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Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the "War against al-Qaeda"--Why it Matters in Rendition and Targeted Killing

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A stylized world map in a light blue-grey tone, overlaid with a faint grid of latitude and longitude lines. The map is centered on the Atlantic Ocean, showing the continents of North and South America, Europe, and Africa.

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RIGHTLY DIVIDING THE DOMESTIC JIHADIST
FROM THE ENEMY COMBATANT IN
THE “WAR AGAINST AL-QAEDA”—
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Jeffrey F. Addicott

RIGHTLY DIVIDING THE DOMESTIC JIHADIST FROM THE ENEMY COMBATANT IN THE “WAR AGAINST AL-QAEDA”—WHY IT MATTERS IN RENDITION AND TARGETED KILLING

*Jeffrey F. Addicott**

The confusion associated with comprehending fundamental legal concepts associated with how America conducts the “War on Terror” centers around the unwillingness of the U.S. government to properly distinguish al-Qaeda unlawful enemy combatants from domestic jihadi terrorists. If the American government cannot properly differentiate between an enemy combatant and a domestic criminal, it is little wonder that attendant legal positions associated with investigation techniques, targeted killing, arrest, detention, rendition, trial, and interrogation are subject to never-ending debate. While all al-Qaeda unlawful enemy combatants can be labeled as violent jihadists, not all violent jihadists are unlawful enemy combatants.

Without a significant about face in leadership that is willing to discern the basic difference between an unlawful enemy combatant and a domestic criminal, America’s reputation will remain under a cloud of suspicion and confusion regarding the legality of our actions associated with two significant areas of critique: rendition and targeted killing vis-à-vis unlawful enemy combatants in the War on Terror.

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CONTENTS

I. INTRODUCTION	260
II. DEFINITIONS.....	264
A. <i>Global Definition of Terrorism</i>	265
B. <i>American Definitions of Terrorism</i>	269
C. <i>Enemy Combatant Versus Unlawful Enemy Combatant</i>	272
D. <i>Domestic Jihadist</i>	280
III. MIXED SIGNALS—BLURRING THE LINE BETWEEN DOMESTIC JIHADIST AND UNLAWFUL ENEMY COMBATANT	284
IV. TARGETED KILLING	292
V. RENDITION.....	297
VI. CONCLUSION	300

I. INTRODUCTION

“Decisions about who, where and how to prosecute have always been—and must remain—the responsibility of the executive branch.”¹
 —Eric Holder

With the devastating terror attacks of September 11, 2001 by al-Qaeda unlawful enemy combatants² on the United States, terrorism is no longer exclusively just another criminal offense to be investigated by the Federal Bureau of Investigation (FBI) and handed over to an Assistant U.S. Attorney for prosecution.³ If the terror attack is carried out by an unlawful enemy combatant, the proper rule of law is not domestic criminal law, but the law of war. This simple common sense distinction is largely lost on a bilious sea of political and ideological distortion. Whatever else the eleventh anniversary of the al-Qaeda terror attacks of September 11, 2001⁴ signifies, it is unfortunate that

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1. Eric Holder, Att’y Gen., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>.
 2. *See infra* Part II(C).
 3. *See* Wayne Zaideman, *Fortifying Legal Approaches to the War on Terror: Methodologic Considerations*, in PERSPECTIVES ON DETENTION, PROSECUTION AND PUNISHMENT OF TERRORISTS IMPLICATIONS FOR FUTURE POLICY AND CONDUCT 23 (Yonah Alexander et al. eds., 2011) (arguing that after the 9/11 attacks, the government elevated counterterrorism as the first priority of the FBI in order to stop terror attacks on the United States before they occur).
 4. *See generally* 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–46 (2004) (setting out a final analysis by the United States government of all the issues associated with the 9/11 attacks by al-

well after the passage of a full decade there still remains great public confusion when it comes to comprehending fundamental legal concepts associated with how America conducts the War Against al-Qaeda,⁵ more popularly referred to by the non-descriptive Bush-era phrase: “War on Terror.”⁶ While some may argue that the fault for this obfuscation rests with the lack of international consensus on relevant standards that should be adopted to deal with international terrorism⁷ in asymmetric warfare,⁸ or that the Bush-created phrase War on Terror itself is horribly vague,⁹ the root cause of this so-called

Qaeda. On September 11, 2001, 19 members of the radical Islamic terror group named al-Qaeda hijacked four U.S. passenger aircraft while in flight (five terrorists each in three of the planes and four in the fourth that went down in Pennsylvania). The al-Qaeda foot soldiers intentionally crashed two of the aircraft into the Twin Towers of the World Trade Center in New York City. A third aircraft targeted the Pentagon in Northern Virginia. The fourth plane, United 93, went down in a field in Pennsylvania, most likely as a result of the heroic efforts of some of the passengers who stormed the al-Qaeda pilots. Almost 3,000 people were killed in the attacks. *Id.*

5. President Barack Obama, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security> (“We are at war. We are at war against al Qaeda, a far reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people and that is plotting to strike us again. And we will do whatever it takes to defeat them.”); *see also* 9/11 COMMISSION REPORT, *supra* note 4.
6. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>. The term War on Terror was coined during the Bush Administration. President George W. Bush stated, “On September 11th, enemies of freedom committed an act of war against our country.” *Id.*
7. *See* John F. Murphy, *The Control of International Terrorism*, in NATIONAL SECURITY LAW 458–61 (John Norton Moore & Robert F. Turner eds., 2005). As of this writing, there is no international definition of terrorism. Numerous attempts have been made over the years to develop an international definition for the term. Professor Murphy argues there is a need for an internationally accepted definition of terrorism to enforce laws against terrorist attacks.
8. *See* Bryan Bender, *DIA Chief Predicts Rise in “Asymmetric” Warfare*, DEFENSE DAILY, Sept. 12, 1996. The term asymmetric warfare is of recent origin. It generally refers to unconventional conflicts against enemies that do not wear uniforms or follow the law of war.
9. *See* Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa’eda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 362–63 (2010) (discussing the confusion associated with the term War on Terror and supporting an Obama term “War Against Al-Qa’eda” as better suited to describe the conflict).

conundrum actually centers around the unwillingness of the United States government to properly distinguish al-Qaeda unlawful enemy combatant terrorists from domestic jihadi terrorists.¹⁰

Instead, the terms “domestic terrorist,” “domestic jihadist,” or just “terrorist” are frequently employed to describe all categories of actors—unlawful enemy combatants as well as common criminals—leaving both domestic and international audiences puzzled as to what should be the proper rule of law to apply to a given act of terror. If the American government cannot properly differentiate between an enemy combatant and a domestic criminal, it is little wonder that attendant legal positions associated with investigation techniques, targeted killing, arrest, detention, rendition, trial, and interrogation are subject to never-ending debate. For instance, one interesting and overriding issue that perplexes is not whether rendition or targeted killing is lawful against unlawful enemy combatants—they certainly are—but, why it is so difficult to discern the unlawful enemy combatant from the domestic criminal? Is it really just a matter of sloppy thinking leading to sloppy application of the proper rule of law?

To be certain, the term terrorism carries with it tremendous definitional baggage. Despite the many descriptive uses of the term terrorism, it is and always will be a tactic, not an ideology.¹¹ From a historical perspective, the threat of terrorism is nothing new. Terror as a tactic is as old as human history. Similarly, those who engage in terrorism as a tactical use of violence can emanate from a variety of ideological sources, including political, social, economic, or religious.¹² As such, popular labels that incorporate the word terrorist to describe groups or individuals include such phrases as, “right-wing terrorists,”¹³

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10. See JEROME P. BJELOPERA, CONG. RESEARCH SERV., RL41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 1 (2010) (explaining that the term jihadist describes an individual who employs the religion of Islam to justify the desire to establish a world which is governed by a Muslim civil and religious system known as a caliphate). See also Devlin Barrett, Siobhan Gorman & Tamer El-Ghobashy, *Bin Laden Kin Nabbed*, WALL ST. J., Mar. 7, 2013, at A1.
 11. See CALEB CARR, THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS 17–30 (2002) (discussing how terrorism is a tactic associated with violence in war and peace).
 12. See *id.* at 16.
 13. See Michael A. Newton, *Exceptional Engagement: Protocol I and A World United Against Terrorism*, 45 TEX. INT’L L.J. 323, 343 n.92 (2009) (citing EDWARD F. MICKOLUS ET AL., INTERNATIONAL TERRORISM IN THE 1980S: VOLUME II 1984–1987 XIII (1989) (“Right-wing terrorism refers to acts perpetrated by outlawed groups that do not seek a social revolution but resort to violence as a way to express and advance their political goals, such as ultra nationalism and anticommunism.”); see also U.S. DEP’T OF HOMELAND SECURITY

“left-wing terrorists,”¹⁴ or “eco-terrorists.”¹⁵ That said, the number one threat facing the United States comes from an ideologically/religiously linked confederation of radicalized violent Islamic jihadists who engage in illegal violence by means of terrorism.¹⁶ Some of these jihadists qualify as unlawful enemy combatants and some do not. While all al-Qaeda unlawful enemy combatants can be labeled as “violent jihadists,”¹⁷ not all violent jihadists are unlawful enemy combatants. In this light, violent jihadists that do not qualify as unlawful enemy combatants must be deemed domestic terrorists, but violent jihadists that do qualify as unlawful enemy combatants must not be labeled as domestic terrorists. Out of all of the nascent legal and policy issues associated with the armed conflict against al-Qaeda, no factor has spawned more public or political rhetoric. If this separation was understood and

ASSESSMENT, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), *available at* <http://www.fas.org/irp/eprint/rightwing.pdf>. The Department of Homeland Security Report not only labeled as right-wing extremists those individuals who are hate-oriented towards minorities and entertain a dislike for large centralized federal government authority, but also cautioned law enforcement to be aware that returning military combat veterans, those dissatisfied with the manner in which the federal government is handling the security of the border, and even people that inordinately embrace limited government might also be ripe for recruitment by right-wing extremist groups. *See id.* at 2.

14. *See* BRENT L. SMITH, TERRORISM IN AMERICA: PIPE BOMBS AND PIPE DREAMS 24–25 (1994). Left-wing terrorists are generally characterized by an extreme sense of utopian egalitarianism, an extreme hatred of nationalism, an extreme opposition to free market capitalism, and an overt opposition to the armed forces. *See id.*
15. *See* Rebecca K. Smith, “Ecoterrorism”?: A Critical Analysis of the Vilification of Radical Environmental Activists As Terrorists, 38 ENVTL. L. 537, 545–46 (2008). Eco-terrorists are generally characterized by an extreme dedication to protecting the so-called natural environment by targeting businesses and government agencies they perceive as engaging in actions that disrupt or harm the environment. Smith’s article discusses the rise of the term “eco-terrorism” and how law enforcement responds to the threat. Eco-terrorists use threats and violence against people or property for environmental reasons, often symbolically. *See also* Joshua K. Marquis & Danielle M. Weiss, *Eco-Terror: Special Interest Terrorism*, PROSECUTOR, Jan. 2005, at 30 (discussing the underground radical eco-terrorist group, The Earth Liberation Front).
16. *See* BJELOPERA, *supra* note 10, at 1–2.
17. *See id.* at 2 (describing violent jihadist as a synonym for “*violent action* taken on the basis of radical or extremist beliefs”).

applied, many of the legal and policy questions would quickly fall into place with little or no dissent.¹⁸

The inability to set bright lines of distinction between al-Qaeda unlawful enemy combatants and domestic jihadists is not just a failure in definition; it is a failure in leadership and does tremendous damage to America's commitment to abide by the proper rule of law.¹⁹ The United States must be able to clearly distinguish between common criminals and unlawful enemy combatants and then apply the appropriate rule of law to each category with unabashed clarity. The purpose of this article is to make this distinction and to forcefully argue that in its second term, the Obama Administration must drastically improve its dismal performance in articulating and communicating that distinction to the public. Without a significant about face in leadership that can actually discern the basic difference between an unlawful enemy combatant and a domestic criminal, America's reputation will remain under a cloud of suspicion and confusion regarding the legality of our actions associated with two significant areas of critique: rendition and targeted killing *vis-à-vis* unlawful enemy combatants in the War Against al-Qaeda.

