INTERNATIONAL

THE CONSEQUENCES OF A "WAR" PARADIGM FOR COUNTERTERRORISM: WHAT IMPACT ON BASIC RIGHTS AND VALUES?

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I. INTRODUCTION

> This administration today, here and now, declares unconditional war on poverty in America. I urge this Congress and all Americans to join with me in that effort. It will not be a short or easy struggle, no single weapon or strategy will suffice, but we shall not rest until that war is won.[1]
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> America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.[2]
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> Our war on terror begins with Al Qaida [sic], but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.[3]

Policy makers have used the rhetoric of "war" throughout the past century to describe a major governmental or societal effort to combat an evil that threatens society, national security, or some other communal good. The idea is a rhetorical tool, a technique for resource mobilization, and, above all, a method for coalescing authority to meet the challenge, whether the challenge is poverty, drugs, or—in the most recent example—terrorism. The "War on

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[1] President Lyndon B. Johnson, Annual Message to the Congress of the State of the Union, 1 PUB. PAPERS 112, 114 (Jan. 8, 1964), *available at* http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/640108.asp.

[2] President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control, 1 PUB. PAPERS 738, 738 (June 17, 1971), *available at* http://www.presidency.ucsb.edu/ws/?pid=3047.

[3] President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

Poverty"—launched in President Lyndon Johnson's first State of the Union address in January 1964—has never ended,[4] but it began to fade from the nation's consciousness in the 1990s with the passage of major welfare reform legislation.[5] The Obama Administration officially ended the use of the term "War on Drugs" in 2009,[6] nearly forty years after President Richard Nixon first launched the campaign in a message to Congress.

Soon after the September 11, 2001, (9/11) attacks made al Qaeda a household word throughout the United States and much of the world, the Bush Administration characterized U.S. efforts to defeat al Qaeda and associated terrorist groups as the "War on Terror." In this case, however, the terminology of "war" goes far beyond rhetoric, resource re-allocation, and centralizing authority. The United States responded to the 9/11 attacks with Operation Enduring Freedom in Afghanistan, a military campaign to: (1) destroy terrorist training camps and infrastructure; (2) capture al Qaeda leaders; (3) end terrorist activities in Afghanistan; (4) destroy the Taliban military; and (5) eliminate the safe haven for al Qaeda and other terrorists.[7] Over the past ten years, the United States has engaged in major military operations in Afghanistan and Iraq,[8] carried out an extensive drone campaign in

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[4] *See* Cal Thomas, Op-Ed., *Here's Where the War on Poverty Is Being Won*, WASH. EXAMINER, May 11, 2011, *available at* http://washingtonexaminer.com/opinion/columnists/2011/05/heres-where-war-poverty-being-won (opining that the War on Poverty has not been won).

[5] *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of U.S.C.).

[6] *See, e.g.*, Gary Fields, *White House Czar Calls for End to "War on Drugs,"* WALL ST. J., May 14, 2009, at A3 (describing the shift in the Obama Administration's approach to America's drug problem).

[7] *See generally* Bush, *supra* note 3 (announcing demands upon terrorist training operations in Afghanistan backed by the threat of U.S. military action); President George W. Bush, Address to the Nation Announcing Strikes Against Al Qaida [sic] Training Camps and Taliban Military Installations in Afghanistan, 2 PUB. PAPERS 1201 (Oct. 7, 2011), *available at* http://presidency.ucsb.edu/ws/?pid=65088 (describing goals and strategies of the "campaign against terrorism"); *see also Operation Enduring Freedom—Afghanistan*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/enduring-freedom-intro.htm (last visited Sept. 10, 2011) (listing initial military objectives of Operation Enduring Freedom).

[8] Operation Iraqi Freedom, the military operation launched in early 2003, is generally considered independent of the War on Terror, but the Bush Administration did connect the two military operations as part of its justification for invading Iraq. *See generally* Caitlin A. Johnson, *Transcript: President Bush, Part 2*, CBS NEWS (Sept. 10, 2009, 1:33 PM), http://www.

the tribal areas of Pakistan,[9] and launched strikes against terrorists in Yemen, Somalia, and Syria.[10] Thousands of people—including U.S. servicemen and women, terrorist operatives, Taliban militants, and civilians—have been killed,[11] and thousands of others have been detained in Iraq, Afghanistan, Guantanamo Bay, and other locations around the world.[12] However, even though the United States is or was engaged in an armed conflict in Afghanistan, Iraq, the border regions of Pakistan, and potentially in Yemen, the whole of the War on Terror does not fit within the concept of armed conflict as understood under international law.[13] Indeed, the War on Terror includes extensive criminal, financial, and other efforts to frustrate, capture, and prosecute terrorists outside the context of any use of military force.[14]

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cbsnews.com/stories/2006/09/06/five_years/main1980074.shtml (transcribing anchorwoman Katie Couric's interview with President Bush).

[9] *See* Bobby Ghosh & Mark Thompson, *The CIA's Silent War in Pakistan*, TIME, June 1, 2009, *available at* http://www.time.com/time/magazine/article/0,9171,1900248,00.html (discussing America's drone campaign in Pakistan).

