
TEN YEARS OF LEGAL EVOLUTION: THE ARCHITECTURE
OF U.S. COUNTERTERRORISM LAW FROM
SEPTEMBER 10, 2001 TO THE PRESENT

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More than ten years have passed since the 9/11 terrorist attacks, which means that our armed conflict against al Qaeda and the Taliban has lasted longer than any other war in our nation's history.² We have killed numerous al Qaeda members, including founder Osama bin Laden, and captured numerous others, including 9/11 mastermind Khalid Sheikh Mohammed.³ Ten years later, there are still over a hundred suspected al Qaeda or Taliban fighters being detained at the U.S. naval base at Guantanamo Bay, Cuba.⁴ The nature of this particular conflict, with an enemy that is a non-state group, has predictably raised a number of novel legal issues over the years.

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² The Cold War lasted nearly fifty years, but it was not an armed conflict. *But see* MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 63-94 (2012) (discussing ways in which the Cold War did constitute a war).

³ James Risen, *An Elusive Figure Who Came to U.S. Attention Late*, N.Y. TIMES, Mar. 2, 2003, <http://www.nytimes.com/2003/03/02/international/asia/02KHAL.html>; Scott Wilson, Craig Whitlock & William Branigin, *Osama bin Laden Killed in U.S. Raid, Buried at Sea*, WASH. POST, May 2, 2011, http://www.washingtonpost.com/national/osama-bin-laden-killed-in-us-raid-buried-at-sea/2011/05/02/AFx0yAZF_story.html.

⁴ Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. TIMES, Apr. 24, 2011, <http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html>.

To get an idea of how much the legal architecture has evolved (or devolved, depending on one's view of things), consider the big legal issues in 2002/2003:

- Could the United States detain a citizen as an enemy combatant, without access to a lawyer and without having been charged for any crimes?⁵
- Did noncitizen detainees at the U.S. naval base on Guantanamo Bay, Cuba, have the right to file petitions for writs of habeas corpus?⁶
- Could detainees be tried in military courts, as opposed to regular federal courts?⁷
- Were detainees at Guantanamo entitled to POW status?⁸

These questions have largely been answered. Sometimes, the government's position prevailed. For example, *Hamdi v. Rumsfeld* upheld the government's authority to classify and detain U.S. citizens as enemy combatants.⁹ Moreover, after numerous rounds of litigation and congressional actions, the Executive Branch has been able to proceed with military trials for certain Guantanamo Bay detainees, with several defendants having been convicted in such proceedings.¹⁰

At other times, the government has lost. *Rasul v. Bush* rejected the Bush Administration's contention that federal courts lacked jurisdiction to hear habeas petitions filed by Guantanamo Bay detainees.¹¹ *Hamdi* held that a U.S. citizen detained as an enemy combatant had a

⁵ See *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

⁶ See *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002).

⁷ See *American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions*, AM. BAR ASS'N (Jan. 4, 2002), <http://www.americanbar.org/content/dam/aba/migrated/leadership/military.authcheckdam.pdf>.

⁸ See *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, HUMAN RIGHTS WATCH (Jan. 29, 2002), <http://www.hrw.org/reports/2002/01/29/background-paper-geneva-conventions-and-persons-held-us-forces>; *United States of America: Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay*, AMNESTY INT'L (Apr. 14, 2002), <http://www.amnesty.org/en/library/info/AMR51/053/2002/en>.

⁹ 542 U.S. 507, 518-19 (2004).

¹⁰ The first to be convicted was David Hicks, an Australian citizen who converted to Islam and joined the Taliban. In 2007, Hicks reached a plea agreement with the military and was convicted of providing material support for terrorism. Josh White, *Australian's Guilty Plea is First at Guantanamo*, WASH. POST, Mar. 27, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/26/AR2007032602439.html?nav=emailpage>. The second was Salim Hamdan, who was convicted at trial of providing material support for terrorism (but acquitted of conspiracy). Jerry Markon, *Hamdan Guilty of Terror Support: Former Bin Laden Driver Acquitted of Aiding Attacks*, WASH. POST, Aug. 7, 2008, at A01.

