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Bridging the Foreign Policy Divide

The Cost of Confusion: Resolving Ambiguities in Detainee Treatment



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The treatment of detainees—interrogation, detention, and trial—has been among the most controversial policies in the Bush administration's global war on terrorism. Indeed, many of the questions that have arisen in the detainee treatment debate are fundamental to counterterrorism policy, and the next administration will have to provide its own answers as a basis for whatever approach it adopts. What has been the import of declaring a “war on terror”? Is this a wise or sustainable organizing principle for counterterrorism policy? What are the respective roles of the three co-equal branches of government in establishing and enforcing the rules? What is the relationship between national security and respect for human rights? Are security and rights competing interests in a zero-sum game?

We believe that there are some general principles that can be shared across progressive and conservative lines on which national counterterrorism policy should be grounded. We do not aim to examine all aspects of counterterrorism policy, which would require us to address a wide array of issues of national security, civil liberties, and human rights—surveillance, seizure of asserted terrorist assets, use of force short of armed conflict, assassination and targeted kidnapping poli-

cies, and many other matters. We focus instead on three specific and closely related issues—interrogation, detention, and trials of detainees—as sources of the principles that should guide counterterrorism policy. We start here because issues of detainee treatment raise profound questions of American values.

Should Counterterrorism Policy Be a “War” on Terror?

Within days—hours, even—of the Al Qaeda attacks on September 11, 2001, the Bush administration was characterizing it and the US response as a war. While some argued that the attacks simply constituted criminality on a mass scale, bipartisan opinion in the United States largely coalesced around the view that the United States was at war, and at war with a transnational, nonstate actor that had declared war upon the United States. This view gradually was transformed in the rhetoric and policy of the United States into what the Bush administration dubbed the “global war on terror.” Although the administration—in an effort to recall the Cold War idea of a long struggle against a persistent enemy—recently sought to rename the effort the “Long War,” the original moniker persists.

Why does the terminology matter? At one level, using the war framework helps build public support for confronting terrorism; the images, analogies, and metaphors that are used to justify the national response shape what kind of action the public supports and its perception of how long and how deep the struggle might be. The invocation of war can justify a great many measures that would not otherwise be contemplated in a peaceful constitutional democracy—emergency powers, strictures on civil liberties, the use of force outside of ordinary domestic police powers, a sense of national unity in a time of crisis that transcends politics, and a heightened expression of presidential and commander-in-chief power, potentially at the expense of the other constitutional branches of government. All of these measures were evident in the response following September 11; it would be accurate to say that despite some misgivings of civil libertarians, in the immediate aftermath of the attacks, there was broad sentiment across party lines and across American society that all of these options for a national emergency were appropriately on the table and that war was a good way of summing up the situation.

Six years on, unsurprisingly, this unity has evaporated. Questioning government and the policies of the party in power is deeply ingrained in our political DNA. In the case of a war that is today more ideological and metaphorical than “hot”—resembling, in this regard, the Cold War—fundamental questions of policy are bound to arise. Thus the very idea of a “global war on terror” is today seen as the policy of a particular presidential

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administration in a way that it was not immediately following September 11. At this point, the war on terror no longer serves as simply a synonym for US counterterrorism policy. The very question of whether US counterterrorism policy should be conceived as a war is precisely what is at issue; to refer to it as a war on terror is to presume the conclusion to a fundamental and contested issue. Hence, in this paper, when we refer to *counterterrorism policy*, we mean it in a generic sense of the set of issues on the table, and when we refer to the *war on terror*, we mean the specific and actual, contested and contestable policies of the Bush administration.

We agree that in the moment of crisis and its immediate aftermath, the president exercised extraordinary powers appropriate to the executive role, including the power to use force to prevent and disrupt further attacks. Moreover, just as we agree that the moment of crisis occasioned extraordinary executive powers, we also agree that over time, those powers must diminish in a return to ordinary constitutional order. As a democracy, we must fashion a response to the ongoing threat of terror in a constitutionally democratic way. Heightened executive power eventually must give way to democratic, majoritarian procedures. The legislature, as a co-equal branch of government, might understandably be sidelined in the moment of crisis but, we agree, must reassert itself if it is to remain a constitutional co-equal. Likewise, the courts must ensure that individual rights under the Constitution and obligations under international law are observed. Such rights are a constitutional obligation of the legislative and the executive branches to protect (although they may well have their own views as to the content and meaning of such rights), but it is the province of the courts, finally, to determine and enforce them.

The characterization of counterterrorism policy as a war on terror affects how domestic political and constitutional processes come into play and is, therefore, far more than simply a matter of public motivational rhetoric. It is language deeply imbued with legal implications. We believe that over time, the character-

ization of counterterrorism policy as a war must be limited to its use as a strategic paradigm for dealing with nonstate actors that have arrayed themselves as enemies of the United States, but it must be carefully confined to make clear that this is a strategic, rather than legal, use of the term. Otherwise, the United States risks going down the road of authoritarian anti-Communist states in the Cold War—Chile, for example, or Guatemala—using the threat of communism as a justification for a permanent state of emergency and emergency presidential powers. This is not to say that the threats posed by terrorism are not real and that the strategic conception of war was not useful—only that the responses must be crafted within constitutional democratic processes and that war, within those processes, has a highly specific legal meaning that is not applicable to most matters of counterterrorism policy.