II. DEFINITIONS

Semantics is the study of the meaning of words. Nowhere is this discipline more critical than in the field of jurisprudence. The hallmark of any constitutional democracy is its firm commitment to the law, and so it is absolutely imperative that the correct rule of law be applied to the proper set of factual circumstances. In turn, before an intelligent discussion of an issue can take place, it is imperative that the terms of the discussion rest on solid definitions. When it comes to rightly dividing the differences in legal treatment between enemy combatants and domestic terrorists, this entails a general understanding of at least four key categories of concern: (1) global definition of terrorism; (2) American definitions of terrorism; (3) differentiating the enemy combatant from the unlawful enemy combatant; and (4) defining the domestic jihadist. Once these terms

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18. *Terrorism, Rights, and National Security—A Debate on the Rights and Treatment of Terrorism Suspects Held by the U.S.* (JURIST Student Assoc. & Uni. Pittsburgh Sch. L., Sept. 28, 2011), <http://www.law.pitt.edu/media/video/6495>. Jeffrey Addicott debated Susan Herman, President of the American Civil Liberties Union at a JURIST event. Addicott argued that if the United States was in an international armed conflict, then all of the activities conducted by the United States—from detention to targeted killing—was lawful.
19. BLACK'S LAW DICTIONARY 1448 (9th ed. 2009). The rule of law is defined in Black's as a "substantive legal principle" and "[t]he doctrine that every person is subject to the ordinary law within the jurisdiction." *Id.*

are set, then the issues of rendition and targeted killing can be understood in their proper light.

A. *Global Definition of Terrorism*

At the start of the discussion, the basic agreement of what the concept “terrorism” means from a global perspective is of the utmost priority. Unfortunately, as many commentators have discovered when researching this matter, consensus is not possible. While the word terrorism has been firmly stamped in the world’s general lexicon, there is still no specific international consensus for what the word actually means.²⁰ This state of affairs is unfortunate because it allows for the word “terrorist” to be freely interchanged with the word “unlawful enemy combatant” or “common criminal.” In large measure, the lack of consensus reflects the perennial friction between competing national interests, but the factor of “one man’s terrorist is another man’s freedom fighter”²¹ represents more than simply another misguided postmodernist expression. For instance, murders committed by the Iranian-backed Hamas²² suicide bombers in Israel against Jewish civilians are praised by some as great heroes of martyrdom.²³ In the field of promoting a “just cause,” *e.g.*, the destruction of the State of Israel, the murders employ the old saw that the ends always justify the means.²⁴ To the reasonable mind, suicide bombers are nothing but murderers, no matter what the cause represented. A just cause cannot be advanced by the intentional murder of innocent civilians.²⁵

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20. See JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 1–3 (6th ed. 2011); see also Gabriel Soll, *Terrorism: The Known Element No One Can Define*, 11 WILLAMETTE J. INT’L L. & DISP. RESOL. 123, 132 (2004).
 21. James J. Ward, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471, 489 (2008). See also Murphy *supra* note 7, at 458 (discussing the concept of labels for those who employ violence in the name of a particular cause).
 22. For an excellent discussion on the terror organization Hamas, see MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* (2006) (describing the origin and purpose of the terrorist organization).
 23. See Walter Reich, *The Enemy at the Gates*, N.Y. TIMES, May 23, 2004, at 14; see also J.S. Piven, *Psychological, Theological, and Thanatological Aspects of Suicidal Terrorism*, 39 CASE W. RES. J. INT’L L. 731, 733 (2008).
 24. See Igor Primoratz, *Terrorism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/terrorism/> (last updated Aug. 8, 2011).
 25. See Jeffrey F. Addicott, *Operation Desert Storm: R.E. Lee or W.T. Sherman?*, 136 MILITARY L. REV. 115 (1992) (reprinted in COMMAND MAG., July-Aug. 1992, at 38) (describing and detailing the war crimes

Understanding the need for a global definition on terrorism and the barrier posed by the related issue of the just cause syndrome, the former Secretary General of the United Nations, Kofi Annan, expended great effort in carving out a lucid definition for terrorism that would be palatable to the international community. Concentrating on the innocent civilian victims of terror, Annan offered a very short and precise definition of terrorism that eliminated any mention of a justification for the “cause” that motivated the act of terror. Following the long-standing logic for outlawing “war crimes” via international treaty, which does not allow any exceptions whatsoever to excuse grave breaches of the law of war,²⁶ Annan proposed the following for adoption:

Any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.²⁷

Unfortunately, the 2005 vote on adoption of this definition by the world body was squashed. The General Assembly of the United Nations was unable to reach consensus due in large part to the fifty-six member Organization of Islamic Cooperation (all Muslim nations) who insisted that any international definition of terrorism contain a

committed by the Lincoln Administration against Southern civilian populations during the War Between the States).

26. See generally *The Geneva Conventions of 1949*, INT’L COMM. RED CROSS (ICRC), <http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions> (last visited Feb. 23, 2013). The primary international treaties dealing with law of war violations for crimes committed during armed conflict are the 1949 Geneva Conventions. The Geneva Conventions are set out in four interrelated categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. All violations of that body of law related to international armed conflict are labeled war crimes and depending on the severity of the crime and are classified as either grave breaches of the law of war or simple breaches of the law of war.
27. Estanislao Oziecicz, *Annan Proposes Definition of Terrorism*, CIGI (Mar. 21, 2005), <http://www.cigionline.org/articles/2005/03/annan-proposes-definition-terrorism>.

certain caveat.²⁸ The Organization of Islamic Cooperation demanded an exception for so-called wars of “national liberation,” *i.e.*, if the violence utilized is to further a “just cause,” such as the ambiguous concept of national liberation, then acts of terror may be tolerated as legitimate expressions of resistance.²⁹ In other words, the murder of civilians or non-combatants is justified if the cause is just. Of course, those familiar with the fifty-six member group already know that they define terrorism internally to exclude Israelis as victims of terrorism and exclude the terror groups Hamas and Hezbollah as terrorists.³⁰

Nevertheless, if a universal definition is not possible from the global perspective, it is possible to at least list four key characteristics of terrorism that better reflect the activity:

1. The illegal use of violence directed at civilians to produce fear in a target group;
2. The continuing threat of additional future acts of violence;
3. A predominately political or ideological character of the act; and
4. The desire to mobilize or immobilize a given target group.³¹

Still, the terrorist attacks that have occurred over the past few decades across the globe from Baghdad to Bombay have energized the United Nations to produce a fairly significant variety of international treaties making specific terrorist acts illegal.³² If there is no international definition of terrorism, then the acts themselves can be criminalized, thus avoiding the harder and more contentious issue of

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28. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 74–126, U.N. Doc. A/59/2005 (Mar. 21, 2005) (emphasizing why the United Nations needs to address and define terrorism as a collective body); *see also* Joshua Muravchik, Editorial, *The U.N.’s Terrorism Gap*, L.A. TIMES, Sept. 18, 2005, at M5 (discussing Annan’s proposed definition of terrorism and the Islamic states’ rebuttal).
29. *See* Colum Lynch, *Islamic Group Blocks Terror Treaty; Nations Demand U.N. Pact Exemption for Anti-Israeli Militants*, WASH. POST, Nov. 10, 2001, at A19.
30. *See* Deborah Weiss, Commentary, *Obama Excludes Israel from Counterterrorism Group: Throwing an Ally Under the Bus*, WASH. TIMES, September 21, 2012, at B.
31. ADDICOTT, *supra* note 20, at 61.
32. *See* Murphy, *supra* note 7, at 465–73 (describing the piecemeal approach via international treaties and conventions, bilateral agreements, and regional conventions; currently, there are twelve international conventions related to terrorism and ten criminal acts identified as terrorism in various UN conventions and protocols).

definition. Accordingly, bombing public places, hijacking aircraft, taking hostages, and so on are all firmly identified as acts of terrorism.³³ Echoing at least a hint of understanding that the targets of terrorism are civilians, which are the central ingredient of terror, whether the terror act occurs in peacetime or during war is irrelevant to the element of criminality.

While the international community cannot agree on a definition of terrorism that is palatable to a majority of its 193 members, it appears that individual states have not been so constrained. The most curious development associated with defining terrorism since the September 11, 2001 attacks on the United States is the fact that almost every nation in the world has adopted new “anti-terrorism laws.”³⁴ According to a September 2011 survey conducted by the Associated Press, over 120,000 people have been arrested and over 35,000 people worldwide have been sentenced and convicted for

33. ADDICOTT *supra* note 20, at 61. Some examples of individual international conventions that address acts of terrorism include: The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 220; Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Feb. 20, 1977, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (June 3, 1983); International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess. Supp. No. 49, U.N. Doc. A/54/49 (Dec. 9, 1999); International Convention for the Suppression of Acts of Nuclear Terrorism New York, G.A. Res. 51/210, U.N. GAOR, 59th Sess., U.N. Doc. A/59/766 (Apr. 4, 2005); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 125; and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178.

34. See Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, HUFFINGTON POST (Sept. 3, 2011), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html?view=print&comm_ref=false.

terrorism offenses since 9/11.³⁵ In a survey of sixty-six countries, China and Turkey accounted for over half of all convictions, with Pakistan accounting for the sharpest rise in terror-related arrests in recent years.³⁶ In the United States, the Associated Press found that the number of arrests of individuals suspected of terrorism-related activity was 2,934,³⁷ with 2,568 convictions.³⁸

At the end of the day, the most pressing matter in the era of the War on Terror is the need for an international definition. Without such, the term continues to be treated as a political piñata.

B. American Definitions of Terrorism

Anyone marginally familiar with how American criminal law addresses terrorism as a criminal act is cognizant of the fact that there are a number of slightly different definitions of terrorism scattered across a broad variety of federal statutes. In the United States, definitional distinctions are made between domestic terrorism and international terrorism. For instance, the Department of Justice defines the term terrorism (referring to domestic terrorism) as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”³⁹ The Department of Justice defines “international terrorism” as violent actions that would be federal or state crimes designed to intimidate or coerce a civilian population or government and that occur primarily outside of the United States.⁴⁰

35. *See id.*

36. *See id.* Pakistan’s conviction rate for terrorism arrests sits at only 10% of cases. *Id.*

37. *Id.* But see ADDICOTT, *supra* note 20, at 130–31 (pointing out that the number of prosecutions for major acts of terrorism or attempted terrorism in the United States are far lower than for “terrorism-related” activity).

