the Commander in Chief would not withstand the scrutiny of a federal court or the modern media.<sup>100</sup>

President Roosevelt never consulted Congress on the establishment of military commissions, although the Supreme Court did find legislative authorization for a trial by military tribunal under a previous congressional enactment, the Articles of War. Consequently, the War Council did not believe President Bush needed to consult with Congress or seek congressional authorization. Again, this posture ignores the years of development in domestic events since World War II. Included among the notable intervening events are the following: the dishonor placed on the military after the My Lai Massacre; post-Watergate concerns over executive power overreach; and perhaps most significantly, the bureaucratic entrenchment of Operational Law, discussed in the previous chapter. The "go it alone" approach adopted by the War Council in an effort to increase the power of the executive branch ultimately backfired leading to the executive branch losing power during a time of war.<sup>101</sup> Jack Goldsmith stated, "I could not understand why

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<sup>99</sup> Jack Goldsmith, *Power and Constraint*, 174.

<sup>100</sup> Jack Goldsmith, *Power and Constraint*, 131.

<sup>101</sup> Jack Goldsmith, *Terror Presidency*, 123.

the administration failed to work with a Congress controlled by its own party to put all of its antiterrorism policies on a sounder legal footing.”<sup>102</sup>

It is reasonable to speculate that the JAG Corps “executives” knew they would not be able to implement their policy design, and thus uphold their moral mission, without eliciting the help of powerful friends in Congress and eventually the courts. The JAG Corps would later exploit the Bush administration’s initial lack of congressional authorization for its plan to utilize military commissions to accomplish its ends of providing greater protections for enemy combatants. Using bureaucratic defense tactics to uphold their honor and defend what they perceived to be their legitimate sphere of influence, the JAG Corps would seek support from Congress on these issues. The JAG Corps ultimately also benefitted from decisions from the courts upholding the rights of the enemy combatants. In 2006, after it became clear that the military commissions the War Council attempted to set up would not be implemented as originally planned, John Yoo cites the problems of “bureaucratic delay in setting them up and interference from federal judges who have blocked them.”<sup>103</sup>

The Bush administration would gain a more substantial legal underpinning regarding military commissions with the passing of the Military Commissions Act of 2006. By that time, though, it was too late to preserve the War Council’s vision of trials conducted before military commissions with diminished legal safeguards for the accused. Congressional and public support for aggressive anti-terrorism policies had dwindled due to the perceived diminished threat from terrorists, combined with the infamy of international incidents like Abu Ghraib and growing reservations regarding the use of “enhanced interrogation” at the Guantanamo Bay detention

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<sup>102</sup> Jack Goldsmith, *Terror Presidency*, 29.

<sup>103</sup> John Yoo, *War By Other Means*, 230.

facility. By 2004 the percentage of Americans that were very/somewhat concerned about themselves or a family member being a victim of a terrorist attack had dropped thirty-one percentage points from 2002, to twenty-eight percent.<sup>104</sup>

Before the bureaucratic tactics employed by the JAG Corps to resist the excesses sought by the War Council can be properly examined, it is essential to lay out the other point of contention the JAG Corps had with the War Council's anti-terror policies. The War Council's legal determination that both al-Qaeda and the Taliban are not protected under the Geneva Conventions would become the second front in this bureaucratic war and intertwine itself with the battle over military commissions.

#### *The Geneva Conventions Front*

Unlike the issue of military commissions, which was hatched in secrecy by the War Council and sprung on the Judge Advocate Generals, the JAG Corps' "executives" were present at initial meetings regarding the Geneva Conventions issue. These meetings were called to decide whether al-Qaeda and their Taliban protectors were entitled to the protections of Geneva Conventions rights. John Yoo stated that:

From what I saw, the military had a fair opportunity to make its views known. Representatives from the Joint Chiefs of Staff, including uniformed lawyers, were present at important meetings on the Geneva question and fully aired their argument... The Justice Department disagreed.<sup>105</sup>

Before the JAG Corps' argument for granting Geneva Conventions rights to al-Qaeda and the Taliban is articulated, it is critical to establish the War Council's perspective because it

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<sup>104</sup> Gallup Poll, "Terrorism in the United States," (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx>)

<sup>105</sup> John Yoo, *War By Other Means*, 35.

represented the Bush administration's legal policy until it collided with roadblocks in Congress and the Supreme Court. The nation-state of Afghanistan signed the Geneva Conventions in 1956. Therefore, the Office of Legal Counsel's (OLC) argument begins with the determination that Afghanistan was a "failed" state due to the central government's inability to provide basic government functions or ensure the rule of law within its borders.<sup>106</sup> In addition, Afghanistan was not controlled by al-Qaeda and although the Taliban controlled the majority of its territory, the United States did not recognize it as the official government of Afghanistan because the Taliban "did not perform basic governmental functions of providing minimal service to the Afghan people."<sup>107</sup> The OLC deemed Common Article III's stipulation that, "conflicts not of an international character" inapplicable with the War on Terror because it is limited to within "the territory of one of the High Contracting Parties." Since the conflict was of an international character (non-state actor attacking the civilian targets of a foreign nation) they determined the article did not apply.<sup>108</sup> Furthermore, al-Qaeda and the Taliban never signed the Geneva Conventions; instead they "thumb their nose" at them, purposely subverting them.<sup>109</sup> The War Council also asserted that al-Qaeda and the Taliban violate the Third Geneva Conventions Article IV by not using fixed and distinctive signs to depict their nationality, did not carry arms openly and did not abide by the laws of war, purposely killing civilians and beheading military prisoners.<sup>110</sup> John Yoo maintains that a "flagrant breach by one side of a bargain generally

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<sup>106</sup> John Yoo, *War By Other Means*, 27.

<sup>107</sup> John Yoo, *War By Other Means*, 28.

<sup>108</sup> The Geneva Conventions, Common Article III, *International Committee of the Red Cross*, (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590006?OpenDocument>)

<sup>109</sup> John Yoo, *War By Other Means*, 17.

<sup>110</sup> The Geneva Conventions, Article IV, *International Committee of the Red Cross*, (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument>)

releases the other side from the obligation to observe its end of the bargain.”<sup>111</sup> For these reasons the OLC determined the Geneva Conventions did not legally apply.

A memo sent by the OLC on January 22, 2002 to Alberto Gonzales and Jim Haynes advised the President that al-Qaeda and the Taliban did not “deserve the legal protections” afforded by the Geneva Conventions. Compliance with it instead became a “matter of policy and goodwill.”<sup>112</sup> Also, the President could “examine the operation of al-Qaeda and the Taliban as a whole and reach a determination.”<sup>113</sup> Freed from the Geneva Conventions’ regulations through a memo from OLC, President Bush decided that the United States would make a blanket determination that all al-Qaeda and the Taliban fighters would not receive the Geneva Conventions rights of Prisoners of War, (rather than requiring individualized findings after a hearing based on the facts relevant to a particular individual), and that instead they would be classified collectively as “unlawful combatants” or enemy belligerents.<sup>114</sup>

A determination that all al-Qaeda and Taliban fighters were “unlawful combatants” violates the Third Geneva Conventions Article V: “such persons [people detained on the battlefield] shall enjoy the [POW] protection of the present Conventions until such time as their status has been determined by a competent tribunal.” However, it was John Yoo and the OLC’s argument that since the Taliban and al-Qaeda violated Common Article III and Article IV, they were not entitled to a determination of their enemy status under Article V. The OLC understood that they were on much stronger legal ground with their argument against al-Qaeda, as opposed to the Taliban, because the Taliban was a localized entity acting as the pseudo government of

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<sup>111</sup> John Yoo, *War By Other Means*, 23.

<sup>112</sup> John Yoo, *War By Other Means*, 29.

<sup>113</sup> John Yoo, *War By Other Means*, 29.

<sup>114</sup> John Yoo, *War By Other Means*, 29.



context and lent credence to the belief that the lawyers within Bush's cabinet were looking for loopholes to get around the Geneva Conventions.<sup>116</sup> These excerpts turned into some of the lawfare ammunition that would eventually discredit the Bush administration's policies. To a degree the Bush administration was looking for loopholes to avoid the constrictions of the Geneva Conventions. John Yoo stated that:

Finding Geneva did not apply would also effectively eliminate any threat of domestic prosecution under the War Crimes Act of 1996, which might impose an unwise and unnecessary straightjacket on U.S. troops in a war whose circumstances and needs were unpredictable.<sup>117</sup>

This statement would have been particularly infuriating to a Staff Judge Advocate practicing Operational Law. The JAG Corps were inculcated with a moral mission to protect the U.S. military's honor. Even before the concept of Operational Law evolved with the precedents established in the 1980s and 1990s, which further legalized warfare and put the JAG Corps closer to the frontlines than ever before, the United States military had honored of the Geneva Conventions. During the Korean War, before the United States or North Korea even ratified the treaty, Douglas McArthur "order[ed] the troops under his command to follow the 'humanitarian principles of Common Article III and the more detailed requirements of the POW Conventions.'<sup>118</sup> The United States even extended Common Article III to the vicious Viet Cong insurgents who deliberately subverted the Geneva Conventions and cruelly tortured captured U.S. service members.<sup>119</sup>

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<sup>116</sup> Alberto Gonzales, Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War, 2.

<sup>117</sup> John Yoo, *War By Other Means*, 40.

<sup>118</sup> John Yoo, *War By Other Means*, 30.

<sup>119</sup> John Yoo, *War By Other Means*, 30.

In every subsequent conflict since Vietnam the United States has ensured their enemy is afforded POW status under the Geneva Conventions. The War Council sought, and succeeded, in overturning this established precedent. For over a half century the U.S. military had built its doctrine, training and standard operating procedures around the JAG Corps' understanding of the UCMJ and the Laws of War. This established precedent had become the norm and any variation from this precedent loses authority both domestically and internationally. As time progressed after 9/11 the Bush administration's divergence from precedent seemed less and less warranted, enhancing the effectiveness of the lawfare campaign terrorist groups were waging against the United States. The Bush administration's post-9/11 terror policies were a direct affront to the JAG Corps' "view of the world," and their moral mission as a bureaucracy, because it was the JAG Corps duty to win the lawfare campaign.<sup>120</sup> Even Colin Powell, then Secretary of State, echoed the JAG Corps' position and argued that it "could undermine U.S. military honor which emphasized maintaining the highest standards of conduct in combat."<sup>121</sup>

John Yoo viewed the JAG Corps' opinion on the Geneva Conventions as an argument for a different legal interpretation, one that was invalid against al-Qaeda. While the JAG Corps viewed it as a legal and moral argument, that was institutionalized through repeated practice. The main argument the JAG Corps "executives" put forth is that if the United States did not follow the Geneva Conventions, future enemies would use similar justifications to validate stripping Geneva Conventions protections of American soldiers and then abuse or torture American soldiers.<sup>122</sup> John Yoo stated, "They [the JAG Corps] believed the Geneva Conventions were now

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<sup>120</sup> Jack Goldsmith, *Power and Constraint*, 175-176.

<sup>121</sup> John Yoo, *War By Other Means*, 40.

<sup>122</sup> Jane Mayer, *The Dark Side*, 83-86.

‘customary international law’ –applicable not by treaty, but by custom developed through the practice of states over time.”<sup>123</sup>

This statement by Yoo is perplexing. The foundational touchstone for Yoo and the War Council is their reliance on historical precedents and previous uses of executive power in the Civil War and again during World War Two. What is especially troubling in this context is that Yoo overlooks the historic military precedent of affording POW rights to the Viet Cong, an enemy that would be very comparable in many respects to at least the Taliban. The Viet Cong, much like the Taliban, were not signatories to the Geneva Conventions and did not adhere to the protections these conventions were intended to afford, but were still afforded these rights. Yoo simply responded to the JAG Corps’ argument in *War by Other Means* by saying “The Justice Department disagreed.”<sup>124</sup> His comment does not begin to convey the vehemence of the JAG Corps’ rejection of the War Council’s position on the Geneva Conventions.

If Yoo and the War Council thought the JAG Corps would passively accept the legal determination of the higher ranking civilian appointees, they were gravely mistaken. The JAG Corps went along with the War Council in the short term, but would fight these determinations on the Geneva Conventions and the military commissions with every bureaucratic weapon they had, to defend the honor of the military as well as their bureaucratic turf. Their efforts to combat the War Council’s view on these two issues would be assisted by the international incident in Abu Ghraib and President Bush’s declining approval ratings.<sup>125</sup>

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<sup>123</sup> John Yoo, *War By Other Means*, 35.

<sup>124</sup> John Yoo, *War By Other Means*, 35.

<sup>125</sup> Gallup Poll, “Presidential Approval Ratings—George Bush,” (<http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>)

## An Internal Bureaucratic War Over Lawfare

*“Tragically, the current administration [Bush administration] chose to respond to the 9/11 with a series of unnecessary, self-inflicted wounds, which have gravely diminished our global standing and damaged our reputation for respecting the rule of law.” –Jack Goldsmith<sup>126</sup>*

Although there were two main points of contention between the War Council and the JAG Corps, both would be battled with the same bureaucratic weapons by the JAG Corps’ entire chain of command. The JAG Corps’ main reasons for fighting this bureaucratic war boil down to a moral sense of mission to uphold the United States Military’s honor. The JAG Corps believed the mechanisms to uphold this sense of honor had been institutionalized in the Uniformed Code of Military Justice, the Geneva Conventions, their training and education, and years of practice throughout multiple conventional and asymmetric conflicts. Thus, the bureaucratic battle and the way that it was fought is intertwined with the JAG Corps training and sense of mission. The role the JAG Corps played in shaping the Bush administration’s legal policies on detention, prosecution and lethal direct action can be looked at more broadly as one of many case studies on executive bureaucracies. This particular case study of the battle between the JAG Corps and the Bush administration transcends American Government and incorporates the realm of International Relations. As previously stated lawfare is both defense and offensive, and it is the job of the President of the United States to go on the offense, by labeling terror as a violation of international law and to put up a strong defense by maintaining a moral high ground. This chapter analyzes an internal bureaucratic battle over how the United States should defend against

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<sup>126</sup> Jack Goldsmith, *Power and Constraint*, 3.

lawfare attacks. Therefore, in this case bureaucracy and lawfare is mixed, and ultimately the Bush administration's lawfare defense proved inadequate.