Characterizing counterterrorism efforts as a *war* has quite different implications, however, for actions taken by the United States abroad.¹ The Bush administration has wanted quite inconsistent things from its characterization of these actions as a global war on terror. There is, first of all, an inconsistency in strategic vision in the characterization of war. The administration has wanted to make clear to the American people, as well as to the world at large, that the United States is willing to pursue terrorists wherever they seek to hide—to deprive them, in the language of the 2006 national counterterrorism strategy, of safe havens—and to do so using all the tools of war. Under this view, the entire world is a battlefield. And yet, even as a matter of strategy, the idea of a global war is more metaphor than reality; the world in its entirety is not—not even potentially—a battlefield. The strategic

The heightened executive power of a crisis eventually must give way to democratic procedures.

Domestically, the executive branch strengthens its powers insofar as the immediate crisis is characterized as a war because the Constitution gives special powers to the president and commander in chief. More precisely, few question the enhanced powers of the president in a moment of crisis such as September 11; when the crisis is converted into a war, those powers become the powers of a commander in chief for as long as the war goes on. It has long been apparent that the strengthening of those executive powers has been an independent goal of the Bush administration, apart from the war on terror itself and sometimes at considerable cost to it. We disagree about the breadth of the president's powers in war, but there is little doubt that those powers depend on how broadly war may validly be defined for legal purposes of the laws and customs of war. But we are in agreement that as a legal matter, the administration's definition of the war is unacceptably broad.

engagement with terrorists is partly in Afghanistan, but it is also even more so in Pakistan—and the United States, for political reasons, at this moment is plainly not willing to make Pakistan a battlefield. It is also, from a strategic standpoint, an engagement with ideologues and radicalized clerics and their followers in such places as Hamburg, Birmingham, and Paris—but they obviously will not be battlefields except in an entirely metaphorical sense. In our view, insofar as counterterrorism policy requires *all* of the tools of government, most of those tools will *not* in fact be the tools of war in the actual meaning of armed conflict. Instead, they will involve surveillance, interdiction of terrorist financing, intelligence gathering, diplomacy, and other methods. Thus the language of global war is necessarily metaphorical. It should not diminish the national resolve to defeat the enemy to acknowledge that actual war is only one tool in that struggle.

Thus trying to apply the term *war* to the entire effort when it is only intermittently a war *operationally*, and therefore *legally*, in particular times and places creates significant problems. The Cold War was strategically well-considered as a war; yet only occasionally and in certain places around the world did it operationally and legally constitute war. Such is the case with the war on terror. Calling global counterterrorism policy a *war*—not only as a strategic concept but as a global operational fact that invokes a specific legal characterization—has profound legal implications and anomalous legal consequences.

Invoking the Law of War in Global Counterterrorism

Invoking war as the strategic policy frame has the virtue of recognizing the way that our enemies see their actions with respect to us. Likewise, from the viewpoint of the administration, invoking war as the policy frame has the virtue of rhetorically separating the current response to terror from policies of the past that essentially treated terrorism as a matter of organized crime gone global, appropriate for law enforcement and the criminal justice system, not the military and war.

But the *legal* invocation of war against a non-state, transnational actor or actors creates many anomalies in the application of the law of war, an essentially state-centric legal regime. Counterterrorism is a global struggle against an enemy which, while obviously real, cannot be identified by the usual indicia of victory or defeat—the end of a regime, the occupation and control of territory, the destruction of enemy forces. It is therefore hard to know when, if ever, the war will be won for legal purposes, a question that is critical for prisoners, who have a legal right to be released at the end of fighting. One might as well say spatially that the entire world is a battlefield, and that temporally, the war will be won when the threat of terrorist violence is banished from the world, which will be a long way off indeed. If correct in any sense, it is only useful as a strategic metaphor, a way of saying that our enemies are not limited to any particular place or people and that they take a

long view of their struggle, as a guide to strategic analysis and a spur to our own long-term counterterrorism policies.

Other issues arise, however, when our terrorist adversaries are portrayed as warriors—issues on which the coauthors are divided. Such a depiction can have the unintended consequence, Massimino points out, of elevating the stature of the enemy in the eyes of its own potential constituency by boosting Al Qaeda's mythic appeal as the defender of Islam, its own preferred image. Anderson, on the other hand, believes that how our enemies see the struggle must be integrated into how we see it.

However useful war may be as a strategic concept, it cannot stand as a legal definition triggering the rights and duties under the laws of war, which rightly require a more tangible and operational foundation. It would be like saying that the Cold War, at every moment of its 40-year run, was legally an armed conflict with the Soviet Union and the Warsaw Pact. The fact was, instead, that however much the United States conceived the Cold War in strategic terms as a *war*, it did not treat it as a legal state of war governed by the law of armed conflict. Recourse to the law of armed conflict was then, as should be the case now, limited to active hostilities rising to the traditionally accepted definition of an armed conflict. We must not confuse the important insights of a strategic view of counterterrorism as metaphorical war with the legal implications of invoking the formal laws of armed conflict.

The Bush administration's invocation of the laws of war may be strategically useful, but it is simply at odds with the legal requirement of an "armed conflict" triggering of the laws of war. The operational conduct of counterterrorism to date has involved several armed conflicts and might involve more, but the global war on terror does not meet the legal definition of an armed conflict.