38. *See Mendoza, supra* note 34.

39. 28 C.F.R. § 0.85 (2010).

40. *See id.* However, numerous federal statutes exist that offer slightly different definitions of terrorism, for example:

- (1) the term “international terrorism” means activities that—
 - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;

Perhaps the best source to consult for definitions from the standpoint of the post-9/11 American perspective on terrorism is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).⁴¹ Designed to increase the ability of law enforcement and intelligence agents to address the threat of terrorist attacks, the USA PATRIOT Act actually created no new laws. In order to better counter acts of terrorism, the USA PATRIOT Act simply amends existing federal laws to ease restrictions and streamline processes regarding activities such as the lawful search of emails, telephone records, financial transactions, and other records.⁴² The USA PATRIOT Act also enhanced America's ability to detain and deport certain aliens suspected of terrorist activities. To date, despite being demonized by various ideologues,⁴³ no provision of the USA PATRIOT Act has been overturned as unconstitutional by any of the federal circuit courts.

In the USA PATRIOT Act, Congress set out specific definitions for the terms "terrorist organization," "international terrorism," and "domestic terrorism." A terrorist organization is defined as one that is:

- (1) designated by the Secretary of State as a terrorist organization under the process established under current law;
-
- (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1) (2009).

41. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 50 U.S.C §§ 1861-1863 (Supp. I 2001)) [hereinafter USA PATRIOT Act].
42. For a good discussion of the general provisions of the USA PATRIOT Act, see John T. Soma et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA Patriot Act*, 31 RUTGERS COMPUTER & TECH. L.J. 285 (2005).
43. See, e.g., Heather Hilary & Nancy Kubasek, *The Remaining Perils of the Patriot Act: A Primer*, 8 J.L. SOC'Y 1 (2007).

- (2) designated by the Secretary of State as a terrorist organization for immigration purposes; or
- (3) a group of two or more individuals that commits terrorist activities or plans or prepares to commit (including locating targets for) terrorist activities.⁴⁴

According to the USA PATRIOT ACT, international terrorism involves violent acts or acts dangerous to human life that violate the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of how terrorists accomplish them, the persons they appear intended to coerce or intimidate, or the place in which the perpetrators operate.⁴⁵

The phrase domestic terrorism is found in Section 802 of the USA PATRIOT Act and is defined as a person who engages in actions:

- (A) dangerous to human life that are a violation of the criminal laws of the United States or any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.⁴⁶

If the acts occur outside the territorial jurisdiction of the United States, they may be regarded as international terrorism.

Under the current American approach, whether from the view of the Justice Department or the USA PATRIOT Act, the main distinction between an international terrorist and a domestic terrorist rests in geography. If the act takes place in the United States, then the phrase domestic terrorism applies, regardless of whether the actor

44. See USA PATRIOT Act, *supra* note 41, § 411(a)(1)(G).

45. 18 U.S.C. § 2331.

46. USA PATRIOT Act, *supra* note 41, § 802.

is an enemy combatant or a common criminal. A similar definitional approach is found in 18 U.S.C. § 2331, where:

- (1) the term domestic terrorism means activities that—
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily within the territorial jurisdiction of the United States.⁴⁷

Except in the limited context of military commissions,⁴⁸ the Congress has not crafted a definition of terrorism where the language turns on the status of the individual planning on, or embarking on, an act of terror. Without such, the various definitions found in federal criminal statutes are of little value in terms of rightly dividing the unlawful enemy combatant who uses terror as a tactic of war from the domestic jihadist who uses terror as a tactic of hatred.

C. Enemy Combatant Versus Unlawful Enemy Combatant

The term enemy combatant is a phrase associated only with the rule of law that regulates lawful behavior in an international armed conflict. The term enemy combatant was used regularly by the Bush Administration and has been adopted as a term of art in most federal court cases which deal with detention issues, including the U.S. Supreme Court.⁴⁹ In its broadest sense, the term enemy combatant describes a person that is subject to the provisions of the law of war.

On those rare occasions when President Obama addresses the issue of the enemy combatant, he prefers to use either a longer descriptive term which identifies an enemy combatant as those individuals who may be detained (or killed) as persons subject to the congressional provisions of the 2001 Authorization for Use of Military

47. 18 U.S.C. § 2331.

48. See *infra* notes 73, 76 and accompanying text.

49. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Force,⁵⁰ or the shorter phrase “unprivileged enemy belligerent” coined by the Democrat-controlled Congress and found in the 2009 Military Commissions Act.⁵¹ When arguing before the federal courts, President Obama apparently exercises his authority to detain enemy combatants only under the congressional provisions and not as part of his Article II powers as the commander-in-chief.⁵² In the minds of some, this reflects the attitude that only Congress has the power to make war,⁵³ but President Obama does not necessarily hold this view.⁵⁴ On other occasions, for instance, the Obama Administration does employ Article II authority as one legal justification to conduct targeted attacks by drone strikes.⁵⁵

Regardless of the Obama Administration’s reluctance to employ the term unlawful enemy combatant, the very label of enemy combatant is a direct byproduct of the corpus of the law of war and has no real meaning outside of that usage. The law of war, also known as the law of armed conflict or international humanitarian law, consists of all of those laws, by treaty and customary principles, which are applicable to international warfare,⁵⁶ *i.e.*, when two or more parties engage in armed conflict. Regardless of how an individual state or party to the conflict chooses to declare war, the law of war applies. The cornerstone of the law of war is the well-recognized Geneva Conventions of 1949.⁵⁷ The Geneva Conventions cover four

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50. S. J. Res. 23, 107th Cong. (2001) (enacted). *See also* Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, No. 08-0442 (D.D.C. Mar. 13, 2009).
 51. Contained in Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111–84, 123 Stat. 2190.
 52. *See* U.S. CONST. art. II, § 2, cl. 1. The primary language setting out executive authority is derived from Article II of the Constitution which provides that the President “shall be the Commander in Chief of the Army and Navy of the United States.” *Id.*
 53. *See* Louis Fisher, *Only Congress Can Declare War*, ABA J., Feb. 2012, at 37 (arguing that the President does not have the authority to “take the country from a state of peace to a state of war”). *See also* U.S. CONST. art. II, § 2, cl. 1.
 54. *See, e.g.*, Charlie Savage, *Attack Renews Debate over Congressional Consent*, N.Y. TIMES, Mar. 22, 2011, at A14.
 55. *See* Eric Holder, Att’y Gen., Dep’t of Just., Speech at Northwestern University School of Law (Mar. 5, 2010), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.
 56. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (explaining that customary international law also makes up the law of war and consists of all those binding norms practiced by nations).
 57. *See supra* note 26 and accompanying text.

broad categories of activity: wounded and sick military on the ground; wounded, sick, and shipwrecked military at sea; treatment of prisoners of war; and protections for civilians in war.⁵⁸

There is, of course, a difference between an enemy combatant and an unlawful enemy combatant. Article 4(1) of the Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, defines the enemy combatant, in the context of prisoner of war, as, “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.”⁵⁹ Precisely mirroring the Geneva Conventions and all existing international laws associated with the conduct of armed conflict,⁶⁰ the U.S. Army (which has primary proponentcy over the other branches of the military for the law of war) has codified all of the legal provisions associated with law of war in *Field Manual 27-10, Department of the Army Field Manual of the Law of Land Warfare* (FM 27-10).⁶¹ The law of war is focused both on the proper targeting of military objectives and the treatment of enemy detainees, prisoners of war, and other noncombatants. Accordingly, those who qualify as enemy combatants are defined in FM 27-10 as “[m]embers of armed forces of a Party to the conflict” or “members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party . . . provided that such . . . fulfill[s]” four specific conditions: (1) that of being commanded by a person responsible for his subordinates; (2) that of having a fixed distinctive sign recognizable at a distance; (3) that of carrying arms openly; and (4) that of conducting their operations in accordance with the laws and customs of war.⁶²

On the other hand, those who engage in wartime violence that do not fulfill the legal requirements to qualify as enemy combatant prisoners of war, if captured, are deemed to be unlawful enemy combatants.⁶³ Since the prisoner of war status⁶⁴ is only conferred on

58. See *supra* note 26 *id.*

59. See Geneva Convention III, *supra* note 26, art. 4(1).

60. See RESTATEMENT, *supra* note 56, § 102.

61. DEP'T OF THE U.S. ARMY, FIELD MANUEL 27-10, THE LAW OF ARMED WARFARE (1956). FM 27-10 affirms that the basic goal of the law of war is to limit the impact of the inevitable evils of war by: “(a) Protecting both combatants and noncombatants from unnecessary suffering; (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (c) facilitating the restoration of peace. *Id.* ¶ 2.

62. *Id.* ¶ 61.

63. See *infra* note 76 and accompanying text regarding military commissions.

persons who are lawful enemy combatants, paragraph 60(b) of FM 27-10 indicates that “[p]ersons who are not members of the armed forces as defined in [the Geneva Conventions], who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population.”⁶⁵

The friction in the analysis is that the al-Qaeda network is not a “Party” to the Geneva Conventions, let alone a state; they are at most non-state actors. Still, as non-uniformed combatants without fixed distinctive signs that do not follow the law of war, al-Qaeda members are properly classified as unlawful enemy combatants. As a practical matter, since both groups can be killed and detained⁶⁶ in accordance with the lawful use of force associated with war, the main difference in treatment between an unlawful enemy combatant and a lawful enemy combatant is related to interrogation issues. An unlawful enemy combatant can be interrogated as long as the techniques do not violate international law such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶⁷ Common Article 3 to the Geneva Conventions,⁶⁸ or any other self-imposed domestic restrictions. In turn, the unlawful enemy combatant, along with a lawful enemy combatant who

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64. Geneva Convention III, *supra* note 26 art. 17. Article 17 of Geneva Convention III provides that prisoners of war are only required to give their “surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.” *Id.* The prisoner of war is not required to give any further information upon questioning. To leave no doubt on this point, Article 17 goes on to provide the following: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.*” *Id.*
65. DEP’T OF U.S. ARMY, *supra* note 61, ¶ 60(b).
66. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004) (plurality opinion holding that a U.S. citizen captured in combat operations in Afghanistan could be detained as an enemy combatant).
67. See G.A. Res. 39/46(I), U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sets out prohibited treatment by governments for all persons and the universal rejection of “torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” Although the international convention provides a definition of torture in terms of “severe pain or suffering”, it lacks any definition of “other cruel, inhuman or degrading treatment.” *Id.*
68. Geneva Convention III, *supra* note 26, art. 3.

commits a war crime, can be prosecuted for war crimes by means of military commissions.⁶⁹

The most significant byproduct of the Supreme Court ruling in *Hamdan v. Rumsfeld*⁷⁰ was the passage of the 2006 Military Commissions Act⁷¹ (passed by a Republican-controlled Congress) to authorize the prosecution of certain unlawful enemy combatants by means of military commissions for listed crimes and war crimes.⁷² Not only did this law strongly refute all reasonable doubt that Congress did believe that the War on Terror was a real war against al-Qaeda and its direct partners, Congress provided a crystal-clear definition of who qualified as an unlawful enemy combatant. Military commissions were established by federal law and authorized to try “any alien unlawful enemy combatant” (a non-US citizen member of al-Qaeda) defined as:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.⁷³

Shortly after President Obama took office, the Democrat-controlled Congress passed the 2009 Military Commissions Act,⁷⁴ which provided some additional due process protections for the accused and, for obvious political expediency, changed the 2006 Military Commissions Act phrase “unlawful enemy combatant” to “unprivileged enemy belligerent.”⁷⁵ As noted, the two designations are

69. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a) (“An Act to authorize trial by military commission for violations of the law of war, and for other purposes.”).

