



# Detention Operations Policy & the Global War on Terrorism

Office of Detainee Affairs  
Presentation for the University of California - Berkeley  
November 30, 2005

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## Terrorism, unfortunately, is not new....

### ▶ History of the Thuggees & India

- Using “terror” ...
  - Thuggee’s in India lasted 300 years
  - Various sources credit them with killing over 2 million people in India.
  - Thuggees are much more akin to a psychotic group of criminals than what we know as “terrorism” today.
  - Ultimately, the British decided “enough is enough” and broke the backs of the Thuggees by killing about 4000+ of the members – often publicly.



Cult of Kali depicted in  
*Indiana Jones and the Temple of Doom*



## What changed on September the 11<sup>th</sup>?

- ▶ **On 9/11, America..**
  - Realized that al Qaeda was more than a criminal threat and enterprise.
  - That UBL, the network of AQ, and the Taliban posed a dangerous threat and amassed a capability to attack the USG *on its own soil*.
  - That counter-terrorism and anti-terrorism efforts required a comprehensive use of all US resources – it was not a law enforcement problem alone.



*Pentagon on fire and partially destroyed following the crash of American Airlines Flight 77*



## The Global war on Terrorism is joined....

- ▶ Al Qaeda had declared war on the US long before 9-11.
- ▶ Two “fatwas” of al Qaeda
  - Attack our Military
  - Attack our citizens
  - Attack our friends and allies
- ▶ This is not a rhetorical war. Al Qaeda has attacked our military, our citizens, citizens of other nations, our friends, our allies, and our interests... and continues to do so.
- ▶ If they could strike again they will – have no illusions of restraint.



*Public Enemy #1 – Usama Bin Laden*



## The Global war on Terrorism is joined....

- ▶ The United States, its allies, and the world recognized that the threat posed by al Qaeda, the acts perpetrated against the US, were acts of war...
  - NATO invoked Article V of the treaty; the collective defense provision.
  - ANZUS collective defense provisions invoked.
  - OAS offers assistance..
  - Rio Treaty







## The Global war on Terrorism is joined....

- ▶ On October 7 – the United States uses military force against those who attacked it.
- ▶ A coalition of more than 40 countries joined the US in Operation Enduring Freedom (OEF).
- ▶ OEF remains active as elements of the Taliban and al Qaeda network attempt to destroy the Karzai government and attack US forces in Afghanistan.



Over 40 Countries compose the Coalition Forces in OEF under Gen. Abazaïd's Command in US CENTRAL COMMAND or "CENTCOM"



## In war – Combatants are Captured.

- ▶ In armed conflicts, some combatants survive and continue to fight, some are killed, and some get captured by the enemy.
- ▶ At Guantanamo – or “GITMO” (written as GTMO) – al Qaeda and Taliban detainees (and supporters) are detained according to the laws of war.
- ▶ The framework of their detention presents unique challenges for international politics.



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*Guantanamo Naval Air Station, Cuba*



## A brief foray into Political Science and Theory

- ▶ **Sovereignty, Authority and War**
  - Thompson’s work about Mercenaries, Pirates, and Sovereigns.
  - The history of the last 100 years or so is one of centralizing international warmaking authority.
  - It also developed a normative understanding of criminal activity as “inside” the boundaries of the nation-state, and war-making authority **OUTSIDE** the nation state. Thus acts committed against states were generally viewed in terms of international conflict – not crime.
  
- ▶ **The affect of this process on the development of the law of war is profound – namely, war is normatively understood as a violent discourse between *primarily nation-state actors*.**
  
- ▶ ***However, like sovereignty as a concept – these normative understandings are not static and are shaped and interpreted in large measure by “power politics”***





## Presidential Address to the Joint Session of Congress

### ▶ Freedom at War with Fear Speech

“This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. **And we will pursue nations that provide aid or safe haven to terrorism.** Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”



## Terrorism as War and Application of LOAC

- ▶ The United States adheres to the rule of law, including the laws of war, and has championed the rule of law.
- ▶ However, the law of war, as one will recall – is a STATE-CENTRIC system of international obligations => not individualistically oriented.
- ▶ Thus, the challenges faced by the USG were...
  - What is the legal status of detainees in GWOT?
  - Given that legal status – what protections (either by law or policy) should apply to those detainees?
- ▶ Answers to these two questions are found in the President's February 7, 2002 memorandum (available at the GW NSC archive - <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>)



## USG Policy...

Our recent extensive discussions regarding the status of al-Qaida and Taliban detainees confirm that the application of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (Geneva) to the conflict with al-Qaida and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm - ushered in not by us, but by terrorists - requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva...

