Targeted Warfare: Individuating Enemy Responsibility

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Targeted Warfare: Individuating Enemy Responsibility

Samuel Issacharoff and Richard H. Pildes

Abstract: Legitimacy of the use of military force is undergoing a fundamental but insufficiently appreciated moral and legal transformation. Whereas the traditional practices and laws of war defined “the enemy” in terms of categorical, group-based judgments that turned on status – a person was an enemy not because of any specific actions he himself engaged in, but because he was a member of an opposing army – we are now moving to a world that, implicitly or explicitly, requires the individuation of personal responsibility of specific “enemy” persons before the use of military force is justified. Increasingly, the legitimate use of military force is tied to adjudicative-like judgments about the individual acts and roles of specific “enemy” figures; that is the case whether the force involved is military detention or lethal killing. This transformation transcends the conventional debates about whether terrorism should be treated more like war or crime and is more profound in its implications.

This readjustment in the basic premises underlying the justified use of military force will have, and is already having, implications for all the institutions involved in the use of military force and in the processes by which decisions are made to use force. For the military, this change will generate pressures to create internal, adjudicative-like processes to ensure accurate, credible judgments about the individual responsibility of particular “enemy” fighters. For the executive, these changes will propel greater engagement in decisions that had previously been more exclusively within the province of the military itself. For the courts, this transformation toward individuated judgments of responsibility will inevitably bring about a greater judicial role in assessing wartime judgments than in the past, as has begin to occur already. These changes are not yet directly reflected (or at least fully reflected) in the formal laws of war, but we anticipate that as these changes embed themselves in the practices of states, especially dominant states, these

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1 Reiss Professor of Constitutional Law and Sudler Family Professor of Constitutional Law, respectively, New York University School of Law. We have presented versions of this project in the following settings and benefitted enormously from the critical comments in each venue: University of Amsterdam Law School, NYU School of Law, University of Virginia School of Law, Iowa Law School, Northwestern School of Law, and UCLA Law School. Special thanks are owed to Trevor Morrison for extended discussions as the ideas here developed. We also received particular assistance from Eyal Benvenisti, Gabriella Blum, Lt. Col Eric Goepner, David Golove, Ryan Goodman, Philip Hamburger, Marty Lederman, Thomas Nochbar, and Matthew Waxman. We are grateful for the research assistance of Kirti Datla, Chris Dodge, Nathan Foell, Paul Hubble, Hal Laidlaw, Jeremy Peterman, and Robin Swartout. It bears emphasizing that the views expressed here are ours alone.
changes in practice will also eventually come to be embodied in the legal frameworks that regulate the use of force. This Article, after identifying this fundamental transformation as the central factor driving struggles over the proper boundaries of military force, then explores the ramifications of this change for issues like military detention and targeted killings.

Introduction

The morality and legitimacy of the practices of war – or at least, the use of military force – are undergoing a fundamental transformation. This transformation is not yet directly or fully reflected in the formal laws of war, but as these changes embed themselves in the practices of states, especially dominant states, these changes in practice might well eventually come to be embodied in the legal frameworks that regulate the use of force. The fundamental transformation is this: whereas the traditional practices and laws of war defined “the enemy” in terms of categorical, group-based judgments that turned on status – a person was an enemy not because of any specific actions he himself engaged in, but because he was a member of an opposing army – we are instead now moving to a world which implicitly or explicitly requires the individuation of personal responsibility of specific “enemy” persons before the use of military force is considered justified, at least as a moral and political matter. This shift applies not to any one particular type of military force, such as lethal force, but to all exertions of military power over enemies, including the ways in which they are captured, detained, incapacitated, or tried.

To a limited but significant extent thus far, this transformation is reflected in the domestic law, including the constitutional law, of some countries, including in decisions of the United States Supreme Court, as well as in the interpretations of international law that some courts, such as the Israeli Supreme Court, have generated. But this quiet, subtle, and inadequately appreciated transformation has been taking place far more as a matter of slowly accepted practices than as settled legal development.3

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3 The Obama administration has developed a set of elaborate protocols for making the determination of whether and under what circumstances to place enemy combatants on the
Accordingly, we proceed in this Article by giving an account of the central manifestations of the transformation in two distinct areas of high-profile debate: the detention of foreign non-state combatants and the targeted killing of leaders of these same forces in the irregular combat that characterizes war against terrorist groups. These are the most visible manifestations of how to create an acceptable legal regime for the modern circumstances of state conflicts with non-state belligerents, but our contention is that these areas are the epicenter of the broader confrontation with the transformation of warfare beyond its conventional state-to-state assumptions. Even within these two areas of high-profile debate, the task that concerns us is not merely giving an integrated descriptive account of how the same departures from conventional war shape the corresponding sense of legality in the pursuit of military objectives. The process of legal transformation in turn shapes the arguments about the proper uses of military force in the context of fighting terrorism, yielding a debate that comes across as polarized or confused or simply unable to engage with the positions of others. Precisely because we are in the midst of this transformation, we do not have clear prior legal frameworks, either domestically or internationally, to draw on to organize the legal framework for addressing the transformed nature of modern warfare.

I. Individuating Enemy Responsibility

We begin with an account of how modern warfare has shifted from the premises of state-to-state conflict and two critical implications for the law of war. In the first instance, war against ill-defined, nonstate forces compels unique responsibility for the selection of the targets of military force during the lethal stages of military engagement and in the incapacitation of enemy combatants who are detained. The need for accurate identification of enemy combatants introduces into military conduct elements of proper identification and proportionate responses generally associated with domestic criminal law rather than the law of war. Further, the need to conduct the inquiry at the level of the individual moves this form of irregular war away from the state-to-state obligations of diplomacy and battle that have defined the law of war regime for several centuries.

a. The Individuated Combatant.

The key to the traditional, status-based regime of the laws of war was that conventional soldiers fought openly as members of an organized military under state control. In particular, they wore uniforms (except for covert operatives), displayed weapons, and fought under an organized command structure. As a result, it was accepted, legally and morally, that the opposing side could treat them on the basis of their status, as simply members of the opposing fighting force. As an initial matter, little dispute typically existed about their identity as a member of the enemy – the open carrying of weapons and wearing of uniforms resolved that issue. In addition, there was no need to determine whether such a soldier had committed any specific identifiable act that would legitimately make him a target for the use of military force. Whether a soldier had fired at the opposing side, or planted a bomb, or engaged in any specific act, or even just handled clerical duties, was irrelevant: group membership in the opposing army was sufficient. Thus on the front end of the use of force – capture, detention, even uses of lethal force – there was no need to differentiate among soldiers in order to attempt to individuate personal responsibility for participation in the enemy’s war machinery. Only in the extraordinary circumstance that an enemy soldier were going to be tried for acts outside the permissible scope of the laws of war – for war crimes – would there be a need to determine individual levels of responsibility. Finally, the same status-based, group-membership principles applied on the back end of the use of force: how long an enemy soldier would be detained was not a function of his own individual identity.

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4 The Supreme Court addressed the significance of uniforms to military identity in Ex Parte Quirin, 317 U.S. 1 (1942) (“The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals”). The emphasis on recognized membership in an armed force was later codified in the Geneva Conventions, in which prisoner of war protections for militia or volunteer forces is made contingent upon their “carrying arms openly” and “having a fixed distinctive sign recognizable at a distance.” Geneva Convention Relative to the Treatment of Prisoners of War art. 4 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

5 See id.

6 For example, in discussing the general power to detain in wartime, the Supreme Court in Hamdi cited authority to the effect that “The time has long passed when ‘no quarter’ was the rule on the battlefield .... It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’ ... ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’” Hamdi v. Rumsfeld, 507, 518 (2004) (quoting William Winthrop Military Law and Precedents 788 (rev. 2d ed. 1920)).

7 See, e.g. id. (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war’”)(quoting Ex Parte Quirin, 317 U.S. 1, at 28, 30).
responsibility for specific acts, but of his membership in the group. Prisoners of war were released collectively, as part of a group, at the war’s end or as part of mutually agreed prisoner exchanges.  

Terrorism and the new face of warfare inherently changes all of this. Because these unorthodox and usually unlawful combatants do not wear uniforms, attributions of status based on group membership are far more uncertain and complex. These combatants violate the cardinal principle of “distinction” by which all combatants can be clearly differentiated from the civilian population. Some of these combatants are true terrorists, in the sense that they actively target civilian populations. Others are more conventional in engaging military forces, though without the differentiating identifiers of military forces. In practice in the world today, whatever significance the distinction may have conceptually, irregular combatants routinely slip into acts of terror directed at the civilian population.

Moreover, even apart from the issue of uniforms, the ability to know that an individual is part of a terrorist organization, based on anything other than his own individual acts of terrorism, is also difficult. Terrorists typically do not “join” the organization in some formally visible way equivalent to the wearing of uniforms. While some terrorists do swear oaths of affiliation to signify their membership in the organization, many do not; in addition, even if such an oath has been taken, obtaining proof of it is far more difficult than proof that a soldier was wearing a uniform. Indeed, it might be easier to prove that an individual committed a specific act of terrorism than it is to prove that he or she took an oath of affiliation. Attributions of status, through group membership alone, are therefore extremely difficult to establish. Most terrorists against whom military force is used, therefore, are not identified on the basis of membership per se, but because of the specific acts in which they have engaged. Perversely, the act defines the status.

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8 Geneva III art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).
9 See Matthew C. Waxman, Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists, 108 Colum. L. Rev. 1365, 1382-83 (2008) (“Al Qaida and other terrorist organizations do not generally identify their membership. They do just the opposite, operating in the shadows, blending in with local populations... In these respects, terrorist networks take the identification problems long posed by guerrilla warfare to new heights”);“Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2113 (2005) (explaining the difficulty of identification).
10 Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 Stan. L. Rev. 1079, 1099 (2008) (“associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al Qaeda suffices to warrant status-based detention even if the facts can accurately be determined”).
Three principal sets of factors are thus driving the transformation in the morality and practices of modern uses of military force. First, the unique structure of modern warfare conducted by nonstate actors inherently creates a need for responsive states to be able to identify correctly the specific individuals who are in fact enemy combatants. Second, modern technological developments, which make this modern form of battle more potentially threatening, also enable dominant states to respond in more discriminating ways; the capacity to do so is likely to generate pressure toward an obligation to do so (if “ought” implies “can,” as theorists have long debated, “can” sometimes implies “ought”). Third, the post-WW II rise of the more general concern for human rights, as a legal and cultural matter, has created pressure for dominant states seeking legitimacy for their actions to incorporate a more general humanitarian concern into their actions, including with respect to the rights of enemies during wartime.

As a result of the nature of modern terrorism and the battles against irregular combatants, therefore, these structural features inevitably and unavoidably propel the use of military force to be directed against specific individuals based on the specific acts those individuals are believed to have committed, as opposed to their status. That is why the use of military force against terrorists necessarily must shift, and has shifted, away from the traditional group-based membership attributions of responsibility to individuated judgments of responsibility. And this individuation applies—or the pressure to maintain this individuation—to every stage of the use of military force.

In the first instance, the initial threshold issue of identification becomes far more complex and consequential: is this actually the specific person believed to have committed specific acts? A whole new regime (whatever its precise contours) to ensure the accuracy of the initial identification question becomes necessary—something virtually irrelevant in the traditional war context. Even when the identification problem is resolved, the degree and type of the appropriate use of military force up front might suddenly become relevant in a way that they are not in the traditional context. In traditional war contexts, one did not distinguish among soldiers and officers based on

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11 In the detention context, Afghan detainees now routinely have the appropriateness of their detention evaluated on an individual basis. See generally Lieutenant Colonel Jeff A. Bovarnick, Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy, ARMY LAW., June 2010, at 9 (describing the evolution and structure of detainee review procedures in Afghanistan). With respect to targeted killings, evaluation of the threat posed by specific individuals dictates their inclusion or exclusion from the Obama administrations’ “kill list.” See Jo Becker & Scott Shane, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all (“Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat . . . .”).
any sense of specific responsibility; if a barracks could be bombed or artillery directed at an advancing force, these things were done without any attempt to differentiate the different levels of responsibility or culpability of individual soldiers or officers. Today, however, it might well be that uses of lethal force, in the form of targeted killings of specific individuals through measures like drone attacks, are more appropriate and justified against high-level commanders than low-level foot soldiers. Similarly, on the back end of the use of military force, when it comes to matters like detention of enemy combatants, it might also be proper—as a moral and political matter, at least—to individuate responsibility. We might hold the architects of 9/11 indefinitely, but it might not be appropriate similarly to hold low-level couriers or others indefinitely.

In traditional wars, of course, these distinctions were mostly irrelevant; all members of the enemy, based on their status, were released as part of group-based releases. But once warfare interjects the question of why this particular enemy is being targeted, and whether the targeting corresponds to the threats presented by this particular individual, the inquiry starts to take on the feel of individualized adjudication. The great traditions of the law of war necessarily address the conditions for states to enter into warfare, the conduct of military battle itself, and the postwar restoration of the peace. By contrast, focusing on the culpability and threat of a particular enemy combatant necessarily diminishes the question of statecraft and recasts military objectives in terms of individual culpability.

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12 Officials associated with the United States’ targeted killing program have apparently determined that strikes against individuals are, in fact, most appropriately directed at terrorist leaders rather than foot soldiers. Jo Becker & Scott Shane, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all (“William M. Daley, Mr. Obama’s chief of staff in 2011, said the president and his advisers understood that they could not keep adding new names to a kill list, from ever lower on the Qaeda totem pole.”). Assistant to the President for Homeland Security and Counterterrorism John O. Brennan’s speech on the legality of targeted killings at the Wilson School likewise adverts specifically to the need to discriminate in target selection based on leadership positions or “operational skills” rather than merely based on group membership. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President’s Counterterrorism Strategy, Remarks at The Woodrow Wilson International Center for Scholars (Apr. 30, 2012), available at http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

13 Geneva III art. 118.

14 These are the defining obligations of jus ad bellum, jus in bello, and jus postbellum. See generally CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 3d ed (New York: Oxford University Press, 2008). For the application to nonstate actors, see Eyal Benvenisti, Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors, 34 YALE J. INT’L L. 541, 541 (2009). For fuller discussion of the international law features on war against nonstate actors, see infra TAN 17.
The central focus of this Article is on the effects of the altered battlefront on the conduct of war. There is a great, but unrecognized, paradox underlying the emerging individuation of responsibility. This paradox accounts for a good deal of the polarized positions that have circulated since 9/11 about the legitimate uses of military force. As the fundamental transformation in the practice of the uses of military force moves, even implicitly, toward an individuated model of responsibility, military force inevitably begins to look justified in similar terms to the uses of punishment in the criminal justice system. That is, to the extent that someone can be targeted for the use of military force (capture, detention, killing) only because of the precise, specific acts in which he or she as an individual participated, military force now begins to look more and more like an implicit “adjudication” of individual responsibility.

A tremendous premium immediately comes to be placed on what we might call “adjudicative facts” – is this the person who did X?– rather than “legislative facts” – is this person a solider in the opposing army? And as soon as military force must be tied to individuated judgments of responsibility, it is easy to understand why, for some critics of the use of force, questions will arise regarding why it is the military, and not the judicial system, that is making these individualized, adjudicative judgments. These kind of individuated judgments have not traditionally been the province of the military, after all. And there is an understandable impulse to conclude that if we are in the world of individualized, adjudicative-like judgments, the institution most traditionally designed for that function is the judicial system.15

Thus, as the unavoidable structural forces that drive uses of military force against modern terrorism come to depend on individuated judgments of responsibility, it is also inevitable that the boundaries between the military system and the judicial system will become more permeable than in the past. The two systems are unlikely to exist in hermetic isolation from each other. The considerations that have traditionally informed one will spill over into the other – and vice versa. That is the fundamental reason that the debates

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15 Among the critiques that Daphne Eviatar of the NGO Human Rights First advances with respect to the Detention Review Board system developed for detainees in Afghanistan, for instance, is the fact that fundamentally adjudicative proceedings are conducted by military tribunals without sufficient trappings of the civilian justice system. DAPHNE EVIATAR, HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 13-19, 27-28, (2011), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf (arguing for the importance of providing legal counsel to detainees and claiming that the current system of “personal representatives” for detainees (who need not be lawyers) is insufficient as a substitute).
over the appropriate uses of military force have been, or are likely to remain for some time, so unresolved, uncertain, confused, and polarized.\footnote{Among the most visible confrontations over the appropriate use of military force came with the confirmation of John Brennan, one of the architects of the Obama Administration’s policy on the use of drones, as CIA director. See Laura Matthews, John Brennan Confirmed as CIA Director, 63-34, International Business Times, March 7, 2013, http://www.ibtimes.com/john-brennan-confirmed-cia-director-63-34-1115860 (reporting Senate resolutions on targeted killing and use of military force in the U.S.).}

In our view, the principal task of the modern morality and, eventually, law of war – the task this Article sets for itself – is to come to terms with the transformed legal and military environment of modern warfare and with the emerging imperative to individuate responsibility when using lethal force against terrorism. We believe it is a serious mistake to conclude from this inevitable individuation that the traditional civil and criminal judicial system should, as a result, fully supplant and displace the uses of military force altogether. But on the other hand, the use of military force must be adapted – as it already is in the midst of doing, under both internal and external pressures – to embrace and to take fully into account the reality that “enemy” responsibility in this era must be individuated. The military, for example, is already in the process of trying to generate procedural protections, analogous to those used in more traditional adjudicative settings but adapted to the unique context of military force, that provide sufficient accuracy and legitimacy to ensure that these individuated attributions of responsibility are being made through credible processes and structures to make them as accurate and fair as possible.\footnote{Aware of the importance of perceived legitimacy and credibility, the military in Afghanistan has begun to allow NGOs to observe the non-classified portions of proceedings in Detainee Review Board adjudications. Bovarnick, supra note __, at 38.}

That is true whether the military force at issue involves detention or targeted killings, the two specific subjects we review. To the extent the government as a whole succeeds in generating the novel structures, institutions, and processes necessary to legitimate the use of military force in an age of individuated enemy responsibility, these uses of force will be more widely accepted.\footnote{Beginning at least with the creation of the Lieber Code to instruct troop behavior during the Civil War, the American military has maintained a public handbook of the conditions for the use of military force, in part to help maintain discipline in the use of force, and in part to ensure public awareness of the country’s rules of engagement. See John Fabian Witt, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).} Our aim is to contribute to that project.