70. 548 U.S. 557 (2006).

71. See *generally* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

72. *Id.* § 948b(a).

73. *Id.* § 948a(1)–(2).

74. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801–07, 123 Stat. 2190 (codified at 10 U.S.C. § 948a).

75. *Id.* § 948a(6)–(9).

identical in meaning and most still prefer the simpler phrase unlawful enemy combatant over the unfamiliar unprivileged enemy belligerent. The 2009 Military Commissions Act retained specific language identifying an al-Qaeda member as an unlawful enemy combatant. The 2009 Military Commissions Act defined its unprivileged enemy belligerent in the War on Terror as:

[A]n individual (other than a privileged belligerent) [unlawful enemy combatant] who—

- (A) has engaged in hostilities against the United States or its coalition partners;
- (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
- (C) was a part of al Qaeda at the time of the offense under this chapter.⁷⁶

Although both the 2006 and 2009 Military Commissions Act can be faulted for self-imposing an exclusion for U.S. citizen al-Qaeda members as candidates for trial by military commission, both congressional acts fully acknowledge the existence and validity of the unlawful enemy combatant and that the proper rule of law to apply is not domestic criminal law but rather the law of war. However, this simple point of clarity never took hold in the Obama Administration;⁷⁷ President Obama attempted to stop the military commissions process immediately upon taking office.⁷⁸

The last major Supreme Court decision to deal with issues associated with the enemy combatant in the War on Terror was the 2008 *Boumediene v. Bush* ruling.⁷⁹ In discussing habeas corpus rights for alleged unlawful enemy combatant detainees at Guantanamo Bay, *Boumediene* specifically used the term enemy combatant throughout the opinion in a manner that directly mirrored Congress' 2006 Military Commissions Act definition.⁸⁰ Without carving out an exception for a U.S. citizen, the Court, adopting the executive branch's definition of the term enemy combatant, stated "an 'enemy combatant' is an individual who . . . was 'part of or supporting forces

76. *Id.* § 948a(7).

77. *See* Holder, *supra* note 1 (announcing the Obama Administration's intent to try Khalid Sheik Mohammed and four other individuals in federal court for their role in the 9/11 attacks).

78. *See infra* notes 123, 124 and accompanying text.

79. 553 U.S. 723 (2008).

80. *See e.g., id.* at 732, 733, 734. *See also* Military Commissions Act of 2006 § 948a(1)–(2) (defining an enemy combatant).

hostile to the United States or coalition partners' in Afghanistan and who 'engaged in armed conflict against the United States' there."⁸¹

Despite the fact that various so-called "human rights" groups, including the International Committee of the Red Cross, have regularly accused the United States of violations of Additional Protocol I to the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts (Protocol I),⁸² for not extending prisoners of war status to detained enemy combatants,⁸³ the Bush Administration refused to apply both the Third Geneva Convention Relative to Prisoners of War Protections as well as Protocol I to unlawful enemy combatants.⁸⁴ In short, the Bush Administration decided that said enemy combatants failed to qualify as lawful enemy combatants under the applicable provisions of international law. The Obama Administration has adopted the Bush position in this regard.⁸⁵

Apart from the *Boumediene* decision extending habeas rights to detainees at Guantanamo Bay to review their status as unlawful enemy combatants, the most significant layer of due process protections for current unlawful enemy combatants came in the 2006 Supreme Court ruling in *Hamdan*.⁸⁶ While *Hamdan* focused on the detainees held at the military facility at Guantanamo Bay, all unlawful enemy combatants (the Obama Administration now holds most at the new multi-million dollar Bagram Air Force Base Detention Facility in Afghanistan⁸⁷) are now entitled to the additional

81. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

82. Protocol Additional to the Geneva Conventions of Aug. 12, 1946, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

83. The legal basis most often asserted is that Additional Protocol I to the Geneva Conventions of August 12, 1949 would accord prisoner of war status to any enemy combatant—legal or unlawful. However, the United States never adopted Protocol I, for the very reason that it bestowed a legal status on non-uniformed combatants. Thus, the idea that Protocol I is binding on the United States as a principal of "customary international law" is correct only in part. The United States is not bound by Protocol I in this regard and is perfectly within its legal rights to interrogate non-uniformed combatants; these individuals are not entitled to the protections given to prisoners of war. *See id.* art. 44.

84. *See* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1025–26 (2004).

85. Addicott, *supra* note 9, at 350.

86. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

87. *See Bagram Detention Center (Afghanistan)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_a_fghanistan/index.html (last updated Nov. 19, 2012) (noting there are over 3,000 people detained at Bagram, compared to 170 at Guantanamo).

protections of Common Article 3 of the Geneva Conventions.⁸⁸ Common Article 3 to the Geneva Conventions states in pertinent part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁸⁹

Attempting to add clarity to the issue of detention authority for unlawful enemy combatants deemed to be “persons captured in connection with hostilities” in the War on Terror, the National Defense Authorization Act for fiscal year 2012 (NDA FY 2012)⁹⁰ included a statutory definition of those individuals who would qualify for indefinite detention. In section 1021(b) the NDA FY 2012, a covered person includes:

88. See Hamdan, 548 U.S. at 631–32.

89. Geneva Convention III, *supra* note 26, art. 3(1).

90. JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41920, DETAINEE PROVISIONS IN THE NATIONAL DEFENSE AUTHORIZATION BILLS 1 (2011).

- (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
- (2) A person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.⁹¹

In summary, enemy combatant is a phrase that applies in time of war and encompasses both the lawful enemy combatant and the unlawful enemy combatant. Unlawful enemy combatants, like lawful enemy combatants, may be killed on sight in accordance with the proper targeting considerations.⁹² If captured, the unlawful enemy combatant, like the lawful enemy combatant, may be detained indefinitely until the war is over.⁹³ Only the unlawful enemy combatant may be questioned beyond name, rank, and serial number, so long as the interrogation does not constitute an outrage “upon personal dignity, in particular humiliating and degrading treatment.” The enemy in the War on Terror is properly designated as an unlawful enemy combatant.

D. Domestic Jihadist

Prior to September 11, 2001, and the start of the war against the al-Qaeda terrorist organization, when one spoke of domestic terrorism it was meant to describe the use of illegal violence by an individual (or group of individuals) by means of an act of terrorism within the physical territory of the United States—on the American homeland. If apprehended, this individual was invariably prosecuted in a federal district court for violation of various federal criminal law statutes associated with the specific criminal act.⁹⁴ In the context of domestic

91. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-190, § 1021, 125 Stat. 1298 (2011).

92. See *infra* part IV.

93. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004). See also Remarks by Alberto R. Gonzales before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* http://www.abanet.org/natsecurity/judge_gonzales.pdf.

94. See United States v. Rahman, 189 F.3d 88 (2nd Cir. 1999). The blind Sheik, Omar Abdel Rahman, and eight other co-defendants were convicted of various federal crimes for the 1993 bombing of the World Trade Center in New York. All were motivated by radical Islam to conspire and conduct the terror attack. See *id.* at 103–05.

terrorism, nothing has changed. Regardless of the motivation, the domestic terrorist who engages in criminal activity is treated under the rule of law associated with domestic criminal activity. Since the FBI is the lead authority for investigating terrorism, such a case is almost always turned over to the federal government for prosecution under federal law.

Understanding the reality that the number one threat facing the nation emanates from domestic terrorists motivated by radical Islam, the Obama Administration adopted the new term “domestic jihadist.”⁹⁵ While this term is valid to describe those that violate criminal laws to include terrorism statutes, it should not be used in the context of enemy combatants.

Many Americans and non-Americans have been infected with the virus of radical Islam. While these individuals are not valid al-Qaeda members, it is certain that their religious beliefs cause them to conduct or attempt to conduct terrorism on the soil of the United States in the name of “jihad,” or holy war.⁹⁶ Of course, not all acts of terrorism targeting America are caused by jihadists, but this murderous movement of radical Islam eclipses all other individuals or groups who employ terror. The ideology of radical Islam influences the minds of individuals who, although not directly tied to the al-Qaeda organization, choose to commit terrorist acts because they have adopted the general theme and goal of al-Qaeda.⁹⁷ According to the 2013 Congressional Research Service Report (CRS) entitled *American Jihadist Terrorism: Combating a Complex Threat*, a jihadist includes any radicalized person who employs the religion of Islam to justify terrorism.⁹⁸ Understanding that the jihadist targets domestic audiences, the phrase domestic jihadist is a merger of terms. According to the CRS Report, “homegrown” and “domestic” are terms that describe terrorist activity or plots perpetrated within the United States or abroad by American citizens, legal permanent residents, or visitors radicalized largely within the United States.⁹⁹ The term “jihadist” describes radicalized individuals using Islam as an ideological/religious justification for their belief in the establishment of a global caliphate, or jurisdiction governed by a Muslim civil and religious leader known as a caliph.¹⁰⁰

95. See BJELOPERA, *supra* note 10, at 5 n.3.

96. See Jeffery F. Addicott, *The Misuse of Religion in the Global War on Terrorism*, 7 BARRY L. REV. 109, 112–16 (2006) (describing the motivation for jihadism as a distorted view of the grace mechanics of Biblical Christianity to achieve salvation).

97. See *id.* at 116.

98. See BJELOPERA, *supra* note 10, at 1.

99. *Id.*

100. *Id.*

Even though the CRS Report ignores the fact that al-Qaeda unlawful enemy combatants, who are obviously also jihadists, have conducted attacks on the American homeland, illustrations of the growing threat posed by jihadists that are not unlawful enemy combatants are many and growing in number. Indeed, since the start of the Obama Administration the pace of domestic jihadist-inspired terrorism on U.S. soil has reached an all-time high. Between May 2009 and December 2012, “arrests were made in 47 ‘homegrown,’ jihadist-inspired”¹⁰¹ terror plots. The most heinous attack by a radical jihadist occurred in the cold-blooded murder of thirteen soldiers at Fort Hood, Texas, in November 2009, by Army officer Nidal Malik Hasan.¹⁰² Because Hasan was in the military and the terror attack occurred on a military installation, the Obama Administration’s Department of Justice declined primary jurisdiction and allowed the military to prosecute him under the Uniform Code of Military Justice.¹⁰³ As stated, in all cases of terrorism—whether motivated by jihadist beliefs or some other cause—the Department of Justice has the lead authority to prosecute under federal criminal law and the FBI has the lead authority to investigate.¹⁰⁴ In fact, the federal district courts have prosecuted (and continue to prosecute) jihadists¹⁰⁵ and other non-jihadist terrorists, such as Timothy McVeigh who killed 167 people in a bomb attack in 1995.¹⁰⁶

A continuing dilemma for the federal government in confronting the threat of the domestic jihadist is that an overly lengthy investigation of a particular terror plot may provide a window of opportunity for the suspect to actually carry out the attack. In the early years following the attacks of 9/11, this potential delay caused the Department of Justice to officially adopt a policy of “anticipatory prosecution” or “pre-emptive prosecution.” Fearing another devastating attack similar to September 11, 2001, the government sometimes moves in and arrests a suspected domestic jihadist at the earliest possible opportunity in a given investigation, as opposed to letting a particular terror plot mature. The downside, of course, is that the suspect is often charged with lesser offenses or even offenses

101. *Id.*

102. *Id.* at 17.

