

# Lawyering Wars: Failing Leadership, Risk Aversion, and Lawyer Creep—Should We Expect More *Lone Survivors*?

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## INTRODUCTION

“We are a nation of laws, not men.” This motto—made famous by the Supreme Court case *Marbury v. Madison*<sup>1</sup>—has existed since the founding of the United States. This maxim embodies the sentiment that, in order to prevent tyranny, citizens should be governed by fixed law rather than the whims of a dictator. In his decision, Chief Justice John Marshall did not qualify his remarks by saying, “we are a nation of laws, except in time of war.” Indeed with the modern U.S. military, Cicero’s observation that “[l]aws are inoperative in war” has never been further from the

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1. 5 U.S. 137, 162 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

truth.<sup>2</sup> Never before has the national security community been so influenced by, and controlled by, an increasingly complex national-security legal system.<sup>3</sup> In many ways this is a good trend, but it, like a pendulum, can swing too far. This Article attempts to assess the current situation and evaluate whether we have swung too far into “overlawyering.”<sup>4</sup>

At the center of this tension is the national-security lawyer.<sup>5</sup> These professionals are charged with helping decision makers—the “client”<sup>6</sup>—navigate the above-mentioned complexities of “war fighting.”<sup>7</sup> More specifically,

2. THE OXFORD DICTIONARY OF QUOTATIONS 151 (Oxford Univ. Press ed., 3d ed. 1980). America’s self-perception, indeed the perception of much of the world, is that we are the ones who follow the rules; even when following rules is difficult, we have tried to wear the “white hat.”

3. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 207–08 (2007); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 854 (2013); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 800 (2011).

4. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Yaser Hamdi, a U.S. citizen captured by U.S. forces on the battlefield in Afghanistan in 2001, was detained at Guantanamo Bay Naval Base. Hamdi’s father filed a petition for habeas corpus in 2002, arguing that Hamdi’s detention was unlawful. The Court held, among other things, that while the executive branch did have the authority to detain certain individuals on the battlefield, it could not do so without providing a system for the individual to challenge his detention. The Court ordered the military to create a system whereby a citizen-detainee could challenge his status as an enemy combatant before a neutral decision maker. See also Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1097 (2009) (“[T]he tension between *Hamdan* and court precedents requiring deference to the executive produce[s] a regime of legal uncertainty that could dissuade the executive branch from pressing its expansive constitutional-avoidance and implied-repeal theories in other contexts whenever judicial review of the merits is possible, even if the courts ultimately decide to avoid ruling on the merits.”); Kent Roach, *Substitute Justice? Challenges to American Counterterrorism Activities in Non-American Courts*, 82 MISS. L.J. 907, 914 (2013) (“The post-9/11 phenomena of substitute justice litigation started in the United Kingdom with a 2002 decision that denounced Guantanamo as a *legal black hole* . . .” (emphasis added)); Charlie Savage, *Judge Rejects New Rules on Access to Prisoners*, N.Y. TIMES, Sept. 7, 2012, at A21 (citing a federal judge who rejected the government’s “effort to impose new restrictions on lawyers’ access to prisoners at Guantánamo Bay, Cuba, if they were no longer actively challenging the prisoners’ detention in federal court”).

5. As discussed more fully below, the title “national-security lawyer” refers both to attorneys employed by the intelligence community and to Department of Defense attorneys.

6. The titles “decision maker” and “commander” are used to describe the individuals who are the consumers of legal advice provided by the national-security lawyer—they represent the “client” in modern legal terms. Just as the client is ultimately in charge of his or her own case, so too is the decision maker in the intelligence community or commander on the battlefield.

7. As a starting point, this Article refers extensively to the terms “war fighting” and “national security” interchangeably. These phrases do not merely refer to the nation’s ability to send troops to combat. Rather, these terms of art are all-encompassing and include not only the tactical protection of the army private who is pulling a trigger in Afghanistan but also the strategic ability of military generals or CIA officers to gather intelligence and project influence around the world.

national-security lawyers are charged with the mission of *enabling* the client to make decisions that are within the bounds of both domestic and international law, but, at the same time, decisions that best protect American interests—whether those interests be the life of one American soldier or the strategic ability to project power around the world.<sup>8</sup> However, there is a difference between lawyers assisting their client by providing support for legal decisions and lawyers *controlling*<sup>9</sup> the discussion through risk aversion, unclear guidance, and legal pedantry.

The purpose of this Article is to explore how the contemporary legal environment has directly and negatively impacted the United States' ability to effectively make war, project power, and protect our service members in the field. The first Part examines the history of how lawyers have risen to dominate much of the discussion in the national-security arena. Next, this Article discusses how the clients, partly through their lawyers, have created a culture of risk aversion in the national-security apparatus that endangers soldiers<sup>10</sup> and other operators with legalized policy decisions and convoluted self-defense rules.

This Article then explores how the “fear of prosecution” and “feeling of persecution” now permeate the defense and intelligence ranks. This fear is impacting the United States' ability to wage war. In Part III, three case studies are used to highlight the issues: the prosecution of Private First Class Richmond, the dismissal of Lieutenant Colonel West, and Operation Red Wings (depicted in the book and motion picture *Lone Survivor*). In these case studies, we see an example of how following a “wrong” legal decision left a U.S. Army unit with zero casualties, an example of how heeding a

8. Military lawyers play a unique role in the U.S. Armed Forces. See Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1276–79 (2006) (outlining how military lawyers provided a crucial check on the U.S. military leadership's authorization of enhanced interrogation techniques in the war on terror); see also Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 Hous. L. REV. 553, 590–95 (2007) (examining Judge Advocates' role in congressional inquiries dealing with conditions of confinement and treatment of individuals suspected of being involved with terrorist activities); Charles J. Dunlap, Jr., Commentary, *Lawfare Today: A Perspective*, YALE J. INT'L AFF., Winter 2008, at 146, 149–52 (2008) (stating that military lawyers are an “indispensable part of a commander's war fighting team”); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 658–67 (2009); Fred L. Borch, *The Judge Advocate General's Corps in the Army and at West Point*, U.S. MIL. ACAD. W. POINT, <http://www.usma.edu/sja/SitePages/About.aspx> (stating that commanders in the U.S. military view their JAGs as “force-multipliers”). The term “force multiplier” refers to individuals or weapon systems that, “when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment.” JOINT CHIEFS OF STAFF, JOINT SPECIAL OPERATIONS TASK FORCE OPERATIONS, JOINT PUB. NO. 3-05.1, at GL-11 (2007).

9. As will be discussed later in detail, lawyers are products of their environments; they can only “control” what they are allowed to control. Therefore, a point that will be stressed throughout this Article is that the client is responsible for ensuring that the lawyer does not intrude too much into the decision-making process.

10. “Soldier” is a term that is specific to a member of the Army. However, in the interest of simplicity throughout this Article, soldier is used to refer to all service members.

correct legal decision wiped out almost all of a U.S. Navy unit, and an example of how a battlefield accident sent a young soldier to prison. This Part concludes with a discussion exploring the consequences of decision makers allowing lawyers to dominate many aspects of the national-security discussion. Specifically, this Part focuses on two questions: How does a risk-averse culture affect the national security community? And how do drastically different consequences, as seen in the case studies, affect the service members' ability to function and protect themselves?

Lastly, this Article attempts to offer suggestions to help ensure that American interests are protected but also that we can continue to wear the proverbial "white hat" and engage in legal and "moral" wars. This Part will further address how national-security lawyers can better serve their clients by providing some level of certainty to national-security operators, give guidance that is understandable to young troops, and provide commanders with legal advice that enables them to exercise the flexibility they must have to fulfill their missions—a thorny issue, but not unsolvable. Ultimately, this Article attempts to meld macro<sup>11</sup> and micro<sup>12</sup> ideas into an understandable whole. However, this is a multifaceted problem, one that will not be solved simply with fewer lawyers or more aggressive commanders. While this Article offers suggestions to help break the status quo, it is acknowledged that the steps necessary are complex and the goal here is to start the discussion.

Further, this Article does not intend to place the blame on the individual intelligence or military lawyer. Rather, the hindrance on war fighting comes from the "lawyer mentality," which is just as often present in nonlawyers. Indeed, this is a mentality that has become pervasive in American culture itself—it is the same culture that causes a company that makes chainsaws to warn its customers with a label that reads "DANGER: Do not hold the wrong end of a chainsaw" or that causes Apple to give notice that its patrons should "not eat [their] iPod shuffle."<sup>13</sup> While individual

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11. See GOLDSMITH, *supra* note 3; see also Hansen, *supra* note 8, at 620 (responding to John Yo and Glenn Sulmasy's article and offering a "better way for understanding the role of the military lawyer within the context of our governmental system"); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1407, 1419–20 (2008) (arguing that military lawyers ensure that civilian decisions are understood and followed by combat troops).

12. See DAVID G. BOLGIANO, *COMBAT SELF-DEFENSE: SAVING AMERICA'S WARRIORS FROM RISK-AVERSE COMMANDERS AND THEIR LAWYERS* (2007); see also Aaron Pennekamp, *Standards of Engagement: Rethinking Rules of Engagement To More Effectively Fight Counterinsurgency Campaigns*, 101 GEO. L.J. 1619, 1620–22 (2013) (discussing current rules of engagement used by soldiers in the field and offering a new model "whereby soldiers' use-of-force actions are governed by general, outcome-based 'standards,' not specific, prescriptive 'rules'").

13. Warning labels on file with author. Other examples of these warning labels designed to reduce legal exposure are Vidal Sassoon placing warning labels on boxes of their hair dryers instructing their patrons to "not use the dryer while sleeping," and a washing machine manufacturer warning its customers: "High Spin Speeds, Do Not Put any Person in this Washer." This author was surprised when he ordered a water bottle from Amazon.com, which came in a small plastic bag that explained in bold letters: "WARNING: To danger [sic] of suffocation, keep this plastic bag away from babies and children. Do not use this bag in cribs, beds, carriages, or play pens. This bag is not a toy." It is noted that the United States has been a litigious nation for some time, as witnessed in 1835 by Alexis De Tocqueville in his book *Democracy in America*, where he wrote, "There is almost no political question in the United

lawyers write such warning labels, the issue at hand is much bigger than a single Judge Advocate General (JAG) officer in Afghanistan—it's a societal issue that is now affecting the ability to protect the country.

Who is ultimately answerable for this shift to “lawyering” wars? Civilian and military commanders need to take responsibility for both their decisions and the consequences of those decisions. Said in a different way, this is an issue with the “client” (decision makers) first and lawyers second. Regardless of who is at fault, the current environment is making the United States less safe.

In trying to describe the ubiquitous behavior of decision makers seeking authorization from their lawyers for war-making decisions, Jack Goldsmith, the once-embattled head of the Office of Legal Counsel<sup>14</sup> (the Department of Justice section that gives the official legal advice to the entire federal government) states:

After 9/11 the White House believed that the President could decline to pursue a particular policy or action that might save thousands of lives only if he had a very good reason. Haunted by 9/11 and the 9/11 Commission, the White House was obsessed with preventing a recurrence of the expected harsh blame after the next attack. When declining to take some action that might conceivably save American lives, the White House would ask itself whether it would have a good excuse to the American people if the failure to act resulted in deaths. A lawyer's advice that a policy or action would violate the law, especially a criminal law, was a pretty good excuse.<sup>15</sup>

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States that is not resolved sooner or later into a judicial question.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop ed., Univ. of Chi. Press 2000) (1835).

14. Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, at E40. Professor Goldsmith was hired in 2003 as an assistant attorney general and tasked to run the Office of Legal Counsel, the division of the Justice Department that advises the president on the limits of executive power. *Id.* Nine months after being appointed, he resigned. *Id.*

Although he refused to discuss his resignation at the time, he had led a small group of administration lawyers in a behind-the-scenes revolt against what he considered the constitutional excesses of the legal policies embraced by his White House superiors in the war on terror. During his first weeks on the job, Goldsmith had discovered that the Office of Legal Counsel had written two legal opinions—both drafted by Goldsmith's friend Yoo, who served as a deputy in the office—about the authority of the executive branch to conduct coercive interrogations. Goldsmith considered these opinions, now known as the “torture memos,” to be tendentious, overly broad and legally flawed, and he fought to change them. He also found himself challenging the White House on a variety of other issues, ranging from surveillance to the trial of suspected terrorists. His efforts succeeded in bringing the Bush administration somewhat closer to what Goldsmith considered the rule of law—although at considerable cost to Goldsmith himself. By the end of his tenure, he was worn out. “I was disgusted with the whole process and fed up and exhausted,” he told me recently.

*Id.*

15. GOLDSMITH, *supra* note 3, at 130–31. Mr. Goldsmith also offers as a reason for the explosion in lawyer influence that

Accordingly, why has the appropriate question—“What are we lawfully allowed to do?”—too often morphed beyond the proper legal ambit into the problematic question—“What should we do?”<sup>16</sup> While these questions may seem to be almost the same, they are in fact fundamentally different.

# I. THE HISTORY AND FUTURE OF “LAWYER CREEP” IN WAR

Two categories of lawyers are discussed throughout this Article: military lawyers, who include both uniformed JAGs and civilian defense lawyers, and intelligence lawyers, who are spread throughout government.<sup>17</sup>

## A. Military Lawyers

On July 29, 1775, General George Washington founded the Army JAG Corps to provide legal advice to the Continental Army during the Revolutionary War.<sup>18</sup> In 1802, the function of the JAG Corps was suspended and not reinstated until 1849.<sup>19</sup> Since then, it has steadily grown in size and influence.<sup>20</sup>

More recently, there has been an explosion of lawyers in the military: specifically, JAG strength is ten percent larger than it was at the close of the Cold War. By contrast, the military in general is forty percent smaller.<sup>21</sup> The civilian lawyer corps in the Department of Defense has also grown at a rapid rate.<sup>22</sup>

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[t]he President and the Vice President always made clear that a central administration priority was to maintain and expand the President’s formal legal powers. In any policy debate, a lawyer could gain traction for a particular course of action—usually, going it alone—by arguing that alternative proposals would diminish the President’s power. . . . This gave lawyers with a pro-executive bent ammunition in any policy debate.

*Id.* at 132.

16. *Id.* at 131. *Contra* Philip Zelikow, *Legal Policy for a Twilight War*, 30 Hous. J. INT’L L. 89 (2007).

17. These attorneys are concentrated in the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Defense Intelligence Agency (DIA), and the Federal Bureau of Investigation (FBI).

