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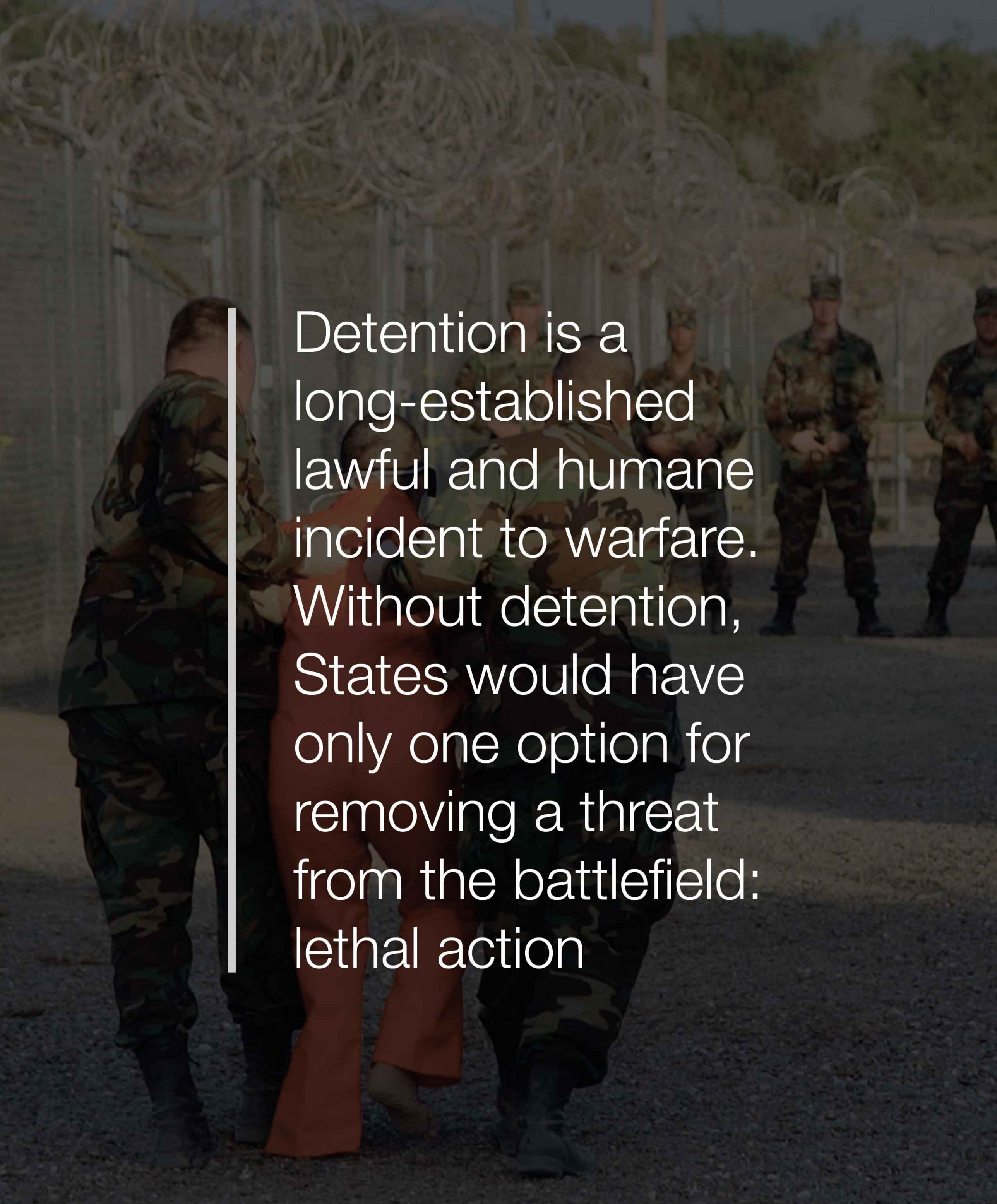

Two US Army Military Police escort a detainee to a cell at Camp X-Ray, Guantanamo Bay Navy Base, Cuba (PH1 Shane T. McCoy/USN/Public Domain)

Re-embracing the Wartime Detention Mission

Ryan J. Vogel

President Donald Trump has made clear his intent to utilize wartime detention in the fight against al-Qaeda and ISIS.[1] As former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, William Lietzau, and I have argued elsewhere,[2] this could be a positive development in the United States' evolving approach to the war against al-Qaeda, ISIS, and their associates, so long as it is coupled with a commitment to continuing key detention policies and humane treatment standards developed over the past fifteen years. In recent years, the United States has largely avoided adding to the detainee population at Guantanamo (GTMO) – mainly in reaction to some of the more infamous excesses from the first couple of years after the attacks on September 11, 2001. But failing to capture new enemy fighters has come with an operational and humanitarian cost. The United States should take the opportunity that comes with political transition to re-embrace the wartime detention mission.

