LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief

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I. INTRODUCTION

The moral imperative and relevance of the Law of Armed Conflict ("LOAC") is more apparent today than before September 11, 2001. Law distinguishes democratic societies from the terrorists who attack them; nowhere is this more apparent than in the methods and means of warfare. Indeed, part of our revulsion and contempt for terrorism lies in the terrorists' indiscriminate, disproportionate, and unnecessary violence against civilians. In contrast, the enduring strength of the LOAC is its reliance on the principles of proportionality, necessity, and discrimination, which protect civilians and minimize combatant suffering. For these reasons, we should not begrudge the LOAC's limitations but continue to find the best contextual process for its meaningful application. In war, and no more so than in a war against terrorism where the terrorists' choice of weapons and targets may be unlimited, this means a process that is both militarily effective and legally sound. This Article is about the role of the President, and the President's legal counsel, in US targeting decisions and in applying the LOAC.¹

Section II begins with three foundational judgments regarding the LOAC. First, the LOAC is hard law; that is, it is identifiable and subject to effective

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¹ While the "law of armed conflict" and "law of war" are used interchangeably by a majority of commentators, I prefer the law of armed conflict as descriptive nomenclature. Although burdensome as a prosaic term, the law of armed conflict more readily reflects the application of this body of law to "combat," and not just to what participants in domestic debates over the war power will recognize as an elusive subcategory of hostilities known as "war."
sanction in US criminal law and in international law. Second, the LOAC is realistic law that relies on contextual principles adaptable to changing circumstances. Third, the LOAC is good policy and usually consistent with military effectiveness. In many contexts there are good policy reasons to restrict the manner in which a target is attacked that go beyond limitations required by the LOAC. As a result, a process of target decision entails the exercise of policy discretion as well as legal judgment and military command.

In constitutional design and practice, the President is given extraordinary authority over the methods and means of warfare. He is also constitutionally responsible for upholding the law. Because of prudential considerations involving the nature of combat and the necessity for secrecy and speed in military command, there is little opportunity, and often less desire, for civilian input into targeting decisions outside the military chain of command. Therefore, the President and the Secretary of Defense, as the senior members (and only civilians) within the chain of command, bear special responsibility to apply and oversee the application of the LOAC. This responsibility is reinforced by the separation of powers doctrine and correlated exercise of deference by the Congress to the President when he is acting as Commander in Chief, and by the judiciary under the non-justiciability doctrine. In short, it is with the President that law, policy, military command, and democratic legitimacy merge.

In light of the President's military and LOAC responsibilities, Section III of this Article emphasizes a contextual process for the exercise of presidential targeting decision. By contextual, I mean a process that is flexible to factual circumstance and need, but not to the application of law. By targeting, I mean presidential decisions regarding the focal application of coercion by forces in the air, on the ground, and at sea. The Article identifies legal, policy, and military factors that should determine when a target should be approved by the President, as a matter of law and as a matter of policy. These same factors should determine whether approval comes on a target-by-target basis, by category of target, by application of Rules of Engagement ("ROE"), or through general direction, known in military doctrine as the commander’s intent. Presidential style will also appropriately influence presidential process. Perceptions of past presidential performance, however, in particular that of President Johnson during the Vietnam War,\(^2\) should not determine the degree of presidential involvement today; current legal, policy, and military context should.

Lawyers may not like to admit it, but law, even in a constitutional democracy, will only sustain the capacity to guide if it is timely and realistic in application. Therefore, this Article concludes in Section IV by describing the role of the presidential lawyer and principles of practice that should facilitate the

timely and meaningful application of law. For the presidential practitioner there is no primer on this subject. Military after-action reports and doctrine are, appropriately, written from the standpoint of military process and doctrine, not necessarily with presidential counsel in mind. I hope this Article and this symposium will serve as a useful point of departure for the consideration of presidential process in the future.

II. FOUNDATIONAL ARGUMENTS

Consideration of the President’s role in wartime, and that of his legal counsel, should start with some foundational judgments about the LOAC. These judgments demonstrate the relationship among law, policy, and national values in applying the law, and therefore, the President’s singular responsibility with respect to the LOAC.

A. THE LOAC IS OPERATIONAL LAW

Cicero may have said that laws are inoperative in war ("Silent enim leges inter arma"); however, in contrast to some areas of international law that are “soft” in application, the law regarding the methods and means of warfare is “hard” operational law. It is reflected in international treaty text, customary international law, and US domestic criminal statutes. It is also subject to effective United States sanction, and on a more episodic basis, international sanction. Adherence to the LOAC is also long-standing United States policy, regardless of military context.

Title 18 of the US Code establishes US criminal jurisdiction over war crimes committed by or against members of the US armed forces or US nationals. War crimes are defined as any conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

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(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.6

Because 18 USC § 2441's substantive prohibitions derive meaning through cross-reference to the Geneva Conventions, among other international norms, US criminal law and international law are ineluctably tied.

United States jurisdiction to enforce the LOAC is also found in the Uniform Code of Military Justice (“UCMJ”).7 Article 18 of the UCMJ includes within the jurisdiction of general courts-martial “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal.”8 Jurisdiction to punish violations of the LOAC is also exercised through application of the punitive articles of the UCMJ, as in the case of William Calley, who was convicted after the My Lai massacre of 22 counts of murder under Article 118 of the UCMJ.9 In addition, Article 21 contemplates the establishment of other jurisdictional vehicles historically used to address violations of the LOAC.10 Article 21 states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.11

Congress, of course, may provide additional means of sanction using its authority under Article I of the Constitution to “constitute Tribunals inferior to the supreme Court . . . define and punish . . . Offences against the Law of Nations,” and to “make Rules for the Government and Regulation of the land and naval Forces.”12

6 18 USC § 2441(c) (2000).
8 UCMJ art 18, 10 USC § 818 (2000).
10 UCMJ art 21, 10 USC § 821 (2002); see In re Yamashita, 327 US 1 (1946).
12 US Const art I, § 8, cls 9–10, 14. This list is illustrative and not necessarily exhaustive. It is intended to demonstrate that the LOAC is subject to effective sanction in US law. This
The LOAC is also subject to international enforcement and sanction through foreign courts, ad hoc tribunals and, potentially, the International Criminal Court. Significantly, the International Criminal Tribunal for the Former Yugoslav Republic (“ICTY”) demonstrated the universal reach of the law by examining NATO’s operations as well as those of Serbia during the Kosovo air conflict. Moreover, the Special Court for Sierra Leone has recently moved from creation to indictment in less than one year. In doing so, the Chief Prosecutor has argued that such ad hoc mechanisms can be timely, cost effective, and precise in the exercise of jurisdiction.

