

Paradigm Shift: The Consequences of Choosing a War Path, and Leaving It

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There is perhaps no choice made in the aftermath of the September 11, 2001 attacks that has been more consequential than the decision to respond to those attacks with war. It may be hard to fathom after 20 years of military conflict, but there was a clear alternative path at the time: treating the 9/11 attacks as a criminal act, as most terrorist acts by non-state actors, domestic and international, had been conceived of to that point. As Bec Hamilton writes in her counterfactual narrative on the opening day of this symposium, “[t]here was nothing necessary or inevitable about the U.S. government’s decision to respond to 9/11 through the lens of war.” Once a war path was chosen, the most consequential choices have been to stay on it and to lead with military force to confront the terrorist threats. There was nothing inexorable about those choices either.

As a legal matter, one mainstream view in 2001 held that responding with armed force to the 9/11 attacks was not even a lawful option, given the actions were conducted by non-state actors that looked more like a transnational criminal network than an army, without the trappings that generally accompany armed conflict. A few years earlier, a UN court had just reaffirmed the common understanding that “isolated acts of terrorism may not reach the threshold of armed conflict,” which requires instead protracted violence. Another reason the attacks did “not fit neatly in prevailing conceptions of ‘war’ or ‘armed conflict’” is that those responsible were not vying to take control of any particular territory or of the U.S. government, although they did believe themselves to be at war (but then again, so did Oklahoma City bomber Timothy McVeigh).

That said, the UN Security Council invoking “the inherent right of...self-defense” in its resolution 1368 on Sept. 12, 2001 quickly started to undercut the view that the war model was not a legally justified response option.

And regardless of whether the attacks on 9/11 themselves triggered a state of armed conflict, the U.S. military response certainly did. The decision to use armed force not just in Afghanistan but across the globe, the early and ugly decisions to flout the rule of law in an amorphous “war on terror,” and the entrenchment of the armed conflict paradigm by subsequent administrations even as they reined in the worst abuses, have had profound consequences on our society, on our government, on foreign populations directly impacted by the war, and on the international order itself.

The United States is poised to further entrench this paradigm today, in part by force of the massive bureaucratic inertia of war formed over two decades, in part because of domestic politics, and in part as a reaction to the recent tragic events that unfolded as the United States and coalition partners pulled out of Afghanistan. We owe it to the next generation to grapple now with the consequences of remaining at war – as well as the consequences of choosing not to be – lest we find ourselves reflexively handing this decades-long legacy of perpetual war to them.

The Legal Consequences of War

Let’s first briefly discuss the overarching legal structure of what it means to be at war before turning to detailed examples. A state of armed conflict makes lawful a range of actions that would be illegal outside of war and springs to life whole bodies of law not applicable in peacetime. International humanitarian law (IHL), or the law of armed conflict (LOAC), applies only during war and regulates its conduct. A host of extraordinary authorities in domestic law become available to the president during war, some of which also apply to other types of declared “national emergencies.” States of emergency also make it possible to derogate from certain international human rights laws, and as a practical matter it is easier for states to assert those powers in an emergency characterized as war.

In practice, when the president is exercising war powers, the executive branch tends to receive an enormous degree of deference from the courts and acquiescence in its activities by Congress (despite the Constitution delegating the majority of the war powers to Congress). As Brian Finucane and Steve Pomper write in this symposium: “When the United States went to war after 9/11, it crossed into new legal territory,” which should have meant the other two co-equal branches of government stepping up to serve their constitutional roles and providing checks and balances. In most cases, they did not. “The president’s war powers are vast and tend to be exercised

in secret. They are often deemed unreviewable by the courts and are almost always under-supervised by Congress,” Finucane and Pomper explain. In sum, the president’s power is vastly greater, and exercised much more freely, when the nation is at war.