18. *Army JAG Corps, History*, U.S. ARMY, <http://www.goarmy.com/jag/history.jsp>.

19. *See id.* (“Most staff positions in the active Army, including Judge Advocate, [were] eliminated. State militias assume[d] Judge Advocate functions.”)

20. *See id.*

21. *See* Bill Gertz & Rowan Scarborough, *Inside the Ring: JAG Proliferation*, WASH. TIMES, Sept. 15, 2006, at A5. In 1998, the nation’s military procurement budget was sixty-nine percent lower than in 1985. Leslie Wayne, *The Shrinking Military Complex: After the Cold War, the Pentagon Is Just Another Customer*, N.Y. TIMES, Feb. 27, 1998, at D1. As of Jan. 31, 2015, the military had 1,360,406 active-duty troops. Dep’t of Defense, *Armed Forces Strength Figures for August 31, 2014*, DEF. MANPOWER DATA CENTER (Aug. 31, 2014), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp). In 1982, there were 2,108,612 active duty personnel in the armed forces. Dep’t of Defense, *Military Personnel on Active Duty by Grade in Which Serving*, DEF. MANPOWER DATA CENTER (Sept. 30, 1982), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp).

22. GOLDSMITH, *supra* note 3, at 91.

This “JAG proliferation”<sup>23</sup> has gone mostly unregulated and will likely continue to grow unfettered for some time to come.<sup>24</sup> Indeed, in the recent military downsizing, the JAG Corps in all three branches and the Marine Corps have been mostly untouched. Military experts argue that such growth is troubling because “unregulated deference to the JAGs has limited some combat operations, and will continue to do so. . . . [L]eaders should remain aware that the growth in JAG influence can have a detrimental impact on the nation’s ability to win wars.”<sup>25</sup> This is true because military commanders are now in a position where their lawyers’ advice is needed to achieve military objectives and not just to determine whether the commanders’ actions are legal.<sup>26</sup>

The beginnings of “JAG creep” started in the Vietnam era, with parallel growth in public policy and attempts to sway public opinion with carefully “lawyered statements.”<sup>27</sup> The military community knows that success in military operations is contingent on public acceptance, a lesson they learned during the Vietnam War.<sup>28</sup>

23. Gertz & Scarborough, *supra* note 21. The phrase “JAG proliferation” first appeared in a discussion concerning the Judge Advocate Generals (the general officers who are the chief lawyers for each branch and often called TJAGs) when they attempted to change their rank from two-star to three-star positions. Some argued that the TJAGs, in their quest to get promoted, purposely obstructed the war on terror and that “[n]ational security was subordinated to TJAGs self-interest. Gaining an increase in JAG strength and three-star rank is more important than defeating the transnational terrorist threat.” *Id.* (citation omitted).

24. Glenn Sulmasy & John Yoo, *Challenge to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1842–43 (2007).

25. *Id.* at 1844.

26. *Id.* According to Sulmasy and Yoo, the Kosovo conflict brought JAGs closer to the front-line decisions, as commanders confronted the complexities of waging an air campaign in civilian-dense areas. *Id.* at 1841. Thus, the commanders turned to their JAGs to make policy decisions. *Id.* See generally James E. Baker, *LBJ’s Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 CHI. J. INT’L L. 407 (2003). It was here that JAGs “transformed their role from back-line staff officers to wartime advisors and to, what JAG legal historian Fred Borch has called, ‘mission enhancers.’” Sulmasy & Yoo, *supra* note 24, at 1841 (quoting FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 326 (2001)). JAGs, now well embedded in the policy arena, have found new prominence in today’s military, seeing “their role as ‘problem solvers’ for commanding officers in combat operations.” *Id.* at 1841–42.

27. See MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 197–200 (2000).

28. See Christopher Gelpi, Peter D. Feaver & Jason Reifler, *Success Matters: Casualty Sensitivity and the War in Iraq*, INT’L SEC., Winter 2005/06, at 7, 7 (“Since the Vietnam War, policymakers have worried that the U.S. public will support military operations only if the human costs of the war, as measured in combat casualties, are minimal.”); see also Charles J. Dunlap, *A Virtuous Warrior in a Savage World*, 8 U.S. A.F. ACAD. J. LEGAL STUD. 71, 77 (1998) (“The United States has already seen how an enemy can carry out a value-based asymmetrical strategy. For example, one of the things that America’s enemies have learned in the latter half of the 20th century is to manipulate democratic values. Consider the remarks of a former North Vietnamese commander: ‘The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win.’ By stirring up dissension in the United States, the North Vietnamese were able to advance their strategic goal of removing American power from Southeast Asia. Democracies are

Indeed, the idea of a “pure military success” is a dead idea—“a strike which takes out a target but leaves behind moral or political debris is a strike which has failed.”<sup>29</sup>

At the beginning of the Vietnam War, lawyers had a very limited role in targeting decisions (such as which targets to hit).<sup>30</sup> Because Vietnam was a public relations disaster, the military response was to call in more lawyers and involve them with strategic and tactical decisions.<sup>31</sup> Consequently, the influence and power of military lawyers at every level of targeting and operations have grown. By the time of the Panama invasion in 1989, “lawyer creep” advanced so far that JAGs proffered legal and tactical advice on issues ranging from dealing with civilian property to avoiding intrusions into Cuban airspace.<sup>32</sup> During the First Gulf War, JAGs were part of decisions that maintained the legality of the coalitions and the planning of the air and ground wars.<sup>33</sup> “By 1999, military lawyers were integrated into every phase of the air campaign, including the finalization of the air-tasking orders which assigned pilots to specific targets and missions.”<sup>34</sup>

Because of new technology, including satellite reconnaissance photography and unmanned aerial vehicles, it is possible for JAGs today to be meticulously involved in the targeting process, examining its legality.<sup>35</sup> Indeed, “[e]very single one of the

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less-resistant to political machinations of this sort than are the totalitarian systems common to neo-absolutists.”).

29. IGNATIEFF, *supra* note 27, at 197.

30. Sulmasy & Yoo, *supra* note 24, at 1838–39. JAGs had little impact in combat operations through Korea and through the first half of Vietnam. *Id.* at 1838–40. “JAGs were not central to, and certainly not expected to be versed in, warfare operations. There was no expectation, or desire, for them to publicly comment on combat operations and policy decisions made by the civilian command authorities. Combat officers would have found involvement by lawyers counterproductive in waging war.” *Id.* at 1838.

31. See IGNATIEFF, *supra* note 27, at 197; see also MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2002).

In Vietnam, the JAG Corps focus began to expand from the traditional military justice role to determining the status of captured enemy personnel and investigating and reporting war crimes. Judge advocate responsibilities also expanded to include foreign claims, international law, and efforts to help reform the Vietnamese judicial system. In a precursor to deployments in the coming decades, judge advocates were forward-deployed to outposts and fire bases throughout South Vietnam.

John J. Brossart & Tom Hagen, *Wartime Consigliere*, BENCH & B. MINN., Oct. 2010, at 16, 17.

32. IGNATIEFF, *supra* note 27, at 197; see also Sulmasy & Yoo, *supra* note 24, at 1841. During this time the number of lawyers in the Department of Defense, both uniformed and civilian, grew at an unprecedented rate—today the department employs over ten thousand lawyers. GOLDSMITH, *supra* note 3, at 91.

33. IGNATIEFF, *supra* note 27, at 197.

34. *Id.* “Military lawyers attached to United States European Command, sat at computer terminals and contributed assessments of the standard Geneva Convention questions for each target: was the objective military; were the means selected proportional to the objective; and what were the risks of damage to civilians.” *Id.* at 197–98.

35. See *id.* at 198. Some scholars argue that this is exactly what is needed: attorney oversight over certain military decisions—specifically drone strikes. See, e.g., Abraham D. Sofaer, *Targeted Killings from Many Perspectives*, 91 TEX. L. REV. 925, 931 (2013)

more than 500 targets in Kosovo was subjected to this type of review.”<sup>36</sup> Writing on the United States’ involvement in Kosovo, Michael Ignatieff stated:

Given that lawyers have infiltrated every decision-making arena in modern society, from hospitals to the Oval Office, it is inevitable that they should have infiltrated the military. [Lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure that he will not face legal consequences.<sup>37</sup>

More recently, there is evidence that lawyers in the intelligence community engage in this exact type of target analysis and approval.<sup>38</sup> John Rizzo, former acting general counsel of the CIA, asserts that a section of CIA attorneys creates what he refers to as a “hit list” that contains individuals who represent a grave threat to the United States.<sup>39</sup> The legal shuffling does not stop there.<sup>40</sup> According to Rizzo, the list

(reviewing Amos N. Guiora, *The Importance of Criteria-Based Reasoning in Targeted Killing Decisions*, in TARGETED KILLINGS, 303, 306–07 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012)). James Robertson, a retired federal judge, argues against judges’ involvement with drone strikes. James Robertson, Editorial, *The Wrong Venue for Drone Review*, WASH. POST, Feb. 17, 2013, at A21. Specifically, Judge Robertson notes that drone targets do not have an initial appearance before a judge to learn of their rights or the charges against them, do not have attorneys representing their interests, and do not have the ability to call witnesses to paint a different story of their guilt or innocence. *Id.*

36. IGNATIEFF, *supra* note 27, at 198; *see also* Baker, *supra* note 26, at 416.

37. IGNATIEFF, *supra* note 27, at 198.

38. Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, at 34.

39. *Id.*

40. *See id.*

The hub of activity for the targeted killings is the CIA’s Counterterrorist Center, where lawyers—there are roughly 10 of them, says Rizzo—write a cable asserting that an individual poses a grave threat to the United States. The CIA cables are legalistic and carefully argued, often running up to five pages. Michael Scheuer, who used to be in charge of the CIA’s Osama bin Laden unit, describes “a dossier,” or a “two-page document,” along with “an appendix with supporting information, if anybody wanted to read all of it.” The dossier, he says, “would go to the lawyers, and they would decide. They were very picky.” Sometimes, Scheuer says, the hurdles may have been too high. “Very often this caused a missed opportunity. The whole idea that people got shot because someone has a hunch—I only wish that was true. If it were, there would be a lot more bad guys dead.”

*Id.*; *see* Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*, 45 CASE W. RES. J. INT’L L. 23, 36 (2012) (“[Goldsmith] notes . . . that lawyers were involved in developing criteria for individuals subject to ‘targeted killings’ by drones.” (reviewing JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 125–60 (2012))). According to reporters at the *New York Times*, lawyers at the Department of Justice’s Office of Legal Counsel also weighed in on the legality of drone strikes. Editorial, *Justifying the Killing of an American*, N.Y. TIMES, Oct. 12, 2011, at A22. Although, apparently, the Department of Justice was not involved with individual targeting decisions and “stopped short of analyzing the quality of the evidence

is then brought to senior CIA attorneys, who analyze the targets, before being sent to the Department of Defense.<sup>41</sup>

This Article does *not* argue that the ends justify the means. Indeed, legal constraints are necessary if wars are to preserve not only public support but also some level of morality.<sup>42</sup> The real problem with the entry of lawyers into the prosecution of warfare is that it encourages the illusion that war is “clean” if the lawyers say so and breeds a culture in the military in which commanders can avoid hard decisions and risk with the shield of “my lawyer told me not to.”<sup>43</sup> A further illusion—often perpetuated by the legal community—is that if we play by the rules, the enemy will too.<sup>44</sup>

### *B. Intelligence Lawyers*

The lawyer creep on war-fighting decisions is not limited to military lawyers.<sup>45</sup> The intelligence community, which also plays a major role in war fighting, has seen an influx of lawyers interpreting multiplying laws in order to provide cover for decision makers.<sup>46</sup> In the 1970s, the CIA had but a handful of

[against a particular target].” *Id.*

41. See Mckelvey, *supra* note 38, at 34.

42. See *infra* Part II.A.

43. See *infra* Part III.

44. It is true that “[r]eciprocity is almost always an indispensable component of the law of war.” Robert D. Sloane, Book Review, 107 AM. J. INT’L L. 972, 975 (2013) (reviewing MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* (2009)); IGNATIEFF, *supra* note 27, at 199–200. John Yoo, the author of the aforementioned “torture memos,” aptly sums up the reciprocity issue in the war on terror:

Al-Qaeda will never follow the rules of war. Al-Qaeda gains its only tactical advantages by systematically flouting them. American restraint in the use of force, the methods of attack, or the treatment of prisoners does not affect the incentives of al-Qaeda members, who seek a goal of salvation in the afterlife. Suicide bombers are not susceptible to deterrence. . . . [F]or al-Qaeda to agree to play on a level playing field with the United States would be tantamount to its accepting defeat. Instead, the United States will have to draw on some old concepts, such as those used to confront piracy, and marry them to new ones, such as precision targeting through intelligence and technology. The integration of real-time intelligence with strikes by special forces and drone attacks, under this legal framework, has made possible some of the United States’ most important victories to date.

John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 79 (2011).

45. GOLDSMITH, *supra* note 3, at 91; see also JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 314 (2007) (“Lawyers are not always invited into the decision-making room [because of] concerns about secrecy, delay, and ‘lawyer creep’ . . . whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer.”).

46. GOLDSMITH, *supra* note 3, at 93–94. It is important to note the separate, yet symbiotic, relationship between intelligence and the war-fighting function of the military.

Intelligence plays a critical role across the range of military operations. Commanders use intelligence to anticipate the battle, visualize and understand the full spectrum of the operational environment, and influence the outcome of operations. . . .

staff attorneys.<sup>47</sup> However, despite substantial personnel cuts in the 1990s, legal scrutiny of CIA actions grew, and the number of lawyers on staff steadily increased, today standing at well over one hundred.<sup>48</sup>

As the lawyer ranks swelled in the intelligence community, so did their power and influence.<sup>49</sup> Decision makers regularly sought to obtain their lawyers' permission before acting in order to avoid "retroactive discipline."<sup>50</sup> In addition, if the lawyer advised against action, the decision maker would be immune from criticism for his or her inaction.<sup>51</sup> At the same time, if the lawyer said "yes," the decision makers would be effectively immune from prosecution and civil lawsuits.<sup>52</sup> Thus, the end of the twentieth century saw decision makers "[s]eeking a lawyer's input [as] a way to avoid both blame and jail."<sup>53</sup>

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In war, intelligence focuses on enemy military capabilities, centers of gravity (COGs), and potential courses of action (COAs) to provide operational and tactical commanders the information they need to plan and conduct operations. JOINT CHIEFS OF STAFF, JOINT PUB. 2-01, JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS, at I-3 to -4 (2012) (emphasis omitted).