In summary, the LOAC is operational law subject to effective sanction. As a result, the President as Commander in Chief not only has a duty to wage war effectively in the interest of US national security, but to do so, under the LOAC, in a manner that “take[s] Care that the Laws be faithfully executed.”

B. THE LOAC IS GOOD POLICY

Good faith application of the LOAC is also good policy. Adherence to the law improves the prospects of, but of course does not guarantee, reciprocal application of the same principles by one’s opponent. More broadly, the moral authority of the United States to espouse the rule of law is founded in part on its consistent and faithful adherence to the law.

Adherence to the law helps to garner and then maintain international support (governmental, elite, and public) for US military operations. This is particularly the case with respect to democracies. In the case of the 1999 NATO air campaign against Serbia, application of the law was a sine qua non for the NATO political consensus necessary to authorize NATO military operations.

Article does not express a view on, nor address, the applicability of the LOAC to persons detained in the course of the war on terrorism. Nor does it seek to identify or validate all potential sources of war crimes jurisdiction nor address the substantive and procedural rules that might apply in a particular jurisdictional circumstance.

14 See Special Court for Sierra Leone, Office of the Prosecutor, Press Release: Statement by David Crang (March 10, 2003), available online at <http://www.sc-sl.org> (click “Press and Public Affairs” and then “Press Releases,” then scroll down to March 10 release) (visited Oct 13, 2003) (reiterating the first indictments from the Special Court for Sierra Leone).
15 David M. Crane, Promoting Accountability and Justice in Sierra Leone, Remarks at the 2003 Judicial Conference of the United States Court of Appeals for the Armed Forces 2–9 (May 13, 2003) (on file with CJIL) (explaining the efficiency and cost-effectiveness of the court). The Special Prosecutor has also demonstrated that in the Sierra Leone context, such a judicial mechanism can work in a complementary way with a Truth and Reconciliation Commission, also intended through a different means to bring justice and healing to a war-torn land. Id at 15–16.
16 US Const art II, § 3.
17 Baker, 55 Naval War Coll Rev at 16 (cited in note 13).
Adherence to the LOAC is also essential to sustaining US public support for American conflict, not necessarily out of a societal sense of legal obligation but out of societal belief in the values of discrimination (distinguishing between civilians and combatants) and necessity, which are embodied in the LOAC. In corollary fashion, actual and perceived US violations of the LOAC erode public support for conflict and may overshadow or undermine the purpose and legitimacy of particular operations. Indeed, real and perceived violations of the law by opponents have helped to cement and sustain public and military support for conflicts, as illustrated by the impact of the “Rape of Nanking,” Saddam Hussein's use of human shields during the First Gulf War, and Iraq's mistreatment of POWs in both Gulf Wars.

The LOAC is also generally consistent with military effectiveness. For example, the use of ordnance against civilians is hardly economical and it is likely to reinforce an adversary's anger and willingness to sacrifice and persist in the fight. Put more directly, indiscriminate or disproportionate use of force may have short-term military advantage, for example, in clearing a village or conducting an urban “reconnaissance by fire.” But in the long run, excessive or indiscriminate force does not generally break the enemy’s will to resist and ultimately can demean and debase military discipline and professionalism. Indeed, indiscriminate bombing during World War II, for all sides, appears to have strengthened civilian resolve. Moreover, unlawful force makes the transition to peace operations more difficult because of the civilian hostility that remains. Commitment to the ideals embodied in the law in both rhetoric and

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reality also helps to buttress military morale, which is indelibly linked to the belief that the US cause and means of warfare are righteous.\(^{21}\)

Finally, good faith adherence to the LOAC is the right thing to do. The protection of innocent civilian life remains the fundamental principle behind the Geneva Conventions and, more broadly, the LOAC.\(^{22}\) The rule of law, and not just of men, remains one of the foundational distinctions between terrorism and tyranny on the one hand, and democracy on the other.

### III. CONTEXTUAL FACTORS FOR PRESIDENTIAL DECISION

In light of the fundamental judgments identified above, the effective and lawful exercise of military command requires a measure of process for each context that meaningfully addresses each parameter. The extent to which the President should participate in such a process and approve targets should depend in turn on a variety of legal, policy, military, and personal factors. To be clear, by “approve,” I mean the use of mechanisms of formal approval, such as a memorandum box checked or direct verbal assent. I also mean less formal processes of review before action is taken, such as the Secretary of Defense and Chairman of the Joint Chiefs of Staff briefing the President on targets or battle plans, including target descriptions. In both cases, the President is rightly perceived as affirmatively assenting to the actions before they occur.

