

Terrorism Law: Materials, Cases, Comments, Sixth Edition, 2011

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(Selected excerpts)

The War on Terror began for the United States on September 11, 2001, with coordinated suicide attacks using hijacked domestic airplanes by 19 members of a sophisticated international terrorist network known as al-Qa'eda. The simultaneous attacks occurred in New York, Washington, D.C., and Pennsylvania, incinerating 3,000 people and destroying billions of dollars in property. Prior to this attack, America responded to al-Qa'eda and al-Qa'eda-styled terrorism with traditional domestic criminal law tools rooted in the American Constitution. After 9/11 America determined that it would have to resort to the tools associated with the regulation of international armed conflict or law of war.

The question of how to best neutralize members of the al-Qa'eda terror network and associated forces is the central focus of the War on Terror. Prior to 9/11 the United States dealt with al-Qa'eda members in the same fashion as other radical Islamic terrorists—when individuals were taken into custody the United States used domestic criminal law to punish them for various terror related crimes. After 9/11, the United States added the more robust rule of law associated with the law of war to address al-Qa'eda enemy combatants. It is the application of the provisions of the law of war to al-Qa'eda enemy combatants that is most often challenged as “illegal” by critics.

In essence, the central issue in the War on Terror pivots around the question of whether or not the War on Terror is a real war or simply a metaphor, like the “war on drugs” or the “war on poverty.” Simply put, if the War on Terror is a real war, or international armed conflict, then the United States is perfectly at liberty to apply the law of war to the kill, capture, or detain enemy combatants (belligerents). For instance, under the law of war the United States has a wide variety of powerful legal tools at its disposal that would otherwise be unavailable. In accordance with the law of war the United States has the right to: (1) kill al-Qa'eda, Taliban, and associated enemy belligerent forces in armed conflict wherever they are found; (2) detain said enemy belligerents indefinitely until the war is over; and (3) try by military commissions certain enemy belligerents that have violated the law of war. On the other hand, if the War on Terror against al-Qa'eda and associated forces is not a real war, then the United States is most certainly engaging in gross violations of both international and domestic law.

While various ideologues are quick to condemn the actions of the United States in the War on Terror at almost every turn, our representative democracy mandates that the answer to the question can only be found in the official pronouncements emanating from the three branches of government. Of course, the primary dilemma for our government rests in the fact that the law of war was written to address an armed conflict between nation-states, not an armed conflict between a nation-state and a non-state actor such as al-Qa'eda.

As this chapter will demonstrate, all three branches of the United States government have strongly signaled that the United States is acting lawfully in applying the law of war to the conflict with al-Qa'eda and associated forces. From September 11, 2001, when al-Qa'eda foot soldiers killed 3,000 people, President Bush remained unequivocal in his contention that, acting under his authority as the Commander in Chief, the law of war applied. To date, although he has not been as forceful or pronounced as President Bush in his public declarations that the nation is engaged in a real war with al-Qa'eda, President Obama has, by and large, adopted the policies of the Bush Administration by continuing to label enemy combatants, kill them, detain them, and prosecute them in military commissions. In a speech on January 7, 2010, Obama reminded the nation: "We are at war. We are at war against al-Qa'eda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and this is plotting to strike us again. And we will do

whatever it takes to defeat them." In tandem, the Congress of the United States has not formally "declared war" against al-Qa'eda, but there can be no doubt that it has "authorized" this War on Terror. Among the indicators of this fact are the 2001 Congressional Authorization for the Use of Military Force and the striking language first set out in the 2006 Military Commissions Act and subsequently followed by the 2009 Military Commissions Act.

Finally, the Supreme Court has generally followed suit and continues to allow the Congress and the President to conduct this conflict under the law of war with some restrictions. In a nutshell the Court has clearly signaled that the United States has the legal power to designate enemy combatants and detain them until the war is over, subject to additional safeguards, e.g., habeas rights (if detained at Guantanamo Bay, Cuba), due to the nature of the non-State actor enemy. What makes the Supreme Court cases a source of contention is the fact that they are slowly, and quite painfully, developing a new rule of law that will bridge the gap between traditional law of war concepts and domestic criminal law concepts. Given the new threat of al-Qa'eda-styled mega terrorism, it is perfectly understandable that the new body of law will come in bits and pieces. Thus, the Court has signaled some confusion along the way with opinions that are bitterly divided, and broadly presented. Nevertheless, the judicial phrase that best exemplifies the evolving legal theme was rendered in 2004 in *Hamdi v. Rumsfeld*, where Justice O'Connor "made it clear that a *state of war* is not a blank check for the president [emphasis added]...."

Another problem facing the United States in its characterization of the War on Terror as an international armed conflict comes from the international community. Out of the 192 member nations of the United Nations, the United States is the only nation that uses the law of war against al-Qa'eda. Other nations plagued by radical Islamic terrorism have elected to amend their domestic criminal laws to, for example, detain suspected terrorists for extended periods of time, e.g., 28 days in the United Kingdom, without charging the terror suspect with a crime.

In short, the legal and policy frustrations stem from the fact that the United States is looking at a square block called the law of war and trying to fit it into a round peg called the al-Qa'eda virtual State. Obviously, it would be helpful if the international community would come together to develop a new set of rules to deal with the new phenomenon of al-Qa'eda-styled terrorism. Such is not likely, given the fact that the United Nations can't even agree on a definition of the term "terrorism." Nevertheless, al-Qa'eda exhibits many of the attributes of a nation-state; their goal is the goal of a nation at war in contrast to the goal of a criminal organization. Because they hide in the shadows and use the freedoms of open societies to shield themselves, it is imperative that the world community employ the full range of lawful tools to engage and defeat them.