The resort to these extraordinary authorities, and the ease with which the President may do so in war, are intended to be exceptions to normal order. But 20 years of exercising these powers, bending their frameworks to the particulars of the post-9/11 counterterrorism problem set, and of building entire institutions of government reliant on their continued invocation, have created a new normal of sorts. There is enormous political and institutional pressure to continue a war that has become such a giant commitment and a settled way of doing business. And it has also become almost unthinkable to many in the policy apparatus that the executive branch might forgo exercising these tremendous powers voluntarily (or to be seen as having ceded them if they might be needed to respond to new threats in the future). Presidents live in fear of a successful terrorist strike and having to explain why every military option was not taken to prevent it (even if the truth is that those military efforts would not have made us safer or would have risked being counterproductive).

But as Nick Rasumussen aptly observed in his [article](#) for this symposium, there is a need “to consider with an open mind whether the strategy and policy approaches we have been relying on in the past two decades are well-suited to the evolving challenges we face.” In the rest of this essay, I will examine the most fundamental of these policy approaches, the war approach, in three contexts – prosecution, detention, and targeted killing – that highlight the clear choices before us 20 years after the longest American war began.

Prosecution

Going to war after 9/11 put the option of military commissions on the table. But it did not require using them or foregoing the peacetime criminal justice system. The civilian federal court system in the United States has, of course, remained open and operating throughout the post-9/11 period. And these courts have been used to try and convict hundreds of terrorist suspects before and since 9/11, including [Zacarias Moussaoui](#) (sometimes called the “20th hijacker”), who was [indicted](#) in 2001 and pled guilty in 2005 to helping plan the 9/11 attacks.

Nevertheless, as part of its pivot to the war path, the Bush administration chose to stand up military commissions at Guantanamo Bay, at first through a [military order](#) issued just months after the 9/11 attacks. That order, and the commissions still ongoing at Guantanamo Bay today under the Military Commissions Act (MCA) later passed by Congress, directly rely on choosing the “war” paradigm, since they are a type of military tribunal used in a time of war to try offenses against the laws of war. (They are not to be confused with courts martial, which are used to try service members for violations of the Uniform Code of Military Justice regardless of whether the nation is at war.)

In U.S. practice, military commissions have historically been used at times and in places where it would be impracticable to use civilian courts. While initial arguments for the post-9/11 commissions relied on the difficulty of trying these international terrorism-related cases in civilian courts, it is military commissions that have proven to be ill-equipped for the task, even as civilian courts have consistently been a useful part of a holistic counterterrorism strategy. Compared to their civilian counterparts, the military commissions at Guantanamo are less adept at handling classified evidence, less experienced with trying complex capital cases (like the 9/11 and USS Cole bombing cases), have less clarity as to what substantive or procedural law applies (including basic constitutional guarantees), have fewer offenses available for charging (the MCA [authorizes prosecutions](#) for certain offenses committed during a “conflict subject to the laws of war”), are plagued by high turnover of judges, and by virtue of their location on an island outside of the U.S. mainland are much more expensive to administer and harder to participate in or observe.

It is no wonder that the civilian court system has secured many hundreds of convictions in terrorism-related cases (by one [count](#), over 660 as of 2018, including over 100 individuals “captured overseas”) as compared to only a handful in the military commissions, several of which were [overturned on appeal](#) (including three in which defendants had pleaded guilty). But the most important cases, including the case of those accused of involvement in the 9/11 attacks themselves, remain mired in pre-trial proceedings that seem unlikely to end anytime soon.

Some of the biggest problems with the Guantanamo military commissions, of course, are unique to the trajectory of the armed conflict during which they were convened. Most important, many of the current defendants were not just “battlefield captures” of soldiers (or spies) caught violating the laws of war, but men who were taken captive and tortured by the United States before they were charged with crimes. As Ian Moss explains in his [article](#) for this symposium on how to close Guantanamo:

It is open and obvious to any casual observer of the military commission system that much of the reason why trials have been illusive revolves around the issue of torture and mistreatment of detainees in U.S. custody. Torture is the U.S. government's original sin with regard to the detention of terrorism suspects now at Guantanamo, and it pervades each of the pending military commission cases. In the words of my former boss, the first Special Envoy for Guantanamo Closure Ambassador Dan Fried, "torture is non-biodegradable."