How did the JAG Corps manage over time to come out victorious against a powerful War Council largely made up of attorneys hand-picked by the President and Vice-President of the United States? James Q. Wilson dedicates an entire chapter to the reasons why bureaucracies clash over "turf" and policy, but he does not address the exact means by which an organization fights to build a "constituency" that permits autonomy.<sup>127</sup> The analysis of how a lower-level bureaucracy successfully remained insubordinate to a higher-level bureaucracy is especially thought-provoking because it is uncharted by Wilson in his research into executive bureaucracies.

An important and often overlooked factor that determined this successful outcome for the JAG Corps is the passage of time and the cascade of intervening events that turned the tide against the administration's policies. The JAG Corps' resolute resistance to the War Council's view persisted throughout the Bush administration, and the JAG Corps' success increased overtime. Perhaps the most important factor was the lack of another terrorist attack. The fear and panic of the 9/11 attacks gave the Bush administration an enormous amount of political capital, which allowed the War Council to validate their unprecedented interpretations over the objections of the JAG Corps. As time went on and America did not experience another major terrorist attack, the Bush administration's anti-terror policies gradually became less tolerated as the perceived threat began to diminish.<sup>128</sup> With the perceived threat diminishing in the public's view, the balancing of the means used to justify the ends led to different results as years

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<sup>127</sup> James Q. Wilson, *Bureaucracy*, 179-181.

<sup>128</sup> Gallup Poll, "Terrorism Within the United States," (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx>)

passed.<sup>129</sup> These forces pushed public sentiment away from the more severe measures sought by the War Council and towards the view of the JAG Corps. This point leads to the more readily identifiable “elite sentiment” measured in congressional legislation and Supreme Court cases that restricted the Bush administration’s initial anti-terror policies, but time is the underlying factor. The public sentiment drove the more significant “elite sentiment” away from the Bush administration’s early legal interpretations.

Another key factor assisting the JAG Corps’ ability to impose its legal design for military commissions and POW status was the actions of American soldiers in Abu Ghraib, Iraq. The location itself was a symbol for incarceration and torture under the Saddam Hussein regime. Despite massive post-Vietnam bureaucratic expansion of the SJAs into forward deployed areas to prevent abuses, “neither law nor lawyers prevented the abuses at Abu Ghraib.”<sup>130</sup> The story broke in November 1, 2003: seventeen U.S. Army soldiers were charged with dereliction of duty, maltreatment, and aggravated assault and battery, for acts of physical and sexual abuse, torture, rape and sodomy. This event shattered the rhetoric that America was fighting from a moral high ground and made President Bush’s comments on how brutal the Saddam or Taliban regime appear very hypocritical. General David Petraeus accurately described it as “the greatest military defeat the United States suffered after 9/11.”<sup>131</sup>

It cannot be overemphasized that one of the most prominent military commanders in the War on Terror described the actions of a few soldiers and the digital images they produced as a “military” defeat, not an attack on U.S. soldiers or a lost battle—lawfare is becoming just as or

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<sup>129</sup> Gallup Poll, “Terrorism in the United States,” (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx?version=print>)

<sup>130</sup> Jack Goldsmith, *Power and Constraint*, 146.

<sup>131</sup> Jack Goldsmith, *Power and Constraint*, 146.

more important than actual military warfare. Members of the terrorist group the Islamic State in Iraq and the Syria (ISIS), which came into being around 2007, continue to use the images and testimony of torture at Abu Ghraib to recruit extremists to their cause.<sup>132</sup> The Abu Ghraib abuses were a result of a lack of leadership and cruel criminal actions by individuals, and more broadly, confusing and contradictory doctrine and training. The JAG Corps would interpret the events at Abu Ghraib as proof that their opinion was correct on the Geneva Conventions' rights for POWs, and the War Council's position was wrong. This supports just how important lawfare has become in the War on Terror, it overshadows the military conflict. Therefore, it is extremely important to understand the internal mechanisms of the Bush administration legal team because these mechanisms produce real external military results. It is no coincidence that 2004 marked a steep drop in fear of another terrorist act, just as the JAG Corps was mounting their fiercest opposition to the War Counsel.<sup>133</sup>

Still, the Bush administration's argument for continuing their extreme legal policies, despite the perceived diminished threat of terrorism, was in part to argue that the threat had diminished precisely *because* the policies they were implementing were successful. Put simply, in their opinion the ends justified the means. The JAG Corps was compelled to overcome this argument to correct the Bush administration's policies and adapt them into something that was compatible with their organization's moral mission. The bureaucratic weapons the JAG Corps had at their disposal were classified memos on the internal disputes within the Pentagon, "in public testimony, and in leaks to the press."<sup>134</sup> For classified memos regarding the JAG Corps'

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<sup>132</sup>Lina Khatib, "How ISIS capitalizes on horrors of Blackwater and Abu Ghraib," *CNN Online* April 15, 2015, (<http://www.cnn.com/2015/04/15/opinions/blackwater-abu-ghraib-isis/>)

<sup>133</sup> Gallup Poll, "Terrorism in the United States," (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx?version=print>)

<sup>134</sup> Jack Goldsmith, *Power and Constraint*, 175.

disagreements within the Pentagon to be made public, they needed a congressional hearing. congressional hearings can still be classified, but they have the potential for members to request that memos and other materials be declassified and made available to the public. The chief example of this are opposition memos written by the JAG Corps that were declassified after a Senate Armed Services Committee hearing on military detention and interrogation in July of 2005 that involved JAG Corps testimony.<sup>135</sup> This particular hearing and its results were the best-case scenario for the JAG Corps executives actively trying to revise the War Council's extreme policies.

In order to get a congressional hearing by the Intelligence or Armed Services committees, it appears the JAG Corps caused unauthorized leaks of documents, and perhaps most notably, John Yoo's definition of torture, (although due to the classified nature of these documents it is impossible to establish the source of this leak conclusively). The key strength of unauthorized leaks is that they direct the interest of journalists, legislative oversight through inspectors general (Congressional officials embedded in the executive to identify abuse) and non-governmental organizations like the American Civil Liberties Union, towards your cause.<sup>136</sup> The obvious downside to leaks is the need for a few courageous individuals to violate military laws regarding classified material. These are the very laws the JAG Corps is sworn to uphold, creating an inherent contradiction. Finally, by their very nature it is very difficult to trace anonymous tips or "whispers" that are reported in the press or prove the source of the leak originated from the JAG Corps. However, the results of leaks can be seen through increased media attention, critical

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<sup>135</sup> Neil A. Lewis, "Military's Opposition to Harsh Interrogation Is Outlined," *New York Times*, July 28, 2005.

<sup>136</sup> Vian Bakir, *Torture, Intelligence and Sousveillance in the War on Terror: Agenda-building Struggles*, (New York: Routledge, 2016), 1994-1995.

congressional hearings, and subsequent legislation, as well as the pursuit of litigation that ultimately led to significant Supreme Court cases rejecting many of the War Council's interpretations.

One of the biggest Bush administration leaks, besides Alberto Gonzales's Geneva Conventions leak, was John Yoo's "Torture Memo" leak. This occurred in the Spring of 2004 amidst the media coverage of the Abu Ghraib atrocities. The exposure of this memo at that time was like pouring fuel on a fire. An in-depth analysis of the legal findings within the torture memo are beyond the scope of this work. Briefly, John Yoo argued that for interrogation techniques to constitute torture, they must result in severe pain equivalent to organ failure or death.<sup>137</sup> The JAG Corps had many objections to the findings in this memo because of their moral objections to Yoo's definition of torture. Yoo could only take this position after the determination that the Geneva Conventions did not apply to al-Qaeda or the Taliban, as the Geneva Conventions provide for a definition of torture that is inconsistent with the one he advanced. Jack Goldsmith was the Assistant Attorney General at the time and categorized this as a "bruising battle with military lawyers" that would become the basis for misleading and unfair attacks by the press and others on his [John Yoo's] motives and judgement."<sup>138</sup> Regardless of the media's accuracy in shining a negative spotlight on a key War Council member, this media attention began to accelerate the decline of public support for the Bush administration's policies on terror and constituted a victory for the JAG Corps.

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<sup>137</sup> John Yoo, "Memorandum for Alberto Gonzales Counsel to the President Re: Standard for Conducting Interrogations," *The U.S. National Archives*, August 1, 2002, (<http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>)

<sup>138</sup> Jack Goldsmith, *Terror Presidency*, 154.

Again, it is very difficult for academics to be able to parse leaks or rumors with any real certainty. However, there is a confirmed case of JAGs specifically leaking information. Unfortunately, the details surrounding these events are sparse, given that they were done in secret and were illegal. The singular event that will be discussed within this work is in March of 2003, when a delegation of JAG Corps “executives” unofficially visited Scott Horton, who was then the head of the Human Rights Committee of the New York Bar Association.<sup>139</sup> This is corroborated, to a degree, by Jack Goldsmith when he wrote that “it was all the more remarkable because for their assistance in their fights, the JAGs turned to human rights organizations with which, on these issues, they had greater commonality of interests than with the President.”<sup>140</sup>

According to reports, JAGs “told Horton that they could only talk obliquely about classified practices, but warned that the American military’s 50-year history of observing the Geneva Conventions is being overturned.”<sup>141</sup> These same reports say they urged Horton’s committee and other human rights groups to challenge the Bush administration on its policies.<sup>142</sup> The JAG Corps’ executives understood that they could not challenge the War Council alone. They believed that unauthorized leaks to the press would set in motion a course of action that would create a series of negative media accounts on the Bush administration. This negative media attention was exacerbated by the human rights violations at Abu Ghraib.

Leaks were not the only weapon the JAG Corps “executives” had at their disposal. Another weapon was the use of the powerful Judge Advocate General’s Legal Center and School, through which the JAG Corps’ “executives” establish the professional norms and

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<sup>139</sup> Vian Bakir, *Torture, Intelligence and Sousveillance in the War on Terror, 1994-1995*.

<sup>140</sup> Jack Goldsmith, *Power and Constraint*, 177.

<sup>141</sup> Vian Bakir, *Torture, Intelligence and Sousveillance in the War on Terror, 1994-1995*.

<sup>142</sup> Vian Bakir, *Torture, Intelligence and Sousveillance in the War on Terror, 1994-1995*.

inculcate points of view during the final training of JAG officers. JAG Officers attend this school after attending law school, and receive a Masters of Law in military law upon completion. This training serves as the foundational authority for “operators” to base their decisions, and was a significant resource of internal bureaucratic resistance.<sup>143</sup> The Operational Law Handbook, the indispensable manual for military law questions for those deployed in a combat environment, is taught to JAG officers during this initial training, and an updated version is released each subsequent year.

Using these Operational Law Handbooks as released over time provides a primary source for determining what was occurring at the JAG Corps’ “operator-level.” One would expect major changes to be made to the handbook’s Chapter 18, “Combating Terrorism,” from the year 2000 to 2004. But even though material was added, the legal substance was either unchanged or contradictory regarding POW rights under the Geneva Conventions. The 2000 version stipulates that “common article 3 of the 1949 Geneva Conventions, which requires that noncombatants be treated in a humane manner, also applies to captured terrorists.”<sup>144</sup> The 2004 version does include several changes: an entire introduction describing the unprecedented events of 9/11, the several changes that have come about due to the AUMF in 2001, and an added section summarizing the rules of President Bush’s military commissions. But the added subsections addressing the applicability of the Geneva Conventions is left very ambiguous. Instead of explicitly stating that President Bush has found that al-Qaeda and the Taliban are not qualified for the Geneva Conventions rights, the handbook concludes a subsection on Guantanamo Bay detainees by stating more broadly that “the United States has treated and will continue to treat all

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<sup>143</sup> James Q. Wilson, *Bureaucracy*, 92.

<sup>144</sup> U.S. Army, "Operational Law Handbook." (Judge Advocate General's Legal Center and School: Charlottesville, Va. 2000), 317.

Taliban and al-Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Conventions.”<sup>145</sup> The phrase “consistent with the principles of the Geneva Conventions” and others like it have been used to validate Geneva Conventions protections for prior insurgents like the Viet Cong and Somalian gangs in 1993.<sup>146</sup>

In terms of the status of detainees in Guantanamo, (which is broadened to include detainees held elsewhere in the Global War on Terror), the text is confusing if not downright contradictory. The opening sentence states that a press release on February 7, 2002 resolved the issue of the status of Guantanamo detainees through the President’s blanket determination that “neither the Taliban nor al-Qaida detainees are entitled to POW status.”<sup>147</sup> The very next sentence immediately contradicts the previous sentence stipulating, “the President confirmed that the Geneva Conventions do apply to Taliban detainees, but not al-Qaida detainees.”<sup>148</sup> This ambiguity written into the 2004 Operational Law Handbook would allow the JAG Corps to continue its education of lower level operators like they always were, instructing that all combatants receive POW status, despite the President’s ruling otherwise. Goldsmith articulates this point, by saying that the education system of the JAG Corps forces them to make clear cut “red lines,” and military commanders rarely get close to red lines out of fear that a misstep will lead to a defeat on the lawfare battlefield--as evidenced in the Abu Ghraib atrocities, as the lawfare battle can be more important than real military objectives.<sup>149</sup> These “redlines” are

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<sup>145</sup> U.S. Army, "Operational law handbook." (Judge Advocate General's Legal Center and School: Charlottesville, Va. 2004), 336-337, (<https://fas.org/irp/doddir/army/law2004.pdf>)

<sup>146</sup> John Yoo, *War by Other Means*, 30.