#### A. LEGAL CONTEXT

Clearly, the President should approve targets to the extent he is legally required to do so—a truism. This might be the case when a targeting decision itself constitutes the constitutional authorization to resort to force; for example, the 1986 aerial raid on Tripoli, or the 1998 strikes on a terrorist command meeting in Afghanistan and on the al-Shifa pharmaceutical plant in Sudan. Depending on one’s theory of constitutional authority and one’s view of the

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\(^{22}\) See Geoffrey Best, *War and Law Since 1945* at 115–23, 253–66 (Clarendon 1994) (explaining how the protection of civilian life was a major international concern during the Geneva Conventions and “has become the driving concern of contemporary IHL development”); W. Michael Reisman and Chris T. Antoniou, eds, *The Laws of War* 80–93 (Vintage 1994) (citing numerous international laws governing the protection of civilians during wartime); *Department of the Army Field Manual The Law of Land Warfare* 3 (Department of the Army 1956) (noting that one of the three purposes of the “law of land warfare” is the protection of “both combatants and noncombatants from unnecessary suffering” and a second purpose is “[s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians . . .”); Maj. Lisa L. Turner and Maj. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AF L Rev 1, 76–82 (2001) (explaining the provisions of the Geneva Conventions intended to protect civilians).
President’s authority to delegate this authority, the nature of a target within an ongoing conflict (for example, across international boundaries) or method of engagement may sufficiently alter the legal context so as to warrant specific presidential approval. In addition, the President alone has the legal authority to change a concept of operations or timeline he has previously approved (unless, of course, he has provided a subordinate commander discretion to adjust as military circumstances dictate). The former circumstance appears to have been the case, for example, with the initial strike targeting Saddam Hussein on March 19, which occurred outside the pre-planned sequence of military events.

Presidential authorization may also be limited in scope as a matter of policy discretion, with the President requiring the Secretary of Defense and combatant commanders to bring certain decisions to him not as a matter of law, but as a function of command. This was the case with respect to NATO’s approval of a phased air campaign against Serbia. In addition, some uses of force will statutorily require presidential approval, such as activities that fall within the definition of covert action.

Presidential decision can also take on added legal valence in close cases where, as a matter of domestic law, the exercise of constitutional authority may serve as a lawful “tie-breaker” for a presidential decision in a manner unavailable to the Secretary of Defense or military commanders when they act pursuant to statutory or general delegated presidential authority alone. That is, the operation of US domestic law may not ultimately constrain the President’s specific exercise of a core constitutional authority, so long as it is exercised in good faith. Moreover, where there are differences in legal view between allies regarding the application of the law—for example, opposing views on the lawful use of land mines or cluster bombs—decisions taken by the President are likely to receive greater deference from allies and afford military commanders greater protection from allegations of misconduct or war crimes for decisions taken in the field.

B. POLICY CONTEXT

Policy context should also dictate the degree to which the process of command includes presidential decision. Whether legally required or not, the President may establish policy “redlines,” or boundaries delimiting permissible action in the absence of subsequent presidential decision. Such decisions may

23 Regardless of one’s constitutional views, it is unthinkable in a democracy that, absent presidential incapacitation, someone other than the President would or could authorize the use of nuclear weapons.
26 50 USC § 413(b) (2000).
include transitions from air to ground forces, increases in the risk of US or civilian casualties, trans-border operations, or operational matters that fall outside of what the President believes he has prepared the American public to expect and to sustain.

The plural-lateral context may also warrant more rather than less presidential involvement. Where allies are hesitant or particularly cautious about targets, the President is more likely to review those targets that he may have to “sell” or defend to his counterparts. As became evident during the Kosovo campaign, a NATO joint operation in Europe will involve a different process of combined consideration than will unilateral operations or operations conducted by ad hoc coalitions of the willing.

Decisionmakers today often have an array of equally lawful and effective options that can accomplish the immediate and direct military objective, but that offer very different policy outcomes, repercussions, and risks depending on how they are employed. For example, where today’s military commander may order an attack on an electric grid to disable an air defense system, broader policy implications arise where technology enables the military to “turn off the lights” momentarily, permanently, or for some time in-between. In contrast, the aerial destruction of a city’s power supply during World War II presumptively entailed an exercise in area bombing. In short, precision targeting options today introduce a new array of legal and policy considerations that extend beyond the immediate military objective of the strike. Questions of proportionality and necessity in turn may depend on analytic judgments about the impact of such actions on the enemy and long term effect on civilian populations. Therefore, civilian issues for decision are also raised. Within the military chain of command such target considerations warrant the consideration of the President and the Secretary of Defense.

C. PRESIDENTIAL STYLE

Process will also reflect the style and personality of the President and his senior staff as well as their views regarding the proper role of the President as Commander in Chief. The degree of presidential involvement will also reflect the level of confidence a President has in his military subordinates, and perhaps, his own confidence in his substantive and moral command over military affairs. This in turn will be informed by past performance and perceptions of performance.

Presidential command is not new. President Lincoln hired and fired generals and read daily dispatches from the front across West Executive Avenue.

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27 By which I mean, inter alia, bilateral arrangements, ad hoc coalitions of the willing, and more formal multilateral arrangements such as NATO.
in the War Department. However, changes in technology have changed the nature of command and the opportunities for presidential involvement. Napoleon’s Grenadier Guards may have had marshals’ batons in their rucksacks, but the US soldier today may have both a GPS indicator and a means of global communication. This increases the opportunities for national command and control over even the smallest maneuver elements or Special Forces spotter.

Stories abound regarding the direct involvement of Presidents in military operations. President Ford directed air operations during the Mayaguez crisis from the White House Situation Room, and at one point considered with his NSC principals whether a pilot on station in the Gulf of Cambodia should seek to disable the rudder of a fishing vessel carrying some of the Mayaguez crew. President Kennedy is understood to have personally directed US destroyers enforcing the quarantine during the Cuban Missile Crisis. Presidents Johnson and Carter were generally viewed as micro-managers, a term intended in both a descriptive and a pejorative sense. Indeed, whenever questions about presidential command arise, commentators often invoke images of President Johnson in his pajamas, pacing the White House basement, apparently paralyzed by doubt and uncertain in decision. That at least is the vision of Presidential command now ingrained in popular perception.

But caution: Presidential perception is not always reality. President Clinton is purported to have approved “every [Kosovo] target” personally at the White House, a myth since repeated in wider circulation, notwithstanding the small number of persons who could actually know in what manner the President reviewed targets. In fact, President Clinton approved a subset of pre-planned targets.