We structure our inquiry around the key issue of the individuation of proper targets in modern war settings, whether for purposes of long-term detention or – more dramatically – for purposes of targeted killing. Targeted killing shares with the detention of irregular combatants the critical features of modern individuated warfare. Both turn on proper and legally justifiable decisions about the nature of the individuals selected for coercive action,
either through capture or physical elimination. To the extent the objective is not prospective punishment but incapacitation of a military threat, both detention and targeted killing fall within the historic domain of military conduct. Yet the requirement of certainty as to individual complicity in threatening activities lends a legalization to the individual-specific determinations, and begins to bleed into the civilian law concepts of criminal proof and due process.

The two categories of law enforcement versus military operations organized much of the historic thinking on the proper response to threats, as well as the original thinking in the United States in the immediate aftermath of 9/11. In the simplest rendition, the object of capturing enemy forces in war is to neutralize enemy combatants so that they no longer pose a risk to our troops, while the object of the criminal law is to punish individuals for completed acts. The laws of war assign a dignity to the status of being a soldier and the object of detention is to render them incapable of further acting pursuant to their mission. By contrast, the criminal law seeks to condemn the individual who has found to have broken the fundamental codes of permissible conduct. The soldier is presumptively an honorable individual, while the criminal is an outcast.

Much as there is a merger of methods between the civilian criminal prosecution and the determination of military justification for targeting, the difference in purpose remains critical. Even the individual-specific determinations of modern warfare mask the fundamentally different objectives of the criminal versus military determinations. In its pure form, the criminal law justifies ongoing detention by a retrospective examination of the severity of the proven crime. Military decisions, whether through detention or targeted attack, are prospective assessments of the future dangerousness of the enemy combatant, a decision for which past conduct may be the most important evidentiary consideration, yet one that may not be determinative – as we shall set out further.

b. The Stateless Combatant.

The problem of how to deal with non-state combatants flows from the ambiguous nature of this form of military engagement. War necessarily implicates the two great traditions of international law. In its classic form, war is armed battle between two states that in its conduct puts civilians at risk of harm. The relation between states and the human rights protections of

19 Becker & Shane, supra note ___, (“[N]ames go off the list if a suspect no longer appears to pose an imminent threat.”); Bovarnick, supra note ___, at 29 (“[T]he board must determine whether the detainee meets the criteria for internment and, if so, whether continued internment is necessary to mitigate the threat the detainee poses.”).
civilians together provide the defining wellspring for the broad sweep of international law.\textsuperscript{20} Unifying the two is a sense of prohibition on state conduct, either in terms of belligerent ambitions regarding other states, or in the effect of state conduct upon civilians. By contrast, “[i]nternational law provides no clear guidance on when, in the absence of sustained interstate hostilities, an ‘armed conflict’ exists so as to trigger the application of the law of armed conflict.”\textsuperscript{21}

Modern warfare challenges the state-focused premises of international law. Whether termed asymmetric warfare or the war on terror, or simply unconventional warfare, the critical fact is that states find themselves in protracted conflict with non-state actors. In the aftermath of September 11\textsuperscript{th}, the Bush Administration seized upon the fractured relation between terrorism and the laws of war to claim that, in the absence of complete correspondence between current emergencies and classic forms of war, the laws of war simply did not apply.\textsuperscript{22} According to this logic, the absence of a state actor on the other side obviated any international-legal limitation upon American conduct.\textsuperscript{23} This position did not survive repeated scrutiny by the U.S. Supreme Court.\textsuperscript{24}

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\textsuperscript{20} See Gabriella Blum, The Laws of War and the "Lesser Evil, 35 Yale J. Int’l L. 1, 7, 9 (2010). As expressed by the International Committee of the Red Cross, “war and peace, civil wars and international conflicts, international law and internal law, all have increasingly overlapping areas. It follows that the law of war and the law of peace, international law and internal law, the scopes of which were at first clearly distinct, are today often applicable at the same time side by side. Thus, the Geneva Conventions and the human rights conventions may often be applied in cumulative fashion”. D. Schindler, The International Committee of the Red Cross and Human Rights, 208 Int’l Rev. Red Cross 5 (1979). See also Jose Alvarez, State Sovereignty is Not Withering Away: A Few Lessons for the Future, in Antonio Cassese, ed., REALIZING UTOPIA—THE FUTURE OF INTERNATIONAL LAW 26 (Oxford University Press 2012) (discussing the continuing relevance of sovereignty, albeit as changed by human rights norms); Ruti Teitel, HUMANITY’S LAW (Oxford U. Press 2012)(discussing the impact of human rights norms across diverse international legal regimes).

\textsuperscript{21} Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 40 Case W. L. Rev. 593, 602 (2009).

\textsuperscript{22} See Memorandum from President George W. Bush to the Vice President et al. (Jan. 7, 2002), available at http://www.npr.org/documents/2005/nov/torture/torturebush.pdf (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.”).

\textsuperscript{23} Id.

\textsuperscript{24} See Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (considering and rejecting the Bush Administration’s argument that “[R]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict ought to eliminate entirely any individual process . . . .”); Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (considering and rejecting the Bush Administration’s argument that “Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’—i.e., a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.”).
Nonetheless, and despite the arrival of the Obama Administration, the questions raised over the past decade about the exact requirements of international law have not gone away. If anything, the expansion of the war on terror to active operations in Yemen and Pakistan, and to the use of drones for targeted killings, has only served to accentuate the pressures that modern warfare places upon the inherited laws of war.25

Simply put, there is a great deal about the pre-existing laws of war that seems poorly addressed to the current circumstances. For example, even a cursory review of the Preambles and first two Articles of each of the four Geneva Conventions reveals that they take their organizing logic as pacts among “The High Contracting Parties” to govern their conduct in war among states.26 The most ambitious of the four basic Conventions, the Third and Fourth Conventions, define their scope in terms of armed conflict among the contracting states or the territorial occupation of a state. Even under common article 3, which conditions the treatment of non-combatants, the contemplated application is outside of what is conventionally understood as international war; indeed, the predicate for common article 3 is “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”27

At the same time, the Supreme Court has recognized, on at least two occasions, that incident to the Authorization of Use of Military Force for deployment of U.S. forces after September 11th was the necessary capacity to detain enemy combatants, even outside the normal channels of state-to-state war.28 We therefore begin by taking up the question of detention in order to

25 We turn more specifically to the use of strikes by unmanned aircraft, the now well-known drones, in the discussion of targeted killing, infra. For a comprehensive account of the expansion of drone use by the United States under President Obama, and of the use of internal procedures to assess and implement “kill-lists” of suspected targets, including in Pakistan and Yemen, see Gregory S. McNeal, Kill-Lists and Accountability, ___ , Georgetown L.J. ___ (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583.


27 Id. art. 3.

28 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (detention “for the duration of the particular conflict in which they were captured is so fundamental and accepted as incident of war as to ban an exercise of the ‘necessary and appropriate force’ Congress authorized the President to use”); Boumediene v. Bush, 553 U.S. 723, 733-34 (2008) (reaffirming holding of Hamdi while striking down the particular form of the Combatant Status Review Tribunals utilized for long-term Guantánamo detainees). Although both the original and the Iraq AUMF did not specifically address the detention of individuals without full criminal prosecutions, this was understood to be an inescapable incident of military engagement, presumably captured within the “necessary and appropriate” use of military force provisions of both AUMFs. For a
highlight the difference between law enforcement functions and military operations. Our inquiry begins a step back from the immediate issues presented by the Guantánamo detainees, including the Supreme Court cases addressing their claims to habeas corpus relief, and to construct from the ground up the foundation upon which to fashion a defensible detention and punishment system for the modern conflict with non-state belligerents.

At present, the debates fall into three basic camps. First there are those inclined to deal militarily with all suspects associated in any way with terrorist activity, even if they are American citizens and even if their alleged connections to, or actions on behalf of, our enemies in this armed conflict are more attenuated than the connections that have typically characterized individuals militarily detained or prosecuted in past wars. Starkly opposed are civil libertarians, who challenge any departure from the normal operation of the criminal justice system and who attempt to fold most or even all of the multifaceted military campaign against Al Qaeda into the mold of a criminal conspiracy, no different in kind than the Mafia or the Medellin cartel.

These are oversimplifications, of course. There are many variations on both the military and civil libertarian positions that embrace some but not all of the claims we have associated with these polar positions. In the main, however, each camp is fond of staking its arguments as a matter of the “rights” of the accused terrorists; for the proponents of the military model, the accused have no judicially rights comparable to those of criminal defendants, for the civil libertarians the rights of captured terrorist suspects consist of the normal operation of the criminal justice system.

A third approach assumes the irreconciliability of the first two and proposes the creation of a distinct branch of the judiciary, sometimes called a “national security court” or “terrorism court,” with discrete procedures for handling allegations of involvement in terror, and with exclusive jurisdiction for such cases. As the leading proponents of this approach argue, “We already have specialized federal courts to deal with matters like bankruptcy, taxes and patents; the case here is far more compelling. In the past, Americans might have hoped that a national security threat would abate over time, and so the pressures on the civilian courts, whatever they were, would subside. Today we have no such luxury. We must create sensible institutions for the long haul.”

fuller treatment of the relation between the AUMF and the need for detention authority, see Curtis A, Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 HARV. L. REV. 2047 (2005).

29 CITES

30 Cites

We share a frustration with myopia of debates that pit rights versus no-rights arguments against one another. Our view, however, is that a properly grounded inquiry into the objectives of detention and prosecution, combined with an institutional sensitivity to the differences between law enforcement and military combat, can resolve many of the contested issues within the confines of existing institutions. We therefore direct ourselves to the question of the object of targeting specific individuals in modern warfare, and not to the question whether one or another tribunal is the appropriate venue for eventual prosecution. Our approach, therefore, is to set out the objectives involved in combating terrorism and then to draw out the institutional and legal conclusions that flow from that.

II. Detention and Asymmetric Warfare

Detention provides the richest framework for legal doctrine to engage the problem of war against nonstate actors. The brute fact of holding an individual in custody sharpens the analogy to the criminal law. As time passes from the moment of capture, the questions of why this individual and for how long press on the frailties of the simple invocation of military necessity. And, unlike the targeted killing discussion to which we turn subsequently, the detention issue is not a time-limited event and the legal questions return in everything from the conditions of detention to the prospect of ultimate release.

a. Normalizing “Transnational” Warfare

We start from the view that the inherited legal categories and instruments of international law do not provide direct answers to many of the crucial legal issues concerning modern battle of the sort the West now confronts, in particular as presented in the need to detain combatants until the cessation of hostilities. At the heart of the difficulty is that the conventional laws of war do not adequately identify an intermediate status between combatants and civilians. These controlling legal instruments were not drafted or designed with attention to the specific circumstances of long-term, multi-front engagements with non-state actors. As a matter of positive law, there is a lack of fit between the structure of the formal laws of war and protracted combat against non-state forces.

The problem begins with the absence of a definition of the detention of an irregular combatant. Under the international laws of war, a person captured by a belligerent power would fall within one of only two categories: combatants and civilians. The detention of combatants as prisoners of war is
Targeted Warfare

governed by the Third Geneva Convention, while detained civilians fall under the Fourth Geneva Convention. As decreed by the Israeli Supreme Court, a detainee became either a prisoner of war under the Third Geneva Convention, or a protected civilian under the Fourth Geneva Convention. Consequently, the laws of war “regards unlawful combatants . . . as civilians” through a process of exclusion, given that they cannot be recognized as “combatants.”

Under the Geneva Conventions, the void between combatants and civilians meant that the protections of prisoner of war status and the limitations on criminal punishment of soldiers would not attach to any irregular fighters. According to Article 4, a combatant is a POW if he belongs to any of the following categories: 1) a member of the armed forces of a Party to the conflict (there is no specified requirement that a member of the armed forces wear a uniform to be eligible for POW status), 2) a member of a militia who meets the specified conditions (i.e. command responsibility, insignia, carrying arms openly, following laws of war), 3) members of regular armed forces professing allegiance to a “government or an authority not recognized by the Detaining Power,” . . . 6) “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.” Article 5 provides that when there is any doubt as to a captured person’s status, there is a presumption that such a person is a POW until a “competent tribunal” makes a determination to the contrary. Thus, the only requirement under the Third Geneva Convention, apart from the protections against mistreatment in Common Article 3, was that a “competent tribunal” be available to determine if an individual was improperly classified as a combatant or civilian.

Civilians under the Geneva conventions fall under the reserve category of “protected persons”—all persons captured by a Party to a conflict who are not protected under one of the other Geneva Conventions. If a protected person is “suspected of or engaged in activities hostile to the security of a State party to a conflict,” that person may not be entitled to the full

34 Public Committee Against Torture in Israel v. State of Israel, paragraph 26, opinion of President Barak, quoted in A, B v. State of Israel, para.12.
35 Geneva III, art. 4.
36 Geneva III, art. 5.
37 Id.
38 Geneva IV, art. 4.
protections of the Convention.\textsuperscript{39} In such a case, “such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.”\textsuperscript{40} The clearest example of this occurs in Article 5 which explicitly provides that the right to communication may be denied to a protected person “where absolute military security so requires.”\textsuperscript{41} However, such restrictions must be removed “at the earliest date consistent with the security of the State or Occupying Power.”\textsuperscript{42}

The Fourth Convention also makes clear that the detention of protected persons is permitted if necessary for security reasons.\textsuperscript{43} Here too the operative time seems to be detention until the “cessation of hostilities,” as with prisoners of war.\textsuperscript{44} Article 27 permits States to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”\textsuperscript{45} While Article 27 allows a State to deviate from some of the general protections afforded to protected persons, such measures may not be “more severe than . . . assigned residence of internment,”\textsuperscript{46} and these measures may only be adopted when “absolutely necessary.”\textsuperscript{47} The Fourth Convention also requires periodic review of the necessity for the involuntary detention of protected persons. According to Article 43, a protected person “shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board . . . .”\textsuperscript{48} If detention will be extensive, the detention must be reviewed at least twice a year, “with a view to the favourable amendment of the initial decision.”\textsuperscript{49}

In the aftermath of the Geneva Conventions, the lack of an intermediate category became a serious problem in addressing wars fought by guerilla bands, particularly in cases of insurgency against colonial powers of decidedly superior conventional military force. The formal application of the Geneva criteria would have guerilla fighters choose either the path of illegality in war, or else certain defeat were they to choose to fight standing

\begin{itemize}
\item \textsuperscript{39} Geneva IV, art. 5.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See generally Ryan Goodman, \textit{The Detention of Civilians in Armed Conflict}, 103 Am. J. Int’l L. 48 (2009).
\item \textsuperscript{44} See Geneva III, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”). Indeed, some have argued that the distinction between POWs and civilian detainees is inconsequential on this score. Derek Jinks, \textit{The Declining Significance of POW Status}, 45 Harv. Int’l L.J. 367, 375 (2004).
\item \textsuperscript{45} Geneva IV art. 27.
\item \textsuperscript{46} Geneva IV art. 41.
\item \textsuperscript{47} Geneva IV art. 42.
\item \textsuperscript{48} Geneva IV art. 43.
\item \textsuperscript{49} Id.
\end{itemize}
armies in uniform with firearms displayed, a militarily doomed enterprise. Additional Protocol I to the Geneva Conventions attempted to fill that gap by allowing guerilla fighters to hide their identity, with an imprecise line holding them to the other obligations of fighting military targets and not deliberately targeting civilians. In effect, the Additional Protocol would have defined the boundaries of warfare by the targets chosen. Civilian targets, what today we would term terrorism, remained impermissible, while unconventional warfare against armies would fall within a new legalized category.

Unfortunately, the Additional Protocol called into question the fundamental premises of the Geneva Conventions: that it was possible to distinguish military and civilian combatants and objectives, and that battle could be directed to military objectives, as with the capturing of territory or overtaking a military installation. Neither premise characterizes military engagements in asymmetric war, leading one critic to ask if “wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.” The “dynamic of reciprocity and retaliation” that allowed for the emergence of norms of state-to-state warfare over centuries was lacking in asymmetric warfare, leaving participants and civilians at considerable risk.

Additional Protocol I, in effect, relieved combatants of some of the obligation to distinguish themselves from civilians, which had in turn created a corresponding obligation of opposing armies to train their fire on the identified combatants, rather than on the distinguished civilians. In law of war terms, this was called the principle of distinction. Among other

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50 See George H. Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 AM. J INT’L L. 1, 7-10 (1991) (arguing that the purpose of Protocol I was to create an incentive for irregular fighters to distinguish civilian targets while at the same time allowing them to hide their identity some of the time).


54 Under Article 44 of Additional Protocol I, "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly.

reasons, because the Additional Protocol would have endangered civilian populations by removing the incentive for irregular combatants to distinguish themselves and expanded prisoner of war protections to such combatants, the United States refused to ratify these protocols. It must be emphasized that, even under Additional Protocol I, Al Qaeda could not claim the status of a lawful belligerent because it is not fighting against “against colonial domination and alien occupation” in a battle for self-determination.

Beyond the formal classifications of combatants in asymmetric conflicts lies the repudiation of norms of conduct of battlefield armies by non-state combatants. The routine disregard for any conventions of war (as with the Al Qaeda use of beheadings of prisoners to sow terror) makes it increasingly difficult for a state army to then view itself as constrained by the norms of conduct that emerged in wars with reciprocal stakes among soldiers. Armies have long inflicted harsh treatment on opposing forces thought to have violated reciprocal obligations on the battlefield. Indeed, the traditional laws of war, going back to the Lieber Code crafted for the Union Army in the Civil War, assumed the right of reprisal against soldiers who violated customary obligations, such as the right to safe surrender, or the humane treatment of the wounded.

Further, the use of civilians as camouflage challenges the obligation to protect civilians that emerges from both humanitarian law and human rights norms. The strategic recourse of non-state warriors to hiding among the civilian population to conduct asymmetric warfare vitiates the assumption that state militaries can accurately distinguish (putatively nonbelligerent) civilian populations from enemy forces. Every military engagement then compels a separate analysis of the justification for the use of force because of uncertainty about who the combatants really are and the difficulty of disengaging the civilian population from the combatants.