103. UCMJ, art. 2(a).

104. See U.S. DEP’T. OF JUSTICE, FISCAL YEAR 2012–2016 STRATEGIC PLAN 12–13 (2012).

105. See ADDICOTT, *supra* note 20, at 525–44 (listing the “Islamic” terrorists that were charged or convicted in U.S. federal courts between 2002 and 2010).

106. Mireya Navarro, *At Fair for Survivalists, Fallout From Oklahoma*, N.Y. TIMES, June 12, 1995, <http://www.nytimes.com/1995/06/12/us/at-fair-for-survivalists-fallout-from-oklahoma.html?pagewanted=all&src=pm>.

that have nothing to do with terrorism. A September 11, 2008, Department of Justice document entitled *Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11* explains:

In each of these cases, the Department [of Justice] has faced critical decisions on when to bring criminal charges, given that a decision to prosecute a suspect exposes the Government's interest in that person and effectively ends covert intelligence investigation. Such determinations require the careful balancing of competing interests, including the immediate incapacitation of a suspect and disruption of terrorist activities through prosecution, on the one hand; and the continuation of intelligence collection about the suspect's plans, capabilities, and confederates, on the other; as well as the inherent risk that a suspect could carry out a violent act while investigators and prosecutors attempt to perfect their evidence.

While it might be easier to secure convictions after an attack has occurred and innocent lives are lost, in such circumstances, the Department would be failing in its fundamental mission to protect America and its citizens, despite a court victory. For these reasons, the Department continues to act against terror threats as soon as the law, evidence, and unique circumstances of each case permit, using any charge available.¹⁰⁷

There are a variety of federal criminal statutes that deal with domestic terrorism, including the broadly written weapons of mass destruction statute, 18 U.S.C. § 2332a.¹⁰⁸ The primary federal law for prosecuting those accused of engaging in domestic terrorism is the Clinton-era Material Support Act, which first appeared in the Antiterrorism and Effective Death Penalty Act of 1996.¹⁰⁹ Set out in two sections, the Material Support Act makes it a criminal offense for anyone to provide material support or resources in aid of terrorist offenses or to provide material support or resources to a foreign terrorist group so designated by the Secretary of State.¹¹⁰ Knowingly providing material support to terrorists is a crime under 18 U.S.C.A. § 2339A¹¹¹ and providing material support or resources to a designated foreign terrorist organization is also a federal crime under

107. Factsheet: Justice Department Counter—Terrorism Efforts Since 9/11, U.S. Dep't of Justice (Sept. 11, 2008), *available at* <http://www.justice.gov/opa/pr/2008/September/08-nsd-807.html>.

108. 18 U.S.C. § 2332a (2004).

109. 18 U.S.C. §§ 2339A, 2339B (2009).

110. *See id.*

111. 18 U.S.C. § 2339A.

18 U.S.C.A. § 2339B.¹¹² To date, federal judges have largely upheld the legality of the statute and numerous jihadists have been convicted.¹¹³ Despite complaints that the statute was overly broad and vague in *Holder v. Humanitarian Law Project*,¹¹⁴ the Supreme Court soundly rejected the idea that the Material Support Act was unconstitutionally vague.¹¹⁵

III. MIXED SIGNALS—BLURRING THE LINE BETWEEN DOMESTIC JIHADIST AND UNLAWFUL ENEMY COMBATANT

Since the inception of the War on Terror, the rule of law made a dramatic shift from the well-worn processes of domestic criminal law to the not-often-employed law of war. Congress authorized the president (as the commander-in-chief) in the 2001 Authorization for the Use of Military Force to use the law of war with “all necessary and appropriate force against those nations, organizations, or persons he determines” were responsible for the terror attacks on 9/11.¹¹⁶ In the Act, Congress gave the president unilateral power to determine who is an unlawful enemy combatant.¹¹⁷ Nevertheless, in the Military Commissions Act of 2006, Congress specifically identified those that would qualify for treatment as unlawful enemy combatants—the Taliban, al-Qaeda, and associated forces.¹¹⁸ Similarly, in the Military Commissions Act of 2009, Congress altered the phrase unlawful enemy combatant to “unprivileged enemy belligerent,”¹¹⁹ but still clearly listed al-Qaeda as a belligerent, along with anyone other than a privileged belligerent who engaged in hostilities against the United States or its coalition partners.¹²⁰

Given that the War on Terror presents new challenges to the old thinking associated with traditional forms of war in that the enemy is not from a specific state, does not wear a uniform, and does not abide by the law of war, it is still unacceptable that the United States has

112. 18 U.S.C. § 2339B.

113. See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1:5 NAT'L SEC. L. & POL'Y 5, 9 (2005).

114. 130 S. Ct. 2705 (2010).

115. See *id.* at 2719–20.

116. S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

117. See *id.* at pmb1.

118. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 48a, 120 Stat. 2600.

119. Military Commissions Act of 2009, Pub. L. No. 111-84, § 948a(5)–(6), 123 Stat. 2190.

120. *Id.* § 948a(7)(c).

not been able to formulate at least the most basic of status distinctions between an unlawful enemy combatant and a domestic jihadist criminal. If instances of this confusion abound from the leadership it is little wonder that the average citizen is left in a constant state of total frustration.

While the Bush Administration certainly demonstrated mixed signals in this regard, the Obama Administration has exhibited what can only be described as a sycophantic approach. Beginning with a pedestrian set of executive orders associated with enemy combatants in early 2009, the Obama Administration has been unable or unwilling to provide a bright-line distinction between domestic terrorism conducted by domestic jihadists and acts of war carried out by unlawful enemy combatants.¹²¹

To be certain, the lack of clarity on treating the enemy combatant exclusively under the law of war began in the Bush Administration, not the Obama Administration. To its credit, when the War on Terror began, the Bush Administration was able to shift away from domestic criminal processes that had been used against all categories of “terrorists” to include the case of Sheik Omar Abdel Rahman, who orchestrated the 1993 radical Islamic terror attack on the World Trade Center.¹²² Both President Bush and Congress saw al-Qaeda and their direct supporters as unlawful enemy combatants and subject to the law of war. Thus, President Bush exhibited a certain degree of determination to employ the law of war consistently to those whom he labeled as unlawful enemy combatants. As such, the Bush Administration used the law of war against al-Qaeda forces to kill them, detain them indefinitely, and to use military commissions. Nevertheless, there were glaring exceptions where political considerations, which demanded a demonstration of accomplishment, trumped consistency in applying the law of war across the board. For instance, while correctly proclaiming that the law of war allowed the use of military commissions for those non-U.S. citizen al-Qaeda members who committed crimes in violation of the law of war, the Bush Administration chose to prosecute two al-Qaeda members in federal district court: Zacarias Moussaoui (the so-called twentieth al-Qaeda terror plot hijacker of September 11, 2001)¹²³ and Richard Reid (the British al-Qaeda shoe bomber).¹²⁴

121. See David Johnston & Elisabeth Bumiller, *Obama's Plan for Closing Guantanamo Faces Legal and Logistical Hurdles*, N.Y. TIMES, July 14, 2009, at A14; Tung Yin, “Anything but Bush?": *The Obama Administration and Guantanamo Bay*, 34 HARV. J.L. & PUB. POL'Y 453, 457 (2011).

122. *United States v. Rahman*, 189 F.3d 88, 103–04 (2nd Cir. 1999).

123. *United States v. Moussaoui*, Indictment, No. 01-455-A (E.D. Va. 2005). Zacarias Moussaoui entered a guilty plea to charges that he conspired to hijack planes and fly them into the World Trade Center and the

The Bush decision to deal with Moussaoui and Reid as domestic jihadists and not unlawful enemy combatants did not go unnoticed by the Obama Administration. In the Obama Administration's continuing desire to marginalize the use of military commissions and rely on domestic criminal courts for unlawful enemy combatants, Attorney General Holder points out that President Bush "consistently relied on criminal prosecutions in federal court to bring terrorists to justice . . . attempted shoe bomber Richard Reid and 9/11 conspirator Zacarias Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses."¹²⁵ Of course, Holder falls into a logical mouse-trap. While it is true that Reid and Moussaoui were al-Qaeda unlawful enemy combatants, it is absolutely not true that the hundreds of other defendants convicted of domestic jihadist terrorism offenses were al-Qaeda. In other words, Reid and Moussaoui could have been sent to Guantanamo Bay as unlawful enemy combatants to await trial by military commission, but not the others convicted in the Bush Administration. Only enemy combatants can be tried by military commissions.

Instead of correcting the Bush-era missteps, and dealing with acts of domestic jihadist terrorism based on the designation of the actor into his proper legal category, President Obama's confused policies in the War on Terror have sown even greater consternation. Not only does the president rarely make public announcements about the fact that America is at war with al-Qaeda,¹²⁶ he seems intent on forcing a

Pentagon. See *United States v. Moussaoui*, 591 F.2d 263, 266–78 (4th Cir. Jan. 10, 2010) (discussing the procedural history); *Moussaoui Pleads Guilty to Terror Charges*, CNN (Apr. 23, 2005), <http://www.cnn.com/2005/LAW/04/22/moussaoui/index.html>. At the sentencing stage of the three-year federal trial, a jury sentenced Moussaoui to life in prison without the possibility of parole instead of the death penalty, which the government was seeking; see *Moussaoui*, 591 F.2d at 277; see also *Moussaoui Formally Sentenced, Still Defiant*, MSNBC (May 4, 2006), <http://www.msnbc.msn.com/id/12615601/>.

124. *United States v. Reid*, 211 F. Supp. 2d 366 (D. Mass. 2008). Richard Reid was convicted of attempting to blow up American Airlines Flight 63 from Paris to Miami on December 22, 2001 with a makeshift bomb in his shoe. He was convicted of multiple life sentences in a federal district court in December 2003. See also *United States v. Reid*, 369 F.3d 619, 619–20 (1st Cir. 2004) (discussing the procedural history); *Exchange Between Reid, Judge Follows Life Sentence*, CNN (Dec. 6, 2003), <http://www.cnn.com/2003/LAW/01/30/shoebomber.sentencing/>.