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31 Ralph Wetterhahn, The Last Battle 97–99 (Carroll & Graf 2001).
33 David L. Greene, With War under Way, Bush Leaving Details to Advisers; Officials Note President Will Stay in Touch during Weekend at Camp David, Baltimore Sun 7A (Mar 22, 2003) (noting that “[s]ome historians have written of how Johnson, under enormous political pressure, immersed himself in Vietnam War field operations, sometimes choosing bombing targets.”).
34 Id (“Johnson was also known to walk in the middle of the night to the White House Situation room. There, in pajamas and slippers, he obtained the latest reports on bombing raids, casualties and missions in specific Vietnamese villages.”).
36 Baker, 55 Naval War Coll Rev at 18 (cited in note 13).
Presidents and their staff may also seek to project a particular image of command at a time of national crisis for the benefit of public morale as well as for political consumption: hands-off to show confidence and calm (and perhaps hedge bets on outcome); or hands-on, to show presidential timber and authority. Presidential handlers, it seems, want to portray a President in command, but not meddling, someone less aloof perhaps than President Reagan, but above all not as engrossed as President Johnson, at least as these presidents are popularly perceived.37

D. MILITARY CONTEXT

There is no more important factor in determining presidential process than military context. Pre-planned and fixed targets permit more time for review than mobile targets and targets of opportunity. At the national level, targets of opportunity must be addressed by Rules of Engagement (“ROE”), class, or delegation of authority, and only in extraordinary circumstances on a case-by-case basis. Likewise, for example, “dual use” targets in a city should entail a further degree of policy and legal review than military targets in the desert, not just because they often present more complex legal questions of proportionality, discrimination, and military objective, but because the policy consequences of US decisions are compounded.

Aerial and land warfare also present different contexts and generally very different opportunities for civilian policy and legal review of targets. Air power is more susceptible to legal and policy adjustment than ground combat, in light of the variations in means and method of attack available through variation in munitions, delivery azimuth, angle of attack, aim point, fuse, and explosive, all amplified with the assistance of computer simulation. Infantry officers, in contrast, have fewer attack options, limited as they are by geography, the nature of indirect infantry weapons, and the nature of manoeuver warfare.

Ground operations are also inherently more fluid than aerial operations against pre-planned or fixed targets. Even when aerial targets are emergent, there is often some time for command consideration as aircraft or weapons platforms move into position. In ground combat there are fewer fixed targets and emerging targets usually require immediate response. Thus, there is rarely opportunity for senior commanders, including the President, to apply law to emerging targets other than through overall frameworks of lawful decision. Put

37 A more empirical index of presidential process is found in the number of National Security Council meetings a President attends during a crisis (including the functional equivalents such as “small group” meetings in the Oval Office). Where the Secretary of Defense and Chairman of the Joint Chiefs attend, it would be unusual for the President not to review past military events as well as preview prospective operations, including pre-planned targets. Agendas and “summaries of conclusion” from these meetings would go even further in verifying the inclusion of military briefs and target package reviews.

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sharply, the NATO command structure, which ultimately succeeded during the Kosovo air campaign, would not function in an infantry environment where ground truth (or perceptions) and “immediate action” training dictate tactical choice and the margin between victory and defeat. Thus, vertical command structures where the President makes specific targeting decisions are most effective in a subset of military operations, including aerial operations and operations against pre-planned or fixed targets.

E. APPRAISAL

There is an apparent tension between security and speed, on the one hand, and a decision process requiring referral up the chain of command, on the other. In each context, decisionmakers must choose on a continuum between what is colloquially referred to as “horizontal” or “vertical” command. Where a vertical structure is adopted, decisionmakers must also specify those decisions capable of and intended for civilian command, which means the Secretary of Defense or the President. Where horizontal command is utilized, commanders must decide how far down the chain of command targeting decisions should be made.

There are a number of advantages and disadvantages to presidential command. Presidential decision can enhance public support for military operations. In what is known as the “war bounce,” the American public tends to rally to support the President in times of conflict. Moreover, the public is more likely to rally behind the President than a commanding general, unless of course such a general has assumed the popular stature of an Eisenhower or a Schwartzkopf. From a military perspective, the participation of the Commander in Chief can buffer the field commander from the spotlight of 24/7 media inspection by assuming or sharing the responsibility of decision in the same manner that athletic coaches may try to deflect unwanted attention from players. However, the corollary is also true. With presidential decision comes direct responsibility for result.

From a legal policy perspective, vertical command also adds to consistency in the application of the LOAC. Where difficult targeting decisions are taken at the national level, the influence of military service branch culture and a combat arms perspective in determining legal result are less important. Personality (other than the President’s) will also play less of a role in how the LOAC is interpreted and applied. The influence of a cautious military lawyer or an aggressive commander becomes less determinative when legal policy is set at the top.

Most importantly, in a constitutional democracy, presidential decision and accountability should not be eschewed, but embraced as a fundamental tenet of what it means to have civilian command of the military instrument. Where Congress has not expressly authorized military action, the democratic legitimacy of US military operations arises from the President and ultimately his electoral
accountability to the people. Moreover, as noted above, it is with the President, and the President alone, that constitutional responsibility over military command and adherence to the law rest.

Vertical command, in my view, also generally contributes to better decisions. First, as a bureaucratic observation, staff work tends to improve in rigor as it runs up the chain of decision. Second, a process culminating with the President is more likely to fuse multiple sources of information and perspective and do so in a timely manner. This is not important if the target is obvious (for example, a column of tanks). And it is less important in an ongoing conflict with military fronts and a Forward Edge of the Battle Area ("FEBA"). In such cases a commander's ROE should adequately set the intended policy, military, and legal parameters. But it is important if the target presents difficult factual, legal, or intelligence judgments like an al-Shifa. In these latter cases, additional perspective may distinguish the sound decision from the merely rapid decision.

Similarly, some targets that may appear on the ground as raising purely tactical military considerations will nonetheless warrant policy consideration when viewed with wider perspective. For example, a decision whether to risk US forces to "secure" the Iraqi National Museum of Antiquities might well hinge on principles of force protection; however, the company or battalion commander on the spot is not well situated to balance the risk to his forces from pushing forward against the national policy consequences of not doing so. Such balancing requires broader considerations of policy intent and multi-dimensional risk assessment up the chain of command, preferably before the checkpoint is reached, but if necessary, afterwards.