Presidential Memorandum – February 7, 2002

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## USG Policy...

...2. Pursuant to my authority as commander in chief and chief executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the attorney general in his letter of February 1, 2002, I hereby determine as follows:

- a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaida is not a High Contracting Party to Geneva.
- b. I accept the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise the authority in this or future conflicts.

Presidential Memorandum – February 7, 2002

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## USG Policy...

**Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.**

Presidential Memorandum – February 7, 2002

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## Combatants and the Rules of War

- ▶ **Combatants, in a traditional war setting, are granted rights and privileges under the Geneva Conventions because they conform to specific obligations.**
  - **The purpose of the Geneva Conventions, or the law of war in general, is to regulate belligerency between state actors.**
  - **Although it may seem odd – the underlying premise of the law of armed conflict is that even in war, states share a common interest and framework.**
  - **The Conventions apply “high contracting parties” – namely States.**
- ▶ **Al Qaeda is not a party to any international treaty.**
- ▶ **The USG position is that the Taliban did not conform to the laws of armed conflict – for various reasons.**



## Implications

- ▶ **Unlawful Enemy Combatants may be detained until the cessation of hostilities.**
- ▶ **No member of the al Qaeda or Taliban is a prisoner of war.**
- ▶ **Regardless of the legal status of detainees in DoD custody, it is our policy and practice to treat all detainees humanely.**





## Terrorism and Criminality

- ▶ Congress authorized the use of military force against al Qaeda, the Taliban, and their supporters for two key reasons:
  - Criminal approaches are essentially reactive => convict “bad guys” after they commit a criminal act.
  - The threats posed by al Qaeda were beyond the ability of the law enforcement community to handle.
- ▶ Congress also recognized the inherent right of self-defense for the United States and the authority of the President, as Commander-in-Chief, to protect the people of the United States.
- ▶ As a result, the Joint Senate Resolution reads as follows:



## **Congress' intent... wage war against terrorists..**

- ▶ **Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and**
- ▶ **Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and**
- ▶ **Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and**
- ▶ **Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and**
- ▶ **Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,**