47. GOLDSMITH, *supra* note 3, at 91.

48. *Id.* This number is still well below the massive "lawyer corps" of the Department of Defense, which stands at over ten thousand strong. *Id.*

49. *Id.*; see also Mckelvey, *supra* note 38, at 34; John Prados, *The Continuing Quandary of Covert Operations*, 5 J. NAT'L SECURITY L. & POL'Y 359, 370 (2012) ("CIA lawyers insist that every individual drone target is selected from careful accumulation of evidence resulting in a proposal to neutralize, put in a memorandum and approved at a high level.").

50. GOLDSMITH, *supra* note 3, at 91.

51. *Id.* at 92.

52. *Id.*

53. *Id.* This obviously is not to say that seeking legal advice gives absolute immunity to the individual seeking advice if their decisions turn out to be illegal. However, in the byzantine-like bureaucracy of the federal government, lawyer shielding is common. See *id.*; see also Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 HOUS. L. REV. 71, 89–90 (2012) (explaining that in the Bush administration, legal advice was used as a "golden shield" [for] the CIA, so that, come what may—even if [the reasoning behind the CIA techniques was] eventually disowned and discarded, as it was—all involved could claim to have acted in good faith, on the advice of their attorney"). Further, lawyer shielding is not only seen in government work. Private businesses also attempt to shield themselves from reprisal by seeking advice from attorneys. Stephanie B. Casteel, *Charitable Planning: From the Simple to the Sophisticated*, AM. L. INST. CONTINUING LEGAL EDUC. (June 23–28, 2013), [http://www.ali-cle.org/index.cfm?fuseaction=online.mp3downloads\\_detail&segmentid=31157](http://www.ali-cle.org/index.cfm?fuseaction=online.mp3downloads_detail&segmentid=31157). Sometimes there is an ulterior motive behind seeking legal advice. Specifically, it can be used to shield conversations under the attorney-client privilege. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) ("The rule which allows a client to prevent the disclosure of information which he gave to his attorney for the purpose of securing legal assistance is founded upon the belief that it is necessary 'in the interest and administration of justice.'" (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888))); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2291 (6th prt. 1961) ("[T]he privilege remains an exception to the general duty to disclose.").

*C. The Dominance of Lawyers*

After September 11, 2001, lawyers began to categorically dominate certain war-fighting functions and decisions, including issues concerning detention of terrorist suspects, interrogation techniques, military commissions, and other terrorism-related topics.<sup>54</sup> This shift did not go unnoticed and rose to the highest levels in the government. On September 12, 2001, while the smoke was still rising from the attacks, President Bush met with his senior officials.<sup>55</sup> At this meeting, Treasury Secretary Paul O'Neill reported that he was attempting to bring legal action against terrorist-associated financial institutions but that "the lawyers' were slowing him down."<sup>56</sup> President Bush was clear and decisive on the issue: "Tell the lawyers that we're at war . . . and we're going to get the terrorists' money."<sup>57</sup> While it is unclear from this discussion what exactly the lawyers were "slowing down,"<sup>58</sup> it is remarkable that just one day after 9/11, lawyers' natural tendency to say "no" was viewed as obstructionism by the President.

Although the President may have viewed one group of attorneys as obstructionists on September 12, 2001, this did not stem the pervasiveness of lawyers in the decision-making process.<sup>59</sup> Once again, this dependence on lawyers for policy decisions is not the fault of lawyers; blame rests at the feet of the decision makers.<sup>60</sup> "Everywhere decision makers turned they collided with confining laws that required a lawyer's interpretation and—in order to avoid legal liability—a lawyer's sign-off."<sup>61</sup> Michael Scheuer, an executive officer at the CIA and chief of the former Bin Laden Unit, testified before Congress that "no operation at the CIA . . . is conducted without approval of lawyers."<sup>62</sup> Mr. Scheuer added: "I can't go to the bathroom at CIA without a lawyer."<sup>63</sup>

54. GOLDSMITH, *supra* note 3, at 130. "The lawyers weren't necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security. But the lawyers—especially White House and Justice Department lawyers—seemed to 'own' issues that had profound national security and political and diplomatic consequences." *Id.*

55. DOUGLAS J. FEITH, *WAR AND DECISION: INSIDE THE PENTAGON AT THE DAWN OF THE WAR ON TERRORISM* 14 (2008).

56. *Id.*

57. *Id.*

58. It is quite possible that the lawyers have a very real legal reason for slowing down Secretary O'Neill's legal advances.

59. *See supra* Part I.A–B.

60. This is ultimately true because the decision maker makes the final call. However, many decision makers have law degrees, and, for the most part, lawyers write the laws of the land. The more complex the laws are, the more job security lawyers have.

61. GOLDSMITH, *supra* note 3, at 130.

62. *Id.*; *see also* Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23.

63. GOLDSMITH, *supra* note 3, at 130. It should be noted that there is a distinction between "good legal analysis" and "any legal analysis." Much has been written on President Bush's and his administration's defunct legal advice during the early years of the war on terror. *See, e.g.*, HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 459 (2005) (arguing that one of the many inaccuracies in the "torture memos"

## II. RISK AVERSION

### A. *Playing it Safe*

Decision risk aversion is simply the fear of taking chances that expose the decision maker to danger—be it political, physical, or legal danger.<sup>64</sup> History provides abundant “examples of how asymmetric tactics can achieve a response from military and political leaders hoping to avoid negative media publicity.”<sup>65</sup> During the 1991 Gulf War, the U.S. Air Force altered its targeting strategy after hundreds of civilians were killed by a strike at the Al Firdos command bunker.<sup>66</sup> “After the massive civilian casualties, General Norman Schwarzkopf required all Baghdad targets to be personally approved by him; he also sharply limited attacks against other National Command Authorities.”<sup>67</sup> Again in 1998, during Operation Desert Fox, because the

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was the “assertion that the federal criminal statute prohibiting torture applies only where a government official specifically intends to and actually causes pain so severe that it ‘rise[s] to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions’” and further explaining that “[t]his claimed standard is bizarre for a number of reasons,” one being that “organ failure is not necessarily associated with pain at all” (alterations in original)); Stephen Gillers, *Legal Ethics: A Debate*, in THE TORTURE DEBATE IN AMERICA 236, 236–38 (Karen J. Greenberg ed., 2006); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008); Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 338–48 (2009); see also DAVID MARGOLIS, DEP’T OF JUSTICE, MEMORANDUM OF DECISION REGARDING THE OBJECTIONS TO THE FINDINGS OF PROFESSIONAL MISCONDUCT IN THE OFFICE OF PROFESSIONAL RESPONSIBILITY’S REPORT OF INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 26 (2010) (arguing that the torture memos were “recklessly false”). Margolis defined recklessness in this context as “conscious indifference to the consequences of [one’s] behavior,” or “conscious disregard of [a] risk.” *Id.* (citing *In re Romansky*, 825 A.2d 311, 316 (D.C. 2003) (alterations in original)).

64. W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court As a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291, 336–37 (2006); see also Karen A. Mingst, *Domestic Political Factors and Decisions to Use Military Forces*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 61, 70 (Charlotte Ku & Harold K. Jacobson eds., 2003) (arguing that domestic opinion is a critical factor in a nation’s decision to use force and that the media plays an especially key role in public opinion).

65. Austin & Kolenc, *supra* note 64, at 337.

66. *Id.*; HUMAN RIGHTS WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR 18 (1991) (citing that between 2500 and 3000 civilians were killed in the Gulf War); Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT’L & COMP. L.Q. 411, 420 (2005) (explaining that during Desert Storm, the Iraqi bunker, Al Firdos, was bombed by United States and Allied forces on February 13, 1991, and that military intelligence reported the bunker as the “headquarters of the Ba’ath Party’s secret police: unfortunately, also their wives and children were there and 200–300 civilians died in the attack”).

67. Austin & Kolenc, *supra* note 64, at 337.

military feared the media's criticism of bombing Iraq during the holy Ramadan period, decision makers only allowed four days of bombing to neutralize key Iraqi targets.<sup>68</sup>

By 9/11, a "fiercely legalistic conception of unprecedented wartime constraints"<sup>69</sup> descended upon the presidency and the rest of the executive branch.<sup>70</sup> Senior officials in a risk-averse atmosphere worried incessantly about the prospect of being prosecuted for their decisions.<sup>71</sup>

This fear stemmed from the legalization of warfighting and intelligence decisions that trickled down from senior officials to lower-level bureaucrats.<sup>72</sup> President Bush in particular wanted to take greater risks to kill or capture al Qaeda agents but could not do so without the cooperation of the military and intelligence community;<sup>73</sup> however, "these bureaucracies—especially in the intelligence community—had in the 1980s and 1990s become institutionally disinclined to take risks."<sup>74</sup> The 1996 Council on Foreign Relations produced a study that condemned the practice of retroactive discipline—"the idea that no matter how much political and legal support an intelligence operative gets before engaging in aggressive actions . . . he or she will be punished after the fact by a different set of rules created in a different political environment."<sup>75</sup> The Church and Pike Committees in the 1970s were critical in exposing serious problems with the way the CIA functioned but at the same time were used to conduct semisanctioned congressional witch hunts of CIA officials; this taught the CIA that their fear was real.<sup>76</sup> Melissa Boyle, a CIA field officer who

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68. *Id.*; DAVEED GARTENSTEIN-ROSS, MY YEAR INSIDE RADICAL ISLAM: A MEMOIR 88–89 (2007) ("Operation Desert Fox had occurred just before Ramadan. The three-day bombing campaign in Iraq had been ordered by President Clinton in December 1998 in response to Saddam Hussein's refusal to comply with UN Security Council resolutions calling for disarmament."). President Clinton himself acknowledged that Ramadan played a major role in choosing the dates of the operation. President Bill Clinton, Public Address on Operation Desert Fox (Dec. 16, 1998), *available at* <http://www.cnn.com/ALLPOLITICS/stories/1998/12/16/transcripts/clinton.html> ("[T]he Muslim holy month of Ramadan begins this weekend. For us to initiate military action during Ramadan would be profoundly offensive to the Muslim world and, therefore, would damage our relations with Arab countries and the progress we have made in the Middle East.").

69. GOLDSMITH, *supra* note 3, at 90; *see also* CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR 24 (2010) (arguing that the national-security debates in the United States "have gone on in weirdly legalistic terms"); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2352 (2006).

70. GOLDSMITH, *supra* note 3, at 90; *see* Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 PEPP. L. REV. 809, 862 (2012) (arguing that lawyers can be seen as confusing risk aversion for the rule of law in an effort to "maintain capital" with both the President and the legal community).

71. GOLDSMITH, *supra* note 3, at 90.

72. *Id.* at 90–91.

73. *See id.* at 91.

74. *Id.*

75. *Getting to the Truth Through a Nonpartisan Commission of Inquiry: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 23 (2009) (statement of Senator John Cornyn).

76. GOLDSMITH, *supra* note 3, at 91; *see also* Gerald K. Haines, *Looking for a Rogue Elephant: The Pike Committee Investigations and the CIA*, in *INSIDE C.I.A.: LESSONS IN INTELLIGENCE* 272 (Sharad S. Chauhan ed., 2004).

specialized in the Middle East, discussed retroactive discipline, suggesting that “it would simplify matters if at the time we were assigned to a covert action program, the letter of reprimand should accompany the orders, as receipt of one seemed inevitable.”<sup>77</sup> The irony should be noted that when the intelligence community did push the envelope with regard to weapons of mass destruction in Iraq, the consequences were devastating.<sup>78</sup>

In addition to addressing the culture of retroactive discipline, lawyers also spread the tone of risk aversion because they have a natural tendency to be overly cautious.<sup>79</sup>

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The investigations of the Pike Committee, headed by Democratic Representative Otis Pike of New York, paralleled those of the Church Committee, led by Idaho Senator Frank Church, also a Democrat. While the Church Committee centered its attention on the more sensational charges of illegal activities by the CIA and other components of the IC, the Pike Committee set about examining the CIA’s effectiveness and its costs to taxpayers. Unfortunately, Representative Pike, the committee, and its staff never developed a cooperative working relationship with the Agency or the Ford administration.

The committee soon was at odds with the CIA and the White House over questions of access to documents and information and the declassification of materials. Relations between the Agency and the Pike Committee became confrontational. CIA officials came to detest the committee and its efforts at investigation. Many observers maintained moreover, that Representative Pike was seeking to use the committee hearings to enhance his senatorial ambitions, and the committee staff, almost entirely young and anti-establishment, clashed with Agency and White House officials.

*Id.* at 272–73; P.G. KIVETT, INTELLIGENCE FAILURES AND DECENT INTERVALS, at xxi (2006) (stating that the commissions were viewed by many at the time “as ‘witch hunts’ and ‘fishing expeditions’”); *cf.* John Cary Sims, *What NSA Is Doing . . . and Why It’s Illegal*, 33 HASTINGS CONST. L.Q. 105, 109 (2006) (“[T]he Church Committee and the Pike Committee, exposed numerous abuses of power. Most significantly for present purposes, the revelations covered the use of break-ins and electronic surveillance against United States citizens based on their exercise of First Amendment rights.”).

77. MELISSA BOYLE MAHLE, DENIAL AND DECEPTION: AN INSIDER’S VIEW OF THE CIA FROM IRAN-CONTRA TO 9/11, at 40 (2004).

78. Senator Olympia Snowe explained: “The Committee’s review of the pre-war intelligence on Iraq’s WMD is replete with information sharing failures, analytic failures and collection failures.” S. SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 475 (2004); *see also* RICHARD L. RUSSELL, SHARPENING STRATEGIC INTELLIGENCE: WHY THE CIA GETS IT WRONG AND WHAT NEEDS TO BE DONE TO GET IT RIGHT 26 (2007) (noting that the failure to prevent 9/11 or report the allegations of Iraq’s supposed WMDs “were simply the latest and greatest of the decades-long string of failures” by the CIA); Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 69–70 (2011); Helena Smith, *The CIA Claims to Have Changed*, GUARDIAN (Aug. 28, 2001) <http://www.theguardian.com/comment/story/0,3604,543170,00.html>.