Presidential command is the fastest method I have observed for fusing disparate interagency information and views into an analytic process of decision. This is particularly important in a war on terror where pop-up targets will emerge for moments and strike decisions must be taken in difficult geopolitical contexts with imperfect information. The President is best situated to rapidly gather facts, obtain cabinet-level views, and decide. Vertical civilian command is

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38 In the days following the fall of Baghdad to allied forces, the military's failure to protect the Iraqi National Museum of Antiquities from looting became an issue of domestic and international debate. See, for example, Christopher Knight, A Cultural Casualty of War: The U.S. Military's Failure to Stop the Looting of the Iraqi National Museum Was a Strategic Blunder, LA Times E1 (Apr 18, 2003). I offer this example because it illustrates well and in topical fashion the confluence of military and national policy considerations in tactical military decision; I do not offer the example in order to criticize or validate US decisions. I do note that the considerable loss of antiquities due to looting appears to have been initially exaggerated. See Christine Spolar, Most Museum Artifacts Found, Chi Trib 1 (May 5, 2003) ("The vast majority of antiquities feared stolen or broken have been found inside the National Museum in Baghdad, according to American investigators who compiled an inventory over the weekend of the ransacked galleries. A total of thirty-eight pieces, not tens of thousands, are now believed to be missing.").
less important, indeed potentially disruptive, where the military objective is set and the concept of operations calls for traditional and rapid maneuver warfare.

Vertical command and fusion can also serve as a fail-safe where such process helps to channel target review into a routine and specialized process of review. Significantly, the erroneous bombing of the Chinese Embassy in Belgrade during the Kosovo campaign followed the identification and generation of a target outside the normal channel of target production. Although the presumptive target designated in briefs was indeed military in nature, human error placed the target at the wrong coordinates, even as the correct target was reviewed and approved by the chain of command. Although unusual, some targets that do not in fact pass a colorable test of military objective or discrimination, or in any event, do not conform with the President's view of such terms, may survive even a rigorous process of staff review.

For sure, there are risks to vertical command. First, as the Long Commission demonstrated in the context of the Beirut bombing, vertical command, in that case involving eleven different layers between the President and the Battalion Landing Team commander, can diffuse responsibility and accountability in dangerous ways. Vertical command can take time and delay critical decision. However, in an age of global communication, Presidential decision need not cause undue delay where decisions flow directly from the President to the Secretary of Defense and are communicated to the combatant command (often by the Chairman of the Joint Chiefs of Staff).

Second, where combat operations are fluid, vertical target decision is inherently dysfunctional unless it is exercised through a commander's intent or ROE. This might be illustrated with reference to weaponized Unmanned Aerial Vehicle ("UAV") platforms that can be deployed both as point-to-point weapons (that is, launched with a specific coordinate in mind) or used to patrol for targets of opportunity. In the initial mode, vertical commanders can appropriately participate in a target decision where the target is pre-planned or fixed. In the latter case, the tactical setting will dictate that command discretion and the LOAC be applied through ROE or target-class approval, rather than an assessment of specific target circumstances at the time of attack.

Third, for some observers, presidential command raises the specter that a civilian will make military decisions that they are not in fact trained to make. Again, the ghost of President Johnson selecting bombing targets in Vietnam lingers. Although some Presidents have had meaningful military and combat experience, few have had the necessary experience or training to determine how many divisions are required to secure supply lines for a three-division push to

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Baghdad. But this critique presumes that presidential decisions are made without military input. On the contrary, Presidential command, at least in modern times, appears to be uniformly the product of a military brief, and in targeting application, deferential to military input.

In short, if not exercised with contextual forethought, presidential command can negate significant US military advantages that are emphasized with horizontal command. Horizontal command is rapid, and if pressed to the lowest tactical level, immediate. It emphasizes military expertise and professionalism, including a US leadership corps unmatched in training, ability, and independent thought, from combatant commander to small unit leader. And it emphasizes ground truth, with decisions taken on the basis of the observations by those with "eyes-on-target."

Nonetheless, in my view, some pundits are too quick to disparage the value of vertical presidential command without acknowledging the possibility of its contextual and effective exercise in a manner that does not diminish US military advantage. The reality is that Presidents are briefed on military operations and that command decision at the level of the Commander in Chief can be taken, in the words of General Tommy Franks, on an "amazing timeline." I have seen the most difficult and novel of military targets identified, briefed, considered, and decided by the President, with legal review by the Attorney General, in less than five minutes. It could be quicker if need be. Moreover, where it is not practicable to brief targets on a case-by-case basis, the President can, and should, exercise his constitutional command function through the review of theater ROE and concepts of operation.

This view does not reflect a lack of faith in the fidelity and skill of the US military. Quite the opposite, it reflects the US military's commitment to constitutional government, challenged at times, but exemplified at the beginning by General Washington surrendering his commission to Congress and in the oath members of the Armed Forces take to "uphold and defend the Constitution." American citizen soldiers should act in combat with the confidence that their commander, and ultimately their interlocutor with the American public, stands behind their lawful actions. In a democracy, the buck should stop with the President and not with the lance corporal or even the Secretary of Defense. It is also at the level of the President and the Secretary of Defense, rather than at the level of the combatant commander, that the process of congressional consultation and briefing occurs. This, in turn, is an important element of constitutional process, democratic legitimacy, as well as a necessary step in building and sustaining public support for conflict.

Nor is this perspective, in the other direction, an expression of constitutional dogma or a sanguine faith in presidents and their lawyers. In my view, there are obvious decisions that are military in nature for military commanders alone to make. The majority of tactical and targeting decisions are in this category. However, there is also an obvious and smaller subset of decisions defined by the factors identified above that are Presidential in scope, and some that are contextually in-between, and we should not eschew a process that includes, and indeed encourages, presidential decision in these areas. A global war on terrorism, or a coalition war over Kosovo, will necessarily present a mix of different issues suggesting different processes of civilian command. The pilot must ultimately decide with the benefit of training and eyes on the target whether he can disable a rudder, but it is the President, not a unified commander like General Curtis LeMay or General Tommy Franks, who should ultimately determine whether and how a quarantine is enforced or a how a chemical attack with the potential consequence of nuclear confrontation may be deterred.