On May 10, 1997, CNN aired a March 22, 1997, interview with Osama bin Laden by Peter Arnett. Bin Laden stated, "We declared jihad against the U.S. government, because the U.S. government is unjust, criminal and tyrannical." On February 22, 1998, Osama bin Laden and his so-called "World Islamic Front" again declared a religious *fatwa* (a formal statement backed by a religious declaration) urging in the strongest terms that all Muslims should engage in violence against "Jews and Crusaders." Rooting his hatred in his interpretation of Islam, he proclaimed:

All these crimes and sins committed by the Americans are a clear declaration of war on Allah, his messenger, and Muslims. And *ulema* (clerics) have throughout Islamic history unanimously agreed that the jihad is an individual duty if the enemy destroys Muslim countries. On that basis, and in compliance with Allah's order, we issue the following fatwa to all Muslims: The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the holy mosque [in Mecca] from their grip.

2.2 An Act of War-The War on Terror

“America is at war.” So stated President Bush’s letter of introduction to the March 2006, National Security Strategy of the United States of America. The phrase “War on Terror” was first used by President Bush on September 11, 2001, aboard Air Force One. His first major public address the next day also declared the terrorist attacks as “acts of war.” In fact, the Bush Administration never departed from the position that the fight against al-Qa’eda and al-Qa’eda-styled terrorism constituted a global war. Although the term War on Terror is not descriptive, for the government of the United States the War on Terror is not a metaphor similar to the “war on poverty” or the “war on drugs.” With the passage of the first Military Commissions Act of 2006, followed by the Military Commissions Act of 2009, there can be no question that both the executive and the legislative branches of the United States clearly view the War on Terror as real war or, in the vernacular of modern usage, a real international armed conflict between the United States and the Taliban, al-Qa’eda, and associated forces. In turn, as the courts continue to rule on various legal aspects of the conflict, it is apparent that they too are willing to accept the fact that the powers used by the United States are more associated with international armed conflict than not.

In a speech delivered in 1984, Ambassador Jeanne J. Kirkpatrick spoke of a coming “terrorist war [against the United States], [that] is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions.” Her words became reality on September 11, 2001, and the world community came to understand terrorism as “an act of war.” Viewing al-Qa’eda-styled terrorism as an act of war is a new manifestation of the changing nature of armed conflict. As such, it poses a new challenge for the historically fixed international rules relating to international armed conflict.

Apart from the enormity of the al-Qa’eda attack, what made the events of September 11, 2001, so vastly different from all previous incidents of terror was that the United States and the North Atlantic Treaty Organization (NATO) both specifically characterized the attack as an “armed attack” on the United States. The unprecedented armed attack determination was significant because it, in turn, immediately signaled that the United States intended to frame the terror attack as an event equivalent to an “act of war” under international law, and not simply a criminal affair to be dealt with by means of traditional law enforcement tools.

Under the law of war, the use of the terms “war” or “act of war” refer to the use of aggressive force against a sovereign State by another State in violation of the United Nations Charter and customary international law. Historically, such illegal acts most often occur without a formal declaration of war; the aggressive act itself triggers the ensuing international armed conflict. Similarly, the term “self-defense” refers to the right of a State to respond with proportionate force to the initial armed attack.

Following September 11, 2001, the United States, NATO, and the U.N. Security Council elected to expand the legal framework concerning the use of force in self-defense to encompass not only any State that had actively participated in the attacks, but any organization or person that was responsible. Accordingly, an authorization for the “use of force” was passed by the United States Congress; the President labeled the attack “an act of war”; NATO invoked its collective self-defense clause, should a NATO member suffer an armed attack; and the U.N. Security Council passed a resolution that employed self-defense terminology associated with those responsible for the attacks. Thus, from its inception, the War on Terror was legally couched by the United States in terms of traditional international law of war terminology, even though the actual attack was carried out, strictly speaking, by a non-State actor.

2.5 Congressional War-Making Power

Congress was also quick to address the attacks in a manner that clearly established the premise that America was engaged in a real “war.” Although Congress elected not to exercise its power to “declare war” under Article I, Section 8, of the Constitution (it has enacted eleven formal declarations of war relating to only five different conflicts of the 200+ times that the United States has introduced military forces into hostilities), it did provide the President with an expansive grant of power to conduct war against al-Qa'eda. Congress clearly authorized the Executive to conduct war. From its very title to its content, the Authorization for the Use of Military Force demonstrated the Congressional desire to frame the use of force as a military action. Specifically, Congress authorized the President to use military force, if necessary, to respond to the attacks with “all necessary and appropriate force against those nations, *organizations*, or *persons* he determines [emphasis added]” were associated with the terror attacks of September 11, 2001. In addition, the resolution also authorized the executive to take action to “prevent any future acts of international terrorism against the United States.” Since the War on Terror is a global conflict, Congress placed no limit on where the President could use military force or for how long. In fact, nothing prohibits the President from applying the law of war within the continental United States. Finally, by inserting language regarding the satisfaction of the War Powers Resolution, Congress further provided the President with solid authority to introduce America's armed forces into hostilities as he saw fit. Passed only three days after 9/11 in an unprecedented show of unity, this resolution was passed by the Senate (98-0) and the House of Representatives (420-1) by an overwhelming majority, save one member from California.

Perhaps the most vivid recognition by Congress that the United States was using the law of war in a real global war came by way of the Military Commissions Act of 2006 where Congress specifically authorized the establishment of military commissions to try those illegal enemy combatants for war crimes. Understanding that military commissions can only be used in the wake of a lawful war, Congress most certainly understood this war to be a real war. Indeed, Congress spelled out exactly who the enemy combatants were in the 2006 Act:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the *Taliban*, *al Qaeda*, or *associated forces*); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense [emphasis added].