79. GOLDSMITH, *supra* note 3, at 92; *see also* Jeremy David Bailey, *Executive Prerogative and the “Good Officer” in Thomas Jefferson’s Letter to John B. Colvin*, 34 PRESIDENTIAL STUD. Q. 732, 738 (2004) (“[W]ith the benefit of hindsight, the people may know the circumstances better than the executive did at the time.”).

As lawyers' influence in the intelligence community grew, their predisposition for caution spread.<sup>80</sup>

During the confirmation hearing of Scott Muller for the position of CIA's General Counsel, he was questioned by Senator Bob Graham, who complained of what he viewed as a risk-averse culture at the Agency.<sup>81</sup> This risk aversion was due, in Senator Graham's opinion, to overcautious lawyering by CIA attorneys who would sometimes forsake an operation "just to play it safe."<sup>82</sup> Senator Graham continued, stating that the Agency needed "excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes."<sup>83</sup> This Senate confirmation hearing illuminates the quandary in which intelligence-community lawyers find themselves:<sup>84</sup> if they are too cautious, they are criticized "for playing it safe in a dangerous world that cannot afford such risk aversion."<sup>85</sup>

Sometimes lawyers provide obscured legal advice because it helps push a separate agenda or serve the bureaucracy.<sup>86</sup> Lawyers give muddy legal opinions when they are seeking legal and political cover for themselves—by giving an evasive opinion, lawyers can always argue that their opinion was not followed in the event that anything goes wrong with a particular operation.<sup>87</sup>

Regardless of their lawyers' motivations, CIA operatives are often left with irresolute legal advice.<sup>88</sup> Further, when field operatives hear staff attorneys talk about

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80. GOLDSMITH, *supra* note 3, at 92.

81. *Nomination of Scott W. Muller To Be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. 1–3 (2002) (opening statement of Sen. Bob Graham).

82. *Id.* at 2.

83. *Id.* Senator Graham finished his statement by asking Muller to give "cutting-edge legal advice that lets the operators do their jobs quickly and aggressively within the confines of law and regulation." *Id.* at 3.

84. GOLDSMITH, *supra* note 3, at 92.

85. *Id.* This type of legal risk aversion is not limited to government but is also an issue in the private sector. See Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 236 (2008); Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 326 (2011); Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 539 (2013) (urging "lawyers to abandon the risk-aversion approach and adopt a variant of the business judgment rule to make reasonable risk-management decisions").

86. GOLDSMITH, *supra* note 3, at 93.

Even when the law is clear, lawyers sometimes offer muddy interpretations to serve a separate agenda. Some lawyers will use legal review as an opportunity to push their beliefs about the appropriateness of the proposed action, or to serve the institutional interests of their bureaucracy. Others will try to cover their behinds in case anything goes wrong by giving hedged answers when a clearer "yes" would have been more appropriate.

*Id.*

87. *Id.* In addition, a faulty or shady legal opinion doesn't provide any actual cover (except perhaps against the commander's bad faith). In the final analysis, the quality of the legal opinion is what matters most.

88. *Id.*

shades of gray that are outlined by degrees of risk, they understandably equivocate their possible actions, particularly when they face prison time if their decisions go sideways.<sup>89</sup> This risk-averse philosophy led David Kay, the former Chief of U.S. Weapons Inspections, to conclude that the “CIA has essentially lost any serious capability for clandestine operations: either collection or covert action.”<sup>90</sup> This is particularly frustrating when the individuals seeking the legal advice are the ones that put themselves in harm’s way (real harm—bullets), while the people seeking political and legal cover with watery legal advice sit behind desks.

More and more, the military is seeing similar risk aversion in its legal ranks.<sup>91</sup> American service members are put in combat situations where they have to make life-or-death decisions in a fraction of a second.<sup>92</sup> Unfortunately, in today’s risk-averse environment, ground troops’ tactical on-the-ground decisions are often judged after the fact, through the clear lens of 20/20 hindsight, by politicians, media outlets, and other individuals who may not understand the complexities of the tactical truth (environmental realities) or what it is like to make split-second decisions while being shot at.<sup>93</sup>

In his book, *Combat Self-Defense*, David Bolgiano argues that

[b]ecause our forces have been in near-continuous combat since 2001, we possess for the first time since WWII a high percentage of the military force that has experienced combat. But in many ways we are still behaving like the risk-averse, peace time Army that pulled assignments in Germany and South Korea where one’s rifle was something that stayed in the arms room and not taken out until the yearly weapons qualification. We now have a new generation of warriors that have performed as well as the much vaunted Greatest Generation of WWII, but we insist on impeding them with pre-9/11 rules: The asymmetric nature of our enemies’ tactics further militates for change.<sup>94</sup>

This is true because of the tendency for American lawyers to “breed” once they get into the system—lawyers beget more lawyers.<sup>95</sup> Moreover, because lawyers are the epicenter of risk aversion in some ways, many argue that the mushrooming of their

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89. *Id.*

90. GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 192 (2004).

91. “The U.S. aversion to losing troops (and the military’s attempts to mitigate that risk) has created a vulnerability . . .” Michael P. Baileys, Book Review, ARMY LAW., May 2010, at 59–60 (reviewing P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2009)).

92. BOLGIANO, *supra* note 12, at 7.

93. *Id.*

94. *Id.*

95. *Id.* at 8 (arguing that “[i]n America, once a lawyer gets his nose under the tent flap of an organization, his corpulent body will often follow”). In Washington, DC, alone, there are more lawyers than there are in the nation of Japan. “Sadly, in some respects, the military is following the lead of Washington . . . In the Army alone, their ranks have swollen to well over 1,500 uniformed attorneys.” *Id.*

ranks is eroding the nation's ability to effectively conduct war.<sup>96</sup> History has taught us that successful military leaders are typically the ones who are decisive and take calculated risks;<sup>97</sup> however, military lawyers, like all lawyers, are trained from the first day of law school to give advice that "protects" their clients (who are military commanders), hence the profusion of risk-averse and less effective generals.<sup>98</sup>

Yet, to the military's credit, some steps have been taken to rectify the problem. For instance, two hundred Taliban soldiers launched a highly coordinated attack against forty-five U.S. soldiers just outside the Afghan village of Wanat in July 2008.<sup>99</sup> The overwhelming force against the American troops left nine dead, twenty-seven wounded, and many questions remaining.<sup>100</sup> The tragedy of the battle or the tactics involved will not be relitigated here; what will be discussed is the Army's investigation and response to that investigation. After a three-month investigation, three officers were given letters of reprimand (a career ender for an officer) for being "derelict in the performance of their duties through neglect or culpable inefficiency."<sup>101</sup> In essence, the investigation found that the military leaders did not adequately plan and bring the proper supplies, did not utilize enough soldiers, and ignored warnings from villagers that an attack was imminent.<sup>102</sup>

However, senior military officers expressed concern that the scrutiny faced by on-the-ground commanders being disciplined could lead to commanders becoming more risk averse, worrying more about being disciplined than about their mission.<sup>103</sup> As a result, a second investigation was launched, which resulted in the reprimands being rescinded.<sup>104</sup> General Charles Campbell rescinded the reprimands, finding that "[t]o criminalize command decisions in a theater of complex operations is a grave step indeed. It is also unnecessary, particularly in this case."<sup>105</sup>

96. *Id.*

97. General George S. Patton sums this historic truth up with his famous quote: "A good solution applied with vigor now is better than a perfect solution applied ten minutes later." *General George S. Patton, Jr. Quotations*, GENERALPATTON.COM, <http://www.generalpatton.com/quotes/index.html>.

98. BOLGIANO, *supra* note 12, at 8.

99. Jack Deligter, *Inside the Battle of Wanat*, VANITY FAIR (Nov. 11, 2011), <http://www.vanityfair.com/politics/features/2011/12/inside-the-battle-of-wanat>; Thomas E. Ricks, *Inside an Afghan Battle Gone Wrong: What Happened at Wanat?*, FOREIGN POL'Y (Jan. 28, 2009), [http://ricks.foreignpolicy.com/posts/2009/01/28/inside\\_an\\_afghan\\_battle\\_what\\_happened\\_at\\_wanat\\_last\\_july\\_i](http://ricks.foreignpolicy.com/posts/2009/01/28/inside_an_afghan_battle_what_happened_at_wanat_last_july_i).

100. Deligter, *supra* note 99.

101. David Martin, *War Hero Gets Career-Ending Reprimand*, CBS NEWS (Mar. 11, 2010, 5:02 PM), <http://www.cbsnews.com/news/war-hero-gets-career-ending-reprimand/>; Michelle Tan, *Army Overturns Reprimands of 3 Wanat Officers*, ARMY TIMES (June 25, 2010, 5:29 AM), <http://www.armytimes.com/article/20100625/NEWS/6250314/Army-overturns-reprimands-3-Wanat-officers>.

102. Martin, *supra* note 101.

103. *In Reversal, Officers at Wanat Battle Will Not Be Punished*, STARS & STRIPES (June 24, 2010), <http://www.stripes.com/news/middle-east/in-reversal-officers-at-wanat-battle-will-not-be-punished-1.108442/comments-7.68558/comments-7.68558>.

104. *Id.*

105. *Id.*

One could argue that this is a double-edged sword. Because the Army does not want to appear to have fallen into the risk-averse trap, it may allow injustices and risky behavior to prevail in order to prove a point. David Brostrom, the father of one of the slain soldiers, certainly thinks so, as he stated that the Army credibility on the issue is “nonexistent.”<sup>106</sup> General Campbell stated that he rescinded the reprimands based in part on his experiences in Vietnam.<sup>107</sup> It should be noted that Vietnam is generally cited by experts and historians as a prime example of where military discipline broke down, which weakened the nation’s overall strategic positions; in this regard, more “lawyering” in Vietnam would have helped the war effort.<sup>108</sup>

### *B. Self-Defense*

The negative effects of risk aversion go beyond senior officers and their lawyers, who are trained and encouraged in many ways to ask questions when faced with difficult situations. Indeed, the tendency to second guess and avoid risk has trickled down to the foot soldiers who do not have the same control over their destiny, affecting their actual or perceived ability to defend themselves.<sup>109</sup>

The definition of “self-defense” in a combat setting fluctuates slightly depending on the conflict being fought.<sup>110</sup> However, a steadfast doctrine in military jurisprudence is the intrinsic right of a soldier to defend him or herself.<sup>111</sup> The American notion of a right to self-defense predates the Constitution with John Locke, an “Uncle” to the nation, stating that

[t]he state of war is a state of enmity and destruction: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man's life, puts him in a state of war with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defense, and espouses his quarrel; it being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him . . . .<sup>112</sup>

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106. Greg Jaffe, *Army Overrules Inquiry Faulting Officers in Wanat Ambush*, WASH. POST, (June 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/23/AR2010062305289.html>.

107. *Id.*; see also Mike Mount & Larry Shaughnessy, *General Reverses His Decision About Deadly Wanat Battle*, CNN (June 23, 2010, 10:24 PM), <http://www.cnn.com/2010/US/06/23/army.reprimands.reversed/>.

108. See *supra* Part I.A.

109. See Tim Kane, *Why Our Best Officers Are Leaving*, ATLANTIC (Jan. 4, 2011, 8:00 AM), <http://www.theatlantic.com/magazine/archive/2011/01/why-our-best-officers-are-leaving/308346/>.

110. See BOLGIANO, *supra* note 12, at 35.

111. *Id.*

112. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (1690); see also ST. THOMAS

Founding Father Samuel Adams wrote in *The Rights of Colonists* that “[a]mong the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can.”<sup>113</sup>

Nevertheless, some argue that the fundamental freedoms afforded to soldiers are restricted by risk-averse decision makers,<sup>114</sup> despite the fact that courts have given considerable leeway to soldiers facing self-defense situations. In *Graham v. Connor*, the Supreme Court held that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable [soldier] on the scene, rather than with the 20/20 vision of hindsight.”<sup>115</sup> The Court continued that this “calculus . . . must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>116</sup> It is not necessary that the soldier be “right” in his or her use of force in self-defense.<sup>117</sup> Indeed, there are numerous cases where a “court found that when looked at as a Monday-morning quarterback, the officers’ actions weren’t reasonable. But when looked at from the perspective of the [soldier] at the time the use of force was applied, the actions were reasonable, and therefore constitutional.”<sup>118</sup>

Notwithstanding the fact that a steadfast tenet of U.S. Rules of Engagement (ROEs) is a stipulation that nothing in the rules limits soldiers’ inherent right to self-defense,<sup>119</sup>

AQUINAS, SUMMA THEOLOGICA II-II, Q. 64, art. 7 (13th century) (“[T]he act of self-defense may have two effects; [ ] the saving of one’s life; [and], the slaying of the aggressor. Therefore, this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in being as far as possible.”).

113. BOLGIANO, *supra* note 12, at 35–36 (citing SAMUEL ADAMS, *THE RIGHTS OF COLONISTS* (1772)).

The Founding Fathers used English common law as a platform to build the U.S. Constitution. English common law long recognized individual’s right to self-defense as a natural and divine right. The drafters were heavily influenced by the works of William Blackstone, and drafted the core of the Constitution to protect life, liberty and property. In Blackstone’s *Commentaries on the Laws of England*, Blackstone held that three primary rights protected by English law were the rights of personal security, personal liberty, and private property. Self-defense was a part of the right to personal security, as one could not be secure in their safety without the right to defend against those wishing to deprive him of it.

*Id.*

114. *Id.* at 45. Specifically, if soldiers, as Americans, have a constitutional, if not divine, right to self-defense, and that right is hindered by risk-averse policies, the policy could be construed as illegal. *See id.*

115. 490 U.S. 386, 396 (1989). In *Graham*, the Court was addressing a police officer using excessive force rather than a soldier, *id.* at 397; however, this author contends that the Court would hold military personnel to the same standard in an analogous situation.

116. *Id.* at 396–97.