<sup>147</sup> U.S. Army, "Operational law handbook." (2004), 336, (<https://fas.org/irp/doddir/army/law2004.pdf>)

<sup>148</sup> U.S. Army, "Operational law handbook." (2004), 336, (<https://fas.org/irp/doddir/army/law2004.pdf>)

<sup>149</sup> Jack Goldsmith, *Power and Constraint*, 137.

distilled down to simple rules of engagement and incorporated into soldiers training, so it becomes second nature. The influence of the JAG Corps on the battlefield are incalculable because of their influence on basic training. Maintaining the established professional norms and inculcating points of view within the lowest level that contradict what a higher-level bureaucracy explicitly orders can be a powerful form of resistance. Overall, this is an example of the JAG Corps exercising a more appropriate amount of defensive lawfare than the President is prescribing in his press releases, using methods of bureaucratic infighting. In the War on Terror, bureaucracy and lawfare are inseparable.

Leaks to the press and internal resistance were the JAG Corps' main weapons against the War Council, but these weapons alone were not enough. The idea behind leaks is to call the media, inspector generals and NGOs to a cause. The JAG Corps was able to gradually turn the media against the Bush administration's policies on Geneva Conventions rights, and thus detention rights, as well as military commissions. It was not difficult to get civil liberties NGOs to oppose the Bush administration after the abuses at Abu Ghraib. Ultimately, though, it would take Congress and the Supreme Court to put an end to the War Council's legal interpretations of what was permissible.

### *Powerful Allies*

The Bush administration condemned the actions that led to the abuse at Abu Ghraib. However, they blamed the episode on a few bad soldiers, rather than a systematic response to the removal of prior legal restraints or an inherent ambiguity in their legal policies that led to widespread abuse and torture. However, the lack of another terrorist attack and the media coverage of the sadistic treatment of detainees at Abu Ghraib, coupled with the internal battle the JAG Corps was waging against the Bush administration, led to the gradual fall of many of the

administration's terrorism policies that the War Council permitted through their radical legal interpretations. As discussed in the introductory chapter, the President of the United States as Commander in Chief is ultimately responsible for guiding an effective lawfare defense through his executive bureaucracy. The effectiveness of a lawfare defense is measured not only in the opinion of the international community but more importantly in the "elite sentiment" of Congress and judges. Bureaucracy is intertwined with lawfare in this case because the JAG Corps used institutional means to dismantle the Bush administration policies that disagreed with their sense of mission and interpretations of law. The Bush administration's lawfare defense is unsuccessful because of the repeated changes to policy and legal interpretations made at the behest of Congress and the Supreme Court.

The timeline begins with the breaking of the Abu Ghraib story in November of 2003. The leaked "torture memo" in March of 2004 placed a much larger portion of the blame on the Bush administration. In June 28, 2004, *Hamdi v. Rumsfeld*, one of the first Supreme Court cases regarding the detention of terrorists, was decided against the Bush administration. Yaser Esam Hamdi was detained on the battlefields of Afghanistan by the Northern Alliance and handed over to the U.S. forces.<sup>150</sup> The Taliban insurgency was engaged in armed conflict with U.S. forces. Hamdi was initially detained at Guantanamo Bay, but when the administration learned he was an American citizen he was moved to U.S. naval brigs in Virginia and South Carolina.<sup>151</sup> His father filed for a writ of habeas corpus. The *Hamdi* decision is not directly related to the questions surrounding the detention of foreign fighters as enemy combatants not receiving Geneva Conventions POW status or trial by military commission, because Hamdi was a United States

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<sup>150</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)

<sup>151</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)

citizen. Moreover, the *Hamdi* Court declined to delineate the precise boundaries of the president's Article II Commander in Chief war powers. Therefore, the *Hamdi* decision cannot fully address the War Council's interpretations.

On the same day as the *Hamdi* decision was handed down, the Supreme Court also released its decision on *Rasul v. Bush*. The Supreme Court found in *Rasul* that the United States exercised complete control and jurisdiction over Guantanamo Bay Prison facilities and since they had this level of control non-citizens had the right to habeas corpus petitions.<sup>152</sup> These ruling rejected the argument advanced by the Bush administration that the judicial branch could not hear challenges to detention because it was not equipped to deal with these issues. The mere grant of certiorari in the *Hamdi* litigation opened the door for future challenges and made the Supreme Court the final appellate court for legal cases arising in the War on Terror. Justice Thomas dissented on precisely these grounds, arguing that the Court lacked the "capacity to second-guess" an executive branch decision during wartime.<sup>153</sup>

Detainees at Guantanamo could now contest their detention in federal court and with many detainees held there without charges presented a serious problem for the Bush administration. It is the combination of these two cases that discredit the Bush administration's lawfare defense and promote a defense against enemy lawfare that is more agreeable to the JAG Corps.

Then, in July of 2005, the Judge Advocates General and the Generals of the military branches were requested at a Senate Armed Services Committee hearing, after which Senator

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<sup>152</sup> *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)

<sup>153</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)

Lindsey Graham (SC-R) would declassify JAG Corps memos opposing the War Council's interpretations. Jack Goldsmith was correct in stating:

There can be no greater affront to the Bush theory of unitary control over the executive branch than military lawyers [the JAG Corps], at the behest of a member of Congress who himself is a reserve military lawyer, publicly disagreeing with the Commander in Chief's legal views in a time of war.<sup>154</sup>

Senator Graham when asked how he used the JAG Corps, he simply stated "I called them up and I ran things by them."<sup>155</sup> The JAG Corps was using their ally in Congress to draft a bill of detainee treatment that fit their legal interpretations. It cannot be emphasized enough, that the legal interpretations of the War Council went against the JAG Corps' worldview and the institutions they had built up in the 1980s and 1990s around their view. The JAG Corps was extremely concerned that the United States long history of being a global leader for prisoner rights, would set a new lower standard, that enemies who captured American soldiers would exploit.<sup>156</sup> Therefore, the JAG Corps used bureaucracies to achieve their moral goals and improve the United States lawfare defense.

After the Senate hearing, Congress began to rein in the Bush administration. The Detainee Treatment Act passed on November of 2005 which changed Bush administration's policies on detention, that were only permissible through the expansive legal interpretations of the War Council. The main changes stipulated in the Detainee Treatment Act of 2005 were: a return to the Army Field Manual Standards of treatment and interrogation of detainees, guaranteeing a defense attorney (JAG Corps officer), and the creation periodic review boards to

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<sup>154</sup> Jack Goldsmith, *Power and Constraint*, 187.

<sup>155</sup> Jack Goldsmith, *Power and Constraint*, 186.

<sup>156</sup> Jack Goldsmith, *Power and Constraint*, 174

determine if the United States still need to keep a detainee at the Guantanamo prison facility. This was a serious blow to the Bush administration and its desire to push the laws existing prior to the Detainee Treatment Act of 2005 to the limit.

Soon after, another Supreme Court case on detainee rights and military commissions in the War on Terror, *Hamdan v. Rumsfeld*, was decided in favor of Hamdan. Hamdan was a detainee accused of being Osama bin Laden's driver, filed for habeas corpus to challenge his detention at Guantanamo Bay. The 5-3 decision written by Justice Stevens determined that an act of Congress and the war powers of the executive authorized the rules for the military tribunal, the rules must conform to both the Geneva Conventions and the UCMJ.<sup>157</sup> The Court determined the specific rules of the tribunal that deemed certain aspects of the trial classified violated both the Geneva Conventions and the UCMJ.<sup>158</sup>

The Bush administration's second loss in the Supreme Court over the War Council's legal interpretations led to the Military Commissions Act in October of 2006, that stripped habeas corpus for foreign detainees "in lieu of detention review by military tribunal and federal court" and finally gave the Bush administration explicit statutory approval for military commissions in the War on Terror.<sup>159</sup>

*Boumediene v. Bush*, decided on June 12, 2008 held that the "petitioners [suspected terrorists] may invoke the fundamental process of habeas corpus."<sup>160</sup> By finding that the petitioners had habeas corpus rights, the court additionally found that the combatant status review tribunals (CSRTs) were an insufficient substitute to habeas corpus. This was the final

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<sup>157</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

<sup>158</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

<sup>159</sup> Jack Goldsmith, *Power and Constraint*, 190.

<sup>160</sup> Jack Goldsmith, *Power and Constraint*, 189.

case to go against the Bush administration's policies, and the mere fact that multiple cases made it to the Supreme Court during the War on Terror is a testament to how far the judicial branch had entered the realm of warfare. Furthermore, for the first time in American history the Supreme Court struck down a wartime measure supported by both Congress and the President.<sup>161</sup> Also for the first time in American history an enemy in a time of war held outside the United States received the constitutional right to appeal their detention.<sup>162</sup> A flood of new habeas corpus cases came in in the fall of 2008, forcing the government to prove that it had factual and legal evidence to detain a combatant. Although, this may seem over burdensome on the executive, this measure is an effect lawfare defense, because it sets the United States apart from terrorist organizations and rogue governments through the rule of law.

President Obama was able to persuade Congress to make amendments to the Military Commissions Act of 2006 in May of 2009, but notably did not get rid of military commissions altogether. While these acts were being passed by Congress and these decisions were being rendered by the Supreme Court, President Bush's job approval ratings were slowly and steadily declining.<sup>163</sup>

It is imperative to examine each major Supreme Court case and each act of Congress which had a direct or indirect impact on either Geneva Conventions rights or military commissions. Even though the rulings in these cases and the restrictions imposed within these laws only narrowly adjusted the policies, they caused a much larger indirect impact. Each time the Supreme Court or Congress checks the executive branch it diminishes its power. This was a

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<sup>161</sup> Jack Goldsmith, *Power and Constraint*, 190.

<sup>162</sup> Jack Goldsmith, *Power and Constraint*, 190.

<sup>163</sup> Gallup Poll Bush Job Approval Ratings 2001-2009, (<http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>)

point of contention with the members of the War Council, who believed that Congress had exceeded its authority by placing restrictions on the war powers constitutionally imbued in the Commander in Chief, with the War Powers Resolution of 1973.<sup>164</sup> Therefore, each decision or law that went against the initial policies of the War Council caused many additional policy points to be adjusted to conform to the new standard, so that more judicial rulings or legislation did not go against the Bush administration. Although the Supreme Court's rulings only applied to the Guantanamo Bay facilities, the legal implications of the *Rasul*, *Hamdi*, *Hamdan* and *Boumediene* cases, compounded and extended into Afghanistan.<sup>165</sup> These judicial decisions influenced the thinking of JAG Corps officers in Afghanistan, as they were concerned that the court might, through a new decision, extend habeas corpus rights to detainees in that area of active hostility.<sup>166</sup> The foregoing cases chipped away at the War Council's argument that anyone, citizen or not, picked up in the combat zones of Iraq or Afghanistan as a member of al-Qaeda or the Taliban was not entitled to Common Article III POW status. The *Hamdi and Rasul* rulings opened the door to the courtroom for other enemy combatants to question the executive branch's policies during the War on Terror.

In between the foregoing Supreme Court cases and the acts of Congress directed at the Geneva Conventions or military commission issues, perhaps the most important event for the JAG Corps was the scheduling of Senate hearings. On July 15, 2005, Senate Armed Services Committee chair Lindsey Graham (R-SC)--himself a former active duty Air Force JAG and reservist until 2015--led a hearing involving all of the top JAGs. The generals included Maj. Gen. Thomas J. Romig, USA; Maj. Gen. Jack L. Rives, USAF; RADM James E. McPherson,

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<sup>164</sup> Jane Mayer, *The Dark Side*, 58.

<sup>165</sup> Jack Goldsmith, *Power and Constraint*, 193.

<sup>166</sup> Jack Goldsmith, *Power and Constraint*, 193.

USN; and Brig. Gen. Kevin M. Sandkuhler, USMC.<sup>167</sup> The declassified minutes of the testimony given by the JAG Corps’ “executives” reveals an unrelenting assertion of their proposed legal policy and opposition to the War Council’s current interpretations. The hearing itself not only garnered the attention of the senators but also gained the attention of media outlets like *The New York Times* and *The Washington Post*. This put the JAG Corps’ opposition into the public eye. There were short statements offered by Maj. Gen. Romig during the hearing, including an acknowledgement that “we did express opposition.”<sup>168</sup> This testimony led to subsequent statements from Graham like, “If they had listened to you [JAG Corps] from the outset, we wouldn’t have a lot of the problems we’ve dealt with over the past two years,” bringing positive media attention to the divergent views existing between the JAG Corps “executives” and the Bush administration’s policies.<sup>169</sup> When asked by Sen. Carl Levin (MI-D) whether the detention and interrogation tactics were consistent with the Geneva Conventions, Air Force Maj. Gen. Rives stated that they were “inconsistent.”<sup>170</sup>

The moral mission of the JAG Corps also came out in the testimony. For example, JAGs made statements like, “the aggressive techniques would endanger American soldiers taken prisoner and also diminish the country’s standing as a leader in ‘the moral high road’ approach to laws of war” and “while [the interrogation practices] are technically legal, they are inconsistent

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<sup>167</sup> Senate Armed Services Committee, Subcommittee on Personnel, *Hearing on military justice and detention policy in the global War on Terror*, 109th Cong., July 15, 2005.

(<https://www.gpo.gov/fdsys/pkg/CHRG-109shrg28578/html/CHRG-109shrg28578.htm>)

<sup>168</sup> Josh White, “Military Lawyers Fought Policy on Interrogations: JAGs Recount Objections to Definition of Torture,” *Washington Post*, July 15, 2005.

<sup>169</sup> Josh White, “Military Lawyers Fought Policy on Interrogations,” *Washington Post*, July 15, 2005.