[10] Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, N.Y. TIMES, Nov. 9, 2008, at A1, *available at* http://www.nytimes.com/2008/11/10/Washington/10military.html.

[11] *See* U.S. Dep't of Defense, Operation Enduring Freedom (OEF) U.S. Casualty Status Fatalities as of: March 20, 2012, http://www.defense.gov/news/casualty.pdf (last visited Mar. 20, 2012).

[12] Sherwood Ross, *28 Countries Helped U.S. Detain War on Terror Suspects*, ANTEMEDIUS (Mar. 30, 2010, 11:43 AM), http://antemedius.com/content/28-countires-helped-us-detain-war-terror-suspects (estimating possible detention of 100,000 suspects by United States and allies).

[13] The law of armed conflict conceptualizes both international armed conflict—a conflict involving two or more sovereign states—and non-international armed conflict—generally understood as a conflict between a government and a nonstate armed group or between/among two or more nonstate armed groups. *See infra* notes 19–20 and accompanying text. There remains extensive debate about whether a transnational conflict between a state and a nonstate armed group outside the borders of that state fits within the existing paradigms of the Geneva Conventions. Presently, the U.S. view is that the conflict with al Qaeda is a non-international armed conflict within the framework of Common Article 3 of the Geneva Conventions. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), *as recognized in* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that "non-international" does not necessarily connote only internal conflicts but also refers to all conflicts that do not fit within the parameters of state-to-state conflict in Common Article 2 of the Geneva Conventions).

[14] *See, e.g.*, Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT'L L.J. 455, 475 (2007) ("War is a

Unlike the purely rhetorical War on Poverty and War on Drugs, the War on Terror is not simply policy rhetoric; rather, it goes hand-in-hand with counterterrorism operations at home and abroad and with major military operations. This Essay will explore the consequences of the use of the terminology of "war" with particular emphasis in two areas: (1) the protection and content of basic rights and values and (2) the long-term effect on the interpretation and development of the law.

The rhetoric of the War on Terror has facilitated and encouraged the growth of authority without the corresponding spread of obligation in many cases. The drone campaign in Pakistan, indefinite detention, prosecution of crimes like conspiracy, material support for terrorism in military commissions, and other practices raise significant questions about the application of domestic and international law to counterterrorism operations, the long-term impact on executive authority, and the role of national security as a "trump card."

In addressing these issues, this Essay will focus on the interaction between the "war" rhetoric and the framework of the law of armed conflict. What impact does using an armed conflict framework for counterterrorism operations have on executive power and judicial review in these situations? What impact does characterizing counterterrorism operations, including law enforcement efforts, as a War on Terror have on the application and implementation of the law of armed conflict?

Although the accretion of authority under the rubric of the War on Terror over the past eleven years has certainly minimized the rights of certain persons and groups and magnified the power of the Executive, especially in the national security realm, it is important to look beyond these immediate effects. These changes have also affected the application and implementation of key bodies of law, such as human rights law, the law of armed conflict, and various domestic legal regimes relevant to national security

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critically useful strategic paradigm for understanding the long term struggle against Islamist terror, just as it was in the Cold War. . . . *Actual* war in counterterrorism, however, war that meets the strict legal definition of war—especially the large scale use of military force—is not usually about fighting the terrorists themselves. . . . It is more typically about fighting *regimes*—those that offer safe haven . . . or those that threaten to provide terrorists with weapons of mass destruction.").

and counterterrorism. This Essay focuses on the law of armed conflict framework, where the consequences are highlighted by the terminology of "war." The long-term ramifications of such effects—i.e., the expanded detention authority or the notion of a global battlefield—offer excellent examples of the power of rhetoric far beyond the meaning of the words. Rhetoric that mobilizes resources and creates a unity of purpose is powerful and can help lead a nation out of crisis. Rhetoric that fosters fear and enables the government to trample on individual rights poses great danger to basic rights and values and undermines the very legal and political framework that ostensibly protects those rights.

II. MIXING METAPHORS? THE "WAR ON TERROR" AND THE LAW OF ARMED CONFLICT

The law of armed conflict (LOAC) governs conduct during wartime and provides the overarching parameters for the conduct of hostilities and the protection of persons and objects.[15] It authorizes the use of lethal force as first resort against enemy persons and objects within the parameters of the armed conflict.[16] It also provides, based on treaty provisions and the fundamental principle of military necessity, for the detention of enemy fighters

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[15] The law of armed conflict is set forth primarily in the four Geneva Conventions of August 12, 1949, and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[16] *See* Geoffrey S. Corn, *Back to the Future: De Facto Hostilities, Transnational Terrorism, and the Purpose of the Law of Armed Conflict*, 30 U. PA. J. INT'L L. 1345, 1352–53 (2009) ("[A]rmed conflict is defined by the authority to use deadly force as a measure of first resort.").

and civilians posing imperative security risks.[17] Along with these authorities, however, come obligations—such as the obligation to use force in accordance with the principles of distinction and proportionality,[18] the obligation to protect civilians and those no longer fighting from the ravages of war to the extent possible, and the obligation to treat all persons humanely.

