Strategy & Entailments: The Enduring Role of Law in the U.S. Armed Forces

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Abstract: This essay aims to redescribe key moments in the history of American military engagements to account for a persistent role that law has played in these conflicts. The law of war tradition has persisted since the War of Independence, we argue, because of an internal dynamic that makes it both strategically useful and costly for the United States to commit itself to rule-bound warfare. Invoking the laws of war to advance the strategic interests of the United States, American soldiers and statesmen have found, entails consequences beyond their control, making reversals in position more costly and enabling critiques in the language of the law. These entailments, we argue, are built into the enduring strategic value of the laws of war. The law has remained useful not because it can claim perfect neutrality, but because it has force independent of the interests for which it is mobilized.

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Law has had a central place in the American military since the War of Independence. But law's persistence has been shadowed by an equally durable critique. Time and again, from the eighteenth century to the present, critics have charged that American soldiers and statesmen invoke the law not as a neutral adjudicator among the contending sides, but as a tactic – a weapon, even – in the advancement of U.S. interests. And Americans have admitted as much. From George Washington's strategic adoption of the legal standards that attached to independent states to the use of law as a nonlethal weapons system in today's counterinsurgency efforts to win hearts and minds, Americans have been remarkably candid about the strategic uses of law.

The difficulty with strategic deployment of the law to advance one's interests, of course, is that it threatens to undo the law's value. When critics today talk about "lawfare," for example, they suggest implicitly that the claims being made in the name of the law lack the neutral status on which the law's legitimacy relies.

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But it is a mistake to think that strategic invocations of the law reveal it to be an empty vessel for the assertion of naked power, and it is a mistake to think that the law requires perfect neutrality for its legitimacy. What is striking is not that the turn to law is based in strategic interests. Of course it is. We should expect nothing different in the domain of armed conflict – or indeed, in any domain. People turn to law for the purpose of advancing projects. But as elsewhere, law in armed conflict is not undone by its inextricable entanglement with power and interest. To the contrary, what makes law strategically valuable is that it entails consequences beyond the control of the parties that invoke it. Paradoxically, this absence of control is critical to the utility of the law, for the gap between law and interest leaves the law in a position to legitimate and empower those who can successfully mobilize it. In turn, this gap has given law an enduring appeal for American soldiers and statesmen in some of their most important endeavors.

Engagement with the law was apparent in the very first days of an American military. The Second Continental Congress, in its first steps after the outbreak of hostilities in 1775, cited the laws of civilized warfare as a cause for war against Great Britain and as a binding code for the belligerents' conduct.[1] The Congress then asserted its control over the armed forces by enacting the Articles of War to govern the newly created Continental Army. In commissioning General George Washington as commander-in-chief, the Congress instructed him to "regulate [his] conduct in every respect by the rules and discipline of war."[2] Washington, in turn, relied on the law both to set the terms of his engagements with the British and to articulate and enforce the obligations of subordinates under his command. He protested the British command's treatment of captured American soldiers as traitors rather than prisoners of war. (The British decision to treat the rebellion as a crime instead of as a war, he complained to his British counterpart, deprived American officers of the "Benefit of those Military Rules" that, as he wrote, "we have shewn on our part the Strongest Disposition to observe.")[3] Similarly, every soldier under Washington's command had to sign the Congress's Articles of War.[4] Washington repeatedly issued orders prohibiting "the infamous practice of Plundering" and urged the Congress to heighten punishments for the offense, for which 194 soldiers were court-martialed and convicted during the war.[5] It is not too much to say that law suffused Washington's entire approach to waging war.