While the torture problem would not go away completely if the cases now pending before military commissions were tried in civilian courts, those courts would at least have predictable and time-tested rules for handling the issues that arise as a result. And as Moss notes, it is also possible to wind down the current commissions and resolve the pending cases through negotiated plea agreements; "resolutions present an opportunity to sidestep the most significant issues that have vexed the military commissions while also providing for some measure of accountability."

Twenty years after 9/11, the inability to bring to trial those responsible for the attacks (or even successfully conclude a plea agreement) is a glaring example of how choosing the war paradigm had grave unintended consequences. It is also an example of where charting a new course does not require exiting the armed conflict paradigm altogether. That is, even if the United States remains at war with some terrorist armed groups, it can responsibly wind down the use of military commissions at Guantanamo and, as it has done for several years already, try any new terrorism-related defendants in civilian courts.

Detention

Unlike prosecution, where a state of war does not necessarily require the resort to the use of military commissions, some amount of detention is likely to be required in a large-scale armed conflict. However, it may not be the case that it is the United States that needs to be the detaining power even in conflicts in which it participates – for example, after only a transitory period in U.S. custody, Iraq detained the vast majority of ISIS suspects initially captured by the United States in the recent conflict there, as did non-state partner groups such as Kurdish forces on the other side of the border in Syria (the United States did sometimes exercise detention authority for a short time period before handing detainees over to its partners, who had their

own troubles handling detention operations). Moreover, aside from Afghanistan and Iraq, most of the so-called “global war on terror” has not been fought with boots on the ground and battlefield captures, but with drones or other remotely operated weapons. But with those caveats, let’s turn next to what a state of war permits in terms of detention and U.S. detention practice in its post-9/11 conflicts.

First, what is wartime detention? The fundamental purpose of detention in armed conflict is to “prevent captured individuals from returning to the field of battle and taking up arms once again” (see *Hamdi v. Rumsfeld*). The ability to detain does not depend on any wrongful conduct by the detainee – quite the opposite, in international armed conflicts where soldiers have a duty to fight for their country’s side in war, a prisoner of war may have broken no domestic or international laws. Instead, detention is based solely on the status of the individual as a combatant (or in a few other circumstances that can be bracketed here, as a civilian who has participated in hostilities or must otherwise be interned if for security reasons it is “absolutely necessary”). The duration of wartime detention matches its purpose – it may last no longer than active hostilities, and in certain cases (such as when detainees are seriously sick or wounded, or “gravely and permanently diminished” in mental or physical health), it must end sooner. Prisoner releases and exchanges are also relatively common in war.

The primary distinction between the purpose of detention in an armed conflict and in the criminal law context is that the former is preventive and the latter is punitive (with the caveat of temporary pretrial detention). It must be recognized, then, that the flip side of the ability to detain a combatant *who has broken no laws* during war is that the same person likely could not be detained to face criminal charges (whether during wartime or not). In the immediate aftermath of 9/11, while the U.S. criminal code could no doubt have reached those most responsible for the attacks (whether they would eventually have been extradited or rendered to the United States to face trial is a harder question), “foot soldiers” who had not taken part in violent acts against the United States and remained abroad would have remained outside of the reach of U.S. criminal laws (query, of course, whether this meant it was truly necessary to detain them). After 9/11, when Congress amended criminal laws against supporting terrorism or designated foreign terrorist organizations to make them apply extraterritorially, the reach of the criminal justice paradigm is much broader.

