
There's No Such Thing as Peacetime

We've spent years believing the war on terror will end and civil liberties will be safe again. It's time to accept that the war will go on forever -- and take steps to protect life and liberty in the new normal.

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Most of us view perpetual war as deeply inimical to human rights, democracy, and the rule of law.

We're not wrong: Since the 9/11 attacks, two successive U.S. presidential administrations have embraced indefinite detention, massive secret surveillance programs, covert cross-border targeted killings, and a host of other troubling practices. In reaction, those concerned with rights and the rule of law have **called for an end** to the post-9/11 "war paradigm," insisting that counterterrorism should not be conceptualized as war and urging a return to a law enforcement framework.

That's an understandable impulse. It's also largely a waste of time and energy. A decade and a half after 9/11, the war on terror continues to open new fronts from Syria to Libya to Nigeria. And it's hard to see this changing under a Hillary Clinton or Jeb Bush administration. Perpetual war is unlikely to end in our lifetimes. Until we accept this, the post-9/11 erosion of human rights is likely to continue.

That's counterintuitive, but bear with me. Consider, first, the question of whether war and peace have ever been as distinct as we like to imagine and whether war has historically been the exception or the norm. Second, consider the degree to which the protection of human rights and the constraint on untrammelled state power currently depends on our ability to draw sharp lines between war and peace (or, at least, between war and not-war). Much that's considered unacceptable and unlawful in peacetime becomes permissible in wartime. Third, consider that today it has become virtually impossible to draw a clear distinction between war and not-war — not just because of bad-faith legal and political arguments made by U.S. officials (though we've seen plenty of those), but because of genuine and significant changes to the global geopolitical landscape. Finally, think about what we might gain if we abandoned the effort to draw increasingly arbitrary lines between peacetime and wartime and instead focused on developing institutions and norms capable of protecting rights and rule-of-law values at all times.

1. "Only the dead have seen the end of war."

"I do not believe America's interests are served by endless war or by remaining on a perpetual war footing,"

President Barack Obama **said in February**. That this statement came as the U.S. president unveiled his request for Congress to authorize military force against yet another enemy — the self-styled Islamic State, this time — was an irony lost on few observers.

No modern politician will praise war. Individual wars, perhaps — but not war as such.

American political culture regards war as an occasional but regrettable necessity, at best, and a tragic and wholly avoidable failure, at worst. Either way, we view war as the exception and peace as the norm. As Obama put it in a 2013 **speech**, "Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises."

On the contrary: For much of human history, war has been the norm and peace has been the exception, though Americans have been largely blind to this reality. Foreign attacks on U.S. soil have been few and far between, and for most of U.S. history, the country's wars have been fought by a small and highly professionalized military, making them largely invisible to the bulk of the American population.

The American Civil War — one of the few to visit its harms on the nation as a whole — occasioned the first U.S. government effort to codify the laws of armed conflict, a set of 1863 instructions issued to Union Army troops during the Civil War. "Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse," declared General Orders No. 100, better known as the **Lieber Code**. "Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace."

This was an optimistic perspective in 1863, coming, as it did, in the middle of a century kicked off in Europe by the Napoleonic Wars, which lasted for over a decade and killed more than 3 million people, and during a bloody civil war that killed some 2 percent of the U.S. population. The 19th century was racked by conflict, from uprisings in Serbia and Greece to the Crimean War and the wars of Italian unification.

The 18th, 17th, 16th, and 15th centuries were similarly marred by widespread conflict, punctuated less by periods of peace than by periods of smaller-scale conflicts. Look back further, and the same is true. As historian Michael Howard put it in *The Invention of Peace*, “Archaeological, anthropological, as well as all surviving documentary evidence indicates that war, armed conflict between organized political groups, has been the universal norm in human history.”