Washington's strategy on the battlefield was to lay claim to the nation-state status that the laws of warfare helped to construct. Washington's mission, and formidable challenge, was to create a disciplined, professional force of long-term regulars, officered by gentlemen trained in the European canons of military science, and capable of outclassing its British counterpart in pitched battle. Washington self-consciously sought out set-piece battles, the archetype of eighteenth-century rule-bound warfare.[6] The Continental Army won few of these engagements. But in the struggle to gain recognition in the family of civilized nations, Washington's commitment to rule-bound warfare paid dividends. The Americans, William Pitt told the House of Lords in 1777, proved they were "not a wild and lawless banditti."[7]

Rules of war also governed the Americans' administration of justice against the enemy. The trial and execution of Major John André, the British officer who famously conspired with Benedict Arnold to deliver West Point to the British, demonstrated Washington's commitment to the sterner dictates of the laws of war. A Board of General Officers convened by Washington de-

cided that André "ought to be considered as a spy from the enemy," and therefore, "agreeable to the law and usage of nations ... he ought to suffer death."[8] André's case marked an early instance of military tribunals being tasked with enforcing the laws of war. André was one of at least twenty British and Loyalist spies tried and executed during the Revolutionary War, most of whom were convicted by courts-martial.[9]

The Revolutionary War also laid the basis for a system of formal training in the laws and science of war. Reliance on foreign engineers, artillerists, and tacticians during the war convinced men like Washington, Henry Knox, Alexander Hamilton, and Thomas Jefferson of the need for a national institution to train "a body of scientific officers and engineers, adequate to any emergency."[10] In 1802, Congress authorized President Jefferson to establish a military academy for engineers at West Point.[11] Sylvanus Thayer, who became superintendent in 1817, designed a curriculum premised upon the Enlightenment theory of warfare as a rational science.[12] In the 1820s, Thayer added international law to the curriculum. Emmerich de Vattel's classic treatise *The Law of Nations* served initially as the standard text until Thayer replaced it with the first volume of James Kent's *Commentaries on American Law*, the leading antebellum work on international law and the law of war at sea.[13] The 1806 Articles of War and the 1821 *General Regulations for the Army*, a set of Vattelian military bylaws compiled by Brigadier General Winfield Scott, served as soldiers' guides for professional and ethical conduct, incorporating rules of international law such as the prohibition of plunder and the humane treatment of prisoners of war.[14]

Sea captains in the early republic also learned the laws of naval warfare. At a time when commerce raiding dominated maritime warfare, the complexities of the law of prize – generally concerning the capture of enemy ships and goods in wartime – dictated important decisions made by naval captains.[15] As Justice Joseph Story of the U.S. Supreme Court noted in an 1814 prize case, irregular conduct at sea could easily "involve the nation ... in serious controversies not only with public enemies, but also with neutrals and allies."[16] The federal judiciary policed the actions of naval commanders and privateers for violations of U.S. policy and international law,[17] applying the international law of prize directly as a rule of decision without deference to a captain's judgment and holding captains personally liable for illegal seizures.[18]

The military's commitment to rule-bound warfare did not, however, go untested. The laws of war, by some accounts, ceased to apply in frontier conflicts with Native Americans.[19] Yet even here, the laws of war were not foreign to conflicts with Indians. To the contrary, the laws of war supplied a rationale for campaigns of destruction against enemies whose own mode of warfare diverged from the rules accepted by European nations.[20] Even Andrew Jackson (though hardly an embodiment of legal restraint) implicitly relied on a deeply embedded logic of the law. Jackson saw enemy violations of the laws of war as triggers for stern retaliation and preemptive defense: the *lex talionis*, or an eye for an eye.[21] The "cruelty and murders" committed by Creeks against white settlers, Jackson wrote, justified "laying waste" to "their villages, burning their homes, killing their warriors and leading into Captivity their wives and Children."[22] Jackson offered a similar rationale for his unauthorized invasion of Spanish Florida in the First Seminole War and his execution of two British citizens, "the principal authors of the hostilities of the ferocious savages," whose mode of fighting "was in open violation of the laws of war and of nations."[23]

Jackson's campaigns refute the notion that legal rules were extraneous to the In-

dian wars. But his conduct raises another perhaps far more troubling possibility for the law in the American military. In Jackson's hands, the law revealed itself to be not a source of restraint, but a tool for advancing the strategic interests of the United States.

A close association between law and interest had existed since at least the War of Independence. That was one reason why Washington had adopted the formal rules of eighteenth-century warfare. But the risk that interest might delegitimize the law emerged as a crisis with the outbreak of the Civil War.

