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The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities

Redefining State Power and Individual Rights in the War on Terrorism

Jonathan Hafetz

Essays

REDEFINING STATE POWER AND INDIVIDUAL RIGHTS IN THE WAR ON TERRORISM

Jonathan Hafetz*

I. INTRODUCTION

America's "war on terrorism" initiated after the September 11, 2001 terrorist attacks has served more than a rhetorical function.[1] It reflects the U.S. government's considered legal position that it is engaged in an armed conflict against al Qaeda, the Taliban, and associated groups—a conflict of unbounded territorial scope and uncertain, if not perpetual, duration. The United States' adoption of a war paradigm as a central part of its counter-terrorism policy has had significant consequences. Among the most important has been the expansion of state power at the expense of individual liberties.

This Essay explores the impact of the war on terror on the detention and treatment of terrorism suspects. Part I describes the shift in U.S. policy after the 9/11 attacks and the legal underpinnings of the war on terrorism. Part II examines how a war paradigm underlies key aspects of the United States' approach to terrorism, including: (1) indefinite detention; (2) the use of military commissions rather than regular criminal courts; and (3) the rendition of terrorism suspects. Part III explores the ways in which the war on terrorism has become institutionalized, and the consequences for the state, society, and individual rights.

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[1] This Essay will use the phrase "war on terrorism" to describe the United States' armed conflict with al Qaeda, the Taliban, and associated forces. Although the Obama administration has refrained from using this phrase, it has maintained that the United States is engaged in an armed conflict with al Qaeda and affiliated terrorist groups and continued many "war on terrorism" policies.

II. THE ORIGINS OF THE WAR ON TERRORISM

Vice President Dick Cheney has said that "9/11 changed everything."[2] But it was the decisions made after the 9/11 attacks that had the most far-reaching impact on U.S. counter-terrorism policy. The shift in the United States' approach to terrorism was immediate. On September 18, 2001, President Bush signed into law a joint congressional resolution authorizing him "to use all necessary and appropriate force against those nations, organizations, or persons" responsible for the 9/11 attacks as well as those who "harbored" them.[3] Addressing the nation two days later, President Bush framed the fight in terms of an apocalyptic armed struggle. "Americans," he said, "should not expect one battle but a lengthy campaign unlike any other we have seen."[4] This new war, President Bush suggested, would not be fought against another country, or necessarily on battlefields, but instead would be waged across the globe against a transnational terrorist organization and its affiliates.

President Bush's framework sought to galvanize the country and to signal that the United States would use all of its power and resources to fight terrorism. It also, however, indicated an important change in U.S. policy, away from treating terrorism through a law enforcement model and towards the adoption of a military-based approach. In the following months, the precise contours of this new kind of war—the war on terror—would be defined through a series of executive-branch memoranda and decisions.

On November 13, 2001, President Bush issued an order calling for the establishment of military commissions to try prisoners for war crimes.[5] The United States had not used military commissions since World War II, and its past use of these *ad hoc* tribunals had been criticized for denying defendants due process and implementing a form of victor's justice.[6] President Bush's order nevertheless swept broadly,

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2 *Meet the Press: Dick Cheney* (NBC television broadcast Sept. 14, 2003), *available at* http://www.msnbc.msn.com/id/3080244/ns/meet_the_press/t/transcript-sept/ (transcript).

3 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

4 Frank Pellegini, *The Bush Speech: How to Rally a Nation*, TIME U.S. (Sept. 21, 2001), http://www.time.com/time/nation/article/0,8599,175757,00.html.

