

Applying the Law of Targeting to the Modern Battlefield

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Introduction

Thank you, Ryan, for that kind introduction. I had the pleasure of working with Ryan when he served as my special counsel at the Department of Defense this past year. He did great work for the Department, and was a superb colleague. His perspectives and insights brought a diversity of thought to enhance our analysis and advice. And thank you Dean Morrison for the invitation to speak here at NYU. This is a flagship law school, a leader in teaching law students how global issues impact all kinds of legal practices, as well as how the law, in turn, affects global issues. That commitment is clear in the great work of the Center for Law and National Security. And so I am so pleased to be here today to share with you a bit about the work I do and where I see daily the significant role the rule of law plays in keeping our country secure.

As the General Counsel of the Department of Defense, I am personally responsible for providing all legal advice to the Secretary of Defense. I also advise the Department's senior leaders on all legal matters related to worldwide defense activities in the security interest of the United States, including counterterrorism and other military operations taking place in Syria, Iraq, and other areas. I work closely with our top uniformed and civilian lawyers, including the Legal Counsel to the Chairman of the Joint Chiefs of Staff as we support our men and women in uniform and as we help ensure that U.S. military operations worldwide are conducted in compliance with the law. I also collaborate with colleagues outside of the Defense Department, including the State Department Legal Adviser, the General Counsel of the CIA, and the National Security Council Legal Adviser. Despite working for different agencies with different missions, we are all dedicated to ensuring that the United States upholds the rule of law in all that we do.

At the Defense Department, one of the most visible ways we implement our commitment to upholding the rule of law is the way in which our military operators employ force overseas, so that is the focus of my remarks today. In particular, I will describe some of the targeting processes our forces use during armed conflict, particularly the ongoing conflict in Iraq and Syria, and how the law plays a key role in those operations. In doing this, I will highlight some of our operational policies, many of which are more protective than the requirements of what is known as the law of armed conflict, or LOAC, as well as the procedures we observe to give effect to both the law and policy. I will illustrate the targeting process with an example of one of the more legally engaging aspects of our fight against ISIL, how the rules relating to the targeting of military objectives and proportionality apply to targeting what is referred to as "war sustaining" objects, and in particular, cash and revenue-generating objects.

As I mentioned, we take our obligation to comply with the law of armed conflict very seriously. And that's because the law is crucial to what we do. President Obama's remarks were unequivocal when he said, the day after he took office, that "transparency and the rule of law will be the touchstones of this Presidency." Law, and in this case the law of armed conflict – or the "law of war" or "international humanitarian law" – is fundamentally a source of our strength. We comply with the law of war because it is the law. But, complying with the law also helps us defeat our adversaries and their ideology, because it helps to confer legitimacy on our actions in the eyes of people around the world. Many of our partners work with us precisely because they know we understand and adhere to the rule of law, to the law of armed conflict. And if these or other partners need help implementing the law, we give it.

Following the law sends a powerful message to those who live in the countries where our military operates and throughout the world: that we fight only our adversaries and not civilians, and we will treat everyone lawfully and humanely, even when our foes do not do the same. We follow the law because it reflects our core values, the very principles that we are fighting to protect and preserve – in short, it reflects who we are.

Of course, our Nation's commitment to abide by the law of armed conflict is not a new phenomenon to the United States. The law of armed conflict has very deep roots in in our own history, in our own military tradition. During the Civil War, for example, President Lincoln approved "General Order 100, Instructions for the Government of the Armies of the United States in the Field." It was prepared by Francis Lieber, a law professor who taught at a law school in New York, and is often called the "Lieber Code." This was one of the first codifications of the law of war principles that had developed over centuries of warfare. It included the following statement that we now know as the principle of distinction: "as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the citizen who does not participate in hostilities is to be spared in person, property, and honor as much as the exigencies of war will admit. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war." This legal requirement to distinguish in our military operations between those participating in the fight and the civilians who are merely caught up in the conflict is one of the bedrock principles of the law of armed conflict. Combatants must distinguish between military objectives, such as combatants, on the one hand, and civilians and civilian objects on the other.