117. BOLGIANO, *supra* note 12, at 52.

118. *Id.*

119. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B: STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005); U.S. ARMY, INT’L & OPERATIONAL LAW DEP’T, OPERATIONAL LAW HANDBOOK, ch. 5, app. A (2012).

there has been a movement in U.S. Commands to limit such rights.<sup>120</sup> The rationale for these limitations is not totally clear; however, some suggest that it may “be based on lawyer-contrived scenarios, whereby it is alleged that continuing to recognize a [s]oldier’s inherent right may somehow interfere with some future command authority or specific mission success.”<sup>121</sup> Moreover, commanders and their lawyers may try to limit this right in an attempt to avoid political fallout in the event a soldier, while exercising his right to self-defense, accidentally shoots an innocent civilian.<sup>122</sup>

In Iraq, the ROEs were clear about self-defense: a soldier may “use force, including deadly force, when you reasonably believe yourself or others to be in imminent danger of death or serious bodily harm.”<sup>123</sup> Yet, in the face of this clear rule, when a group of soldiers was asked to describe when they could use deadly force in self-defense, five different answers were given with “the overarching theme being . . . ‘I don’t know, Sir, but I do know that I will be in trouble if I fire my weapon.’”<sup>124</sup>

When General David Petraeus took command from General Stanley McChrystal in Afghanistan, the *Army Times* reported that the danger was not with the ROE itself but rather in how commanders interpreted those rules.<sup>125</sup> Specifically, commanders put absolute prohibitions in place where General McChrystal intended to have balance.<sup>126</sup> Indeed, General McChrystal believed that when an innocent civilian was killed, more insurgents were created, but he also believed that every time an American soldier was lost, the will of the American people was sapped; his ROEs were established to balance those two realities.<sup>127</sup>

David Bolgiano places the blame for this confusion on the fact that soldiers are aware of the reality that when a soldier is involved in a shooting, it is investigated by the Army’s Criminal Investigation Division.<sup>128</sup> Bolgiano contends that by charting a “criminally-focused investigation into the actions and decisions of soldiers and commanders who exercise their inherent right of self defense in time of war is

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120. BOLGIANO, *supra* note 12, at 58; see also Aaron Pennekamp, *Standards of Engagement: Rethinking Rules of Engagement To More Effectively Fight Counterinsurgency Campaigns*, 101 GEO. L.J. 1619, 1632–33 (2013).

121. BOLGIANO, *supra* note 12, at 58.

122. See *id.* at 58–59; see also Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 19. See generally Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, ARMY LAW., August 2013, at 24, 25.

123. U.S. AIR FORCE, AIR FORCE INSTRUCTION 31-207: ARMING AND USE OF FORCE BY AIR FORCE PERSONNEL (1999). Demonstrated hostile intent is “[t]he threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces . . . .” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A: STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (2000).

124. BOLGIANO, *supra* note 12, at 16.

125. William H. McMichael & Sean D. Naylor, *Petraeus’ War Change in the Air*, ARMY TIMES 10 (July 5, 2010).

126. *Id.*

127. See *id.*

128. BOLGIANO, *supra* note 12, at 9.

outrageous.”<sup>129</sup> Lawyers influence this push in an attempt to keep their commander (client) free from legal entanglements.<sup>130</sup> In doing so, they have crafted command policies regarding self-defense that resemble protective policies seen in other areas of the law, such as workplace harassment law.<sup>131</sup> “This is all good, preventive lawyering, but it does not work when one is in the realm of the laws surrounding the use of deadly force in self-defense.”<sup>132</sup> Lawyers engage in this preventive lawyering by adding “last resort” or “exhaust all lesser means” language to soldiers’ orders regarding their ability to engage an enemy.<sup>133</sup> The result is a tactical retrograde of soldiers’ abilities to protect themselves on the battlefield due to morphing risk-averse rules, which have created the strong sentiment among the ranks that using lethal force as an option of first instance will result in prosecution.<sup>134</sup>

An example of this reluctance to allow soldiers to engage in self-defense because of risk aversion is evident in the following true story:

Late one evening two Soldiers—one Staff Sergeant and one Specialist—were returning to main compound escorting a humanitarian assistance convoy. As they were traveling down a relatively busy street a vehicle came along side of them. It was carrying two uniformed Afghan individuals; the uniforms appeared military in nature. The vehicle began to swerve back and forth then sped up and cut in front of them at an angle and forced the Soldiers to stop. The two Afghans jumped from their vehicle brandishing AK-47s. One Afghan stood in front of the soldier’s vehicle with his weapon pointed at them and the other Afghan walked up to the left, driver’s side of the vehicle. He pointed his weapon toward the vehicle and told the Soldiers he wanted their money. They told him they didn’t have money and the Afghan became more forceful and belligerent, demonstrably pointing his weapon toward the Soldiers and telling them again to give him their money. At this time the Soldiers got their wallets, pulled out some money and gave it to the Afghan. The Afghan wasn’t satisfied that he had all the money and once again he became forceful. He bent into the window with his weapon and told them he wanted it all. The Specialist gave him the rest of the money he had. The Afghan was satisfied this time because both Soldiers showed the inside of their wallets. He walked back to the car; both men got in the car and drove away. They made off with close to \$200, [a significant sum] for a Soldier and a huge sum for an Afghani.<sup>135</sup>

The amazing part of this story is not that it happened, but rather that when the soldiers reported the incident and were asked why they did not shoot, the soldiers admitted that they were unsure if the ROE allowed them to use deadly force.<sup>136</sup> “They felt that since this wasn’t actual combat and they weren’t fired at first, they were not

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129. *Id.*

130. *Id.* at 26.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 12.

135. *Id.* at 14–15.

136. *Id.*

justified in self-defense and shooting them would have been the wrong thing to do and they would have been in trouble.”<sup>137</sup> This begs the question: What if the assailants were not simple thugs looking to rob some American soldiers but rather were mujahideen (the enemy)<sup>138</sup> who simply wanted to kill the soldiers? The soldiers’ deliberation over what level of force was allowed would have likely gotten them killed. If two Afghani robbers know that American soldiers will hesitate to use deadly force and will not fire unless fired upon (or that is their perceived interpretation), then the enemy likely knows this as well.

When the unit conducted an ROE class as a result of the incident, the lawyers conducting the class said that the soldiers acted appropriately and would not have been justified in using deadly force.<sup>139</sup> Moreover, the lawyers proffered that because “there was no real threat and the Afghans were only robbing them, and since it wasn’t an act of war, shooting them would not have been justified.”<sup>140</sup> Bolgiano asks: “[I]f you don’t have the right to shoot the enemy when he is threatening you with a weapon and is robbing you literally at gunpoint then when do you have the right to defend yourself?”<sup>141</sup>

### III. FEAR OF PERSECUTION AND PROSECUTION

The idea for this article came from a discussion the author had with Lance Corporal Philip Jones (USMC).<sup>142</sup> Lance Corporal Jones said: “To be honest with you, Sir, I am more afraid of the JAGs than I am of the enemy.” Lance Corporal Jones was killed by enemy fire a few days later on April 8, 2006.<sup>143</sup> While his statement may not accurately portray the role of JAGs nor reflect every service member’s opinion, it does reflect a sentiment that permeates the ranks. Lance Corporal Jones was killed by an enemy sniper; thus, by all accounts his concern played no role in his death (i.e., by hesitating before returning fire). The same is not true for every casualty.<sup>144</sup>

This Part uses three case studies to describe the culture of fear and reticence taking hold in our soldiers and intelligence officers and examines the consequences of those concerns. No single case study demonstrates the problem; rather, reading the three together followed by a discussion of the consequences in their totality reveals the bigger issue.

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137. *Id.*

138. Mujahideen is Arabic for Holy Warrior and the common term used for the enemy in Iraq and Afghanistan. *Mujahideen*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1523091/mujahideen>.

139. BOLGIANO, *supra* note 12, at 15. It is noted that the lawyers conducting the class were not JAGs. They were mobilized reservists who were lawyers in their civilian careers and not military lawyers. However, the command apparently allowed them to teach the class with their lawyer’s hat on. *See id.*

140. *Id.*

141. *Id.*

142. For respect of the family, the author changed this marine’s name.

143. *Iraq Coalition Casualties: Military Fatalities*, ICASUALTIES.ORG, <http://icasualties.org/Iraq/Fatalities.aspx>.

144. *See generally* JANE BLAIR, *HESITATION KILLS, A FEMALE MARINE OFFICER’S COMBAT EXPERIENCE IN IRAQ* (2011).

*A. Case Study 1: PFC Edward L. Richmond Jr.*

On February 27, 2004, Private First Class Edward Richmond Jr.'s ("PFC Richmond") unit received word that high-level insurgents were hiding in Taal Al Jal, a small village outside Kirkuk, Iraq.<sup>145</sup> PFC Richmond's squad was to provide security outside the village while the rest of the unit was clearing the village looking for insurgents.<sup>146</sup> The initial orders that PFC Richmond received from the squad leader, Sergeant Jeffrey Waruch (SGT Waruch), were to "[s]hoot any males fleeing the village, but check with him if possible before firing."<sup>147</sup>

When the operation began at daybreak, screaming in both Arabic and English could be heard from the security line, as well as small-arms fire.<sup>148</sup> During the raid, an order to detain all males leaving the village was issued.<sup>149</sup> At that time, PFC Richmond noticed a man leaving the city, approximately two hundred meters from his position. Remembering his initial order, PFC Richmond requested permission to engage the target.<sup>150</sup> Specifically, SGT Waruch later testified that "Edward asked if he could shoot the man; Edward said he asked if he was supposed to shoot the man."<sup>151</sup> SGT Waruch ordered Richmond *not* to shoot the fleeing man and instead set out for the man and told PFC Richmond to assist him.<sup>152</sup>

As the two soldiers approached the man, he became agitated and began pointing at the village.<sup>153</sup> SGT Waruch ordered the man to put his arms up and as he went to search the Iraqi, he told PFC Richmond to stand guard with his rifle ready.<sup>154</sup> SGT Waruch quickly patted the man down to look for weapons, and when SGT Waruch tried to pull his wrist down to handcuff him, the man resisted.<sup>155</sup> At this time, SGT Waruch told PFC Richmond to point his weapon at the man and told him to "shoot him if he moves."<sup>156</sup> At that point, the man stopped resisting, and SGT Waruch was able to cuff him.<sup>157</sup>

The two soldiers and their prisoner headed back to their perimeter.<sup>158</sup> At some point, the cuffed man lost his balance on the uneven ground and stumbled into

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145. See Anne Hull, *The Army vs. Spec. Richmond*, WASH. POST, Sept. 24, 2006, at A1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* According to PFC Richmond, soldiers from his unit were given ROEs that included shooting any villagers that tried to escape the raid. Sworn Statement of Edward L. Richmond, Jr., *United States v. Richmond*, No. 20040787 (U.S. Army Judiciary Mar. 29, 2004), available at [https://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/DOD041043.pdf](https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOD041043.pdf).

150. Hull, *supra* note 145; Jason Chudy, *Soldier Gets Three Years, Dishonorable Discharge for Shooting Iraqi Civilian*, STARS & STRIPES (Aug. 6, 2004), <http://www.stripes.com/news/soldier-gets-three-years-dishonorable-discharge-for-shooting-iraqi-civilian-1.22496>.

151. Hull, *supra* note 145.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* This statement was denied by SGT Waruch in court. *Id.*

157. *Id.*; see also Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal To Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 97-98 (2005).

158. Hull, *supra* note 145.

Waruch.<sup>159</sup> Believing that the Iraqi was trying to escape, PFC Richmond fired one round from his M4 assault rifle.<sup>160</sup> The round met its mark and struck the Iraqi.<sup>161</sup> Immediately after shooting the Iraqi, PFC Richmond proclaimed that the man had jumped at SGT Waruch.<sup>162</sup> The Iraqi died as another soldier came to the scene.<sup>163</sup> Without knowing exactly what happened, he looked at PFC Richmond and said, “you are f - - - - .”<sup>164</sup> PFC Richmond had been in Iraq for less than three weeks.<sup>165</sup>

Although PFC Richmond was confident he would be cleared by his command and the Army, he was charged with unpremeditated murder and scheduled for a court-martial in Tikrit. He faced life in prison.<sup>166</sup> PFC Richmond was found not guilty of unpremeditated murder; he was, however, found guilty of voluntary manslaughter, and he received a three-year sentence, a demotion, and a dishonorable discharge.<sup>167</sup> At the sentencing phase of his trial, PFC Richmond stated: “If I had known everything then that I know now, it wouldn’t have happened . . . .”<sup>168</sup> A tragic side story to Richmond’s is that of SGT Waruch. Ten days before PFC Richmond shot the Iraqi civilian, SGT Waruch had shot three female civilians, one of whom (a fourteen-year-old girl) was killed.<sup>169</sup> While SGT Waruch was initially cleared of the

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159. *Id.*; see also *Iraq Digest*, SEATTLE TIMES, Aug. 8, 2004, at A7.

160. Hull *supra* note 145.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*; see also Jason Chudy, *GI Faces Court-Martial in Death of Suspected Insurgent*, STARS & STRIPES (Aug. 1, 2004), <http://www.stripes.com/news/gi-faces-court-martial-in-death-of-suspected-insurgent-1.22316>.

167. See Hull, *supra* note 145; *Iraq Digest*, *supra* note 159.

168. Hull, *supra* note 145.

169. *Id.* SGT Waruch was the soldier escorting the prisoner killed by PFC Richmond and the prosecution’s chief witness in PFC Richmond’s trial. *Id.* The story of SGT Waruch’s participation in the trial in many ways demonstrates the need for more legal oversight. *Id.* At trial, SGT Waruch’s own credibility was questioned, and it was discovered that his nickname was “Shady Jay.” *Id.* His superior testified that he was a “compulsive liar.” *Id.* Moreover, after PFC Richmond’s trial, his father received a letter containing confidential army information that detailed an incident involving SGT Waruch. *Id.* The paperwork detailed the incident:

[SGT Waruch’s] platoon was riding in a convoy to Al-Abassi when a roadside bomb exploded. Soldiers began firing from the sides of their vehicles. No one was seriously hurt by the bomb, but orders went out to stop any Iraqis fleeing the area.

Waruch began running across farmland after a group of several Iraqis in the distance. After crossing a muddy stream in pursuit, he fired warning shots in the air and screamed for them to stop.