Detention is an important part of armed conflict. The Obama Administration was not nearly as interested in developing and defending its detention policy as it was in keeping a campaign promise to close GTMO, which President Obama called "a blot on our national honor."[3] Of course, deciding on policy or tactical grounds to close a detention facility is reasonable, but not if it becomes the basis for a State's entire approach to detention operations. It is true that the United States continued to capture and detain enemy fighters during the Obama Administration, mostly during the surge in Afghanistan. But while the Administration vigorously defended its controversial policies related to lethal actions, particularly those conducted by drones outside the "hot battlefield," its only emphasis for detainee operations was in ending them.[4]

In Europe, too, courts have undermined the ability for U.S. allies to detain during armed conflict.[5] Indeed, in a recent case in the United Kingdom, the inherent authority of a nation to detain at all in non-international armed conflict has been challenged.[6] The United States and some of its key allies are losing sight of the humanitarian and operational advantages of wartime detention. This in spite of the fact that U.S. detainee law, policy, and practice has continued to progress throughout the past fifteen years, becoming in every respect the international standard for wartime detention operations.

Interestingly, detention has typically been most criticized by the human rights community. Some of this is due to persistent questions over the appropriate legal framework in which to situate the fight against al-Qaeda and now ISIS.[7] The conflation of two very disparate legal regimes (law of war versus criminal law) leads to incoherent policy, inadequate law from which U.S. courts can draw in making decisions on jurisdiction over detainee matters, and confusion for the public on the basis for continued detention outside criminal legal processes. The fact that many terrorist fighters do not fit neatly into the categories specified in the Geneva Conventions has led many to conclude that they should be dealt with under the law enforcement framework, which has well defined standards for incarceration. Calls for al-Qaeda or ISIS members to be "brought to justice," or claims that they are "imprisoned" at Guantanamo, or assertions that detained fighters are being held "indefinitely without charge" abound. Of course, all of these statements reflect the purposes of criminal law, which is to prosecute those who have committed crimes and imprison convicts for punitive sentences of a definite duration.

The purpose of the law of war is very different: detained persons are not "imprisoned" for punitive purposes or as a result of a conviction, but are held simply to keep them from fighting for the duration of the conflict. Therefore, it does not make sense to speak of "holding an individual without charge" in the context of an armed conflict – all detained persons, including prisoners of war, are held without charge. States have no obligation to prosecute captured fighters in wartime, and have generally not sought to do so while the war is ongoing. Similarly, it does not make sense to speak of "indefinite detention" in the context of an armed conflict. All conflicts are "indefinite" in nature; wars do not

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begin with a predetermined end-date. When combatants enter a conflict they must do so knowing that, should they be captured, they may be lawfully held without charge for the duration of the hostilities – whether that is a hundred days or a hundred years. The United States should continue to affirm this legal distinction.

The United States should also demonstrate that detention in armed conflict is preferable as a humanitarian matter. Detention is a long-established lawful and humane incident to warfare. Without detention, States would have only one option for removing a threat from the battlefield: lethal action. Morally responsible and legally observant States take prisoners in wartime. In part this is because detention is temporary and non-punitive – and almost always reversible. In fact, of the tens of thousands of individuals detained during America's post-9/11 wars, almost all have been transferred or released. In addition, the United States has placed a consistent and progressive emphasis on preparing detainees to return to civilian life and preventing their reengagement in hostilities. This focus has led to training, education, and other programs aimed at helping detainees readjust to post-detention civilian life. Of course, none of this is possible if a State pursues only lethal approaches.

But detention is not only a moral and lawful option in wartime, it is also operationally preferable. Detaining enemy fighters provides valuable intelligence collection opportunities. Detainees may be interrogated, their possessions may be analyzed, their location may be investigated, and all of this information may be gathered to help military and intelligence professionals learn more about the enemy group and its plans. Detainee information has provided United States officials with a great deal of the information on terrorist organizations, their modus operandi, and personnel.

In addition, failing to capture enemy fighters and releasing detainees prematurely needlessly prolongs the conflict, leading to unnecessary death and destruction. A mistake that both the Bush and Obama administrations made was to transfer or release detainees without an overarching strategic reason for doing so. Of course, if the United States finds through new intelligence or through a detainee review process that it has the wrong person in custody, that person should be released without delay. But in cases where the United States knows it is holding a member of the enemy, transferring that person back only provides another opportunity for that person to go back to the fight. Reconstituting the enemy while hostilities are ongoing simply prolongs the war. We saw this happen countless times with the same detainees being repeatedly recaptured in Afghanistan and Iraq, only to be set free again. At GTMO, the reengagement rate consistently hovers in the 30-35% range. If a detainee is clearly part of the enemy, the burden should be on him to demonstrate that he is unlikely to go back. Otherwise, that person should stay in detention until the war is over or until another viable opportunity to mitigate his threat becomes available.