125. Holder, *supra* note 55.

126. See President Barack Obama, *supra* note 5. One of the rare public statements by President Obama that recognized that the United States was at war with al-Qaeda occurred in the wake of the attempted plane bombing by al-Qaeda member Umar Farouk Abdulmutallab in December 2009: "We are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that

return to the use of domestic criminal law to cover unlawful enemy combatants, even if the terror acts occurred outside of the American homeland.¹²⁷ The Obama executive orders referenced earlier provide ample proof of this intent. Shortly after being sworn, President Obama issued three executive orders on January 22, 2009. Obama ordered: (1) the closure of Guantanamo Bay within one year;¹²⁸ (2) the suspension of all ongoing military commissions;¹²⁹ and (3) the suspension of the CIA's enhanced interrogation program.¹³⁰ The first two executive orders were rendered null and void in fairly short order. As of this writing, Guantanamo Bay is still not closed and military commissions have now been fully approved by the Obama Administration.

In spite of these so-called setbacks in the Obama vision, the Obama Administration still refuses to abandon its policy of using domestic criminal courts whenever possible. Starting with the June 2009 transfer of al-Qaeda unlawful enemy combatant Ahmed Ghailani from Guantanamo Bay to stand trial in New York federal district court, where he was convicted on only one count for his role in the al-Qaeda terrorist bombings in Africa in 1998,¹³¹ and continuing with the trial of Umar Farouk Abdulmutallab,¹³² the Nigerian national who attempted to detonate an explosive device on an airplane traveling from Amsterdam to Detroit on December 25, 2009, the Obama Administration seeks every opportunity to downplay the use of the law of war, particularly in terms of domestic prosecution. President

killed nearly 3,000 innocent people, and that is plotting to strike us again. And we will do whatever it takes to defeat them." *Id.*

127. See Charlie Savage, *Developments Rekindle Debate Over Best Approach for Terrorism Suspects*, N.Y. TIMES, Oct. 14, 2011, at A14 (discussing the Obama Administration's desire to use federal criminal law for terrorism suspects in and outside the United States).
128. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009); see also Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) (establishing a special task force on detainee disposition).
129. 74 Fed. Reg. at 4899.
130. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).
131. Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, WASH. POST, June 10, 2009, at A1. Ahmed Ghailani was transferred to a New York District Court on June 9, 2009, despite bipartisan opposition in Congress. This was the first case of a non-American detainee from Guantanamo Bay transferred to U.S. soil to stand trial. *Id.* Ghailani pleaded not guilty to multiple charges in connection with the 1998 embassy bombings in Tanzania and Kenya. *United States v. Ghailani*, 686 F.Supp.2d 279, 284–85 (S.D.N.Y. 2009) (discussing the procedural history).
132. Kevin Johnson, "Underwear Bomber" Trial Refreshed Security Debate, USA TODAY, Sept. 30 2011, at 6A.

Obama's top counterterrorism expert, John Brennan, said that the October 2011 conviction of the so-called underwear bomber, Abdulmeutallab, in federal district court "showed why the administration strongly believes that terrorism suspects arrested inside the United States should be handled by the traditional system [domestic criminal law]."¹³³

Perhaps one of the most egregious instances of confused leadership in the Obama Administration occurred in November 2009. Despite the fact that the 2001 Authorization for Use of Military Force deemed that those responsible for the attacks of 9/11 would be subject to the provisions of the law of war,¹³⁴ *i.e.*, members of the al-Qaeda terror network, Attorney General Holder announced that five of the most senior members of al-Qaeda—Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin Al Shibjh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi—would be transferred from military custody in the detention facility at Guantanamo Bay, Cuba, to stand trial in domestic federal criminal court in the Southern District of New York for their roles in the 9/11 attacks.¹³⁵ This move was roundly criticized for a variety of reasons: the phenomenal cost of holding the trial in New York City, security considerations associated with sparking violence by supporters of radical Islam, and continued trauma to the families.¹³⁶ From the perspective of the rule of law, the most serious concern was embracing and upholding the proper rule of law—the law of war.¹³⁷ Holder seemed oblivious to the fact that the five members of al-Qaeda had been detained for years in the Guantanamo Bay Detention Facility without being charged with a domestic federal crime. These five are not common criminals but rather unlawful enemy combatants. Under the law of war, such detention is perfectly lawful. The reasonable observer would therefore expect that said unlawful enemy combatants would then be tried by a military commission. The proper rule of law would neither suggest nor support a domestic criminal trial.

133. Savage, *supra* note 127 at A12.

134. *See* Authorization for the Use of Military Force, S.J. Res. 23, 170th Cong. § 2 (2001) (enacted).

135. *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN (Nov. 13, 2009), <http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html>.

136. *See generally* Eugene R. Fidell, Op-Ed, *The Trouble with Tribunals*, N.Y. TIMES, June 14, 2009, at WK8; *see also* Charlie Savage, *U.S. Prepares to Lift Ban on Guantanamo Cases*, N.Y. TIMES, Jan. 20, 2011, at A1.

137. *See Morning Meeting with Dylan Ratigan* (MSNBC television broadcast Nov. 13, 2009), *available at* <http://www.stmarytx.edu/ctl/index.php?site=centerForTerrorismLawMedia#mediaArchives>.

When Holder announced this ill-thought out decision, the Military Commissions Act of 2009 (passed by the Democrat-dominated Congress) had already been signed into law. Again, all unlawful enemy combatants that had violated the law of war or other criminal acts should be processed for prosecution by means of a military commission, not a domestic criminal trial. Fortunately, the outcry from the American people was so great that the Obama Administration was forced to suspend the decision and finally, almost two years later, in March 2011, the Obama Administration lifted its self-imposed freeze on new military commission trials at Guantanamo Bay.¹³⁸ Shortly thereafter, Attorney General Holder blamed Congress for his lack of perspicacity and reluctantly announced that he was “referring the cases [of the five al-Qaeda leaders] to the Department of Defense to proceed in military commissions. Furthermore, [he] directed prosecutors to move to dismiss the indictment that was handed down under seal in the Southern District of New York in December, 2009.”¹³⁹

Even now, after the November 2012 election, the Obama Administration seems unable to understand the gravamen of the matter and simply will not concede the obvious: the proper rule of law must be used exclusively *vis-a-vis* the proper actor.

The lengthy prepared remarks delivered by Attorney General Eric Holder at Northwestern University School of Law in March 2012 did absolutely nothing but add extra layers of misstatement and confusion.¹⁴⁰ The speech was reviewed in some detail by various legal commentators¹⁴¹ because it provided the public with a rare explanation of the Obama Administration’s position on a variety of national security topics to include the legitimacy of the “reformed” military commissions, the reauthorization of portions of the Foreign Intelligence Surveillance Act, the use of domestic federal criminal courts, and the use of drone missile strikes to kill “terrorists” outside of what Holder called the “traditional battlefield.”¹⁴² While the opening portion of the speech refreshingly and correctly stated that “[w]e are a nation at war,” Holder quickly mired his remarks in confusing rhetoric by failing to distinguish between the “terrorist,” the “homegrown extremist,” and the “enemy belligerent.” Responding to critics of Obama’s use of a domestic federal criminal court in

138. See Evan Perez, *Obama Restarts Terrorism Tribunals*, WALL ST. J., March 8, 2011, at A1.

139. Holder, *supra* note 1.

140. Holder, *supra* note 55.

141. See, e.g., Robert Chesney, *Text of the Attorney General’s National Security Speech*, LAWFARE (Mar. 5, 2012), <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/>.

142. Holder, *supra* note 55.

handling the case of Abdulmutallab, Holder all but conceded that Abdulmutallab was in fact a member of al-Qaeda. Holder even detailed how Abdulmutallab was carrying out an act of jihad by going to the al-Qaeda training camp in Yemen where he met with a leader of al-Qaeda in the Arabian Peninsula and was given detailed instructions on how to carry out the terror attack.¹⁴³ Nevertheless, Holder simply lumped Abdulmutallab with other domestic jihadists like Faizal Shahzad, the naturalized American citizen who tried to set off a car bomb in New York City's Time Square, and disingenuously boasted about how both were convicted in federal domestic courts.¹⁴⁴ Then, in the same paragraph of his remarks about Abdulmutallab, Holder referred to other "homegrown extremists" that have been convicted. Abdulmutallab was certainly not a homegrown extremist; he was an unlawful enemy combatant.

The case of Umar Farouk Abdulmutallab should never have been handled under the sphere of domestic criminal law. Once detained at the Detroit airport, President Obama had every right to designate Abdulmutallab an unlawful enemy combatant and to send him to a detention facility in Afghanistan or Cuba for questioning and, if appropriate, for prosecution in a military commission. Instead, the President elected to employ the rule of law associated with domestic criminal law for Abdulmutallab. Abdulmutallab knew he was an unlawful enemy combatant; at his sentencing in February 2012, Abdulmutallab loudly proclaimed that he was honored to be a member of al-Qaeda.¹⁴⁵ As for Faisal Shahzad, he was an American citizen and could not have been tried in a military commission even if he were a member of al-Qaeda.¹⁴⁶ Finally, to add insult to injury, Holder's bait and switch logic regarding Abdulmutallab and Shahzad barely raised an eyebrow from the law students or their Northwestern law professors.

Although unlawful enemy combatants are clearly qualified for killing or prosecution by means of military commissions, voices in and out of the government still view federal criminal law as the proper rule of law to apply,¹⁴⁷ resulting in massive levels of misstatement and

143. *Id.*

144. *Id.*

145. See 'Underwear Bomber' Umar Farouk Abdulmutallab Handed Life Sentence, THE GUARDIAN (UK), Feb. 16, 2012, <http://www.guardian.co.uk/world/2012/feb/16/underwear-bomber-sentenced-life-prison>.

146. Holder, *supra* note 55.

147. See Walter Slocombe, *Critical Consideration of US' Approaches and Methods of Treating Suspected Terrorists*, in PERSPECTIVES ON DETENTION, PROSECUTION AND PUNISHMENT OF TERRORISTS IMPLICATIONS FOR FUTURE POLICY AND CONDUCT 1 (Yonah Alexander et al. eds., 2011) ("Much of [terrorist detention, prosecution, and punishment] is illegal, immoral and even criminal.").

misunderstanding.¹⁴⁸ The term domestic terrorism can now have a dual meaning, and so it must now be viewed in the context of whether one is describing the terror acts of an unlawful enemy combatant in the United States or the acts of an individual, *e.g.*, a non al-Qaeda domestic jihadist like Major Nidal Malik Hasan, who commits a terrorist act in the United States in violation of a state or federal criminal justice statute.¹⁴⁹ In other words, when viewed from the lens of the War on Terror, the term domestic terrorism is best defined based on the identity of the subject involved in the act. Is the terrorist an unlawful enemy combatant or not? If he is an unlawful enemy combatant, then the appropriate responsive rule of law to apply is the law of war, not domestic criminal law.

In the media reports surrounding what happened on the tenth anniversary of attacks on 9/11, the *New York Times* did not have a single story in its Monday, September 12, 2011, newspaper concerning the fact that the United States was engaged in a ten-year armed conflict or war with al-Qaeda. Instead, all of the stories were cloaked in the ambiguity of “terrorism.” The closest story to even attempt to deal with the topic of the lawful use of violence in armed conflict was entitled *Around the World, Support for the U.S. is Mixed with Fatigue and Regret*.¹⁵⁰ The article talked about how nations from around the world marked the date by “expressing their commitment to democracy and the fight against terrorism.”¹⁵¹ The article then quoted a political analyst as saying that “most of Europe, the initial sympathy for America after 9/11 was ‘followed by a lack of enthusiasm . . . for the way 9/11 was exploited for political purposes.’”¹⁵² Such assessments should come as no surprise. As long as the United States is unable to provide clarity under the rule of law for its actions, the byproduct will be predictable: confusion.