In summary, I am not arguing for a fixed template of presidential decision but a contextual approach that accounts for a range of legal, policy, and military factors in deciding when and how Presidents should exercise command and, in doing so, apply the law. Such an approach recognizes that in a constitutional democracy, it is entirely appropriate for military decisions to be made by the President, and we should not avoid or obfuscate such a process, but celebrate and encourage its presence. I am not troubled that President Johnson dwelled on a war that would, for America, last over ten years and cost 58,000 American lives. I would expect that all Presidents would care as much. The image is only alarming if the President stifles advice, ignores better ideas in doing so, or if Presidential indecision hampers military effectiveness. Where the President does decide on targets, he should do so with the benefit not only of military input but also legal input.

IV. THE PRESIDENT’S LEGAL COUNSEL

Generals are sometimes accused of fighting the last war. Similarly, lawyers are sometimes accused of asserting black letter rules that might seem outdated or inchoate in a gray world. For sure, textual legal expression is, by its nature, frozen in time and requires interpretation. But the application of the law is consistently updated by taking account of current context.

In the area of targeting, the LOAC regulates rather than prohibits force, seeks to minimize rather than preclude civilian casualties, and seeks to minimize human suffering. These critical legal policies are realized through the application of the principles of necessity, discrimination, proportionality, and military objective that are found in textual law and customary law. These are the principles to which commanders and lawyers return time and again. Clear
prohibitions, such as those prohibiting deliberate attacks on civilians or denying quarter, offer essential benchmarks. But absolutes do not always control as a matter of law in a world where terrorists use civilian airliners as missiles, and tyrants use civilians as human shields to protect weapons of mass destruction (“WMD”). Contextual principles applied in good faith do work in accomplishing the military mission and in protecting civilian society. Such principles adapt to wars against terrorism as well as fixed military fronts. And, such principles are capable of application by corporals, specialists, and Presidents.

Michael Reisman has noted that if customary international law “has the advantage of applying to everyone,” it also “has the disadvantage of often being hard to identify.” This is a source of frustration and sometime tension for commanders, policymakers, and lawyers, whether they are applying customary international law from an operational or human rights perspective. This is especially so when the law is applied asymmetrically (as in the terrorism context) and therefore is perceived as being inchoate, because it constrains only one side. Likewise, the application of necessity, proportionality, and military objective at times is subject to imperfect definition and differing interpretation. As a result, the cases that tend to drive debate with respect to US actions often entail judgments involving the application of agreed upon principles to difficult facts, or that involve unintended errors in intelligence, equipment, munitions, or execution, but not in the legal framework applied or the result intended. There is also room for honest differences of view where the law is evolving based on customary practice. One function of the presidential lawyer is to identify the critical legal policies at issue and to ensure that their objectives are likely to be realized in a new context by an appropriate and lawful application of force. This requires a process of meaningful and timely legal input to decision. Discussion of legal process inevitably engages pre-existing notions of “lawyers,” based on observation, experience, and myth. As issues of force deeply color perspectives on the validity and applicability of international law generally, specific experiences involving lawyers (or perhaps, accounts of lawyers) may unduly shape commanders’ and policymakers’ views as to whether lawyers should have a wartime role. “Process” to some is itself antithetical to the notion of military command. Throw in a lawyer to boot and you have a quagmire. As a result, not all commanders or policymakers welcome lawyers onto the military targeting team. This reluctance reflects innate and valid practices of secrecy, as well as concerns about delay and the possibility that the lawyer may say “no” to something the decisionmaker wants to do.

My position is clear—the participation of lawyers in a military targeting process is indispensable as a matter of law. It also offers significant policy advantages in how the US articulates target decisions and establishes the legal

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credibility of those decisions. This is true at the division level and it is true at the presidential level. If contextually designed to parallel the process of command, such legal input will be operationally effective, at least to the extent the exercise of operational command is itself effective. Intuitively, the answer is for lawyers to address concerns about speed by limiting participants to the essential few and meeting real world deadlines, not for commanders to omit lawyers from the decision cycle. This means a Judge Advocate in the field and/or a Unified Staff Judge Advocate, the DoD General Counsel (and/or Joint Chiefs of Staff/Legal Counsel), and a presidential lawyer, depending on the level of command decision.

The role of the military lawyer is well described elsewhere, including in this volume. The role of the President’s legal counsel is less well understood and certainly not defined by acknowledged practice or doctrine. In my view, the President’s legal counsel has three essential tasks: education, review, and appraisal.

A. EDUCATION

Lawyers and policymakers need to train for war, albeit intellectually, and not with the physical risk embedded in military training. When Daniel Webster transcribed his most famous statement about self-defense in the context of the Caroline incident, he did so four years after the precipitating event.42 Today’s national security lawyer does not have such time for deliberation. For a variety of reasons relating to the nature and multiplicity of transnational and state threats, combined with the devastating potential of WMD, questions of whether to resort to force and the methods and means of force will pop-up and require immediate decision. Decisionmakers may have to assess an option in a night, or in a tactical moment, and immediately explain the action to the American public and the world for all times’ sake.

That means the President and his legal counsel will come to the decision table as they are. Therefore, they must already know the LOAC relevant to their level of command as well as the foundational judgments that underpin the LOAC. This puts a premium on furnishing necessary background in advance of crisis, a tall order for any president’s legal counsel competing for the president’s time and attention, but it must be done. A President is simply not going to stand by for a lecture on Grotius at a time of crisis. Instead, he will recall Cicero. Moreover, clients are more likely to absorb principles that constrain, as well as that permit, in the calm before crisis than they are in the heat of the decision moment. That means the framework for lawful decision must already be

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42 See letter from Daniel Webster to Mr. Fox April 24, 1841, reprinted in 1 The Papers of Daniel Webster, Diplomatic Paper 1841–43 (New England 1983).
embedded in decisionmaking checklists, or at least that portion of the checklist that includes counsel in the decision cycle.