With that background, what has U.S. practice been with respect to post-9/11 detention? Hina Shamsi, Priyanka Motaparthy, and Scott Roehm write for this symposium that the years following 9/11 were characterized by the “Bush administration’s turn to ‘the dark side,’” which when combined with subsequent administrations’ failure to seek accountability, helped ensure the failure of U.S.

policies. Nowhere is this more the case than with respect to detention policy. From the CIA's black sites and rendition of terrorist suspects to torture by other countries, to the shocking abuses at Abu Ghraib, to the early claims that Guantanamo detainees were beyond the reach of any legal paradigm and the purported legalization of torture and other forms of cruel treatment by Justice Department attorneys, post-9/11 detention practices involved a "repudiation of U.S. values, not by extremist outsiders but by our own hand." This "betrayal of America's professed principles was the friendly fire of the war on terror."

Alongside the abuses of the CIA's "rendition, detention and interrogation" (RDI) program and among some of those detained after capture on the battlefield, throughout the entire 9/11 period, the United States also engaged in lawful and appropriate detention – both in the armed conflict setting and through its criminal justice system.

Some individuals detained through one of these modes were transferred into others, and some merged over time – for example, those who were not released from the RDI program were shunted into "law of war" detention at Guantanamo Bay, where some of the battlefield captures from Afghanistan were also sent. And as noted above, the United States also engaged in short-term detention, primarily in Afghanistan and Iraq, before handing detainees over to partner forces.

The Bush administration also experimented in two post-9/11 cases with military detention of individuals initially arrested within the United States. It did not go well. As my former colleagues Christopher Fonzzone and Josh Geltzer succinctly summarized in *Just Security*: "Jose Padilla and Ali al-Marri – were suspects captured in the United States and transferred to military custody. In both cases, years of contentious litigation over the Government's ability to hold the detainees in military custody ensued, before the Government ultimately transferred both men back to federal courts for prosecution."

Today, the United States no longer runs detention operations in Afghanistan or Iraq. President Obama did not seek meaningful accountability for the CIA's post-9/11 detention practices, but he did ensure that it would no longer be in that detention business. The last detainee brought to Guantanamo was in 2008. Neither Obama nor Trump (despite his campaign vow to "load it up") brought a new detainee there. Instead, both used the criminal justice system to prosecute suspected terrorists, including those who planned or attempted attacks against the United States (although it very rarely used war authorities to capture them), and worked with partner countries to boost their counterterrorism prosecution

capacity. The post-9/11 terrorism detention picture now consists of the 39 men still at Guantanamo, many more convicted terrorists serving sentences in U.S. federal prisons (including one serving a life sentence, [Ahmed Khalfan Ghailani](#), brought for federal trial from Guantanamo before Congress barred transfers even for trial), and an active docket of terrorism-related cases in the civilian federal courts.

To be sure, the detention of some individuals in terrorism-aligned cases pursuant to criminal process, and in the [immigration](#) system pending removal, is not without [controversy](#) or abuse (including the well-documented [abuse](#) of “material witness” arrest warrants immediately after 9/11). But these systems, for all of their flaws, are heavily regulated by the U.S. Constitution and other domestic laws, and must also comport with U.S. international human rights law obligations. And while enforcement of those obligations is not always what it should be, there is a greater degree of transparency and accountability for abuses than in armed conflict settings.

Against this backdrop, what, if anything, must change when it comes to detention if the United States were to pivot away from its current wartime footing? The obvious answer is that Guantanamo must close. There can be no “law of war” detainees who are not facing criminal charges (but criminal proceedings, in either the military commissions or federal courts, may continue when a war ends). Given even the Bush administration, as well as Obama and now Biden, have endeavored to close the facility in any event, this change can only be seen as long overdue and all for the better. But what is crystal clear is that it should not be the tail that wags the dog – staying at war to hang onto detention at Guantanamo would be a new round of friendly fire in post-9/11 counterterrorism policy and a misuse of our military. And there is a way to close it responsibly [if we try](#).