In 2009, a Democrat controlled Congress passed the Military Commissions Act of 2009. In that legislation, Congress changed the term “unlawful enemy combatant” to “unprivileged enemy belligerent,” but still specifically identified anyone who was a part of al-Qa'eda as the enemy. The 2009 Act states:

The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who - (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

While Congress continues to pass legislation consistent with the idea that the War on Terror is a real armed conflict against al-Qa'eda, one power that Congress clearly has in war-making is over “the

purse.” Ultimately, Congress has the power to cut off funding to any protracted use of military forces. As a practical matter, the ongoing combat in Iraq or Afghanistan could not continue without Congressional approval.

2.6 Presidential War-Making Power

Armed with the Congressional Joint Resolution, U.N. Resolution 1368, and the NATO Resolution, President George W. Bush exercised his authority as the Commander in Chief, under Article II, Section 3, of the Constitution, and quickly set about gathering the necessary evidence to find those who committed the attacks and to establish linkage to the State or States that may have provided material support to the terrorists. President Bush consistently held that the United States was in a state of armed conflict with al-Qa’eda. President Obama has agreed, but not as loudly or consistently.

Even without a Congressional resolution authorizing the use of military force, the President is the Commander in Chief and has independent Constitutional authority to order the military into action. In fact, there is a long history of American presidents utilizing military forces abroad in situations of armed conflict or potential armed conflict to protect United States citizens or promote United States interests. The number of instances where the executive has used military forces abroad without, for example, a Congressional declaration of War, well exceeds 200 in number. Selected instances include: 1798–1800, undeclared naval war with France; 1801–1805, the First Barbary War (Tripoli declared war but not the United States); 1806, Mexico Incursion; 1806–1810, Gulf of Mexico Incursion; 1810, West Florida Incursion; 1812, Amelia Island in Florida; 1813, West Florida; 1813–1814, Marquesas Islands; 1814–1825, Caribbean (engagements between pirates and American war ships in response to over 3,000 pirate attacks on merchantmen between 1815–1823); 1815, Second Barbary War; 1950–1953, Korean War; 1958, Lebanon; 1962, Cuba; 1962, Thailand; 1964, Congo; 1964–1973, Vietnam War; 1965, Dominican Republic; 1980, Iran; 1981, El Salvador; 1982, Lebanon; 1983, Honduras; 1983, Chad; 1983, Grenada; 1986, Libya; 1989, Panama; 1989, Andean Region; 1991, Persian Gulf War; 1993, Bosnia; 1993–1995, Somalia; 1993–1995, Haiti; 1997, Serbia; 2001, Afghanistan; and 2003, Iraq. In fact, the last time Congress “declared” war was in December 1941. In the vast majority of cases, Congress simply authorizes the conflict.

Nevertheless, the President’s authority to use the armed forces and the authority of Congress to declare war or to otherwise share in the process of war-making has been the source of much debate over the life of the Republic. Clearly the framers gave each branch of government war making powers in furtherance of their vision of a government of “checks and balances.” This system of checks also ensured a built-in source of friction between the two branches.

3.2 Weapons of Mass Murder

In London in 1605, a terror plot was uncovered to use barrels of gunpowder - the weapon of mass destruction of the day - to blow up the English House of Lords and kill King James I. The terrorists were a group of Catholic radicals wishing to eliminate Protestant rule in England. Guy Fawkes, the leader of the plot was convicted and executed. Four hundred years later the United Nation's chief nuclear watchdog, El Baradei, warned that the most imminent threat facing the world is deadly nuclear material falling into the hands of extremists.

The world must wake from its millenary sleep and recognize the real possibility that weapons of mass destruction will be used against large civilian population centers. Clearly, the terror attacks of September 11, 2001, demonstrated that international terrorism has now “broke us across the threshold” of creating mass casualties far in excess of anything Guy Fawkes could have imagined. The al-Qa’eda-styled terrorist is not content to kill in the tens or twenties, he aggressively seeks

access to weapons of mass destruction in order to murder in the thousands and tens of thousands. Al-Qa'eda has openly boasted that it seeks nuclear weapons. While nuclear weapons may be beyond the reach of international terrorists at this time, biological weapons, chemical weapons, and "dirty bombs" are not. Biological and chemical agents are inexpensive, easy to obtain, hard to trace, and capable of killing thousands upon thousands. Dirty bombs are devices which use conventional explosives in conjunction with nuclear, chemical, or biological byproducts. In addition, terrorists may strike "live" nuclear facilities as the arrest of the "Toronto 19" terror cell in August 2003 exemplified (reports of the alleged plot by 19 radical Muslim males included crashing a plane into the Seabrook Nuclear Reactor in Massachusetts).

Finally, as terrorists become more sophisticated in the cyber world, they will soon engage in significant cyberterrorism attacks to disrupt entire networks that control vital infrastructure systems. Even now, al-Qa'eda terror cells routinely depend on the Internet for training and tactical support to, for example, provide instructions on how to make a bomb from commercial materials. According to terror expert Gabriel Weimann, the number of terror-related websites has risen from 12 in 1996, to more than 4,500 as of 2005. Militant Islam's goal of global war fits perfectly with the Internet's anonymity and ability to reach millions. The terror groups need not even use fixed Internet sites that can be monitored, since discussion boards and encrypted messages are nearly impossible to break.