¹¹ 542 U.S. 466, 473 (2004).

constitutional right to a hearing before a neutral decision-maker to challenge his classification, with the assistance of counsel.¹²

Ten years later, the burning questions are:

- Is targeted killing (especially via unmanned aerial vehicles) lawful?¹³
- Can the United States target its own citizen for killing without having tried, much less convicted, him?¹⁴
- Can such targeted attacks take place anywhere the targets can be found?¹⁵

In other words, we have gone from asking whether we can detain “bad guys” as something sort of like POWs (but without all the privileges) to asking whether we can shoot on sight, to kill – or, as some contend, “assassinate.”¹⁶ To be sure, I have glossed over some important intermediate questions, like whether waterboarding counts as torture. That issue exploded into the public sphere in the middle of the last decade with the declassification of the infamous “Standards of Conduct” memo (also known as the “Torture Memo”).¹⁷ But, as far as we know, waterboarding was used on only three detainees, and not since the early 2000’s.¹⁸ Not only have we – as far as is known – not subjected anyone else to waterboarding since then, but one of President Obama’s first official acts was to issue an Executive Order banning waterboarding and other forms of coercive interrogation.¹⁹

So, how did we get from fretting about whether we can detain suspected al Qaeda fighters indefinitely to wondering whether it is

¹² 542 U.S. at 538-39.

¹³ See Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (Mar. 6, 2012), <http://www.cfr.org/intelligence/targeted-killings/p9627#p3>.

¹⁴ See David Cole, *Killing Our Citizens Without Trial*, N.Y. REV. OF BOOKS (Nov. 24, 2011), <http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial/?pagination=false>.

¹⁵ See Anthony Dworkin, *Obama Administration Announces Legal Basis for Drone Attacks*, CRIMESOFWAR.ORG, <http://www.crimesofwar.org/commentary/obama-administration-announces-legal-basis-for-drone-attacks/> (last visited Mar. 27, 2012).

¹⁶ Steve Peoples, *Ron Paul: Anwar Al-Awlaki, U.S.-Born Al-Qaeda Cleric, ‘Assassinated’*, THE HUFFINGTON POST (Sept. 30, 2011), http://www.huffingtonpost.com/2011/09/30/ron-paul-american-al-qaed_n_989129.html.

¹⁷ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, at 1-2 (Aug. 1, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

¹⁸ R. Jeffrey Smith, *Bush Says in Memoir He Approved Waterboarding*, WASH. POST, Nov. 4, 2010, at A02 (discussing how waterboarding was employed on Khalid Sheik Mohammed and two other CIA detainees).

¹⁹ Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

okay to hunt them down with unmanned aerial vehicles and blow them up with missiles? A fully detailed answer to that question is well beyond this short essay, but the key to understanding what happened is to understand that we now appear to accept as a legal proposition that there is a legitimate and lawful counterterrorism role to be played by the military.

This is a distinct change from the pre-9/11 approach, which, for the most part, relied on traditional law enforcement tools to fight terrorism. When terrorists tried to bring down the World Trade Center in 1993 with a truck bomb, we tracked down the perpetrators and tried them in federal court.²⁰ One of the ringleaders, Ramzi Yousef, was captured in Pakistan and turned over to us via rendition.²¹ When al Qaeda terrorists blew up our embassies in Kenya and Tanzania, we indicted those whom we thought were responsible.²² Most were never brought to justice, unlike Ahmed Ghailani, who was captured after 9/11 and eventually tried by the Obama Administration in federal court.²³ When al Qaeda terrorists attacked the Khobar Towers complex in Saudi Arabia (where many Americans live), the FBI tried to investigate.²⁴ When al Qaeda terrorists attacked the *U.S.S. Cole* while it was docked in Yemen, here too we sent the FBI to investigate.²⁵

This was no accident. As a matter of policy, we used to think that treating terrorists as combatants would only elevate their status; it is one of the main reasons that President Reagan refused to submit an amendment to the Geneva Convention for ratification by the Senate, because he thought it would privilege guerilla fighters.²⁶

There are a few exceptions, of course. Notably, after we suspected Libyan agents of bombing a discotheque in Germany, we launched

²⁰ GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR* 179-85 (2011).