We therefore agree that the Bush administration's global claim is incorrect as a matter of law. The administration has dealt with the

lack of fit between the nature of the conflict and the laws of war in radically inconsistent ways—but always, it must be said, in ways that benefit its preexisting desire to strengthen the hand of the executive branch. We examine three issues—detention of individuals as enemy combatants, trials by military commissions of detained enemy combatants, and interrogations—in which this disconnect has had the most profound consequences.

Detention

The laws of war permit belligerent powers to detain captured enemy combatants without charge or trial for the duration of the conflict in order to prevent them from rejoining the fight. The Bush administration embraced the laws of war and claimed under them the traditional legal right to hold detainees, for example at Guantanamo Bay, until the end of hos-

The inconsistency produced by this decision was breathtaking. The United States was taking detainees not only on traditionally defined battlefields such as Afghanistan but also at O'Hare airport in Chicago and Bradley University in Peoria. The administration argued first that the constitutional war powers of the president provided the basis for these detentions; later, it argued that the detainees were combatants who could be held for the duration of hostilities. Invoking constitutional war powers, or alternatively, the laws of war, as a basis for holding detainees without charge or trial in the domestic legal system, while simultaneously denying that the laws of war applied to them, created a legal black hole that threatened to subvert the laws of war altogether.

Indeed, this critique was shared by most of the military's own uniformed law of war legal

The administration has dealt with the lack of fit between the nature of the conflict and the laws of war in radically inconsistent ways....

ilities. What is at issue here is not the right of a belligerent in wartime to hold combatants—this is undisputed. The dispute is over the very definition of *war* in the “global war on terror.” This is a difficulty of legal definition all on its own on which the coauthors are agreed that the administration was wrong.

While claiming the rights of a belligerent to detain captured enemy combatants, however, the Bush administration at the same time, through the office of the White House counsel, made one of the most legally and conceptually ill-considered moves in its entire counterterrorism strategy. It concluded that, although the war on terror was a *war*, the Geneva Conventions—the laws of war—did not apply to those detained in it. Terrorists are not lawful combatants, it argued, and hence fall outside the law altogether. They could thus be dealt with by the commander in chief at his discretion.

specialists in the military, who have argued that the Geneva Conventions should apply only to battlefield detainees, no matter how one defined the strategic scope of the “war.” Al Qaeda flunked the tests of Article 4 of the Third Geneva Convention on POWs, and hence its members were not entitled to the privileges of POW status. Prisoners of war are held to keep from taking up arms again but are not subject to prosecution or punishment, provided that they have complied with the laws of war. For Al Qaeda's part, though, while its members were *combatants* by virtue of taking an “active part in hostilities,” the group's systematic violations of the laws of war rendered them unprivileged combatants individually, i.e., unlawful belligerents under the laws of war. They could be detained under the law of war and, as unprivileged combatants, charged with crimes arising from their acts of belligerency, such as murder and destruction of property. Legal procedures for trials of unlawful combatants derive from the

terms of Article 75 of the 1977 Additional Protocol I of the Geneva Conventions.²

But this international law of war approach went unheeded by the administration. Instead, the administration sought to hedge against legal challenges to its war-without-law approach by holding detainees at Guantanamo which, it hoped, would be beyond the reach of US courts and habeas corpus. It lost on the substance of that argument in the *Rasul* case, having rested it on a claim of executive power so overreaching that it failed, on the habeas corpus issue, to gain even Justice Scalia's vote.

We are in agreement that the scope of the administration's global war on terror is legally too broad. There are two wars in which the United States is currently involved: Afghanistan and Iraq. Other armed conflicts may develop, but the world is not a battlefield in its entirety, and the United States may not seize and detain as combatants under the laws of war individuals not directly engaged in these armed conflicts. On this fundamental point we are agreed.

We disagree, however, as to the concept of illegal combatancy. Massimino takes the view that a person who flunks the tests of legal combatancy in Article 4, Third Geneva Convention, becomes thereby a civilian protected by the Fourth Geneva Convention (albeit one who may be charged with violations of the laws of war). The International Committee of the Red Cross (ICRC) also takes this view, along with a significant body of the human rights community. Anderson believes that such an approach effectively rewards combat that violates the laws of war and that a person who fails the tests for legal combatancy is not a civilian, but an illegal combatant, an unlawful belligerent. The disagreement is far from merely academic; it involves fundamental questions of treatment of civilians under the Fourth Geneva Convention (who nonetheless may be detained as security risks, but with considerably greater protections than those afforded unlawful belligerency).

These disagreements between the authors notwithstanding, both agree that the current legal situation is an unsatisfying and unwork-

able mish-mash of bits of highly contested international law combined with Bush administration policy decisions, Supreme Court opinions that are themselves bits of this and that, and narrow legislative fixes designed to satisfy minimum requirements of the case law. The Supreme Court, in successive cases and with various hedges, has allowed certain domestic law remedies at Guantanamo such as habeas corpus which, while arguably defensible holdings under US domestic law, have no historical or textual basis in the law of war, at least regarding foreign combatants. Yet at the same time that the court has grafted essentially domestic law onto the question of detention, it also has found, in *Hamdan*, that the conflict is governed by Common Article Three of the Geneva Conventions. This legal holding thus puts a certain practical floor under the administration's conduct—prohibiting cruel, humiliating, or degrading treatment of detainees and violence to life and person.³

The administration, for its part, has responded to this holding by acknowledging the application of the Geneva Conventions as a largely formal matter, asserting that in any case, the United States is in compliance with Common Article Three. In the Military Commissions Act of 2006, the administration sought and obtained legislation to insulate it from habeas corpus, claims by detainees asserting the Geneva Conventions, or other claims to the contrary.