We can see the basic outlines of the problem in the creation of the military commissions system in the war's early weeks. In 1861, the Office of Judge Advocate was headed by John Fitzgerald Lee, cousin to the Confederate general Robert E. Lee.[24] Lee could hardly have been more inimical to President Lincoln's war strategy: he denied the legality of the Union's interference with slavery and its blockade of the South. Furthermore, he believed that military commissions, which would soon become an essential part of the American military effort, violated the Constitution's jury trial and federal court provisions.[25] Secretary of War Edwin Stanton disagreed; he summarily discharged Lee. In September 1862, Lincoln appointed Joseph Holt as Judge Advocate General, a position newly created by Congress to oversee all courts-martial and military commissions.[26] Three weeks later, Lincoln suspended the writ of habeas corpus nationwide and authorized the trial by military commission of not only "rebels and insurgents," but also anyone "affording aid and comfort" to the enemy.[27] Armed with vast prosecutorial authority and a cadre of young lawyers committed to the Union cause, the new Judge Advocate General transformed the office into an aggressive advocate for the power of the United States military in wartime. But in doing so, he raised a question that remains with us today: in the hands of the American military, is law little more than a convenient means to multiply the force of arms?

Sometimes the advancement of Union interests through the laws of war arose out of the law's value as a pragmatic tool for international cooperation. When U.S. Navy Captain Charles Wilkes seized two Confederate commissioners aboard a British steamer known as the *Trent* in November 1861, for example, he very nearly touched off a war. British officials were outraged at Wilkes's violation of the British vessel's rights on the high seas, but American audiences were thrilled at a much-needed success in the grim early months of the war. Secretary of State William Seward found in the law a perfect face-saving solution. He defended Wilkes's right to stop and search neutral vessels, but he identified what some have called a "technical wrong" as reason to turn the commissioners over to the British.[28] Some have viewed such maneuvering as proof of the futility of international law, but the *Trent* affair demonstrated the value of the law of war in offering ways to resolve controversy. Strategic deployment of the law helped Lincoln and Seward manage conflicts with Britain.

At other times, the Union's invocation of the laws of war advanced its interests over those of its enemy. Consider Lincoln and Seward's legal rationale for the blockade of southern ports.[29] The blockade, as an act of war, presupposed the Confederacy's status as an independent belligerent nation. At the same time, however, the Union committed to treat Confederate privateers as pirates. This policy presupposed that the Confederacy was a conspiracy of criminal traitors rather than a legitimate belligerent state. As if this contradiction were not bad enough, a series of Union positions adopted during the war on the capture of neutral cargoes represented embarrassing reversals from the United States' support for

neutral shipping rights in the War of 1812, not to mention its recent defense of privateering after the European powers had sought to prohibit the practice in 1856.[30] Lincoln and Seward's reading of the laws of war in this regard was thus patently self-serving. Charles Francis Adams would later complain that these sorts of contradictions brought the "law into contempt" and revealed the "quite unintelligible and somewhat ludicrous state of what is termed Law, of the international variety."[31]

Critics be damned, the Union continued to press arguments on the laws of war that served its interests against the South. The Lieber Code, published as General Orders No. 100 of the Union Army in April and May of 1863, adopted aggressive positions on the permissibility of certain forms of force, especially in the emancipation of slaves held by the enemy.[32] Holt's judge advocates put the Lieber Code to use and developed secret and self-serving interpretations of congressional legislation on military detention and the writ of habeas corpus.[33] (By the end of the war, Holt's judge advocates charged more than one thousand people in military commissions with violating the laws of war.)[34] In the summer of 1863, the Supreme Court endorsed the basic structure of the blockade strategy in *The Prize Cases*.[35] The next year, in the case of Clement Vallandigham, it let stand the Union's military commissions strategy.[36]

Northern victory seemed to vindicate the aggressive approach adopted by the Union war effort and by Holt's judge advocates. And yet the aggressive efforts to push legal doctrine were not without costs. Invoking the law, it turned out, was not free.

Critical accounts of the laws of war in U.S. history point to ways in which the law served not as a source of restraint, but instead as a convenient means by which to legitimate the use of force and advance the strategic interests of the United States.[37] The Civil War and the World Wars of the twentieth century provide powerful test cases for this account.