LOAC applies in all situations of international and non-international armed conflict, as set forth in the Geneva Conventions. International armed conflict involves any difference between two states involving the intervention of the armed forces;[19] non-international armed conflict encompasses protracted armed hostilities between a state and non-state armed group or between two or more non-state armed groups.[20] In light of the particular subject matter here—the rhetoric of "war" and its consequences—it is important to note that the drafters of the Geneva Conventions specifically declined to use the word "war" because of the ease with which countries in the past had used the absence of a declaration of war as a justification for not applying LOAC to a particular conflict.[21] "War" has thus become a political

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[17] *See* Third Geneva Convention, *supra* note 15, art. 4 (describing various prisoner of war categories); Fourth Geneva Convention, *supra* note 15, arts. 42, 78 (permitting internment).

[18] The principle of distinction mandates that all parties to a conflict distinguish between those who are fighting and those who are not and that parties only target those who are fighting. In addition, fighters, including soldiers, must distinguish themselves from innocent civilians. *See* Additional Protocol I, *supra* note 15, art. 48. The principle of proportionality states that parties must refrain from attacks where the expected civilian casualties will be excessive in relation to the anticipated military advantage. *See id.* art. 51(5)(b).

[19] *See* Common Article 2 to the four Geneva Conventions, *supra* note 15 (declaring that the Geneva Conventions apply in full to "cases of declared war or of any other armed conflict which may arise between two or more [contracting states], even if the state of war is not recognized by one of them").

[20] *See* Common Article 3 to the four Geneva Conventions, *supra* note 15 (prohibiting certain treatment as inhumane); Additional Protocol II, *supra* note 15, art. 1 (describing the applicability of Additional Protocol II to non-international armed conflicts as those conflicts "between [a state]'s armed forces and dissident armed forces or other organized armed groups").

[21] For example, during World War II, the Japanese claimed that their operations in China and Manchuria were "police operations" and, therefore, did not trigger the law of war. *See* International Military Tribunal for the Far East, *Judgment of 4 November 1948*, at 490 ("From the outbreak of the Mukden Incident till the end of the war[,] the successive Japanese Governments refused to acknowledge that the hostilities in China constituted a war. They persistently called it an 'Incident.' With this as an excuse[,] the military

term rather than a legal one. Nonetheless, there is little doubt that the use of the term to describe the U.S. struggle against terrorism has had profound effects on the law and its application.

Many scholars and advocates have written and discussed the comprehensive threats to individual rights that the War on Terror has fostered: black sites, extraordinary rendition, denial of habeas corpus, enhanced interrogation techniques—the list goes on and has been thoroughly documented.[22] Indeed, in-depth discussion of each of these categories of rights violations is beyond the scope of this Essay. Two challenges raised by the clash of "war" rhetoric and the application of LOAC to operations against terrorists are relevant here, though, because they directly demonstrate the consequences to the law and, in turn, the ability of the law to fulfill one of its central tasks: protection of individual rights.

A. A GLOBAL BATTLEFIELD?

First, the nature of the U.S. operations against al Qaeda and other terrorist groups raises the very real specter of a global battlefield. Traditionally, an international armed conflict takes place wherever the forces of the belligerent parties meet—including the high seas and possibly outer space—except the territory of neutral parties. The law of neutrality thus defines the relationship between states engaged in an armed conflict and states not participating and, in traditional conflicts, provided the boundaries for the conduct of hostilities.[23] Traditional conceptions of belligerency and neutrality do not effectively address the complex spatial and temporal nature of terrorist attacks and

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authorities persistently asserted that the rules of war did not apply in the conduct of the hostilities.").

[22] *E.g.*, David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55 (2006) (discussing enemy detention and the subjection of law of war violators to military tribunals); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005) (discussing the limits of interrogation and treatment of detainees); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) (discussing secret detention centers, rendition of enemy combatants to third party countries, and enhanced interrogation of prisoners).

[23] *Cf.* Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, ch. 1, Oct. 18, 1907, 36 Stat. 2310 (defining boundaries and responsibilities of neutral powers).

states' responses, however, leaving open fundamental questions about where the conflict with terrorist groups does and can take place. The rhetoric of the War on Terror seems to lead directly to a conclusion that the world is a global battlefield—that wherever a terrorist operative is found is part of the zone of combat.[24] The law, in contrast, is not so settled.[25]

Uncertainty about the scope and parameters of the conflict can pose significant risks for individual rights. First, invoking wartime authority is, at base, a decision to harness the authority to use force as a first resort against those identified as the enemy, whether insurgents, terrorists, or the armed forces of another state. In contrast, human rights law, which would be the dominant legal framework in the absence of a conflict, authorizes the use of force only as a last resort.[26] The former—LOAC—permits targeting individuals based on their status as members of a hostile force;[27] the latter—human rights law—permits lethal force against individuals only on the basis of their conduct posing a direct threat at that time.[28] LOAC also accepts the incidental loss of civilian lives as collateral damage, within the bounds of the principle of proportionality;[29] human rights law contemplates no such casualties.