Add into the equation the fact that al-Qa'eda terrorists have demonstrated a clear desire to use weapons of mass murder, if possible, and President Bush's call for expanding the War on Terror to any State that exhibits a willingness to support terror makes fundamental sense. Even without a renegade State to supply them with weapons of mass murder, terrorists can acquire them in the following ways. According to a Public Agenda Special Report: Terrorism, there are four general scenarios regarding the terrorist use of nuclear devices: (1) the terrorist makes a crude nuclear bomb using smuggled uranium or fissile material; (2) an unstable nation falls into the hands of terrorists (e.g., Pakistan is said to have dozens of nuclear weapons); (3) a conventional bomb is employed to explode radioactive materials (so-called dirty bomb); or (4) a nuclear power plant is attacked. Accordingly, a doomsday scenario becomes a central consideration of whether or not the War on Terror should be expanded. Researchers at Stanford University have compiled a "database of lost, stolen and misplaced nuclear material depicting a world awash in weapons grade uranium and plutonium that is not publicly accounted for." Again, even one or two dedicated suicide bombers armed with a chemical, biological, or nuclear weapon could inflict catastrophic death and destruction in an urban environment.

The problem, of course, is how does one deal with an ideology steeped in pseudo-religious fanaticism which compels its foot soldiers of terror to gladly commit suicide in order to kill innocent civilians? As discussed in Chapter 1, the phenomenon of martyrdom in the name of God is known as *Istishad* and it represents a chilling development in four aspects:

- Suicide bombings can result in massive casualties and infrastructure damage.
- Suicide bombings attract wide media attention and vividly portray the determination of the suicide bomber to the "cause."
- Because there is no exit strategy for the suicide bomber to save himself, the suicide attack can be executed at the optimum time and place to ensure success.
- Since the suicide bomber is killed in the attack, there is no possibility to interrogate the attacker for information.

On the other hand, particularly in Europe where the Muslim population is large (the Muslim population in France is 10 percent; Britain is 3 percent; and America is 1 percent, with seven million Muslims and 2,000 Mosques), the task for law enforcement is to weed out the radical clerics and

terrorists without creating a climate of fear and intimidation in the Muslim community. In addition, the 2005 London bombings clearly demonstrate that one cannot simply blame “outsiders” for the attacks. The Muslim terrorists that packed acetone peroxide (the bomb of choice which is known as the Mother of Satan) into four rucksacks and then murdered 52 innocent people on July 7, 2005, were all members of British society. Likewise, the 24 arrests made in the August 2006 London raids that disrupted the bombing of up to ten transatlantic airliners were British Muslims as were the dozen Canadian Muslim terrorists arrested in Canada in 2006 who had about three tons of ammonium nitrate in their possession and planned to behead the prime minister.

3.5 The Obama Approach to the War on Terror

When Senator Barack Obama ran for President of the United States in the 2008 election against Senator John McCain, his major campaign slogan was based on a cry for “change.” Of course, even the novice student of political science knows that the promise of change crops up during practically every presidential campaign in American history and then quickly fades into oblivion once the winner takes office. In short, there really has been no significant changes from the Bush policies to the Obama policies. Indeed, in terms of dealing with the threat of militant Islam posed by al-Qa’eda, the Taliban, and associated forces, there can be little question that in the first two years of his presidency, Obama actually retained many key Bush Administration policies. Although his efforts to portray his ideas as somehow different played well with the main-stream media headlines of the day, President Obama was largely ineffective in setting a clear departure from the policies of the Bush Administration. If anything, Obama sowed more confusion than Bush. For instance, President Obama’s promised change to provide a so-called “new and comprehensive strategy for Afghanistan and Pakistan” to address the threat of militant Islam took over ten months to hatch and resulted in the adoption of a Bush-styled “surge” (used in the Iraq War) to simply deploy an additional 40,000 troops on the ground in Afghanistan. His campaign-era thoughts to send American troops to Western Pakistan where the main al-Qa’eda structure had reconstituted never materialized. Instead, President Obama sought a stabilized Afghanistan.

President Obama’s expressed desire to dismantle key elements of the Bush policies *vis-à-vis* al-Qa’eda, the Taliban, and associated forces began only days after taking the oath of office. Instead of creating an interagency task force to conduct a detailed study of all viable options and recommendations on how best to proceed in the War on Terror, the President issued executive orders mandating what were billed as sweeping changes in policy, and then established an interagency task force to study the consequences of his directives. In three executive orders (E)) issued on January 22, 2009, the President ordered: (1) EO 13492, the closure of Guantanamo Bay within one year; (2) EO 13492, the immediate halt of all ongoing military commissions (even though the Congress had specifically authorized them); and (3) EO 13440, the suspension of the CIA’s enhanced interrogation program. Ironically, within one year of the announcement, the first and second executive orders would be, for all practical purposes, functionally nullified and the third a non-event. It was not until January 7, 2010, that President Obama pronounced a truly unequivocal statement that the U.S. was at “[W]ar against al-Qa’eda.” Paradoxically, this statement was made only after the intense criticism of the Obama Administration following the arrest of al-Qa’eda member Umar Farouk Abdulmutallab for trying to detonate an explosive device on a U.S. aircraft on Christmas Day 2009.

Over 800 detainees have resided at one time or another at Guantanamo Bay, coming from approximately 40 countries, with Saudi Arabia, Afghanistan, and Yemen the most represented. When President Bush left office in January 2009, less than 250 detainees remained. The individuals still held there during President Obama’s first and second year in office were detained under the same legal theory used by President Bush: under the law of war they were detained as enemy combatants until either hostilities ceased or specific charges were levied against them in a military commission or, if they were U.S. citizens (like al-Qa’eda member Jose Padilla), in a federal court.

In reality, the most perplexing interrogation issue aired by the Obama Administration revolved around the waterboarding of three senior al-Qa'eda members in CIA custody under the Bush Administration. President Obama publicly asserted that waterboarding was torture but then refused to take any criminal action against those who authorized or carried out the technique. As discussed in Chapter Six, Obama placed his Administration and himself in violation of international law because he was required under Article 7 of the Torture Convention to either extradite the alleged torturer or "submit the case to . . . competent authorities for the purpose of prosecution." He refused to do either.