For the United States, the unacceptability of the Additional Protocol left the unhappy choice of treating irregular combatants either as soldiers or as civilians. In the latter case, presumably the operation of civilian criminal law must apply (leaving aside the question of its application by normal criminal courts of military commissions) unless there were some proof of specific

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security concerns – a category that raises once again the indeterminate status of detention for prolonged periods of non-state belligerents. Thus, for example, U.S. Army Regulation 190-8, Chapter 1, Section 6e(10), anticipates that a determination that an individual is not a combatant and entitled to the protections of the Third Geneva Convention would have to be tried criminally for specific criminal conduct: “persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.” At the same time, most human rights conventions allow some right of detention for purposes of national security, so long as such detentions are “grounded in law.”

Thus, even to the extent the issues were looming on the horizon in some of the anticolonial uprisings that occurred at the time some of these instruments were drafted, no clear resolution emerged of how they should legally be addressed. That lacuna does not stop advocates from arguing that international law does require A, B, or C; moreover, the values and principles underlying various bodies of international law might usefully inform how we ought to think about its application to modern terrorism. But we see these arguments more as aspirational – about what international law ought to be, in the mind of various proponents – than as positivistic statements about what international law already is. This lacuna, however, should not be taken as an invitation to claim that no law, or no international law, applies at all. Instead, it requires us to reflect on the foundational structures of modern warfare and how these underlying normative legal principles and values ought best be adapted and applied to these circumstances.

The problem then becomes what to do with prisoners taken in what Eyal Benvenisti helpfully characterizes as “transnational war” in which a state actor finds itself combating foreign non-state actors beyond the state’s borders, as with the actions against Al Qaeda in Afghanistan. Here the normal category of wartime detention does not readily apply to combatants

59 Under Geneva IV, arts. 27, 42, 43, a state involved in a war or other armed conflict with another state that is also a signatory to the Geneva conventions is allowed to detain civilians for security reasons. There is no corresponding recognized law of war addressed to what we are terming transnational warfare. Otherwise, a detainee may be covered only by the International Covenant on Civil and Political Rights. GERRY SIMPSON, LAW, WAR & CRIME 160 (2007). These in turn address primarily the conditions of detention rather than its objectives and seek to compel “respect for the inherent dignity of the human person” for all those under a state’s authority, regardless of the reason for and circumstances of the detention. International Covenant on Civil and Political Rights art. 10(1), 16 Dec. 1966, 999 U.N.T.S. 171.

60 Quoted in BENJAMIN WITTES, LAW AND THE LONG WAR 40 (2008).

61 Hakimi, supra note ___, at 608 & n.51, 615.

62 Benvenisti supra note 78, at 341.
who do not wear uniforms and blend into the civilian population, and who engage in a military conflict of unspecified duration. Given the amorphous front and fighting force, an indiscriminate use of detention until the end of hostilities could amount to possible life sentences for all those that enroll as militants and are subsequently captured – including those at a young age and/or those who have not committed particularly heinous acts – an outcome that seems disproportionately harsh.63

Despite the formality of the inherited category distinctions between civilians and combatants, the practical laws of war and human rights law have effectively created new categories for addressing the persistent problem of asymmetric war. In the Israeli Supreme Court’s discussion of targeted killings, for example, the formal (and somewhat formalistic) treatment of all nontraditional combatants as presumptively protected civilians is quickly coupled with practical exceptions of military necessity that, in effect, create a third category between civilians and combatants.64 A similar approach to a developing practical accommodation comes with the increasing focus on the proportionality of the relation between the overall military objectives and the likely collateral consequences among true civilian casualties.65 Here again, the practicalities of this form of warfare have moved out ahead of the formal doctrines of international humanitarian law.66


64 HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. (PCATI) [2005] (Isr.), slip paras. 38-40, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (laying out conditions under which persons classified as “civilians” under the Geneva civilian/soldier binary may nevertheless be targeted for killing under the Convention “for such time as they taking a direct part in hostilities.” The Israeli Supreme Court’s opinion stresses the danger of a “revolving door” of terrorism in which complete immunity from military response inures to militants so long as they are not in the very act of committing violence).

65 The Israeli Supreme Court was acutely aware of such proportionality concerns in its landmark decision. Id. at par. 45 (“attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage”). The United States and Israeli militaries have responded to the concerns evinced by civilian collateral damage in part by requiring that each country’s respective chief executive personally approve targeted killings that implicate innocent civilians casualties.)

66 Notably, both the United States and Israel have placed internal limits on their respective targeted killing programs such that the chief executive’s personal approval is required prior to carrying out strikes that implicate innocent civilians. Steven R. David, Israel’s Policy of Targeted Killing, 17 Ethics & Int’l Affs, April 2003, at 111, 115 (2003) (“[I]f innocent casualties could occur as a result of the operation, the IDF will again seek the approval of the minister of defense and the prime minister before launching the attack”). Jo Becker & Scott Shane, Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, N.Y. TIMES (May 29, 2012), at http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all (“When a rare opportunity for a drone strike at a top terrorist arises — but his family is with him — it is the president who has reserved to himself the final moral calculation”).
b. Limits of Criminal Law

In the first years after 9/11, much of the debate about the use of domestic legal structure to handle foreign combatants centered on whether terrorism was more “like crime” or “like war;” once that threshold judgment was made, various legal entailments and consequences were thought to follow logically. But as we have accrued more experience with these issues over a decade, it has become clearer that this threshold question of war versus crime does not fully or adequately resolve the range of legal questions that urgently must be answered.

Invoking the criminal law immediately differentiates the new asymmetric warfare from customary state-to-state conflicts. The basic problem is that war turns on killing and capture, the heart of the prohibitions of the ordinary criminal law. The attempt to impose a legal regime on the conduct of warfare required a disciplinary convention apart from the ordinary criminal code, even though many of the captured soldiers would have engaged in acts of violence that would otherwise routinely be subject to criminal prosecution. In dealing with captured soldiers in the conventional war context, act-based prosecutions are not even an option for detained enemy soldiers. Detention is the only form of incapacitation permitted, other than killing. Soldiers are not committing crimes; they are immune from prosecution (unless they engage in non-routine means of waging war, i.e., war crimes). Under the Geneva Conventions, for example, captured soldiers are POWs and are afforded the same protections against punishment as the soldiers of the detaining army.67 This is referred to in the commentary as the principle of assimilation.68 This is a modern adaptation of the Civil War-era Lieber Code which stated that the “municipal laws,” as the normal civilian power was termed, of the respective countries of armies facing one another have no effect and may not be applied to captured soldiers.69

As a result, there has never been a general practice of trying enemy soldiers as soldiers in any court. Part of the reason is that the detention of enemy soldiers involves a prospective judgment of their future dangerousness, while criminal law is concerned with the proper level of punishment for what are completed acts. By contrast to the detention of enemy combatants, under the criminal law, the “focus is retrospective, rather

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67 Geneva III art. 45.
69 Id. art. 41.
Consequently, the laws of war have been directed to detention rather than criminal prosecution as the primary form of restraint of enemy combatants. We did not try enemy soldiers simply because they shot at Union troops in the Civil War, or our troops in World War I, World War II, or any other war. Although military tribunals have been used in extraordinary cases to try enemy belligerents whose conduct was deemed to violate fundamental humanitarian norms and thereby to constitute war crimes, trial has never been the presumptive disposition of the enemy in war. Instead, captured enemy soldiers have typically been detained for the purpose of disabling them from continuing the fight against us, then released once the war ends or to pursue some other tactically valuable end, such as an exchange of prisoners.

This poses the heart of the problem. Unlike the criminal law, status-based wartime detention often does not even involve any kind of specific act; it is much more obviously tied to affiliation, namely, the wearing of a uniform. But terrorism itself is a crime; terrorist organizations (unlike armies) are criminal organizations whose object is to attack civilians, not capture territory. Thus, anyone participating in such an organization is also committing a crime and can be prosecuted.

In fighting a non-state adversary organized along military lines, neither category fits well. Because Al Qaeda is a military force, it may be necessary in the course of degrading its military capacity to detain the cook and the driver, and not just the bomb-maker – as indeed we have. It would be easy to justify detention of the cook or driver if Al Qaeda were viewed as a proto-army and principles of disabling an adversary were to apply. But it is hard to bring the act of driving or cooking into the act-based domain of criminal prosecutions, except through expansive recasting of what constitutes a crime.

One of the effects of a prolonged and legally unclear war against terrorist operatives has been the significant expansion of the reach of a series of inchoate crimes so that more and more of the actions in which members, affiliates, or even fellow travelers of terrorist groups participate are now defined as crimes. This is the logic of the expansive crime of material

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72 Matthew Waxman aptly captured this problem in an article that examined the evidentiary questions posed by the individual assessments necessary to detain suspected terrorists. The problem, as Waxman summarized, is that in the “criminality-versus-warfare dichotomy,” the basic decisions that have to be taken with regard to suspected terrorist “do not fit neatly into either paradigm.” Matthew Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists, 108 COLUM. L. REV. 1365, 1378 (2008).
support to terrorism.\textsuperscript{73} It is not only the concrete act of terrorism itself, such as bombing a subway, that is criminal, but virtually any form of connection, participation, funding, etc. that potentially falls under the commands of the expansive criminal law or associated civil penalties,\textsuperscript{74} particularly as the definition of crime itself becomes more inchoate. The contrast to conventional conceptions of war stands out. Not only are soldiers immune from criminal prosecution, but we would find it all the more strange to consider prosecuting the general's driver, cook, etc. But even these low-level actors when operating as part of a terrorist organization are committing crimes and can be prosecuted, no matter how remote from actual attacks upon civilians.

The new crime of material support for terrorism is a nebulous concept that has already forced our courts to confront the limits of what may be prosecuted, including among American citizens.\textsuperscript{75} Fortunately, most of our detainees are thought to have engaged in particular acts of violence that mark them as enemy combatants, such as shooting at our soldiers or at civilians.\textsuperscript{76} Sometimes these are acts that could be prosecuted even in a customary war (such as acts of terror directed at civilians); other times these are acts that would be privileged in wartime (such as shooting in a firefight with soldiers). In unconventional war, these acts are both evidence of affiliation and specific acts for which criminal prosecution may be sought. So unlike conventional war in which it is the status of being a soldier that typically controls, it is natural to think in terms of specific acts in the context of terrorism – which creates a pull toward the act-based justification (hence, prosecution) for detention.

As a practical matter, however, it is oftentimes difficult to use the forms of normal civilian prosecution for individuals who are seized in the course of a military conflict.\textsuperscript{77} But the critical question is not simply one of criminal


\textsuperscript{74} See 18 U.S.C.A. §2339A(b)(1) (West 2009) (defining “material support” to include “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”).

\textsuperscript{75} See Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010) (holding that “material support” as used in 18 U.S.C. 2339B applied to the provision of expert advice (including legal advice) by U.S. based organizations even for seemingly benign legal advocacy activities, and that this provision withstood First Amendment scrutiny).

\textsuperscript{76} CITE NEEDED

\textsuperscript{77} One of the obvious challenges to such prosecution is, of course, evidentiary. Lt Col. Bovarnick notes that the rules of evidence currently employed by Afghan Detainee Review Boards have few restrictions on admissibility. Bovarnick, supra note 67, at 23 ("The rules of
procedure but of the object of the investigation. Ascertaining status as a combatant for purposes of detention is not the same thing as deciding to try individuals as punishment for discrete acts of terror. Despite the repeated habeas petitions presented to the DC courts on the propriety of detention, there is no reason that this form of review should be had in the Article III courts in the first instance. In the absence of tribunals capable of making the initial screening decision, and as the time of detention grows, federal courts will be conscripted to serve this role. But as a matter of policy, it appears preferable to have in place the institutions that can make initial determinations of the propriety of detention as an irregular combatant regardless whether the zone of conflict and the situs of detention is near or far from the territorial United States.

The task of ensuring accurate initial identification decisions could be handled by courts, though it is a non-obvious use of courts to make determinations of the military role of detained individuals without any necessary sentencing implications. Thus, for example, the current DOJ-DOD “Determination of Guantánamo Cases Referred for Prosecution” addresses in broad strokes the considerations for referral to military commissions or Article III courts, with a preference for the latter, but only for matters to be prosecuted. The DOJ-DOD protocols do not address the verification issue for detention.

But individuals captured through military actions are not necessarily either best or most efficiently tried through the normal criminal justice system. There are a range of protocols that need to be established to address evidence that apply in a criminal court do not apply at a DRB, which is an administrative hearing. The board may consider any information offered that it deems relevant and non-cumulative.”). Among the aspirational goals for improving the Detainee Review Boards, highlighted by observing NGOs, are making earnest attempts to have capturing units focus on evidence gathering notwithstanding the fact that this is outside the traditional battlefield purview. Id. at 39 (“While this is not likely to occur in the near term, a culture change such as the one suggested by Mr. Horowitz [of the Open Society Institute]—evidence gathering rather than intelligence gathering—is a method that units could adopt.”)

78 In Hamdan, the Supreme Court made clear that the ad hoc quality of the government’s detention policies was a source of liability both under domestic and international law. In response to the government’s argument that the Geneva Convention did not apply to the war with Al Qaeda, which was not a signatory to the Geneva Convention, the Court pointed to Common Article Three of the Geneva Convention and found that the term “regularly constituted court” in Common Article III excluded after-the-fact constituted military commissions. Hamdan v. Rumsfeld, 548 U.S. 557, 631-32 (2006).

79 Indeed, in Hamdi, Justice Souter raised the possibility that the government had not demonstrated that it was “acting in accord with the laws of war authorized to be applied against citizens by [the AUMF],” Hamdi v. Rumsfeld, 542 U.S. 507, 551 (2004). (Souter, J., concurring in part and dissenting in part).

the particulars of bringing actions for crimes against these individuals that are unlikely to be in conformity with normal criminal procedure, and it is unlikely that individuals such as Khalid Sheikh Mohammed would or could be released from detention even if the prosecution for specific criminal conduct fails. The limited US practices from past wars do not indicate that the criminal culpability of enemy combatants has generally been thought to be a matter of ordinary criminal prosecution. Nuremberg is a clear example of a tribunal specifically designed to prosecute the specific criminal conduct of German officers and soldiers. Because it was constituted after the war was over, its only function was to assess criminality, and those individuals acquitted at Nuremberg were released. Similarly, a special military commission was convened for the trial of Masaharu Homma for, among other things, his responsibility for the Bataan Death March. But there are only a handful of prosecutions of Axis war criminals in the ordinary criminal courts of any country after World War II, as with the trial of Klaus Barbie in France in 1987.

c. War and Crime.

For much of its existence as a detention site, Guantánamo has served as shorthand for the initial forms of responding to 9/11 under the Bush Administration. Although as a candidate for office in 2007, President Obama

81 Attorney General Holder adverted to this point in his initial declarations that Khalid Sheikh Mohammed (“KSM”) would be subject to criminal prosecution, presumably in New York. To some consternation, he also added that even were KSM to be acquitted of the specific criminal charges brought against him, the government would nonetheless continue to hold him. Jake Sherman, Eric Holder grilled by Senate Republicans, POLITICO (Nov. 19, 2009, 4:54 PM), http://www.politico.com/news/stories/1109/29670.html (“Wisconsin Sen. Herb Kohl, the second-ranking Democrat, also asked the question that many have raised: What if Mohammed gets off on a technicality or is acquitted? Holder assured the committee that the United States has the ability to keep Mohammed in custody as an enemy combatant”). For an earlier discussion of the pressures on the criminal justice system from the efforts to try foreign terrorists, see Samuel Issacharoff, Error! Main Document Only. Judging in Times of the Extraordinary, 47 HOUSTON L. REV. 533 (2010).


84 For an overview of the historical background of the Barbie Trial and its relationship to the Nuremberg tribunals, see Guyora Binder, Representing Nazism: Advocacy and Identity and the trial of Klaus Barbie, 98 YALE L.J. 1321 (1989).
vowed to close Guantánamo,\textsuperscript{85} the political and logistical realities frustrated that aim.\textsuperscript{86} To this day, much attention is still focused on the 171 or so detainees who remain at Guantánamo,\textsuperscript{87} particularly as these detainees became a focus of partisan divides.\textsuperscript{88} Our concern, however, is with the policies underlying detention more generally, rather than with the particular situs of detention, whether it be at Guantánamo or in Afghanistan or aboard a naval vessel.\textsuperscript{89} Absent some coherent policy on detentions, the legal challenge to the indeterminate status of detainees plays out in the habeas context in the federal courts (whether in claims by detainees at Guantánamo prisoners\textsuperscript{90} or in Afghanistan\textsuperscript{91}). Ultimately, however, we agree with Ben


\textsuperscript{87} Ben Fox, \textit{Guantánamo closure hopes fade as prison turns 10}, \textit{Associated Press}, Jan. 10, 2012, available at http://hosted2.ap.org/APDEFAULT/3d281c11a96b4ad082fe88aa0db04305/Article_2012-01-10-CB-Guantánamo-10th-Anniversary/id-f4ecc0e310674dedaad3a210a5506e42. Of those 171 detainees, 46 are “indefinite detainees” who will not be charged or released, 89 are eligible for transfer or release, 6 face death-penalty trials that may begin this year, 4 are convicted war criminals, and 1 is serving a life sentence. Carol Rosenberg, \textit{Why Obama Hasn’t Closed Guantánamo Camps}, \textit{Miami Herald}, Jan. 7, 2012, available at http://www.miamiherald.com/2012/01/07/2578082/why-obama-hasnt-closed-Guantanamo.html.


\textsuperscript{89} See \textit{Daniel Klaidman, Kill or Capture}: \textit{The War on Terror and the Soul of the Obama Presidency} 249-52, 258 (2012) (discussing capture in Somalia of Ahmed Abdualkadir Warsame, who was then held for three months in international waters aboard the U.S.S. Boxer, while being interrogated and while officials wrestled over where to send him for detention or trial).