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[24] The view of the Bush Administration was: "Our [W]ar on [T]error will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan." Kenneth Roth, Comment, *The Law of War in the War on Terror*, 83 FOREIGN AFF. 2, 2 (2004) (quoting President Bush's statement made on September 29, 2001).

[25] For a comprehensive discussion of LOAC and the problem of defining the battlefield, see Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1 (2010).

[26] *See generally* Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUM. LEGAL STUD. 52 (2010) (analyzing the relationship between international humanitarian law and international human rights law and the use of deadly force).

[27] *See* Additional Protocol I, *supra* note 15, art. 51 (prohibiting targeting individuals based on their status as civilians).

[28] *See* Corn, *supra* note 26, at 76 ("[D]eadly force is presumptively invalid unless and until the state actor determines that a genuine individual necessity to employ force exists.").

[29] *See* Additional Protocol I, *supra* note 15, art. 51 (prohibiting attacks expected to cause incidental loss of civilian life if "excessive in relation to the concrete and direct military advantage anticipated"); *id.* art. 57 (requiring that parties take precautions to refrain from

These contrasts can literally mean the difference between life and death in many situations. Indeed, "[i]f it is often permissible to deliberately kill large numbers of humans in times of armed conflict, even though such an act would be considered mass murder in times of peace, then it is essential that politicians and courts be able to distinguish readily between conflict and nonconflict, between war and peace."[30] To the extent that the terminology of "war" leads to a willingness to view the whole world as a battlefield, this rhetoric has had a profound (and unfortunately negative) effect on individual rights in a host of locations around the world. Moreover, the effect has not been even-handed: individuals living in countries where the United States is willing to use force against terrorist operatives are, naturally, at much greater risk of death, injury, or property loss than those in countries where the United States employs bilateral law-enforcement methods and cooperation.[31]

The global battlefield concept, a direct result of the rhetoric of the War on Terror, has had similar effects in the area of detention. Without engaging in a broader discussion about detention, it is relevant here to note simply that once we accept the idea of "war" everywhere, it becomes correspondingly easy to accept that persons captured anywhere in the world can be detained within the War on Terror paradigm. Decisions regarding the appropriate detention framework for a given individual often seem to be made on the basis of anything but the law, including raw political considerations. An individual captured in one location will likely face trial under the criminal justice system while another individual captured elsewhere will land in Guantanamo Bay or another U.S. detention facility with no prospect of trial or, at best, trial before the military commissions. Again, as with the use of force, the potential for grave violations of individual rights and for unequal treatment grows exponentially in such circumstances.

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disproportionate attacks).

[30] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 702 (2004).

[31] *See supra* text accompanying notes 8–12.

B. DETENTION "UNDER THE LAW OF WAR"

A second area in which the terminology of "war" has a profound effect on individual rights is the notion of long-term "law of war" detention for suspected terrorists. In the spring of 2011, the Obama Administration issued an Executive Order establishing indefinite detention "under the law of war" for a designated number of detainees at Guantanamo Bay.[32] Again, the terminology is critical. Using the term "law of war" to describe the indefinite detention of terrorist suspects suggests that the detention fits within an existing legal framework—that it has a legal imprimatur of sorts. There is little doubt that "law of war detention" sounds better than "indefinite detention," which conjures up images of persons held with no recourse to the courts or other means for challenging detention. LOAC does provide for detention without charge for both prisoners of war (POWs) and civilians in certain circumstances and for the duration of the conflict.[33] At issue here is whether the terminology of "war"—here, the label of "law of war detention"—is essentially "fixing" what would otherwise be a problematic legal framework.

One set of problems stems directly from the definitional uncertainties associated with a global "war": where the battlefield is and for how long the war lasts. The essential prerequisite to the notion of terrorist suspects being held in detention under the law of war is that we are operating within a paradigm that triggers the law of war: armed conflict. As noted above, however, assessing the parameters of the armed conflict against al Qaeda and other terrorist groups from a legal standpoint is difficult and remains the source of extensive debate. United States practice suggests that any identifiable parameters to the zone of combat are driven solely by case-by-case considerations rather than the application of a defined legal paradigm.[34] When law of war detention is

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[32] Exec. Order No. 13567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

[33] *See supra* note 17 and accompanying text.

[34] *See* Blank, *supra* note 25, at 22 ("[United States] practice, where decisions to use force are based on belligerent status or conduct rather than any adherence to geographical or spatial concepts, does indeed compel the conclusion that the [United States] views the whole world as a battlefield. And yet, at the same time, the [United States] also seems to view certain areas as outside the scope of appropriate belligerent activity, most likely based

fundamentally the detention of persons picked up on the battlefield, the inability to define the battlefield creates a risk of detaining persons who do not fall within the parameters of the armed conflict. An equally challenging and potentially graver problem lies in the wholly unknown timeframe of the conflict. In the case of armed conflict, detention of both POWs and civilians ends upon the cessation of hostilities.[35] Terrorism, however, rarely ends. Rather, it is something to be managed and minimized instead of defeated. Without any grasp of when the end of hostilities against terrorists might be or even what the end of hostilities might look like, it remains highly likely that "law of war" detention will actually become generational or lifetime detention—a paradigm not contemplated under the laws of war and one that raises significant moral and legal questions.