5 Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,831–36 (Nov. 16, 2001), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 25–28 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

6 *See, e.g.*, LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003); Alan W. Clarke, *De-Cloaking Torture:* Boumediene *and the Military Commissions Act*, 11 SAN DIEGO INT'L L.J. 59, 86 n.115 (2009)

authorizing the commissions to prosecute any foreign national the President had "reason to believe . . . was a member of . . . al Qa[e]da" or had "engaged in, aided or abetted, or conspired to commit" a terrorist act.[7]

In addition, the administration began describing prisoners as "enemy combatants," claiming that the government could detain them indefinitely without charge instead of prosecuting them. In war, the administration argued, enemy combatant detentions were routine and well-accepted. A substantial number of prisoners detained after 9/11, however, bore little, if any, resemblance to any established definition or traditional understanding of a "combatant." The prisoners included individuals who were not members of an enemy government's armed forces, had not been on a battlefield, and had not taken part in hostilities against the United States or its allies. Some prisoners were seized outside areas of armed conflict altogether, in places such as Bosnia or The Gambia.[8]

Intelligence-gathering was a central, if not the primary, goal of the detentions. As Vice President Dick Cheney explained after the 9/11 attacks, the United States planned to "work . . . the dark side," doing things "quietly, without any discussion, using sources and methods that are available to our intelligence agencies."[9] In a series of memoranda, the Justice Department's Office of Legal Counsel sanctioned various "enhanced interrogation techniques" that bordered on, and in some cases amounted to, torture, including water-boarding, cold cell, and prolonged sleep deprivation.[10] War helped to supply a justification for these techniques, which the Bush administration grounded in the President's power as commander-in-chief under Article II of the Constitution—a power that the authors of the *Torture Memos* claimed was without restriction—notwithstanding the Geneva Conventions, the

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7 Military Order of November 13, 2001, *supra* note 5, § 2(a).

8 Gabor Rona, *An Appraisal of US Practice Relating to 'Enemy Combatants,'* 10 Y.B. INT'L HUMANITARIAN L. 232 (2007).

9 *Meet the Press: Dick Cheney* (NBC television broadcast Sept. 16, 2001), *available at* http://www.msnbc.msn.com/id/14720480/ns/meet_the_press/t/transcript-sept/ (transcript).

10 David Cole, *Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS, Oct. 8, 2009, http://www.nybooks.com/articles/archives/2009/oct/08/the-torture-memos-the-case-against-the-lawyers/; William Ranney Levi, Note, *Interrogation's Law*, 118 YALE L.J. 1434, 1434 (2009). *But see id.* at 1439 (arguing that U.S. interrogation policy allowed the flexibility to engage in highly coercive interrogation practices long before 9/11).

Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, and a federal statute criminalizing torture.[11]

These policies were not devised in a vacuum, but were designed to facilitate the detention and interrogation of individuals in U.S. custody. By January 2002, the United States had already started bringing prisoners to its naval base at Guantánamo Bay, Cuba; that facility would ultimately hold 779 men (171 remain there today).[12] In addition, the United States detained prisoners at Bagram Air Base in Afghanistan (where it currently holds approximately 1800 prisoners),[13] as well as at secret overseas CIA jails, known as "black sites."[14] The United States also rendered prisoners to foreign governments for torture. Together, these practices helped create a new U.S.-run global detention system.[15]

The war on terror provided the overarching framework for this system. This war, moreover, was defined in such a way to render inapplicable international humanitarian law or other legal constraints. The Bush administration, for example, maintained that the Geneva Conventions did not apply to al Qaeda or Taliban members, arguing that prisoners in the war on terror were not protected even by Common Article 3.[16] Article 3 applies in non-international armed conflicts (i.e., conflicts not between two nation states) and prohibits torture, cruel treatment, and outrages on personal dignity as well as "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial

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11 Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS, *supra* note 5, at 172.

12 *See* Andy Worthington, GUANTÁNAMO: THE DEFINITIVE PRISONER LIST (PART I), http://www.andyworthington.co.uk/guantanamo-the-definitive-prisoner-list-part-1/ (last updated May 2011).

13 *See* Molly Hennessy-Fiske, *Review Board Decides Fates at Afghan Jail; Rights Groups Say Release Hearings at U.S. Facility Don't Afford Proper Counsel*, L.A. TIMES, May 11, 2011, at A3 (placing the number of detainees at 1800).

14 *See, e.g.*, Associated Press, *Secret CIA Prison in Romania Exposed: Report*, NYDAILYNEWS.COM, http://articles.nydailynews.com/2011-12-08/news/30492622_1_cia-prison-secret-cia-detainees (using this term to describe a recently discovered CIA facility in Romania).