Advance guidance on the LOAC also helps establish lines of communication and a common vocabulary of nuance between lawyer and client. Any policymaker who receives such a brief will be sure his or her lawyer fully participates in the targeting process at that level of command. In addition, the policymaker will understand in a live situation that the lawyer is applying "operational law" and not kibitzing on operational matters.

At the same time, the presidential lawyer must understand the strengths and limitations of the intelligence process that informs command and legal judgments as well as the evolving nature of military operations, and thus the evolving application of law. By example, the advent and increasing prevalence of precision weapons in the US arsenal has led to unrealistic expectations that armed conflict, at least on the part of the United States, can be conducted with few or even no collateral casualties. 43 This is a worthy objective, and one that I am confident the United States Government embraces, not just because it reflects the intent of the LOAC and is morally sound, but, for hard realists, because it is also good policy. The aerial weapons of today's United States arsenal permit extraordinary and precise adjustments in aim point, angle of attack, and azimuth of attack as well as different variants in fuse and explosive. Combined with detailed and rapid computer models, which can project blast effects, and a professional cadre of "targeteers," the US capability to maximize discrimination and minimize civilian casualties is remarkable, and easily unmatched in history. But a few words of caution are needed.

Precision weapons do not lift the fog of war, and lawyers should not confuse "precision weapon" with "precision decision." They do not address questions of perfidy and ruse, human and technical errors, or limitations in intelligence. And they do not address technical or logistical capabilities. Precision weapons are simply not the right choice for every strategic or tactical scenario and may not be "on station" in every tactical situation.

Further, because many precision weapons are either unmanned or capable of effective launch from afar, or both, some may perceive that the United States

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43 See, for example, Human Rights Watch, Civilian Deaths in NATO Air Campaign, Summary (Feb 2000), available online at <www.hrw.org/reports/2000/nato> (visited Sept 13, 2003) (implying that large numbers of civilian deaths resulted from questionable targeting and munition decisions); Human Rights Watch, New Figures on Civilian Death in Kosovo War (Feb 7, 2000), available online at <www.hrw.org/press/2000/02/nato20.htm> (visited Sept 13, 2003) (alleging that "[a]ll too often, NATO targeting subjected the civilian population to unacceptable risks" and suggesting that illegitimate targeting and munition decisions resulted in large numbers of civilian deaths).
is not taking “all reasonable measures”\textsuperscript{44} to prevent collateral casualties when its pilots do not break a certain ceiling or enter the airspace of the country affected in order to launch the weapon. Caution is warranted here as well. “Eyes on” can make the difference in distinguishing between a column of buses with refugees and one with combatants. But, pilot “eyes on” will not necessarily change the quality of intelligence, if, for example, the target is a building. Moreover, discrimination is not measured by the equivalence between civilian and military casualties, but by the minimization of civilian casualties. Precision aerial weapons accomplish that end. Further, increased pilot risk often means an increase in civilian risk as well. This is certainly the case where helicopters are employed in lieu of precision weapons and area suppression munitions are used to prep the area of helicopter operations. Further, regardless of platform, if pilots are shot down, ground troops will follow. And ground combat is usually more destructive and indiscriminate to civilians than aerial attack with precision weapons.

For these reasons, the law should encourage states to develop, invest in, and use precision weapons, and lawyers should consider with care the adoption of absolutes that might negate the advantages to the combatant from using precision weapons, the use of which upholds the fundamental tenets of the LOAC by improving the ability to discriminate between military and civilian targets.

\textbf{B. TARGET REVIEW AND ARTICULATION}

The president’s legal counsel should perform at least two target functions for the President. First, he should provide independent guidance on the application of the law within the framework of an established client relationship. He does this by clearly and quickly concurring on memos, by e-mail, or orally. For that small subset of more difficult targets, he should explain how principles apply in context and document the analysis for the record. As a matter of legal policy, he should identify relevant precedent so that the President will understand where on a historical continuum of practice his decision will fall and how it may shape the law, reciprocal conduct, and perceptions of US views of the law.

Where necessary, legal counsel must be prepared to say no. However, in the American context there are few targeting proposals that will reach the President that should prompt absolute LOAC prohibitions. Most decisions involve judgment calls regarding the application of law to facts, or intelligence and analytic judgments regarding facts and projected outcomes. Nonetheless,

\textsuperscript{44} See Additional Protocol I art 57, § 4 (cited in note 18); see also Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations ch 8.1 (cited in note 18) (requiring “all reasonable precautions”).
because targets will be added, dropped, and adjusted by the President (or in his presence) immediate legal consideration is required. So too, targets of opportunity will be brought directly to the President as time or secrecy dictate, as was the case with Saddam Hussein’s command bunkers during Operation IRAQI FREEDOM. As a matter of timing and culture, it is hard enough for the military lawyer to advise commanders on the LOAC ahead of decision; it is entirely unrealistic for the military lawyer to take issue with a target already approved by the President. Therefore, the law must be weighed in conjunction with the President’s decision and that requires a presidential lawyer.

Of course, with the President, the roles of client and lawyer merge. In his capacity as chief executive and with his duty to “take Care that the Laws be faithfully executed” the President is not just Commander in Chief, but Counsel in Chief. However, the President who hopes to exercise both his command and legal role at once could find that “he has a fool for a client.” Application of the LOAC requires role-playing. My own observation, and certainly the sense garnered from presidential papers and pronouncements, is that no burden weighs more heavily on the President than his responsibility to protect American lives. Such a duty should compel the President to press his advisors and his lawyers as far as he can to accomplish this end, now more than ever where the nuclear age walks parallel to the age of terrorism. With the President’s preeminent responsibility thus defined, a President who is also serious about the rule of law, including the application of the law of armed conflict, should seek dispassionate legal advice from a person dedicated to this role. At the level of the President, this has the added advantage of ensuring that the Commander in Chief’s view of the law is applied to national-level decisions. Moreover, in most contexts, this will be the only legal view expressed from outside the Department of Defense. Furthermore, decisions taken without such legal participation may be perceived as, and in fact be, less credible where legal issues are raised.