<sup>170</sup> Josh White, “Military Lawyers Fought Policy on Interrogations,” *Washington Post*, July 15, 2005.

with our fundamental values.”<sup>171</sup> A hearing of this nature, in front of a favorable audience in the form of reserve Judge Advocate Sen. Graham, was the best case scenario for the JAG Corps to mount opposition to the War Council in a meaningful forum. This hearing created allies for the JAG Corps in Congress and the media.

These congressional allies would be instrumental in the enactment of the Detainee Treatment Act of 2005, which was contained within the DOD appropriations bill H.R. 2863, under Title X. This Act stipulates:

- (a) In General. —No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.<sup>172</sup>

This law was a massive blow to the War Council and a huge victory for the JAG Corps. Its enactment effectively made all executive agencies abide by Geneva Conventions Common Article III, and as a result, Article IV and Article V of the Geneva Conventions as well. The Army Field Manual 34-52 on Intelligence Interrogations states in multiple areas, including the preface, that:

The principles and techniques to be used within the constraints established by the following: The Uniform Code of Military Justice (UCMJ) and the Geneva Conventions Relative to the Treatment of Prisoners of War of August 12, 1949 [Common Article III]<sup>173</sup>

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<sup>171</sup> Neil A. Lewis, “Military’s Opposition to Harsh Interrogation is Outlined,” *The New York times*, July 28, 2005.

<sup>172</sup> H.R. 2863, “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (<https://www.congress.gov/bill/109th-congress/house-bill/2863/text>)

<sup>173</sup> Army Field Manual on Intelligence Interrogations: Human Intelligence Collector Operations, FM 2-22.3 (FM 34-52), vii, (<https://www.state.gov/documents/organization/150085.pdf>)

The passage of the Detainee Treatment Act of 2005 caused adjustments to the standard operating procedures of the CIA and DOD regarding the interrogation and detention programs then in use to order to meet the POW standard imposed by the act. The JAG Corps had achieved their policy of abiding by the Geneva Conventions and fulfilling the moral mission that had been developed and instilled in the military services since the 1980s.

Now that the JAG Corps was victorious on the Geneva Conventions front, the wheels were also set in motion to restructure the military commissions. The second important Supreme Court case to address the War Council's interpretations, *Hamdan v. Rumsfeld*, decided in June of 2006, would address the military commissions issue. Hamdan was a Yemeni national accused of being Osama bin Laden's driver. He was captured in November of 2001 by militia forces in Afghanistan and then delivered to the U.S. military. In June of 2002, he was moved to Guantanamo Bay. President Bush determined on July 3, 2003, that Hamdan and five other detainees were subject to the Military Order signed in November of 2001, and therefore would be triable before a military commission and would be assigned military counsel to represent them.<sup>174</sup>

The "operator" level Judge Advocate (Hamdan's assigned defense lawyer), followed the standing operating procedure that the JAG Corps had developed over the past twenty years, promptly filed demands for charges and for a speedy trial pursuant to the UCMJ.<sup>175</sup> These demands were denied on the grounds that Hamdan was not entitled to the UCMJ's protections, despite years of JAG Corps precedent to the contrary. Prior to his trial before a military commission under the rules laid out by the War Council, Hamdan challenged the legality of the

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<sup>174</sup>*Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

<sup>175</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

military commission to decide his case. The District Court decided in his favor, but the D. C. Circuit Court of Appeals reversed, upholding the validity of an adjudication of the charges against Hamdan by a military commission.

The matter was heard by the Supreme Court on March 8<sup>th</sup>, 2006. The 5-3 majority opinion written by Justice Stevens did not rule military commissions unconstitutional, but did place the burden on the executive to satisfy the basic preconditions for military commissions in the absence of explicit congressional authorization.<sup>176</sup> The majority ruled that “nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”<sup>177</sup> Furthermore, the majority decision declared Common Article III of the Geneva Conventions applicable because “high contracting parties (signatories) also must abide by all terms of the convention vis-à-vis one another even if one party to the conflict is a non-signatory power.”<sup>178</sup> Since the Court ruled that Common Article III applied to al-Qaeda and the Taliban, it also recognized the need for Hamdan to be tried by a “regularly constituted court” and not a “special tribunal,” further bolstering the Court’s decision that the War Council’s rules for military commissions were invalid. This also reinforced the JAG Corps’ argument for both Geneva Conventions POW status for combatants and that military commissions should be modeled after the rules of evidence in courts-martial.

The initial victory for the JAG Corps on the military commissions front would be short lived. By October of 2006, a bill introduced by Sen. Mitch McConnell (R-KY) titled the Military Commissions Act of 2006 would give the President explicit authority to establish military

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<sup>176</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

<sup>177</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

<sup>178</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

commissions.<sup>179</sup> *Hamdan v. Rumsfeld* was essentially reversed by legislative action, because the President now had explicit congressional authorization to convene military commissions, (albeit with some adjustments giving additional protections to the defendant) to adjudicate the charges against enemy combatants, an important factor the Supreme Court found to be lacking in its *Hamdan* decision. This is a remarkable example of the separation of powers, and check and balances instituted into the United States government at work.

Despite receiving authorization from Congress, military commissions still proved much more complicated than initially expected due to several other bureaucratic roadblocks, in addition to the persistent internal resistance of the JAG Corps. Few military commissions resulted in convictions. Also, the Supreme Court's decision in *Boumediene v. Bush* handed down in June of 2008 would upend President Bush's position even at the apex of his power by ruling that the Military Commissions Act of 2006 was an unconstitutional suspension of the writ of habeas corpus.

The petitioners in *Boumediene v. Bush* were all aliens designated as enemy combatants and detained at Guantanamo Bay. They filed petitions for habeas corpus seeking a court review of their detention. The majority, in granting the enemy combatants with a right to seek such judicial review, relied on the indefinite nature of the War on Terror compared to past military conflicts that have been of "limited duration."<sup>180</sup> The Court determined that it did not have "the luxury" during the War on Terror to leave this power to detain indefinitely without judicial review undefined.<sup>181</sup> These decisions made major adjustments to military commissions because

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<sup>179</sup> Military Commissions Act of 2006, 109<sup>th</sup> Cong. <https://www.congress.gov/bill/109th-congress/senate-bill/3930>

<sup>180</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 553 U.S. 723, 171 L. Ed. 2d 41 (2008)

<sup>181</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 553 U.S. 723, 171 L. Ed. 2d 41 (2008)

the petitioners could “invoke the fundamental procedural protections of habeas corpus.”<sup>182</sup>

President Obama would retain the right to use military commissions, in practice he would avoid them as much as possible.

The battle over the Geneva Conventions issue and the Bush administration’s military commissions was ended not internally by the JAG Corps alone but with the assistance of the other branches of government. The JAG Corps’ actions were motivated by their mission to uphold the military’s honor, but achieved through bureaucratic infighting and by utilizing the institution of military law the JAG Corps had constructed, rather than advising the President directly. The way in which this bureaucratic warfare was fought says a lot about American government and executive bureaucracies in general, specifically that the president cannot always control his bureaucracies. But it is not limited to just American Government--the motives behind this battle illustrate just how important a lawfare defense is to American foreign policy. The battle within the executive, congressional legislation and Supreme Court cases diverted attention away from the actual battlefields in the Middle East, but created a stronger lawfare defense that the Obama administration used to argue that his administration fought on a moral high ground.<sup>183</sup> This claim is true in some respects and false in others--it will be analyzed in the next chapter.

#### *The JAG Corps Case Study and Executive Bureaucracy*

The battle between the JAG Corps and the Bush administration evidences just how important this aspect of war fighting has become in the twenty-first century. It also demonstrates broader implications about the American executive’s sprawling bureaucracies more broadly. James Q. Wilson describes a number of points for achieving autonomy and defending one’s

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<sup>182</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 553 U.S. 723, 171 L. Ed. 2d 41 (2008)

<sup>183</sup> Jack Goldsmith, *Power and Constraint*, 4.

“turf.” This analysis will focus on Wilson’s discussion on turf that are most relevant to the JAG Corps’ fight over what they viewed as the proper lawfare defense.

Wilson articulated, “be wary of joint or cooperative ventures.”<sup>184</sup> The War Council saw themselves as the experts in the field of counterterrorism law and wanted to expand their power by operating unilaterally at first, without specific congressional approval on either issue.<sup>185</sup> The JAG Corps would diverge from this viewpoint, because they needed the help of Congress and the media to peel back the power the War Council possessed. Furthermore, the JAG Corps wanted Congress involved from the start, so it would set up a stronger lawfare defense for the United States. Another significant factor in a bureaucratic turf battle is, “seeking out tasks that are not being performed by others.”<sup>186</sup> The previous chapter conveyed how the JAG Corps took incidents like the My Lai massacre as a failure of their bureaucracy and exclusively subsumed the area of Operational Law, establishing precedents and consolidating their turf over Operational Law. Most importantly, “fight organizations that seek to perform your tasks,” the JAG Corps took the job of defending the United States military’s honor.<sup>187</sup> Wilson states that bureaucratic battles over turf are fought not between operators or managers, but by executives. He does not explain the tactics bureaucracies use to battle over turf, but he does explain that effective executives in turf battles have “an enormous capacity for work and (often) an obsession with the goals they wished to attain”<sup>188</sup> This case study absolutely supports Wilson’s claim. The executives of both competing bureaucracies, the War Council and the JAG Corps, were obsessed with achieving their goals.

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<sup>184</sup> James Q. Wilson, *Bureaucracy*, 189-190.

<sup>185</sup> James Q. Wilson, *Bureaucracy*, 190.

<sup>186</sup> James Q. Wilson, *Bureaucracy*, 189.

<sup>187</sup> James Q. Wilson, *Bureaucracy*, 189.

<sup>188</sup> James Q. Wilson, *Bureaucracy*, 202.

The JAG Corps ultimately succeeded in overturning policies implemented by the War Council. This result was accomplished due to a confluence of contributing factors including: the lack of another terrorist attack; the scandal of abuses at Abu Ghraib and the resulting change in public sentiment; the JAG Corps' ability to turn the spotlight of negative media attention on the Bush administration; and finally, its resistance to the War Council's legal interpretations that facilitated congressional and judicial developments complementing their resistance efforts. Although it is impossible to prove, it is safe to say the negative media attention promoted legislation against the War Council's legal policies and enhanced the chances of terrorism cases finding their way onto the Supreme Court docket. As momentum began to mount against the War Council's legal interpretations supporting the Bush administration's policies, it was only a matter of time before the JAG Corps reclaimed their turf and reinstated themselves as the experts on military law.

### *Conclusions*

Supreme Court Justice Hugo Black concluded the majority opinion in the controversial and largely discredited case *Korematsu v. the United States* with the following observation: "the need for action was great and the time was short. We cannot--by availing ourselves of the calm perspective of hindsight--now say that these actions were unjustified."<sup>189</sup> Despite the wrongful internment of Japanese-Americans *Korematsu* justified, there is merit to the argument that wartime decisions should not be judged after the fact when the threat has diminished. But in this particular case study the JAG Corps immediately stated that the action the Bush administration took as a result of the War Council's legal interpretations was the wrong course of action. The JAG Corps threw up every bureaucratic roadblock it had at its disposal, including: enlisting the

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<sup>189</sup> *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944)

help of Congress; seeking the publication of unfavorable internal documents by the press resulting in unfavorable media attention for the Bush administration; benefitting from landmark Supreme Court cases; and most importantly, as the fear of a terror attack dwindled, the corresponding reduction in support for President Bush and his policies. The JAG Corps valued their individual mission to defend the honor of the military and present a defense to the lawfare attacks al-Qaeda would inevitably use to discredit the United States war effort.

The origins of the “Warrior-Lawyer” indicate that the Staff Judge Advocates (SJAs) conducting Operational Law in an area of armed conflict were considered the experts in the rule of law during lethal operations. There was no other executive bureaucracy formally trained in this subject matter. The SJAs organizational structure while practicing Operational Law functioned differently from the rest of the Judge Advocate Generals Corps (JAG Corps). As described in the second chapter, the SJAs’ organizational structure after 9/11 still matched that of a “coping organization,” meaning both its outputs and outcomes were difficult to measure.

The Pentagon was on a war footing. Since this was a war against a new enemy, employing new strategies, it would require the Department of Defense (DOD) and Central Intelligence Agency (CIA) to “innovate” their tactics on the battlefield. They would also have to transform the manner in which enemy combatants were detained and how interrogations were conducted. James Q. Wilson asserts that bureaucracies, especially the DOD and CIA, resist innovation inherently, because they were created to ensure stability and a continued routine of organized relationships.<sup>190</sup> Both bureaucracies were stuck in a Cold-War era mindset in 2001 that was not well-suited for the nature of the present war. Both DOD and the CIA would undergo several tactical innovations on the battlefield to adapt to a new enemy and new battlefield

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<sup>190</sup> James Q. Wilson, *Bureaucracy*, 221-222.

operations. The SJAs, on the other hand, successfully prevented a change to their standard operating procedures for Operational Law. The JAG Corps adaptations, albeit slowly, with the assistance of Congress, the Supreme Court, the media and international tragedies, succeeded in overturning the War Council's legal interpretations and consequently the Bush administration's policies. The JAG Corps used the institutionalized mechanisms of bureaucracy to resist the War Council, but they did not resist adaptations purely to maintain their standard operating procedure. They resisted because they felt their standard operating procedures were the correct moral and legal procedures, and they valued these procedures over the will of the President.

As we will see in the next chapter, President Obama would campaign against the idea of an endless war with no boundaries during the 2008 election. Despite this, after taking the oath of office, President Obama would increase targeted killing via airstrikes and raids both inside and outside the declared war zones of Afghanistan and Iraq. This approach was due in no small part to the opposition to President Bush's legal decisions on detention, interrogation, and prosecution of terrorists.<sup>191</sup> The options for President Obama were narrowed in part due to his campaign promises. Moreover, by 2009 it was clear that any sort of long-term detention without trial or "enhanced interrogations" of enemy combatants were fraught with political and legal pitfalls that should be prudently avoided. Most of the War Council's interpretations on "direct action," meaning strikes or raids against suspected terrorists, were still fully intact during the Obama administration. President Obama sought to avoid capture altogether and instead chose simply to kill terrorists all around the globe, partly as a way of avoiding becoming ensnared with contentious detention issues. This policy was more straightforward because it avoided the legal pitfalls of detention and prosecution through military commission, but it also posed legal and

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<sup>191</sup> Jack Goldsmith, *Power and Constraint*, 14.

ethical dilemmas beyond those engendered by detention, interrogation and prosecution, as will be seen in the next chapter.