## Authorization for Military Force

**That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.**

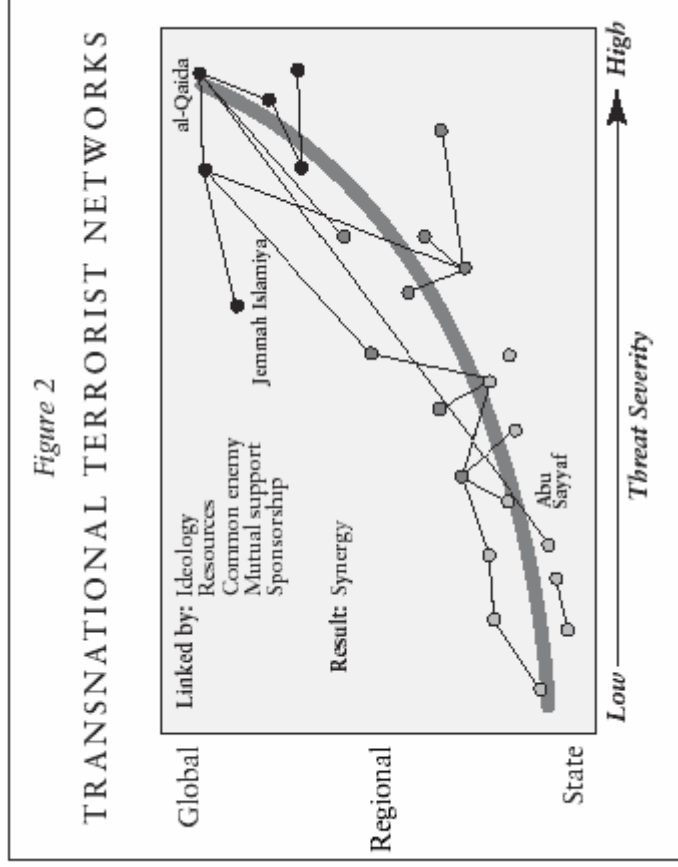
S.J. Res. 23 - 2001

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# Desired End State of GWOT



From the 2003 Counter-Terrorism Strategy of the US

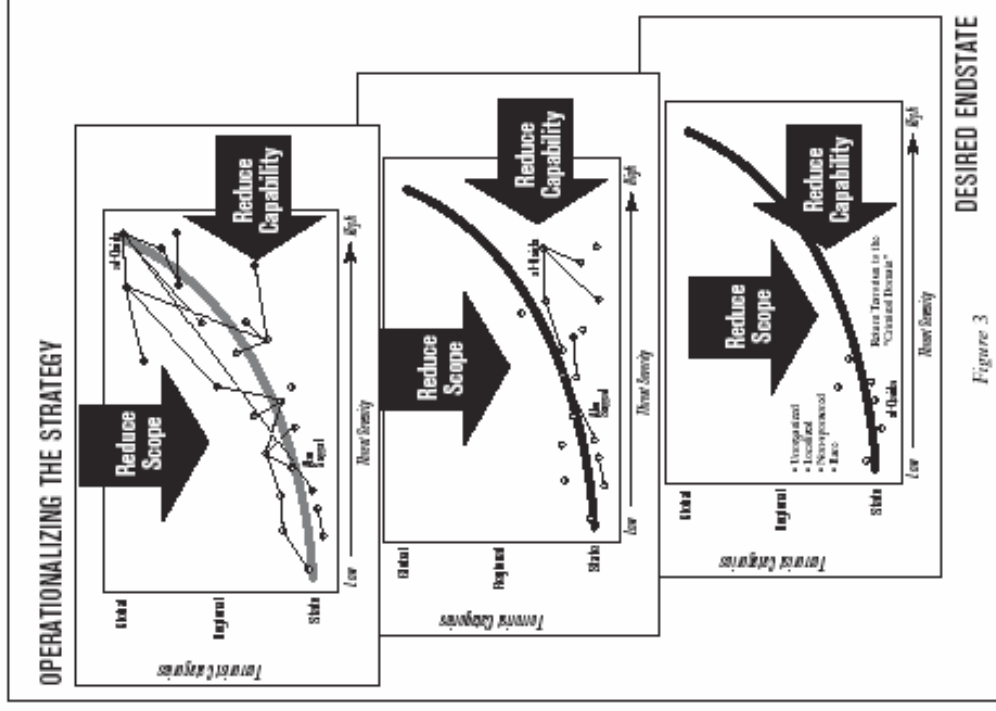
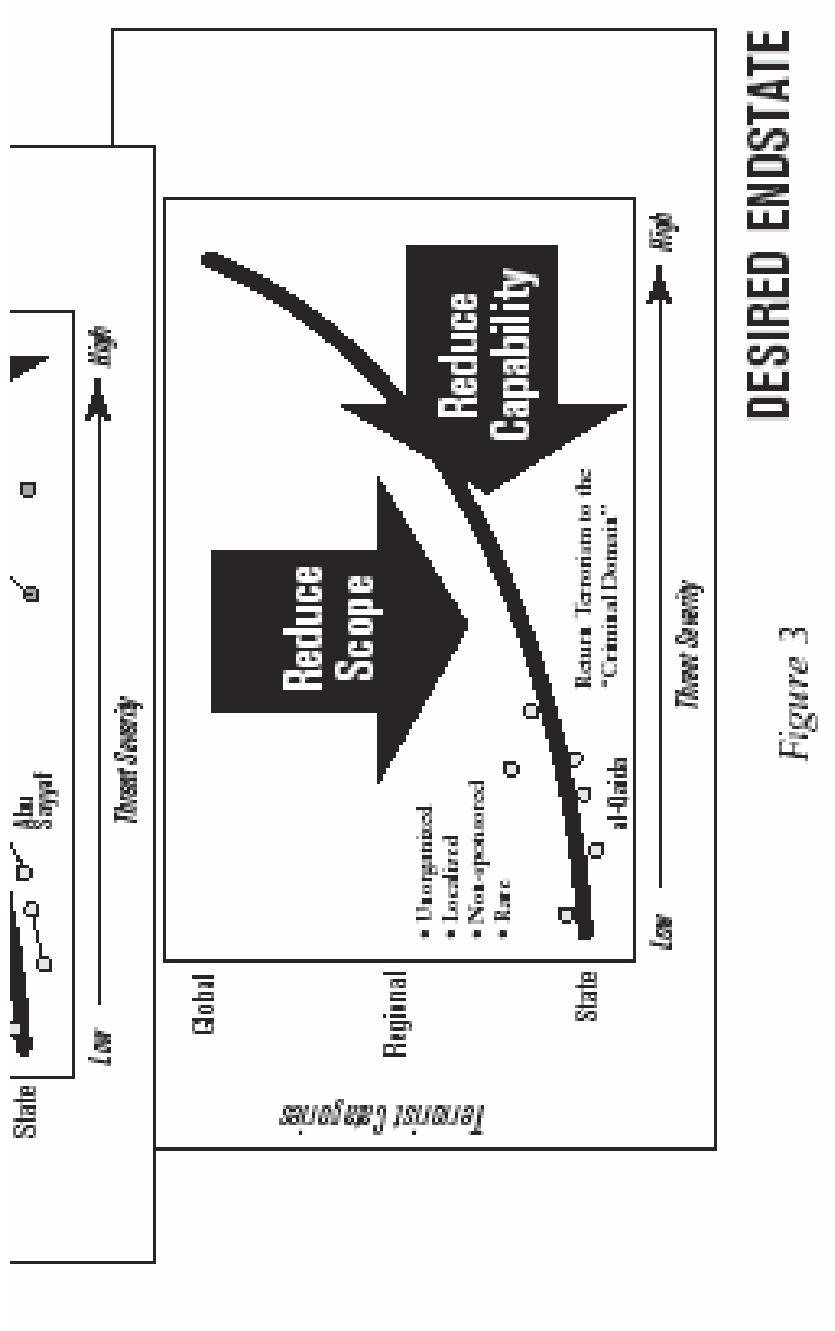