While other radical Islamic terrorists must be processed by domestic criminal law, the War on Terror is a real war against al-Qa'eda, the Taliban, and associated forces. As the Commander in Chief, it is imperative that President Obama communicate this fact with clarity to the American people and the world. Only then will he be able to provide clear and decisive leadership by matching the correct rule of law words with the proper deeds. Acting in accordance with the new discipline of "lawfare," legal clarity mandates that the President voice fewer platitudes about "change," particularly given the fact that, like all wars, it is not solely a matter of putting "steel on target," i.e., killing the enemy; it is a propaganda effort as well.

Unfortunately, President Obama's first two years in office have been rubricated by confusion and frustration in a desire to somehow change Bush Administration policies. For instance, the Obama Administration's refusal to irrevocably and sternly tell the public that the conflict with al-Qa'eda terrorist forces was a "war," contrasted sharply with his simultaneous argument in federal court that al-Qa'eda fighters were in fact illegal enemy combatants subject to the law of war. This lack of clarity only provided fuel for America's enemies to perpetuate the false propaganda that the United States was acting illegally by, for example, detaining people without trial in Guantanamo Bay.

Leadership skills rooted in the panacea of dialogue and a "see where it takes us" approach in terms of national security are disastrous when confronting totalitarian fanatics. If the events of 9/11 have taught Americans anything, it is that the United States must operate under the law of war against those individual al-Qa'eda Islamic terrorists designated as enemy combatants. President Obama must put aside political partisanship and forcefully acknowledge the manifest fact that America is at war, and then institutionalize comprehensive policies that are fully rooted in the context of the law of war, not domestic criminal law. Many of these law of war foundational policies—detaining enemy combatants, military commissions, interrogation—were developed during the Bush years and require only slight refinement, not change. Congress has provided some leadership with the passage of the 2009 Military Commissions Act, but the Executive branch must assert greater leadership. If this means that President Obama must acknowledge successes in the previous Administration, then so be it. The nation is at war, the Commander in Chief must lead in accordance with that premise.

The probability that terrorist organizations like al-Qa'eda may employ chemical, nuclear, or biological weapons of mass destruction in suicide attacks poses not only a direct threat to the well-being of tens of thousands of innocent people, but also raises new controversies regarding the possible curtailment of long recognized civil liberties. In creating greater domestic security from future terrorist attacks, the United States government must not trample on American liberties in the name of preserving them. This concern speaks to the matter of "due process." The term due process is most commonly used to describe the rights that Americans enjoy as spelled out in the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The term has also come to be associated with American values of fairness and reasonableness in the treatment of others.

By definition, the traditional approach to combating terrorism is encompassed in two terms—antiterrorism and counterterrorism. Although most associate the term *counterterrorism* to cover both concepts, strictly speaking, antiterrorism involves all those steps and actions taken by authorities to decrease the probability of a terrorist act from occurring. Antiterrorism, the proactive, preventative stage of stopping terrorism, includes techniques designed to harden potential high profile targets (e.g., government buildings or military installations), as well as actions taken to detect a planned terrorist attack before it occurs. For example, to prevent future terrorist attacks, the Pentagon and private industry are both experimenting with video surveillance, modeling techniques, and commercial technologies such as those used to identify automatic teller machine customers by scanning their faces.

One of the facets of the War on Terror is the realization that antiterrorism relies heavily on the efforts of ordinary citizens who, when observing suspicious behavior, are willing to notify law enforcement. The Department of Homeland Security regularly reminds the public that the "most effective weapon against terrorism is you." Suspicious activity is the key and can involve reporting on witnessing activity in any of the five basic elements related to conducting a terror attack: (1) target identification, (2) intelligence gathering and planning, (3) logistics and training, (4) conducting rehearsals or dry runs, and (5) the attack itself. Sometimes the suspicions prove profitable, as with the September 2002 arrest of six members of the Lackawanna radical Islamic sleeper terrorist cell in New York (based on a tip by an Arab American), the August 2006 arrest of 24 al-Qa'eda-styled radicals in the failed plot to detonate liquid bombs on ten planes bound to the United States from Britain (based also on a tip from the British Muslim community), or the failed plot by Faisal Shahzad in May 2010 to car bomb New York's Times Square. However, sometimes the suspicions prove incorrect, as in the 2003 case of three men of Middle Eastern descent who were overheard "joking" at a Georgia restaurant about a terrorist plot to be conducted in Miami, Florida (the three were subsequently stopped in Florida and, after a day-long investigation, were released). Therefore, antiterrorism is very much a bottom-up approach which must include ordinary citizens as a first line of defense.

America allows free speech in most circumstances, but never allows illegal violence. Another innovative antiterrorism program is designed to ease tensions between the government and a variety of antigovernment organizations. Following the 1995 Oklahoma terror bombing, for instance, this approach saw Federal Bureau of Investigation (FBI) agents talking directly to various so-called militia leaders. From Montana to Indiana, federal agents opened dialogues with leaders of several militia organizations to provide a forum for discussion in the hope that channels of communication would help prevent acts of violence. While this approach will bear little fruit with al-Qa'eda-styled terrorists, it is still wise to explore all avenues of prevention measures—informants can be recruited to work against the terror group.

Counterterrorism measures are those tactical actions taken by authorities in response to an actual terrorist incident. In this vein, planning and training will have a great impact on the success or failure of real world counterterrorist measures. While National Security Presidential Directive 5 and Presidential Decision Directive 39 designate the Department of Justice, through the FBI, as the lead agency in the event of a terrorist attack on the homeland, the expected mass casualties, physical damage, and potential for civil disorder resulting from a weapon of mass destruction attack would undoubtedly see a shift to the Department of Defense (DOD) as the *de facto* lead federal agency for many counterterrorism issues.