According to [SGT Waruch,] he was 200 yards away when one of the Iraqis knelt down with what looked like a tube-like object, possibly a rocket-propelled grenade. [SGT] Waruch fired about five times, knocking down two bodies. This subdued the group, but as he moved closer, two other Iraqis suddenly started to run toward him, with one reaching into her clothes. He fired five more rounds.

incident, a second review found that he had not acted in concert with the ROEs.<sup>170</sup> The girl was trying to surrender, and no weapons were found.<sup>171</sup>

*B. Case Study 2: LTC Allen West*

On August 20, 2003, Lieutenant Colonel Allen B. West (LTC West)<sup>172</sup> was at the Forward Operating Base (FOB) Taji interrogating an Iraqi policeman believed to be working with insurgent forces and who had information concerning a pending attack against U.S. troops.<sup>173</sup> When the detainee, Yahya Jjodi Hamoody, would not tell LTC West details about the pending ambush, LTC West stood by while his soldiers beat the detainee.<sup>174</sup> LTC West then took the detainee outside and threatened to kill him, firing a round from his pistol near the detainee's head.<sup>175</sup> At this point, the detainee told LTC West about the ambush, which consequently was thwarted, possibly saving American lives.<sup>176</sup>

LTC West was charged with mistreating a prisoner for his actions.<sup>177</sup> Ultimately, while LTC West escaped a court-martial, he "was relieved of his command, and after

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Arriving at the group in the field, he saw that a girl was shot in the head and her pulse was gone. Another female was hit in the thigh and going into shock. Another was shot in the knee.

Waruch had fired on a mother and her two daughters, killing a 14-year-old. The survivors would later tell a reporter that they had been weeding a bean field and had started to run as the Americans ran toward them.

*Id.*

170. *Id.* By all accounts, SGT Waruch was never punished. *See id.*

171. *Id.*

172. LTC West became a congressman, representing the 22nd District of Florida in the U.S. House of Representatives. *Rep. Allen West*, GOVTRACK.US, [https://www.govtrack.us/congress/members/allen\\_west/412413](https://www.govtrack.us/congress/members/allen_west/412413). Representative West lost his 2012 bid for reelection. Michael C. Bender, *Why Did Florida Fire Allen West?*, BLOOMBERG BUS. (Nov. 29, 2012), <http://www.businessweek.com/articles/2012-11-29/why-did-florida-fire-allen-west>.

173. *See, e.g.,* Deborah Sontag, *How U.S. Officer's Risk in Iraq Backfired*, INT'L HERALD TRIB., May 28, 2004, at 2; *U.S. Officer Fined for Harsh Interrogation Tactics*, CNN (Dec. 13, 2003), <http://www.cnn.com/2003/US/12/12/sprj.nirq.west.ruling/> [hereinafter *Officer Fined*].

174. Richard Beeston, *U.S. Officer Admits Role in Mock Execution*, LONDON TIMES, Nov. 20, 2003, at 22; *see also* Vernon Loeb, *Army Officer's Actions Raise Ethical Issues*, WASH. POST, Nov. 30, 2003, at A24.

175. *Officer Fined*, *supra* note 173; *see also* Ohman, *supra* note 157, at 108 (reporting that LTC West "dragged an uncooperative detainee, who was an Iraqi policeman suspected of planning attacks against U.S. forces, outside to an area used for clearing weapons, gave the man a count to five to start cooperating, then fired two shots near the detainee's head").

176. *See Officer Fined*, *supra* note 173; *see also* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1259 (2005).

177. Beeston, *supra* note 174. Prosecutors charged that LTC West's actions amounted to torture and violated the Uniform Code of Military Justice (UCMJ), specifically Articles 128 and 134. *Officer Fined*, *supra* note 173. The lead prosecutor in the case, Captain Magdalena Pezytulska, argued that LTC West should go to jail for assault and for communicating a threat. *Id.* "This is a case about a man who lost his temper," she argued. "There are consequences for [West's] actions." *Id.* (alteration in original).

a pretrial hearing under Article 32 of the UCMJ, the commanding general disposed of the charges through nonjudicial punishment” but ended West’s career in the Army.<sup>178</sup>

In defense of his actions, LTC West stated that after the interrogation there were no further ambushes on American forces near Taji until after he was relieved of command.<sup>179</sup> At his hearing he stated, “I know the method I used was not right, but I wanted to take care of my soldiers.”<sup>180</sup> Yet when asked if he would act differently if he ever faced a similar situation, LTC West testified, “If it’s about the lives of my soldiers at stake, I’d go through hell with a gasoline can.”<sup>181</sup> In an interview with Anderson Cooper, LTC West stated, “[A]s a commander, I had . . . a moral obligation . . . and responsibility to the safety and welfare of my soldiers. . . . [It is a decision] each and every person has to do within their own selves and within their own heart.”<sup>182</sup>

Back in the United States, LTC West received a hero’s welcome.<sup>183</sup> LTC West has received numerous letters from supporters, including one signed by ninety-five members of Congress sent to the Secretary of the Army.<sup>184</sup>

West, while being forced out of the Army, was not criminally prosecuted, and therefore his story could be seen as the system “working.” Specifically, the situation could be characterized as a commander looking out for his men—one who, after making a hard call in a life-and-death situation, was protected to some extent by decision makers above him. However, others could argue the opposite—an Army officer not being prosecuted for an obvious crime is proof of the system failing, and West’s story can serve as an example of a need for more legal oversight. As a society, we have declared that torture is wrong and illegal.

This case study is not included as an example of lawyer creep or lawyer neglect—it could be either depending on one’s perspective. Rather, West’s story demonstrates the shades of gray that soldiers face.<sup>185</sup> The importance of this case will be better

178. Ohman, *supra* note 157, at 108; *Report: West Will Not Face Court-Martial*, STARS & STRIPES (Dec. 14, 2003), <http://www.stripes.com/news/report-west-will-not-face-court-martial-1.14475>. LTC West’s punishment consisted of a fine of \$5000, and he was ordered to the rear detachment to await the processing of his retirement. *Officer Fined*, *supra* note 173. The 4th Infantry Division’s top general, Maj. Gen. Raymond Odierno, could have rejected the administrative action and ordered a court-martial. *Id.* In that case, LTC West would have faced eleven years in prison. *Id.* In addition to LTC West, four enlisted soldiers received nonjudicial punishment for their role in the interrogation. Memorandum from the U.S. Army Criminal Investigation Command regarding CID Report of Investigation—Final-0152-03-CID469-60212-5C1A/5C2/5T1 (Feb. 6, 2004), available at [http://www.aclu.org/torturefoia/released/105\\_167.pdf](http://www.aclu.org/torturefoia/released/105_167.pdf).

179. *Officer Fined*, *supra* note 173. But see O’Connell, *supra* note 176, at 1259 (“No evidence of a plot was ever found [and] no one was arrested.”).

180. *Officer Fined*, *supra* note 173.

181. *Id.*

182. Interview by Anderson Cooper with Allen West, U.S. Army LTC, Retired, CNN News (Dec. 23, 2003), available at <http://transcripts.cnn.com/TRANSCRIPTS/0312/23/ltm.18.html> [hereinafter Interview with Cooper].

183. See Lona O’Connor, *Army Officer Who Threatened Prisoner Addresses Luncheon*, PALM BEACH POST, May 28, 2004, at 5C.

184. See Deborah Sontag, *How Colonel Risked His Career By Menacing Detainee and Lost*, N.Y. TIMES, May 27, 2004, at A1.

185. As noted, West’s decision to abuse his prisoner is not a gray legal decision. However, when faced with protecting his men or the rights of the prisoner, the decision, from a military

understood as a backdrop to the next. Here is an example of a soldier making the arguably right moral decision, or at the very least the right military decision, but the wrong legal decision. This will be contrasted below, where the right legal decision but wrong military (and maybe moral) decision ended with tragedy.

### C. Case Study 3: Operation Red Wings

On June 28, 2005, a four-man Navy SEAL team conducted a reconnaissance mission behind enemy lines in Afghanistan.<sup>186</sup> The team, led by Lieutenant Michael Murphy, had the mission to scout the whereabouts of Ahmad Shah, a terrorist who led a Taliban terrorist group nicknamed the “Mountain Tigers.”<sup>187</sup>

During their mission, the SEALs were stumbled upon by three Afghan goat herders—two men and a fourteen-year-old boy.<sup>188</sup> The team weighed their options: they were convinced the herders were unarmed civilians; however, they had reason to believe that the herders were aligned with the enemy and would compromise their position.<sup>189</sup> The team also recognized that “[t]he strictly correct military decision would still be to kill them without further discussion . . . .”<sup>190</sup> Marcus Luttrell, the author of the book *Lone Survivor* (which has been made into a motion picture), reports, “The hard fact was, if these three Afghan scarecrows ran off to find [Ahmad Shah] and his men, we were going to be in serious trouble, trapped out here on this mountain ridge. The military decision was clear: these guys could not leave there alive.”<sup>191</sup> However, Lt. Murphy, concerned over the *legal ramifications* of killing the civilians, described the situation: “If we kill them, someone will find their bodies real quick. For a start, these fucking goats are just going to hang around. And when these guys don’t get home for their dinner, their friends and relatives are going to head straight out to look for them . . . .”<sup>192</sup> Lt. Murphy further explained the consequences of killing the civilians, beyond compromising the operation, stating, “When [someone] find[s] the bodies, the Taliban leaders will sing to the Afghan media. The media in the U.S.A. will latch on to it and write stuff about the brutish U.S. Armed Forces. Very shortly after that, we’ll be charged with . . . . [t]he *murder* of innocent unarmed Afghan farmers.”<sup>193</sup>

In helping Lt. Murphy make the decision on what to do with the civilians, Luttrell says the thought of spending years in an American prison alongside murderers and rapists influenced his decision to recommend letting the civilians go.<sup>194</sup> Not agreeing

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perspective, is less clear.

186. *Operation Red Wings*, U.S. NAVY, <http://www.navy.mil/moh/mpmurphy/soa.html>.

187. *Id.*

188. MARCUS LUTTRELL, *LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10*, at 201–03 (2007).

189. *See id.* at 201–02.

190. *Id.* at 202.

191. *Id.*

192. *Id.*

193. *Id.* at 203 (emphasis added).

194. *Id.* at 203, 206. Luttrell went on to say:

with Luttrell, Matthew Axelson disputed that killing the civilians would be murder. In support of his position, he stated, “We’re not murderers. No matter what we do. We’re on active duty behind enemy lines, sent here by our senior commanders. We have a right to do everything we can to save our own lives. The military decision is obvious. To turn them loose would be wrong.”<sup>195</sup> Ultimately, at Luttrell’s recommendation (one he now regrets) and given Lt. Murphy’s fear that they would “almost certainly be charged with murder[,]” Lt. Murphy ordered the civilians to be released.<sup>196</sup>

After the team released the prisoners, they presumably informed the Taliban where the team was, and the SEALs were attacked.<sup>197</sup> A fifty-man, well-armed militia attacked the team from three sides and pushed the team from the mountainside to a ravine.<sup>198</sup> Lt. Murphy was able to radio for help, which resulted in an Army Chinook helicopter with sixteen U.S. military personnel aboard being dispatched to extract the SEAL team.<sup>199</sup>

As the helicopter entered the battle zone, it was hit by a rocket-propelled grenade and crashed, killing all sixteen service members.<sup>200</sup> On the ground, the SEAL team

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Was I afraid of the liberal media back in the U.S.A.? Yes. And I suddenly flashed on the prospect of many, many years in a U.S. civilian jail alongside murderers and rapists.

And yet . . . as a highly trained member of the U.S. Special Forces, deep in my warrior’s soul I knew it was nuts to let these goatherds go. I tried to imagine what the great military figures of the past would have done. Napoleon? Patton? Omar Bradley? MacArthur? Would they have made the ice-cold military decision to execute these cats because they posed a clear and present danger to their men?

*Id.* at 203.

195. *Id.* at 205.

196. *Id.* at 206. It should be noted that in Luttrell’s account, the team took a vote; thus, according to Luttrell, the decision was not an “order.” *Id.* However, in the military when the leader makes a decision, regardless of how he got to that decision, it is an order.

197. *Operation Red Wings*, *supra* note 186.

198. *Id.*

199. *Id.*

Murphy, intent on making contact with headquarters, but realizing this would be impossible in the extreme terrain where they were fighting, unhesitatingly and with complete disregard for his own life moved into the open, where he could gain a better position to transmit a call to get help for his men.

Moving away from the protective mountain rocks, he knowingly exposed himself to increased enemy gunfire. This deliberate and heroic act deprived him of cover and made him a target for the enemy. While continuing to be fired upon, Murphy made contact with the SOF Quick Reaction Force at Bagram Air Base and requested assistance. He calmly provided his unit’s location and the size of the enemy force while requesting immediate support for his team. At one point he was shot in the back causing him to drop the transmitter. Murphy picked it back up, completed the call and continued firing at the enemy who was closing in. Severely wounded, Lt. Murphy returned to his cover position with his men and continued the battle.

*Id.*

200. *Id.*

was picked off, leaving Marcus Luttrell as the lone survivor.<sup>201</sup> The battle left nineteen Americans dead, as well as an estimated thirty-five Taliban militiamen killed by the four-man SEAL team. Lt. Murphy was posthumously awarded the highest award by the United States, the Medal of Honor.<sup>202</sup> Luttrell, who evaded the enemy for four days before being rescued by Army Rangers, received the Navy Cross for heroism.<sup>203</sup>

#### *D. Consequences*

The next clear step after identifying the issue is to ask, “So what?” and “What’s next?” Specifically, what are the real consequences on war fighting from lawyer creep and lawyer-induced risk aversion, and what can be done to limit these harmful effects? Using the three case studies above as a backdrop, there is a strong argument that lawyers helped enable commanders to create policies that actually put American service men and women in jeopardy, both physically and legally.<sup>204</sup>

A close examination of PFC Richmond’s case shows that he was put in legal peril by those who judged his actions through the lens of 20/20 hindsight.<sup>205</sup> This is not to say that PFC Richmond was not guilty of manslaughter—on the contrary, he was

201. *Id.*

202. *Id.*

203. Marcus Luttrell, NAVYSEALS.COM, <http://navyseals.com/ns-overview/notable-seals/marcus-luttrell/>. The following service members lost their lives in the operation:

1. Lt. (SEAL) Michael P. Murphy, 29, of Patchogue, N.Y.
2. Sonar Technician (Surface) 2nd Class (SEAL) Matthew G. Axelson, 29, of Cupertino, Calif.
3. Machinist Mate 2nd Class (SEAL) Eric S. Patton, 22, of Boulder City, Nev.
4. Senior Chief Information Systems Technician (SEAL) Daniel R. Healy, 36, of Exeter, N.H.
5. Quartermaster 2nd Class (SEAL) James Suh, 28, of Deerfield Beach, Fla.
6. Gunner’s Mate 2nd Class (SEAL) Danny P. Dietz, 25, of Littleton, Colo.
7. Chief Fire Controlman (SEAL) Jacques J. Fontan, 36, of New Orleans, La.
8. Lt. Cmdr. (SEAL) Erik S. Kristensen, 33, of San Diego, Calif.
9. Electronics Technician 1st Class (SEAL) Jeffery A. Lucas, 33, of Corbett, Ore.
10. Lt. (SEAL) Michael M. McGreevy Jr., 30, of Portville, N.Y.
11. Hospital Corpsman 1st Class (SEAL) Jeffrey S. Taylor, 30, of Midway, W. Va.
12. Staff Sgt. Shamus O. Goare, 29, of Danville, Ohio.
13. Chief Warrant Officer Corey J. Goodnature, 35, of Clarks Grove, Minn.
14. Sgt. Kip A. Jacoby, 21, of Pompano Beach, Fla.
15. Sgt. 1st Class Marcus V. Muralles, 33, of Shelbyville, Ind.
16. Maj. Stephen C. Reich, 34, of Washington Depot, Conn.
17. Sgt. 1st Class Michael L. Russell, 31, of Stafford, Va.
18. Chief Warrant Officer Chris J. Scherkenbach, 40, of Jacksonville, Fla.
19. Master Sgt. James W. Ponder III, 36, of Franklin, Tenn.