## The Obama Administration and the Warrior Lawyer

*“The foundations of the secret war were laid by a conservative Republican President and embraced by a liberal Democratic one who became enamored of what he had inherited...instead of the ‘hammer’ America now relies on the ‘scalpel.’” – Mark Mazzetti in *The Way of the Knife*<sup>192</sup>*

*“And we had a very bad problem in the Bush Administration that the Obama Administration, quite frankly, has corrected. The civilian lawyers in the Bush Administration in my view shut out military legal advice and tried to make a power grab, saying the judge advocate general had to – clear their legal advice to their commanders through the civilian office of the general counsel. That to me, was an exercise of control of legal independence.” Senator Lindsey Graham (R-SC)<sup>193</sup>*

From the introductory quotes this chapter takes on a very different tone and analysis than the previous chapters. The bureaucratic battle of the Bush administration had largely been settled by the end of his second term. The legal interpretations made by the Bush administration’s War Council that resulted in its policies had been fought with bureaucratic mechanisms by the JAG Corps. Although, this bureaucratic battle contains all the trappings of a typical turf war it was fought because the JAG Corps had a distinct sense of mission to uphold the military’s honor and wanted a better defense against the rhetorical weapons of lawfare. The military’s honor and the actions of the United States are particularly vulnerable to lawfare attacks. This is because the United States is viewed as the leader of western liberal democracies. The significance of public opinion and elite sentiment effects the United States more than a totalitarian regime because of the very nature of liberal democracies. Terrorists seek to exploit this by accusing the United

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<sup>192</sup> Mark Mazzetti, *The Way of the Knife*, (New York: Penguin Press, 2013), 5.

<sup>193</sup> Thomas E. Ricks “Republican solon blasts Bush’s Admin.’s ‘power grab’ in handling JAGs, applauds Obama’s Admin.’s fixes” *Foreign Policy*, September 22, 2011.

States military of being hypocritical when it condemns torture, detention without trial and civilian casualties, yet violates the rule of law that has been institutionalized in order to avoid inhuman treatment. This rhetoric not only can affect external international opinion, but it can also thwart the United States internally by causing prolonged debates in Congress that distract from the military mission abroad. However, the Obama administration was correct to view deliberations including the JAG Corps and Congress as a strength of the United States as well as a defense against these lawfare attacks. Mark Martins, a distinguished officer in the JAG Corps sums up this point by stating, “when this process legal advice does not constrain policy but rather confirms it.”<sup>194</sup>

The Obama years, in contrast to the Bush years, were marked by comity between his civilian executive branch lawyers and the JAG Corps, and entailed no such intra-executive branch battle. Instead, the bureaucratic interaction between the JAG Corps and the Obama administration was one of cooperation, further marking the JAG Corps’ success in getting their policies implemented over the two terms of the Bush administration.

Before he became president, candidate Obama was effective at branding both his primary and general election opponents as being complicit with President Bush’s unsuccessful legal interpretations from the early stages in the War on Terror, especially by connecting both to their vote on the Iraq War. President Obama used this strategy of branding opponents as proponents of Bush’s policies to help win the White House. Yet once in power, President Obama largely followed many of the same policies that the Bush administration had begun by successfully exploited the areas of wiggle room he left himself in his campaign speeches.<sup>195</sup>

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<sup>194</sup> Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, (W.W. Norton Co.: New York, 2009), 138.

<sup>195</sup> Jack Goldsmith, *Power and Constraint*, 5.

President Obama “copied most of the Bush Counter-Terrorism program as it stood in January of 2009, expanded some of it, and narrowed it a bit.”<sup>196</sup> Additionally, not every divergence from the Bush administration’s anti-terrorism legal policies can be attributed to new guidance from President Obama. A large part of the changes must be attributed to tactical innovations from the two key wartime bureaucracies: the Department of Defense (DOD), especially the Joint Special Operations Command (JSOC), and the Central Intelligence Agency (CIA). The meshing of Intelligence and Special Operations using raids and drone strikes proved extremely effective in routing terrorist activities without large U.S. involvement. These standard operating procedures were not developed during the early stages of the War on Terror and only came about through trial and error. These new tactics were used during the latter stages of Bush’s second term, but proved useful to the Obama administration and were readily expanded once he took office. President Obama proved that Drone strikes and the judicious use of Special Forces was “cleaner,” meaning that it was less likely to spawn adverse Supreme Court cases and congressional legislation, than large scale detention.

However, these tactical innovations were not completely free from legal controversy. Expanding or redefining what constitutes a war zone, giving the CIA the ability to kill with drones, and even the use of U.S. Special Forces in non-combat zones were all evolutions that necessitated expanded legal underpinnings. President Obama’s policies were not encumbered with the bureaucratic resistance suffered by the Bush administration, largely due to his willingness to work with the JAG Corps to create the legal foundations for these novel uses of military force, rather than working at odds with it. President Obama enlarged the areas in which U.S. forces could strike without a new authorization of military force. He also stretched the post-

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<sup>196</sup> Jack Goldsmith, *Power and Constraint*, 5.

9/11 2001 Authorization of Military Force against al-Qaeda and its affiliates to new situations that were not contemplated when this authorization was adopted, posing certain legal dilemmas, which did not manifest themselves in notable legal or congressional setbacks, contrary to the Bush administration. Since the Reagan administration issued Executive Order 12333 the CIA was barred from conducting assassinations, and the type of global warfare implemented through drone strikes beyond areas of “active hostilities” presented another issue, potentially running afoul of this executive order. Still, unlike President Bush, President Obama in his eight years in office avoided a damaging Supreme Court case.

There was, however, one significant congressional setback suffered by President Obama during his tenure as President, although this setback was not a result of a battle with the JAG Corps. Instead, he was thwarted in his attempted closing of the Guantanamo Bay Prison facility by the Senate stripping the \$80 million he requested to close the facility by a vote of 90-6. The Senate maintained this stance throughout his two terms.<sup>197</sup> Additionally, President Obama’s drone policy was heavily debated, including an anti-drone filibuster by Sen. Rand Paul (KY-R). Notwithstanding the foregoing, overall President Obama was able to implement his anti-terror legal interpretations with the support of the JAG Corps and unimpeded by Congress or the Supreme Court.

How was President Obama able to accomplish such a feat? One of the main explanations is the collaboration between the executive branch attorneys and the JAG Corps which assisted in accomplishing this legal maneuvering. The focus of this chapter is the Obama administration’s use of the JAG Corps to help codify and validate his policies. This was accomplished through a

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<sup>197</sup> David M. Herszenhorn, “Funds to Close Guantanamo Denied,” *New York Times*, May 20, 2009.

number of ways, including embracing and implementing Supreme Court precedent, rather than open resistance to these decisions as was seen in the Bush administration. The Obama administration was also able to stretch the legislative text from the 2001 AUMF to cover novel circumstances, instead of looking to rely on his Commander in Chief war powers (as Bush did). This work will not decide which administration had the better anti-terror policy. It will instead only address which administration won the legal battle behind the actual battlefield. Lawfare is not something exclusively used by terrorists against the United States. President Obama was able to use lawfare to his advantage, and his success is measured in the lack of high visibility litigation or legislation against his policies.

Just because the Obama administration avoided Supreme Court cases does not mean it was free from legal obstacles. President Obama vastly expanded the scope of the War on Terror and the manner in which it was to be fought. Capturing, detaining and prosecuting terrorists, as we know from the Bush chapters, proved incredibly burdensome and problematic. The Obama administration used technological and tactical innovations developed during the latter stages of the Bush administration, in combination with the institutionalized legal interpretations of the JAG Corps, to kill terrorists well beyond “areas of active hostilities,” meaning the conflicts in Iraq and Afghanistan. President Obama avoided many of the contentious issues that vexed the Bush administration with detention and prosecution of enemy combatants. Drone strikes targeting terrorists either succeeded in killing the intended terrorist or they didn’t. If successful, such strikes efficiently accomplished the goal of degrading the leadership and effectiveness of the terrorist organization. If a drone strike did not accomplish the intended objective, it involved a small degree of risk and none of the problematic issues that were engendered by detention and prosecution.

In selecting direct action President Obama met relatively little resistance to what could have been a controversial practice of killing terrorists with drone strikes. It is important to note that the use of drones has been continuously backed by the public.<sup>198</sup> Ultimately, targeted killing proved more efficient than detention and military commissions because it drastically reduced the potential of litigation against his administration. Lawfare is such an effective weapon against liberal democracies because it not only produces international objections to an anti-terror strategy, but also creates legislative pushback, adverse litigation and unfavorable public opinion that distracts from the military mission. By reducing litigation within the United States through targeted killing, President Obama was freed from the controversy and litigation that constrained Bush's anti-terror policies.

The core grievance against the Obama administration was not against his policies or actions, but the secrecy that these policies and actions were cloaked in. On December of 2016, on his way out of office, Obama's legal policies were unveiled through the release of all executive legal findings, procedures and document entitled Presidential Policy Guidance (PPG), which provided an elaboration of the relevant considerations for the use of direct action (or not to do so), and the legal interpretations that supported it. An author writing just a mere six months ago would have had to pore through various speeches and snippets of press releases to speculate on exactly what considerations the Obama administration was legally relying on to conduct strikes or raids outside of areas of "active hostilities." Now an author can examine a mere sixty-six pages and ascertain Obama's legal rationale. The official reason for releasing a summary of legal interpretations and PPG was transparency and public edification, but it is reasonable to

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<sup>198</sup> Pew Research Poll, "Public Continues to Back U.S. Drone Attacks," (<http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks>)

assume that President Obama also wanted to make his legal policy on terrorism known to hold the incoming Trump administration accountable to the public.<sup>199</sup>

In order to assess President Obama's use of the JAG Corps in the War on Terror, it is first necessary to examine his campaign promises and his subsequent actions once he became president. Once in office President Obama will use certain tactical innovations to circumvent some of the early mistakes of the Bush administration. Then, through legal determinations, the application of criteria contained in PPG and guidance from the JAG Corps, Obama was able to implement his anti-terrorism policies in places inside and outside of "areas of active hostilities." The key examples of the execution of these policies are: operations in Yemen, Somalia, Syria/Iraq against ISIS, the drone strike against U.S. citizen Anwar al-Awlaki. Each of these instances will be reviewed below.

#### *The 2008 Campaign and the 2009 Policies*

During the Democratic primaries in 2007, a young one-term Senator from Illinois and former constitutional law professor, Barack Obama, burst on the political landscape with an anti-war message. His campaign was ultimately able to defeat two political powerhouses: Sen. Hillary Clinton (NY-D) in the Democratic primary and Sen. John McCain (AZ-R) in the general election. Obama's eloquent campaign speeches called for a reversal of many of President Bush's war related policies. With President Bush's approval ratings in steady decline since 2004 and Americans becoming less concerned about terrorism, it made sense to pair Sen. McCain and President Bush together in speeches.<sup>200</sup> This pairing was made in simple statements in campaign

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<sup>199</sup> The White House Press Secretary, "Report on the Legal and Policy Frameworks Guiding The United States' Use of Military Force and Related National Security Operations," President Barack Obama, Dec. 2016, 2.

<sup>200</sup> Gallup Poll, *Terrorism in the United States*, (<http://www.gallup.com/poll/4909/terrorism-united-states.aspx?version=print>)

speeches like “John McCain voted with George Bush ninety percent of the time.”<sup>201</sup> Through quick statements such as these Candidate Obama was able to connect McCain to President Bush’s failures in the early stages in the War on Terror, essentially campaigning against Bush’s first administration.

However, most of the legal pronouncements made by the Bush administration’s War Council were no longer in place by the time Obama took office. Candidate Obama attacked the Bush administration’s approach to military detention, prosecutions before military commissions, “enhanced” interrogation, rendition, surveillance, and his overall military strategy in both Iraq and Afghanistan. In doing so, he was agreeing with the JAG Corps’ position on the Geneva Convention with statements like “we cannot win a war unless we maintain the high ground” and pledging to “again set an example for the world that the law is not subject to the whims of stubborn rulers and that justice is not arbitrary.”<sup>202</sup> He also gave speeches supporting the *Hamdan* decision and calling for a Habeas Corpus Amendment that would get Khalid Shaikh Mohammed (the mastermind behind the 9/11 attacks) a “full military trial, with all the bells and whistles.”<sup>203</sup> He will have counsel, he will be able to present evidence, and he will be able to rebut the Government’s case.”<sup>204</sup> Later, President Obama would attempt to prosecute Khalid Shaikh Mohammed in Federal Court in Manhattan, but through protest and legal delays the trial never happened. Mohammed is still in the pre-trial phase for a trial by military commission.<sup>205</sup>

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<sup>201</sup> Barack Obama, *Words That Changed A Nation: The Most Celebrated and influential Speeches of Barack Obama*, (Washington, D.C.: Pacific Publishing Co. 2009) 77.

<sup>202</sup> Jack Goldsmith, *Power and Constraint*, 4.

<sup>203</sup> Barack Obama, *Words That Changed A Nation*, 149.

<sup>204</sup> Barack Obama, *Words That Changed A Nation*, 149.

<sup>205</sup> Charlie Savage, “Judge Allowed Destruction of Evidence in 9/11 Case, Defense Says,” *New York Times*, May 11, 2016.

