

TERRORISM AND CHANGES TO THE LAWS OF WAR

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Thanks, Scott, and it's nice to be back at Duke again. I was here a number of years ago to open the new Center for International and Comparative Law and again last year. It is great to be back, and I thank the organizers for putting together this panel.

I am going to begin my remarks by placing this discussion in a policy context since I am the person most recently out of the government. First, I will address what has changed in the last year under the Obama administration and what has not changed. Then I will focus within that policy context, more specifically, on the issues for this panel regarding use of force, including where and against whom force may be used.

It is appropriate that we are speaking today, because exactly one year ago President Obama issued his famous three executive orders that made many changes from the Bush administration's policies.¹ The three orders were: one, to close Guantanamo within one year and review every detainee's status in order to determine what ought to be done with them;² two, to end the CIA interrogation program and to conduct a review of what sort of interrogation program there ought to be;³ and three, perhaps the most significant and difficult to implement, to review all detainee laws and policies to determine what the appropriate legal framework should be.⁴

I applauded those executive orders when they were issued and still think that they were good decisions. Several of us on these panels worked quite hard during the Bush administration to achieve the results in those executive orders, and it was disappointing that the Bush administration could not resolve some of these same issues sooner. So, as a policy matter, I generally agreed with the orders and believed that they did reflect some change.

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1. See *infra* notes 2-4 and accompanying text.

2. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

3. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

4. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

That said, since that day a year ago, relatively little has happened to implement those three executive orders. First, obviously Guantanamo has not closed, and it looks like it will not close in 2010 because Congress has blocked the President's ability to move detainees to the United States. Second, the CIA program was officially shut down, but it had really ended years ago. Moreover, as you may have seen in the press just a couple of days ago, the director of national intelligence is already bickering with the director of the FBI about who ought to conduct interrogations and whether the intelligence community should be allowed to do more robust interrogations.

Finally, the third executive order created a task force that was to review detention policy overall, but the task force missed its six-month deadline and extended the deadline to a year. The task force should have reported by now, but has not done so in large part because the issues are so difficult.

So those are the things that have changed. What I would like to focus on now is what has not changed. That is the remarkable thing: that there has been, in fact, more continuity than change between the Bush and Obama administrations.

The main point is that the legal framework that the Obama administration is applying continues to be a law of war framework. The President dropped the label of "a Global War on Terror," and I think this was a good idea because this label did more harm than good. But he is still pursuing, as a legal matter, a global war on al Qaeda and, most significantly, he is applying the laws of war for detention and for targeting. In his famous Archives speech, he emphasized that the United States is at war with al Qaeda,⁵ and under some pressure from Republicans recently, has had to repeatedly say, "We are at war. We are at war against Al Qaeda . . ."⁶ What that means is that he continues to rely on the laws of war as the legal basis for our military and our CIA to kill alleged terrorists around the world. He uses these laws to detain people indefinitely, without trial, and to assert the right to detain people even though they have not been charged with any crime.

Furthermore, he has emphasized that it is not the criminal laws that apply, but the Law of Armed Conflict. He has asserted a right to detain

5. President Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

6. President Barack Obama, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security>).

people not just in Afghanistan, where there are active hostilities taking place, but essentially anywhere in the world.

With respect to the prosecutions of those individuals whom the United States is detaining who can be tried, the administration has said it will try many of them in military commissions. The attorney general announced in November that he will try the 9/11 planners in federal court in New York.⁷ I personally think it is a good idea to try the 9/11 planners in federal court—those people had, in fact, clearly committed federal crimes. But to the great consternation of many of the President's supporters who thought that he was going to immediately jettison the military commissions, the President has said that he is going to retain them. I think he made this decision largely because he has found that many of the Guantanamo detainees cannot be tried in federal court, not because of any way that they have been treated, but because they did not violate our federal criminal laws. The things that many of the detainees had done, to the extent they were violations of law, were violations of the laws of war, not of violations of federal criminal law.⁸ Therefore, the President has continued targeting, detaining, and prosecuting members of al Qaeda under the laws of war.

In addition, in a lesser known announcement last summer, the Obama administration said that it will continue the practice of renditions.⁹ Not only will it continue the renditions that had historically been practiced back through the Bush and the Clinton administrations of going out and snatching terrorist suspects and bringing them back to the United States for trial, but it will also use renditions to snatch an individual and transfer him from one country to another. That is a controversial concept and something that I think our allies will raise questions about.