15 *See* JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM (2011).

16 Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees to the Vice President, the Secretaries of State and Defense, the Attorney General, and Other Officials (Feb. 7, 2002), *in* THE TORTURE PAPERS, *supra* note 5, at 134–35.

guarantees which are recognized as indispensable by civilized peoples."[17]

Defining terrorism as a "new kind of war" not only facilitated the creation of Guantánamo and other prisons outside the law.[18] It also paved the way for far-reaching changes in the United States' approach to the detention, trial, and treatment of prisoners in its custody.

III. U.S. COUNTER-TERRORISM POLICY IN THE WAR ON TERROR

The language and logic of war has played a pivotal role in the United States' confinement of prisoners at Guantánamo and elsewhere. Not only did war provide a new nomenclature—the "enemy combatant"—to exempt terrorism suspects from the ordinary criminal process and trial, but it also supplied the rationale for a new form of detention.[19] War, by its nature, justifies indefinite confinement. As the Supreme Court explained in *Hamdi v. Rumsfeld*, the detention of enemy fighters to prevent their "return to the battlefield is a fundamental [and accepted] incident of waging war."[20] In the war on terror, however, these detentions are of both unlimited geographic and temporal scope: The conflict's battlefield is global and its duration is long and uncertain. Although in *Hamdi* the Supreme Court cautioned against expanding the President's military detention authority beyond the traditional understandings of armed conflict,[21] it did not limit that authority, and it accepted "enemy combatant" as a valid legal category. After *Hamdi*, the government continued to apply *Hamdi*'s logic to authorize detention beyond the battlefield in Afghanistan, and lower courts largely

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17 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138.

18 *See generally* Donald H. Rumsfeld, *A New Kind of War*, N.Y. TIMES, Sept. 27, 2001, http://www.nytimes.com/2001/09/27/opinion/27RUMS.html (using the phrase "new kind of war" to describe the operation against terrorist networks).

19 Under the Obama administration, the term "unprivileged enemy belligerent" was substituted for "enemy combatant." National Defense Authorization Act for Fiscal Year 2010, § 948a(7), Pub. L. No. 111-84, 123 Stat. 2190, 2575. The change, however, was mainly cosmetic and did not significantly affect the underlying scope or nature of the military detention power asserted. *See* Respondents' Mem. Regarding the Scope of the Govt's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442, filed Mar. 13, 2009 (D.D.C.) (TFH) ("Gov'ts Detention Authority Br."), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf (discussing the government's detention power under the 2001 Authorization for Use of Military Force).

20 Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion).

21 *Id.* at 521 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [the] understanding [that the AUMF authorizes detention for the duration of hostilities] may unravel.").

acquiesced in the government's expansive claims of detention authority.[22] Over time, the notion of a global armed conflict against al Qaeda and associated terrorist organizations took root, gaining acceptance among judges, lawmakers, and the public.

War has also provided a basis for limiting court review of detention operations. The United States has staunchly resisted federal habeas corpus jurisdiction over war-on-terrorism-detentions, citing the risks and difficulties posed by judicial review of military operations and interference with intelligence-gathering. While the Supreme Court ultimately upheld federal habeas jurisdiction over the petitions of Guantánamo detainees,[23] it established a multi-factor test for determining the extraterritorial reach of the Constitution's Suspension Clause that requires courts to consider the burdens on the government before finding an entitlement to habeas corpus.[24] Following *Boumediene*, the D.C. Circuit rejected extending federal habeas jurisdiction to the United States' detentions at Bagram to avoid interfering with military operations there.[25] Further, even regarding Guantánamo, the D.C. Circuit has narrowly construed the detainees' habeas rights—out of concern with interfering with military and counter-terrorism operations. In reviewing detainee habeas cases, the circuit has: (1) affirmed the continuing need for broad executive detention power in the armed conflict with al Qaeda, the Taliban, and associated forces;[26] (2) analyzed the government's allegations with deference and under lax evidentiary rules to accommodate the demands of the military and intelligence agencies;[27] and (3) precluded judges from granting effective relief to prisoners whose detentions are found by courts to be invalid.[28]