The most important additional issue with respect to detention policy is who has the power to determine that one is a combatant in the first place and not, say, an innocent shepherd or someone sold into our custody for bounty by the Northern Alliance. The administration has asserted that this is a matter of executive branch discretion. Prior to the Supreme Court's decisions in the *Rasul*, *Hamdi*, and *Hamdan* cases, it based this view on the claim that the Geneva Conventions did not apply to these detainees, hedging its bets by keeping them in Guantanamo, which it hoped would be beyond the reach of the federal courts. After losing, in part, its habeas as well as other claims defended on executive

power grounds in *Rasul* and *Hamdi*, it established limited tribunals for detainees, apparently intended to satisfy the requirements of the Third Geneva Convention, Article 5, requiring, in cases of doubt, a tribunal to determine combatant status.

Those tribunals are of a limited nature—and judicial review of them is confined to the question of whether the tribunal followed its own procedures. They have, as a result, been sharply criticized on due process grounds. These combatant status tribunals, however, exist for purposes of establishing the basis for detention, not for the separate question, addressed below, of trials for violations of the laws of war.

Congress has written legislation narrowly designed to meet the requirements of *Hamdan*,

would not. But since neither Anderson nor Massimino regards the executive branch's designations as actually or potentially infallible, we agree strongly that this procedure, as enshrined in the MCA, is unacceptable and not remediated by the provision of limited combatant status review hearings.

Congress has so far agreed that federal court access will not be permitted. Whether the Supreme Court ultimately will defer to the two political branches of government on this legislation's many extraordinary measures is at this point unknown, but no one doubts that litigation will be both lengthy and momentous. Changes in party control of one or both houses, or other political factors, or further court decisions, are highly likely to produce new legislation or significant modifications of existing legislation—already, the new Democratic

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and the president has signed it: the Military Commissions Act (MCA). That legislation is an admixture of fundamentally domestic assertions of authority, with one eye defensively fixed upon the requirements of Common Article Three. Among other things, it purports to deprive the courts of jurisdiction with respect to habeas claims by alien unlawful enemy combatants, and deprives them of the ability to allege violations of the Geneva Conventions before any court.⁴ It makes the decision to detain someone designated by the president as an enemy combatant—potentially even for life—an executive branch determination, and almost entirely unreviewable by the federal courts.

If one assumes hypothetically that the executive branch is infallible in its judgment as to who is or is not a terrorist, then one might accept such an arrangement. In such an “infallible executive” scenario, Anderson would support such detentions, while Massimino

Congress following the 2006 midterm elections is considering amending the MCA, particularly with respect to habeas corpus.

Yet the pattern of highly reactive legislation is unfortunately likely to continue. Rather than pushing for truly systematic reform (as recommended by the authors of this paper further below), the US legislature seems content to react either to a specific court decision or to a particular demand of the executive branch.

Trials of Detainees by Military Commission and Combatant Status Review Hearings

Not many months after September 11, the administration announced that it did not intend to submit alleged terrorists to regular trial by the federal courts except in particular circumstances, but would instead submit them to trial by military commission.⁵ This procedure is fundamentally different from the combat status

review hearings described in the preceding section. Those combatant status review hearings are not a judgment about guilt or innocence; they are hearings designed to offer a limited review of whether the person being detained should be called an “enemy combatant” at all and whether that person continues to pose a security risk to the United States.⁶ The combatant status review hearings are akin to administrative detention hearings, rather than a trial. By contrast, the military commissions, as originally conceived and in the tradition of US military law stretching back to the Civil War, are military trials on charges of violations of the laws and customs of war.

Although possessed of a long history and indisputably part of military law, such commissions have been hotly disputed in their specific application in the global war on terror since they were first promulgated in executive orders following September 11, through to their legislative authorization in the MCA of 2006. The policy objective of the administration following September 11 was stark—to make entirely plain that it was breaking with the criminal law approach to transnational terrorism pursued by earlier administrations. The paradigm would be war and, henceforth, it would operate under the laws of war.

Military commissions were thought to provide a form of justice that is defensible under US law and military custom as well as international law and custom (once the administration had reversed course on the relevance of the Geneva Conventions in establishing unlawful belligerency). The most fundamental objection to military commissions in the global war on terror—one which we share—is that whatever the concept of battlefield detainee arising from either international law or US military law and custom, the invocation of a global war on terror, with the entire world a battlefield encompassing Al Qaeda detainees found in Afghanistan and a US citizen detained in Chicago, is simply too broad to sustain its legal weight.