Al-Qaeda unlawful enemy combatants qualify for treatment under the law of war, regardless of where they are located in the world. The Authorization for Use of Military Force contains no geographic restrictions concerning making war against al-Qaeda. As the commander-in-chief, President Obama has utilized the provisions of the law of war to engage in warfare. Thousands of al-Qaeda, Taliban, and associated forces have been killed by President Obama, mainly in Afghanistan and Pakistan but also in other countries including Sudan,

148. Holder, *supra* note 55.

149. Nancy Gibbs, *The Fort Hood Killer: Terrified . . . Or Terrorist?*, TIME, Nov. 23, 2009, at 27 (exploring if the killing at Fort Hood was an “intimate act of war”).

150. Steven Erlanger, *Around the World, Support for the U.S. is Mixed with Fatigue and Regret*, N.Y. TIMES, Sept. 12, 2011, at A22.

151. *Id.*

152. *Id.*

Yemen, and Somalia. President Obama has detained hundreds of new enemy combatants at Bagram Air Force Base and continues to hold approximately 165 enemy combatants at Guantanamo Bay, Cuba.¹⁵³ Attorney General Holder was correct in 2012 when he stated that “our legal authority is not limited to the battlefields in Afghanistan.”¹⁵⁴

Finally, to be sure, the United States has self-restricted the law of war on U.S. soil, *e.g.*, killing, detention, and prosecution by military commissions. It is the policy of the United States that anyone committing an act of terror on the homeland of America will be initially dealt with under domestic criminal law.¹⁵⁵ Although American citizens may be killed and detained if they are al-Qaeda members, the Obama Administration has issued a signing statement to the FY 2012 defense appropriations bill that “[President Obama] would never let U.S. citizens be detained or interrogated under the law of war.”¹⁵⁶

IV. TARGETED KILLING

In a report delivered to the United Nations Human Rights Council, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, defined targeted killing as “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law . . . against a specific individual who is not in the physical custody of the perpetrator.”¹⁵⁷ Of course, the rule of law that justifies a state killing another human being rests in either the law of war or the long recognized customary international legal right of self-defense. Illegal state killings conducted outside of these two limited arenas are either murder¹⁵⁸ or assassination.¹⁵⁹ While the term murder is easily separated from the discussion because it generally applies to the use of force related to domestic criminal law, the term assassination is often misunderstood and thus misapplied by both policymakers and the media. Of course, this is somewhat

153. *The Guantanamo Docket*, N.Y. TIMES & NPR, <http://projects.nytimes.com/guantanamo> (last updated Dec. 11, 2012).

154. Holder, *supra* note 55.

155. See Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1225 (2002) (noting that the 9/11 attacks were punishable under domestic law).

156. *Obama's Missing Detainees*, WALL ST. J., Apr. 3, 2012, at A12.

157. Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24/Add.6, ¶ 1 (May 28, 2010).

158. BLACK'S LAW DICTIONARY, *supra* note 19, at 1114.

159. *Id.* at 130.

understandable given that the current executive order prohibiting assassination fails to even define the term. Executive Order 12,333 reads:

No person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination.¹⁶⁰

If one accepts the common definition of assassination to mean “to murder (a prominent person) by surprise attack, as for political reasons,”¹⁶¹ then it is clear that Executive Order 12,333 does not make illegal something that was once legal. In other words, murder is always illegal. When the term assassination is used to describe a killing, such as the public announcement in May 2011 that Osama Bin Laden was killed,¹⁶² it follows that one would automatically presume that the killing was illegal.

Perhaps one of the best short reviews of assassination was penned by W. Hays Parks, while he served at the Army Office of the Judge Advocate General, International and Operational Law Division.¹⁶³ Parks made clear that the purpose of Executive Order 12,333 was to ensure that the international community and the American people understood that the United States does not condone assassination “as an instrument of national policy.”¹⁶⁴ Nevertheless, Parks correctly pointed out that as a matter of law, Executive Order 12,333 was not designed “to limit lawful self-defense options against legitimate threats to the national security of the United States or individual U.S. citizens.”¹⁶⁵

The term targeted killing is most often associated with the use of unmanned aerial Vehicles (UAVs), or drones, to kill unlawful enemy combatants.¹⁶⁶ These attack platforms have been in use in the War on

160. Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Aug. 27, 2004).

161. Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 760 (2003).

162. Emily Babay & Brian Hughes, *Crowds Rejoice at White House after News of Bin Laden's Death*, WASH. EXAMINER (May 2, 2011), <http://washingtonexaminer.com/article/113539>.

163. See Memorandum from W. Hays Parks, Special Assistant for Law of War Matters to The Judge Advocate Gen. of the Army, *Memorandum of Law: Executive Order 12333 and Assassination* (Nov. 2, 1989), <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf>.

164. *Id.* at 8.

165. *Id.*

166. See Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1201(2011).

Terror for a decade.¹⁶⁷ The first targeted killing of an unlawful enemy combatant outside of the active war zone of Afghanistan occurred in November 2002 when a predator drone struck a car carrying Al-Harethi and four others.¹⁶⁸ Al-Harethi was an al-Qaeda member and suspect in the 2000 *USS Cole* attack in Yemen.¹⁶⁹

Since taking office, President Obama has demonstrated a predilection for the use of drones to kill unlawful enemy combatants. One commentator called Obama's use of drones as a "remarkable turnaround for a politician who had criticized almost every aspect of the 'war on Terror' waged by his predecessor in the Oval Office."¹⁷⁰ Under Obama, American drones have killed hundreds of suspected enemy combatants, mostly in Pakistan and Afghanistan, but also in Somalia, Sudan, and Yemen.¹⁷¹ From the time that Obama took office in 2009 until early 2012, there have been over 240 drone attacks in Pakistan alone, "with a death toll well over 1,300."¹⁷² The use of a drone to kill deprives the subject of all his civil liberties. Unlike other issues such as detention authority, interrogation, or trial, a targeted killing provides no "appeal." The goal is to kill.

The primary legal theory for the Obama drone attacks is that the United States is at war. Unlawful enemy combatants are not killed because they are necessarily guilty of a crime, but because they are members of a hostile force.¹⁷³ Again, the unlawful enemy combatant determination is made by the president, not by a court. Furthermore, the candidate on the President's "kill list" may also fall into the category of "associated forces" of al-Qaeda and the Taliban. In *Hamli v. Obama*, the D.C. Circuit court sided with the Obama Administration's view that the 2001 Authorization for Military Force extended to "associated forces" of al-Qaeda and the Taliban.¹⁷⁴ In a companion case, *Bensayah v. Obama*, the D.C. Circuit noted:

167. See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 151 (2010).

168. *Id.* at 150.

169. *Id.*

170. William Shawcross, *Terror on Trial*, WALL ST. J., Jan. 7, 2012, at C1.

171. *Id.*

172. *Id.*

173. See Blum & Heymann, *supra* note 167, at 146.

174. See, e.g., *Hamli v. Obama*, 616 F.Supp.2d 63, 75 (D.D.C. 2009) "Associated forces do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with al Qaeda or the Taliban." *Id.* at 75 n.17.

[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is “part of” al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.¹⁷⁵

In addition to the standard targeting considerations of proportionality, unnecessary suffering, and military necessity, it is well established that noncombatants may be killed if incidental to a lawful attack.¹⁷⁶ This concept is known as collateral damage.

While the military is authorized to conduct the actual killing, it is well-known that civilian contractors and the CIA also provide input in the intelligence gathering processes.¹⁷⁷ The CIA will not release any information about their role in the use of drones,¹⁷⁸ but the primary concern from a law of war perspective is whether or not the CIA and other civilian contractors are acting in accordance with supporting military operations in a defensive role and not actively participating in offensive operations.¹⁷⁹

Even if the United States were not at war, targeted killing could still be lawful under the longstanding concept of self-defense. In other words, the authority to use violence in war exists in tandem with the inherent right of state's to defend themselves. The analytical framework for the use of force is found in Article 51 of the UN Charter, which codifies the “inherent right of self-defense.” The inherent right of self-defense refers to the right of a country to unilaterally engage in acts of self-defense; regardless of what any other nation or organization, including the United Nations, may or may not do. This is a well-known and ancient component of international law:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present

175. *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010).

176. *See* Esther Hamutal Shamash, *How Much is Too Much? An Examination of the Principal of Jus in Bello Proportionality*, 2 ISRAELI DEF. FORCE L.R. 103, 106 (2006) (stating that the principle of proportionality represents a compromise between military necessity and the protection of civilians).

177. *See* Radsan & Murphy, *supra* note 166, at 444.

178. *See id.* at 446 (noting that the CIA is a clandestine organization).

179. *See* ADDICOTT, *supra* note 20, at 274–80.

Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁸⁰

Parks sets out three different scenarios where self-defense may be used: (1) in response to an actual use of force; (2) in pre-emption of an imminent use of force; and (3) against a continuing threat.¹⁸¹ Indeed, a prime example of this authority in action occurred on August 20, 1998, when President Bill Clinton ordered a targeted military strike on Afghanistan by means of more than seventy Tomahawk cruise missiles in direct response to the August 7, 1998, al-Qaeda terror attack on the American embassies in Kenya and Tanzania.¹⁸²

While the general legal basis for targeted killing is rather elementary, the application in the War on Terror is often clouded due to the utter failure of the government to set out the authority with clarity. For instance, the confusion associated with whether the 2011 American “drone” killing in Yemen of al-Qaeda cleric and leader, American-born Anwar al-Awlaki, was “legal” or not, reflects very poorly on the political leadership of the United States.¹⁸³ Due to the inability of the commander-in-chief to lucidly articulate a legal justification divorced from political overtones, even people in the United States found it quite easy to accuse the country of wrongdoing. The *New York Times* editorial page on October 4, 2011, carried six letters to the editor on the topic of al-Awlaki’s death.¹⁸⁴ Of those six letters, only one of them understood that the killing was an entirely lawful act carried out under the law of war. All the others reflected varying degrees of confusion that included sentiments that the United States was: (1) wrong for not operating under domestic criminal law to arrest al-Awlaki; (2) wrong for killing a U.S. citizen; or (3) that the rule of law didn’t really matter because al-Awlaki was a “bad guy” and “we have to do what we have to do (the law of the jungle).”¹⁸⁵

180. See U.N. CHARTER art. 51.

181. Parks, *supra* note 163, at 7–8.

182. Richard J. Newman et al., *America Fights Back*, U.S. NEWS & WORLD REP’T (Aug. 23, 1998), http://www.usnews.com/usnews/news/articles/980831/archive_004624.htm.

183. See Greg Miller, *Strike on Aulaqi Demonstrates Collaboration Between CIA and Military*, WASH. POST Sept. 30, 2011, http://articles.washingtonpost.com/2011-0930/world/35272700_1_lethal-operations-cia-director-qaeda.