And the century that followed the Lieber Code's historical misremembering was no better: Two world wars wiped out tens of millions, to say nothing of the numerous non-Western conflicts that engulfed parts of Africa, Asia, and Latin America. Even the fortunate United States was in a state of near-constant warfare throughout the 20th century. There were the two world wars, of course, and the wars in Korea and Vietnam. And there were many other conflicts between 1900 and 2000 that Americans have largely edited out of the national narrative. Between 1900 and 2000, the United States has also used military force in China, Cuba, Mexico, Haiti, Panama, the Philippines, the Dominican Republic, Nicaragua, Turkey, Russia, Cambodia, Laos, the former Yugoslavia, Lebanon, Grenada, Libya, Sudan, Iran, Iraq, Guatemala, and El Salvador, among other places. Granted, these were mostly “small wars” — but as legal historian Mary Dudziak notes in her fine book *War Time*, “It is only through forgetting the small wars that so much of American history is remembered as peacetime.”

Why should Americans expect anything different from the 21st century? In the century's first 15 years, the United States has already fought two large-scale ground wars, one in Iraq and one in Afghanistan, and used air power and special operations forces to kill perceived enemies in a dozen other places, from Pakistan, Yemen, and Libya to Somalia, the Philippines, and Syria.

The stunning rise of the Islamic State is yet another reminder that turning the page on war is easier said than done. The notion that states can monopolize violence seems increasingly quaint: The technologies of destruction are cheap and widely available, and acts of brutality can easily be broadcast on YouTube and Twitter. We are, as the military puts it, in an *era of persistent conflict*. It's an era that won't end soon.

2. Policing the boundaries between war and peace

It goes against the grain to accept that wartime is unlikely to end. If war has been a universal norm of human history, so too has been the human effort to draw sharp lines between war and peace. History and anthropology books offer numerous examples of elaborate rituals designed to delineate war's boundaries, including complex initiation rites preceding wars and the elaborate painting and costuming of warriors.

Old Norse literature tells of the “berserkers,” who changed form and personality by donning the pelts of wolves or bears before going into battle. In 19th-century Liberia, warriors wore special masks during raids, and war was prohibited while “bush school” was in session for boys and girls. In the American Southwest, Navajo warriors spoke a different dialect after setting out on raids, using what they called a “twisted language” with a special vocabulary. The Navajo also sought to carefully maintain the spatial boundaries between war and non-war: “On the way home from a raid,” noted anthropologist D.W. Murray wrote, “a symbolic line would be drawn in the desert, the men would line up facing the enemy country, and as they sang they all turned toward home and the common language was resumed.”

Modern Americans are not as different from the Liberians or the Navajo as we believe. The U.S. Constitution assumes that wars will be formally “declared,” while the Geneva Conventions presume that battles will be fought upon clearly delineated battlefields by uniformed soldiers operating within specialized, hierarchical military organizations. The modern law of war is just the latest iteration of the age-old human effort to draw Navajo-like lines between war and peace.

In fact, we have staked quite a lot on our ability to do so. Both domestic and international law differentiate between peacetime rules and wartime rules, and a vast chasm lies between the two. In times of “peace” — which we take to be “normal” times — we expect governments to refrain from infringing upon their citizens' civil liberties and to refrain from using lethal military force inside the territories of other sovereign states. In times of war — which we imagine to be an exceptional state of affairs — the law gives states far greater latitude when it comes to intrusions on individual liberty and the use of lethal force.

Historically, Congress has been willing to grant broader powers to law enforcement, military, and intelligence agencies in times of war and perceived national security crisis, and U.S. courts have been willing to subject government actions to a lower degree of scrutiny when these actions are taken in the name of national security. As the Supreme Court put it in 1981, “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”

U.S. history is **replete** with examples of restrictions on individual liberties that have been upheld in the context of national security imperatives but that would likely not have been permitted absent such justifications. During World War I, Congress passed the 1917 Espionage Act and the 1918 Sedition Act, which placed severe limitations on First Amendment rights and were used to prosecute more than 2000 people; for the most part, U.S. courts upheld the provisions of these acts in the name of national security. In 1940, Congress passed the Alien Registration Act with similar limitations on free expression. The courts similarly upheld it on national security grounds. The courts also upheld still more severe interference with individual liberty: In *Korematsu v. United States*, for example, the Supreme Court notoriously declared that “military urgency” justified the internment of Japanese-Americans during World War II.