In addition, a closer examination of the purposes of both traditional law of war detention and the apparent purposes of detention of suspected terrorists at Guantanamo Bay demonstrate a significant diversion of purpose between the two types of detention. While the former is based on the notion of protective custody, the latter includes powerful suggestions—both overt and subliminal—that the detention is inherently punitive in some way. The Third Geneva Convention establishes a comprehensive framework of protective detention for POWs based on the primary purpose of preventing captured personnel from returning to hostilities.[36] POWs are not subject to prosecution for their lawful acts in combat, reinforcing that their detention is not a form of or a precursor to

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on a conception of what the host nation can or will do to address a particular threat. The co-existence of these two themes suggests that delineating the lines between battlefield and non-battlefield is based more on arbitrary decision-making than on a process stemming from traditional law-based conceptions of the theater of hostilities.").

[35] *See* Third Geneva Convention, *supra* note 15, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Fourth Geneva Convention, *supra* note 15, arts. 46, 133, 134 (ending restrictive measures of protected and interned persons at "the close of hostilities").

[36] *See* Third Geneva Convention, *supra* note 15, arts. 12, 13, 19, 23 (describing humane treatment and methods for reasonably ensuring POW safety); *id.* art. 21 (permitting internment and restricted parole); *see also In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy."); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 28 (2004) ("[D]etention has only one purpose: to preclude the further participation of the prisoner of war in this ongoing hostilities.").

punishment.[37] In addition, the detaining power's obligations emphasize the protective nature of the detention.[38] Similarly, civilians detained for imperative reasons of security under the Fourth Geneva Convention are held in a protective or preventive—rather than punitive—paradigm.[39] Article 78 of the Fourth Geneva Convention, the foundation for security internment during armed conflict or belligerent occupation, "relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power" but are considered "dangerous to its security."[40] In contrast, individuals currently detained at Guantanamo Bay and slated for indefinite "law of war" detention are persons often identified as dangerous terrorists rather than suspected terrorists.[41] Indefinite detention is presented as an alternative to prosecution in Article III courts or military commissions—a clear message that the detention itself is the punishment.[42] The so-called "law of war" detention thus takes on a decidedly punitive cast, in direct opposition to the protective and preventive purposes of traditional detention under LOAC. Here again, the terminology of "war" creates a situation in which individual rights are minimized, left unprotected, and violated in the name of the War on Terror.

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[37] *See* Third Geneva Convention, *supra* note 15, art. 99 ("No prisoner of war may be tried or sentenced for an act . . . not forbidden by [law].").

[38] For example, POWs must be held away from the combat area so as to be protected from the dangers of combat. *Id.* arts. 19, 23. Reprisals against POWs are prohibited. *Id.* art. 13. And, the detaining power retains responsibility for the treatment of POWs even after transferring them to another power. *Id.* art. 12.

[39] *See* Fourth Geneva Convention, *supra* note 15, art. 78 (allowing internment, if necessary, for security or safety reasons).

[40] OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION 368 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans.) (1958). The Commentary goes on to state that "[t]he precautions taken with regard to [such persons] cannot, therefore, be in the nature of a punishment." *Id.*

[41] *See* Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, N.Y. TIMES, Feb. 13, 2004, at A1 (describing detainees at Guantanamo Bay as the "worst of the worst" and terrorists "committed to indiscriminately killing Americans").

[42] *See* U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 12 (Jan. 22, 2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf (finding that "prosecution of [the detainees] is not feasible . . . in either federal court or the military commission system" and concluding that "there is a lawful basis for continuing their detention").

These two examples—the global battlefield and indefinite detention—demonstrate how the rhetoric of "war" has led to the use of LOAC in ways and circumstances not necessarily foreseen within the existing legal framework. This does not mean that LOAC is inapplicable to the challenges of terrorism and counterterrorism nor that LOAC cannot rise to the occasion. Rather, it means that by using the rhetoric of "war," U.S. political leaders have been able to stretch—and in some cases pervert—LOAC to fit their political goals in ways that fundamentally undermine what should be an unshakable legal and moral commitment to protecting and preserving individual rights, even in the face of serious national security threats and even the rights of the very persons who pose those threats.

III. THE LONG TERM: UPENDING THE BALANCE BETWEEN NATIONAL SECURITY AND INDIVIDUAL RIGHTS

Law often creates or requires a balancing of interests—a way to address competing needs and goals or to uphold multiple, often seemingly competing values and principles. In few areas is this role for the law starker than in war, counterterrorism, and other components of national defense. On the broader level, war and counterterrorism both require robust national defense without ignoring individual rights. For example, in war, the authority to kill the enemy goes hand-in-hand with the obligation to treat not only innocent civilians, but also captured enemy personnel (who minutes before may have been the target of deadly attack), humanely and with dignity.[43] In the case of counterterrorism, pursuit of suspected terrorist operatives, who seek to kill innocent civilians and endanger the nation-state, takes place within the legal parameters governing surveillance, interrogation, and trial. This combination of values and obligations is both difficult and extraordinarily important.

