Lawfare

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The term “lawfare” describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals.

Al Qaeda, of course, is an experienced lawfare practitioner. Its training manual, written by British and American torture experts in Manchester, England, openly instructs detained al Qaeda fighters to claim torture and other types of abuse as a way of obtaining a moral advantage over their captors. That advice has been routinely followed by detainees at Guantanamo Bay, who have succeeded in generating incessant demands—from European officials among others—for the base’s closure and their own liberation.

These efforts, however, pale to insignificance compared with the lawfare initiative in the U.S. federal courts on behalf of al Qaeda and Taliban detainees. The Statistics Amended from habeas corpus petitions to free captured enemy combatants—cases that were dismissed by the U.S. Court of Appeals in Washington, D.C., last Tuesday—tolerate suits seeking monies from U.S. government officials, to challenge the traditional detention of the detainees’ conditions of confinement.

There was aquistic attempt to save Saeed al-Ghamdi’s life by asking a federal court in Washington, D.C., to “stay” his execution by the Baghdad government. Several lawsuits seek to hold the U.S. government liable for the alleged misconduct of other governments. Of these, the lawsuit by Canadian Maher Arar, ostensibly tortured after being “rendered” to Syria, is the best known.

The most significant common thread among all these actions is the clear desire to portray U.S. government actions as illegitimate and unprecedented. In effect, the claims for extensive due process rights for captured enemy combatants that are unproven.

Combatants, whether the regular soldiers of sovereign states, irregular guerillas or terrorists, have never enjoyed the right to contest the legality of their detention in the civilian courts, or to a criminal trial. The U.S. Supreme Court reaffirmed these traditional rules in Hamdi v. Rumsfeld (2004), where a clear majority held that captured al Qaeda operatives could constitutionally be held as enemy combatants for the duration of hostilities without the process required for individuals accused of civilian violations. The only process the U.S. could present was a limited opportunity to contest, before military authorities, the factual basis for classification as an enemy combatant with a limited opportunity for judicial review.

Perhaps the most pernicious ongoing lawfare example is the effort to hold U.S. officials financially liable for their wartime conduct based on the theories developed in Bivens v. Six Unknown Named Agents (1984). In that case, the Supreme Court permitted a civil damage suit against individual federal drug enforcement agents for allegedly violating the plaintiff’s constitutional rights, in particular the Fourth Amendment guarantee against unreasonable searches and seizures.

Several Bivens actions have been filed on behalf of overseas combatants, deployed in a wide array of assets abroad. They are raising and maintaining to provocation abroad. By relieving the pressure on domestic exchange rates and slowing the accumulation of the reserves, the government would not allow the government to control the exchange rate. This would eliminate the fiscal costs of sterilizing inflows, give domestic investors opportunities for international portfolio diversification and stimulate the development of domestic financial markets. The market system would be allowed to invest in a wide array of assets abroad.

There are of course complimentary approaches to gradual capital account liberalization, such as allowing pension funds and other institutional investors to invest abroad. But such alternatives typically do not allow the government to control the quantity and timing of external flows as easily. Furthermore, our proposal would give domestic retail investors experience with international investments and allow for gradual learning-by-investing. In countries with weak financial systems, it would give domestic banks some breathing room to adjust to the new reality of their depositors having alternative investment opportunities. These developments would improve the depth and efficiency of the domestic financial sector, and better prepare the government for more comprehensive capital account liberalization.

Indeed, if appropriately structured, our proposal has the benefit of allowing countries to move toward the goal of capital account convertibility in a carefully calibrated manner, without exposing the domestic financial system to risks associated with uncontrolled outflows. This proposal should not be seen as a surefire way to phase-in policy reforms such as strengthening of the domestic financial system. But may be a way to gradually increase the exchange rate flexibility. By relieving some of the pressures caused by inflows, this approach could create a more sustainable environment for countries to adopt these essential policy reforms. For that alone, it deserves serious consideration. Mr. Prasad is a professor of trade policy at Cornell University. Mr. Rajan is a professor of finance at the University of Chicago’s Graduate School of Business.