184. Letters to the Editor, *The Killing of a Qaeda Leader in Yemen*, NY. TIMES, Oct. 4, 2011, at A22.

185. *Id.*

Amazingly, not a single voice in the Obama Administration took the time to defend the action as lawful under a simple set of legal parameters related to the law of war. Instead, the White House issued statements associated with the fact that we were “defending” ourselves against a terrorist,¹⁸⁶ even though the foundational rule of law justification has nothing to do with the fact that al-Awlaki was a “terrorist” or a bad person. The justification for America’s lawful use of force against al-Awlaki was as follows: (1) the United States is at war with al-Qaeda; (2) the law of war rule of law applies to this war, not the domestic criminal law rule of law; (3) the law of war allows the United States to kill on sight any unlawful enemy combatant, detain indefinitely any unlawful enemy combatant, or use military commissions when appropriate (unless the nation imposes self-restrictions).

It took a full seven months after the killing of al-Awlaki before Attorney General Holder finally offered his “thoughts” on targeted killing at his March 5, 2012 address to Northwestern School of Law. He indicated that the United States would kill by drone or otherwise when: (1) the subject is located abroad; (2) the subject is a senior operational figure; (3) the subject is a member of al-Qaeda, Taliban, or associated forces; (4) the subject is involved in planning operations focused on killing Americans; (5) the threat is imminent and an opportunity to kill is open; (6) there is no feasible option for capture; and (7) the use of violence will comply with the law of war.¹⁸⁷

In the case of Anwar al-Awlaki, if he was a member of al-Qaeda (and he was), then he qualified for treatment under the full parameters of the law of war. Thus, it is not a violation of the law of war for the United States to kill an American citizen al-Qaeda member without warning. In addition, if that American citizen is an unlawful enemy combatant, then the United States can use the law of war as the proper rule of law to deal with him. While it is true that the 2006 (as well as the updated 2009) Military Commissions Act did exclude American citizen al-Qaeda members from trial by military commissions, this is a self-imposed rule, not a rule mandated by the law of war.

V. RENDITION

In tandem with the issue of targeted killing, the matter of rendition has been a lightning rod for debate when used in the context of the War on Terror. Simply put, rendition¹⁸⁸ refers to the

186. Holder, *supra* note 55.

187. *See id.*

188. BLACK’S LAW DICTIONARY, *supra* note 19, at 1410 (defining rendition as the “return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime”).

long-standing practice of one state sending a non-citizen individual to another state.¹⁸⁹ The practice is not illegal per se and the government's authority to engage in rendition stems from the president's authority under Article II.¹⁹⁰ The act of rendition only becomes illegal under a limited set of circumstances. The seminal legal instrument in this regard is the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).¹⁹¹ Article 3 of the Torture Convention prohibits any state party to "expel, return (*"refouler"*) or extradite any person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture."¹⁹² The more common euphemism for this illegal practice is "extraordinary rendition,"¹⁹³ although it should be properly categorized as "illegal rendition."

In making the determination as to whether an illegal rendition has occurred, the state party is required by Article 3(2) to "take into account all relevant considerations" with particular regard to whether or not there exists "a consistent pattern of gross, flagrant or mass violations of human rights"¹⁹⁴ in the receiving state. Even though the Torture Convention's combined factors of "substantial grounds," coupled with "a consistent pattern of gross, flagrant or mass violations of human rights," provide considerable flexibility for a state

189. *See* United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (holding that the practice of bringing a defendant into the jurisdiction of the courts of the United States by force is generally lawful per the Ker-Frisbie Doctrine).

190. *See* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1205 (2004) ("[T]he historical record unequivocally demonstrates that the President has exercised unchallenged and exclusive control over individuals captured during military operations since the time of the Founding.").

191. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 67, pmbl. (setting forth the standards of treatment for all persons and the universal rejection of "torture and other cruel, inhuman or degrading treatment or punishment throughout the world"). The convention provides a clear definition of torture, although it is lacking any definition of "other cruel, inhuman or degrading treatment." *See id.*

192. *Id.* art. 3. *See also* Jules Lobel, *The Prevention Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1408 (2007) (discussing the act of knowingly using rendition to a State that tortures).

193. BLACK'S LAW DICTIONARY, *supra* note 19, at 1410 (defining extraordinary rendition as "transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation").

194. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 67, art. 3(2).

party to justify a particular rendition, at least the prohibition is established and a standard is established, albeit a subjective one. Surprisingly, Article 16 has no similar requirement regarding rendition to a state that engages in “other cruel, inhuman or degrading treatment,” shortened to the term “ill-treatment.” For all practical purposes, this means that a state is free to turn over an individual to a state that it actually knows engages in ill-treatment. In practice, the United States relies heavily on assurances from the host state via diplomatic channels that the non-citizen will not be subjected to torture or ill-treatment.¹⁹⁵

Because the Senate’s ratification of the Torture Convention expressly mandated that the treaty was not “self-executing,”¹⁹⁶ Congress passed legislation to implement Article 3 of the Torture Convention as part of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).¹⁹⁷ Curiously, however, in terms of rendition the FARRA only provided a policy statement without legal effect. The pertinent provision states:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that person would be in physical danger of being subjected to torture, regardless of whether the person is physically present in the United States.¹⁹⁸

In the War on Terror, the concern over illegal rendition centers on the transfer of an individual from the United States to another country.¹⁹⁹ Since detainees are illegal enemy combatants, they are not prisoners of war and thus not subject to protection of the Geneva Conventions as a bar to any transfer whatsoever. Law Professor Robert Chesney argues quite persuasively that because of the definition of “protected persons” in the Fourth Geneva Convention,

195. See Roger Strother, *Obama Administration to Continue Extraordinary Rendition Program, Promises Oversight*, OMB WATCH (Aug. 25, 2009), <http://www.ombwatch.org/node/10336>.

196. See 136 CONG. REC. 36, 198 (1990).

197. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, § 1242(a)–(b), 112 Stat. 2691-761, 2681-822 (codified at 8 U.S.C. § 1231 note (2006)) [hereinafter FARRA].

198. *Id.* § 1242(a).

199. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180–83 (1993) (holding that Article 3 of the Torture Convention only applies to transfers of persons from U.S. shores to another country).

al-Qaeda, Taliban, and associated forces are not covered and thus are all candidates for rendition.²⁰⁰

While the Clinton Administration engaged in rendition of terror suspects prior to 9/11, the Bush Administration engaged in lawful rendition of detainees as well. According to the left-leaning Center for Human Rights and Global Justice, however, the United States engaged in illegal rendition by sending non-citizens to such countries as “Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria.”²⁰¹ Although candidate Obama strongly condemned rendition in the Bush Administration when running for office in 2007, he quickly reversed his position after the election and as a practical matter adopted the entire rendition policy that he had so strongly condemned as torture and illegal.²⁰² The 2009 Obama executive order condoned the practice of rendition but promised more oversight in the process to ensure that torture does not occur.²⁰³ As a practical matter, over the past four years, the Obama Administration has utilized the practice sparingly, if at all.²⁰⁴

VI. CONCLUSION

*“During the Nuremberg trials, part of what made us different was even after those Nazis had performed atrocities that no one had ever seen before, we still gave them a day in court, and that taught the entire world about who we are.”*²⁰⁵

—Barack Obama

While some may argue that the fault for the confusion associated with unlawful enemy combatants versus domestic jihadi terrorists rests with the lack of international consensus on relevant standards that should be adopted to deal with “international terrorism,” the root cause for this confusion actually centers on the inability of the Obama Administration to properly distinguish al-Qaeda unlawful enemy combatant terrorists from domestic jihadi terrorists. This

200. See Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 737 (2006).

201. ASS’N OF THE BAR OF THE CITY OF NEW YORK & THE CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y.U. SCH. OF L., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 8 (2004).

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

203. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

204. *Obama’s Missing Detainees*, WALL ST. J., Apr. 1, 2012, at A12.

205. Shawcross, *supra* note 170.

confusion began in small measures in the Bush Administration but has been magnified to absurd degrees in the Obama Administration. Obama's ill-conceived attempts to close Guantanamo Bay, stop military commissions, prosecute senior enemy combatants in New York federal district court, and generally refuse to acknowledge with any regularity to the public that America is engaged in a real "war" with al-Qaeda has produced massive distortion and consternation about the legality of our actions.

The reason that all this matters, is that if the United States is operating under the rule of law associated with domestic criminal law *vis-à-vis* al-Qaeda, then America has engaged in horrid violations of domestic and international law in the past eleven years by killing al-Qaeda members on sight, detaining al-Qaeda members indefinitely without trial, and using military commissions to prosecute al-Qaeda members. On the other hand, if America is in a real war, then all of these actions are perfectly lawful.

The number one threat facing the United States comes from a loose confederation of radicalized violent Islamic jihadists who engage in terrorism as the preferred tactic of murder. Some qualify as unlawful enemy combatants and some do not. While all al-Qaeda unlawful enemy combatants can be labeled as "violent jihadists," not all violent jihadists are unlawful enemy combatants. In this light, violent jihadists that do not qualify as unlawful enemy combatants must be deemed as domestic jihadist terrorists, but violent jihadists that do qualify as unlawful enemy combatants must be treated under the law of war. Out of all of the nascent legal and policy issues associated with the armed conflict against al-Qaeda, no factor has spawned more debate than correctly applying this separation. The inability to clearly set bright lines of distinction between al-Qaeda unlawful enemy combatants and domestic jihadists is not just a failure in definition, it is a failure in leadership and does tremendous damage to America's commitment to abide by the proper rule of law. America must be able to clearly distinguish between criminals and combatants and then apply the appropriate rule of law to each category.

The distinction set out in this paper between an unlawful enemy combatant and a domestic jihadist is not that difficult to delineate. As the commander-in-chief, one of the president's main roles is to ensure that America acts under the correct rule of law. Because the War on Terror is fought against a non-state actor, it is imperative that the president make this distinction precise so that not only our enemies understand that we are following the appropriate rule of law, but the American people and our allies understand as well. Only then can we validate our behavior as operating under the rule of law. President Obama's March 2011 executive order regarding the start of new trials by military commissions and the legality of indefinite detention is a step in the right direction, but it still sends confused

signals because it leaves open the option to try unlawful enemy combatants in federal district courts. Acting in accordance with the new discipline of “lawfare,” coined by the Major General (US Air Force, ret.) Charles J. Dunlap, Jr., Executive Director, Center on Law, Ethics and National Security at Duke University School of Law,²⁰⁶ clarity mandates that the commander-in-chief firmly communicate the distinction between a domestic jihadist and an unlawful enemy combatant, and properly apply the appropriate rule of law in each and every instance. Only then can one speak intelligently about rendition and targeted killing.

Considering that the hallmark of any democratic government is its commitment to the rule of law, a rational discussion of the rule of law *vis-à-vis* domestic terrorism means applying the appropriate legal response to an attack (or attempted attack) on the American homeland. This mandates a clear understanding of what one means by domestic terrorism and which rule of law applies—domestic criminal law or the law of war? The American government must do a far better job in correctly dividing the application of the term when it comes to discussions of violent jihadist threats.

206. See Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Ctr. for Human Rts. Pol’y, Harvard Kennedy Sch. Program on Nat’l Sec. and Human Rts., Workshop Paper, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.