The D.C. Circuit's recent ruling in *Latif v. Obama* illustrates this approach.[29] In *Latif*, the appellate panel ruled that district judges must presume the accuracy of government intelligence reports unless rebutted by the petitioner. While the presumption purportedly applies only to the accuracy of what a report describes (e.g., that the detainee, in fact, made the particular statement to the interrogator), and not to the underlying

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22 *See* Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus after* Boumediene, 57 WAYNE L. REV. (forthcoming); *see also* Stephen I. Vladeck, *The D.C. Circuit after* Boumediene, 41 SETON HALL L. REV. 1451 (2011) (arguing that the D.C. Circuit narrowly applied *Boumediene*).

23 Boumediene v. Bush, 553 U.S. 723, 787 (2008).

24 *Id.* at 766.

25 Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

26 Al-Bihani v. Obama, 590 F.3d 866, 872–73 (D.C. Cir. 2010).

27 Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

28 Kiyemba v. Obama, 605 F.3d 1046, 1050–51 (D.C. Cir. 2010).

29 Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011).

truth of the information itself, that distinction makes little difference in practice. Under *Latif*, judges are unable to critically examine intelligence reports prepared by the government amid the fog of war, despite the fact that they often consist of multiple levels of hearsay and despite past findings by district judges of their unreliability. And a single such report—without any corroborating evidence—is sufficient to justify a prisoner's continued detention. As Circuit Judge David Tatel noted in dissent, the ruling "comes perilously close to suggesting that whatever the government says must be treated as true."[30] With this ruling, he explained, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[31]

The war paradigm has also made possible the development of a system of military commissions as an alternative forum to federal courts for trying terrorism suspects. Military commissions rest on the premise that members or supporters of al Qaeda and associated groups are subject to prosecution for a range of offenses under the laws of war by virtue of their membership in, or support of, terrorist organizations. Congress has twice legislated various offenses triable by military commissions.[32] Some of these offenses, such as murder in violation of the law of war,[33] rest solely on the defendant's status as an "unlawful enemy combatant" (or "unprivileged enemy belligerent" under current terminology).[34] This offense is based on the theory that any harm caused by unprivileged belligerents violates the laws and customs of war.[35] This theory, however, lacks support under international law, and exposes any person who fights against the United States or its coalition partners in the war on terror to prosecution as a war criminal, even if that person's actions—for example, shooting back at U.S. or allied military forces—would be lawful if committed by a privileged belligerent (i.e., one who qualifies for prisoner of war status under the Geneva Conventions).[36]

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30 *Id.* at 779 (Tatel, J., dissenting) (internal quotation marks omitted).

31 *Id.*

32 National Defense Authorization Act for Fiscal Year 1020, Pub. L. No. 111-84, 123 Stat. 2190; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

33 10 U.S.C.A. § 950t(15) (West, Westlaw through P.L. 112-89 (excluding P.L. 112-55, 112-74, 112-78, and 112-81)).

34 *See* David W. Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Charges Against Omar Khadr* 9–11 (Loyola Law Sch. L.A., Legal Studies Paper No. 2010-37, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract=1669946 (explaining why murder in violation of the law of war, as it has been applied in military commission prosecutions, is not a violation of the law of armed conflict).

35 *See id.*; Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 289 (2011).

36 Corn, *supra* note 35, at 290–91. Unlike privileged belligerents in international armed conflicts (i.e., conflicts between nation states), "nothing a non-state belligerent can do can

Other offenses, such as conspiracy to commit war crimes,[37] and material support for terrorism,[38] are generally not recognized as war crimes under international law.[39] The application of prosecution for these offenses to Guantánamo detainees raises problems not only under international law, but also under the Constitution's Ex Post Facto Clause (since they were not law-of-war violations when committed, and were made so only after the fact by congressional legislation). Additionally, the prosecution of military commission defendants for providing material support for terrorism creates significant jurisdictional overlap with Article III courts, as that charge is commonly leveled by prosecutors against defendants in federal criminal cases.[40]