²¹ *Id.* at 182-85.

²² *Id.* at 237.

²³ Peter Finn, *Terror Detainee Largely Acquitted*, WASH. POST, Nov. 18, 2010, at A01. Ghailani was convicted of one count of conspiracy to damage or destroy U.S. property but acquitted of the remaining 284 counts of murder and attempted murder.

²⁴ GRAFF, *supra* note 20, at 201.

²⁵ *Id.* at 302.

²⁶ See Tung Yin, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention's Regulation of Interrogation of Captured Combatants Through Positive Inducements*, 26 B.U. INT'L L.J. 227, 235 (2008).

devastating air strikes against Tripoli.²⁷ That, at least, was an attack against a foreign country, which is the traditional role of the military. The best historical precedent was probably the 1998 missile attack against a pharmaceutical plant in Sudan, in retaliation for the embassy bombings.²⁸ This attack, it should be noted, was condemned and lampooned as imitating the plot of the movie *Wag the Dog*, in which a fictional president launches a war to distract the public from a sex scandal.²⁹ The implication was that President Clinton, then embroiled in the Monica Lewinsky scandal, was misusing the military.³⁰

For a number of reasons, the events of 9/11 demanded more than law enforcement. For one thing, we had no formal relations at all with the Taliban, and hence no legal process to acquire custody over Osama bin Laden and other senior al Qaeda members.³¹ Negotiations went nowhere.³² For another thing, the scale of the 9/11 attack, combined with the international tangle of the 9/11 conspiracy, seemed in some ways more like a military attack than the sort of terrorism that occurred earlier. Indeed, NATO invoked for the first time a provision declaring that an attack on one member was an attack on all members.³³ The United Nations Security Council recognized that the United States had a right under the UN Charter to respond in self-defense.³⁴ Most importantly, from the perspective of domestic law, Congress authorized the President to use military force against al Qaeda and the Taliban.³⁵

²⁷ PETER HUCHTHAUSEN, *AMERICA'S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. MILITARY ENGAGEMENTS, 1975-2000*, at 93-94 (2003).

²⁸ GRAFF, *supra* note 20, at 229-30.

²⁹ *WAG THE DOG* (New Line Cinema 1997).

³⁰ See John F. Harris, *In Midst of Scandal, Clinton Planned Action*, WASH. POST, Aug. 21, 1998, at A01, available at <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/decision082198.htm>.

³¹ See Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 159 (2005).

³² *Id.*

³³ Jessica Rettig, *10 Years After 9/11 NATO's Future Remains Uncertain*, U.S. NEWS & WORLD REPORT, Sep. 9, 2011, available at <http://www.usnews.com/news/articles/2011/09/09/10-years-after-911-natos-future-remains-uncertain>.

³⁴ See Colum Lynch, *U.S. Holds Out Threat of Force Against Iraq*, WASH. POST, Oct. 10, 2001, at A01.

³⁵ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 424 (2001) (“[T]he 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

Despite these points, at the outset of the war against al Qaeda, there was considerable opposition to the idea of using military force against non-state actors, such as international terrorists. European leaders and human rights groups decried the indefinite detention of captured fighters, demanding that they be charged with crimes or released outright.³⁶

Common sense gradually prevailed. Unless we were willing to distort our criminal law code to an unrecognizable shape, there would be many detainees against whom we would not have any charges to bring. After all, the direct 9/11 participants were dead, and only the organizers and leaders like Osama bin Laden, Ayman al-Zawahiri, Khalid Sheikh Mohammed, and a few others could be considered conspirators. Foot soldiers simply shooting at what they perceived to be American invaders could hardly be labeled as co-conspirators – though federal prosecutors would no doubt love such a massive expansion of conspiracy law to use against associates of drug dealers and the like.