Currently, there are seven main areas of concern that have been voiced in the public square as the government struggles to develop durable legal and policy underpinnings to what promises to be a long conflict with al-Qa'eda-styled terrorism. They involve: (1) the use of military commissions; (2) the power of the United States to investigate, detain, and question terrorist suspects; (3) the expansion of the use of the United States military to enforce domestic law; (4) immigration; (5) the use of new information-gathering technologies; (6) the issue of "assassination"; and (7) the protection of Constitutional rights.

Military Commissions

Without question, the 2006 MCA certainly washed away all doubt regarding Congress' willingness to characterize the War on Terror as a real global war against real enemies who desire to murder and terrorize. Accordingly, Congress demonstrated that it was more than willing to employ the full weight of the rule of law pertaining to armed conflict against the enemies of the United States. In fact, the Democrat controlled Congress followed suit by amending portions of the MCA in its 2009 Military Commissions Act.

Not only did the 2006 MCA provide crystal clear guidance in the context of the establishment and operation of military commissions to try "any alien unlawful enemy combatant" (al-Qa'eda and al-Qa'eda-styled Islamic terrorists) it provided concrete statutory definitions concerning a wide variety of terms that had been previously hotly debated. The 2006 MCA also clearly placed a large legal "seal of approval" on many of the initiatives taken by the Bush Administration in the War on Terror. For instance, the 2006 MCA defined "unlawful enemy combatants" in precise language:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

While the 2009 MCA changed the 2006 MCA term "unlawful enemy combatant" to "unprivileged enemy belligerent" it still provided a similar detailed description of who qualified as the enemy in the War on Terror: "An individual (other than a privileged belligerent) who has engaged in hostilities against the United States or its coalition partners; or has purposefully and materially supported hostilities against the United States or its coalition partners; or an individual who was a member of al-Qaeda at the time the offense occurred."

Ironically, some still view the common sense evidentiary provisions in the 2009 MCA as a violation of Common Article 3's requirement that the accused be afforded all the necessary "guarantees...recognized as indispensable by civilized peoples." Such ethnocentric views are quickly dispelled when one considers the day-to-day activity of most modern European criminal courts where hearsay is regularly considered and far different legal avenues regarding the introduction of evidence are regularly employed. Even the International Criminal Court, the icon of those who worship at the altar of internationalism, allows hearsay. In fact, earlier calls by some (including uniformed judge advocates who should have known better) that a military commission should include the same due process standards that American soldiers enjoy at a military courts-martial under the Uniform Code of Military Justice were wisely disregarded by Congress in 2006 and 2009. Obviously, these "relaxed" provisions in the MCA are necessary due to the exigencies of war—witnesses and victims may be

dead, investigators are not able to get to the crime scene, etc. Nevertheless, the 2009 MCA provides more due process rights to the accused than any military commission has ever provided in the history of military commissions in the history of war. In general frame, the 2009 MCA provides the following rights for the accused who is charged:

- a copy of the charges in English and a language he understands;
- right to a free military attorney or to hire a civilian attorney, may also have foreign consultants;
- a presumption of innocence for the accused;
- guilt must be proven by the government beyond a reasonable doubt;
- access to evidence that the prosecution plans to present at trial;
- access to evidence known or reasonably should be known to the prosecution tending to exculpate the accused;
- right to remain silent;
- no adverse inference for remaining silent;
- right to testify subject to cross-examination;
- right to obtain witnesses and documents for defense;
- right to present evidence and cross-examine witnesses;
- no statement obtained by torture or by cruel, inhuman, or degrading treatment is admissible;
- accused will see every piece of evidence that the panel sees (even classified);
- appointment of interpreters to assist defense;
- right to be present at every stage of trial (except when proceedings are closed for national security) unless disruptive;
- access to sentencing evidence;
- cannot be tried again by military commission once verdict is final;
- right to submit a plea agreement;
- a panel consists of at least five members (at least 12 members if death penalty case);
- challenges to members of the panel by the defense;
- two-thirds of the military officers on the panel must agree on findings of guilt;
- unanimous decision for death sentence;
- trial is open to the public (exceptions recognized for physical safety of participants);
- automatic appellate review by a Court of Military Commission Review (CMCR);
- further review by petition to the D.C. Court of Appeals and by writ of certiorari to the Supreme Court.

4.6 Federal Courts

It is well settled that federal district courts of the United States have the legal authority under both domestic and international law to prosecute nonresident aliens for terrorist crimes committed on foreign soil as well as for war crimes. This power has been exercised many times against militant Islamic terrorists, both prior to and after 9/11. In this context, the courts have often been called on to balance the need between the government's desire to protect national security and the defendant's right to a fair and open trial.

A constant problem for the government in dealing with the threat of al-Qa'eda-styled terrorism is expressed in the policy of "anticipatory prosecution," or "pre-emptive prosecution." Desiring to avoid another 9/11 attack on the United States, the government's policy in the first years after 9/11 was to arrest suspected terrorists at the earliest opportunity in a given investigation, as opposed to letting a particular terror plot mature. The down side to this policy was that the government was not able to prove the more serious terror offenses in a court of law, leaving the suspects charged with lesser

offenses and sentenced to shorter terms. Responding to criticism that DOJ should wait longer before intervening with premature arrests in a terror investigation, a September 11, 2008 DOJ document entitled: Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11 explains:

In each of these cases, the Department has faced critical decisions on when to bring criminal charges, given that a decision to prosecute a suspect exposes the Government's interest in that person and effectively ends covert intelligence investigation. Such determinations require the careful balancing of competing interests, including the immediate incapacitation of a suspect and disruption of terrorist activities through prosecution, on the one hand; and the continuation of intelligence collection about the suspect's plans, capabilities, and confederates, on the other; as well as the inherent risk that a suspect could carry out a violent act while investigators and prosecutors attempt to perfect their evidence.