Finally, and most notably, Candidate Obama vowed to close the Guantanamo Bay prison facilities, but was unable to do so.<sup>206</sup>

In hindsight, the words and actions of Candidate Obama are incredibly clever. As president, he was able to exploit the “wiggle room” he left in specific phrasing, cast the blame for his inability to accomplish promised tasks onto Congress (albeit with some legitimate justification), and in some cases, completely depart from his campaign promises.<sup>207</sup>

That is not to say that some of Candidate Obama’s campaign promises were not addressed once he was in office. Almost immediately after his inauguration Obama signed executive orders suspending military commissions and rolling back some Bush-era secrecy rules. Additionally, a mere two days after inauguration Obama addressed both “fronts” in the JAG Corps’ battle against the War Council by signing executive orders banning torture of detainees, closing CIA foreign prison sites, pledging to uphold the Geneva Conventions and making a promise to close Guantanamo.<sup>208</sup> However, Goldsmith summarizes it best by stating, “contrary to nearly everyone’s expectations, the Obama administration would continue almost all of its predecessor’s policies.”<sup>209</sup> This is often described as a “new normal.”

Yet, with all the resistance experienced during the Bush administration, how was the Obama administration able to continue a majority of his predecessor’s policies? Some portion of the answer is found in the evolving military technology utilized and most importantly, the cooperation among executive bureaucracies and Congress, in contrast to the “go it alone

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<sup>206</sup> Jack Goldsmith, *Power and Constraint*, 7.

<sup>207</sup> Jack Goldsmith, *Power and Constraint*, 4-5.

<sup>208</sup> Jack Goldsmith, *Power and Constraint*, 4.

<sup>209</sup> Jack Goldsmith, *Power and Constraint*, 5.

approach” Bush pursued.<sup>210</sup> By refraining from placing any additional detainees at Guantanamo and authorizing very few military commissions, President Obama avoided any unfavorable Supreme Court detention decisions. The Obama administration had the explicit goal of avoiding Supreme Court cases and congressional pushback, by turning the military “hammer” into a “scalpel.”<sup>211</sup>

### *Converting the Hammer into a Scalpel*

This analogy is often used when describing the differences between the Bush and Obama administration’s military approach to the War on Terror. President Bush used large numbers of conventional troops and detained enemy combatants in mass, earning the nickname “the hammer.” President Obama used a “light footprint” approach, withdrawing conventional troops, replacing them with Special Forces and drones, as well as stopping large scale detention.

Despite an enormous responsibility (or blame) placed on the President of United States in terms of the role as Commander in Chief, a president is not responsible for enhancements in technology and tactics which enable a wider array of military options, including drones and the use of Special Forces units. However, President Obama used these developments to alter the strategy of the War on Terror. This changed strategy still required validation for the use of military force from both the JAG Corps and the Obama administration’s legal team. Before an explanation of the legality behind this shift can be provided, the tactical shift itself must be described.

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<sup>210</sup> Jack Goldsmith, *Terror Presidency: Law and Judgement Inside the Bush Administration*, (W.W. Norton Co.: New York, 2007), 123.

<sup>211</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 147.

The vast majority of these innovations came from the previously mentioned bureaucratic entities of JSOC and the CIA, (Special Forces and Intelligence). Wilson states:

We ought not be surprised that organizations resist innovation. They are supposed to resist it. The reason an organization is created is in large part to replace the uncertain expectations and haphazard activities of voluntary endeavors with the stability and routine of organized relationships. The Standard Operating Procedure (SOP) is not the enemy of the organization; it is the essence of organization.<sup>212</sup>

However, the DOD and CIA were able to overcome their initial resistance to the alterations of their respective standard operating procedures, albeit through the loss of American lives and years of fighting a determined enemy. When Wilson was writing in 1983, he outlined, specifically, the military's inability to innovate to low-intensity or mid-intensity wars in places like the Middle East.<sup>213</sup> Now in 2008 the military developed more pragmatic solutions to a diffused network of terrorists: they developed a diffused network of their own using small Special Forces and Psychological Operations units, "fighting terrorists, like terrorists."<sup>214</sup> DOD were also able to utilize recent innovations, such as: improvements to helicopter technology that largely silenced specially designed helicopters allowing stealthy placement of Special Forces wherever they could be put to good use to fight terrorists with the element of surprise; a wider range of surveillance drones including smaller versions that could keep a constant clandestine watch on terrorists enabling better planning of military operations through superior intelligence; the adaptation of drones to make them more lethal; and finally, the evolution in the tactics and

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<sup>212</sup> James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It*, (United States: Basic Books, 2000), 221.

<sup>213</sup> James Q. Wilson, *Bureaucracy*, 223.

<sup>214</sup> Professor Eric Fleury, Lecture on "Network Warfare," *The College of the Holy Cross*, November 4, 2016.

use of Special Forces to carry out missions that were not contemplated before, as discussed below. All of these developments as well as others provided President Obama with a wider range of options to combat terrorist units on terms more favorable to his views. These innovations were not made by President Obama, and in fact were occurring in earnest during the latter stages of the Bush administration.<sup>215</sup> Yet President Obama was able to adopt many of these developments and use them to alter the use of military force against terrorism and consequently, enabled a less controversial stance regarding detention and prosecution of enemy combatants as there were far fewer of them. Conveniently, these innovations fit within President Obama's campaign promises of troop withdrawals and a "light footprint," yet also promoted a tough stance on terrorism.

Perhaps the most crucial large scale innovation regarding Counter-Terrorism is the meshing of intelligence and unconventional military forces. It is often said the U.S. military is only prepared to fight the last war, in this case, the Cold War. There are many disadvantages to the prolonged nature of fighting a diffused terrorist network, but one advantage is greater time for adaptation. As opposed to a conventional war like World War Two, the War on Terror had already given Obama seven years of war experience to draw upon in developing a policy.

...the tools of secret war had been calibrated and redefined during that period, and Obama's team thought they saw an opportunity to wage war without the staggering costs of the big military campaigns that topple governments, require years of occupation, and catalyze radicalization throughout the Muslim world... use a 'scalpel' rather than a 'hammer' to carry out war beyond war zones.<sup>216</sup>

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<sup>215</sup> Seymour M. Hersh, "The Coming Wars: What the Pentagon can now do in secret," *The New Yorker*, Jan. 24, 2005. (<http://www.newyorker.com/magazine/2005/01/24/the-coming-wars>)

<sup>216</sup> Mark Mazzetti, *The Way of the Knife*, 219-220.

Obama used this experience to his advantage. He had no intention of ending targeted killing efforts. Instead, he had his National Security Advisor James Jones compile a uniform “kill list” for terrorists outside declared war zones.<sup>217</sup> The Obama administration’s “light footprint” mission could utilize drones, cruise missiles, air strikes and Special Forces.<sup>218</sup> The two preferred weapons were drones and Special Forces.

The overall weapon of choice for the Obama administration was drones, based on the frequency of their use (506 known times).<sup>219</sup> The weapon fit many of the considerations on the Obama administration’s wish list for warfare: cheap, reliable, killed quietly, “a weapon unbound by the normal rules for accountability in combat.”<sup>220</sup> A typical manned airstrike from an F-16 or B-2 usually requires extensive coordination with troops on the ground.<sup>221</sup> Drones can operate autonomously, validating their targets with high tech cameras and not risking the lives of pilots, or worse, their capture.

This presents many advantages for a weapon system, mainly low to no risk of friendly lives lost and a high likelihood that enemies will be killed. Another significant reason pertains to the lawfare aspect: a drone strike still violates a foreign state’s sovereignty but to a lesser degree than troops on the ground or large-scale manned airstrikes.<sup>222</sup> The age of drones or the remote-

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<sup>217</sup> Mark Mazzetti, *The Way of the Knife*, 226.

<sup>218</sup> Jane Mayer, “The risks of the CIA,” *The New Yorker*, Oct. 26, 2009, 3.

<sup>219</sup> Micah Zenko, “Obama’s Embrace of Drone Strikes Will Be Lasting Legacy,” *New York Times*, Jan. 12, 2016.

<sup>220</sup> Mark Mazzetti, *The Way of the Knife*, 99.

<sup>221</sup> U.S. Joint Fires Support, “Chapter V Joint Fires Assessment,” JP-3-09, Joint Chiefs of Staff, ([http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_09.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_09.pdf))

<sup>222</sup> Daniel Byman, “*Why Drones Work: The Case for Washington’s Weapon of Choice*,” *Foreign Affairs*. No. 92, (2013), 34.

control age lowered the bar for war and became an object of fascination for both the CIA and JSOC.<sup>223</sup>

The other favored weapon system of the Obama administration (using the term weapon system loosely) was Special Forces. Each branch of the military selects their best soldiers, sailors, pilots and Marines, to undergo extremely difficult and arduous physical and technical training to be able to deploy anywhere in the world at a moment's notice. The various groups include Navy SEALs, Army Rangers, Army Green Berets, the Army Special Operations Aviation Regiment, Air Force Combat Controllers and Marine Recon Teams. All of these units have specialized mission sets that are combined under JSOC. With the line blurred between spies and soldiers, the operational tempo could be increased, meaning less time analyzing potential missions and more uses of lethal force.<sup>224</sup> These types of raids are riskier than drones because they put American lives at risk and are arguably a further violation of a state's sovereignty. Furthermore, these soldiers can also be used to "train, advise and assist" a host nation's military, removing U.S. soldiers from direct action, yet still achieving the mission of routing out terrorists.<sup>225</sup> For these reasons the Obama administration used drones more often but in certain circumstances, where a sizable amount of intelligence could be collected or the target was deemed significantly valuable, i.e. Osama Bin Laden, raids were used. Providing a legal foundation for the use of these available weapons was the combined work of the Obama

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<sup>223</sup> Mark Mazzetti, *The Way of the Knife*, 99-100.

<sup>224</sup> Eric Fleury, Lecture on "Network Warfare," *The College of the Holy Cross*, November 4, 2016.

<sup>225</sup> "Commander's Handbook for Security Force Assistance," *Joint Center for International Security Force Assistance*, (Army Command and General Staff College, Fort Leavenworth, Kansas), Jul. 14, 2014.

administration's legal team and the JAG Corps. Through their collective efforts, the Obama administration was given validation for the use of these types of lethal military force.

Additionally, an important lawfare objective that raids can achieve is evidence collection. Intelligence and evidence have also become blurred in the age of legalized warfare. There is an inherent risk in remaining on a dangerous objective longer than what is required, but sometimes soldiers spend extra time collecting evidence with a "site exploitation" or "forensics kit."<sup>226</sup> The practice of collecting evidence at a military objective is a testament to just how powerful lawfare has become and how important it is to use it effectively.

Even as Iraq and Syria was beginning to fall victim to the ascent of ISIS, President Obama was extremely reluctant to return high numbers of conventional troops back on the ground in this region for political and military reasons. The high-level terrorists would continue to be hunted by intelligence operatives, drones and Special Forces. However, now under the Obama administration the U.S would not deploy conventional forces that could remove sanctuaries and isolate high value targets. Instead, Obama's strategy would be to utilize the improving Iraqi Army or moderate rebels armed and trained by the U.S. to take on these tasks. Again, this work is not an analysis of the military success of this strategy, but a measure of the legal success of it domestically and internationally. From a lawfare standpoint, it was quite successful overall, through relatively minor adjustments to what was inherited from the Bush administration.

### *Legally Validating the Scalpel*

With the authorization provided by the passing of a Joint Resolution Authorization for the Use of Military Force (AUMF), on September 16, 2001, President Bush declared his global

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<sup>226</sup> Jack Goldsmith, *Power and Constraint*, 154.

War on Terror four days later. In the AUMF Congress ushered in a new era of presidential authority to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>227</sup> Another AUMF authorizing force against Iraq was adopted by Congress in October of 2002. Over the course of fifteen years fighting the War on Terror the meaning of the word “aided” in the AUMF would be gradually expanded. On November 27, 2016, over fifteen years since the first AUMF, President Obama used the same congressional authorization to expand military efforts, and especially drone strikes, against the terrorist group al-Shabaab in Somalia.<sup>228</sup> The Obama administration validated this expanded interpretation of the AUMF using Commander and Chief clause in the Constitution.

President Obama even asked Congress for a new AUMF, particularly for the fight against ISIS, but it never made it to a vote.<sup>229</sup> Many things factor into why Congress does not act on a particular issue, but the overarching one is the lack of immediacy and complacency with the existing 2001 AUMF.<sup>230</sup> The furthest extent of the Obama administration’s use of the 2001 AUMF can be found in his legal framework for the use of lethal force in Yemen and Somalia, Despite slight variations both the examples demonstrate an effort towards defensive lawfare through deliberate and cautious methods of using force in these countries. This sentiment is best summarized in a statement given during Obama’s first term by his chief general counsel of the

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<sup>227</sup> Joint Resolution 23. Authorization for the Use of Military Force,” 107<sup>th</sup> Congress. Sept. 16, 2001

<sup>228</sup> Charlie Savage, Eric Schmitt and Mark Mazzetti, “Obama Expands War With Al Qaeda to include Shabab in Somalia,” *New York Times*, Nov. 27, 2016.

<sup>229</sup> Amber Philips, “President Obama’s push for military authorization to fight ISIS won’t go anywhere in Congress. Here’s why.,” *The Washington Post*, Dec. 7, 2015.

<sup>230</sup> Amber Philips, “President Obama’s push for military authorization to fight ISIS won’t go anywhere in Congress. Here’s why.,” *The Washington Post*, Dec. 7, 2015.

Department of Defense Jeh Johnson, “overreaching with military power can result in national security setbacks, not gains.”<sup>231</sup> The Obama administration did not attempt to make new legal interpretations for the use of force against an unconventional enemy like the Bush administration. Instead, the Obama administration adapted historical precedents like a strict interpretation of the Geneva Conventions and “traditional principles of statutory construction,” to these new war zones.<sup>232</sup> Obama’s method of adapting more established precedents created a better lawfare defense than the Bush administration’s tendency of developing new precedents.