The rest depends, in large part, on whether the United States ever again intends to engage in ground combat operations. In the context of explaining his decision to withdraw from Afghanistan, President Biden has made clear that he intends to use “[over-the-horizon](#)” strike capabilities as the war continues, stating explicitly that “we just don’t need to fight a ground war” to defeat terrorists militarily. And Biden has justified this approach in part by explaining that it is already how the United States fights other wars, against al Shabaab in Somalia or al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, for example. While this simplified overview of U.S. counterterrorism operations beyond Afghanistan elides the fact the United States does, in fact, have special operators “on the ground” in [80 countries](#), they are not there to facilitate U.S. detention operations. In short, even if there will be a continued reliance on drones and commando raids (discussed in the next section below), no ground wars almost surely means no U.S. military detention operations.

“Direct Action” and Targeted Killing

The most stark difference between times of peace and war is that in war the use of lethal force against combatants, and against enemy property, is lawful so long as the rules of IHL are followed. (It is also lawful to target civilians for such time as they take direct part in hostilities.) The foreseeable effects of civilians killed and civilian infrastructure destroyed as “collateral damage” is also something that the laws of war specially permits (if deemed proportionate to the expected military benefits).

When the Bush administration chose to go to war after 9/11, it commenced the decades-long conflicts, with their enormous toll of civilian and combatant casualties, that President Biden is now seeking to end with the withdrawal of U.S. and allied forces in Afghanistan, and soon Iraq. The duration, human toll, and financial expense of those major ground wars have been extraordinary. The decision to go to war also started the United States down a path that led to the use of lethal force beyond the borders of Afghanistan, but ostensibly as part of the same armed conflict. Those “beyond the battlefield” strikes have in many ways defined the post-9/11 era and shone the greatest light on the stark differences between applying a criminal law or a war paradigm.

What has become known as “targeted killing” or “direct action” beyond “areas of active hostilities” (as Obama described it in his [Presidential Policy Guidance](#) governing such activities) began in the years immediately following 9/11 but was ramped up by President Obama, and then again under Trump. According to reports by news and analysis organizations and some U.S. disclosures, it expanded beyond the battlefield of Afghanistan (and later Iraq and Syria), to include [Yemen](#), [Pakistan](#), [Somalia](#), and later [Libya](#) and [Niger](#). (I should emphasize that this is not a comprehensive list of all counterterrorism activity the United States has engaged in based on the existence of an armed conflict, which include air strikes, drone strikes, raids conducted by special operators, train and equip programs, and other assistance and intelligence activities.)

The United States undertook these strikes – as well as the “traditional” battlefield operations in Afghanistan and later Iraq and Syria – based on the premise that it was in an ongoing armed conflict against those it was targeting, even if those groups were located thousands of miles from any “hot battlefield” and even if they were not those who attacked the United States on 9/11 but were “associated” or “successor” forces

of those groups. These remain, to put it mildly, controversial legal positions, even amongst most close U.S. allies (and even within the offices of some U.S. government lawyers themselves at the time). But they have also become remarkably durable across U.S. administrations of both political parties.

A thorough cataloguing of the legality of the U.S. position on the scope of the armed conflict since 9/11 – and in turn, who it may kill and where – is well beyond the scope of this essay. Let us turn instead to the question of what the consequences would be with respect to lethal targeting if the United States were to pivot away from the post-9/11 wars.

It should perhaps go without saying that, much more so than in the prosecution and detention contexts, when it comes to counterterrorism targeting, choosing to step away from the armed conflict paradigm would be a seismic shift. The ability to engage in status-based targeting would be over.

No drone wars. No “decapitation strategy.” No annual tolls of civilian casualties. No levelling of city blocks. The sprawling post-9/11 lethal-action bureaucracy would disappear or be repurposed, as would the funds used to support it. (Of course, strikes outside of ongoing armed conflict, like those Biden has already taken against “Iran-backed militias” in Iraq and Syria, or those the Obama administration took against Houthis in Yemen, could potentially still be taken if there were a valid claim of self-defense under international law and of Article II authority under domestic law.)

The set of questions that lurk on the other side of the ledger are as familiar on the 20th anniversary of 9/11 as they were on the 10th, but they are made more stark by recent events in Afghanistan that could presage a resurgence of its use as a terrorist base of operations. Is “operational disruption” in the form of targeted killing what keeps Americans safe from mass casualty attacks? What should the Biden administration – or a future one – do if it discovers terrorist training camps in unfriendly or ungoverned territory? Are the other instruments of national power the United States (and its partners) have at its disposal up to the task of preventing another 9/11?