Framing terrorism as war has not only helped expand the substantive scope of criminal liability through military commission jurisdiction, but has also led to a diminishment of safeguards against wrongful imprisonment. As in the habeas corpus detention cases, the government has argued that the exigencies and challenges presented by the war on terrorism warrant laxer evidentiary rules and procedural protections than those required in regularly established courts, whether under the federal criminal or military justice systems. In *Hamdan v. Rumsfeld*,[41] the Supreme Court rejected the government's argument that those exigencies justified deviating from the rules of military courts-martial under the Uniform Code of Military Justice ("UCMJ"), including by allowing the accused's exclusion from proceedings and denying the accused access to evidence in certain circumstances.[42] Yet, while

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ever result in 'lawful' belligerent status, [thus] impos[ing] an *international* legal sanction without a complimentary *international* legal reward." *Id.* at 291.

37 10 U.S.C.A. § 950t(29).

38 10 U.S.C.A. § 950t(25).

39 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 597–98 (2006) (plurality opinion of Stevens, J.) (concluding that conspiracy is not a war crime under the law of war); David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 362 n.48 (2008) (noting that "providing material support for terrorism" is not considered a war crime under international law).

40 RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 31–38 (2008), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf (discussing prosecutors' use of the material support for terrorism statute in federal criminal prosecutions); *see* HUMAN RIGHTS FIRST, FACT SHEET: TRYING TERROR SUSPECTS IN FEDERAL COURTS (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf (same).

41 548 U.S. at 620–23.

42 *Id.* at 622–25 (finding that the military commissions violate article 36(b) of the UCMJ, which requires "'uniform[ity] insofar as practicable'" between courts-martial and military commission rules (quoting 10 U.S.C. § 836 (2000))); *see also* David J. R. Frakt, *Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War*, 46

subsequent legislation has repaired some of their deficiencies, military commissions still give the government greater latitude to rely on hearsay, and contain fewer protections against the use of coerced evidence, than regularly established courts.[43] War, in short, has been invoked to justify the development of a separate adjudicatory system that lacks the same safeguards as federal criminal courts or military courts-martial.

In addition, war-based rationales underlay the Bush administration's extraordinary rendition of terrorism suspects, who were transferred to foreign governments or secret CIA-run prisons for torture or other highly coercive methods of interrogation. Before 9/11, the United States typically conducted renditions within a law enforcement framework, bringing terrorism suspects to the United States to face trial or sending them to foreign governments for legal process there.[44] Following 9/11, however, the United States broke with this rendition to justice model. Internal bureaucratic constraints were lifted, and terrorism suspects were transferred across the globe—outside any legal framework and with the specific purpose of subjecting them to torture or other mistreatment.[45] The legal construct of an armed conflict against terrorist groups helped pave the way for this shift, with its emphasis on unfettered executive power and its characterization of renditions as mere "wartime transfers" exempt from any constraints imposed by international human rights and international humanitarian law.[46]

IV. INTER-BRANCH ACCEPTANCE OF THE WAR ON TERRORISM AND THE IMPLICATIONS FOR STATE POWER AND INDIVIDUAL RIGHTS

The war on terror has triggered far-reaching changes that transcend any one administration. While the military detention of terrorism suspects is subject to greater legal constraints now than after 9/11, those

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VAL. U. L. REV. 729, 736–37 (2012) (describing the Bush administration's military tribunals that were invalidated in *Hamdan*).

43 David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration* (Loyola Law Sch. L.A., Legal Studies Paper No. 2010-32, 2010), *available at* http://ssrn.com/abstract=1658590; *see* Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part Two*, FINDLAW (Nov. 30, 2009), http://writ.news.findlaw.com/mariner/20091130.html.

44 HAFETZ, *supra* note 15, at 52–53.

45 Although the United States had begun rendering terrorism suspects to foreign governments during the mid-1990s, after 9/11, the practice expanded significantly, operated with fewer internal checks, and was no longer tied to the existence of legal proceedings against the suspect in the receiving country. *Id*.