The *Hamdan* court held that the executive branch exceeded its authority in establishing

military commissions that differed from provisions of the Uniform Code of Military Justice, but the court also emphasized that these issues could be resolved through legislation. (It also held, by reason of finding that Common Article Three applied, that the administration had to proceed with trials that fell within the meaning of Common Article Three’s language of “regularly constituted courts.”)⁷ Accordingly, the administration sought legislation designed merely to ratify what it already had designed and put in place. Opposition developed in the Senate, however, with Republican Senators John McCain, John Warner, and Lindsay Graham all insisting on changes to the procedures for military commissions. After rounds of negotiations on the trial issue, as well as the detention and interrogation issues, the White House and the senators reached agreement, and the MCA was signed by the president in October 2006. Democrats largely stayed out of the wrangling between the three Republican senators and administration, although they fiercely attacked the bill as it came to a vote and overwhelmingly voted against it. At this writing, the new Democratic Congress is considering efforts to amend it.

Although we agree, in principle, that military commissions *can* be used to try individuals for violations of the laws of war, and although we further agree that the global war on terror is too broad a definition of *war* to support the *universal* application of military commissions to all detainees that the administration determines to put on trial, we disagree as to the proper “fix.” Massimino would require that all those not captured on a traditionally defined battlefield be tried, if suspected of criminal violations, in regular US courts, while limiting military commissions to those captured on battlefields as traditionally defined in US military and international law. Anderson agrees that military commissions should ideally be limited to those captured on traditionally defined battlefields, but does not believe that those otherwise captured should necessarily be tried in regular US courts. He believes, as discussed below, that Congress should create a special, civilian counterterrorism court to try such cases, with limited habeas review by

regular US courts; if such reform is (as is likely) unreachable, then he prefers the current MCA approach (modified to include a limited form of regular court review).

With respect to the initial decision to detain and its review through the combatant status review tribunals (CSR tribunals)—as distinguished from any trial that might later follow for alleged crimes by unlawful belligerents—we agree that the CSR tribunals are inadequate as a procedure and put far too much determinative power into executive branch hands—not just in a moment of uncertain security risk, but permanently. To the degree that current legislation gives the executive branch full power to detain a person as an enemy combatant potentially forever (and we disagree about whether the MCA in fact grants such power to the president), it ought to require a far more

Anderson believes, by contrast, that allowing a backdoor route into the full federal courts through habeas or other mechanisms is neither required for noncitizens nor acceptable from the standpoint of national security. He would prefer the current MCA legislation to full habeas access to federal court. On the other hand, agreeing that the current law lacks sufficient protections, he would prefer comprehensive counterterrorism reform to create a special civilian counterterrorism court with special rules of procedure, evidence, and review that address the special issues of terrorism. While agreeing that the United States needs a procedure for administrative detention in terrorism cases using a special civilian counterterrorism court as its vehicle, Anderson is skeptical that international human rights law can serve except in a general and hortatory way as the standard to

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substantive process of review than reflected by the combatant review status tribunals.

Just as we differed as to the proper fix for the issue of trial venues and procedures, we likewise differ, however, as to the proper remedy regarding the decision to detain and to continue to detain. Massimino believes that individuals who cannot be properly considered combatants in an armed conflict, but who nonetheless are suspected of criminal conduct, should be tried in the regular federal courts. With respect to those who cannot be tried but who pose a serious threat to national security, she believes that in (the unlikely event of) a full-scale reform of counterterrorism policy, there might be limited room for legislative enactment of an administrative detention procedure, outside the laws of war and outside the military altogether, provided that it comported with the strict requirements of international human rights law.

be met. Anderson further believes that a special counterterrorism court should be created but limited to two functions—to review administrative security detention decisions by the executive and to try terrorist criminal cases for specified terrorist crimes, taking over from both the regular federal courts and military commissions.

But there is a significant convergence of views here on a crucial issue, despite other disagreements of approach. We think that, apart from whether these cases should be heard by the federal courts or, in Anderson's view, a special counterterrorism court, any comprehensive reform of counterterrorism should take the military out of the business of detention generally in the war on terror—including detention and the holding of detainees, combatant status review hearings, and military commissions. The “armed conflict” part of the war on terror should be

confined as a legal matter to armed conflicts as traditionally defined in the law of war.

Yet the legislation passed by Congress to satisfy *Hamdan*, the MCA, underscores the increasing distance between the law of war and the domestic law definitions applicable to detention and military commissions. The MCA effectively twists itself into a pretzel seeking to reconcile a law of war and military law paradigm with something that, even if it is not traditional criminal law, does not bear great resemblance to traditional law of war. The definition of an unlawful enemy combatant in the MCA, for example, bears very little resemblance to the traditional definition of a combatant in the laws of war. On the contrary, the MCA fundamentally reaches to definitions of persons to be detained that are appropriate instead to administrative detention procedures, using such standards as “material support” for terrorism.

That being the case, it is time to call it what it is (administrative detention), cease applying a military law rationale to it that does not really work, and make it a civilian rather than military jurisdiction. The military, we suspect, would agree. Similarly, on the habeas issue: While no one seriously wants to extend habeas protections to ordinary soldiers taken prisoner on the battlefield, the reason the issue is now under such bitter debate is because we *also* understand that seizing an American citizen at O’Hare airport is scarcely the same thing as the capture of German soldiers in Normandy and that it *does* raise questions about habeas corpus. The pretzel twisting and creation of more and more domestic law purporting to be military law or international law of war—while having an ever-smaller substantive connection with it—risks both the integrity of our domestic law and the integrity of our military law and commitment to the international law of war. While we disagree on exactly how to redress this, we are firmly in agreement that the limitless legal extension of the war paradigm exemplified in the MCA does not work. The current jerry-rigged structure makes little sense now and will not function in future administrations,

irrespective, frankly, of whether and the extent to which the courts bless it or not.