\textsuperscript{90} After Boumediene v. Bush, 553 U.S. 723 (2008), the D.C. District and Circuit Courts issued numerous decisions in response to Guantánamo habeas petitions, thereby creating a de facto common law on the scope of the government’s authority to detain. The Obama administration argued that it could detain members of AUMF-covered groups as well as non-members who provided support to such groups. See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at *2, In re Guantánamo Bay Detainee Litigation, No. 08-442 (D.D.C. 2009), available at http://www.justice.gov/opa/documents/memo-re-det-auth.pdf. However, the D.C. District Court held that while individuals who participated in the command structure of a terrorist organization could be detained at Guantánamo, non-members who merely provided support to such an organization could not. See Gherebi v. Obama, 609 F. Supp. 2d 43, 68, 71 (D.D.C. 2009) (authorizing detention for those who "receive and execute orders within [the enemy
Wittes that “habeas review shows up only as a stopgap against injustice. It never operates as the front-line defense against wrongful conviction.”\(^92\) Despite the heat over the detention debate, or perhaps because of it, the more fruitful it may be to rediscover first principles.

organization’s] command structure,” but precluding it for those not “members of the enemy organization’s armed forces”); Hamilies v. Obama, 616 F. Supp. 2d 63, 76-77 (D.D.C. 2009) (holding that substantial support for a terrorist organization could not, by itself, justify detention). A D.C. Circuit panel subsequently adopted a more expansive view of the executive’s detention authority, however, holding that non-members who had “purposefully and materially supported” enemy forces could be detained. See Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010). The Al-Bihani panel majority also declared the international laws of war to be “inapposite” in determining the scope of the president’s war powers, but, in a subsequent explanatory statement denying en banc review, a majority of the circuit judges declared the discussion of international law of war principles in Al-Bihani to be “not necessary to the disposition of the merits.” Id. at 871; Al-Bihani v. Obama (Al-Bihani II), 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc). D.C. Circuit decisions also clarified what types of evidence could be used to demonstrate membership in a terrorist group, including attendance at a training camp or guesthouse. See Uthman v. Obama, 637 F.3d 400, 406 (D.C. Cir. 2011) (discussing the significance of guesthouse attendance); Al Odah v. Obama, 611 F.3d 8, 17 (D.C. Cir. 2010) (suggesting that training-camp attendance alone might be sufficient to justify detention).

91 In Al-Maqaleh v. Gates, District Judge John Bates held that habeas was indeed available for at least three non-Afghan individuals being held at the Bagram Theater Internment Facility in Afghanistan. 604 F. Supp. 2d 205, 235 (D.D.C. 2009). The D.C. Circuit reversed Bates’s ruling, however, holding that, under Boumediene, federal district courts did not have jurisdiction over such habeas claims because the United States had no intent to permanently occupy Bagram, and because Bagram was located in an active war zone. Al-Maqaleh v. Gates, 605 F.3d 84, 97-98 (D.C. Cir. 2010).

92 BENJAMIN WITTES, LAW AND THE LONG WAR 152 (2008). Habeas review through the D.C. courts has now become the driving force of all sorts of detention policies, including even the government’s evidence justifying detention. District Judge Kessler first resisted the government’s reliance on “mosaic theory,” which would allow individual pieces of evidence to be assessed in the context of all of the evidence on record, rather than independently. See Ahmed v. Obama, 613 F. Sup. 2d 51, 56 (D.D.C. 2009) (arguing that mosaic theory is “only as persuasive as the tiles which compose it”). Circuit Judge Randolph D.C. Circuit repudiated Judge Kessler’s approach, however, and suggested that courts apply “conditional probability analysis,” in which they view each allegation in light of the other evidence. See Al-Adahi v. Obama, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010) (noting that the district court “wrongly required each piece of the government’s evidence to bear weight without regard to all (or indeed any) other evidence in the case”). Subsequent D.C. Circuit decisions followed Judge Randolph’s admonition. See, e.g., Salahi v. Obama, 625 F.3d 745, 753 (D.C. Cir. 2010) (deeming it appropriate to consider the evidence “collectively rather than in isolation”); Uthman v. Obama, 637 F.3d 400, 407 (D.C. Cir. 2011) (noting that the court is to “consider all the evidence taken as a whole”). Other procedural issues that the D.C. courts addressed include the admissibility of hearsay evidence and the appropriate standard of proof in Guantánamo habeas proceedings. See Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010) (permitting the use of hearsay evidence, but requiring courts to assess the evidence’s reliability); Id. at 878 (holding a preponderance of the evidence standard constitutional); Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (suggesting that a standard lower than preponderance of the evidence might be appropriate).
The Supreme Court’s Guantánamo decisions, as we read them, invite precisely this inquiry. Starting with *Hamdi v. Rumsfeld*, the Court held out the possibility that the constitutional requirements for detention decisions “could be met by an appropriately authorized and properly constituted military tribunal.” In *Boumediene v. Bush*, the Court analyzed the availability of habeas relief as turning in large measure on “the adequacy of the process through which that status determination was made.”

Focusing on process unfortunately strains the historic divide between military and police activities. The objective of police work is to apprehend targets and to bring them to trial in the criminal justice system. Virtually all aspects of their engagement with arrestees, from the *Miranda/Dickerson* warnings to the formalized chain of custody processes for evidence, are undertaken with an eye to permitting the orderly prosecution of the criminal suspect. By contrast, the objective of a military operation is to disable a threat and to render the enemy incapable of posing a new threat, including through the use of deadly force. All the objectives of a military action concern the termination of the threat, and battlefield procedures are generally not designed to facilitate an alternative goal of eventual prosecution. Mission-specific rules of engagement and the background principles of the law of war primarily ensure that military engagements themselves remain within prescribed boundaries. They are not designed to enable persons captured in those engagements to be prosecuted in a civilian court system.

Much as the new battlefield places a premium on adjudicative facts (i.e., why this person?), this does not merge the objectives of trial for criminal and military detention purposes. Criminal defendants are charged with violating the norms of our society, applicable to them because they are citizens, residents, or involved in activities that take place within our borders or have effects there, or that affect our personnel or other sovereign interests abroad. Generally speaking, our constitutional norms of criminal procedure are designed to provide protections to those within or sufficiently connected to our society and who are charged with violating the norms of that same

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94 *Id.* at 538 (emphasis added).
96 *Id.* at 766 (emphasis added). Justice Kennedy went on to contrast the role of habeas: “Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances...It appears the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention.” *Id.* at 779-80. *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 587 (2006) (striking down detention review because “the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established.”).
Treating nonprivileged captured combatants or irregular armies, such as Al Qaeda, into criminal defendants may paradoxically entitle them to more legal protection than the soldiers of lawful armies who are obligated to distinguish themselves from the civilian population.98

For our purposes, however, the central effects of the failure of irregular combatants to identify themselves is that it increases the risk of error in determining who is and who is not a properly detained combatant, and correspondingly increases the likelihood of innocent civilian casualties and detentions. This lack of certainty over identification means that legal processes will be infused into the detention regime of nonprivileged combatants in a way that would not be true of captured soldiers in uniform from conventional armies. Where the status of a detainee as a combatant is in dispute, as with individuals seized in the course of military operations abroad against a clandestine force, there is a need for a competent tribunal to make that determination. It matters whether someone detained at Guantánamo or elsewhere is an Al-Qaeda operative as opposed to some villager who was turned over to local forces because someone coveted his motorbike.

In the terms of the Geneva Conventions, it is only civilians under Geneva IV whose status is subject to periodic review every six months, not privileged prisoners of war under Geneva III.99 By contrast, the extra process measures that are emerging in the battlefield attach to the assessment of whether or not a detainee is in fact an unlawful combatant.100 Once that status determination is made, however, there is no reason under the laws of war or any sensible policy to give irregular combatants more rights than ordinary soldiers. Simply put, the unilateral conduct of unlawful combatants in refusing to distinguish themselves from the civilian population cannot endow them with rights they would not have as lawful combatants. At the same time, the fact that there is no corresponding state enemy imposes on the capturing nation

97 Philip Hamburger provides an illuminating discussion of the traditional view that allegiance to the nation was a precondition for the protections of its laws. The young American republic considered itself bound by its internal laws, but not as a consequence of the rights claims of those who had taken up arms against the U.S. Philip Hamburger, Beyond Protection, 109 COLUM. L. REV. 1823 (2009).

98 Part of the reason for the specific protections afforded prisoners of war was to induce soldiers to conform to the rules of war, and to protect the non-combatant civilian population from being confused for belligerents. To offer the same treatment, let alone superior treatment to nonprivileged combatants would undermine whatever remains of the incentive structure for soldiers to advertise the fact of their being combatants. Under traditional laws of war terms, the fact that unlawful combatants do not wear uniforms and do not display weapons has the primary effect of raising the risks of civilian casualties in battle.

99 Geneva IV, article 78 (requiring that internment of noncombatants “shall be subject to periodical review, if possible every six months, by a competent body set up by the said [capturing] Power”).

100 John Duffy helped us with formulating this point.
the responsibilities for monitoring the continued well-being of the captives, including the decision as to when release is justified or compelled. In normal war conditions, that decision ultimately rests with the state patron of the captured soldier who through surrender or prisoner exchanges can secure the end of detention and its attendant burdens.

Uncertainty over the status of detainees should not be confused with the beginning of a prosecution. As expressed by the Supreme Court with regard to the Authorization for the Use of Military Force (“AUMF”) following 9/11, “the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.” 101 Thus, in the first instance, military tribunals, such as the Detainee Review Boards currently being used in Afghanistan, appear best situated to making the determination as to the status of a battlefield captive as a combatant, and in making a preliminary assessment of the continued threat posed by that individual. As we will set out, the need to make that individuated assessment differentiates immediately the detention of irregular combatants from the relatively routine processing of prisoners of war of a belligerent army – the customary instruction to yield “name, rank and serial number” upon capture.

The historic legitimacy of detaining enemy fighters not for what they have done but because of who they are—on account of their status as enemy belligerents as opposed to their having committed any particular criminal act—is why it is possible that an individual alleged to belong to Al-Qaeda might be absolved of war crimes and yet still be subject to detention. Substantive criminal law in the United States has long forbidden detention based on status rather than conduct,102 with only discrete and distinguishable exceptions. In the military context, in contrast, status-based detention of enemy belligerents is the norm, not the exception. Moreover, the traditional scope of this detention authority is broad: In times of war, it is as permissible to detain the enemy military’s cook as it is the bombardier. Absent a specific war crimes prosecution, it is the fact of being a soldier that justifies detention rather than specific proof of having committed a particular offense.

d. Individuated Proof and the Justification for Detention.

The object of this Article is not to provide a top-to-bottom account of a fully formed detention policy. Rather, the goal is to situate the current

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101 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004). See also Hakimi, supra note ____, at 605-06 (“Detention is not about punishment; it is about incapacitating persons and thereby containing the security threat they pose”).

debates over detention – and subsequently over the use of targeted killings – within the framework of legally justifiable war aims directed against non-state combatants. We turn now to three of the most important legal and moral questions, in our view, about processes and institutional structures regarding military detention in asymmetric warfare.

i. Are Particular Detentions Justified Initially?

As discussed, the Geneva Conventions specify the treatment owed to prisoners of war, but assume both that the combatants could be identified and that the duration of the confinement would be the customary boundaries of declared war. The object of the detention was to disable combatants so that they could not contribute to further military opposition to the captors. Because prisoner of war status did not involve a moral condemnation of the detainees as criminals, the Geneva Conventions specified norms of treatment that went beyond basic norms of humane accommodations. An examination of the policies that emerged in Iraq in the second Bush Administration and under the Obama administration show the move to integrate the wartime model into the real world of asymmetric warfare. As a threshold matter, a credible and humane detention policy is central to the objectives of irregular war, as well captured by military officers charged with the development of detention policies at Camp Bucca, Iraq:

In Iraq, 160,000 people have been through the detention process, and we estimate that each detainee has a network that includes approximately 100 other Iraqi citizens. As a result, detainee experiences under America’s care and custody may influence up to 16 million of Iraq’s 26 million inhabitants. To see the potential future effects of current detention operations, one need only recall that many former detainees such as Nelson Mandela, Fidel Castro, Daniel Ortega, and Jomo Kenyatta became important national leaders after their release from custody.103

The American intervention into Afghanistan and Iraq did not focus particularly on the question of detentions, for reasons that are increasingly hard to recall as the years of military engagement continue to mount. With regard to Iraq, for example, “detention operations did not figure prominently in pre-invasion planning because the assumptions driving that planning did not include a sustained U.S. ground presence, let alone an extended

occupation and counterinsurgency campaigns.” 104 With operations on the
ground, however, came the problem of holding prisoners, particularly with
enemy fighters refusing to distinguish themselves from civilians.

Because of the violation of the principle of distinction by nonuniformed
fighters, any detention system begins with the difficult task of identification
of unlawful combatants. As these systems mature, they learn to use field
intelligence to identify operatives in such a way that is subject to some form
of verification. In practice, the process of determining combatant status
functions as the de facto substitute for identification provided by the
uniforms of lawful combatants. Necessarily, the identification process
coincides with military objectives because the same determination of
belligerent status, even when engaged in noncombatant activities, may be the
trigger for the use of force. 105 But these investigatory efforts are always
limited by the reality of war. As Lieutenant Eddie Johnson told Robert
Chesney, “[t]here were many occasions where we felt very exposed and at
risk during an operation. This was due to the fact that proper evidence
collection was very time-intensive. There were times where I pulled my
platoon off an objective, in lieu of evidence collection, in order to protect
it.” 106 Or, put more succinctly by Captain Joshua Lewis, “our main effort
was to stay alive and get home.” 107

The alternative argument, that an unlawful combatant can only be
attacked when in action, but then assumes safety as soon as his weapon is put
away, would again create an indefensible legal protection to unlawful
combatants not shared by lawful soldiers. 108 Such preliminary identification
“does not imply criminal guilt or outlaw status but establishes affiliation in
the same way that uniforms do.” 109

104 Chesney, supra note ___, at 563.

105 Even here, the line between military and police functions begins to blur. Because of
uncertainty over the identity of enemy combatants in Afghanistan, the individuation problem
at the heart of the Article influences many aspects of modern military engagement. As a
matter of military necessity, American forces have begun to rely on sophisticated systems of
biometric identification of individuals encountered through contractors, applications of
employment, and military operations. The result is a significant database of personal
identification that both assists in military assessments and in more police-like evidentiary
proof. For an overall discussion of the military use of biometric information, see The Eyes
Have It, THE ECONOMIST, July 7, 2012 at 40.

106 Chesney, supra note ___, at 571.

107 Id.

108 In Michael Walzer’s famous discussion, a soldier bathing naked and unarmed remains a
military target of opportunity. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL
ARGUMENT WITH HISTORICAL ILLUSTRATIONS 143 (1977). Perhaps the most provocative
reassessment of the impact of modern warfare on traditional norms regarding the killing of
opposing forces comes in Gabriela Blum, The Dispensable Lives of Soldiers, 2 J. LEGAL
ANALYSIS 69 (2010).

At the same time, even the initial screening of detainees cannot escape the question of what the object of the initial review should be. Any criminal-law infused notion of probable cause points back to illicit actions that can be traced back to the detainee. Yet, as played out in battle in Iraq, “soldiers routinely took custody of persons who were not identified to any particular act, but, instead, simply had been identified as ‘bad’ by a neighbor or had been part of a large group of individuals detained in a general sweep of an area.”110 The question of identity alone could not establish whether detention was justified for any particular individual. The lack of a formal military structure meant that being “bad” was an insufficient substitute for the clarity provided by a uniform and a rank in an army. Instead, identifying individuals that needed to be detained meant assessing their individual acts and distinguishing the real combatants from the civilian web in which they embedded themselves.

The need to distinguish enemy combatants from civilians made it an operational necessary to create a robust system of Detention Review Boards (“DRBs”) in Iraq and then, most notably, Afghanistan, to assess the propriety of prolonged detention.111 As the system evolved, it took on more of the characteristics of the formalized detention system in Israel,112 one that has in turn developed under the most careful judicial scrutiny of any country.113 What is more striking is the increasing standards of proof as these review boards acquire the characteristics of bureaucratic legalism, to borrow John Witt’s term for the maturation of the civil tort system.114 One study in Israel found that detention review resulted in immediate release of the detainee in about five percent of cases, in an order of release upon completion of a six-month period of detention in about 17 percent of cases, and in a reduction of planned detention in another 9 percent of cases.115 In Iraq, an initial review of detentions under new DRB procedures implemented in 2007 resulted in an immediate increase in rates of release from around five percent to thirty

110 Chesney, supra note ___, at 579.
112 For comparisons of detention regimes and their evolution, see Ashley S. Deeks, Administrative Detention in Armed Conflict, 40 Case W. Res. J. of Int’l L. 403, 432 (2009).
113 Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906, 1923-24 (2004) (describing the abandonment of prudential barriers to judicial review, such as standing, and the limited deference to military authorities on detention decisions, resulting in broad judicial review of detention decisions).
percent.\textsuperscript{116} In the first period of operation of the final version of Detention Review Boards in Afghanistan, running from September 2009 through June 2010, continued detention was recommended in 64 percent of cases, with the bulk of the remainder split between outright release or transfer to Afghan authorities.\textsuperscript{117}

Beginning in 2009, the current Detention Review Boards review the propriety of all persons held in the Detention Facility in Parwan (the “DFIP”).\textsuperscript{118} Persons detained in the field may be held for up to two weeks, primarily for information gathering purposes, before being transferred to DFIP.\textsuperscript{119} Once in formal detention, a DRB must convene at six-month intervals to assess a detainee’s continued detention, with the first such DRB occurring within sixty days of a detainee’s arrival at DFIP.\textsuperscript{120} The DRB, using a preponderance of the evidence standard,\textsuperscript{121} must make two determinations. (1) is the detainee a member of al Qaeda or the Taliban subject to detention? (2) If so, what course of detention should be followed?\textsuperscript{122} A negative answer to the first question requires release.\textsuperscript{123} If the detainee is either a member of an opposing force, or if the answer is uncertain, the DRB must recommend a specified course of action, leading to release, or to continued detention in POW-like conditions, or in some circumstances to criminal prosecution, as set forth in a Department of Defense memo from the Assistant Secretary of Defense to the Chairman of the Senate Armed Services Committee.\textsuperscript{124}


\textsuperscript{117} Lieutenant Colonel Jeff A. Bovarnick, Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy, ARMY LAW., June 201029 n.141..