But if the United States decides to detain new enemy fighters in its current wars, it must treat them properly. Doing otherwise not only harms short-term operational interests and puts its people at risk of prosecution, it hands the enemy invaluable propaganda to bring more recruits into the conflict. President Trump has suggested that torture works and that the United States should "fight fire with fire."[8] But re-engaging in "enhanced interrogation techniques" would be a huge mistake. As mentioned above, detention in wartime is non-punitive – detainees are only being held to prevent them from returning to the fight. Therefore, the law requires that detainees be treated humanely and with respect. States may certainly interrogate captured enemy forces, but that interrogation must not become coercive or cruel. Too often the discussion on torture focuses squarely on the question of effectiveness, with some claiming that it is always effective and others claiming that it never is. Military and civilian interrogators have found that non-coercive methods are simply more likely to yield more reliable information over a greater period and in greater quantity.[9] Or, as Secretary of Defense James

Mattis reportedly asserted, "give me a pack of cigarettes and a couple of beers, and I do better with that than I do with torture."[10]

The United States has already had this debate and rightly concluded that it does not and cannot condone the use of torture or cruel, inhuman, or degrading treatment for myriad reasons. Torture and ill treatment is illegal and immoral. The United States did significant damage to its national reputation, war effort, and interoperability with allies using harsh interrogation techniques and poor treatment in the early days of its detention operations, the consequences of which it continues to experience. The interrogation techniques in the Army Field Manual[11] and the standards in the Geneva Conventions work, and they keep us in good standing with the law, our allies, and the international community.

Beyond interrogation, though, the United States should continue to treat detainees in accordance with all law, policy, and regulations. All three branches of government and both political parties have agreed that detainees must be afforded the basic protections found in Common Article 3 of the Geneva Conventions, and the U.S. Government has wisely exceeded its legal requirements pertaining to treatment standards for well more than a decade. Humane treatment is not only legally and morally required, but it benefits our troops and avoids needlessly complicating our detainee operations. Having uniform, clear, and principled rules helps to prevent abuse and allows personnel working detention operations to operate free from fear of future repercussion. In addition, detainees will be more compliant, less disruptive, and less violent to the guards and each other.

The good news for the United States is that it has already developed and adopted a pragmatic and progressive detention policy. By defining and restraining its power over individuals in its war with terrorist groups, the United States has created a principled, sustainable, and credible detention regime that serves the United States'. interests while providing a standard consistent with American values. Unfortunately, the United States has largely distanced itself from these successes and pushed detention operations out of its approach to combatting al-Qaeda and ISIS. This has been a grave mistake, and the United States should seize the opportunity with a new Administration to re-embrace law of war detention. If a country is authorized to use lethal force it must also be authorized to detain those same individuals instead.

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[1] On the campaign trail and in office, Trump has advocated for a number of detention-related actions, including keeping the detention facility at Guantanamo (GTMO) open and adding to its detainee population, using enhanced interrogation techniques that include and surpass waterboarding, and trying American citizens suspected of terrorism in military commissions.

[2] Ryan Vogel and William Lietzau, "Trump's Opportunity to Get GTMO Right," *Lawfare*, January 27, 2017 available at https://www.lawfareblog.com/trumps-opportunity-get-gtmo-right.

[3] "President Obama Defends Counterterrorism Plan Before Handover to Trump," *Chicago Tribune*, December 6, 2016, available at http://www.chicagotribune.com/news/nationworld/ct-obama-counterterrorism-speech-20161206-story.html.

[4] See e.g., Barack Obama, Remarks by the President at the National Defense University, May 23, 2013, available at https://obamawhitehouse.archives.gov-/the-press-office/2013/05/23/remarks-president-national-defense-university.

[5] *See Al-Skeini and others v. United Kingdom, App. No. 55721/07, 7 July 2011; see also Al-Jedda v. United Kingdom*, App. No. 27021/08, 7 July 2011.

[6] Joined cases of Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence [2014] EWHC 1369 (QB).

[7] Traditionally, the United States has approached terrorism primarily as a law enforcement matter, occasionally relying on the military to reach dangerous individuals when law enforcement approaches were inadequate for accomplishing the objective. For example, the Clinton Administration primarily relied on law enforcement tools to combat terrorism throughout the 1990s, including its response to the 1993 World Trade Center bombing by terrorists. However, the Clinton Administration used Tomahawk cruise missiles to strike terrorist camps in Afghanistan and Sudan in 1998 after the embassy bombings in Nairobi and Dar es Salaam.

[8] Dan Merica, "Trump on Waterboarding: 'We Have to Fight Fire with Fire,'" *CNN.com*, January 26, 2017, available at http://www.cnn.com/2017/01/25/politics/donald-trump-waterboarding-torture/.

[9] See e.g., Ali Soufan, "My Tortured Decision," *New York Times*, April 22, 2009, available at http://www.nytimes.com/2009/04/23/opinion/23soufan.html.

[10] Sheri Fink and Helene Cooper, "Inside Trump Defense Secretary Pick's Efforts to Halt Torture," *New York Times*, Jan. 2, 2017, available at https://www.nytimes.com/2017/01/02/us/politics/james-mattis-defense-secretary-trump.html

[11] Army Field Manual 2-22.3.

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