Interrogation of Detainees and the Definition of Torture

Perhaps no issue in the war on terror has aroused greater passions than the interrogation of detainees. While there is widespread rejection of torture as un-American, citizens of this country are profoundly divided as to the morality of other harsh interrogation techniques, those that constitute cruel, inhuman, or degrading treatment short of torture. Many believe that we should not be parsing a distinction between torture and other cruelty; many others believe that refusing to use such techniques when they could prevent catastrophic terrorist attacks is itself a breach of morality. The United States is not the first country to grapple with terrorism, and it is not the first to face the moral and legal dilemmas raised by these questions.

The administration’s initial approach to interrogations was to assert executive branch power and exploit what it saw as ambiguities in the rules. Where the domestic criminal law prohibited torture, lawyers at the Justice Department produced a memo construing the statute so narrowly that “old-fashioned” torture methods—cigarette burns, breaking fingers—would not qualify as torture, and reassured interrogators that in any event, the president can authorize violations of the law in his power as commander in chief. Where the Geneva Conventions required refraining from torture, cruel treatment, and outrages upon personal dignity, administration lawyers argued that, as unlawful combatants, detainees in US custody were not entitled to those protections. Where treaty obligations required the United States to prevent the use of cruel, inhuman, or degrading treatment, the administration reinterpreted a reservation to the treaty to mean that the United States was not bound by the prohibition on cruelty when it acted abroad. When Congress passed the McCain Amendment and overruled this interpretation, requiring US personnel everywhere in the world to refrain from cruel, inhuman, and degrading treatment of prison-

ers, reports surfaced that administration lawyers had found a way around that, as well, by interpreting the prohibition as a flexible standard that would allow cruel treatment in circumstances that did not “shock the conscience.” When the Supreme Court ruled in *Hamdan* that the humane treatment standards of the Geneva Conventions (found in Common Article Three) were binding on the United States in its treatment of all detainees, the administration sought to replace that standard with its more flexible “shocks the conscience” interpretation. Congress rejected the administration’s proposal to redefine Common Article Three, but it narrowed the scope of what constitutes a war crime in ways designed to immunize past conduct. The president nonetheless concluded upon signing the bill into law that the CIA could continue to use a set of “alternative

ever shown that inflicting torture or other such cruelty yields reliable information or actionable intelligence.⁸ When the Pentagon released its new Army field manual on intelligence interrogations last September, rejecting cruel and inhumane tactics, Lieutenant General John Kimmons, deputy chief of staff for Army Intelligence, explained it bluntly: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that.”⁹

Moreover, even torture that produces accurate information may work against US interests. Longstanding army doctrine cautions that the use of such techniques, if revealed, could undermine public support for the war effort and degrade respect for the standards on which US troops rely for protection. And cer-

The abuses at Abu Ghraib were effective only in undermining US moral authority and providing a boon to jihadist recruitment.

interrogation techniques” beyond those authorized for use by the military.

In the face of these efforts to circumvent the rules, the president’s repeated assertions, however sincere and heartfelt, that “we don’t torture” ring hollow around the world. And that is not surprising. We have, in fact, tortured detainees in our custody. According to the Pentagon’s own figures, at least eight of these were literally tortured to death—beaten, suffocated, frozen, hung. How do we account for this from a country that led the world in drafting the international convention prohibiting torture?

Torture and other forms of cruelty gain a seductive appeal during times of insecurity because of the lure that their use might “work” to protect innocent civilians from catastrophic harm. But what does it mean to say that torture “works”? No systematic study has

tainly the abuses at Abu Ghraib were effective only in undermining US moral authority and providing a boon to jihadist recruitment.

But despite all this, the lure of torture—or if not torture, something very close—remains strong. There persists a communal American fantasy that if we are ever faced with a ticking time bomb scenario, we can save the day and avert disaster if only we overcome our squeamishness and “take off the gloves.” Indulging in this fantasy has led American policy far off track and away from the values of life and human dignity for which it claims to be fighting this long war. It is time to put the fantasy aside.¹⁰

We share the view that intelligence is one, if not the most important, tool in combating terrorism today. We also start from the premise that torture is and should remain illegal. While there is a range of conduct that the United

States has agreed to—and should refrain from (and we may disagree about where that line should be drawn)—the conduct on that spectrum for which a person can be held criminally liable (war crimes, torture) must be made crystal clear.

The MCA provides some additional clarity. It defines what it calls “grave breaches of Common Article Three,” the violation of which could subject a person such as a CIA official to criminal liability. They are: torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. It recognizes that the executive has the authority to define lesser offenses and the terms of their criminal liability, as well as to “interpret” the meaning of the provisions that do not amount to grave breaches. The act provides protection from legal action for government officials engaged in interrogations prior to the act (by making amendments to the War Crimes Act retroactive to its passage in 1997), and provides that the Geneva Conventions cannot be invoked as a source of rights in any court.