\textsuperscript{118} Id. at 25. The DFIP facility is located near Bagram airfield. Id.


\textsuperscript{120} Bovarnick, supra note ____, at 22.

\textsuperscript{121} Id. at 29.

\textsuperscript{122} Id.

\textsuperscript{123} Id. (“If a majority of the board determines the detainee does not meet the criteria for internment, the detainee must be released from Department of Defense custody as soon as practicable. The decision to release cannot be changed by the convening authority.”).

\textsuperscript{124} Letter from Phillip Carter, Deputy Assistant Sec’y of Def. for Detainee Policy, to Senator Carl Levin, Chairman of the Senate Armed Servs. Comm. (July 14, 2010) available at http://www.politico.com/static/PPM205_bagrambrfb.html. The possible recommendations are:
In practice, the detention review system built from the ground up looks to take elements from Geneva III\textsuperscript{125} and Geneva IV\textsuperscript{126} to yield a pragmatic accommodation between the uncertainty of the status of irregular combatants and the need for continued disabling of forces that would again take up arms against American interests. From Geneva III comes the notion of tolerable, humane treatment of wartime combatants once rendered hors de combat. From Geneva IV comes the need for evidentiary certainty in the detention of non-uniformed combatants and the need for periodic review of status to ensure the continued need for detention. Consistent with our overall theme, there is little formal law to guide this intuitively sensible detention regime, but it seeks to accomplish the basic aims of wartime detention in promoting military security while providing for humane treatment of prisoners taken during periods of hostility.

\textbf{ii. How Long Can and Should Detentions Last?}

The second major problem derives from the uncertain boundaries of unconventional war. In conventional war, detention has an end, as does the war itself. Detainees are held until the end of hostilities, a prisoner exchange, or some other intervening event. In unconventional war, there is no state to surrender or negotiate a prisoner exchange. Anyone picked up for being an Al Qaeda cook or driver, for example, could, in theory, be held forever under the traditional laws of war – an unseemly prospect. This temporal uncertainty creates tremendous pressure to funnel everything through the act-based system, because at least that system generates determinate sentences.

If we return to the impetus for the Lieber Code during the Civil War, there is a need to normalize the rules of military engagement, both to provide direction to soldiers and to force accountability for the decisions of the belligerent powers. The challenge is to build a system that normalizes in the law a recognition that there must both be non-penal detention and some form of act-based determination to justify that detention. Two options for doing so exist. The first would be to derive more force from the criminal justice model

\begin{quote}
“(a) Continued internment at the DFIP. Such recommendation must include a determination not only that the detainee meets the criteria for internment, but also that continued internment is necessary to mitigate the threat the detainee poses.
(b) Transfer to Afghan authorities for criminal prosecution.
(c) Transfer to Afghan authorities for participation in a reconciliation program.
(d) Release without conditions.
(e) In the case of non-Afghans and non-U.S. third-country nationals …transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.”
\end{quote}

\textit{Id.} at 9.

\textsuperscript{125} Geneva III, art 79-82, 85-96.

\textsuperscript{126} Geneva IV art. 27, 41,42 & 43.
and create some presumed fixed-length terms of detention based on the seriousness and nature of the underlying acts, or the depth and seriousness of the individual’s involvement in Al Qaeda or associated terrorist organizations. Fixed terms would eliminate the prospect that the lowest-level foot soldiers would be held as long as the masterminds of Sept. 11, 2001, and ensure that similarly situated detainees are treated similarly. And the United States would show that it recognizes that, while detention might be appropriate and necessary for some core group of fighters who cannot sensibly be tried as criminals, the prospect of prolonged, indefinite detention is a troubling prospect (we leave aside those implicated in mass murder, such as the 9/11 plotters).

Nonetheless, forcing every detainee into the criminal justice system is not inherently more protective of the detainees. Unlike incarceration after conviction, non-criminal detention under the laws of war can never be used for punishment; its sole justification is incapacitation. This is precisely why the laws of war, going back to the initial formulation in the Lieber Code, prohibited the use of “municipal” or customary civilian law to judge the conduct of troops at war. And criminal conviction for material support for terrorism, probably the most common available charge, carries a maximum sentence of 15 years in most cases, and a life sentence if death resulted.\footnote{127} Fixed terms of detention, based on these factors, might yield shorter terms for low-level fighters, and certainly have in historic warfare.

Alternatively, the United States could create a credible system of periodic hearings to determine whether a detainee remains enough of a threat to justify continued detention. It is not enough to provide one round of legal process to make sure the right person is being held; some way to periodically revisit these cases is also vital. The key factual inquiry in these hearings would be whether an individual remains so dangerous that his continued detention is a matter of national security. In the field in Afghanistan, this has meant the development of a formalized use of specially commissioned DRBs to on regular, six-month bases determine whether continued detention is justified.\footnote{128} The inquiry here must be, as helpfully framed by Curtis Bradley and Jack Goldsmith, “whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities.”\footnote{129}

\footnote{127} 18 U.S.C.A. § 2339A (West 2009).
\footnote{128} A detailed account of the evolved practices in Afghanistan can be found in Lieutenant Colonel Jeff A. Boivarnick, Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy, ARMY LAW., June 2010, at 9.
\footnote{129} Bradley & Goldsmith, supra note ___, at 90. Among the relevant factors that Bradley and Goldsmith suggest examining are, “the detainee’s past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile.”
Alternatively, the two approaches — fixed terms and periodic review — could be combined. Instead of being automatically entitled to release after a certain number of years, a detainee could instead be presumptively entitled to release. A hearing to assess whether he remains a continuing threat could be held. The structure of those hearings could be tied to how strong the presumption of release ought to be.

Non-criminal detention has been a fact of national security policy since Sept. 11, whether in Afghanistan, Iraq or Guantánamo. Defining who may (legally) and should (strategically) be detained is not easy. But if there are good reasons that not every captured fighter or terrorist can be put into the criminal justice system, the government will need some system of prolonged non-criminal detention. Any such system will have to be designed in ways that come to terms with the specter of endless detention. On the other hand, there must be some credible detention policies in place anytime military force is projected internationally. The absence of a secure and meaningful detention capability for captured enemy combatants creates a strong incentive not to capture and instead to neutralize the threat posed by enemy forces through lethal force.\footnote{See Chesney, supra note ___, at 573-74 (citing episodes of U.S. troops resorting to killing dangerous enemy combatants to serve as “a useful reminder of the subtle relationship between detention and the use of lethal force, not to mention a cautionary tale regarding the manner in which that relationship can transmit incentives when detention options are restricted in a combat setting”). See also Michael J. Frank, \textit{Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq}, 18 FLA. J. INT’L L. 1, 83-85 (2006) (providing interviews regarding troop responses to leniency toward detainees by the Central Criminal Court of Iraq, which was established in 2003).}

Indeed, the most detailed account of internal Obama administration deliberations on this issue quotes leading military and counterterrorism officials, including the Vice Chairman of the Joint Chiefs of Staff, decreeing the fact that the administration had no viable option or plan for capturing and detaining high-level terrorists. The inability to settle, for political reasons, on a legitimate place in which to detain suspects leads to the possibility that a bridge figure between Al Qaeda and Somali terrorists was killed, rather than captured — despite his enormous potential intelligence value — in part because of the lack of a viable detention option. One anonymous top Obama counterterrorism advisor is quoted as saying that the lack of a viable detention option, which then pushed options toward more lethal ones, was always on the back of everyone’s mind: “Anyone who says it wasn’t is is not being straight.”\footnote{KLAIDMAN, supra note ___, at 126-27.} As a result, “[t]he inability to detain terror suspects [created] perverse incentives that favored killing or releasing suspected terrorists over capturing them.”\footnote{KLAIDMAN, supra note ___, at 126.}
There is little historic experience in the United States with long-term detention strategies on this model. Countries that have dealt with semi-permanent internal national security threats, such as Israel and India,

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<tr>
<td>Applies to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Israeli residents/citizens</td>
<td>Foreigner unlawful combatants (residents of Gaza and Lebanon, but residents of the West Bank)</td>
<td>Residents of the Occupied Territories (West Bank)</td>
</tr>
<tr>
<td>Basis for Detention</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minister of Defense orders arrest</td>
<td>Army Chief of Staff orders arrest</td>
<td>IDF commander orders arrest</td>
</tr>
<tr>
<td>Detention Requirements</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1) declared state of emergency (meaningless)</td>
<td>1) participate in a hostile act against Israel; or 1a) be a member of a force carrying out hostile acts against Israel; and 3) Release would harm security (presumed)</td>
<td>1) Reasonable cause to believe security so requires; and 2) believe detention is necessary for “imperative security reasons”</td>
</tr>
<tr>
<td>Initial Review</td>
<td>48 Hours</td>
<td>8 days</td>
</tr>
<tr>
<td>Subsequent Review</td>
<td>3 months</td>
<td>6 months</td>
</tr>
<tr>
<td>Appeal</td>
<td>Supreme Court</td>
<td>Supreme Court</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>Civilian</td>
<td>Civilian</td>
</tr>
<tr>
<td>In camera hearings</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Deviations from rules of evidence</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

India shares two features with Israel. Both were governed colonially through the British Mandate and integrated features of British law into the law of security detentions. Further, both have had to confront internal acts of terror launched from surrounding states. The combination leads to similar formal structures of detention authority. The Indian Constitution formally recognizes exceptions to the rules governing swift legal process and access to counsel for for “any person who is arrested or detained under any law providing for preventive detention.” CONST. OF INDIA Jan. 26 1950 art. 22, cl. 3. Preventative detention is also authorized for “any person who for the time being is an enemy alien.” Id. Most recently, in response to the Mumbai attack, Parliament passed The Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008. Despite the formal limitations on judicial review, the Indian courts have developed numerous doctrines based on “non-application of the mind,” an
have developed detention regimes with highly developed appeals mechanisms that operate in coordination with the national court system, either directly or by right of ultimate appeal.

What is striking, however, is that the American experience is far more developed on the ground in Afghanistan than it is formally – again reflecting the dead weight of the political impasse over Guantánamo.

### iii. Military Commissions or Criminal Courts?

We leave to last the debates over forum for reviewing detentions. On our view, the most important threshold issue in dealing with captured individuals alleged to be involved in terrorism is not the choice of forum issue for a trial – military commissions or civilian courts – but the more fundamental question of whether those individuals should be detained or tried. As discussed above, detention is a status-based regime justified not as a means of punishment for specific criminal acts, but as a means of defusing a threat that arises in a military or analogous context. Only once the decision is made that act-based criminal punishment is the appropriate means of dealing with a particular individual does the narrower question come into play of whether that individual should be tried in a military commission or civilian court.

What principles should guide this allocation? The Attorney General, with the assistance of a task force from various parts of the United States government, put forth a set of guidelines for making these decisions. Under those guidelines, one important factor was whether the individual had attacked military forces or civilians. Under this principle, the Attorney General initially decided that those involved in the bombing of the USS Cole were to be tried in a military commission, while those involved with the 9/11 attacks were to be tried in civilian courts. That distinction quickly broke down in the face of resistance from a variety of local and national political actors, and the Attorney General was forced to change this decision and hold the trials for the 9/11 plotters in a military commission. Congress has also legislated to prohibit civilian trials for all those currently held at Guantánamo Bay and to require military trials for any of those who are tried. The arbitrariness standard, to yield what has been termed “meaningful judicial review” and even “unusually robust” judicial review. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 Mich. J. Int’l L. 311, 331 n. 108 (2001).


President has signed the legislation containing these provisions, but has objected that Congress is interfering inappropriately with presidential decisions that implicate matters of foreign affairs and national security.\(^{138}\) The President has thus far stopped short of arguing directly that this legislation is an unconstitutional interference with his prerogatives under Art. II of the Constitution.

The issue of how to decide between military commissions and civilian courts will nonetheless arise if the United States captures additional alleged terrorists, or if the President is ultimately able to persuade Congress to relax the current restrictions on those held at Guantánamo.\(^{139}\) That still leaves unresolved the threshold question of whether military commissions should be used at all to try any alleged terrorists. Likely, the determination of status is best handled by military procedures on the model developing through the DRBs. But for those who are detained going forward, and for whom

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President Obama has avoided, thus far, any direct confrontation based on reserve Article II powers of the President. The most direct engagement with the question of presidential powers regarding the Guantánamo detainees came in Judge Kavanaugh’s concurring opinion in Al-Bihani, in which he asserted that “when the President acts extraterritorially against non-U.S. citizens in self-defense of the Nation, especially in support of a war effort that Congress has authorized, . . . the President possesses broad authority under Article II, as Chief Executive of the Nation and Commander in Chief of the Armed Forces, that does not depend on specific congressional authorization.” Al-Bihani v. Obama (Al-Bihani II), 619 F.3d 1, 50 (2010) (en banc) (Kavanaugh, J., concurring). In this zone, the President is not “subject to judicially enforceable international-law limitations.” Id.

\(^{139}\) We leave aside here questions about whether these policies should and can, under international law, distinguish between American citizens and non-citizens. American policy since 9/11 in certain areas, like use of military commissions for those accused of war crimes, has limited these policies to non-American citizens. In addition, no American citizens are presently being held in long-term detention at Guantánamo Bay. These limitations might be a reflection of politics, or of political culture more broadly, or of American law – American constitutional law might give greater protection to the rights of citizens than to those of non-citizens, particularly if those non-citizens are not long-term, lawful residents of the United States. Both American political culture and law appears to vest more legal significance in the fact of citizenship (and, perhaps, long-term lawful residence) than that of many other democracies. E.g. Hamdi; note __ supra, initially limited its grant of habeas petitions solely to American citizens, prior to its extension to aliens in Boumediene, note ___ supra Yet, many sources of international law, including international human rights law, have sought to erode the distinction between citizens and non-citizens and to require uniform treatment of all those held by the state.

Thus, the fact that American policy distinguishes between citizens and non-citizens, and recognizes greater rights (as a matter of policy or law) for citizens undermines the legitimacy of American policy, or its perceived legality, among some other countries or human-rights activists. Can coercive policies of targeting, detention, and/or military trial be legitimate and lawful if they distinguish between citizens and non-citizens, and exempt the former from the burdens the state imposes on the latter? If some differences between citizens and others remain appropriate, what should those differences be and what justifies the relevant distinctions?
criminal prosecution is sought, some rationale has to be put forward as to the allocation of responsibility between civilian and criminal tribunals. If an individual can lawfully be detained, does it follow that he can and should be tried, if at all, before a military commission? If only some of those in this category should be tried before a military commission, while others should be tried before a civilian tribunal, what are the principles that ought to determine that allocation?140

As should be evident throughout, we do not view judicial review as the most essential element in the legal structure for addressing the legal challenges of targeted warfare. Many of the critical decisions are unlikely to get to courts; those that do might well involve deferential judicial reluctance to second-guess front-line institutional actors. Nonetheless, it is a remarkable fact that is far too little appreciated that so many key legal questions after 9/11 still have no judicial resolution. There are real costs to the American system of reactive and concretely focused judicial review. One of the central functions of law ought to be providing clear enough guidance to primary actors, including government officials, to enable them to plan in advance and make concrete policy judgments within the constraints of the law. Yet it is remarkable, more than a decade after 9/11, how much legal uncertainty remains regarding many central issues in this area, and how much time is spent within the government and outside trying to figure out what are the boundaries of the controlling legal regime. It is easy to forget that one of important functions of a legal system is to legitimate public action

140 We also leave aside whether policy should differ for those captured in the U.S., whether citizens or not, and those captured outside our territory. Policy on this issue has been a bit ambivalent; in the early years after 9/11, the government did detain one person (an American citizen) captured within the United States. Jose Padilla, an American citizen, was seized at O’Hare airport in 2002 on suspicion of being involved in an attempt to set off a crude radioactive device termed a “dirty bomb.” He was held for over three years in a Navy brig as challenges to his detention worked their way through the courts, including to the Supreme Court in Rumsfield v. Padilla, 542 U.S. 426 (2004). Ultimately, the government filed criminal charges against Padilla, who was subsequently convicted, and this remains the only use of detention for someone captured in the U.S..

As a matter of law, it might be the case that the inside/outside distinction is not of legal significance. If the nature of the acts an individual commits makes it legal to detain him or try him before a military commission, it might not matter whether he commits those acts inside or outside the United States (this geographical boundary might also roughly, though, imperfectly, track the citizen/non-citizen distinction). But the specter of the United States government employing war-like powers within the United States will nonetheless understandably generate considerable concerns.

At the same time, limitations of this sort will raise similar issues in other countries about whether the United States is acknowledging that the coercive measures associated with asymmetrical warfare are not to be directed are inappropriate at home. To the extent that many exceptional measures reflect military exigency – as we will discuss with regard to targeted killing – then the distinction might be justified so long as the U.S. has complete control of its territory. At the same time, American policy must confront the possibility that engaging emergency measures only abroad may undermine the legitimacy of those policies.
by clarifying what the law permits and prohibits. Yet the American system of judicial review has mostly failed to perform that function. We should keep in mind the costs, as well as the benefits, of the reactive and limited system of American judicial review when understanding how we have arrived at the resolutions (or uncertainty) we have today.

III. Targeted Killings and Drones

The general legal concerns over lawful and appropriate uses of military force in today’s circumstances were acutely brought to light in the context of the lethal use of force when the United States government killed Anwar al-Awlaki, an American-born radical Islamist cleric, on September 30, 2011, while he was traveling between Marib and Jawf Provinces in northern Yemen. The killing, carried out by the Joint Special Operations Command under the direction of the CIA, occurred when two Predator drones flew from a secret American base in the Arabian Peninsula into Yemen and fired Hellfire missiles at a car that was carrying Awlaki and other alleged operatives from al-Qaeda’s branch in Yemen. The Obama administration had explicitly authorized the targeted killing of Awlaki early in 2010, placing him on lists of terrorists approved for capture or killing — lists that are maintained, and made operational by the CIA and the military.