From early in the war, Lincoln and his Cabinet found that law talk, even strategic law talk, imposed costs. When the Union tried to prosecute Confederate privateers in New York, defense lawyers pointed out that down the hall in that very courthouse, Union lawyers in prize cases were arguing that the conflict rose to the level of a war in which a blockade might lawfully be imposed, even as the privateer prosecutions presupposed the opposite. The jury in the privateering case refused to convict. Piracy prosecutions had proven difficult to reconcile with the Union's commitment to the international laws of war.[38]

A number of features in the Union's legal strategy came back to haunt the war effort. Some were minor: a mistake in the Lieber Code, for example, produced embarrassment when the Confederacy was able to engage in what would otherwise have been unlawful paroles of captured Union prisoners during the Gettysburg campaign.[39] But other feedback effects were more serious. Having treated members of the Confederate armed forces as soldiers, it was much more costly to insist after the war that Confederate officials were not entitled to immunity from prosecution. To be sure, the United States indicted Jefferson Davis for treason, imprisoning him at Fort Monroe for two years. But prosecuting him in front of a jury had simply become too difficult, in substantial part because the Union had treated him as a head of state for four years.[40] Consider, too, the miserable prisoner of war camps at places like Andersonville in the South and Elmira in the North. These camps, where some fifty thousand men died during the war, were a product of the Union's insistence on the lawful combatant status of black soldiers.[41] Indeed, in the largest sense, the failures of Reconstruction were already embedded in the war ef-

fort thanks to the Union's legal treatment of the South. By committing to view the South as a legitimate belligerent with all that this entailed, the Union made it more difficult to engage in the systematic rebuilding of Southern social life and the Southern economy after the war was over.[42]

In the Civil War years, a pattern emerged. Engagement with the laws of war inevitably came in the pursuit of interests and strategies. But such engagements brought entailments and consequences: feedback effects that exacted costs of their own. In the decades after the great struggle over slavery, that same pattern reappeared. In truth, it continues to reappear to this day.

As the United States began to establish a global presence, for example, its traditional defense of neutral rights and private property on the seas made the new hard-line positions of men like Alfred Thayer Mahan, the prominent advocate of American sea power, much more difficult to maintain. Mahan opposed not only the immunity of private property, but even the protection of neutral ships' cargoes, a view at odds with the United States' earlier legal and diplomatic position.[43] When the United States fought a brutal counterinsurgency in the Philippines at the turn of the century, the laws of war crafted to help the Union win the Civil War traveled to the far reaches of the Pacific. Those laws did not prevent American soldiers from resorting to torture to interrogate Filipino insurgents, but they did produce convictions in courts-martial of American soldiers and officers.[44] To be sure, the punishments were shockingly minor,[45] but the law against torture and the courts-martial helped galvanize domestic opponents of the conflict and imposed nontrivial political costs on the Roosevelt administration.

World War II presented perhaps the most serious test since the Civil War of the law's capacity to constrain the conduct of the U.S. military. By some accounts, the war offered further evidence that American military leaders invoke the law's dictates merely for strategic purposes.[46] Certainly, the rules of warfare codified at The Hague and Geneva Conferences and published in field manuals around the world proved unable to prevent unprecedented levels of destruction. One need only think of the crippling economic blockades, the submarine attacks on merchant shipping, and of course the saturation bombing of cities from the air to see that the war's participants seemed to abandon the law's core prohibition on the killing of civilians. Allied air attacks alone killed an estimated 300,000 to 500,000 civilians in Germany and 330,000 civilians in Japan.[47] In the words of War Secretary Henry Stimson, the use of atomic bombs in Japan offered "final proof that war is death."[48]

Stimson's stern realism, though, like that of William Tecumseh Sherman before him, did not imply a rejection of legal restraints on warfare. Allied interpretations of the laws of armed conflict provided license for the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki. But those laws and their traditions also attached lasting consequences to these acts. The laws of war offered noncombatants shockingly little protection. But they nevertheless shaped the course of the conflict and its aftermath in certain important respects, not least by providing a vocabulary of critique.