Thus, while the law clarifies some matters, it leaves others open for interpretation. Murder, for example, mutilation, and rape are clear enough. But, strikingly, even something as fundamental as torture is not entirely clear under the new law. During debate about the legislation, Democratic and Republican members of Congress in both houses gave examples of conduct that, while not explicitly listed in the statute, would, in their view, constitute a grave breach—waterboarding, forced nudity, forcing a prisoner to perform sexual acts or pose in sexual positions, beatings, electric shocks, burns, or other physical pain, the use of dogs to terrify, induced hypothermia or heat injury, and mock executions. But none of these techniques, some of which had previously been authorized by the administration, were explicitly listed in the statute.

This is a mistake. Anderson and Massimino disagree about many aspects of interrogation

procedures, but we agree that it is the obligation of Congress and the administration to be transparent and specific with respect to what constitutes a crime under US law.¹¹

Why is this failure to be specific so problematic? Because the people of the United States are deeply divided as to the substance of these issues—torture, not torture, degrading treatment, not degrading treatment, etc.—and because such terms as *humiliating* or *degrading* are not plainly objective in the way that, say, murder is, the only clear democratic means to establish their meaning is through the process of legislation. But to meet this need, such legislation must be specific, transparent—and above all avoid euphemism, generalities, and vagueness. Granted, no lawmaker willingly votes in a way to make him or herself any more accountable than absolutely necessary—but the importance of these issues is such, and the divisions among the public is such, that only public votes on these issues can give the answers democratic legitimacy. There is, of course, a further question as to whether the courts, in their role as protectors of individual rights, would defer to the legislature’s judgments, and we likely disagree as to the extent of deference owed. But we do not disagree on the obligation of Congress to legislate plainly on these questions.

We believe this as a fundamental principle of fairness, not because we think that interrogators should seek to walk right up to that line of criminal conduct. To the contrary, we believe that in order to prevent torture, US policy must build a buffer of additional prohibitions, like a fence around the Torah.¹² As former Navy General Counsel Alberto Mora wrote in a memo critical of interrogation policies that permitted the use of cruelty and other force short of torture: “Once the initial barrier against the use of improper force had been breached, a phenomenon known as ‘force drift’ would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force

must be better.” Although agreeing that the prohibitions against torture require a buffer, we nonetheless would likely disagree with the content of what that buffer zone should be.

Many countries that have faced a terrorist threat have imagined themselves immune from the force drift phenomenon. In Israel, Turkey, the UK in Northern Ireland—every democracy that has tried to walk along the edge of this cliff, by authorizing abusive treatment only in emergencies or only with respect to certain types of suspects, has ended up falling off. Once physical cruelty and inhumane treatment is authorized, it is very difficult to contain and control within preset parameters.

Just as the use of force tends to “drift” upward, it likewise migrates between agencies. For this reason, we also agree that both the

Anderson takes the view, for example, that the International Covenant on Civil and Political Rights does not, in accordance with its text and longstanding US views, apply extraterritorially. Massimino believes that such treaties bind US actions wherever they are taken. Our view of how widely human rights law would serve as a check on US action thus differs considerably.

Many have argued that while it is fine to have these standards, we would be wise to keep them to ourselves. Before the new Army field manual on intelligence interrogations was issued, the Pentagon seriously considered attaching a secret annex in which techniques permitted for use only on certain detainees would be listed. The argument for this approach was that transparency about which techniques interrogators could use would aid

Once physical cruelty and inhumane treatment is authorized, it is very difficult to contain and control within preset parameters.

prohibition against torture, and the “fence” around that prohibition, should apply equally to all US personnel. In other words, there should be a single standard of humane treatment to which all US personnel—military and civilian—adhere.

This does not mean that all detainees must be treated alike. We are not arguing here that Khalid Sheikh Mohammed must be granted the privileges to which prisoners of war are entitled. But there should be no daylight between the baseline humane treatment standards governing military and CIA interrogations.¹³ In wartime, those standards are found in Common Article Three of the Geneva Conventions. Outside of armed conflict, they are found in international human rights and domestic law.

The authors disagree, however, as to the application of international human rights law.

the enemy in resisting. But our biggest problem now is not that the enemy knows what to expect from us, it is that the rest of the world, including our allies, does not. So long as they believe that we are willing to engage in torture and other cruel, inhuman, and degrading treatment—conduct for which we routinely condemn others—we will continue to pay for past mistakes.

Conclusion: The Choice of Paradigms

This paper has focused on the three most domestically and internationally divisive issues in the war on terror—detention, trial, and interrogation. There are many other issues of grave importance, but these three capture the fundamental questions of value that must be answered by national policy in pursuing counterterrorism. And our answers on such essential matters—even in the face of polarizing controversy—will help build a coherent and sustainable counterterrorism

policy. Our recommendation is that there be a return to basics, a return to the question of fundamental paradigms in US counterterrorism policy.

Counterterrorism has been presented since September 11 as the choice between a criminal law model of counterterrorism and a war model of counterterrorism. That binary seems to us wrong. What we describe as the war on terror represents a strategic view of a long struggle in which strategic war concepts are appropriate to frame the conflict. They do not describe, however, the legal requirements for invoking the law of war in a global war on terror. The contradictions and strains that arise from trying to fit counterterrorism policy into the straightjacket of war, while at the same time seeking to use the law of war as a means to insulate the executive branch from established checks and balances, are nearing a breaking point. The MCA is likely to accelerate political crises as much as defuse them because it is so ill-structured a settlement for the long term—designed, as it was, to meet the narrowest requirements of a Supreme Court decision and make up for mistakes made early in the interrogation and detention process.