Such targeted killings highlight the reality that the modern practice of military force in asymmetric conflicts cannot be carried forward without a kind of individuation of enemy responsibility that was largely unknown to


143 See Mazzetti et al., supra note 145; Griffin & Fishel, supra note 146.


the traditional laws of war. As a result, analogous kinds of novel *ex ante* and *ex post* process and institutional issues inevitably emerge concerning when specific individuals can properly be targeted for lethal military force. Targeting a particular enemy combatant may be viewed as the antithesis to the general, indiscriminate bombing of civilian centers during WWII, or the general strafing of enemy armies. Indeed, as practiced, the most sophisticated targeted killing programs make finegrained distinctions among and between enemy “soldiers;” only those exceptionally high-up in the command and operational structures are singled out for personalized targeting. 146 Thus, as with detention, there is a tremendous premium on making sure the initial identification decision is accurate, unlike in conventional wars when battlefield armies and uniforms inherently resolve the identification and accuracy issues. What processes should suffice to ensure sufficient accuracy in the critical initial determination that the specific acts of a particular individual rise to the level appropriate to trigger the use of lethal force? Which institutions in the government, and how many branches of the government, should be required to participate in that decision and in what form? Similarly, *ex post* process and accountability issues arise concerning how to assess whether the individuated judgments of enemy responsibility were indeed accurate and how proportionate the effects of a targeted killing were to the legitimate military objectives.

Retrospective refinement of the criteria and processes used for decisionmaking emerges as critical to all targeted warfare decisions. While the *ex post* issues differ between detention and targeted killings in certain obvious ways – in detention, the issue is how to determine appropriately whether someone represents a continuing threat, while in targeted killings, the issue is retrospective analysis of the initial targeting judgments – the fact that individualized judgments of responsibility are involved creates similar pressures for *ex post* assessment to ensure the justification of subsequent military action.

Finally, the recurring paradox associated with individuation arises just as much with targeted killings as with detention: if government is making such adjudicative-like judgments of individual responsibility before using military force, should it be required to use the more traditional institutions and processes through which similar ascriptions of individual moral and legal responsibility are traditionally made – namely, the criminal law. 147 The

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147 Others have also explored the potential relationship between detention and targeted killings. Matthew Waxman, for example, has asserted that the more tolerant standard of “reasonable care” that attaches to targeting decisions should govern, at least initially, the decision to detain. Matthew Waxman, *Detention as Targeting, supra* note 99, at 1401–04. See also Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 Mich. L. Rev. 1366 (2012) (arguing against utility of the binary combatant/noncombatant and
Awlaki case provides a useful introduction because “[u]nlike detention, for which litigation has produced detailed public elaboration of the government’s legal standards, the drone program is shrouded in secrecy, though presumably targeting decisions are based on similar law of armed conflict standards in assessing who is or is not an enemy fighter.”

1. Killing the Enemy

Targeting critical enemy leaders is a longstanding, if delicate, facet of warfare. Whether the means used were training the long rifles of the post-Civil War era on opposing field commanders, or deploying snipers, or shooting down the airplane of Admiral Yamamoto during WW II, warring armies have always recognized that all soldiers may be soldiers, but some pose a more lethal threat than others. Nor is the fact that the new forms of targeting allow warfare to be conducted from distances far removed from the exchanges of fire on the battlefield. The history of military technology has always focused on the ability to deliver lethal force from a distance. The current debate over drones and targeted killings is in one sense a mere technological update of earlier efforts to degrade the military ability of the enemy.

In an important sense, however, modern targeting and the use of drones is a more central part of contemporary warfare. What may have originated as a tactical response now emerges as a central strategy for attacking enemy forces. The specific forms of targeting are a reflection of the particular geopolitical context in which we live, the military technology now available, and weak or failed states that cannot or will not control the threat these groups pose to citizens and residents of other countries.

Military attacks conducted from a distance involve either static or dynamic targeting. Static targeting, in which the aim is to take out a particular, fixed facility, is essentially no different than bombing runs of World War II, save for the technology. By contrast, the new technology, as with cruise missiles, offers the ability to engage in dynamic targeting that responds to momentary windows of opportunity against specific individuals or activities, rather than the more examined decision to take out fixed structures.149

Drones present the question of dynamic targeting most clearly, but in at least two different contexts, according to news accounts. In one, the civilian/noncivilian division and in favor of proportionality test applied in individualized decision framework).


149 Our thanks to Major Andrew Gillman, USAF, for addressing this distinction.
government might be aware, for example, that a certain house is used by Taliban-associated forces for bomb making. When drone surveillance detects a group of militants entering the house carrying weapons and materials used to make bombs, and the drone operators launch a missile strike at the house, they might not know the names of any of the individuals involved. In a second context, intelligence actors might have been tracking the whereabouts of the Taliban’s chief bomb making expert, and when he enters the house, the drones are ordered to strike – in this context, military decisionmakers know the name of the figure involved.

Traditionally, the laws of war grew out of the intersection between the Law of Armed Conflict (“LOAC”) developed by militaries to govern the rights of combatants, on the one hand, and International Humanitarian Law (“IHL”), which largely developed to govern the treatment of civilian noncombatants and combatants hors service (as when prisoners of war). Even for soldiers who fell under the LOAC, the use of lethal force was limited to the military objective, usually defined territorially as the need to take a particular hill or equivalent objective. The first formal international gathering on war practices, the St. Petersburg conference of 1868, issued a series of limitations on the application of lethal force. For example, the St. Petersburg Declaration prohibited the use expanding bullets under a certain size that would not so much disable enemy forces but guarantee subsequent death. Similarly later military conventions would ban serrated bayonets on the grounds that a straight-edge bayonet wound would disable an enemy combatant whereas the serrated edge would serve to ensure subsequent death from an infected wound that could not heal. This logic took hold even in the worst of direct combat, and French troops in WWI had a standing order to shoot immediately any German prisoner captured with a serrated bayonet – a consequence that was quickly internalized by the German forces who abandoned the prohibited weapon. Thus, even in traditional wars against conventional enemies, the LOAC contained incipient, if not highly developed, principles against the infliction of gratuitous or excessive violence against enemy soldiers outside the need to disable the enemy’s military capacity.

In our view, there are four myths about the modern use of drones to target specific, identifiable individuals for lethal force. The first myth is that targeting specific individuals for death is a dramatically modern innovation in military practice. Technology has certainly enhanced the capacity to use this tactic effectively, but the tactic itself has long been a part of military practice. The invention of the long rifle, for example, gave snipers the ability to pick off opposing field officers. The modern practice, however, does begin with the discrete act of seeking out military enemies outside normal

150 See MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR 51 (2010).
wartime engagements based on an individualized assessment of the threat they present. The use of lethal force is not incidental to a battlefield objective of capturing a particular piece of territory but becomes a distinct response to the generalized threat posed by a particular individual. Killing is now not secondary to a distinct military objective but becomes the objective itself because of a specific determination about the threat posed by the continued operation of an individual. At a more fundamental level, as Eyal Benvenisti argues, the laws of war had two major premises that fail in modern asymmetric conflict. Traditionally, it was possible to distinguish military and civilian objectives, and, in addition, battle could be directed to military objectives, as with the capturing of territory or overtaking a military installation. Neither premise necessarily characterizes military engagements in asymmetric war – or put another way, the military objective becomes killing itself.\footnote{Eyal Benvenisti, \textit{The Legal Battle to Define the Law on Transnational Asymmetric Warfare}, 20 DUKE J. COMP. & INT’L L. 339, 341 (2010).}

The object of the targeted attack changes as well, in a way that seems morally defensible. Drones enable military planners to focus on high-level targets, and there is a further morality in that – we should appreciate a technology that can discriminate between low-level and high-level combatants, and minimize the loss of life to foot soldiers of the other side by concentrating fire on the leaders. Precision targeted killings should be seen as a substantial humanitarian advance in warfare, assuming that use of force is justified in the first place. Whereas the tradition LOAC placed the foot soldier at greatest risk of being killed in combat, the new targeted killing regime initially redirected lethal force to the command structure of the enemy. In our view, it is a mistake to focus exclusively on the level of force being used without also understanding that the targets (if accurately identified) bear a moral culpability for unlawful warfare completely distinct from anything that could be attributed to conventional soldiers in a state-authorized war, especially in the case of conscript armies. As the technology improved, most notably with drones, the targets could expand from the command structure to operational centers, as with attacks on remote sites at which enemy combatants trained or assembled.

A second myth concerning targeted killings as a new form of warfare is that this ability to project force from a distance itself raises new legal issues. But this view is simply an exercise at drawing a technological line that, in our view, has little moral or legal force in and of itself. Drones present the same \textit{legal} issues as any other weapons system involving the delivery of lethal force. Advances in military technology have always been about the ability to project force from a distance. Drones are a technology, the latest technological development in the history of warfare, but they do not change
the legal issues, under either domestic or international law, relevant to
deciding whether particular uses of force are justified. In technologically
advanced countries, militaries have long been in the business of delivering
lethal force at great distances from their targets. The U.S. Navy has engaged
enemy personnel by firing cruise missiles from ships in the Mediterranean
into Libya, Iraq, and Sudan. Air Force pilots frequently take off from bases
far removed from the actual theater of conflict and drop their bombs based on
computer-generated targeting information from thousands of feet above the
ground; the bombing campaign over Serbia during the Kosovo war, for
example, involved pilots taking off from the Midwest in the United States
and returning there. Ancient advances, such as catapults and longbows,
involved the delivery of force from a distance, instead of hand-to-hand
personalized combat. U.S. drone operations reportedly follow the same rules
of engagement and use the same procedures as manned aircraft that use
weapons to support ground troops. At least the military’s use of drones
operates within the same military chain of command, subject to civilian
oversight, as all other uses of military force.

One can view the technological advances that make drone warfare
possible with horror or with fascination (or both), but the idea of projected
force beyond hand-to-hand warfare does not of itself present radically new
legal issues. As the philosopher David Luban rightly concludes, targeted
killings “are no different in principle from other wartime killings, and they
have to be judged by the same standards of necessity and proportionality
applied to warfare in general: sometimes they are justified, sometimes
not.” Nor is there anything particularly novel about concerns that
advances in military technology somehow fundamentally alters the nature of
warfare. John Witt describes the revulsion of Francis Lieber in grappling
with the introduction of new Civil War armaments, including early versions of
land mines and underwater torpedoes. Lieber confessed, “the soldier within
me revolts at the thing. It seems so cowardly…. [But] the jurist within me
cannot find arguments to declare it unlawful.”

Technological advances in warfare combine with the changed nature of
combatants to challenge the inherited categories of combat, including such
important questions as the ability to draw a sharp distinction between the

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152 Matt J. Martin with Charles W. Sasser, Predator – The Remote-Control Air
War Over Iraq and Afghanistan: A Pilot’s Story 104 (2010) (commenting that “[t]o us,
the Predator is a longer-duration, lightly armed (and much less survivable) version of an F-16
...).

153 Id.

154 David Luban, What Would Augustine Do: The President, Drones, and Just War Theory.

155 Witt, supra note ___, at 237. As Lieber concluded, wars “are no Quixotic
tournaments.” Id.
operation of humanitarian law governing the treatment of combatants and human rights commands over the protection of civilian non-combatants. David Kretzmer, for example, has thoughtfully argued that debates over the legitimacy of targeted killing turn on the inability to fit the technical and legal justifications within inherited legal categories.\footnote{David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 EUR. J. INT’L L. 171, 186 (2005) (suggesting the need of a mixed approach to capture the moral and legal issues at stake in targeted killings). See also Noah Feldman, Choices of Law, Choices of War, 25 HARV. J.L. & PUB. POL’Y 457 (2002) (also presenting the case for the collapse of clear legal categories governing this form of warfare).}

A third prevalent misconception, in our view, is that drones and targeted killing pose a major threat to the humanitarian purposes and aims of the laws of war. The key principles of the laws of war are the principles of necessity, distinction and proportionality – the principles that force should intentionally be used only against military targets and that the damage to individual citizens should be minimized and proportionate. Drones, as against other uses of military force, better realize these principles than any other technology currently available. Indeed, they allow for the most discriminating uses of force in the history of military technology and warfare, in contexts in which the use of force is otherwise justified. If the alternative is sending US ground forces into Yemen or the frontier regions of Pakistan, the result will be far greater loss of civilian life, and far greater loss of combatant lives, than with drone technology.

Fourth, a more subtle concern that perhaps underlies the humanitarian critique of targeted killings is that drone warfare might make the use of force “too easy.” Since powerful states do not have to put their own pilots or soldiers directly at risk, will they resort to force and violence more easily? This is a serious issue, but some historical perspective might help put this concern in a broader frame. Throughout the modern history of warfare, there has been concern that humanitarian developments in the way war is conducted will, perversely, make it more likely that states will go to war. The argument is essentially that there is a Faustian tradeoff between the laws of war and the initial decision to go to war. This is an enduring, moral complex issue that has attended virtually every effort in the paradoxical-sounding project of making warfare more humane; pacifists in the 19th century objected to the formation of the International Committee of the Red Cross and its efforts to mitigate the horrors of war.\footnote{For some perspective, this was exactly the argument that led Florence Nightingale to oppose, initially, the development of the International Committee of the Red Cross to monitor treatment of prisoners; as she wrote to the founder of the ICRC in initially rejecting the organization: “Such a society would relieve governments of responsibilities which really belong to them which they only can properly discharge . . . and being relieved of which would make war more easy.” She eventually changed her mind, of course. CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 389 (2012). For an excellent account of the moral ambiguities and complexities of these issues, see Ken}
paradox surrounds even purely humanitarian aid during wartime; in some contexts, access to such aid has become a strong economic incentive to continue the war, for the very purpose of extracting more of this financial assistance.\footnote{See Jide Nzelibe, Courting Genocide: The Unintended Effects of Humanitarian Intervention, 97 Cal. L. Rev. 1171, 1197-1204 (2009) (discussing the factors that led rebel factions in Darfur to behave intransigently at peace talks in order to exploit the possibility that outside intervention could force a favorable settlement to the conflict). See also John Ryle & Justin Willis, Introduction: Many Sudans, in The Sudan Handbook 27, 29 (2012) (similarly addressing disequilibrium created by foreign humanitarian intervention).}

A more complicated picture emerges if we shift from the perspective of the civilian leaders who authorize the use of force to those who actually deliver that force. One of the consequences created by individuating the responsibility of specific enemies, combined with drone technology, is the possibility of a much greater sense of personal responsibility and accountability on the part of drone operators for lethal uses of force than that exhibited by prior generations of fighters. At least some drone operators report exactly this kind of experience of personal responsibility for their actions, including their mistakes, that was much less likely in earlier generations when “the enemy” was faceless and undifferentiated in most circumstances.\footnote{As an example, consider the following account of an exchange between a drone operator and Harold Koh, the Legal Adviser to the State Department, when Koh commented that he had heard drone operators had a “PlayStation mentality:”}

The lead operator lit into Koh. “I used to fly my own air missions,” he started, defensively. “I dropped bombs, hit my target load, but had no idea who I hit. Here I can look at their faces. I watch them for hours, see these guys playing with their kids and wives. When I get them alone, I have no compunction about blowing them to bits, but I wouldn’t touch them with civilians around. After the strike, I see the bodies being carried out of the house. I see the women weeping and in positions of mourning. That’s not PlayStation; that’s real. My job is to watch after the strike too. I count the bodies and watch the funerals. I don’t let others clean up the mess.”

\footnote{See Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency 217 (2012). Similarly, as Martin puts it: “I doubted whether B-17 and B-20 pilots and bombardiers of World War II agonized over dropping bombs over Dresden or Berlin as much as I did over taking out one measly perp in a car.” See Martin, supra note \_\_\_, at 53.}
should focus on whether the use of force is justified in the first place. Moreover, one should be careful not to romanticize traditional combat and the pressures toward excessive violence it nearly always unleashes. To the extent the humanitarian critique of the use of drones is that sending in ground troops acts as a restraint on the use of force, compared to the use of force from remote locations, such as with drones technology, this idea might have matters backwards, at least once the decision to use force at all has been made (and made, hopefully, for appropriate and lawful reasons). Dramatic overuse of force is most likely when scared kids come under attack on an active battlefield and respond with massive uses of force directed at only vaguely identified targets. Remoteness from the immediate battlefield— with operators able to see much more of what is going on— almost surely enables much more deliberative responses. One Air Force combat officer who became a drone operator supports this conclusion; he comments that compared to conventional combat, both in the air and on the ground, the distance involved with drones enable operations to be “deliberate instead of reactionary,”\textsuperscript{160} compared to manned combat flights, he experienced drones as affording “the ability to think clearly at zero knots and one G”,\textsuperscript{161} and he observed that other “methods of warfare could be, and often were, much more destructive”\textsuperscript{162}—indeed, he goes so far as to comment that when marines were sent into operations, they “broke things and killed people” while drones enabled U.S. military force to be “less brutal.”\textsuperscript{163}

Whether one accepts or not this particular self-reported drone operator experience, a realistic appraisal of all the costs and benefits of the use of drones must confront the “compared to what” question. Perhaps in some contexts, if drones were not available, no force would be used; but in many cases, it seems likely that much greater force would be used instead. Put another way, powerful nation-states are unlikely to remain passive in the face of significant risks to the physical security of their citizens and property that emanate from other nations that are unwilling or unable to control these threats. Nor is it clear why states should be understood to have a moral obligation to permit their citizens and territory to be attacked. If states have the capacity to do so, they will neutralize these threats through killing or capture; and at times, the humanitarian costs of capture, in terms of harm to and loss of innocent life will be great, and at other times, capture might not be practicable for any number of reasons (a complex issue to which we return below). As a result, it seems to us that any general humanitarian critique of the targeted killing has a moral obligation to offer a credible, practical alternative that a state can realistically employ to protect the lives of its

\textsuperscript{160} MARTIN, supra note ___, at 104.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 108.
citizens and that better serves the humanitarian aims of the laws of war.

