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Disaggregating 'War'

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Abstract:

This Term, the Supreme Court addressed several important questions regarding the role of law and legal institutions in the “war on terrorism.” Specifically, the Court issued important rulings concerning (1) the scope of the President’s war powers; (2) the rights of enemy combatants; and (3) the proper role of courts in time of war. Much remains unresolved by the Court’s opinions, but several basic propositions about the legal concept of “war” are reaffirmed. Presidents enjoy some extraordinary powers in time of war; the role of the judiciary is diminished in some important respects (but not extinguished) in time of war; a specialized legal regime, the “law of war,” is activated in time of war; the President, as Commander-in-Chief, is entitled to substantial deference in matters directly related to the conduct of war; and in particular, the President enjoys wide latitude in the treatment of the enemy. These cases present remarkably complex legal problems because defining “war” (and its legal consequences) is as difficult as it is necessary. What is a “war”? When does it begin and end? What rules apply in time of war? What is the proper distribution of institutional authority in time of war?

These questions are presented in acute form in the “war on terrorism.” Indeed, it is now clear that the September 11 attacks (and the response to them) placed the concept of “war” under tremendous strain. Consider that the Bush administration has advanced several controversial claims that turn substantially on the proper meaning of “war.” For example, the administration characterizes U.S. antiterrorism policy as the “war on terrorism.” The administration also characterized the September 11 attacks as “acts of war” triggering the right of self defense under the United Nations Charter. The President also characterized the attacks as “war crimes”—rendering the perpetrators amenable to prosecution before ad hoc military commissions. In addition, the rights of several hundred detainees are sharply delimited, according to the administration, because they are “enemy combatants”—that is, they took up arms against the United States in time of war. The administration nevertheless insists that the law of war does not protect these “combatants” because they do not qualify as “prisoners of war.” Critics, on the other hand, take issue with each of these claims. Some argue that the United States cannot be at war with a terrorist network. Others insist that terrorist attacks do not constitute “acts of war” or “war crimes.” Still others insist that a formal declaration of war is necessary to activate certain extraordinary presidential powers. And some argue that the law of war confers substantial legal protection on terrorist fighters captured and detained by the United States.

Although all these disputes turn on how best to define the existence and legal consequences of “war,” they each revolve around quite different policy concerns. That is, the legal concept of “war” is expected to do different kinds of work in each of these issue areas. Drawing on this point, I argue that “war” should be disaggregated into three

distinct concepts: "armed conflict" –which defines the conditions under which international humanitarian law is applicable; "armed attack" –which defines the conditions under which states are entitled to use force in self defense; and "war" proper—which defines the conditions under which various emergency powers are activated as a matter of domestic law.

Scholars, litigants, and courts (including the Supreme Court) often conflate these notions of "war"—invoking policy arguments from one domain in service of a claim peculiar to another. For example, some proponents of broad presidential war powers argue that a formal declaration of war is not required to activate extraordinary powers traditionally confined to "times of war" because the contemporary law of war applies to all armed hostilities that *de facto* constitute "armed conflicts." This claim—which enjoys a certain surface appeal—is less persuasive when the two strands of war law in play are disentangled. The low threshold of application for the law of war (or "international humanitarian law" in contemporary parlance) reflects the principal policy concern animating this body of law: the under-application of humanitarian principles in the conduct of organized hostilities. The declaration of war requirement for the activation of certain emergency powers reflects other policy concerns such as (1) the importance of providing formal notice to individuals (and perhaps other states) of the existence of a state of war; and (2) the importance of diffusing formal authority to trigger emergency powers. The distinctive characteristics of the "war on terrorism" might clearly constitute an "armed conflict" within the meaning of the law of war, and yet not constitute a "war" for the purposes of activating a broad range of domestic emergency powers. Moreover, the "war on terrorism" might "never end" in the sense that international humanitarian law should govern each and every U.S. military operation (irrespective of where, when, or against whom the operation is directed). Nevertheless, it might be essential to cabin temporally the "war"—understood as an authorization to suspend certain aspects of ordinary law.

The upshot is that disaggregating "war" along the lines proposed here facilitates a more focused analysis of the war-related legal disputes arising out of the current conflict. To illustrate this point, I analyze the Supreme Court's opinions in *Hamdi* and *Rasul* in view of the disaggregation of "war"—emphasizing how the disaggregation model provides better answers to the pressing questions confronted by the Court.