Another key law of war principle reflected in the Lieber Code that still guides our operations today is the principle of proportionality. The Lieber Code indirectly references the principle of proportionality in its discussion of military necessity. The Code stated that "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons

whose destruction is incidentally unavoidable in the armed contests of the war.” The Lieber Code’s acknowledgement that in the conduct of war, there might be incidental death of civilians has developed into an increased focus in modern times on protecting those civilians who are caught up in the conflict but not taking part in it. At the most fundamental level, the principle of proportionality precludes those that use force in armed conflict from acting in a way that is unreasonable or excessive. When targeting military objectives, combatants also must take feasible precautions to minimize harming civilians or civilian objects and refrain from attacks that are expected to cause civilian casualties excessive to the concrete and direct military advantage anticipated.

I will talk specifically about this principle of proportionality in just a few minutes, but let me just return briefly to the overall idea of how these and other law of armed conflict principles impact our military operations. The fundamental principles of this body of law, including the principles of distinction and proportionality, and all of the law of armed conflict rules that are based on those principles, shape and guide every decision our military makes to use force. We not only *follow* the law of armed conflict, but in many cases, when it is feasible, we do *more* than what the law requires by applying policies and standards that are more protective of civilians than required by the law of armed conflict. President Obama, like other Presidents before him, has established policies that apply conditions to military operations beyond what is required by the law when it is practicable to do so.

Let me illustrate this by sharing with you a little bit about the process that we follow to implement the law as well as some of the policies that instruct us to take measures beyond what the law requires. It is helpful to understand what that process looks like in order to get a sense of the extraordinary effort our military makes to comply with the law and to implement such policies.

I. Targeting process

This process, which we call the targeting process, begins with the identification of a target: a person who is part of the adversary force or an object that is important to the adversary’s operations and that U.S. forces assess is necessary to attack in order to advance the United States’ military interests in the conflict. The potential target could be a building, or a vehicle or a leader of an adversary armed force, for example. The person who identifies that target may be a soldier or commander on the ground who is involved in a current combat operation, or he or she may be an Air Force officer who is planning an attack and identifies potential targets that support the operation. When there is time to plan in advance for a particular target, we call that deliberate targeting. When we are reacting to an immediate need or attacking a target that is on the move to cause harm, we call that dynamic targeting. The process I will lay out for you applies to both types of targeting, but the urgency associated with dynamic targeting means the process often plays out much faster.

Let me start with the deliberate targeting process. Let's assume that as part of our military operations against ISIL, there is a bridge being used by ISIL to move military vehicles or perhaps VBIEDs – vehicle-borne improvised explosive devices, which are big moving car bombs that tend to look like something out of a Mad Max movie – for the purpose of attacking U.S. forces, friendly forces, or even civilians. Unfortunately, ISIL does this routinely. The U.S. commander responsible for that portion of the battlefield may consider targeting that bridge in order to deter the ISIL attacks. He or she is supported by a staff who will then look at that potential target and conduct an analysis of whether that bridge can be attacked, and if so, how best to do so.

Intimately involved in this staff process is the staff legal advisor – a military attorney. Judge Advocates, as we call them, or JAGs, are commissioned officers who are part of battle staffs throughout the military, and provide advice to other members of the staffs and commanders on legal issues, ensuring that the principles of distinction and proportionality, along with other important legal considerations, are properly applied to military operations. Embedded with commanders on aircraft carrier strike groups, at airfields, in operations centers, in strike cells, and sometimes at remote outposts in Iraq, Afghanistan, or other areas, these skilled men and women give legal advice in real time. They work together with multi-disciplinary teams so that our commanders, operators, and planners can make the best decisions about how to fight an adversary in a way that will be effective and complies with the law. In fact, the Department of Defense requires each DoD Component to “Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations,” and for Commanders at the highest levels to “Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.”