46 Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1394–1418 (2006) (examining the legal justifications for extraordinary rendition).

detentions have also become institutionalized. The result has been to significantly expand state power, limit individual rights, and erode accountability mechanisms. This process of institutionalization is reflected in the actions of all three branches of the federal government.

Following his inauguration in January 2009, President Obama ordered the closure of the Guantánamo Bay detention facility within one year, and criticized the prior administration for abandoning human rights and constitutional values in the struggle against terrorism. President Obama's subsequent failure to close Guantánamo demonstrates the continued support for the new status quo among Congress, the practical obstacles to restoring legal safeguards after years of extrajudicial detention, and the extent to which national security policy itself has become highly politicized. It also suggests how deeply the assumptions behind the war on terrorism have become embedded in public policy and discourse.

Even as he promised to close Guantánamo, eliminate any remaining secret CIA prisons, and ban torture, President Obama himself endorsed central policies underlying the war on terrorism. While President Obama expressed a preference for trying Guantánamo detainees in federal court, he said that criminal trials were not always feasible, nor were they required.[47] President Obama instead accepted that there existed a category of individuals too difficult to try, but too dangerous to release, who could be detained indefinitely under the 2001 Authorization for Use of Military Force ("AUMF"),[48] as informed by the law of war.[49] President Obama also endorsed the use of military commissions to try terrorism suspects, after initially suspending all commission proceedings for four months.[50] Although President Obama acknowledged that the United States' prior use of commissions at Guantánamo was flawed, he believed that military commissions could provide a legitimate alternative to the federal criminal courts for the prosecution of certain terrorism suspects.[51] The administration thus supported legislation aimed at reforming commissions and making them a more viable forum for

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47 The White House, Remarks by the President on National Security (May 21, 2009) (National Archives, Washington, D.C.).

48 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

49 *Id.*

50 William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. TIMES, May 16, 2009, at A1.

51 *Id.*

terrorism cases.[52] With military detention and prosecution, the administration has, in short, pursued a policy of tool-maximization and legitimization: maintaining the government's flexibility to treat terrorism suspects under either a law enforcement or law-of-war paradigm, while making incremental reforms to make the military option more credible and sustainable.

Congress, in turn, has sought not only to entrench key war on terrorism policies, but also to expand them in new ways. It has sought repeatedly to prevent the closure of Guantánamo. Congress, for example, has prohibited the transfer of Guantánamo detainees to the United States for any purpose—whether for release, continued detention, or criminal prosecution in an Article III court.[53] It has also placed significant restrictions on the President's ability to transfer Guantánamo detainees to another country, including to their country of origin.[54] It enacted measures, for example, barring the transfer of any Guantánamo detainee to a country where there has been a confirmed case of recidivism by a former Guantánamo detainee who was transferred to that country[55] and requiring a foreign country to provide numerous guarantees about a transferred detainee's future conduct.[56] Together, these restrictions helped prevent Guantánamo's closure.

Recent legislation has not only further embedded war on terrorism detention practices, but expanded them in new ways. The 2012 National Defense Authorization Act ("2012 NDAA") expressly authorizes the military detention of individuals who were "part of" or who "substantially supported" al Qaeda, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners.[57] Although this provision of the 2012 NDAA largely codifies lower-court

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52 The Obama administration helped to secure passage of the Military Commissions Act of 2009, which created additional protections for defendants facing prosecution. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat 2190.

53 *See, e.g.*, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137.

54 *Id.* § 1033(c) (prohibiting the transfer of a detainee to his home country or any third country where any detainee previously transferred to that country engaged in terrorist activity following his transfer).

55 *Id.* § 1033(c)(1).

56 *Id.* § 1033(b) (requiring a foreign country to agree to ensure that a transferred prisoner will not take action to threaten the United States or its citizens or allies and to share information about the transferred prisoner with the United States regarding the prisoner or his associates that could affect the security of the United States or its allies).