At the start of World War II, the American military command purported to recognize certain core principles governing aerial bombardment.[49] Many European strategists of the interwar period, however, believed that the advent of air power had signaled the end of legal constraints on warfare.[50] Indeed, international efforts to codify the laws of war had largely failed to develop explicit, binding rules to restrict aerial bombardment of cities and industry, except by analogy to land and naval warfare. Amendments to the Hague Conven-

tions on land and naval warfare in 1907 prohibited "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended."[51] The rules left considerable latitude, however, for states to expand the definition of legitimate military targets such that most urban areas could be deemed "defended."[52] More stringent rules for air warfare had been drafted by the Hague Commission in 1923 and by the League of Nations in 1938, but they were never ratified.[53]

In the early years of the war, architects of the American bombing campaign relied on the principles and categories of the laws of war in evaluating their strategic options. U.S. Army Air Force leaders, for example, cited the law's considerations when they chose to adhere to a strategy of daytime "precision" airstrikes on military targets in Germany and the Pacific.[54] The American approach was self-consciously distinct from the less discriminate strategy undertaken by the Royal Air Force Bomber Command over German cities after the blitz.[55] To be sure, the American low-altitude strategy gave way as the war progressed. The Casablanca Directive, issued in February 1943, defined the objective of the Allied Combined Bomber Offensive in Europe as the "destruction and dislocation of the German Military, industrial, and economic system and the undermining of the morale of the German people to the point where their capacity for armed resistance is fatally weakened."[56] American armed forces made a similar move in the Pacific theater in the spring of 1945 when they shifted from precision raids to a ferocious campaign of low-altitude nighttime firebombing of Japanese cities under General Curtis LeMay.[57] But the slide from discrimination to destruction should not blind us to the constitutive role the law played. Disregard of legal principles under great pressure does not render those principles irrelevant. To the contrary, virtually all agree that the basic values and norms of the law helped shape the United States' approach to the bombing question in the first year of the war.

Indeed, the tradition of law in war led officials to counsel restraint on important occasions. Both Henry Stimson and Robert A. Lovett, assistant secretary of war for air,[58] urged that the United States pursue "only precision bombing in Japan," rather than area bombing.[59] Stimson also successfully opposed the atomic bombing of Kyoto, a city that military leaders initially ranked as a first-choice target.[60] Even if he were motivated by a personal attachment to the city, Stimson made his case by invoking values embedded in the rules of war – the protected status of civilians and cultural sites.[61]

After the war, the costs of the most aggressive bombing campaigns revealed themselves once more. At Nuremberg, the strategic aerial bombardment of German civilians became a vast embarrassment for the Allies. German defendants accused of killing civilians asserted the defense that "every Allied nation brought about the death of noncombatants through...bombing."[62] In Tokyo, Justice Pal of India dissented from the convictions of Japanese war criminals, insisting that in view of the bombing campaigns over Japanese cities, the war crime proceedings were nothing more than victor's justice.[63] A court in Tokyo even concluded in 1963 that the Americans' atomic bomb attacks violated the international laws of war.[64]

Here then were real and enduring entailments of the laws of war for the U.S. military. Small consolation for those killed at Hiroshima, Nagasaki, and Tokyo, no doubt – but real costs, nonetheless, that continue to shape America's reputation around the world. Since World War II, military and political leaders in the United States have had to find a limiting principle with which to distinguish American tactics from the war crimes of the Germans and Japanese. Le-

May himself was famously reported as saying, "I suppose if I had lost the war, I would have been tried as a war criminal."[65] Perhaps he would have. But the fact that the victor needed to explain and defend its actions in the wake of the war demonstrated that the laws of war served not simply as a license for violent exertions of state power, but also as a source of critique, and even, sometimes, a source for practical judgments in desperate times.