The **same pattern** has held since 9/11. The Patriot Act, the Military Commissions Act, and recent amendments to the Foreign Intelligence Surveillance Act have undermined due process protections and permitted new government intrusions on privacy. The 2001 Authorization for Use of Military Force, broad to begin with, has been interpreted by the executive branch as a virtual **blank check**, permitting drone strikes and military raids in a widening range of states against an expanding list of targets. As in the past, Congress has largely acquiesced, and the courts have found a host of reasons to dismiss rights-based challenges to U.S. government counterterrorism actions (by frequently accepting government assertions that permitting such lawsuits to move forward would reveal secrets damaging to U.S. security interests, **for instance**).

International law is similarly permissive in times of threat and conflict. In peacetime, the willful killing of human beings is a crime. Even the state's law enforcement agents are forbidden to use lethal force except in defense of themselves or others: The police, for instance, can't just decide to bomb an apartment building in which suspected criminals lie sleeping, and they can't write off the deaths of innocent people as “collateral damage.” In peacetime, the intentional destruction of private property and severe restrictions on individual liberties are also impermissible.

Wartime **turns these rules** upside down.

Actions that are considered both immoral and illegal in peacetime are permissible — even praiseworthy — in wartime. Willful killing is permitted under the law of armed conflict, as long as those targeted are enemy combatants or others participating directly in hostilities. And under the international law of armed conflict, individuals can be targeted based on their status as combatants, rather than solely on the threat posed by their activities. Thus, during a war, a combatant can lob a grenade into a building full of sleeping people, as long as he reasonably believes the sleeping people to be enemy soldiers. Even actions that a combatant *knows* will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality, and distinction.

Under international law, various lesser forms of coercion and intrusion are also permissible in wartime though unlawful in peacetime. In wartime, the Geneva Conventions permit enemy combatants to be detained for the **duration of the conflict**, and even those determined to be civilians can be indefinitely detained for “imperative reasons of security.” In wartime, generally speaking, private communications can be lawfully restricted or intercepted; private property can be searched and destroyed, and so on.

We have gambled heavily on our ability to draw and maintain clear boundaries between war and peace. Consider U.S. drone strikes outside of “hot battlefields.” If the United States is at war with al Qaeda and its associates and a U.S. drone strike kills an individual suspected of being a terrorist “combatant,” the killing is presumptively lawful under the law of armed conflict. If the United States cannot be said to be “at war” with al Qaeda and its associates, the same act becomes an extrajudicial execution — or, to put it more bluntly, assassination, or murder.

There are many things we are willing to tolerate on an exceptional basis, but not if they become the norm. Thus, indefinite detention for the duration of a conflict is one thing if a conflict is likely to last for two years, or five, or even 10. It's another thing altogether when a conflict can confidently be expected to last a lifetime. The suspension of civil liberties is one thing during an emergency of short duration, and another thing over the long term. The killing of human beings without due process or any mechanisms for accountability is one thing in the trenches of World War I, and another thing when the killings can take place anywhere on Earth, at any time, against an ill-defined, non-uniformed, and changing foe.

3. Things get blurry.

When war is relatively bounded, when it is something that happens within a defined place and time and involves a clearly defined group of actors, we can tolerate its relatively unconstrained violence. But the nature of modern security threats resists all efforts at categorization.

In a war against a geographically diffuse terrorist network, the spatial boundaries are necessarily arbitrary. A war against constantly morphing organizations that often lack centralized leadership structures cannot “end” with a peace treaty. A war against a constantly changing set of actors who move from place to place and from organization to organization can have no clearly defined “enemy.” (Just look at the difficulty that the United States has had in defining the “associated forces” of al Qaeda and the Taliban or in placing geographical limits on efforts to counter the Islamic State, which has now declared “provinces” in multiple noncontiguous regions from Libya to Egypt.)