As the lawyer provides input into this hypothetical decision of whether to attack the bridge, he or she might refer to applicable treaties and to resources like the Department of Defense Law of War Manual, an important reference that my office put together over many years. Military lawyers consider relevant rules of engagement and policy guidance specific to the military operation – these are established by higher-level commanders. And they look to any additional policy guidance such as the guidance that we have for evaluating collateral damage risks or minimizing civilian casualties. For example, they consider the many policies and procedures that were ultimately compiled into Executive Order 13732, which is a presidential executive order that sets out the “policy on civilian casualties resulting from U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense.” It includes a reaffirmation that the U.S. military will apply the principle of proportionality in all its military operations. The Order specifically states the legal requirement to “take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties,

such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances.”

So, the lawyer in our hypothetical bridge scenario now engages with other members of the staff, which will include experts on intelligence, military operations, combat engineering, and weapons, to provide a recommendation to the commander concerning whether to attack this bridge. Again, let’s assume the commander’s staff has already determined that the enemy is using or planning to use this bridge for military purposes to attack U.S. forces or innocent civilians or perhaps our Coalition partners. Initially, the staff considers whether the bridge is a valid military objective under the law of armed conflict—that is, whether the bridge by its nature, location, purpose, or use makes an effective contribution to military action, and whether its total or partial destruction, capture, or neutralization, under the circumstances, offers a definite military advantage. The staff also considers whether the bridge is a valid target under applicable policies, including the rules of engagement. In this case, the bridge’s location and its purpose or future expected use as the point where enemy vehicles cross the river and move to the fight means that it could be advantageous to destroy the bridge to deny the enemy the use of that route. Thus, the bridge could be a valid military objective.

The staff will also apply other related law of armed conflict rules such as rules that prohibit attacks against specifically protected objects like cultural property and hospitals. Applicable policies, including the rules of engagement, set even more specific or restrictive requirements in certain areas. For example, these rules lay out certain “no-strike” lists, with particular objects or zones designated for protection that cannot be attacked unless the commander obtains higher-level approval. They must “de-conflict” the target with these no-strike lists by determining the target is not on the list or, based on specific information, that there is a reason why the target no longer merits protection, such as if members of ISIL are using a cultural site as a fighting position.

As the staff gets ready to brief the commander on potentially targeting that bridge, they are going to do a lot of homework, including gathering a lot of intelligence on that bridge. They are going to look at who else uses that bridge and traffic patterns so they know the times when the bridge is full of people and when it is not. Is it only used by enemy fighters or is it used by civilians too? They are going to look in the area and see where the next nearest bridge is, whether it is close or far away. They are going to look at the capability of this bridge and others in the area to carry heavy loads such as military vehicles. In other words, if this bridge can carry heavy loads and there is another nearby bridge that cannot, but that civilians could still use to cross the river, the commander is going to want to know that.

The lawyer is going to help the staff in this process by analyzing the proposed strike to advise on whether taking it would comply with the law of war principle of proportionality. The lawyer's advice helps the commander assess whether or not to take the strike, such as if the attack on the military objective would be expected to cause incidental harm to civilians and civilian objects that would be excessive in relation to the concrete and direct military advantage expected to be gained.

The staff would apply a methodology to estimate collateral damage, which includes an analysis of different ways to attack the target. For example, they conduct what is called a "weaponeering" analysis, where they evaluate the best type of munition to use and calculate its likely effects. They could recommend adjusting the angle of the weapon's impact to minimize any collateral effects. Depending on the weapon or the angle at which it hits the target, this potential attack on the bridge might cause damage to nearby buildings or even certain sections of the bridge – or it may leave them more or less undamaged. The staff will take this into account and will make recommendations on the weapon, angle, and other factors in order to achieve the desired effect while minimizing collateral damage. They may bring in an engineer to give advice on which section of the bridge they should strike such that it can't be used by ISIL in the short term, but it could more easily be rebuilt after the conflict is over. In some contexts, the staff may notify and seek concurrence from the government of a host nation where operations are occurring.

Additionally, they consider important questions such as the best time to attack the bridge so that the fewest civilians are in the area, such as striking the bridge at night. They will consider whether it is feasible to take steps to warn civilians in the area of a strike, without compromising the effectiveness of the attack. This could be done with leaflets, or radio broadcasts, or even firing a warning shot to get people off the bridge before the strike. These are all considerations that assist the staff in recommending to the commander the best way to conduct the attack that accomplishes the military mission, but also complies with law of armed conflict principles such as distinction and proportionality, as well as the rule requiring feasible precautions to reduce the risk of harm to civilians and civilian objects.