The past decade has demonstrated that the rhetoric of "war" can upend these delicate balances in a variety of ways.[44] The

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[43] *Cf.* Third Geneva Convention, *supra* note 15, art. 13 ("Prisoners of war must at all times be humanely treated.").

[44] *See supra* Part II.

potential damage goes deeper, however, threatening the very paradigms and structures that protect individual rights and facilitate effective process precisely at times of great national crisis and danger. Abuses can be stopped and wrongs can—sometimes—be righted, but a new culture of how we view the values of individual rights and national security and the appropriate balance between them can be much harder to unravel. The purpose here is not to argue that it is impossible to be in an armed conflict with terrorist groups and that the United States should only use the tools of law enforcement in countering the threat from terrorists at home and abroad. Indeed, the nation-state has multiple tools at its disposal to address terrorist threats, including military force, criminal law, financial measures, and so on. Each of these has its place, and they can and often are used in concert.

The question, rather, is the consequence of using the terminology of "war" on the overall framework. Thus, the assertion of the "war" paradigm naturally leads to the assertion of wartime privileges and authorities—in and of itself not necessarily an issue. What is problematic, however, is when this assertion of wartime authority has, in essence, a spillover effect through the expansion of definitions, concepts, and the morphing of paradigms. This can happen in two ways: (1) the "re-conceptualizing" of paradigms to broaden the areas that fit within wartime authority and (2) the fostering of a belief that "war" can displace law and rights. Without recognition of these developments and the risks they pose for the long term, even the complete reversal of all policies that have undermined individual rights will not suffice to ensure their protection in the future.

A. "RE-CONCEPTUALIZING" PARADIGMS

The issues raised in the previous Part—indefinite detention and the global battlefield—demonstrate how the "war" rhetoric has broadened existing paradigms to encompass more individuals, more conduct, and more geographic space. But re-conceptualizing also involves the tweaking of existing legal paradigms to include or exclude individuals or rights, usually with detrimental results for the protection of individual rights. The debate over what to call terrorist operatives is a useful example. Before the 9/11 attacks,

terrorists were nearly uniformly considered criminals and were pursued, arrested, prosecuted, and punished within the criminal justice system.[45] Individuals that the United States fought against in armed conflict, such as in Iraq in the first Gulf War, were considered to be enemy fighters—usually POWs if they met the relevant criteria—and treated in accordance with the law of armed conflict.[46] By all measures, the post-9/11 paradigm has involved a merging—in one form or another—of these two frameworks, as numerous scholars have analyzed and critiqued over the past decade.[47] The consequence has been to reshape both paradigms, in effect, in problematic ways.

Superimposing the rhetoric of "war" on the law enforcement and criminal justice paradigm has spurred efforts to create what appears to be a separate—and less protective—process for those accused of involvement in the War on Terror. The relaxation of the *Miranda* protections for suspected terrorists is a prime example, in which the claim, "We are at war with these people," was all it took to undermine one of the most fundamental constitutional protections of the past half-century.[48] The damage to individual rights is significant—individuals merely suspected of terrorist activity are stripped of a basic right all other individuals in the criminal justice system enjoy simply because we can fit their alleged conduct within this broad framework of the War on Terror. But the consequences do not stop there.

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[45] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 77, 172 (2d Cir. 2003) (upholding the sentences of individuals accused of terrorist activities); United States v. Rahman, 189 F.3d 88, 103 (2d Cir. 1999) (affirming convictions of ten individuals accused of terrorist activities).

[46] U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, app. L (1992) (stating that the most important requirements for enemy POW operations are defined by the four Geneva Conventions).

[47] *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1109 (2008) ("The government has responded to these pressures by incorporating into the military detention model many of the procedural constraints associated with the criminal justice system.").

[48] Evan Perez, *Rights are Curtailed for Terror Suspects*, WALL ST. J., Mar. 24, 2011, at A1 (describing new rules that relax *Miranda* warning requirements); *see also* Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1 (discussing U.S. Attorney General Eric Holder's proposal for Congress to loosen the *Miranda* rule for terrorism suspects).

The willingness to tinker with rights and protections sets the stage for continuing and future deprivations of individual rights—all on the grounds that such expanded powers are "necessary" for the national fight against terrorism. Some, for example, argue that all persons arrested in the United States for suspected involvement in terrorist acts should automatically be held in military custody in Guantanamo Bay before any judicial process whatsoever.[49] The result would be that persons who traditionally would proceed through the criminal justice system would be held in detention potentially without charge or trial, lost in the complex political maze that is Guantanamo Bay today. Easier—perhaps, but certainly not in accordance with the U.S. tradition of individual rights and protections. At present, this automatic transfer to military custody is neither law nor policy, but the fact that it remains a potential option demonstrates just how powerful the rhetoric of "war" can be. In the context of so-called "ordinary" crimes, our society recognizes that law enforcement must operate within parameters that help protect individual rights—that "[i]nconvenience in law enforcement is the price of the rule of law."[50] The interjection of the terminology of "war" seems to turn this bedrock principle on its head.

