What Does it Mean to Fight a “War” Against al Qaeda?

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Overview

• Terrorism as crime or war?
• War in the 21st century
  – Domestic/International law criteria
• Classification of the adversary
• Classification of the conflict
Terrorism as crime

- Approach endorsed by international treaties
- Wide range of statutory prohibitions
  - Federal law recognizes terrorism specific crimes
  - Acts of violence generally state crimes also
- Long history of successful prosecutions
- Commands greatest international respect
  - Right to demand cooperation
Terrorism as crime issues

- Location
- Strength
- Incapacitation
“War on Terror”: Metaphorical or Real?

20th century “Wars on”:
- crime
- poverty
- cancer
- drugs
- gangs

9/10/11 “War on illiteracy”
9/11/11 “War on terror”
9/18/11 AUMF
Domestic Law: AUMF

... the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Al Qaeda
The [Afghan] Taliban
20th Century Evolution of “War”

Originally lawful policy choice for states
- legal state of relations between countries

UN Charter Art. 2(4) bars threat/use of force
- Art. 51 provides self-defense exception
- requires armed attack

Geneva III (POW Convention) now mandates repatriation at close of “active hostilities”

“Armed conflict” supplants “war”
- level of violence criteria
Endless War?

How would conflict with al-Qaeda end?

- Repeal of AUMF
- Dissolution of al-Qaeda organization
- Decrease in level/frequency of violence
Major Law of War Issues

- Classification of U.S. adversaries
- Classification of the conflict
- Location of hostilities
- Detention
  - Identification of “enemy”
  - Conditions
- Interrogation
- Trial
- Reparations
Classifying the Enemy

• Essential element of “war” paradigm
  – Liability to attack
  – Criteria for detention
  – Eligibility for trial

• “Enemy combatants?”
  – DOD created term in 2002
Classifying the Enemy

- **Combatants**
  - **Attack**: Any time, any place*
  - **Detain**: For duration of hostilities
  - **Try**: Same courts as own service personnel

* Geneva III
Classifying the Enemy

- **Attack:** While participating in hostilities
- **Detain:** If serious security threat, review every 6 mos.
- **Try:** Domestic law (no immunity)

Geneva IV

Civilians
Classifying the Enemy

Geneva III

Combatants

Geneva IV

Civilians

Unlawful Combatants

Ex parte Quirin
Classifying the Enemy

- Combatants
  - Geneva III
  - Unlawful Combatants
- Civilians
  - Geneva IV

Ex parte Quirin
Classifying the Enemy

**Geneva III**

**Combatants**

- **Attack**: Both any time, any place (assumes CCF)
- **Detain**: Duration of hostilities or review every 6 mos.
- **Try**: LOW or domestic law (no immunity)

**Geneva IV**

**Civilians**

Need to decide!
Geneva Conventions – Common Art. 2

International Armed Conflict (IAC):

. . . the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . .
Geneva Conventions – Common Art. 3

Non-International Armed Conflict (NIAC):

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. . . .

NO definition of combatant/belligerent immunity

NO detention authority

Real issue w/Afghanistan/Taliban
Location of Hostilities
Guantánamo Facts

• 779 men and boys have been held
  - 155 remained as of 1/23/14
    - 13 are “high value” detainees
    - 17 are Afghans

• 2009 Detainee Task Force recommended:
  – 77 should be released (incl 56 Yemenis)
  – 45 should be detained indefinitely
  – 33 should be tried

Just 1 periodic review since 2009
The Way Forward

• Credibly establish classification of conflict(s)
  – Afghanistan/Taliban as NIAC
  – Recognize al Qaeda as belligerency?

• Identify applicable LOW rules
• Conform detention conditions to law
• Charge or release those not detainable
• Develop “post-war” anti-terrorism strategy
• Seek congressional approval to participate in local NIACs?
Discussion?
Part I – Identified Options

• Criminal law
  – Robust scope
  – Greatest legitimacy
  – Downsides partly overstated, but real risks

• Piracy
  – Faithful application of criminal law
  – Geographic constraints on apprehension

• Law of War
  – Pragmatic roots, flexible authorizations
  – Protective of civil liberties(?)