In some cases where, despite the best efforts to minimize the risk to civilians, the risk of causing significant civilian casualties exists, there's an additional process for seeking higher-level approval in the chain of command. Seeking higher-level approval can be important for a number of reasons. Senior commanders may have a better understanding of the political and strategic context and can exercise a more well-informed judgment expected of them regarding whether the concrete and direct military advantage expected from the strike warrants the additional expected civilian casualties.

Once the staff has finished its work, the recommendation is taken to the commander, who is briefed about all the information gathered on the potential target and will then make a decision as to whether or not to attack it. If the commander determines it meets all the legal and other policy requirements, consistent with the advice of the military lawyer, and that it supports the assigned military mission, he or she will approve the attack. Then the staff will continue to monitor the target until the attack takes place, informing the commander of any changes to the information in case that may alter the commander's decision.

One additional note worth making here: the example of the bridge is one where the target is an object. If the contemplated use of force were intended to be lethal – that is if, for example, enemy forces were on the bridge – the analysis would include these same law of armed conflict principles of distinction, proportionality, military necessity, and so forth.

Also if the target is a terrorist or terrorist forces outside areas of active hostilities – meaning not in Iraq, Afghanistan, Syria, or certain parts of Libya—the policies that the legal advisor would review and apply would also include the Presidential Policy Guidance for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, which sets specific additional rules for those areas. The PPG, as it has come to be known, lays out procedures to determine whether the overseas target is lawful and then whether, as a matter of policy, the lawful target should be attacked. It lays out a policy preference to capture if feasible, rather than use lethal force, as well as prescribed procedures for high-level approval of such operations. The PPG generally requires that, among other things, lethal operations be conducted only against targets that pose a continuing, imminent threat to U.S. persons; that there must be “near certainty” that the terrorist target is present and that non-combatants will not be injured or killed; and that no other reasonable alternatives exist to address the threat to U.S. persons effectively. Decisions to use lethal force in locations to which the PPG applies are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise. And so, everywhere that the PPG applies, these are additional policy guidelines for the use of lethal force, and they are applied in addition to the law of war rules. Further, as a matter of law, force is to be used only when lawful under the relevant *jus ad bellum*, the law that governs the legality of the use of force in another state.

Throughout this target development and strike process, lawyers play a key role. During “deliberate” targeting, like the bridge example, lawyers are actively engaged in the process I’ve just discussed. Sometimes that lawyer might consult with lawyers in higher headquarters, including the attorneys in the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff who can give additional expertise or insight, or the lawyers in my office.

At other times, however, commanders have to make rapid-fire decisions in what I earlier referred to as “dynamic” targeting. In such cases, there may not be extensive time to work through all of the steps that might be involved in a deliberate strike. For example, there may not

be time to consult an engineer who can advise on the optimal location to strike a bridge. But in dynamic targeting, too, the lawyers are integral. A military lawyer often sits right next to – or at least very near – the commander making the targeting decisions in the joint operations center or targeting cell to advise on dynamic strikes. There, the judge advocate participates in the discussion, hears the relevant information, and gives legal advice on proposed strikes.

I recently traveled to the Middle East to meet with our service members there who are involved in on-going military operations, including counter-ISIL operations, and I witnessed the targeting processes in action first-hand. I visited lawyers who provided legal analysis as the weapons operators generated computer models that displayed and assessed the projected damage by the various weapon systems. I saw the comprehensive legal check lists these judge advocates had produced to ensure that commanders, operators, and planners had the relevant information to enable them to make decisions in accordance with the law of armed conflict. I observed, and the lawyers themselves indicated, that commanders respected their advice.