2. Legal justifications: The Novel Role of Individuation

The government’s legal justifications under domestic and international law for targeted killings, including of American citizens overseas in certain contexts, has been laid out in broad outline through a series of speeches by key legal and counterterrorism officials, including national Security Advisor John Brennan,164 State Department Legal Advisor Harold Koh,165 Department of Defense General Counsel Jeh Johnson,166 and, in the most important speech, Attorney General Eric Holder.167 We do not want to tarry long on these already-much discussed general legal principles, or on the puzzles presented about applying them properly at the borders (such as whether the same principles appropriate for the conventional battlefield of Afghanistan can properly be extended to targeted killings in places like Yemen and Somalia168, or whether the same principles that justify targeted killings of al Qaeda operatives can properly be extended to individuals working for groups loosely affiliated with al Qaeda or generally aligned in aim, such as Al Shabab). Instead, we want to focus on the ways in which these legal justifications reflect our central theme, which is the increasing individuation of enemy responsibility under both the practice of modern military uses of force against alleged terrorists and the legal understandings (or at least, the perceived legal understandings of the United States) of what the law permits and requires with respect to targeted killings. Some aspects of this individuation are well recognized by specialists in this area, but others are more subtle.

In the administration’s first major articulation of its legal justification

164 Brennan, supra note 13.
for the targeted-killing program, Legal Adviser Koh concluded that the
United States was engaged in an ongoing armed conflict, under international
law, with al Qaeda, the Taliban, and associated forces, and that a state that is
“engaged in an armed conflict or in legitimate self-defense” has the right to
use lethal force and is not legally required to provide those targets with any
kind of legal process before targeting them. This use of lethal force also
had to meet the IHL requirements of distinction and proportionality as well.
In a later and more detailed speech that specifically addressed the application
of these principles to the intentional targeted killing of American citizens
who are overseas and allegedly involved in terrorism (of which there has
been one, at the time of this writing) Attorney General Holder asserted that
such targeting was permitted at least when the citizen targeted is (1) located
overseas; (2) has a senior operational role; (3) with an al Qaeda or al Qaeda-
associated force; (4) is involved in plots that aim at harm or death of
Americans; (5) the threat is “imminent,” though the precise boundaries of
this concept remain to be given more specific content; (6) there is no

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169 Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address Before the Annual
Meeting of the American Society of International Law (Mar. 25, 2010), available at
http://www.state.gov/s/l/releases/remarks/139119.htm (“[A] state that is engaged in an armed
conflict or in legitimate self-defense is not required to provide targets with legal process
before the state may use lethal force. Our procedures and practices for identifying lawful
targets are extremely robust, and advanced technologies have helped to make our targeting
even more precise. In my experience, the principles of distinction and proportionality that the
United States applies are not just recited at meetings. They are implemented rigorously
throughout the planning and execution of lethal operations to ensure that such operations are
conducted in accordance with all applicable law.”).

170 According to Klaidman’s account, Harold Koh argued for a legal theory called
“elongated imminence,” which Koh analogized to the battered wife syndrome defense; if
alleged terrorists showed a consistent pattern of violence, that should be understood to meet
the “imminence” standard, even if they were not about to engage in any specific strike at the
moment at which they were targeted. KLAIMAN, supra note ___ at 220. This “elongated
imminence” legal theory might be appropriate for the context of terrorism, but whether it is
consistent with prior understandings of imminent threat under international law doctrines
might be the subject of continuing debate. Holder himself appeared to reject strict notions of
temporal imminence for what he instead called the “last window of opportunity” to stop an
attack. Consider also this striking passage on how the administration defines “imminence”
from John Brennan’s speech, given before Holder’s speech:

This Administration’s counterterrorism efforts outside of Afghanistan and
Iraq are focused on those individuals who are a threat to the United States,
whose removal would cause a significant – even if only temporary –
disruption of the plans and capabilities of al-Qa’ida and its associated
forces. Practically speaking, then, the question turns principally on how
you define “imminence.”

We are finding increasing recognition in the international community that
a more flexible understanding of “imminence” may be appropriate when
dealing with terrorist groups, in part because threats posed by non-state
feasible option of capture without undue risk; and (7) the attack complies with IHL principles of necessity, distinction, and proportionality. And in a more recent, important further elaboration of the legal, ethical, and prudential principles that inform the administration’s targeted killing decisions, key White House adviser John Brennan asserted that lethal force was used only when capture was “not feasible.” Brennan described this principle as an “unqualified preference,” which suggests ambiguity about whether the administration regards the principle as a legal constraint or an ethical and prudential one; he also appeared to limit the infeasibility of capture as a constraint that applied to those targeted away from the “hot battlefield” of Afghanistan – which suggests this constraint might not apply to targeted killings on more conventional battlefields.

What emerges is a new American doctrine governing the use of lethal force outside the traditional battlefield context. The result does not yet have the form of hard law, but provides legal-style guidance. Within this general framework, the emergence of individuated enemy responsibility as an essential predicate to the use of military against that individual force – as in the detention context – arises at two points at least. First, all these accounts of the legal framework employed make clear that lethal force outside the conventional battlefield context is not employed against any “member” of the enemy. As John Brennan put it: “We do not engage in lethal action in order to eliminate every single member of al-Qa’ida in the world.” Targeted killings are limited to those who pose a “significant threat” to U.S. interests. Brennan offered illustrative examples, such as an individual identified as an operational leader of al Qaeda or associated forces; an operative, in the midst of training for or planning to carry out attacks against U.S. interests; or someone with “unique operational skills that are being leveraged in a planned attack.” In his remarks, Koh used the language of “high-level al-Qaeda leaders who are planning attacks” to refer to the individuals who were being targeted, without any further specification of how far the legal and/or ethical justifications for targeted killings extended. And Holder referred only to

actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.


171 Holder, supra note 41.
172 Brennan, supra note 13.
173 Brennan, supra note 44.
174 Brennan, supra note 13.
175 Koh, supra note 39.
targeting “senior operational leaders of al Qaeda and associated forces.”

In addition, credible journalistic accounts report highly-focused internal deliberations and even debates about whether specific individuals, based on extremely specific facts about their alleged role, can or should be targeted.

It is important not to lose sight of the profound transformation these developments reflect. Even as the U.S. government asserts that it is at war and has the power to use lethal force against its enemies, it is not adhering to the traditional law of war principle that lethal force can be directed against any member of the enemy armed forces, whether high-level commander or low-level foot soldier. Instead, the government is individuating the responsibility of specific enemies and targeting only those engaged in specific acts or employed in specific roles. The government is making what has all the appearance (and reality) of adjudicative-like judgments based on highly specific facts about the alleged actions of particular individuals (and not their membership per se in the opposing side). And here too, as with detention, this individuation of enemy responsibility is undoubtedly part of what fuels the demand in some quarters that the criminal justice system, rather than unilateral executive direction of military force, should be used instead: if the government is using force only after such fact-bound determinations of responsibility are made, isn’t that the traditional province of the criminal law (of course, this criticism does not address the fundamental underlying pragmatic problem, which is that the government cannot feasibly capture these individuals in the first place).

What motivates this change in practice in the perceived legitimate use of military force? The short answer is that the lines between law, morality, and prudence become blurred here; the categories spill over into each other, and they spill over into each other in the context of unconventional war and technological change in the conduct of war. It is not clear whether the Obama administration believes that some or all of this individuation is already legally required by international law or whether this individuation is thought necessary as a matter of morality and sound strategy. Because courts play so little role in adjudicating these questions, particularly in the targeted killing area, the line between law, morality, and prudence is likely to remain blurred for some time to come. Much greater technological capacity at refining the use of force undoubtedly also plays a role in driving the law, morality, and prudence of these uses of force in a more individuated

176 Holder, supra note 41.
178 Attorney General Holder’s remarks on targeted killing, in particular, do not speak directly to the perceived requirements of international law regarding individuation of targets, but the Attorney General frequently insists in his address that such killings at least conform with international law. Holder, supra note 41 (“This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally.”).
direction. As Jack Goldsmith nicely notes, “technological developments that in once sense enhance the United States’ military authority also end up constraining it because once there is capacity to be precise in targeting, the moral or political (and, soon, legal) duty to do so soon follows, regardless of what the law previously required.”\(^{179}\) That dynamic is part of what is fueling the transformation of the law of war into the more individuated framework of enemy responsibility.

The “preference” for capture over killing is a second, more subtle, outcropping of the emerging norm of individuation. Again, the departure from the traditional laws of war is striking; no such preference, let alone legal requirement, exists during the traditional laws of war. Enemy soldiers can be killed, even if they could be captured, except in the limited circumstance in which they have engaged in extremely clear manifestations of surrender or are considered hors combat as a result of wounds. There is no obligation to differentiate between soldiers whose threat can be neutralized by capture versus those who can be neutralized only by killing.

To be sure, there is ambiguity in the emerging American practice about whether what we might call the “least restrictive alternative requirement” of “capture over killing” is a legal requirement necessary to justify targeted killings or merely a policy preference rooted in strategic calculations (capture enables mining for intelligence) or moral considerations (killing is gratuitous when capture is possible); John Brennan’s statement suggests a policy preference, not a legal requirement.

The first publicly acknowledged, successful personality-based targeting in the context of the modern form of non-state belligerents was conducted by Israel in 2000 (recall that President Clinton in 1998 ordered unsuccessful cruise missile strikes specifically targeting Osama Bin Laden).\(^{180}\) Israel sent a helicopter gunship to successfully kill a militia leader in Bethlehem.\(^{181}\) The then-administration of President George W. Bush criticized the use of this tactic, though there appear to have been internal divisions within the administration and then-Senator Biden defended Israel’s action.\(^{182}\) By 2002, in the wake of 9/11, the Bush administration and the American government

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See also Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 74 (2010) (changing form of warfare “requires states to invest in military technologies that enable them to tell combatants apart from civilians and target the former without harming the latter. To do this, they must often engage in individual-based determinations of the identity and role of their target.”).


\(^{181}\) Id.

had changed its views and initiated the first American targeted killings.\(^{183}\)

As the legal framework for this issue evolved and became more public in Israel, including through litigation before its High Court, the legal understanding of the constraints under which targeted killings can permissibly take place does appear to make this “least restrictive alternative” constraint an actual legal requirement.\(^{184}\) Thus, even before the Israeli High Court adjudicated the legality of these killings, the internal executive branch guidelines developed from 2000-02 specified a six-factor set of requirements, including that “arrest is impossible” and that such operations were to be limited to areas not under Israeli control (presumably because in those areas, capture is feasible).\(^{185}\) Moreover, in the most important judicial decision thus far on the legality of targeted killing, the Israeli High Court in 2005 specifically seemed to hold that Israeli law precludes a targeted killing “if a less harmful means can be employed.”\(^{186}\) As a matter of Israeli domestic law, Justice Aharon Barak concluded for the High Court, Israeli law includes a proportionality requirement, which entails the constraint that, among available military measures, the military “must choose the means whose

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\(^{183}\) http://www.foreignpolicy.com/articles/2012/08/13/targeted_killings?page=0,1

\(^{184}\) The emerging American doctrine has striking parallels to the decision of the Israeli Supreme Court on the lawfulness of targeted killing. Israel accepts a much greater judicial role in overseeing military operations, thus leading to an earlier hardening of the legal categories. Per the decision by President Aharon Barak, there are four requirements:

1. “Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities”
2. “Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.”
3. “Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent”
4. “Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.”


\(^{185}\) See Laura Blumenfeld, In Israel, a Divisive Struggle over Targeted Killing, WASH. POST. (Aug. 27, 2006), at 3 http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR200608260917_4.html (describing internal executive branch processes for targeted killings by Israeli forces).

harms to the human rights of the harmed person is smallest."\textsuperscript{187} If this principle actually becomes embedded in Israeli law, it would constitute in two respects an even more radical reconceptualization of the legal constraints on the use of military force during wartime. Moreover, this appears to be an example in which the emerging legal rules of warfare concerning terrorism might be spilling over into even more conventional war contexts; nothing in the Israeli High Court decision suggests that this principle of "minimal force required" is limited to the asymmetric warfare settings as opposed to being a general legal principle applicable to all war contexts. That would constitute an even more remarkable move toward construing law (either domestic or international) in ways that highly individualize both the nature of the specific individual actions involved and the contexts in which force can be applied against particular persons.

Within American domestic law, the requirement that capture not be feasible before killing is justified does appear to be a constitutional requirement with respect to American citizens, at least in the understanding of Attorney General Holder and the Obama administration. Thus, whatever the ambiguity whether this "least restrictive alternative" requirement applies to targeted killings in general, as reflected in the uncertainties about how to construe John Brennan's statement, the targeted killing of American citizens overseas does specifically require that capture not be feasible. A host of questions arise, of course, about precisely what it means for capture not to be "feasible." It appears that the term "feasible" in this context derives from the military risk involved in capture, rather than any sense of impossibility.\textsuperscript{188} What remains most essential to notice about this requirement is that, at least with respect to American citizens, we are seeing further recognition even from within the executive branch, without judicial compulsion, of an even more individuated approach to uses of military force.

As this move toward individuating enemy responsibility continues to develop, one question it will confront is whether law itself (as opposed to morality or political prudence) will require or permit different treatment of a country's own citizens who pose terrorist threats from that of non-citizens who pose the identical threat. Currently, American legal understandings apparently are that there is a significant legal difference, as reflected in the differences and tensions between the Brennan and Holder speeches. According to the Obama administration, American citizens overseas who pose identical threats are entitled to greater substantive legal protection than non-citizens; force must be the only feasible option for the former but not the latter.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{See, e.g.} Holder, \textit{supra} note 41 ("[feasibility] is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel.").
Differentiating the treatment of threats coming from citizens as opposed to non-citizens is a deeply controversial matter, both in theory and in international law. Particularly when force can be used only once the enemy “target” is highly individuated, in terms of his specific actions, it is not at all clear why, in principle, an American citizen in the same overseas location who poses the identical threat as a non-American should have greater legal protection. As a matter of domestic politics, perhaps, one can understand why political leaders would want to ensure their own citizens that they receive special protection against the exceptional circumstance of their own government using lethal force against them. But as a matter of law, why should governments have the power to kill non-citizens who could otherwise be captured but not kill citizens in that circumstance? As a matter of morality, David Luban argues, “the nationality of casualties is irrelevant... To focus on the lives of Americans is parochial in a way that the morality of war is not.”

Further, as a matter of international law and the domestic law of some countries, providing greater protections to one’s own citizens in the terrorism context can be a reason to condemn, not praise, the practices by which a country metes out its use of military force; political process theory would suggest that the only protections non-citizens are likely to have in these and similar contexts is if a country’s own citizens must live under the same legal regime. Indeed, United Kingdom’s House of Lords held British anti-terrorist detention policy illegal precisely because it imposed greater restrictions on non-nationals than on British citizens. And finally, despite the apparent distinctions suggested by Attorney General Holder’s speech between targeting citizens and non-citizens, Daniel Klaidman, in describing President Obama’s decision to authorize the killing of Al-Awlaki, writes that after the President reviewed the intelligence and was left with no doubt that Al-Awlaki posed a major and imminent threat to American security, the fact that Al-Awlaki was an American, President Obama believed, “was immaterial.” Perhaps there is journalistic license in that summary statement, but whether the emerging individuation of the laws of war, both domestically and in international law, requires or permits the further individuation and differentiation of citizens and non-citizens remains a difficult and unresolved question.

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189 Luban, supra note __, at ¶ ,40 (“From the point of view of just war theory, the nationality of casualties is irrelevant. If they are enemy belligerents, they can be targeted, regardless of their nationality; if they are not enemy belligerents, they can’t be, regardless of their nationality. . . . To focus only on the lives of Americans is parochial in a way that the morality of war is not.”).

190 A v Secretary of State for the Home Department, [2004] UKHL 56, at 68 (HL) (the “A Case”).

191 KLAIMDAN, supra note __, at 265.
3. Procedural Safeguards

As with all use of lethal force, it is essential that there be adequate procedures in place to maximize the likelihood of correct identification and minimize risk to innocents. In the absence of formal legal processes, sophisticated institutional entities engaged in repeated, sensitive actions – including the military – will gravitate toward their own internal analogues to legal process, even without the compulsion or shadow of formal judicial review. The need to provide a formal structure to military power is as present with regard to targeted drone warfare as it was in the ground-up detention practices that emerged in Iraq and Afghanistan. This is the role of bureaucratic legalism in developing sustained institutional practices, even with the dim shadow of unclear legal commands. These forms of self-regulation are generated by programmatic needs to enable the entity’s own aims to be accomplished effectively; at times, that necessity will share an overlapping converge with humanitarian concerns to generate internal protocols or process-like protections that minimize the use of force and its collateral consequences, in contexts in which the use of force itself is otherwise justified. But because these process-oriented protections are not codified in statute or reflected in judicial decisions, they typically are too invisible to draw the eye of constitutional law scholars who survey these issues from much higher levels of generality.

In theory, such review procedures could be fashioned alternatively as a matter of judicial review (perhaps following warrant requirements or the security sensitivities of the FISA court), or accountability to legislative oversight (using the processes of select committee reporting), or the institutionalization of friction points within the executive branch (as with review by multiple agencies). Each could serve as a check on the development of unilateral excesses by the executive. And, presumably, each could guarantee that internal processes were adhered to and that there be accountability for wanton error.

The centrality of dynamic targeting in the active theaters such as the border areas between Afghanistan and Pakistan make it difficult to integrate legislative or judicial review mechanisms. Conceivably, the decision to place an individual on a list for targeting could be a moment for review outside the boundaries of the executive branch, but even this has its drawback. Any court engaged in the ex parte review of the decision to execute someone outside the formal mechanisms of crime and punishment risks appearing as a modern variant of the Star Chamber. \[192\] Similarly, there

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\[192\] There are some mechanisms that try to reconcile a form of judicial oversight of unilateral executive decisions over a kill list, incorporating a distinct set of legal procedures. One insightful commentator has looked for guidance to the long-established English (and, in some cases, American) practice of “outlawry.” Under this conventional approach, an individual who refuses to respond to a criminal indictment in a court of law may be deemed to
are difficulties in forcing a polarized Congress as a whole to assume collective responsibility for decisions of life and death and the incentives have turned out to not to be well aligned to get a subset of Congress, such as the intelligence committees, to play this role effectively.\textsuperscript{193}

Under President Obama, the choice has been a far more formalized process of executive oversight drawing on multiple agencies to cross-check targeting decisions. According to the most credible journalistic account of these processes in the Obama administration: "It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government’s sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects’ biographies and recommend to the president who should be the next to die."\textsuperscript{194} It is difficult to know, of course, how robust and adequate that process is in fact, but it is surely broader and more widespread across different parts of the executive branch than many outsiders seem to assume.