Overall, it is evident that the key difference between the Obama and Bush administrations was that President Obama avoided detentions and military commissions. As demonstrated by the number of direct action raids or strikes instead of detentions, the Obama administration preferred eliminating terrorists on the battlefield, and if detention was necessary it would be contested in federal court. This strategy is a better defense against the lawfare rhetoric of terrorist groups, simply because it avoids the legal snares of detention and the accusation of unfair treatment in military commissions.

Operations in Yemen are primarily focused on eliminating al-Qaeda in the Arabian Peninsula (AQAP), but include operations against Houthi rebels who have taken over Yemen’s capital and roughly half of its territory. The United States on October, 12, 2016 launched cruise missiles to destroy Houthi controlled missiles sites that were threatening U.S. warships operating in

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<sup>231</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 145.

<sup>232</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 145.

the Gulf of Aden.<sup>233</sup> These strikes are not as controversial as the use of drones and Special Forces, because the causal link to self-defense is more readily identifiable, i.e. protecting U.S. warships. Furthermore, stretching the 2001 AUMF is less tenuous in the Yemen case because AQAP is a direct affiliate of al-Qaeda.<sup>234</sup> The Obama administration argued that they were operating with the consent of the Yemeni government, which arguably lacks certain levels of legitimacy by not controlling a significant portion of the territory within its borders. The strategy of interpreting the 2001 more expansively and avoiding detention successfully avoided the political and legal constraints that the Bush administration encountered. Yemen returned to the forefront of public debate during the first weeks of the Trump administration due to a Special Forces raid that resulted in the death of a U.S. Navy SEAL in January 29, 2017.

Operations in Somalia are notably more complicated. The U.S. is conducting counter-terrorism operations against al-Qaeda and its “associated” force, al-Shabaab.<sup>235</sup> Although al-Shabaab has pledged affiliation with al-Qaeda, the connection is weaker than AQAP. Shabaab does not bear the name al-Qaeda and did not exist during 2001.<sup>236</sup> The group was founded in 2007 as an Islamic insurgency committed to expelling Ethiopian troops, who invaded Somalia after an Islamist council took control of the war-torn nation.<sup>237</sup> The Ethiopian military was supported by the United States’ broader campaign against al-Qaeda and in support of the African

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<sup>233</sup> The White House Press Secretary, “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” President Barack Obama, Dec. 2016, 18.

<sup>234</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” 18.

<sup>235</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 17.

<sup>236</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” 17.

<sup>237</sup> Charlie Savage, Eric Schmitt and Mark Mazzetti, “Obama Expands War With Al Qaeda to include Shabab in Somalia,” *New York Times*, Nov. 27, 2016.

Union. At first President Obama authorized airstrikes and drone strikes against only specific high-value targets that had “sufficient ties” to al-Qaeda, falling more clearly within the 2001 AUMF.<sup>238</sup> The administration then expanded its interpretation to include the entirety of al-Shabaab, including its thousands of foot soldiers.<sup>239</sup> The inclusion of al-Shabaab under the fifteen-year old 2001 AUMF is tenuous at best. However, despite a tenuous connection the Obama administration was not constrained by Supreme Court cases or congressional legislation; President Obama was able to implement his anti-terror policy without these impediments.

The Obama administration claimed they obtained consent from both the Yemenis and Somali governments to use military force within the borders of their nation, therefore not violating their sovereignty. However, in President Obama’s legal policy framework, there is a specific loophole for the use of force against a non-state group operating within a failed state. This gap in international and domestic law is exploited through the claims of self-defense “when faced [with an] actual or imminent armed attack,” and the use of force becomes necessary when the state government is unable or unwilling to prevent the non-state actors’ attacks (i.e. AQAP, Houthi Rebels, and al-Shabaab).<sup>240</sup> This determination on self-defense or whether a state can prevent such attacks is extremely subjective. However, the Obama administration was able to continue this strategy without many international objections.

Additionally, the Obama administration argued that Congress was giving implicit support for the military campaign in Yemen and Somalia through the “unbroken stream of

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<sup>238</sup> Savage, Schmitt, and Mazzetti, “Obama Expands War With Al Qaeda to include Shabab in Somalia,” *New York Times*

<sup>239</sup> Savage, Schmitt, and Mazzetti, “Obama Expands War With Al Qaeda to include Shabab in Somalia,” *New York Times*

<sup>240</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” President Barack Obama, Dec. 2016, 10.

appropriations.”<sup>241</sup> Whether this interpretation is constitutionally viable or not is outside of the scope of this work, but it is important in terms of the implications on lawfare. What is significant to this work is that there were less major domestic objections during the Obama administration largely because the methods of use of military forces, utilizing drones and Special Forces, was less of an affront to a nation’s sovereignty than conventional forces and the United States was not directly detaining combatants.

From a lawfare standpoint, no other branch of U.S. government limited the Obama administration’s use of military force during his eight years in office and there was no internal rift between the Obama administration and the JAG Corps. Public opinion has largely supported President Obama’s actions.<sup>242</sup> With the use of military force either explicitly or implicitly validated, President Obama sought self-restriction in the methods in which force was used beyond that of the Geneva Conventions and the UCMJ. President Obama’s PPG is a significant move from a lawfare standpoint. The foreword of the Obama administration’s legal framework for the War on Terror includes multiple phrases like “what makes America truly remarkable is not the strength of our arms or our economy, but rather our founding values, which include the respect for the rule of law and universal rights.”<sup>243</sup> The Obama administration sought to be more deliberative and restrictive than international law prescribed through PPG, in order to maintain public opinion at home and abroad.

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<sup>241</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 16.

<sup>242</sup> Gallup Poll, “How High Will Terrorism Concerns Rise, How Long Will They Last?” (<http://www.gallup.com/poll/192713/high-terrorism-concerns-rise-long-last>)

<sup>243</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” i.

In contrast, the Bush administration's War Council sought to push international law to its limits, alienating the "operators" in the JAG Corps and ultimately finding that the majority of its policies were limited or overturned. The Obama administration learned from this mistake and applied more established legal precedents. Jeh Johnson, the general counsel of the DOD during Obama's first term, sums up this deliberate strategy:

in the conflict against an unconventional enemy such as al-Qaeda, we must consistently apply conventional legal principles. We must apply, and we have applied the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historical precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.<sup>244</sup>

This strategy of continuing conventional legal principles like using lethal force on the battlefield instead of mass detention or federal criminal courts to put terrorists on trial, ultimately worked better than attempting to construct new legal interpretations. The Obama administration believed the Bush administration's failure to listen to the JAG Corps objections led to the Supreme Court cases going against the Bush administration and inhuman treatment of detainees at Guantanamo Bay.<sup>245</sup> The best evidence of the Obama administration's collaboration with the JAG Corps is found in the rules of engagement for the drone strike against U.S. citizen Anwar al-Awlaki. This example provides evidence that cooperation with the JAG Corps has resulted in less internal dispute, even when involving an extreme case of targeting a U.S. citizen. The

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<sup>244</sup> Jeh C. Johnson, "National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean's Lecture at Yale Law School," *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 145.

<sup>245</sup> Jeh C. Johnson, "National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean's Lecture at Yale Law School," *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 145.

targeted killing of al-Awlaki was litigated but unlike many of the Bush administration cases, the Obama administration had the case dismissed on the grounds that there was enough evidence al-Awlaki was an unlawful combatant and a sufficient threat to national security.<sup>246</sup>

The JAG Corps specifically assisted in creating the rules for vetting a target in the Obama administration. Prior to a drone strike the available intelligence is vetted, the operators plan the mission and the final step is the JAG Corps' lawyers review of the legality of the operation, ensuring it conforms to domestic and international law.<sup>247</sup> Set forth below are the rules of engagement for drone strikes of high value-targets:

(a) near certainty that the terrorist is present, (b) near certainty that non-combatants will not be injured or killed, (c) capture is not feasible, (d) relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to the U.S and (e) No other reasonable alternative exists to effectively address the threat.<sup>248</sup>

Additionally, there are caveats for U.S. citizens and time sensitive strikes, but these are the core components of the Obama administration's pre-strike criteria.<sup>249</sup> The rules of engagement for high-value targets are the most relevant because medium-low value targets are usually targeted with coordination of ground troops, in "areas of active hostilities." That practice

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<sup>246</sup> Matt Danzer, "A Summary of Friday's Decision in al-Aluqi v. Panetta," *Lawfare*, Apr. 7, 2014, (<https://www.lawfareblog.com/summary-fridays-decision-al-aulaqui-v-panetta>)

<sup>247</sup> MAJ James A. Burkart, "Deadly Advice: Judge Advocates and Joint Targeting," *The Army Lawyer*, Department of the Army Pamphlet 27-50-16-06, (2016), 10.

<sup>248</sup> "Procedures for approving Direct Action against terrorist targets located outside the United States and Areas of Active Hostilities." *Department of Justice*, [Declassified] on May 22, 2016, ([https://www.justice.gov/oip/foialibrary/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foialibrary/procedures_for_approving_direct_action_against_terrorist_targets/download)) 3.

<sup>249</sup> "Report on the Legal and Policy Frameworks Guiding The United States' Use of Military Force and Related National Security Operations," Dec. 2016, 22.

is called dynamic targeting.<sup>250</sup> The most controversial drone strikes occur in areas outside of active hostilities and with coordination from intelligence agencies, instead of DOD ground troops.

Dynamic targeting using drones, like in the al-Awlaki case, is where the Staff Judge Advocates (SJAs) come into their role as lower level operator following their standard operating procedures, while President Obama as the executive strategizes. More specifically, the SJAs “will review the target folder, either hard copy or electronic, and all the underlying intelligence, such as satellite imagery and intelligence summaries, to conduct a legal assessment and ensure that the potential target is a valid military objective.”<sup>251</sup> The most essential aspect for the Judge Advocate is being able to defend the fact that an individual like al-Awlaki is a military objective, because it must be established that the targeted individual is a military objective in order to avoid becoming an “assassination.” A direct military objective constitutes the elimination of someone or some organization that poses an imminent threat to the United States. The Obama administration put particular emphasis to ensure that the legal determination that an individual was a military objective and could be lawfully targeted, was “debated and heavily scrutinized.”<sup>252</sup> Unlike the Bush administration, the Obama administration included both civilians and members of the JAG Corps in these internal debates.<sup>253</sup>

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<sup>250</sup>U.S. Joint Fires Support, “Executive Summary,” JP-3-09, Joint Chiefs of Staff, x, ([http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_09.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_09.pdf))

<sup>251</sup> MAJ James A. Burkart, “Deadly Advice: Judge Advocates and Joint Targeting,” *The Army Lawyer*, Department of the Army Pamphlet 27-50-16-06, (2016), 16.

<sup>252</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 147.

<sup>253</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 144.

The JAG Corps is the first of many to legally review “target folders” prior to using a drone strike during the Obama administration. It is the role of a SJA to determine, the “near certainty” that the terrorist in question is first “vetted,” meaning in order to ensure near-certainty there must be at least two forms of intelligences supporting the identity of the target and none against.<sup>254</sup> Also it is the role of the SJA to ensure that the elimination of this target (killing of this person) serves a direct military purpose. This step confirms that the strike is not an assassination and that the “weapon system” is not used superfluously.<sup>255</sup> The Obama administration sought interagency approval for terrorist targets, typically this involves approval from the Department of Defense, the State Department, the Department of Justice, and the CIA. After the target was approved by at least these agencies, the high-value target “nominated” for lethal force would be presented to President Obama, who carried the final say.<sup>256</sup>

This first consideration is more significant than the others at the moment, because President Trump in his first few months in office has shifted away from the legal framework Obama used and has seemingly delegated power to make these decisions almost exclusively to the Department of Defense.<sup>257</sup>

After the target is vetted, the “near-certainty that non-combatants will not be injured or killed” is achieved through the analysis of military commanders and members of the JAG Corps

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<sup>254</sup> MAJ James A. Burkart, “Deadly Advice: Judge Advocates and Joint Targeting,” *The Army Lawyer*, Department of the Army Pamphlet 27-50-16-06, (2016), 11.

<sup>255</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 21.

<sup>256</sup> “Procedures for approving Direct Action against terrorist targets located outside the United States and Areas of Active Hostilities.” *Department of Justice*, [Declassified] on May 22, 2016. 11-13.

<sup>257</sup> Ben Hubbard and Michael R. Gordon, “U.S. War Footprint Grows, With No Endgame in Sight: Concerns That No One Is Planning for Peace as Americans Expand Mideast Role,” *New York Times*, Mar. 30, 2017.

with the goal “to apply enough force to create the desired first order effects on the target, while minimizing the second order” effect. In other words, the targeting practices must comply with proportionality.<sup>258</sup> Proportionality, meaning the use of American military force must be proportional to the threat posed by an individual or group, unlike the Bush administration, was a point of emphasis for the Obama administration.<sup>259</sup> Determining if capture is feasible is a tactical military decision. The final two criteria are addressed with each specific countries’ validation for the use of American force within its borders.

President Obama signed off on 506 drone strikes that killed 3,040 terrorists and 391 civilians.<sup>260</sup> This is a significant number when compared to President Bush’s 50 drone strikes carried out, and 296 terrorists killed and 391 civilians killed.<sup>261</sup> Looking at the numbers, President Obama’s adherence to the Geneva Conventions and PPG successfully limited civilian deaths and increased terrorist deaths, with fewer ground forces. Again, the American public has consistently backed the use of drones.<sup>262</sup> As previously stated in the second chapter on the expansion of the JAG Corps and the origins of the SJA, the SJA’s are on the operator level.<sup>263</sup> Wilson describes the operators as the lowest level bureaucrats, who receive distinct professional training, have high expectations from peers, and the impetus to carry out their duty from higher

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<sup>258</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 21.

<sup>259</sup> Jeh C. Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration: Dean’s Lecture at Yale Law School,” *Yale Law and Policy Review*, No. 141, Feb. 22, 2012, 145.