*Operation Red Wings*, *supra* note 186.

204. *See supra* Part III.A–C.

205. *See supra* Part III.A.

found guilty of manslaughter by a jury; thus, he is guilty.<sup>206</sup> Rather, the point is this: Should the country, as a policy matter, be concerned that soldiers fight in a less effective way because they fear a court-martial? Assuming the evidence against PFC Richmond was true and accurate, the question still remains: Do we put soldiers in jail because they make a mistake on the battlefield? No one accused PFC Richmond of committing a war crime; in fact, he was accused of manslaughter—of making a *mistake*. Which raises a valid point: If we do not take soldiers' word at face value when they say they were afraid and give them the benefit of the doubt, is the military not opening itself up to mandating an exploration into the minds and motives of every soldier engaged in a shooting? Is this the kind of precedent that will help the military win wars? Remember, the primary mission of the military is to win the nation's wars; war by its very nature is violent, and in a flurry of violence, innocent people are inevitably killed, as was the case with PFC Richmond's civilian.<sup>207</sup>

LTC West echoes this sentiment. When asked if he would have used the same interrogation tactics again today knowing what he knows now he said, "[W]hat that lends to is punishment-based decision-making. And I would not base the decision by the punishment."<sup>208</sup> LTC West went on to say, "If I was in the same situation and I felt that the soldiers' lives were in danger and there was something that had to be done to protect them and to get them back home to their families, we'd have to take maybe a similar course of action."<sup>209</sup>

LTC West's story further demonstrates the sentiment among the fighting forces that soldiers will be persecuted, or even prosecuted, for trying to protect themselves or their fellow soldiers. It must be noted that it is fairly clear that LTC West's actions were not legal; in fact, he admitted he was wrong, and yet his men lived.

The Operation Red Wings story has a very different ending. The SEALs took the proper *legal* action—killing the civilians would have most likely been deemed murder. Certainly, it was this legal conclusion that Lt. Murphy reached that influenced his decision to let the civilians go, despite knowing that it was the wrong

206. *See id.*

207. *See* Stephen J. Rockel, *Collateral Damage: A Comparative History*, in *INVENTING COLLATERAL DAMAGE: CIVILIAN CASUALTIES, WAR, AND EMPIRE* 1, 16 (Stephen J. Rockel & Rick Halpern eds., 2009). Rockel suggests that allowing the legalization of incidental deaths as an inevitable product of war is intended to justify the military advantage that Western technology provides:

As euphemism, [collateral damage] served to legitimize what was no longer legitimate or lawful; killing on purpose became killing accidentally on purpose. . . . Killing could continue as business as usual, but shrouded in the mystique of military jargon. When questioned, it was always denied if unproven; when proven, it was regretted as an accident.

*Id.* at 4; *see also* GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 41–42 (2010).

208. Interview with Cooper, *supra* note 182.

209. *Id.* Anderson Cooper followed up this question by saying: "Because even at the time you did this, even at the time you decided, you know, I'm going to pull the trigger and shoot the gun near this man's head, you knew you were going to get punished." *Id.* LTC West responded: "Oh, absolutely. I mean there's no way of shirking away from that and as I said, you have to be a standup kind of person and be willing to accept whatever decision is going to come from that." *Id.*

*military* decision. This is lawyering of the battlefield in its purest form: A soldier makes a decision to engage in illegal behavior, which he knows is illegal and ruins his career, but he and his men live. A SEAL makes a legal decision, knowing it is a bad tactical move, and he and most of his men perish. It is interesting to note that the *moral* decision is harder to identify here. Because of their actions, at least fifty-four individuals are dead, including nineteen U.S. troops. Using the unfair but crystal-clear lens of hindsight 20/20, one can speculate that if Lt. Murphy and the other SEALs had killed the goat herders, it is probable that the death toll on June 28, 2005, would have been much lower.

In contrast, PFC Richmond makes a mistake and is prosecuted for manslaughter, while his superior, SGT Waruch, faced no real consequences after he made a mistake that ended the life of a fourteen-year-old child and wounded others. This dilemma appears to be the ultimate catch-22. The unequal results of the above case studies demonstrate why it is so difficult to lawyer the battlefield, which is senseless and maddening in its very essence.

Marcus Luttrell believes that lawyers meddling in war fighting was a direct cause of his team's demise.<sup>210</sup> He summed up the opinion with the following statement:

Look at me, right now in my story. . . . [M]y best buddies all dead, and all because we were afraid . . . to do what was necessary to save our own lives. Afraid of American civilian lawyers. I have only one piece of advice for what it's worth: if you don't want to get into a war where things go wrong, where the wrong people sometimes get killed, where innocent people sometimes have to die, then stay the hell out of it in the first place.<sup>211</sup>

In addition, according to Luttrell, the "ever-intrusive rules of engagement" made by politicians in Washington, DC, do not protect soldiers.<sup>212</sup> Specifically, Luttrell rails against the ROE that soldiers may not shoot until fired upon or that soldier has positively identified an enemy combatant and has proof of his intentions.<sup>213</sup> Luttrell notes that this standard is "all very gallant," but it fails to recognize that soldiers are put in extreme circumstances, patrolling for hours at a time in intense heat, facing improvised explosive devices, and sustaining casualties—their friends.<sup>214</sup> They are quite frankly scared. Then they are asked to wait for the enemy to show their intentions, which often is manifested by a soldier hitting the ground, wounded or dead.<sup>215</sup>

[This] situation might look simple in Washington . . . . However, from the standpoint of the U.S. combat soldier . . . those ROE[s] represent a very serious conundrum. [Soldiers] understand [they] must obey them

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210. See LUTTRELL, *supra* note 188, at 313.

211. *Id.*

212. *Id.* at 37.

213. *Id.*

214. *Id.*

215. *Id.*

because they happen to come under the laws of the country [they] are sworn to serve.<sup>216</sup>

However, at the same time, soldiers know that these very rules represent a danger to their lives. “[T]hey undermine [their] confidence on the battlefield in the fight against world terror. Worse yet, they make [them] concerned, disheartened, and sometimes hesitant.”<sup>217</sup>

216. *Id.* at 37–38.

217. *Id.* at 38. The ROE card carried by the author in Iraq read in part:

NOTHING IN THESE RULES LIMITS YOUR INHERENT AUTHORITY AND OBLIGATION TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND YOURSELF, YOUR UNIT, AND OTHER US FORCES.

1. HOSTILE FORCES: NO forces have been declared hostile.
2. HOSTILE ACTORS: You may engage persons who commit hostile acts or show hostile intent with the minimum force necessary to counter the hostile act or demonstrated hostile intent and to protect US forces.

Hostile Act: an attack or other use of force against US Forces or a use of force that directly precludes/impedes the mission/duties of US Forces.

Hostile intent: The threat of imminent use of force against UKS Forces or the threat of force to preclude/impede the mission/duties of US Forces.

3. You may use force, up to and including deadly force, against hostile actors:
  - a. In self-defense;
  - b. In defense of your unit, or other US Forces;
  - c. To prevent the theft, damage, or destruction of firearms, ammunition, explosives, or property designated by your Commander as vital to national security. (Protect other property with less than deadly force.)
4. ESCALATION OF FORCE: When possible, use the following degrees of force against hostile actors:
  - a. SHOUT: verbal warnings to HALT . . .
  - b. SHOVE: physically restrain, block access, or detain.
  - c. SHOOT: to remove the threat of death/serious bodily injury or to protect designated property.

IF YOU MUST FIRE:

- (1) Fire only aimed shots. NO WARNING SHOTS.
- (2) Fire no more rounds than necessary.
- (3) Fire with due regard for the safety of innocent bystanders.
- (4) Take reasonable efforts not to destroy property.
- (5) Stop firing as soon as the situation permits.
5. CROWDS: Control civilian crowds, mobs, or rioters interfering with US Forces with the minimum necessary force. When circumstances permit, attempt the following steps to control crowds:
  - a. Repeated warnings to HALT . . .
  - b. Block of access, or other reasonable use of force necessary under the circumstances and proportional to the threat.
6. DETAINEES: You may stop, detain, search, and disarm persons as required to protect US Forces. Detainees will be turned over to the Military Police or Kuwait Police ASAP.
7. Treat all persons with respect and dignity.

Soldiers fight for numerous reasons.<sup>218</sup> The motivation may be a pure sense of patriotism, a fear of the consequences if an order is not obeyed, or defense of self or a buddy.<sup>219</sup> While the inspiration to fight may not be clear, what is clear is that “a soldier will be less inclined to fight if he is not certain that his conduct will be protected from prosecution by his nation, the enemy nation, or an international tribunal.”<sup>220</sup>

On November 13, 2004, an embedded reporter filmed a U.S. marine shooting an allegedly unarmed prayer-goer in the head as he entered a mosque.<sup>221</sup> The marine unit engaged the mosque kinetically (direct action) before entering, and, therefore, had reason to believe that there were hostiles in the building.<sup>222</sup> Further, the day before the mosque incident, the same marine unit was attacked by the same insurgents while they were giving medical treatment to both civilians and insurgents that were injured in the firefight.<sup>223</sup>

The videotape filmed in the mosque shows the marine entered “the mosque, observed multiple Iraqi casualties in the room, and, when one of the insurgents moved his arm upwards, the marine raised his rifle and shot the Iraqi twice in the head.”<sup>224</sup> After the reporter released the videotape and the name of the marine, the media, referring to the incident as the “double tap in Fallujah,” accused the marine of violating the Geneva Convention.<sup>225</sup> What was not reported, or not reported in any meaningful way, was the fact that the young marine was briefed just prior to the mission that insurgents were taking amphetamines and adrenaline to enhance performance.<sup>226</sup> Also not reported was the fact that the “day before the incident, the Marine in question lost a teammate to a similar booby-trapped Iraqi body. Just hours before the incident at the Mosque, a booby-trapped Iraqi body killed one Marine and injured five others.”<sup>227</sup> Because of these tactics, the marine commander ordered his men to engage and destroy any male between the ages of fifteen and fifty who posed a security risk, regardless of whether he was armed or not.<sup>228</sup>

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*US Forces in Iraq Must Follow Rules of Engagement in Use of Force*, LAWREADER, <http://news.lawreader.com/2006/11/15/us-forces-in-iraq-must-follow-rules-of-engagement-in-use-of-force/> (Unclassified as of 011800Z NOV 03). ROE Card on file with author.

218. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1, 54 (2007).

219. *Id.*; see also LEONARD WONG, THOMAS A. KOLDITZ, RAYMOND A. MILLEN & TERENCE M. POTTER, STRATEGIC STUDIES INSTITUTE, WHY THEY FIGHT: COMBAT MOTIVATION IN THE IRAQ WAR (2003); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 168 (2005).

220. Hansen, *supra* note 218, at 54–55 (citing Sean Rayment, *British Troops in Iraq Are Afraid To Open Fire, Secret MOD Report Confirms*, TELEGRAPH (Apr. 30, 2006), <http://www.telegraph.co.uk/news/uknews/1517035/British-troops-in-Iraq-are-afraid-to-open-fire-secret-MoD-report-confirms.html>).

221. BOLGIANO, *supra* note 12, at 66.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* 66–67.

226. *Id.* at 66.

227. *Id.* at 67.

228. *Id.*

Instead of protecting the young marine, the military immediately pulled him away from his unit pending the determination as to whether criminal charges would be brought.<sup>229</sup> Back home, politicians and their lawyers reacted by trying to dictate under what circumstances the enemy could be shot.<sup>230</sup> Ultimately, after six months, the investigation cleared the marine, finding that he acted within the ROE,<sup>231</sup> but not before the fighting force heard about the six-month criminal investigation.<sup>232</sup> When other soldiers and marines face similar circumstances, will the “double tap in Fallujah” investigation be in the back of their minds? Will they hesitate, taking just a few more seconds to see what happens next? Is the military not reducing its combat effectiveness by making its soldiers second guess themselves and “think like a lawyer” on the battlefield instead of fighting like a soldier?

In battle, the rules our soldiers need to follow must be simple. “[S]oldiers must make split-second decisions to kill or be killed.”<sup>233</sup> However, by the time the rules are “lawyered” up, it is the ex-post analysis of those rules that the soldier’s actions will now face. For the “kid on the pointy end of the spear [the rules have] been tinkered with and watered down by sometimes well meaning commanders and judge advocates [and are] nearly unrecognizable” or incomprehensible.<sup>234</sup>

While the “good guys” might have a hard time keeping the rules straight, according to Marcus Luttrell, the enemy does not. The “terrorist/insurgents know the rules as well as they did in Iraq. They’re not their rules. They’re *our* rules, the rules of the Western countries . . . . And every terrorist knows how to manipulate them in their own favor.”<sup>235</sup> Luttrell sums up the problem:

The truth is, in this kind of terrorist/insurgent warfare, no one can tell who is a civilian and who’s not. So what’s the point of framing rules that cannot be comprehensively carried out by anyone? Rules that are unworkable, because half the time no one knows who the goddamned enemy is, and by the time you find out, it might be too late to save your own life. Making sense of the ROEs in real-time situations is almost impossible.<sup>236</sup>

The military is not the only institution to lose its edge because of lawyering. The intelligence community has also been paralyzed by a culture of risk aversion and legalism.<sup>237</sup> In response to the embassy bombings in Tanzania and Nairobi, President Clinton issued secret orders in August 1998 that authorized the CIA to work with tribal leaders in Afghanistan to capture and/or kill Osama Bin Laden.<sup>238</sup> The CIA had

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229. *Id.*

230. *See id.* at 68.