Figure 3



# Desired End State of GWOT



DESIRED ENDSTATE

Figure 3

From the 2003 Counter-Terrorism Strategy of the US



## Unprecedented Review Processes at GTMO

- ▶ Every GTMO detainee has received a Combatant Status Review Tribunal or CSRT
- ▶ Every GTMO detainee has or will receive an Administrative Review Board to determine if we need to continue to hold.
- ▶ We do not want to be the world's jailer – but we have an imperative need to protect our country.
- ▶ Some we have released have returned to the fight.



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## **Returning detainees to Home Governments**

- ▶ **The United States fully complies with its obligations under international law.**
  - **Notably – the Convention Against Torture**
  - **...and the Geneva Conventions**
- ▶ **We have repatriated several detainees – not a single one has been harmed by home governments.**
- ▶ **We have decide not to repatriate detainees because of concerns of mistreatment or torture.**



## **More Governments need to take responsibility**

- ▶ **The US and the Govt. of Afghanistan have reached an understanding whereby the majority of Afghan detainees captured in OEF will be repatriated to Afghan control.**
- ▶ **The detainees held in GWOT are dangerous people – we understand why governments are hesitant to take them back.**
- ▶ **Some governments, however, have neither the means or the will to hold these combatants – that must change.**
- ▶ **The ability to globalize the effort is key – nations must recognize their obligations as sovereigns to accept responsibility.**





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## Summary

- ▶ The US is at war with al Qaeda, the Taliban, and their supporters – the law of war governs that conflict.
- ▶ The detention of enemy combatants is subject to that law and the USG adheres to it.
  - We will continue to detain fighters on the battlefield.
  - We can hold them until the cessation of hostilities.
- ▶ Because of the nature of the conflict, the fact that terrorists are sub-national actors, neither the law of war, nor criminal law, cleanly and neatly apply. Ultimately, as the US counter-terrorism strategy describes – a transition from war to policing is the end state.
- ▶ That said – USG policy is focused on not holding those longer than necessary and has taken unprecedented steps to provide detainees with administrative process.
- ▶ Governments need to accept responsibility for their nationals who commit acts of terrorism.