In 2004, the Supreme Court issued three decisions in terrorism cases that collectively upheld the government's authority to detain enemy combatants, although the Court did call for some rudimentary court process to hear claims by the captured fighters.³⁷ Specifically, detainees were given the right to file habeas petitions to challenge the basis for their detention.³⁸ Interestingly, in one of the cases, the Court acknowledged that even an American citizen could be detained as an enemy combatant, though of course, such a person would have a number of rights pertaining to challenging such classification.³⁹ Two years later, the Court decided that the President's military court procedures were flawed.⁴⁰ It was not that military courts would never pass muster

against the United States by such nations, organizations or persons.”); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2061 (2005).

³⁶ *See* Karen DeYoung, *Group Criticizes U.S. On Detainee Policy; Amnesty Warns of Human Rights Fallout*, WASH. POST, May 28, 2002, at A04 (indicating that Amnesty International listed eight human rights violations as a result of the indefinite detention of alleged terrorists); John Mintz, *U.S. Adds Legal Rights in Tribunals; New Rules Also Allow Leeway on Evidence*, WASH. POST, Mar. 21, 2002, at A01.

³⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2004); *Rasul v. Bush*, 542 U.S. 466, 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 426 (2004).

³⁸ *Hamdi*, 542 U.S. at 535; *Rasul*, 542 U.S. at 485; *Padilla*, 542 U.S. at 427.

³⁹ *Hamdi*, 542 U.S. at 532-33.

⁴⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006).

under the Constitution, it was just that these court procedures were no good.⁴¹

These decisions, and a follow-up one in 2008,⁴² did two things. First, they confirmed the role of the military in fighting al Qaeda. Second, they blunted the more objectionable aspects of the Bush Administration's claim to unilateral executive authority. The aspects of military force that survived court review were essentially those that Congress had agreed to, not those that the White House had arrogated to itself.

Which brings us to where we stand today. If it is largely settled now that we can use military force against a terrorist group like al Qaeda, then it may not be surprising that the Obama Administration has ramped up our targeted killing of known and suspected al Qaeda fighters. Military combat is not only about prosecuting and punishing the enemy; it is about disabling them, whether by capturing them, wounding them, or killing them. Still, the spectre of high-tech death raining down from the skies appears to give some pause about the legality of such attacks.

The nature of the weapon platform – a drone, as opposed to a piloted bomber, for example – should not matter from a legal perspective.⁴³ If anything, targeted killings probably result in fewer unintended deaths of innocent civilians (what the military calls “collateral damage”), thus satisfying the law of war requirements of proportionality and distinction. The concern, rather, lies in the target selection process itself, particularly (but not only) when the target is an American citizen. What activity or conduct gets you put on the “kill list,” and moreover, how do you get off that list?

That issue, it turns out, has not really changed fundamentally over the last ten years. We went from wondering about what sort of hearings detainees should get to demonstrate that they are not “bad guys” to now wondering about the hearings that targets should get to

⁴¹ For a detailed synopsis of *Hamdan*, see Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505 (2007).

⁴² *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴³ See Renee Dopplick, *ASIL Keynote Highlight: U.S. Legal Adviser Harold Koh Asserts Drone Warfare Is Lawful Self-Defense Under International Law*, INSIDE JUSTICE (Mar. 26, 2010), http://insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law (quoting speech by State Dept. Legal Adviser Koh).

demonstrate that they, too, are not “bad guys.”⁴⁴ Unfortunately, a prime vehicle for litigating that issue was mooted when we killed Anwar al-Aulaqi in a missile strike in mid-2011.⁴⁵

Perhaps the takeaway from the last decade is this: we are not adding to the population at Guantanamo, but that is in large part because we are not capturing anyone anymore; we are just killing them on the battlefield. Whether you think that’s progress or regression is an exercise left to the reader.

⁴⁴ See generally *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (addressing the contention by Nasser al-Aulaqi that his son Anwar al-Aulaqi should be removed from a list “targeting” him for assassination).

⁴⁵ Peter Finn & Greg Miller, *Family Condemns Death of Awlaki’s Son*, WASH. POST, Oct. 18, 2011, at A01.