57 National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011). The provision mirrors the detention authority claimed by the Obama administration. *See* National Defense Authorization Act for Fiscal Year 2010, § 948a(7) Pub. L. No. 111-84, 123 Stat. 2190, 2575.

interpretation of the President's detention authority under the AUMF,[58] the legislation contains several new measures, including one mandating that certain terrorism suspects be subjected to military detention.[59] While the President may waive this requirement if he deems it in the national security interests of the United States,[60] the legislation creates for the first time a default presumption of military custody in counter-terrorism operations.

Courts have largely accommodated the military treatment of terrorism suspects. They have, for example, accepted the analogy between members of al Qaeda (and associated terrorist groups) and traditional combatants, who may be detained until the end of the war to prevent their return to the battlefield. Courts have also accepted the use of military commissions to try terrorism suspects of war crimes. Although the Supreme Court invalidated the military commissions created by President Bush's November 2001 executive order, it did so on the basis of those commissions' failure to adhere to congressional requirements,[61] and invited subsequent legislative action in the field.[62]

Nor has the Supreme Court elsewhere rejected the government's attempt to treat terrorism suspects under a war paradigm. To be sure, in *Rasul* and *Boumediene*, the Court rebuffed the government's assertion of unreviewable executive detention overseas and held that Guantánamo detainees could invoke the federal courts' habeas corpus jurisdiction to challenge the lawfulness of their confinement.[63] And, in *Hamdan*, the Court ruled that all individuals held in connection with the war on terror, including suspected members of al Qaeda, were entitled, at minimum, to the protections of Common Article 3 of the Geneva Conventions.[64] But none of these decisions challenged the underlying premise that terrorism suspects could be subjected to military jurisdiction and detained or tried outside of the federal criminal justice

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58 *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010).

59 *See* H.R. 1540 (mandating military detention of individuals who are part of al Qaeda or associated forces and who "have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners"). The mandatory military detention provision excludes U.S. citizens. *See id.*

60 *Id.*

61 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 594–613 (2006) (describing the commissions' failures to adhere to congressional requirements).

62 *Id.* at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

63 Boumediene v. Bush, 553 U.S. 723, 799 (2008) (holding that Guantánamo detainees may seek habeas corpus review under the Constitution's Suspension Clause); Rasul v. Bush, 542 U.S. 466, 483–84 (2004) (holding that Guantánamo detainees may seek habeas corpus review under the federal habeas corpus statute).

64 *Hamdan*, 548 U.S. at 629.

system. Furthermore, by providing some constraints on the executive's more extreme assertions of power—whether by: (1) insisting on legislative authorization for military commissions (*Hamdan*); (2) providing for habeas corpus review of indefinite law-of-war detention (*Rasul* and *Boumediene*); or (3) affirming the application of baseline international legal protections against torture and other mistreatment (*Hamdan*)—these decisions have paradoxically helped to sustain war on terrorism detention practices through a process of moderation and legitimization.

America's response to new terrorist threats shows how much public perception and political debate have shifted since 9/11. After Nigerian Umar Farouk Abdulmutallab failed to detonate an explosive bomb hidden in his underwear while aboard a Northwest Airlines flight bound for Detroit, he was arrested and charged with attempted murder and use of a weapon of mass destruction. Politicians and pundits immediately attacked the Obama administration for prosecuting Abdulmutallab in federal court rather than in a military commission, even though federal prosecutors had obtained several hundred convictions in terrorism-related cases since 9/11, and military commissions had yielded only a handful, all plagued by controversy.[65] Opponents of using Article III courts to try terrorism suspects argued, for example, that a federal prosecution would undermine the government's ability to gain useful intelligence by preventing the use of harsh interrogation methods and mandating procedural protections, including that the defendant be afforded a lawyer.

Nearly a decade of viewing terrorism through the lens of war, rather than from a law enforcement perspective, has helped to make it possible to argue that terrorist suspects need not be charged in the regular courts or afforded the protections given other criminal suspects. It has also contributed to a climate of fear, in which only tough-sounding solutions have credibility in the public sphere, and where it is assumed that individual rights guaranteed under the Constitution must be sacrificed to protect security. This framing helps explain why, for example, the federal indictment of Somali terrorism suspect Ahmed Abdulkadir Warsame—after Warsame's two-month detention on a U.S. ship in the Gulf of Aden—prompted attacks against the Obama administration for failing to prosecute Warsame in a military commission.[66] Bringing Warsame to trial in the United States, rather than sending him to

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[65] Letter from Ronald Weich, Assistant Attorney Gen., to Senators Patrick J. Leahy (D-VT) and Jeff Sessions (R-AL) (Mar. 26, 2010).