231. *Id.* at 67. The report held that because insurgents in the area made a practice of booby-trapping their dead and wounded, the soldier was justified in firing his weapon to eliminate a reasonably perceived threat. *Id.*

232. *See id.* at 69.

233. Hansen, *supra* note 218, at 55.

234. BOLGIANO, *supra* note 12, at 23.

235. LUTTRELL, *supra* note 188, at 168.

236. *Id.* at 169.

237. GOLDSMITH, *supra* note 3, at 94.

238. *Id.*

reliable intelligence on the whereabouts of Bin Laden but was frozen into inaction because of Executive Order 12,333, which banned assassinations.<sup>239</sup> Furthermore, CIA officers knew “the fate of Robert Baer, a CIA case officer who, in the midst of organizing opposition to Saddam Hussein in 1995, was called home to Langley to face a career-ending FBI investigation for conspiring to murder Hussein.”<sup>240</sup> Because of this heritage, the CIA director, George Tenet, and other senior CIA officials insisted on clear, unambiguous instructions from the President that authorized the CIA to kill Bin Laden.<sup>241</sup> When the CIA could not get clear direction, it recommended caution to its field officers in order to avoid another Baer incident.<sup>242</sup>

The clear authorization never came. While it was agreed that Executive Order 12,333 did not apply to Bin Laden because he was a military target, the White House and Justice Department were of the opinion that using lethal force was legal only if it was necessary for self-defense while arresting him.<sup>243</sup> “This distinction was bad enough from the CIA’s perspective, but the operation was further muddled by the lawyers’ refusal to be clear about what constituted self-defense, or about how imminent a threat Bin Laden must pose before the CIA operation could commence.”<sup>244</sup>

On this topic, Sandy Berger told the 9/11 Commission that President Clinton indeed gave clear, unambiguous instructions that the CIA had the authority to kill Bin Laden.<sup>245</sup> However, CIA officials from the director’s office to operational officers had a different version of the story and claimed that the “unambiguous” instructions stated that Bin Laden could be killed only as part of “credible capture operation[s].”<sup>246</sup> “CIA agents attempted to enlist Northern Alliance leader Ahmed

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239. *Id.*; See generally Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976); Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 19 (2003); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. DEC. 1989, at 4, 7–8; Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 680–85 (2005); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 125 (1991); Daniel Schorr, *Stop Winking at ‘the Ban,’* CHRISTIAN SCI. MONITOR (Sept. 21, 2001), <http://www.csmonitor.com/2001/0921/p11s1-cods.html>. But see Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR C. REV., Spring 2007, at 127, 134–35 (claiming that “[w]ithout an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination—a homicide and a domestic crime”).

240. GOLDSMITH, *supra* note 3, at 94 (citing ROBERT BAER, *SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA’S WAR ON TERRORISM* (1st ed. 2002)).

241. *Id.*

242. *Id.* at 95 (citing STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001*, at 425 (2004)). Some have argued that “[i]f the caution about military adventure is translated into general risk-aversion when it comes to unnecessary military engagements, then there will likely be a distributional effect on the success rate of such countries.” Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 196 (2009).

243. GOLDSMITH, *supra* note 3, at 95.

244. *Id.*

245. ALLISON, *supra* note 90, at 193.

246. *Id.*

Shah Massoud in this effort.<sup>247</sup> After hearing the CIA's carefully worded instructions about what he could and could not do to apprehend bin Laden, Massoud told the briefer: "You Americans are crazy. You guys never change."<sup>248</sup> Ultimately, fear of prosecution for acting outside a convoluted order "induced by cautious legal authorizations, led the CIA to forego the covert operation."<sup>249</sup> The simple fact that there is so much debate on what the instructions actually were or what they meant seems to indicate that maybe they were not so clear.

According to the 9/11 Commission Report, because of the botched Bin Laden mission and "many other episodes prior to 9/11, intelligence officers spooked by cautious lawyers failed to take actions that might have prevented the 9/11 attacks."<sup>250</sup> Of particular note, the 9/11 Commission Report stated that the CIA's institutional aversion to risk—largely created by its lawyers—contributed significantly to its failures prior to September 11, 2001.<sup>251</sup> Jack Goldsmith states that the overcautious attitude was further hindered by the fact that "CIA leaders encouraged their officers to buy professional liability insurance for legal expenses to be incurred in the expected criminal and related investigations."<sup>252</sup> The beleaguered Robert Baer, an expert on retroactive punishment and its effect on the CIA's ability to defend the nation, explained that

the signal the insurance sends is clear[:] "Don't take risky assignments. Don't get involved in any contravention or possible contravention of American law. Just don't do it. It's not worth it. You can't afford the lawyers. The organization's not going to back you up. Take a nice safe assignment. Take no risks."<sup>253</sup>

Lastly, some argue that risk-averse lawyers are deteriorating the United States' war-fighting capabilities by hindering the military's ability to recruit new service members.<sup>254</sup> Decorated Navy SEAL Luttrell recognizes how this issue impacts recruiting when he said, "I simply do not want to see some of the best young men in the country hesitating to join the elite branches of the U.S. Armed Services because they're afraid they might be accused of war crimes by their own side, just for attacking the enemy."<sup>255</sup> Army Lieutenant Colonel David Bolgiano said on the subject, "If the Army thinks it has a recruiting problem now, wait until the mothers and fathers of prospective recruits learn that the military is trying to give more legal protections to possible al Qaeda members demonstrating hostile intent than the Fourth Amendment currently gives to criminals in the United States."<sup>256</sup>

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247. *Id.*

248. *Id.*

249. GOLDSMITH, *supra* note 3, at 95.

250. *Id.*

251. *See id.*

252. *Id.* (citing R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance; Plans Fund Defense in Anti-Terror Cases*, WASH. POST, Sept. 11, 2006, at A01).

253. *Id.* at 96.

254. *See, e.g.*, LUTTRELL, *supra* note 188, at 39.

255. *Id.*

256. *See* BOLGIANO, *supra* note 12, at 58.

## IV. RECOMMENDATIONS

As with any problem as complex as the one laid out here, there are no easy solutions. As proffered above, the lawyering of wars has led the military and intelligence community down a road of risk aversion and fear of prosecutions—making service members and intelligence officers less safe.<sup>257</sup> At the same time, one could surmise that if lawyers are too withdrawn from the process, we could have a brazen national-security apparatus much like we saw in Vietnam, causing discipline, moral, and human-rights issues—also making the country less safe (and less noble).

Whether in CIA headquarters or on patrol in Afghanistan, a decision maker desires, largely based on fear, to have a lawyer sign off on a decision.<sup>258</sup> We need to reduce and ultimately remove this unnecessary worry from our troops and intelligence operatives. As stated above, this is not a lawyer issue but a command issue. Specifically, there needs to be a change in the mindset of decision makers from one of concern over liability to concern about the survivability and the confidence of our soldiers. The lawyers who are advising their decision makers should “concern themselves with enhancing our commands’ survivability within the parameters of the law, not with helping risk-averse commanders play [cover your ass.]”<sup>259</sup>

To that end, decision makers and lawyers need to be trained or retrained on what exactly their roles are. Indeed, the laws in the national-security field that the military and intelligence community follow are often not as simple as black and white, but instead they are different shades of gray.<sup>260</sup> Hence lawyers (as well as their intelligence and military decision-making clients) must be trained that when answering the question of whether aggressive and violent actions are legal, clear answers don’t necessarily leap from the pages of the U.S. Code and military legal manuals.<sup>261</sup> Often, the best a JAG or intelligence counsel can do is clearly lay out degrees of legal risk and ensure that his or her client knows that the deeper they push into those gray areas of legal prohibitions, the more risk that decision maker assumes.<sup>262</sup>

Moreover, it bears repeating that soldiers and intelligence officers in the field are usually best equipped to assess the situation and apply what countermeasures are necessary—whether those be to pull a trigger or to recruit a criminal to become a spy.<sup>263</sup> The trend to unnecessarily scrutinize every move by operators needs to stop.<sup>264</sup> “Such scrutiny, especially without proper judgment-based training, can create deadly hesitation among Soldiers [and intelligence officers].”<sup>265</sup>

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257. *See supra* Part III.

258. BOLGIANO, *supra* note 12, at 9.

259. *Id.* at 28.

260. GOLDSMITH, *supra* note 3, at 92–93.

261. *Id.*

262. *See id.* at 93.

263. Typically, when legal advice is needed one has the “luxury of time to consult with an attorney to gain an understanding of an otherwise unclear law. Unfortunately, in most deadly force encounters, failure to act right now gets you killed and you don’t have time to put the world on hold and dial 1-800-LAWYER. . . .” BOLGIANO, *supra* note 12, at 29–30.

264. *Id.* at 69.

265. *Id.*

This is not to say that soldiers and field officers should be allowed to run roughshod over the law. If an individual commits a crime, he should be prosecuted to the fullest extent of the law. A reasonable middle ground would be to give those in the line of fire the benefit of the doubt if it is apparent that they acted in good faith—even if it turns out that the soldier or officer made a mistake. In the “double tap in Fallujah” incident, the marines were authorized to assess the situation and use their best judgment when deciding who was a threat.<sup>266</sup> The marines entered the mosque, which contained gunmen who were known to employ the tactic of playing dead only to use American sensibilities of treating the wounded to kill marines. “When the one individual raised his arm, the Marine made a split second decision to eliminate that threat.”<sup>267</sup> Did it really take six months to determine that it was a good shoot? Or did it take six months to appease the risk-averse decision makers who seemed to be more worried about the politicians and media back home than our soldiers on the ground?

In the case of PFC Richmond, had the military applied the same standard followed by the FBI for lethal force, one can speculate that Richmond—who believed his superior was being attacked by an insurgent—would have been deemed to have acted in good faith.<sup>268</sup> Specifically, Department of Justice policy on lethal force states that “[l]aw enforcement officers . . . may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.”<sup>269</sup> Furthermore, the force used “must be reasonable under the circumstances and is appropriate when ‘the officer has a reasonable belief’ that such force is necessary.”<sup>270</sup>

Next, while our soldiers and intelligence officers may have the best physical equipment to get the job done, they also need clear and simple ROEs to help keep them safe and make them effective.<sup>271</sup> Generic guidelines from higher headquarters are fine, and even helpful, so long as it is recognized that the answer to when to use force is “almost always incident specific and must be based on the split second judgment of individual [operator] on the scene.”<sup>272</sup>

Furthermore, the rules that are drafted and implemented with the help of lawyers to keep soldiers “safe” must be discarded. The intelligence and military is filled with individuals who have made careers out of being “safety officers.” Some of these “safety” rules are just plain dangerous. For instance, military police (MP) are not

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266. *Id.* at 68.

267. *Id.*

268. It is noted that the individual who was killed was flexi-cuffed (essentially handcuffed using thick plastic zip-ties). However, this was during ongoing combat operations where the service members were told armed insurgents were in the area. Furthermore, PFC Richmond testified at his court-martial that he did not see the civilian flexi-cuffed. Sworn Statement of Edward L. Richmond, Jr., United States v. Richmond, No. 20040787 (U.S. Army Judiciary Mar. 1, 2004), *available at* [https://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/DOD041043.pdf](https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOD041043.pdf).

269. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE’S USE OF LESS-LETHAL WEAPONS, at 5 (2009), *available at* <http://www.justice.gov/oig/reports/plus/e0903/final.pdf>.

270. *Id.* at viii.

271. BOLGIANO, *supra* note 12, at 30, 116.

272. *Id.* at 116–17.

allowed to carry a round in the chamber of their firearms for the fear they could have an accidental discharge, never mind the fact that they may, at some point, face a situation where they will actually have to use their weapons.<sup>273</sup> “This type of ‘safety first’ mentality is indicative of America’s having bred an entire generation of risk-averse officers. This is dangerous because it is contrary to developing a warrior mentality and it degrades realistic training.”<sup>274</sup> Moreover, this “risk-averse atmosphere has created a military where safety isn’t merely an aspect of the mission, but rather has become the mission. Training, development, and, sadly, even tactics are often subordinated to ‘safety.’ It shouldn’t be ‘safety first,’ it should be ‘mission first, as safe as reasonably possible.’”<sup>275</sup>

Lastly, lawyers who advise national-security decision makers must resist the temptation of typical legal training that quantity equals quality. As mentioned, there has been an explosion of attorney hires in the military and intelligence community, but it appears that while more lawyers should equal more access to legal advice, we simply have more lawyers. And while the substantive law is the subject of this Article, the author proffers that the issue is not the law but the role lawyers are playing in the process.

#### CONCLUSION

The title of this Article asks if over lawyering is going to cause more lone survivors. To answer this question, consider the saying in the military that “it is better to be judged by twelve than carried by six.”<sup>276</sup> The basic premise of the saying is that you should act to protect yourself and deal with the consequences later—it is better to be alive and judged than dead and buried.<sup>277</sup> The dissonance between this phrase and the legal rules reflects the tension in the system.

This is not to say that the ends justify the means when national security is involved—that would be indeed a very slippery slope. Lawyers help protect the system and ensure that we stay the “good guys.” After all, we are a nation of laws. To that end, Americans have no problem fighting wars under a system that is legal and just. In the past few decades, however, it has become difficult to feel that the rules are “tough but just.” It now seems that it is an elaborate maze of “lawyering.”

Are we asking for more lone survivors? No. Has the risk-averse mindset hindered the nation’s ability to carry out *legal* missions that increase the national security? Yes. The result: the individuals who carry the fight to the enemy have been less than enthusiastic about pushing the envelope due to the fear of being prosecuted for either making a mistake or for doing something that is later determined to be unpopular.

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273. The author served as an MP, and this was the standard practice for the MP corps while not in a combat area.

274. BOLGIANO, *supra* note 12, at 107.

275. *Id.*

276. BOLGIANO, *supra* note 12, at 70.

277. See, e.g., *I’d Rather Be Judged by 12 Than Carried by 6*, URB. DICTIONARY (Dec. 31, 2005), <http://www.urbandictionary.com/define.php?term=I'd+rather+be+judged+by+12+than+carried+by+6>.