While it might be easier to secure convictions after an attack has occurred and innocent lives are lost, in such circumstances, the Department would be failing in its fundamental mission to protect America and its citizens, despite a court victory. For these reasons, the Department continues to act against terror threats as soon as the law, evidence, and unique circumstances of each case permit, using any charge available. As Attorney General Mukasey has stated: "[W]hen it comes to deciding whether and when to bring charges against terrorists, I am comfortable knowing this: I would rather explain to the American people why we acted when we did, even if it is at a very early stage, than try to explain why we failed to act when we could have, and it is too late."

As the horror of 9/11 fades into history, the federal authorities have become more patient. For instance, the Fort Dix Six case where a cell of radical Islamic terrorists were planning to enter Fort Dix, New Jersey, and murder military personnel was allowed to mature for a year before the arrests were made. Also, in 2010, radical Islamic terrorists Mohamed Mahmood Alessa and Carlos Almonte were arrested for conspiracy to commit murder after over four years of surveillance by the FBI.

By law and custom federal prosecutors are authorized the discretion to decline cases brought to them by investigative agencies. According to a 2009 Syracuse University study by the Transactional Records Access Clearinghouse, from 2004 to 2008 various federal investigative agencies initially characterized nearly 8,900 individuals arrested as "international terrorists." Of that number, only 2,302 individuals were convicted in federal district courts on either criminal statutes penalizing terrorist activity or other criminal statutes dealing with more general offenses, e.g., immigration violations, identity theft, or false statement charges. In turn, only 1,245 of the 2,302 received prison confinement, and only 52 were sentenced to 20 years or more in confinement. Reflecting the policy of anticipatory prosecution, although the 2,302 persons were designated as "international terrorists" by the DOJ, the actual crimes they were charged with often had no direct connection to what courts normally deem to be terrorist activity. In fact, the primary lead charge was 18 U.S.C. § 1001 (fraud/false statements, identity theft). In labeling an individual as a terrorist, Courts generally turn to a group of 14 federal statutes determined to be "terrorist" offenses, such as 18 U.S.C. § 2332 (terrorism transcending national borders) and 18 U.S.C. § 2339 (providing material support to terrorists).

4.11 Assassination

Juxtaposed to the issue of crafting a legal basis for the use of preemptive military force is the recurring issue of whether certain individuals—such as high level al-Qa'eda or leaders of totalitarian States which support or sponsor terrorism—can be legally targeted for "assassination." In other words, if preemptive military force is an acceptable addition to the rule of law, can the United States simply kill selected high-level leaders without having to employ large-scale military forces against the offending rogue nation or terrorist organization?

Currently, there are two principle documents associated with these two legal concerns. Respectively, they are the groundbreaking 2002 National Security Strategy of the United States of America released by the Bush White House on September 17, 2002, and the Presidential Executive Order 12333 banning assassination.

Before a thing can be properly discussed it must be properly defined. A comparison of most definitions reveals that the common meaning associated with the term assassination is that it is “murder by surprise” usually carried out for “political purposes.” In a law review article on the topic, Tyler Harder believes that the best way to capture the meaning of assassination is to view it as a combination of three essential elements: “(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose.” Thus, an assassination must contain all three elements or the killing will not meet the requirements of an assassination. Harder’s approach is a good starting point because it focuses on the elements of murder—always an illegal concept—and politics—a concept generally reserved for activities not in the sphere of warfare.

Since assassination is universally regarded as murder, it is important to distinguish the concept of murdering another human being, which is always illegal *per se*, from the concept of killing another human being, which may or may not be illegal. Unfortunately, the distinction between murder and killing is often blurred in modern society contributing to a lack of clarity on the subject of assassination. Many postmodernists erroneously believe, for example, that it is somehow immoral for the State to take the life of another human being under any circumstances. For them, the concept of *nullem crimen sine poena* (no crime without punishment) does not extend to taking the life of another human. Hence, in their minds, all killing is both immoral and illegal.

Interestingly, definitional problems regarding the lawfulness of killing another human being can be traced back to the Biblical prohibition on this matter found in the Decalogue at Exodus 20:13 and Deuteronomy 5:17, which many widely regarded English translations, such as the King James version of the Bible, incorrectly render as: “Thou shalt not kill.” In fact, the correct translation of the Hebrew into the English is: “Thou shalt not *murder* [emphasis added].” The Hebrew word for kill is not used in the prohibitions of Exodus 20:13 and Deuteronomy 5:17. The Hebrew word that is used is *lo tirtzach* and “refers only to the criminal act of homicide, not [for instance] taking the life of enemy soldiers in legitimate warfare.” In fact, the Mosaic law is filled with detailed laws that specifically mandate that the State should lawfully kill certain humans convicted under the rule of law for such crimes as murder, kidnapping, etc. The Old Testament principle is properly seen as centering on the duty of the State to protect its citizens on interior lines from domestic criminal behavior.

In turn, the Mosaic law also sets out a detailed law of war codex which provides for the protection of citizens on exterior lines by specifically authorizing the killing of enemy combatants. From the Judeo tradition, killing enemy combatants in battle is not murder.

In other words, if murder is a violation of both domestic United States law and international law, Executive Order 12333 really does not make illegal something that was not already illegal. Therefore, doing away with Executive Order 12333 would not allow the United States to engage in assassination, either in peace or war. Indeed, revoking Executive Order 12333 would only send a negative signal, suggesting to the world that the United States did away with the ban so that it could commit an illegal act of murder.

Parks correctly recognizes that a State may use military force in peacetime if it is acting in self-defense. Such acts are not assassination:

Historically, the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities.