In addition, the recent work of Professor Gregory S. McNeal sets out the detailed formal procedures that exist ex ante, and the mechanisms of accountability that exist ex post, for evaluating pre-planned targeted strikes by the military, including targeted killings by military-controlled drones, in Afghanistan.\textsuperscript{195} Any evidence on these questions at this stage of experience must, of course, be viewed as highly uncertain, given that these attacks take place by definition in areas in which it is very difficult to get reliable reports on the numbers and identities of those killed or wounded. This account leaves to the side the use of drone strikes by the CIA or other intelligence agencies, about whose processes there is little in the public record.

Two striking findings Professor McNeal reports are, first, that civilian casualties reportedly occurred in less than 1 percent of pre-planned strikes have foresworn customary legal protections regarding their person or property. The condition of outlawry could justify state use of lethal force to control the threat posed by such individuals, so long as the individuals so designated do not surrender to authorities to face the charges against them. In essence, judicial procedures would remain an alternative available to alleged (citizen) terrorists, but the Executive would not be prevented from using lethal force when persons like Anwar al-Awlaki chose to remain in the Yemeni hinterland rather than submitting to formal judicial procedures. See Jane Y. Chong, Targeting the Twenty-First-Century Outlaw, 122 YALE L.J. 724, 754-56 (2012).

\textsuperscript{193}See AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY (2011).

\textsuperscript{194}See http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all& r=1

\textsuperscript{195}See Gregory S. McNeal, The U.S. Practice of Collateral Damage Estimation and Mitigation, SSRN (Nov. 4, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954795 . Given that any drone program the CIA might control has not been publicly acknowledged by the United States government, there is, needless to say, no comparable information on any such program, assuming from news accounts that one does exist.
(and other strikes, when time and combat circumstances make it possible)\textsuperscript{196} that followed the protocol the military now employs, called a Collateral Damage Mitigation Assessment (CDM), and second, that under internally self-generated guidelines, a senior commander (typically a General officer), the President, or the Secretary of Defense is required to approve in advance any pre-planned military strike in Afghanistan in which one or more collateral civilian casualties is projected. To be sure, as the first analysis to open up these issues, McNeal’s work has yet to be tested; the empirical facts on matters such as these are likely to be much debated. But as the first actual descriptive account of the processes and protocols the military uses in pre-planned targeted strikes, McNeal’s work advances public knowledge considerably.\textsuperscript{197}

As McNeal describes, even before military planners and their lawyers turn their attention to law of war and international legal requirements, such as proportionality analysis, they engage in a process known as CDM, designed to generate a less than 10 percent probability that a pre-planned strike will produce any “collateral damage.” In any targeted strike, a first and essential stage is implementing the law of distinction, of course, which means correctly identifying the person who is properly treated as a legitimate target of lethal military force. Both legally, with respect to who can be made a lawful target, and factually, with respect to the accuracy of these initial determinations, this subject is one of those most often discussed in academic literature and public debate.

But McNeal also recounts a far less familiar second ex ante stage, in which military planners first identify the collateral damage concerns, to persons or the environment, within the radius likely to be affected by the strike. These planners then implement a series of “mitigation techniques” designed to minimize the probability, and amount, of damage or injury to collateral individuals and property. These techniques, based on empirical data and computer analyses, involve the use of “progressively refined analysis of available intelligence, weapon type and effect, the physical environment, target characteristics and delivery scenarios keyed to risk thresholds established by the Secretary of Defense and the President of the United States.”\textsuperscript{198} These measures aim to ensure less than a 10 percent probability of serious or lethal wounds to non-combatants and percentage

\textsuperscript{196} McNeal reports that since June 2009, pre-planned operations constituted all air-to-ground operations in Afghanistan other than emergency situations in which close air support was called in. \textit{Id.} at 5 n.9.

\textsuperscript{197} Recent disclosures confirm the high-level authorization requirement. Jo Becker & Scott Shane, \textit{Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will}, N.Y. Times (May 29, 2012), at \texttt{http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all} (“In Pakistan, Mr. Obama had approved not only “personality” strikes aimed at named, high-value terrorists, but “signature” strikes that targeted training camps and suspicious compounds in areas controlled by militants. . . ”).

\textsuperscript{198} \textit{Id.} at 18.
probability of damage to collateral structures. These techniques precede legal analysis of the proportionality issue.

These protocols also build in heightened procedural mechanisms and enhanced executive branch accountability when the analysis suggests substantial collateral damage. The rules of engagement contain a non-combatant casualty cutoff value, established by the President and Secretary of Defense. For estimates below this level, a senior commander (Major General (2 star rank)) may authorize the operation; for estimates above, the target must be approved by an entity called the National Command Authority and military commanders must go through a special “sensitive target approval and review process.” According to McNeal, for pre-planned strikes in Afghanistan, the current cutoff is one, which reflects the strategic importance in counterinsurgency operations of minimizing civilian casualties. Thus, if a targeted strike operation is expected to result in one civilian casualty, the National Command Authority must approve it. The reported results, no doubt still subject to confirmation, reveal low levels of unintended casualties, certainly light years removed from the carpet bombing of the aerial wars of the 20th century. Independent of the accuracy of reported numbers of such casualties, though, the point is that the CDM and related processes reveal the internal development of “lawlike” institutional procedures and protocols that the military and executive branch can develop to discipline their discretion, without the direct intervention of courts (and where even the shadow of judicial oversight is small).

One important source of independent evidence, the New America Foundation (which works through prominent Western and Pakistani media sources to compile statistics on remote killings in Pakistan) is that these formal procedures are effective. In several recent articles, Peter Bergen of the New America Foundation has argued that the data suggest a precipitous decline in civilian casualties from drone strikes, falling from a high of nearly 50 percent of drone strike casualties in 2008 to the rather remarkable

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199 Id. at 24–25.
200 This authority is apparently delegated to the commander of US and ISAF forces, which had been General Petraeus and as of this writing is General Allen. Id. at 29 n. 108.
203 See generally, An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012, NEW AMERICA FOUNDATION available at http://counterterrorism.newamerica.net/drones; See Woods, supra note __ (noting that New America Foundation’s data is “the most frequent source of statistics for the US media, including CNN itself. So the accuracy of its material is important”).
conclusion that the rate had dropped by 2012 effectively to zero percent.\textsuperscript{204} Bergen attributes this rapid improvement to the use of smaller munitions, improved drone flight technology, increased Congressional oversight, and stricter Executive guidelines regarding the use of drones.\textsuperscript{205} Regardless, tallies of civilian deaths remain an inexact science and Berger’s reports have been met with some criticism.\textsuperscript{206} Even a procedurally regulated use of targeted weaponry will remain highly dependent, of course, on military intelligence about the enemy. The fewer the resources on the ground, the more likely mistakes are going to be made, including terrible losses of civilian life. To the extent that drones or air strikes are used as the primary form of engagement, as for example in Yemen, the greater the risk of error appears to be.\textsuperscript{207}

What emerges overall is the beginning of institutional practices rooted in the hazy intersection of the laws of war, the moral obligations of democratic states, and evolving military capabilities. In the initial phases of the emerging use of drones as a central platform in counterterrorism policy, it is unclear precisely what procedural safeguards and institutional structures were used to make targeting decisions. As reflected in more recent public presentations of

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\item \textsuperscript{205} See Bergen, \textit{Civilian Casualties Plummet}, supra note \textsuperscript{204}.
\item \textsuperscript{206} Even the London-based Bureau of Investigative Journalism, which, in addition to being skeptical of Bergen’s claim that no civilians have been killed in 2012, is generally more skeptical of the strikes, recorded a similar dramatic decline in by 2012 in its own comprehensive database. Chris Woods, \textit{June Update - US Covert Actions in Pakistan, Yemen and Somalia}, \textsc{Bureau of Investigative Journalism} (July 2, 2012) (“fewer civilians are being killed in CIA drone strikes in Pakistan than at any time in the Obama presidency”), http://www.thebureauinvestigates.com/2012/07/02/june-update-us-covert-actions-in-pakistan-yemen-and-somalia/; Scott Shane, \textit{The Moral Case for Drones}, \textsc{N.Y. Times} (July 14, 2012) (“The bureau has documented a notable drop in the civilian proportion of drone casualties, to 16 percent of those killed in 2011 from 28 percent in 2008. This year, by the bureau’s count, just three of the 152 people killed in drone strikes through July 7 were civilians”), http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html?hp;
\item \textsuperscript{207} For a remarkable piece of reporting on a recent strike in Yemen that appears to have rested on faculty intelligence, with major loss of innocent lives and serious counterproductive strategic consequences, if the article is accurate. See Sudarasan Raghavan, \textit{When U.S. Drones Kill Civilians, Yemen’s Government Tries to Conceal It}, Wash. Post (Dec. 24, 2012) http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ace2-486d-11e2-8af9-9b50cb4605a7_story.html.
\end{itemize}
policy by Holder, Koh and Brennan, as well as journalistic accounts of the internal decisionmaking process, the Obama administration has tried to systematize the military use of drones by creating internal procedures that assess the importance of the target, the risks of civilian casualties, and the quality of the information about the proposed strike. Though reliable data is hard to come by, it appears that the error rate in drone strikes has diminished over time. Nonetheless, a procedurally regulated use of targeted weaponry is highly dependent on military intelligence about the enemy. The fewer the resources on the ground, the more likely mistakes are going to be made, including terrible losses of civilian life. To the extent that drones or air strikes are used as the primary form of engagement, as for example in Yemen, the greater the risk of error appears to be.

As a substantive matter, there are many myths or confusions or misunderstandings in public debates about drones and targeted killings. But the technological and technique do not raise exceptional legal issues; the question is whether use of force is justified, and if it is, the delivery of that force through a drone rather than a manned plane or cruise missile doesn’t raise novel issues. As a procedural matter, though, it is extremely important that the legal justifications for this power be articulated fully and publicly and as transparently as possible. The importance of these constraints is due to what one of us has elsewhere called “the general dynamic of terrorism policy.”

As we have now seen across two administrations since 9/11, modern terrorism confronts government with certain challenges different from more conventional crime. In response, government might conclude that pragmatic, functional, and effective responses require adapting policy to these new circumstances, including using powers not used in ordinary times or in response to conventional crime. Some of these powers might have deep roots in past American practice and law during conventional wars (such as detention); others might be relatively more novel (targeted killings). These policies involve particularly aggressive uses of coercive, even lethal power; they are unfamiliar, not only to most citizens, but to many legally educated actors, since the last use of even the more familiar of these powers was, essentially, almost 70 years ago during WW II. The policies might (or might not) be functionally appropriate, effective, and legally justified. But government actors need to recognize that these kinds of coercive and less familiar powers will understandably and predictably trigger concerns in many quarters about whether what is being done is justified; whether the actions rest on sound reasons; and whether the government is using these powers in appropriately restrained ways, including showing appropriate respect for the interests and values that these policies sometimes override.

(that is, are these values being compromised no more than necessary to accomplish the government’s legitimate aims).

If government is going to use these powers, it needs to “give back” to these understandable concerns. Yet consistently since 9/11, government has tended to do much less on this front than it should. Astute policymakers should recognize that the tradeoff for deploying these powers is that government assumes a greater burden to provide as full a public accounting and explanation of why it is using these powers, how they are being used, with what internal substantive and process-based constraints, and within what understanding of the legal principles involved. As scholars of the presidency going back at least to Richard Neustadt have observed, the effective power of a president – and of government – is bound up in the credibility of the president’s actions, including the basis for them. The capacity of the government to sustain these kinds of policies over extended periods of time is intimately tied to the credibility of these policies in various audiences, such as Congress, the courts, and public opinion. Where international cooperation and support is inevitably required, these policies will also have to have some degree of credibility in those audiences as well to elicit continued cooperation. And if this was true when Neustadt first wrote on the eve of the 1960s, it is true in spades today. Government actions today, including many previously secret ones, quickly get disclosed in the modern age of digital cameras, the internet, a vast array of non-governmental organizations that exist to monitor government conduct, and a journalistic culture that thrives on exposing the government’s actions. The credibility of government action, even legitimate, justified action, can easily be undermined, including by misperceptions, misunderstandings, or willful distortion, if government does not participate actively in putting forth the reasons for its actions in a credible, public way.

Greater government participation can take many forms, with the context dictating the appropriate form: in some contexts, release of appropriately redacted legal memoranda; in other contexts, providing in other ways a clear statement of the legal framework under which the government operates (rather than through occasionally leaks to the press); in these or other contexts, having senior government officials, including lawyers, publicly explain these justifications – and to do so repeatedly, in numerous contexts. But given the inherent dynamic of the novel policy changes terrorism generates, government must recognize more effectively the need to become a more active participant in publicly justifying, explaining, and defending its policy and legal choices.

Even if some or most of the procedural safeguards to ensure accurate

\[\text{\footnotesize 209 RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990).}\]
decisionmaking are likely to be internal to the executive branch, that does not remove the importance of the formalization of consistent policy or internal legal safeguards. Nor should that fact undermine the government’s obligation to provide as much transparency as is consistent with other legitimate governmental policy interests.

**Conclusion**

We are at the early stages of a profound but partial transformation regarding the legitimate use of military force: An emerging imperative increasingly requires adjudicative-like individualized judgments about the particular responsibility of specific individual “enemies” before military force can legitimately be used against them. This is a transformation from the traditional status-based or group-based justifications for use of force against “the enemy” to a more act-based or individuated justification for when force is legitimate.

This change is being propelled by a combination of the inherent structural differences between the nature of insurgent, guerilla, and terrorist groups today (the principal targets of military force by democratic forces in today’s world) and the conventional armies of the past; by technological changes that enable far more discriminating deployments of force; and by the post-World War II emergence of a more general humanitarian sensibility among Western democracies, at least.

In turn, the evolving military practices of dominant states are beginning to reflect this new military reality. Military practice and moral arguments about this change will move far more quickly than legal change, but to extent, this transformation is also beginning to be reflected in the domestic law of some states and in arguments about obligations under international law. Military practice, perceptions of morality, and legal obligation will mutually influence each other as this transformation unfolds.

The ramifications of this emerging imperative to individuate enemy responsibility are wide-ranging. Military forces will inevitably have to develop analogues appropriate to the military context for the procedural protections (hearings, evidence-based assessments, and the like) designed to ensure accuracy of adjudicative-like judgments of individual responsibility when coercive state power is deployed domestically. The United States military in its evolving post 9/11 self-understanding has been doing that, and these kind of procedural protections will have to be credible if military force will be sustainable over the long run in these contexts. Similarly, it is probably also inevitable that courts will step in to play a somewhat more significant role to assess the use of at least certain exercises of military force (perhaps more in the context of detention than military operations themselves) than they have in the past; as the justification for force becomes
more closely tied to ascriptions of individualized responsibility, the courts will instinctively experience certain of these issues as closer to the kinds of questions with which courts deal traditionally. Once we recognize that we are moving toward a regime of individuating enemy responsibility, at least to some extent, it is also perhaps inevitable that pressure will arise from some quarters to insist that only the most traditional model for how to assign those judgments – the criminal justice system – is fit for this task.

But a central theme of this Article is that the existing legal frameworks, both domestic and international, do not provide direct answers to the critical legal questions this transformed military context spawns. The question is not whether terrorism is more “like” war or crime. Neither the legal regimes for regulating war (primarily, international law) nor for regulating crime (primarily, domestic law) were designed to reflect the emerging individuation of responsibility towards which practice and morality are moving. The question is how best to adapt either international law or domestic law or both to come to terms with the perceived imperative to individuate responsibility while also recognizing the functional and practical constraints under which military power must inevitably be deployed.

While we seek to capture one important emerging strand in the practice of warfare in certain modern contexts, we do not suggest that our account offers a comprehensive descriptive or normative perspective on all forms of modern military practice. Surely there will continue to be contexts in which traditional armies of nation states confront each other on conventional battlefields, as in the two recent wars the United States fought against Iraq. In addition, even outside this traditional warring of nation-state armies, there will be many contexts in non-conventional wars in which military force still continues to be directed against groups of individuals believed to consist of enemy forces (or against military objects, such as training camps, where such groups of individuals are thought to be present). In these contexts, the traditional status-based distinctions and justifications for the use of military force continue to characterize its use. But how might the emerging individuation of enemy responsibility affect these more traditional contexts?\(^{210}\)

In one projection of the future path of the morality and law of the use of military force, we might envision two distinct regimes that manage to co-exist side by side: a regime of status-based uses of force in more “traditional” contexts alongside the more individuated regime of enemy responsibility we describe here. But we might also ask whether it is

\(^{210}\) We are particularly indebted to Marty Lederman for pressing this point with us.
plausible or stable that two such distinct regimes could be sustained in such stark “acoustic separation” from each other.\footnote{See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. (1984).}

In a different projection of that future, therefore, we might imagine that the emergence of the more individuated regime will have moral or legal ramifications that spill back, to some extent, into the more traditional regime. Gabriella Blum, for example, speaks of the “changing nature of the battlefield” creating a military environment that “is increasingly dependent on case-by-case judgments.”\footnote{Blum, *supra* note ___, at 74.} To the extent technologies of intelligence and military force enable more discriminating judgments even in more traditional contexts between those enemy “soldiers” who pose a serious threat and those who do not (by virtue of their specific role, for example, in the enemy’s army), perhaps pressure will arise to refine traditional status-based attacks to more individuated, threat-based attacks.

We are not arguing that the use of military force in all contexts is moving from a status-based to act-based regime; there are and will continue to be many contexts in which the traditional status-based approach will continue to be justified and legitimate, both morally and legally. But we have only dimly seen that the fundamental imperative driving policy and argument on these issues is the need to individuate enemy responsibility in a credible and justifiable way. The more we grasp that fundamental transformation, the more clarity we can bring to the creative act of deciding how to design military and legal regimes that will appropriately reflect this transformed military, moral and legal environment.