At one location, I observed a dynamic strike take place. I was in a meeting at the Joint Operations Center. A military lawyer, also present in the meeting, got called into the strike cell to work with the commander who was the target engagement authority – the ultimate decision maker. The proposed target consisted of two VBIEDS that were completed but not yet on the move to where they would be detonated. Before authorizing the strike, the commander methodically worked through the analysis of whether the target was a valid military target. He asked lots of questions, including what information supported the assessment that these were VBIEDS, and that the people near them were ISIL fighters, what weapons were available, whether any civilians were nearby and how his staff reached their conclusion to these questions, what the collateral effects would be, whether those collateral effects would be proportionate to the concrete and direct military advantage expected to be gained by striking the target. Cameras scanned to get close up views and also to pull back to provide a wide-angle view in order to see if there were other buildings or people nearby. This all moved very quickly, and involved input from a room full of people with different dedicated jobs. Ultimately, once the target engagement authority was satisfied, he asked the judge advocate whether he had any remaining legal or policy issues, and when the lawyer did not, the commander decided to carry out the strike.

II. Cash and Revenue-Generating Targets

Now that I have laid out the targeting process for you, I would like to discuss a specific set of targets that have generated a lot of discussion lately. This set of targets is sometimes referred to as war-sustaining or revenue-generating targets. In current operations against ISIL, these targets include such things as oil production or oil transportation assets and bulk cash storage sites. Although these types of targets are classified as “war-sustaining” targets, that term describes a broader category of targets than what I am talking about here. All of the four permanent members of the U.N. Security Council that are conducting operations in Syria – the UK, Russia, and France in addition to the United States – have struck these kinds of sites –

particularly petroleum installations – in order to deny resources to ISIL. In carrying out these strikes, our government has worked to ensure that U.S. operations adhere to the law of armed conflict, the law of nations, and to principled policy guidelines that guard against overbroad targeting.

It is important to understand that we do not believe categorically that we can target any and all cash or revenue-generating objects simply because of their nature. Rather, we consider each potential target on a case-by-case basis and evaluate it in light of the information we have available, in order to assess whether it meets the definition of a military objective. This is no different than any other target. And thus before striking it, we must be sure that all legal requirements are met, including two in particular – the principles of distinction and proportionality. Again, this is no different than any other object we might target.

The same targeting principles that applied to my bridge example with the VBIEDs also apply to war-sustaining targets, or for this discussion, cash and revenue-generating targets. That is, the principle of distinction requires us to distinguish between civilian objects and military objectives and only to direct attacks against military objectives. And, military objectives, insofar as objects are concerned, are those objects which, by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances at the time, offers a definite military advantage. The U.S. view is that this definition may encompass certain objects that make an effective contribution to the enemy's ability to conduct or sustain combat operations. This definition has appeared in treaties that the United States has accepted, including treaties applicable to non-international armed conflict.

The definition of military objective is generally broken down into two prongs: (1) “effective contribution to military action;” and (2) “definite military advantage.”

First, the targeted object must make an effective contribution to military action. In the case of ISIL and the targeting of certain petroleum facilities it controls, petroleum is the principal source of support for ISIL's armed action. ISIL regularly uses petroleum to support its armed action, and, indeed the organization depends on it. The money it receives from sales of petroleum is used to purchase weapons and pay fighters. ISIL funnels petroleum revenues directly to the group's fighting forces. Similarly, with the bulk cash storage sites ISIL controls, money is used by the armed group to recruit and retain fighters or to buy weapons, ammunition, fuel, and other supplies and equipment. Given this analysis, certain petroleum facilities such as pumping stations or the transportation assets that take the oil either to its depots or to market to be sold make an effective contribution to ISIL's military action, as has certain cash stored in ISIL bulk cash storage sites.

The second part of the legal test is that the complete or partial destruction of the object must offer a definite military advantage in the circumstances at the time. This requirement

generally excludes attacks for which anticipated military gains are indeterminate or speculative. Because ISIL controls and depends on petroleum production, sales, and revenue for its military operations, the military advantage the United States gains from striking this infrastructure is not indeterminate or speculative. The United States eliminates not only the use of the petroleum for military purposes, but also the opportunity to sell the petroleum to create cash that will also be used for military purposes. Also, ISIL cannot easily substitute petroleum for other sources of ready fiscal income. So the military effects of damaging or destroying ISIL-controlled petroleum facilities will be more certain than they might otherwise be if ISIL could easily replace that revenue from other sources. The same is true for ISIL forces' stores of bulk cash. When we destroy actual currency at an ISIL bulk cash storage site, it represents a real loss to ISIL's ability to buy weapons and fund fighters because ISIL cannot easily replace the money by printing legitimate currency.