Rights advocates are often inclined to dismiss the increasing blurriness of the boundaries between war and peace as merely a product of disingenuous U.S. government rhetoric. They are wrong to do so. No question, there has been some disingenuous rhetoric, but recent decades have also seen real and significant changes in the geopolitical landscape: Revolutionary technological changes have reduced the salience of state borders and physical territory and have increased the lethality and disruptive capabilities of nonstate actors and even individuals. The nature of modern security threats makes it virtually impossible to draw neat lines between war and peace, foreign and domestic, emergency and normality.

Today, this is the central challenge to hard-won global gains in human rights and the rule of law: Most of the institutions and laws designed to protect rights and prevent the arbitrary or abusive exercise of state power rest on the assumption that we can readily distinguish between war and peace, yet there is no longer any principled way to do so. The modern law of armed conflict is little more useful to us than the Navajos' lines in the desert sand or their symbolic shift from ordinary language to the "twisted language" of war.

4. From rules for wartime and peacetime to rules for all times

It's time to stop relying on lines drawn in the sand; the wind and waves always wash them away. If the rule of law and the protection of human rights are predicated on our ability to distinguish between war and peace, but we can find no principled way to do so, we will continue to see rights erode and unaccountable state power expand in the coming years and decades.

We can respond to the post-9/11 erosion of rights in one of two ways. First, we could try to shoehorn war back into its box and insist on an end to the "war" on terror, a wholesale rejection of the war paradigm, and a return to the law enforcement framework that we associate with times of peace. This is what most human rights and rule-of-law advocates have been trying to do for the last decade and a half, with little success.

Alternatively, we can abandon the Sisyphean effort to "end" war and instead focus on developing norms and institutions that support rights and the rule of law, but are not premised on sharp lines between war and peace. We can begin to develop a politics for the space between total war and total peace — a politics that recognizes both total war and total peace as rare and that accepts that a murky middle ground is likely to be the norm for many years to come. And has been all along.

As Dudziak **puts it** in *War Time*, "Military conflict has been ongoing for decades, yet public policy rests on the false assumption that it is an aberration. This enables a culture of irresponsibility, as 'wartime' serves as an argument and an excuse for national security-related ruptures of the usual legal order. If we abandon the idea that war is confined in time we can see more clearly that our law and politics are not suspended by an exception to the regular order of things.... Wartime has become the only kind of time we have, and therefore is a time within which American politics must function." She **adds**, "A cultural framing of wartimes as discrete and temporary occasions, destined to give way to a state of normality, undermines democratic vigilance."

What would it mean, in practice, to develop a law and politics premised on the assumption that we will remain unable to draw meaningful boundaries between war and peace? I don't know. It will take many minds and many years to figure this out. But the task is not impossible if we stick to the core principles enshrined in America's founding documents: that life and liberty are unalienable rights, that no person should be arbitrarily deprived of these rights, and that no one — no individual, no organization, no state — should be able to exercise power unaccountably.

If we take these principles seriously, we might, for instance, develop better mechanisms to prevent arbitrariness, mistake, and abuse in targeted killings. At the moment, debates about targeted strikes fall prey to meaningless war/peace dichotomies: Some insist that no person should be executed by the state without the full range of due process protections provided by criminal law, while others on the more hawkish side insist that fighting wars effectively requires that we accept a high risk of mistake, because judicial oversight of the battlefield would be absurd and unduly burdensome.

But there is surely an alternative: better laws and institutions. We need laws and institutions that accept that certain kinds of threats bring with them an urgency rarely encountered in law enforcement and that there is therefore a related need for at least temporary secrecy. At the same time, laws and institutions designed for an age when ongoing decentralized threats are the norm rather than the exception must be more rigorous in oversight, with greater transparency and more effective accountability mechanisms than would be required in a conflict between states on a temporally and territorially bounded battlefield.

We'll never get there, though, if we continue to put our faith in lines drawn in the sand. The Forever War is here to stay. Wartime is the only time we have. We might as well get used to it — and get to work.

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