From the opposite side, the imposition of the traditional armed conflict paradigm has been stretched as well, both in incorporating traditionally criminal law concepts and in applying the law to individuals. For example, U.S. military commissions currently have jurisdiction to prosecute crimes such as material support for terrorism, conspiracy, and murder in violation of the law of war.[51] Although including these crimes in the commissions' jurisdiction surely maximizes the potential to prosecute more individuals within the military commission system, these are not traditional crimes under the law of war and therefore do not fit properly within the commissions' jurisdiction.[52] To the extent that the

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[49] *See, e.g.*, Charlie Savage, *Senate Approves Requiring Military Custody in Terror Cases*, N.Y. TIMES, Nov. 29, 2011, at A22.

[50] Thomas M. Franck, Commentary, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT'L L. 686, 687 (2004).

[51] *See generally* United States v. Hamdan, No. CMCR 09-002, 2011 WL 2923945 (U.S.C.M.C.R. June 24, 2011) (analyzing statutes granting such jurisdiction).

[52] Under the "define and punish" clause, Congress can establish law of war military

procedural rules and protections differ between the military commissions and ordinary criminal trials—a concern that has diminished significantly with recent reforms to the military commission process—individual rights are affected.

The use of "war" rhetoric has also altered how LOAC applies in a definitional way to individuals.[53] How the law categorizes persons within an armed conflict is critical to the protections and rights such persons enjoy—giving this definitional aspect of the law great reach. Revisiting the substantive debate about whether suspected terrorist operatives are criminals or belligerents (whether entitled to POW status or not) is beyond the scope of this Essay. For the purposes of the instant discussion, however, it is particularly interesting to note that in the course of nearly ten years of debate, conversation, legislation, and judicial opinions attempting to create and set the parameters of the category of enemy combatant, nearly all of that debate has focused on which legal paradigm to apply—*not* on the fact that these are individuals with basic rights.

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commissions only to prosecute recognized violations of international law. *See* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849 (2007) (describing the majority view related to the law of Nations Clause). Material support for terrorism does not appear as a crime in any positive international law, including the Geneva Conventions, the Hague Conventions, and the Rome Statute of the International Criminal Court. *See* James G. Vanzant, Note, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1070 (2010) (stating that the U.S. military commission acknowledged that support of terrorism is not in any international agreement nor mentioned in any of the treaties or statutes defining law of war offenses). *But see Hamdan*, 2011 WL 2923945 at *43–44 (holding that material support for terrorism is a war crime). The same issue arises for conspiracy, and although versions of conspiracy—such as conspiracy to commit genocide and joint criminal enterprise—have been tried in military commissions and international criminal tribunals, those versions differ significantly from what is included in the jurisdiction of the U.S. military commissions. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 603–04 (2006) (noting that the crime of conspiracy has been tried in U.S. military commissions exercising law of war jurisdiction). Furthermore, the crime of murder in violation of the law of war departs substantially from any comparable crime under LOAC.

[53] Fionnuala Ni Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, 40 ISR. L. REV. 563, 585 (2007) (noting that "the deployment of the term [war] is not without legal significance in so far as it seeks to reshape legal categorizations and suggests that the hegemonic state has the implicit power to re-make legal categorizations by virtue of their 'naming it so' ").

The uncertainty that still persists in many quarters has created a situation in which rights protected in either or both legal paradigms—armed conflict or law enforcement—are minimized or denied. The most obvious example is the use of torture in the course of interrogation—a practice prohibited in every legal regime, domestic or international, that could conceivably apply to persons captured in the course of the War on Terror.[54] Others include the detention of persons at unidentified black sites—held incommunicado and without notification to any family or authorities—and extraordinary rendition.[55]

B. "WAR" AND LAW

The minimizing of rights through the merging and stretching of legal paradigms is one symptom of perhaps the greatest detrimental consequence of the use of the terminology of "war." Unfortunately, the use of the rhetoric of a War on Terror and the concomitant manipulation of legal regimes and protections for individual rights has led to a growing sense that "war" can displace law and rights. As Harold Hongju Koh (the current Legal Advisor to the U.S. Department of State) wrote soon after the 9/11 attacks: "In the days since, I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules."[56]

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[54] *See, e.g.*, 18 U.S.C. § 2340A (2010) (making it a federal crime to commit torture); Third Geneva Convention, *supra* note 15, art. 17 (prohibiting torture of POWs); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (prohibiting torture and "cruel, inhuman or degrading treatment or punishment"); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 198 U.S.T. 202, 1465 U.N.T.S. 85 (prohibiting torture and obligating state parties to prevent and punish torture).