In our own time, one of the most striking developments for the role of law in the U.S. military has been the vast expansion of the sheer number of lawyers in the military, combined with the self-conscious deployment of law as a tactical nonlethal weapons system in counterinsurgency campaigns. The increase in lawyers has been a long time in coming. Under Holt, the Judge Advocate's Corps reached thirty-three officers by the Civil War's end. In 1916, Congress greatly increased the number of lawyers in the Judge Advocate's Corps and the Officers' Reserve Corps in response to the growing number of courts-martial and pressing wartime legal problems. Over the course of World War II, the military's legal force expanded from four hundred to over two thousand.[66] In the war's wake, reforms to the Uniform Code of Military Justice produced ever more demand for lawyers. Today, estimates from inside the Department of Defense calculate that the Pentagon employs a total of ten thousand lawyers: far more than are employed by even the largest law firms in the world. In the early twenty-first century, the American military is quite plausibly the largest employer of lawyers on the planet.[67]

In no small part, this vast expansion in lawyers highlights the place of law in many of the new strategic projects of the twenty-first-century American military. In conflicts since the Vietnam War, military lawyers have gained a more formal and direct role in shaping the conduct of military operations, a process concomitant with the development of operational law. In the aftermath of the My Lai massacre, blamed upon failings in military discipline and law of war training, the Defense Department established a Law of War Program that tasked judge advocates with overseeing military operations' compliance with the law of war.[68] Judge advocates have drafted the rules of engagement for operations since Grenada and the Gulf War and produced the *Operational Law Handbook* for resolving legal questions in the field.[69] In counterterrorism operations today, lawyers perform critical roles in the selection of targets for drone strikes. They serve as advisors in evaluating the compliance of targeting decisions with the obligations of proportionality and discrimination.[70] And they have played, and continue to play, increasingly important roles in counterinsurgency efforts to win hearts and minds – efforts that took off under the aegis of General David Petraeus in Iraq and General Stanley McChrystal in Afghanistan.[71] The move to law in our own time has struck many observers as unprecedented. But while there are surely new features of the experience, what is *not* new is the basic dilemma: the U.S. military invokes the law to advance its interests, but the law's capacity to advance those projects is undermined to the extent that the law does no more than advance the interests of those who invoke it. Once again, what saves the law from defeating itself is that its internal structure and logic entail feedback effects and loops. Consider the judge advocates who have defended Al Qaeda in the military commissions or criticized the use of torture in interrogations; acting in no small part on the basis of professional norms inculcated by the law, they have made life substantially more difficult for the military prosecutors.[72] Consider the difficulties faced by the Guan-

tanamo military commissions more generally; they have been badly undercut by legal process. Indeed, much of the United States' post-9/11 campaign has produced global pushback mobilized around legal categories like the rule of proportionality in targeting or the norm against torture in detention. Harms to American reputation around the world have been made salient by the law. As legal scholars David Cole and Jack Goldsmith have both shown in their separate accounts of national security law in the post-9/11 era, the combined effects of civil society institutions, alongside the judiciary and the bar, have served meaningfully to constrain the executive branch in general and the military in particular.[73] The social cost of refusing to comply with the rules of war – rules that are now thoroughly institutionalized within the professional military – is perhaps the best measure of the law's effectiveness in shaping wartime conduct.

At the close of *Just and Unjust Wars*, Michael Walzer takes up the example of Arthur Harris, known as "Bomber" Harris for his role in overseeing the British strategic aerial bombardment efforts of World War II. By the end of the war, Harris had been responsible for a bombing campaign of terrible ferocity toward civilians and civilian infrastructure. In Walzer's account, Harris was dishonored – denied a peerage because of the moral obloquy of his country.[74]

One might quibble with Walzer; the dishonoring of Bomber Harris also reflected a judgment that strategic aerial bombardment did poorly in advancing the British war effort.[75] But if that is so, then the dishonoring of U.S. Attorney General Alberto Gonzalez did the dishonoring of Bomber Harris one better. For when Gonzalez retired in 2007, he began an unprecedented year-long odyssey of looking for a job; the United States' chief lawyer could barely find decent work. Gonzalez was, as he put it, "one of the many casualties, of the war on terror."[76] And even if we discount his hyperbolic language, even if we acknowledge his other troubles as attorney general, the point remains. Gonzalez's open dismissal of the legal rules arising out of armed conflict earned him a social stigma that was hard to shed. It was a lesson that Lincoln would have recognized in his own day as in ours. The law has constitutive force independent of the projects of those who mobilize it. That is its power, and that is its risk.

ENDNOTES

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