After listing several historical examples of the United States' use of military force in self-defense, including the 1986 bombing of "terrorist related targets in Libya," Parks concludes: "Hence there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security."

Indeed, immediately following the terrorist attacks of September 11, 2001, the Congress of the United States clearly recognized the inherent right of self-defense in peacetime. While the Congress never "declared war" under the provisions of Article I of the Constitution, they quickly passed a joint resolution which left no doubt as to their desire to authorize the President of the United States to use military force in self-defense. Among other things, the Congressional Resolution recognized the inherent right of self-defense,

under the Constitution to take action to deter and prevent acts of international terrorism against the United States...[and] authorized [the President] 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.

The Congress clearly understood that targeting individual terrorists associated with the attacks on the United States was not assassination, but the appropriate response in self-defense to unlawful aggression. President Obama has most certainly fully embraced this concept.

4.12 The Constitution and the War on Terror

To some, the War on Terror portends a society in which the rights of the individual will more and more have to give way in favor of ever increasing security measures designed to vindicate the expanding desire of protecting the safety of the public from global terrorism. It may be a correct assessment that the continuing War on Terror makes our civil rights *vulnerable* to erosion, but the so-called "slippery slope" argument which resists all changes in the law must be viewed against the clear and present threat of al-Qa'eda-styled terrorist organizations and their possible use of weapons of mass destruction. The all too real specter of mass casualties, billions of dollars in physical damage, and civil disorder absolutely demands that the federal government fulfill its primary mission of ensuring the safety and viability of its citizens. As Supreme Court Justice Robert Jackson remarked in *Terminiello v. Chicago*, "[t]he constitutional Bill of Rights...[is not] a suicide pact." Jackson went on to say: "The choice is not between order and liberty. It is between liberty with order and anarchy without either."

On the other hand, there are many who object to law enforcement tools such as the USA PATRIOT Act as an unconstitutional violation of civil liberties. According to Gregory Nojeim, the former Associate Director of the ACLU's Washington Office: "These new and unchecked powers could be used against American citizens who are not under criminal investigation, immigrants who are here within our borders legally and also those whose First Amendment activities are deemed to be threats to national security by the Attorney General." Despite efforts by various ideologues to demonize the USA PATRIOT Act, the provisions are actually a judicious effort to stop future terror attacks, and in 2006 and 2009 a majority of the members of Congress voted to extend the vast majority of the provisions. Commenting on the number of local governments that had passed resolutions or laws against the USA PATRIOT Act, a Justice Department spokesman noted that many of the ordinances were based on "erroneous" information and that the USA PATRIOT Act "has been one of the most important tools Congress has given the government to fight terrorism and prevent terrorist attacks." In order to thwart future attacks, law enforcement must have the legal ability to gather information on suspected

terrorists in order to stop them before they attack.

Another issue of debate that occurred in 2006 was the Bush Administration's "data mining" program that targeted the international calls between terrorist suspects abroad and individuals in the United States. This warrantless program was conducted without a FISA court order by the National Security Agency (NSA) and with the help of the nation's largest telecommunications firms. While the program did not include listening to telephone calls, legal and security experts debated the government's argument that President Bush was acting under his wartime authority as the Commander in Chief under Article II of the Constitution and the Congressional Authorization for Use of Military Force after 9/11. Indeed, echoing Chief Justice John Marshall announcement in *Marbury v. Madison* that "a legislative act contrary to the Constitution is not law," the FISA Court of Review in 2002 affirmed that FISA did not prohibit the President from exercising his independent constitutional power.

While the FISA rules regarding collection of foreign intelligence in the United States is clearly spelled out in statute, the question of whether or not the Executive Branch's Article II power trumps FISA restrictions has never been decided by the United States Supreme Court. In other words, despite the fact that a string of Presidents have operated under the parameters of FISA when conducting foreign intelligence, it is still an open question from the perspective of the Supreme Court as to whether the President's Article II power exempts him from the Fourth Amendment warrant requirements when foreign intelligence is conducted, even if that foreign intelligence collection takes place in the United States proper. If the rulings of federal circuit courts are measured in this question, it certainly appears that the President possesses independent Constitutional authority to conduct warrantless electronic surveillance in the sphere of foreign intelligence collection. In fact, every federal court of appeals to consider the matter has concluded that the President has independent constitutional authority to conduct warrantless electronic surveillance of foreign powers and their agents.

In summary, the government has always taken steps to curtail civil liberties in times of crisis. In the past, some of the measures have been clearly unconstitutional, e.g., President Lincoln's suspension of the writ of habeas corpus for jailed "Northern" American citizens, or President Roosevelt's internment of thousands of U.S. citizens of Japanese descent. Compared with these abuses, the government's efforts in the War on Terror are hardly extreme. In fact, the American people have overwhelmingly approved of the overall performance of the government in finding a working balance between defending their freedoms and protecting their freedoms. Nevertheless, as the federal government makes policy and moves the nation in the War on Terror, it is prudent to well recall the caution of George Washington: "[T]he price of freedom is eternal vigilance." Accordingly, all measures employed to combat terrorism must be within the bounds of democratic principles and the rule of law. More importantly, so-called extraordinary laws should be proportionate to the terrorist threat and frequently reviewed, revised, and rescinded if no longer needed. For instance, the London bombings of July 2005 caused the British to develop new security laws that seriously challenge the foundation of freedom of speech by making it illegal to glorify or indirectly incite terrorism. Obviously, the line between free speech and security is greatly stressed in the War on Terror because this is not a war in the classic sense. This war will not end with a formal surrender. Thus, changes in law that appear necessary in the name of security for the moment may become an unwanted fabric of our society for future generations. If one is to avoid the slippery slope, then marked and clear legal notches must be set out beyond which we as Americans will not pass.