Role-playing, as in other substantive areas, also entails fact testing. Such a role is all the more critical where timelines are short and process may be truncated. Are all relevant facts and analytic conclusions on the table? Are there seams of factual disagreement between agencies that advocates for action or inaction have glossed over or omitted? Although these are not inherently legal questions, the dispassionate lawyer, trained to review fact and argument, can play a critical role in presidential process.

C. APPRAISAL

The President’s counsel must also consider the immediate and enduring legal consequences of the President’s decisions. How will the target be
explained? What information is available to do so? Will other states, and non-state actors, assert a reciprocal right of action? If so, what impact will this have on US national security and to international public order?

Policy articulation is ultimately the business of policymakers and their speechwriters and press secretaries, not lawyers. The language of law does not always pack the punch or clarity of policy prose. Policymakers "retaliate," lawyers "respond." "Shock and awe" are not words lawyers would immediately use to describe necessary and proportionate action. Even where a sound presidential decision is taken, if it is not well explained, in terms of factual predicate or legal foundation, tactical and military victory can turn to political defeat. The President's legal counsel can play an important role in influencing how US targeting decisions are explained and therefore perceived, particularly when so much policy articulation for US military action occurs at the presidential or cabinet level.

Al-Shifa illustrates the point. Contradictions in statements, as well as statements that seemed to inflate facts, distracted and obscured public focus from the essential national security underpinning of the President's decision: Al-Shifa was a pharmaceutical plant that the Director of Central Intelligence determined was linked to both chemical weapons precursors and to Osama bin Laden. After the August 1998 embassy bombings the President had no doubt of al Qaeda's intent to attack the United States by whatever means possible.

In my experience, the United States does a better job at incorporating intelligence into its targeting decisions than it does in using intelligence to explain those decisions after the fact. This in part reflects the inherent difficulty in articulating a basis for targets derived from ongoing intelligence sources and methods. Moreover, it is hard to pause during ongoing operations to work through issues of disclosure. Commanders should look forward and not behind. But articulation is an important part of the targeting process that must be incorporated into the decision cycle for that subset of targets raising the hardest issues, for example, where the purpose may not be apparent from information available to the public, or the civilian casualties are high in relation to the military advantage apparent to the public.

Whatever the role of the President's legal counsel generally, he or she bears a special responsibility to ensure that when the President speaks, or his immediate advisors speak, they do so conscious of the legal and legal policy implications of their words. Where the President speaks the message is magnified and the consequences usually irreversible.

As part of the appraisal function, the President's legal counsel also bears responsibility to ensure that ongoing operations are conducted in a manner consistent with presidential direction and that presidential orders do not have unintended or ill-founded effect. Do the ROE work? Has presidential process delayed decision, or put servicemen at risk? If so, is such process well founded?
Second, where the President has provided limited or nuanced authorization, have circumstances changed? In the case of a campaign conducted with embedded journalists reporting 24/7, the answers may be self-evident without need for inquiry. But where clandestine counter-terrorist operations are involved, or serial conflicts outside the public eye—for example, the Iraq No Fly Zones (1991–2003) or Somalia—such questions become more relevant, if not urgent.

V. CONCLUSION

Targeting process is usually considered from the perspective of military efficiencies. In my view, such processes should also be evaluated from the perspective of constitutional imperatives and legal efficiencies. Neither perspective need be exclusive of the other.

The advantages of horizontal command are apparent. The advantages of presidential command are less apparent, but more enduring in a constitutional democracy founded on the principle of law. In context, there are good arguments for vertical civilian decision, and in particular presidential approval. Such approval may be required as a matter of law, for example, when the target itself requires the constitutional authorization to resort to force. As a matter of legal policy, the President should also approve targets (or classes of target, etc.) that cross new boundaries—in territory, weapon choice, collateral casualty, and risk.

Moreover, from presidential decision comes enhanced political and legal legitimacy. Presidential decision, on the close calls, results in consistency in application of targeting principles. For the military, this brings public recognition that in democracy the military implements rather than makes policy, and therefore should be supported for its professionalism and not on the basis of its policy choices.

Although decision in the field is generally faster, presidential decision can also create military efficiencies. This is the case where targets based on uncertain information emerge, requiring difficult and timely choices based on the immediate collection and review of national level intelligence judgments from multiple agencies. The President is best situated legally and bureaucratically to fuse this information and make a decision in a timely manner. As a matter of constitutional law and process, the President is also best situated to determine what information, if any, will be disclosed in order to articulate the basis for difficult decisions. These are problems that have arisen and will continue to arise in a global war on terrorism.

To be clear, the President may, and appropriately does, delegate his command and legal responsibilities in a majority of contexts. Presidential targeting decisions will be primarily focused on pre-planned or emerging aerial
targets and less so on emerging infantry targets. Thus, presidential targeting approval should apply to only a small subset of targets. Decisionmakers should ask: Is this something the President needs to approve? If not, what are the military and policy consequences of doing so? Military officers within the chain of command should ask not only if this is a target or decision that must go to the President, but also whether it should go to the President. The question is not can it be done, but should it be done based on the policy, legal, and military factors at play. Decision is rapid when it is framed contextually (that is, target, class, or ROE) and decisionmakers are trained in temperament and the substantive issues relative to the decision.

When the President decides, he should do so with the benefit of counsel. Why? Because the President's primary role in national security is making policy decisions. His focus is rightly on the cost and benefits of the options presented. At the same time, the President bears direct and ultimate responsibility under the Constitution to uphold the law and, as Commander in Chief, this includes the LOAC. The President's counsel, then, guides by educating the commander, testing facts, and offering contextual applications of principles. During the articulation phase of a decision, the lawyer also serves as an advocate. Only rarely should the lawyer serve as judge, but the President's legal counsel must be prepared to assume all three roles.