Finally, the Obama administration is not giving detainees much more process. The individuals who are being held in Bagram have challenged their detention and have insisted on a right to habeas in U.S. courts, even though they have never been in the United States and are not in Guantanamo. Judge Bates, of the D.C. District Court, granted habeas rights to a limited number of non-Afghan nationals.¹⁰ That case was just argued on

7. Attorney Gen. Eric Holder, Announcement of Forum Decisions for Guantanamo Detainees (Nov. 13, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-09113.html>).

8. See Scott L. Silliman, *The Appropriate Venue for Trying Terrorist Cases: Prosecuting Alleged Terrorists by Military Commissions*, 42 CASE W. RES. J. INT'L L. 289 (2009).

9. See David Johnston, *U.S. Says Rendition to Continue, but With More Oversight*, N.Y. TIMES, Aug. 24, 2009, available at <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

10. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, Nos. 09-5265 (D.C. Cir. May 21, 2010).

appeal before the D.C. Circuit. The point here is that the Obama administration is opposing habeas rights for anybody outside of Guantanamo.¹¹

My point overall is that the legal framework the Obama administration is applying continues to be the laws of war. I think the Obama administration has found that to fight al Qaeda, particularly with hundreds of thousands of our troops around the world, one simply cannot apply exclusively a human rights law or criminal law framework.

What are the implications of this around the world? When I became the State Department Legal Adviser, I began a dialogue with our allies to try to do a better job of explaining the legal rationale for U.S. policies, because our allies obviously felt that many, many mistakes were being made. The Obama administration is going to need to continue this dialogue. There is going to be a honeymoon period during which the allies will be very happy with the initial executive orders and the tone that the administration is adopting. But, as the Administration continues many of the Bush administration's unpopular policies of indefinite detention without trial, renditions, and military commissions, our allies will then have one of several choices. They can hold their noses and look the other way because they like the new administration. They can say, "Gee, these are the same policies that we didn't like before," and get back into the same head-butting with the U.S. administration that existed before. Or, and this is what I hope will happen, they will see that an administration that they like is continuing policies that they do not like, conclude there must be some reason for that, and continue a serious dialogue on these issues. I think this first year there has been a bit of a honeymoon, but as these policies continue, the administration is really going to have to work hard to explain the continuation of these policies.

Finally, I will discuss the rules applicable to the use of force and to targeting. Two issues arise regarding this topic: first, where can you use force, and second, against whom can you use force? Both of these were issues that were extremely difficult for the last administration, and the new administration will find them equally difficult.

First, where can one use force? If the United States is using military force around the world, can it only be—as some of our allies have suggested—in Afghanistan, because that is really the only place where an armed conflict is going on? The position of the last administration, and the policy of this administration, is that while there are active hostilities taking place in Afghanistan, al Qaeda is not containing its operations to Afghanistan. Therefore, both the Bush administration and the Obama administra-

11. *Id.*

tion are asserting the right to use force in self-defense *anywhere* in the world where the United States is threatened or being attacked by al Qaeda.

Essentially, the Obama administration is continuing, as a legal matter, the idea of a global war on terror. I found in my discussions, particularly with Europeans, that the United States' assertion of the legal right under international law essentially to use force *anywhere* in the world is an extremely upsetting concept. Does that mean the United States believes it is at war with al Qaeda in London and can shoot people on the streets of London? Actually, it does not, because there are two competing international law principles. As the United States, we have the right to use force anywhere to defend ourselves, a right that is reflected in the UN Charter¹² and under customary international law. But there also exists the countervailing sovereign right of every other country in the world to be free from the use of force by the United States.¹³

In sum, the United States asserts the right to use force in the 194 countries where it might be threatened, but then must immediately subtract from that approximately 190 countries that can contain the problem on their own. The theory has been that the United States has a right to use force against al Qaeda *only* in those places where a country is unable, or unwilling, to contain the threat itself, which really results in just a couple of countries in the world: Afghanistan, Yemen, and Somalia.¹⁴ But the idea that the United States can use force anywhere in the world continues to be controversial, and it is going to require some further discussion.

If that is not difficult enough, the even more difficult question is which individuals may the United States use force against specifically, since the United States is really not attacking these countries, but rather is attacking members of al Qaeda or the Taliban in these countries. The difficult thing is to figure out against whom, and under what set of rules, one can use force—either lethal force or detention, which is a lesser type of force than lethal force.