[55] *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 148 (2006) (noting that inhumane treatment may include "cut[ting] prisoners of war off completely from the outside world," especially from their families).

[56] Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 23 (2002). The author continues, noting that "[i]n fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this." *Id.*

Hand-in-hand with this sometimes below-the-surface premise is the more explicit notion that some people simply fall outside the bounds of the law. Thus, whereas LOAC, specifically the Geneva Conventions, classifies persons as either combatants or civilians and establishes a series of rights and obligations for each group, for many years the U.S. government has taken the approach that persons detained in the course of operations against al Qaeda are neither combatants nor civilians,[57] but rather, that they fall outside the existing parameters of the law. Indeed, the statement that members of al Qaeda, and sometimes even the Taliban, are not covered by the Geneva Conventions was a common refrain in the early years of the War on Terror.[58] Such statements are extraordinarily pernicious and raise grave concerns about the protection of individual rights in the face of national security threats.

Moreover, they are fundamentally at odds with the very object and purpose of the relevant legal regime. As the Commentary to the Fourth Geneva Convention explains, "Every person in enemy hands must have some status under international law. . . . *There is no* intermediate status; nobody in enemy hands can be outside the law."[59] The complexities and challenges inherent in applying LOAC to an armed struggle with terrorist groups operating across borders do not justify attempts to gerrymander the law around the very people who are the target of either lethal force or detention and prosecution. Indeed, even a cursory examination of LOAC demonstrates that it is designed to protect the rights of individuals especially in two situations: (1) during the conduct of hostilities and (2) when they fall into enemy hands, whether through

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[57] Note that while the term "combatant" is specific to international armed conflict and does not apply in non-international armed conflict, it is generally recognized that in non-international armed conflict, persons are either fighters or civilians. *See* MICHAEL N. SCHMITT ET AL., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY 4 (2006) ("[F]ighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities.").

[58] *See, e.g.*, President George W. Bush, Memorandum on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.dia.mil/public-affairs/foia/pdf/detainee/Humane%20Treatment%20of%20al%20Qaeda%20and%20Taliban%20Detainees.pdf (determining that various articles of the Third Geneva Convention do not apply to either al Qaeda or Taliban detainees).

[59] UHLER ET AL., *supra* note 40, at 51.

belligerent occupation, capture on the battlefield, or detention for imperative reasons of security. In much the same way, the constitutional and statutory protections for criminal defendants in the domestic criminal justice system are designed to protect persons suspected of or being prosecuted or punished for criminal action—the very persons whose rights are minimized when the terminology of "war" undermines basic protections.

Finally, the role of the courts cannot be ignored here. One of the Judiciary's key roles is to protect and push back against excessive executive authority and the encroachment on individual rights. The United States has an unfortunate tradition of courts deferring to the Executive in times of national security crisis,[60] which naturally leaves individual rights out in the cold. The decision to uphold internment of Japanese-Americans during World War II is a classic example.[61] Equally troubling, however, is the Judiciary's abdication of responsibility for protecting individual rights and challenging executive authority during times of "war"—in essence, a refusal to get in the game: "It has always been one of the pillars of freedom, one of the principles of liberty . . . that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."[62] Not only does the

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[60] *See generally* Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005) (examining how U.S. and Israeli courts review executive decisions regarding armed conflict).

[61] Korematsu v. United States, 323 U.S. 214 (1944). In his dissent, Justice Jackson warned that judicial ratification of excessive executive wartime authority can cement that authority and the damage to individual rights, causing longer-term problems:

> [A] judicial construction of the [D]ue [P]rocess [C]lause that will sustain this order is a far more subtle blow to liberty. . . . A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, . . . [t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . There it has a generative power of its own, and all that it creates will be in its own image.

Id. at 245–46 (Jackson, J., dissenting).

[62] Liversidge v. Anderson, [1941] 3 UKHL 338, at 361 (appeal taken from Eng.) (Lord Atkin, dissenting).

rhetoric of "war" directly undermine individual rights, but when the language of "war" leads courts to step back rather than enter the fray, it also leads to a much more widespread and long-term culture that upends the inherent balance between national security and individual rights.

IV. CONCLUSION

War and other national security crises often test the limits of the law. In doing so, they also test the fabric of society and the recognition that it is precisely at times of crisis that protection of individual rights is most important. As President (Chief Justice) Aharon Barak of the Israeli Supreme Court eloquently wrote about the need to uphold individual rights at times of crisis:

> This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.[63]

When the rhetoric of "war" creates a unifying sense of purpose throughout the country, when it motivates people to sacrifice for the greater good, when it mobilizes resources in defense of the nation, such rhetoric is powerful and positive. When the rhetoric of "war" creates a venue for the government to infringe on or even eliminate individual rights, when it provides an excuse for the manipulation of law for political ends, when it undoes the balance between executive and judiciary and between national security

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[63] Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148 (2002) (quoting opinion written by President Barak in H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845) (internal quotation marks omitted).

and individual rights, then such rhetoric risks great damage to the law and the protection of rights.