These are very real questions, although they can have a tendency to set up false dichotomies (take strikes or “do nothing”) or rely on impossible counterfactuals (does a bombed training camp necessarily avert mass casualty attacks? do mistaken strikes that result in civilian casualties or the wrong person targeted help mobilize adversaries and enemies?). But a major reason why the armed conflict paradigm has

been so hard to shift out of – perhaps why President Obama could not take us off of the “perpetual wartime footing” he spoke out against in 2013 – is that no political leader, or civil servant, wants to be responsible if a successful attack *might* have been averted by the use of military force.

If we are to shift away from perpetual war, we must face that it means accepting that risk and countering it with other proven measures. But we must also keep front of mind the very real risks of staying at war in order to keep status-based targeting on the table. These go well beyond the contours of this brief essay, but include at a minimum weighing the long-term costs for our service members and their families, the risks of legitimizing rights-violating actions of other states in the name of counterterrorism, and the costs to our own democracy. Obama reminded us in 2013 to be “mindful of James Madison’s warning that ‘No nation could preserve its freedom in the midst of continual warfare.’” And there are of course concrete risks to our own security: namely, that a mistaken strike, based on faulty intelligence or other errors, can produce serious blowback and alienate the local populations and countries the U.S. needs to win over most if it is to succeed in the long term. Or that it could escalate a conflict rather than de-escalate (as with Trump’s strike on IRGC Commander Soleimani or Biden’s strikes on “Iran-backed militias”). Or that, as Asha Rangappa describes, a “myopic focus” on “Islamist terrorism” will take too much focus away from the growing threat of white nationalism and other forms of violent extremism here at home.

When it comes to non-military measures to deal with what will likely always be a risk of terrorist attack, as Luke Hartig explains, that means building our resilience and relying on our defenses:

[T]o observe the recent debate around the Afghanistan drawdown, some believe it’s inevitable (only a matter of time) before an Afghanistan-based al-Qaeda tries to strike the United States. Even if that is correct, we must begin to believe, and to understand, that it’s okay to play defense, to rely on our law enforcement professionals, intelligence community, international cooperation, or even armored airliner cockpit doors to prevent terrorist attacks. These capabilities have shown their ability to stop terrorism time and again since 9/11, and we should trust in the defenses and networks we have built to keep threats at bay.

A Paradigm Shift?

The 20 years since 9/11 have been marked not just by being at war, but by the way the war began — both in terms of the horrific nature of the 9/11 attacks themselves, and the profoundly mistaken way the Bush administration responded, including in its expansive conception of the “global war on terror” and the methods chosen to fight it. It has become difficult to disentangle the pathologies of still being at war, entrenched as it has become through multiple administrations of both political parties, from the persistent legacies of its worst abuses.

But with 20 years of hindsight, at least one thing is clear: the Pandora’s box that opened in the aftermath of 9/11 has not been shut and the pull to use the powers of war has become almost inexorable. As President Obama warned in a speech intended both to defend his continuing the war started by his predecessor but also make the case for winding it down, the failure to shift out of the war paradigm, however it is fought, has pernicious effects:

We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war — through drones or Special Forces or troop deployments — will prove self-defeating, and alter our country in troubling ways.

It is no longer September 12th, 2001. As Luke Hartig reminds us, “[i]rregular conflicts — whether related to terrorism or not — do not necessarily demand military responses.” There are other policy strategies that “should be properly resourced and used as tools of first resort.” President Obama could have taken us off the war path, swiftly and decisively, upon taking office. President Trump could have done the same, as he promised. Whether or not Congress exercises its constitutional responsibility to decide whether the nation should remain at war, it remains within the power of the president to change course. The choice of whether to pass perpetual war to a fifth president now falls to Biden.