In a traditional armed conflict, the solution is pretty clear. People wear uniforms; you know that they are part of an enemy army. In a non-traditional conflict, it may still be clear that a state may target the person without the uniform who is coming at its soldiers with a gun, or who is setting off a bomb—they would seem to be combatants. But what about the person who made the gun, made the bomb, delivered the gun, delivered the

12. U.N. Charter art. 51.

13. U.N. Charter art. 2(4).

14. See, e.g., Harvey M. Sapolsky et al., *Restraining Order: For Strategic Modesty*, WORLD AFF. J., Fall 2009, at 84, 89-90 (arguing that the United States should only take military action against terrorist organizations where the "host country" cannot or will not act).

bomb, financed the gun, financed the bomb, or had the safe house? As this person's connection to the conflict becomes more and more attenuated, the question becomes quite difficult. That is the core the issue: when non-state actors are not representing an individual country, which ones actually can be treated as combatants for targeting or for detention? They are essentially all civilians, but they are civilians who are engaging in combat.

Human rights groups have tended to suggest that they do not believe that a law-of-war framework should be used in a conflict with a group of civilians like members of al Qaeda.¹⁵ However, I think that over the last eight years it has become gradually more accepted that one can be in a state of armed conflict with a non-state actor. Now that we see groups like al Qaeda that can assert force at the same level that countries assert force, a law of war framework is an acceptable one. But this still does not tell a country the proper rules to apply as far as specific people who can be targeted. Neither the Third Geneva Convention nor the Fourth Geneva Convention, nor even Common Article Three, advises a country as to specifically who can be targeted.¹⁶ That leaves a country with a number of possible legal theories. The United States is often told that the applicable international law is clear. But, even after eight years, it is still not clear to the United States or any other country what legal rules apply to targeting and detention issues.

Approximately six years ago, the International Committee of the Red Cross ("ICRC") put together a study on civilian combatants. It is called *The Study on Direct Participation In Hostilities*, after the international legal rule that the only time that civilians may be targets is when they are directly participating in hostilities.¹⁷ But when is a civilian directly participating in hostilities? If civilians are shooting or bombing by day, but by night they go back home to their houses, are they still combatants? Or can they only be targeted when they are doing the bad things, not when they are home?

The ICRC report spent six years studying this issue; its report is not binding, but reflects some useful guidance. The United States and most other countries agree with some parts of the ICRC report but not other parts

15. See e.g., Kenneth Roth, Human Rights Watch, 83 FOREIGN AFF. 2, 3 (2004) (arguing that the category of combatant under the law of war is difficult to apply to terrorist activities where "roles and activities are clandestine and a person's relationship to specific violent acts is often unclear.").

16. See NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (2009), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC_002_0990.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF) (noting that direct participation in hostilities will suspend a civilian's right to protection, but that "neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities").

17. *Id.*

of it, but I would note that it took some of the best experts in the world six years to come to a consensus as to who is directly participating in hostilities. However, the ICRC guidance is still not very clear.

Therefore, inside the United States, these issues have been left to our courts to try to sort out. There have been a number of decisions over the last couple of years to clarify who is a combatant that can be detained. In May 2009, Judge Bates in the D.C. District Court concluded that it is permissible under U.S. law—The Authorization to Use Military Force¹⁸—and international law to detain individuals who are members or part of al Qaeda or the Taliban but not those who are substantially supporting al Qaeda or the Taliban.¹⁹

Just ten days before this panel discussion, the D.C. Circuit, in a rather surprising opinion in the *Bihani* case, rejected this conclusion and decided instead that individuals can be detained if they are members or part of al Qaeda or the Taliban or if they are substantially supporting them.²⁰ Moreover, in what was perhaps the most surprising part of the ruling, the D.C. Circuit held that international law is irrelevant and that the only law the Court would look at in determining who can be detained is United States domestic law.²¹ This issue will likely have to be resolved by the Supreme Court, which in the next year or two will probably issue the fourth in its series of detention decisions to clarify who can be detained.

In conclusion, the United States is regularly told that there are no problems with the law or gaps in the law with respect to detention and targeting. The problem is only a question of implementation, implying that if the United States would just do a better job of applying the law, it would all be very easy. I think the answer is that this is not an easy area, that there are not clear rules, and that it is quite difficult to accuse someone of violating the law with respect to targeting and detention. One can appropriately say that the United States has adopted a number of bad policies, but we are going to be debating for a very long time what the applicable rules are or ought to be.

18. Pub. L. No. 107-40, 115 Stat. 224 (2001).

19. *See Hamdani v. Obama*, 616 F. Supp. 2d 63, 74-77 (D.D.C. 2009).

20. *See Al-Bihani v. Obama*, 590 F.3d 866, 884-85 (D.C. Cir. 2010).

21. *See id.* at 871 (finding that reference to international law is “inapposite and inadvisable when courts seek to determine the limits of the President’s war powers,” and that courts must look instead to “the text of relevant statutes and controlling domestic caselaw”).