When we analyze both of these legal requirements, we do so based on available intelligence. We use this information to assess whether our strikes will likely have the effect of degrading ISIL. And when we target these types of objects over an extended period of time, we evaluate, through intelligence assessments, whether it is in fact producing the expected results. We look through after-strike assessments to see whether these types of targeted strikes are stunting ISIL's ability to pay or recruit its fighters, purchase weapons and ammunition, and carry out other armed activities.

These two requirements exclude civilian objects from attack. Although each target must be assessed based on its facts and circumstances, all else being equal, each additional link in a causal chain between an object and its contribution to military action will generally make the military advantage to be gained from its destruction less certain, and more remote, and therefore less likely to qualify as "definite." In addition, who controls the object can be significant. For example, a mom-and-pop operation to sell oil generally would not qualify as a military objective because an independent actor, and not ISIL, is controlling the object. Similarly, we would not generally target a civilian operated bank, which is different from a bulk cash storage site used by ISIL to fund salaries for its fighters.

After applying the rules to determine whether a cash or revenue-generating object is targetable as a military objective, we must still apply the proportionality rule and assess feasible precautions. In targeting these objectives, we must refrain from an attack that is expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the anticipated concrete and direct military advantage. As I described in the discussion of our targeting process, targeteers and weapons specialists work to minimize the risk of harming civilians in a strike. All civilians, as long as they are not directly participating in hostilities, are factored into their calculations. For example, when feasible, we have minimized the risk to civilian truck drivers who are driving petroleum to a black market site by dropping leaflets and warning the truck drivers away from the trucks. We also consider the civilians who are present at or near the bulk cash storage sites, and we refrain from taking such strikes if civilian casualties

are expected to be excessive in relation to the concrete and direct military advantage expected to be gained. Further, as with the assessment of whether an object constitutes a military objective, any proportionality assessment must necessarily be fact-dependent and context-specific. For cash and revenue-generating objects controlled by ISIL, the proportionality analysis can be complex, especially if it raises questions about secondary effects on the civilian population.

In sum, U.S. operations against ISIL's war-sustaining capabilities are grounded in long-established legal understandings of legitimate military targets. By applying these requirements, along with other relevant rules, we ensure that our operations adhere to the law of armed conflict and remain a principled approach to defeating ISIL.

I can describe for you how this process played out in an actual attack on a bulk cash storage site that occurred in January of this year. The proposed target was an ISIL bulk cash storage site located in Mosul, Iraq. The military commander's staff who considered the strike used the targeting process discussed above and the lawyers involved applied the previously-described legal analysis for cash and revenue-generating targets.

Given the facts of this specific situation, including the intelligence that the cash was being used to pay ISIL fighters and conduct terrorist operations, the targeting authority determined that the bulk cash was a legitimate military objective. The next step then for the targeting authority before approving the strike was to conduct a proportionality analysis.

This bulk cash storage site happened to be in an area where civilians were often present—as you might expect from a building that used to be a civilian bank before ISIL turned it into a cash storage site. As a result of the high number of civilians in the area, the targeting authority took specific steps to minimize potential harm to civilians by ordering the attack to occur at a time when the potential for any civilian casualties was deemed to be the lowest.

With respect to the effectiveness of the attack and the resulting military advantage gained by U.S. and coalition forces, news reports later in January indicated that ISIL was cutting the salaries of its fighters in half. In April of this year, Secretary of Defense Carter testified before Congress that “our attacks on ISIL's economic infrastructure – from oil wells and trucks to cash storage to ISIL's financial leaders – is putting a stranglehold on ISIL's ability to pay its fighters, undermining its ability to govern, and making it harder to attract new recruits.”