[66] *See* Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 6, 2011, at A1.

Guantánamo, wrote Senators Joseph I. Lieberman and Kelly Ayotte, limited the government's ability to obtain intelligence, risked the disclosure of classified and other sensitive information, and endangered the country's safety.[67]

The United States' adoption of a war paradigm, moreover, has facilitated the expansion of other controversial practices, such as targeted killing, which involves the use of unmanned Predator drones to conduct deadly attacks against suspected terrorists. Outside of armed conflict, a state's authority to use deadly force is limited; domestic and human rights law require a concrete, specific, and imminent threat of death or serious physical injury to do so.[68] The United States, however, has utilized the expansive and malleable parameters of the war on terror to justify the targeted killing of alleged members of al Qaeda and al Qaeda offshoots in places like Yemen and Somalia, where the existence of armed conflict and the application of the law of war is uncertain.[69] At the same time, because targeted killing is justified as a wartime measure, it is more difficult to challenge in the courts given the hesitancy of judges to interfere with military matters and their historic deference to the executive in this realm.[70]

V. CONCLUSION

After the United States announced that it had killed Osama bin Laden, public officials and commentators were careful to emphasize that the threat of terrorism remained. In part, this reflected a pragmatic assessment that al Qaeda transcends any one individual, and that the danger posed by al Qaeda and other terrorist groups remains significant. But it also highlighted the contradictions and tensions underlying the war on terrorism itself. If the war is not over now, will it ever end and, if so, what will be the metric for answering this question? The withdrawal

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67 Joseph I. Lieberman & Kelly Ayotte, Op-ed, *Why We Still Need Guantanamo*, WASH. POST, July 22, 2011, at A17.

68 UNITED NATIONS, HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON 9–12 (2010), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 11–25 (Notre Dame Law Sch., Legal Studies Research Paper No. 09-43, 2010) (examining the legality of the use of military force against suspected terrorists).

69 *See* Philip Alston, *The CIA and Targeted Killings Beyond Borders* 51 (N.Y. Univ. Sch. of Law Pub. Law & Legal Research Paper Series, Paper No. 11-64, 2011) (noting the use of targeted killing in Yemen and Somalia).

70 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 54 (D.D.C. 2010) (dismissing on standing and political question grounds the placement of an American citizen located in Yemen on a targeted kill list).

of U.S. troops from Afghanistan? A determination by the President that the terrorist threat has been eliminated?[71]

As if to pre-empt these questions, lawmakers introduced legislation reaffirming that the United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces, expressly authorizing the indefinite detention of individuals who were part of or substantially supported enemy forces in that conflict, and omitting any nexus to the 9/11 attacks.[72] The legislation not only underscores the United States' commitment to a law-of-war-based approach to the detention and trial of terrorism suspects, but it also shows the malleability and durability of this framing mechanism.

Bin Laden's death should have prompted a re-examination of the war paradigm. But, instead, it reinforced how deeply—and perhaps irrevocably—that paradigm has permeated national security institutions, influenced counter-terrorism policy, and altered public opinion. Put another way, the last decade's expansion of government power and limitations on civil liberties seems less a temporary accommodation of the exigencies and demands of war than a permanent transformation in the relationship among the state, society, and the individual.

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[71] *See generally* Mary L. Dudziak, Op-Ed, *This War Is Not Over Yet*, N.Y. TIMES, Feb. 16, 2012, at A31 (describing the difficulties in determining when a war ends).

[72] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011); *see also* Hedges v. Obama, No. 12 Civ. 331, 2012 WL 1721124, at *26–28 (S.D.N.Y. May 16, 2012) (comparing the 2012 NDAA to the 2001 AUMF).