

Why terrorists aren't soldiers

By Wesley K. Clark and Kal Raustiala

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The line between soldier and civilian has long been central to the law of war. Today that line is being blurred in the United States in the struggle against transnational terrorists. Since 9/11 the Bush administration has sought to categorize members of Al Qaeda and other jihadists as "unlawful combatants" rather than treat them as criminals.

The courts are increasingly wary of this approach, and rightly so. In a stinging rebuke, this summer a U.S. federal appeals court in Virginia struck down the government's indefinite detention of a civilian, Ali al-Marri, by the military. The case illustrates once again the pitfalls of the current approach.

Treating terrorists as combatants is a mistake for two reasons. First, it dignifies criminality by according terrorist killers the status of soldiers. Under the law of war, military service members receive several privileges. They are permitted to kill the enemy and are immune from prosecution for doing so. They must, however, carefully distinguish between combatant and civilian and ensure that harm to civilians is limited.

Critics have rightly pointed out that traditional categories of combatant and civilian are muddled in a struggle against terrorists. In a traditional war, combatants and civilians are relatively easy to distinguish. The 9/11 hijackers, by contrast, dressed in ordinary clothes and hid their weapons. They acted not as citizens of Saudi Arabia, an ally of America, but as members of Al Qaeda, a shadowy transnational network. And their prime targets were innocent civilians.

By treating such terrorists as combatants, however, we Americans accord them a mark of respect and dignify their acts. And we undercut our own efforts against them in the process. Al Qaeda represents no state, nor does it carry out any of a state's responsibilities for the welfare of its citizens. Labeling its members as combatants elevates its cause and gives Al Qaeda an undeserved status.

If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves. As a result, terrorism should be fought first with information exchanges and law enforcement, then with more effective domestic security measures. Only as a last resort should we call on the military and label such activities "war." The formula for defeating terrorism is well known and time-proven.

Labeling terrorists as combatants also leads to this paradox: While the



deliberate killing of civilians is never permitted in war, it is legal to target a military installation or asset. Thus the attack by Al Qaeda on the destroyer Cole in Yemen in 2000 would be allowed, as well as attacks on command centers like the Pentagon. For all these reasons, the more appropriate designation for terrorists is not "unlawful combatant" but the one long used by America: criminal.

The second major problem with the approach of the Bush administration is that it endangers U.S. political traditions and the country's commitment to liberty, and further damages America's legitimacy in the eyes of others.

A great danger in treating operatives for Al Qaeda as combatants is precisely that its members are not easily distinguished from the population at large. The government wields frightening power when it can designate who is, and who is not, subject to indefinite military detention. The Marri case turned on this issue. Marri is a legal resident of the United States and a citizen of Qatar; the government contends that he is a sleeper agent of Al Qaeda. For the last four years he has been held as an enemy combatant at the Navy brig in Charleston, South Carolina.

The federal court held that while the government can arrest and convict civilians, under current law the military cannot seize and detain Marri. Nor would it necessarily be constitutional to do so, even if Congress expressly authorized the military detention of civilians. At the core of the court's reasoning is the belief that civilians and combatants are distinct. Had Ali al-Marri fought for an enemy nation, military detention would clearly be proper. But because he is accused of being a member of Al Qaeda, and is a citizen of a friendly nation, he should not be treated as a warrior.

Cases like this illustrate that in the years since 9/11, the Bush administration's approach to terrorism has created more problems than it has solved. We need to recognize that terrorists, while dangerous, are more like modern-day pirates than warriors. They ought to be pursued, tried and convicted in the courts. At the extreme, yes, military force may be required. But the terrorists themselves are not "combatants." They are merely criminals, albeit criminals of an especially heinous type, and that label suggests the appropriate venue for dealing with the threats they pose.

America trains soldiers to respect the line between combatant and civilian. U.S. political leaders must also respect this distinction, lest we unwittingly endanger the values for which America is fighting, and further compromise the efforts to strengthen security.

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