<sup>260</sup> Micah Zenko, “Obama’s Embrace of Drone Strikes Will Be Lasting Legacy,” *New York Times*, Jan. 12, 2016.

<sup>261</sup> Micah Zenko, “Obama’s Embrace of Drone Strikes Will Be Lasting Legacy,” *New York Times*, Jan. 12, 2016.

<sup>262</sup> Public Continues to Back U.S. Drone Attacks, *Pew Research*, May 28, 2015, (<http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks/>)

<sup>263</sup> MAJ James A. Burkart, “Deadly Advice: Judge Advocates and Joint Targeting,” *The Army Lawyer*, Department of the Army Pamphlet 27-50-16-06, (2016), 10.

ranking officers.<sup>264</sup> These SJAs are the front line lawyers making legal determinations and providing information up the chain of command. Based off the numbers when working within the Obama administration's framework for drone strikes, the SJAs and the administration were successfully able to wage a defensive lawfare campaign, behind the military campaign.

The drone strike against U.S. citizen Anwar al-Awlaki on September 30, 2011 is perhaps the best example and most arduous test of the legality of Obama's policy. Awlaki was a Muslim scholar and cleric, acting as the chief propagandist for AQAP in Yemen. There is also evidence he conspired with the Fort Hood shooter and plotted the Christmas Day bombing attempt on a jetliner. Finally, Awlaki was a U.S. citizen born in Las Cruces, New Mexico, and attended undergraduate and graduate schools in the U.S.<sup>265</sup> The legal rationale behind the targeted killing of Awlaki demonstrates the furthest extent of the authorization to use military force and the due process clause of the Fifth Amendment in the U.S. Constitution's Bill of Rights.

Awlaki met the criteria of an imminent threat due to his involvement in prior attacks and publicly announced conspiracy to commit further terrorist attacks on the United States. The determination that Awlaki was an "imminent" threat involved a loose interpretation of imminence. There was no direct evidence that an attack was about to happen within the hour or day. But the fact that Awlaki repeatedly stated he intended to attack the United States and had been involved in past attacks was enough for the Obama administration to determine Awlaki was an imminent threat. This claim was litigated but ultimately dismissed in 2014, demonstrating that the claim of imminent threat was tenuous but valid.<sup>266</sup>

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<sup>264</sup> James Q. Wilson, *Bureaucracy*, 27.

<sup>265</sup> Matt Danzer, "A Summary of Friday's Decision in al-Aluqi v. Panetta," *Lawfare*, Apr. 7, 2014, (<https://www.lawfareblog.com/summary-fridays-decision-al-aulaqui-v-panetta>)

<sup>266</sup> Matt Danzer, "A Summary of Friday's Decision in al-Aluqi v. Panetta," *Lawfare*, Apr. 7, 2014, (<https://www.lawfareblog.com/summary-fridays-decision-al-aulaqui-v-panetta>)

Once he was identified, it was determined by military commanders he could not be captured.<sup>267</sup> The operation was deemed within the laws of armed conflict and the use of force had been authorized through the expansive interpretation of the 2001 AUMF.<sup>268</sup> Furthermore, the same justification that a police officer advances for the use of deadly force was used to legalize the use of military force against a U.S. citizen abroad. Since Awlaki was considered a continued imminent threat against the United States, it was deemed legal to use deadly force, just like it is legal for a police officer to use deadly force when a suspect “threatens the officer with a weapon or there is a probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.”<sup>269</sup> The Obama administration released a previously classified 41-page memo in June of 2014 outlining its legal reasoning. The memo cites numerous Supreme Court cases and the 2001 AUMF.

Obama’s methods of targeted killing remain viable options in and outside areas of active hostilities, and can even be used to justify the use of force. It can only be considered speculation at this point due to the limited data available, but perhaps President Trump favors this option as opposed to drone strikes due to his authorization of a raid in Yemen.<sup>270</sup>

#### Obama Conclusions

Is Obama’s overall military strategy a viable legal option for continuing the War on Terror? Were the executive bureaucracies of civilians and uniformed JAG Corps members in

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<sup>267</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 22.

<sup>268</sup> Benjamin Wittes, “The Al-Aulaqi OLC Memo: A Quick and Dirty Summary,” *Lawfare*, (<https://www.lawfareblog.com/al-aulaqi-olc-memo-quick-and-dirty-summary>)

<sup>269</sup> “Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations,” Dec. 2016, 23.

<sup>270</sup> Abby Philips, “Trump passes blame for Yemen raid to his generals: ‘They lost Ryan,’” *Washington Post*, Feb. 28 2017.

agreement during the Obama administration's term in office? It is hard to quantify the level of collaboration between the JAG Corps and the Obama administration but the lack of media claims of internal disputes and congressional hearings signifies that the JAG Corps' defiance ended after the Bush administration's policies were changed.

There is a reason why there is no Obama administration lawyer who could be compared to John Yoo--one did not exist. The JAG Corps' relative silence in the media is reflective of their overall agreement with the Obama administration. When it is the JAG Corps' "operators" that ensure compliance with the Geneva Conventions and Rules of Land Warfare, it is logical that they would support an administration's policies and cooperate with that administration. This happened during the Obama years: a powerful bureaucracy of military lawyers assisted in the implementation of the President's legal framework and policies. The opposite occurred during the Bush administration, where the JAG Corps fought against some of Bush's initiatives during his first administration and actively sought assistance from Congress and the Supreme Court to bring an end to specific policies.

What can be further deduced from the large-scale withdrawal of troops from Iraq and Afghanistan, the high number of drones strikes and the few "capture" raids that occurred during the Obama years is that President Obama recognized the drawbacks of detention usually outweigh its benefits. Although killing a terrorist loses valuable human intelligence, the Obama's administration's repeated choice was to use deadly force instead of capture.

Even if a raid results in a successful capture, it begets another problem: what to do with the detainee. Prosecuting detainees in federal or military court is

difficult because often the intelligence against terrorists is inadmissible or using it risks jeopardizing sources and methods.<sup>271</sup>

Obama's recognition of the complications involved in detention and prosecution, and determined it was "cleaner" to use targeted killing, demonstrating an effective defensive lawfare. This allowed the Obama administration to avoid court cases and congressional legislation that went against their policies. Lawfare has become such a determining factor in the War on Terror that the benefits of being cautious and following more established precedents outweigh the costs in speed and secrecy.

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<sup>271</sup> Daniel Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," *Foreign Affairs*. No. 92, (2013), 34.

## Conclusions

*“Torture works. OK, folks? You know, I have these guys—“Torture doesn’t work!”—believe me, it works. And waterboarding is your minor form. Some people say it’s not actually torture. Let’s assume it is. But they asked me the question: What do you think of waterboarding? Absolutely fine. But we should go much stronger than waterboarding.”-Donald Trump*

*“Lawyers too have gained more independence and power that the President cannot effectively control, especially in the military, but in other pockets of the executive branch as well.”<sup>272</sup>-Jack Goldsmith*

The case study of the JAG Corps bureaucratic role is multifaceted and complex, including necessary analysis of bureaucracy in American government and the effects the bureaucracy has in the War on Terror. It cannot be overstated how remarkable it is that the JAG Corps, a component of the military--an organization predicated on hierarchy and a chain of command--immediately disagreed with the President’s orders after a large-scale attack on U.S. soil. What is even more remarkable is that the JAG Corps won, and eventually obtained the legal interpretations they wanted. This demonstrates how much lawfare has been incorporated into warfare and how powerful a bureaucracy with a sense of mission can be. Finally, although the executive may be unduly burdened by the over-legalization of warfare, the point is moot because lawfare is not going away. The rule of law has been so ingrained in the fabric of the United States and other Western democracies that it would be almost impossible to overturn the legalization trend regarding warfare. Therefore, the president must address and mitigate the issues lawfare presents in order maintain the fight against terrorist groups.

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<sup>272</sup> Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, (W.W. Norton Co.: New York, 2009), 228.

Drawing from the work of James Q. Wilson, this thesis demonstrates that the JAG Corps went through a vast bureaucratic expansion that changed the professional norms of the organization and its culture. The military services determined that the My Lai massacre was a result of lack of training, as well as loose interpretations of the Geneva Conventions and the rules of war. The Department of Defense decided to increase the personnel and responsibilities of the JAG Corps, so that a strict interpretation of the rules of war was implemented in training. The invasion of Grenada, Operation Urgent Fury, was the first instance of the JAG Corps' expanded role. The infantry commanders on the ground reported back to their generals that they preferred the Staff Judge Advocates (SJAs) being as close to the front as possible so trained military lawyers could make legal interpretations and advise the commanders. This allowed the commanders to devote more time and effort to the military mission, instead of worrying about criminal investigations and appearances on the nightly news. This change also resulted in an expanded legal education system for SJAs that furthered the professional norms and culture. Additionally, the Watergate scandal and general distrust of the executive branch after the Vietnam War led to congressional responses like the War Powers Resolution, making the use of military force more regulated. This expanded the role of the JAG Corps into ensuring the executive branch complied with laws passed by Congress. Every subsequent conflict leading to the War on Terror further institutionalized the JAG Corps' bureaucratic roles of compliance and upholding the military's honor.

The 9/11 terrorist attacks introduced an unprecedented enemy in the form of a non-state actor (al-Qaeda), which was able to project an unconventional force on American soil. There was a tremendous amount of fear and uncertainty in the aftermath of 9/11, and the demand for solutions to America's new enemy was great. The Bush administration's legal team, nicknamed

the War Council, was committed to increasing the power of the executive branch and advanced the most expansive legal interpretations possible in the War on Terror. The JAG Corps immediately pushed back against many of these legal interpretations because they did not adequately defend against the powerful rhetorical weapons of lawfare and jeopardized the military's honor. Specifically, the JAG Corps felt the Bush administration's rules for military commissions did not afford enough rights to defendants, and that the loose interpretations of the Geneva Convention rights for detainees put the American military at risk for lawfare attacks. The JAG Corps was correct and the Bush administration was rightly criticized as being hypocritical. Ultimately, despite the unprecedented enemy America faced, the JAG Corps wanted to maintain the precedents established in the 1980s and 1990s because they were the best means to upholding the military's honor.

Although the infighting seen during the Bush administration appeared like a typical bureaucratic struggle over turf, it was actually fought over a devote sense of mission to a strict adherence to the rule of law. The JAG Corps would take advantage of international incidents like Abu Ghraib and blame it on the legal interpretations of the Bush administration. Leaks to the press by the JAG Corps drew negative media attention to the Bush administration. One result of the negative media attention was a congressional hearing involving the generals of the JAG Corps. This hearing allowed for the "executives" of the JAG Corps to openly criticize the Bush administration's legal interpretations. These hearings sparked new legislation that adhered to the JAG Corps' legal interpretations. Simultaneously, Supreme Court decisions during the Bush administration also brought the Bush administration's legal interpretations and subsequent policies closer to the JAG Corps' view. Bureaucratic mechanisms achieved the moral goals of the JAG Corps.

These moral goals were then solidified through the Obama administration's cooperation with the JAG Corps. Learning from the mistakes the Bush administration made, Obama's legal team, specifically Counsel for the Department of Defense Jeh Johnson, listened to the legal advice of the JAG Corps. The results were a heavier reliance on the use of drones and special forces, and a shift away from large-scale detention and military commissions. The Obama administration did not endure the gauntlet that the Bush administration received for its rules on military commissions or legal interpretations on detention. The Obama administration was not entirely free from litigation and criticism, but the cooperation with the JAG Corps to make comprehensive legal checks before military force was used allowed for the Obama administration to expand outside areas of active hostilities and frequently use drones. Overall, the Obama administration, through the help of the JAG Corps, created a better lawfare defense that prevented the law from frequently interfering with military missions.

President Trump in his first few months in office has signaled a shift away from some of the Obama-era targeting constraints that were implemented in part by the JAG Corps. As the quote from President Trump as a candidate at the beginning of this chapter reveals, his views regarding the treatment of detainees, at least at the time he made this remark, are in stark contrast to those of his predecessor, and a likely source of future peril for his administration. The target constraints approved by President Obama were designed to prevent civilian casualties and maintain a strict adherence to the laws of war.<sup>273</sup> If Trump loosens these constraints it is likely civilian casualties will increase. Seeing as a War on Terror is just as much a battle for hearts and minds as it is a military battle, more civilian deaths can lead to more jihadist recruits.

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<sup>273</sup> Charlie Savage and Eric Schmitt, "Trump Administration Is Said to Be Working to Loose Counterterrorism Rules," Mar 12, 2017

Additionally, President Trump has temporarily declared three parts of Yemen and has declared Somalia an ‘area of active hostilities’ for 180 days.<sup>274</sup> Declaring an “area of active hostilities” legally permits large-scale detention and an increase in civilian casualties. Although this is legally permitted, it can still cause several strategic setbacks because it does not adequately defend against the rhetorical weapons of lawfare. Familiar opponents of lax standards for the use of military force like Senator Lindsey Graham have already spoken out against Trump’s legal interpretations and policies.<sup>275</sup>

If the Trump administration continues to remove many of the standards the Obama administration put in place with the help of the JAG Corps, President Trump will inevitably run into the same legal and political snares the Bush administration did. Moreover, the blowback would be significantly more pronounced because President Trump is not reacting to a terrorist attack on the scale of 9/11. It is appropriate for someone with President Trump’s non-legal background to delegate decisions on the use of force, but the rules of engagement and legal vetting process put in place by President Obama should not change. If the War on Terror is to be sustained, President Trump should heed the lessons learned by President Bush and protect against lawfare attacks through cooperation with the JAG Corps and strict adherence to the rules of war.

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<sup>274</sup> Charlie Savage and Eric Schmitt, “Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules,” Mar 12, 2017

<sup>275</sup> Charlie Savage and Eric Schmitt, “Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules,” Mar 12, 2017

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