The counterterrorism policies of any new administration or new Congress, of whatever party, Republican or Democratic, must start from a view that counterterrorism operates across a wide range of activities. At one end is law enforcement, particularly domestic law enforcement (the kind that breaks up domestic terrorist plots). At the other end is war—actual war, armed conflict involving armies and troops and the weapons of war. War, we can now begin to see, is more often aimed at government backers of terrorists rather than the terrorists themselves. The real action against terrorists themselves takes place in a zone between those two extremes. The tools in this zone include surveillance, tracking and seizure of terrorist assets, cooperation with foreign intelligence and police services, domestic security measures for key infrastructure, protection of air travel, and so on. It also includes detention, interrogation, and the use of force short of war, such as attacks on terrorist training

camps, targeted assassinations of terrorists, and other uses of violence that do not always rise to the legal level of “armed conflict.”

It is this ground between the extremes that inevitably will be the focus of most of our counterterrorism efforts in the future, and we badly need legal rules to define that zone of action and its limits. The coauthors may disagree over precisely how those rules should be shaped and, perhaps most deeply, over the role of the courts in monitoring and policing the activities of this category of activity. But we are agreed that developing this center category of activities, which are neither pure criminal justice nor war, will be the key to a counterterrorism policy that moves beyond policy binaries that ill-serve the United States, operationally and legally. Comprehensive counterterrorism policy for a new administration and a new Congress will necessarily look beyond the simple alternatives of law enforcement or war.

End Notes

¹ Or against non-US citizens. The Military Commissions Act of 2006, for example, distinguishes flatly between citizens and noncitizens. We disagree as to whether this distinction of nationality is appropriate or consistent with domestic or international human rights law.

² Although the United States has not ratified Protocol I, it has accepted that Article 75 reflects customary law binding on the United States.

³ Yet the court seems not to have considered the possibility that by finding that the conflict with Al Qaeda is a conflict “not of an international character” so as to invoke Common Article Three, it arguably cut out application of nearly all of the rest of the Geneva Conventions, including the grave breaches provisions, for example, and the Article 5 tribunal mechanism for determining combatant status, all of which arguably require that the conflict be an Article 2 international armed conflict precluded by application of Common Article Three. We ourselves disagree (as do military law experts) as to the legal consequences of the court’s rather sparsely reasoned holding on this vital question.

⁴ The MCA purports to do more than deprive detainees of a private action under the GCs. It says that no person can invoke the GCs as a source of rights, even in a habeas or other action.

⁵ We use *military commission* and *military tribunal* here interchangeably; we reserve the term *court martial* for regular proceedings under the full mechanisms available to US soldiers under the Uniform Code of Military Justice.

⁶ The issue of habeas corpus is most relevant to the detention question, rather than trials under the military commissions, since habeas pertains in the first place to the legal grounds for holding the detainee.

⁷ What constitutes a “regularly constituted court” for purposes of Common Article Three promises to be a hotly contested issue, which *Hamdan* failed to quiet, and it is an issue on which we likely disagree but will not pursue here.

⁸ This is not the same as saying that nothing revealed under torture is ever true. But intelligence must be more than simply true in order to be useful. When US personnel beat an Iraqi Army general, bound him, and stuffed him head first into a sleeping bag, the only information he revealed before he died was information already known to his interrogators.

⁹ Anderson is frankly skeptical of the assertion that torture does not produce useful information, or at least does not produce useful information distinguishable from intelligence “noise.” However, he does not argue for making torture legal under any circumstances. The fundamental issue, for Anderson, is not the illegality of torture, but how it and other terms such as inhumane treatment or cruelty are to be concretely defined so as to make transparently clear what is legal and illegal.

¹⁰ Anderson notes that even if, as he acknowledges, the “ticking time bomb” scenario is largely, though not entirely, a chimera that is tangential to the daily toil of thwarting terrorist plots, it enjoys political support that cannot be dismissed out of hand. A significant range of political figures—including Hillary Clinton, Chuck Schumer, and John McCain—have said they might resort to torture if necessary in such a scenario. It cannot, therefore, be viewed purely as a fixation of the Bush administration.

¹¹ A further issue that deserves a clear policy is whether certain techniques are permissible in certain situations. Can more aggressive interrogation be used on a known terrorist mastermind such as Khalid Sheikh Mohammed, as opposed to a person who may still turn out to be the innocent shepherd? We differ as to this general principle—Anderson in favor, Massmino against—but we agree the matter must be clarified in legislation.

¹² According to Jewish law, the precepts of the Torah were to be “fenced around” with additional restrictions in order to prevent violation of the core precepts themselves.

¹³ Anderson believes that while a comprehensive reform of the existing system should establish a single standard across the US government, there are practical difficulties. He believes that the existing US military manual is too restrictive, for instance, in a case like Khalid Sheikh Mohammed. Since revision of the military manual is in Anderson’s view not likely, and probably not wise, he would accept two standards today: one applicable to the military, and one applicable to all civilian agencies. Massimino would hold the civilian agencies to the military standard.

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