III. Law of War Manual Revisions

So, I hope I have been able to shed some light on the targeting process for you. As you can tell, it is often a complex and involved process. There are certainly times when a targeting decision is not difficult, but there are also occasions when these decisions are extremely difficult and the lawyers providing legal advice to the targeting authority need the very best resources to assist them. As I mentioned earlier, one of those useful resources is the Department of Defense Law of War Manual. The Manual is a publically available document written to “provide

information on the law of war to [Defense Department] personnel responsible for implementing the law of war and executing military operations.” The Manual was initially released in 2015, and we have already updated it once, reflecting some changes to clarify the discussion of journalists. That update was made better by a robust process of dialogue with journalists and colleagues in the government, leading to clarifications that make the Manual a stronger resource for our practitioners.

We expect to update it periodically because for the Manual to achieve its purpose, it has to be a living document and provide as much clarity on the very tough issues on which these lawyers must provide advice. In order to accomplish that, we continue to review it and amend it to make it a better resource for the JAGs in the field. Let me give you a current example that concerns targeting and the principle of proportionality we have been discussing.

One of the very difficult questions in targeting is how to deal with what we call human shields. These are civilians who either willfully place themselves on or near military objectives, or are forced to do so, in an effort to prevent those objectives from being attacked because our enemies know that we strive to avoid injuring civilians. There are an endless number of test questions that could deal with this issue on a law of armed conflict class final. Unfortunately, our JAGs often have to deal with the question when real lives are at stake. The current version of the Manual provides some information on this, but we have determined that we could provide greater detail that would be more helpful to the lawyers in the field. So, we have been working on our next revision of the Manual and it will provide greater clarity on the DoD legal view of human shields, noting that whether voluntary or involuntary, civilian “human shields” would not be considered to be directly participating in hostilities and would not thereby lose their protections from attack. Specifically, the revised Manual clarifies that the proportionality rule applies to these individuals and that feasible precautions must be taken to reduce the risk to human shields.

Similarly, commentators and others have read the Manual and raised questions about how civilians who are proximate to military operations, such as workers in a factory that produces military weapons, are factored into the proportionality analysis. Arguments range from “they should receive full protection as civilians” to “they have forfeited their protections and are entitled to receive none.” The revision of the Manual will clarify that the proportionality principle applies to these civilians, and that feasible precautions must be taken to reduce the risk of harm to them, although their choice to support military operations in or on a military objective may be weighed by commanders as a factor in the proportionality analysis.

I am pleased that our Department can engage in productive dialogue about these issues, and that we can respond relatively quickly and carefully when those who read the Manual point out to us that parts of it may be unclear. Ultimately, clarifying misimpressions and improving the manual advance our fundamental mission of keeping our country secure. I believe it reflects well on the men and women who serve that mission with incredible dedication.

Conclusion:

I hope this presentation has given you a better understanding of the targeting process that the Department of Defense uses in our on-going military operations. And if you found this interesting, I have a pitch to make to all of you students in the audience. We have literally thousands of military and civilian attorneys across the Department of Defense, some of whom deal with these same kinds of issues on a daily basis. The range of legal practice is extremely diverse. It includes the lawyers embedded in our targeting cells, those supporting our special operators and our combat units and task forces. It also includes a great many other legal practice areas besides targeting, from helping to resolve landlord-tenant issues to reviewing proposed legislation, to prosecuting, defending and assisting victims in cases in court. The legal issues are fascinating. And the sense of mission and the satisfaction that comes from practicing public service law in this area are immense. It is an exciting and diverse practice that I hope appeals to you. We have a lot to offer and I hope you will seriously consider joining us.

I would like to conclude by observing that as we transition to a new Administration, there undoubtedly will be changes as policies are rethought. But the enduring interests of the United States continue, as does the obligation of the United States to comply with the law of war and the law of nations. The role of the lawyer within the military, and within the Department of Defense will continue to be of enormous importance, and I am confident that the superb civilian and military lawyers I have worked with will continue to help the United States serve as a beacon of liberty, security and the rule of law.

I would like once again to thank Ryan and Dean Morrison for inviting me here, and all of you for listening. It is a great honor to have been able to speak with you this evening.