



# Law Warriors Needed

December 18, 2017 **Ilan I. Berman** *U.S. News & World Report*

**Related Categories:** Democracy and Governance; North Korea; Russia

"The first thing we do," proclaims one of the characters in "Henry VI," Shakespeare's famous play about palace intrigue, "let's kill all the lawyers."

Over the ages, the phrase has become ubiquitous - and synonymous with popular disdain for what is widely seen as an elitist, out-of-touch profession. Yet today, the expertise of legal professionals is desperately needed to help the U.S. navigate the emerging geopolitical discipline known as "lawfare."

In strategic terms, "lawfare" represents a comparatively new phenomenon. U.S. military planners first formally articulated the use of law as a weapon of war as a discrete concept less than two decades ago. It is also a poorly understood one. Historically, the United States has paid little attention to the effects that law can have on national security decision-making, or to the ability of international norms to constrain - or conversely, to expand - the operating environment for our diplomats and soldiers.

America's adversaries, by contrast, have given the subject considerably more thought. More and more nation-states (among them Russia, China, Iran and North Korea) have begun to "weaponize" international law and harness it as a tool to advance their own strategic interests.

So far, our answer to these initiatives has been deeply deficient. For example, the U.S. government has yet to mount a serious, sustained challenge to Russia's expanding territorial claims in the Arctic, despite the region's emerging importance to the global energy market. Similarly, we have paid far too little attention to the potential of Iran's persistent territorial claims to key parts of the Persian Gulf, or seriously challenged North Korea's expansive conception of permissible conduct under international law.

On those select occasions it has attempted a response, the U.S. has actually made matters considerably worse. Thus, in 2015, when the United States Pacific Command carried out "freedom of navigation" operations intended to challenge China's emerging territorial claims in the South China Sea, the legal doctrine it invoked - that of "innocent passage" - inadvertently strengthened China's hand by implicitly suggesting that American ships were in fact traversing sovereign Chinese territory.

Reversing this policy drift requires U.S. decision-makers to pay greater attention to the importance of creating clear, unambiguous legal precedents that deny potential adversaries their desired freedom of action. And it requires them to craft a formal "lawfare" doctrine that is aimed at advancing U.S. strategic interests through the use of international law, and at countering the legal initiatives of other states in the international system.

Proper staffing will be needed as well. Today, with nearly 1.4 million licensed lawyers, the U.S. boasts one of the highest percentages of legal professionals per capita in the industrialized world. Yet the overwhelming majority of these lawyers (some 75 percent) can be found in private practice; less than 10 percent of America's total legal workforce is currently estimated to be employed in government.

There are practical reasons for this, from vastly more lucrative private sector salaries to the rapid turnover rate generally associated with mid- to upper-level government employment. But the effects amount to nothing short of a brain drain of competent legal professionals from the national security space. Retaining this talent requires creating incentives (including financial ones) for lawyers to join or remain in government, and establishing institutions and mechanisms that give them a louder voice in the national security debate.

Underpinning all of this should be a key realization. It is a vital U.S. strategic interest to establish, and then to preserve, the broadest possible freedom of action in the international arena through the proactive manipulation of legal principles. After all, America's contemporary adversaries are all actively working to reshape the international legal order to advance their own strategic objectives. We need to be doing the same to promote ours.

*Ilan Berman is senior vice president of the American Foreign Policy Council in Washington, D.C. He is the Editor of The Logic of Irregular War: Asymmetry and America's Adversaries, which has just been released by Rowman & Littlefield Publishers.*