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THE YEAR IN REVIEW

AIR FORCE LEGAL SERVICES
IN THE TWENTY-FIRST CENTURY

JAG CORPS 21



TERRORISM LAW

BY PROF. JEFFREY F. ADDICOTT

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What is terrorism law? Simply stated it is all the legal issues associated with the War on Terror. Obviously, this War on Terror is unlike anything we have seen or fought before and what really rubricates the discussion is the premise: Are we at war, or is this just simply a metaphor like the “war on drugs” or the “war on poverty?” I submit we are at war. A lot of people do not like that, but whether they like it or not, as lawyers, we can put that aside because what really matters is—“What does the law say? Are we at war or are we not at war?” If we are not at war, than we are doing a lot of illegal stuff—let’s just put it that bluntly. On the other hand, if we are at war, this is really nothing different than what we’ve done in past wars. The best example of this is how Congress characterized the detainees in the recent Military Commissions Act.

Our President, under Article II, is the Commander in Chief. There is no doubt that he clearly believes we are at war. On September 11th, he essentially said, “We’re at war, and I’m going to reach into the toolbox called ‘laws of armed conflict,’ and I’m going to pull those thunderbolts out and I’m going to use them to wage war on terrorists.” Before September 11th, the Administration reached into the toolbox of “domestic criminal law,” and if we captured an al Qaeda terrorist, we would prosecute him in federal court, and treat him as a criminal defendant. The terrorists who tried to topple one of the twin towers in 1993 are a perfect example. After September 11th, Congress did not declare war but they passed, as we know it, a use-of-force resolution. It’s rather strongly worded and it gives the President wide latitude to do what he thinks is necessary to bring to justice those individuals that were responsible for the events of September 11th or were associated with al Qaeda. It’s a very broad authority. So the President, armed with that resolution and armed with his own inherent authority, has waged a war against terrorism. But terror is a tactic, so how can you be at war with terror?

We are stuck with the term, so I’ll use the term “War on Terror” or the “Global War on Terrorism.” I think you can make the argument that Congress believes that we’re at war much more clearly today than you could two or three years ago or even one year ago. Because for five years, Congress has kind of sat on the sidelines. They



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passed the use-of-force resolution in Iraq, but they really have not done a whole lot of heavy lifting. They have not joined and armed the President with their legislative authority and told the President, “Okay, we’re going to go with you, we’re going to pass statutes, specifically authorizing certain issues associated with the War on Terror.” But now, the Congress has become energized. The 2006 Military Commission Act was a legal broadside that has yet to fully settle in the minds of many Americans. Congress very clearly established the legitimacy of military commissions. They addressed the issues of interrogation tactics; the use of the rules of evidence at military commissions—allowing hearsay, not requiring search warrants, not worrying about the chain of custody issues—head on and they clearly addressed the issue of *habeas corpus* head-on.

So there is no doubt that those people that have said that they want to demonize the Bush Administration for doing a certain issue in the War on Terror, they now have to demonize the Congress as well because they have joined hand-in-hand in approaching the War on Terror from the perspective that it is a real war. You cannot have military commissions unless it is a real war.

You do not have any combatants unless it is a real war. You cannot suspend *habeas corpus* unless you are using the laws of war and it is a real war. Congress clearly believes now that this is a real war. So when you have a debate with someone—that is the premise. If you get the other side to admit that, “Yes, our government believes that this is a real war,” you have won the debate because what we are doing at Guantanamo Bay, Cuba, is nothing different than what we have done in previous wars.

I did a show the other day on National Public Radio, and the commentator said, “We are going to have a discussion today on the issue of Guantanamo Bay. We have Professor Addicott on one side and we have another commentator on the other side—two widely different views. We are going to let the audience hear these views and make up their mind about the inmates at Guantanamo Bay.” So I went first and said, “First of all, if you’re going to be an impartial observer or an arbitrator of two sides, they’re not ‘inmates.’ By using the word ‘inmate,’ you are essentially saying that we only use the domestic laws to deal with these people, which means: they get charged with crimes, they have to have an attorney, they will be able to file writs of *habeas corpus*. Calling them inmates is incorrect, they are “detainees.” In World War II, we had over 400,000 Germans and Italians right here in this country. No one ever suggested that they should have a lawyer or that we needed to charge them with crimes. Why? Because we were at war and under the laws of war, you can detain these people indefinitely until the war is over without charging them with a crime. That is what we are doing at Guantanamo Bay.

Now, after five years, Congress has finally stood up and said we agree with that approach and have now responded to the 2004 Supreme Court decision. In 2004, the Supreme Court was faced with the issue of; “Can the President designate somebody as an enemy combatant?” And the answer was, “Yes, but...” and the “but” was, “Hey, we’re not fighting a nation-state, the laws of war are really written when two nations go to war against each other.” We’re fighting what I call a “virtual state.” There are 192 nations in the United Nations. If you lined up all those nations in terms of strength, al Qaeda would be, if it were a nation, about number 100. It’s a powerful organization that is not a criminal organization. They act more like a nation-state. They entertain a Nazi-like ideology. They are like a nation-state in terms of the power that they project and their goals. Whether we believe it or not and whether we like it or not, as lawyers, this is very disheartening. They want to kill us. As lawyers, we like to take off our jackets and negotiate with people, but how are we going to negotiate with them?

This fact is illustrated from a story that came about down in Guantanamo Bay, as covered by *The New Yorker*. The magazine interviewed the former commandant about a fellow called “Half-Dead Bob.” Half-Dead Bob was picked up on the battlefield of Afghanistan weighing about 50 pounds, missing a lung, and had shrapnel wounds. What did we do to Half-Dead Bob? We nursed him back to health. He got back to about 130 pounds. But as the commandant was interviewing him, Half-Dead Bob said, “You’re a very good Christian, General, you’ve been very good to me, but you do know that when I get out of here, I’m going to kill you and your family.” That is the mind set, and the Jihad is a global war. The battlefield is the world for these folks, and it is a very dangerous enemy that we are facing. So that is why I do not like the term “War on Terror.”

This is not a war against the Irish Republican Army or other terrorist groups. It is not even a war against militant Islam. It is a war against a very specific slice of militant Islam—al Qaeda, and al Qaeda has declared war on us. And essentially, you win wars by killing the enemy. That is the brutality of war, you cannot negotiate with them. The only thing they understand is the application of lawful force or the threat of lawful force and that is it. They are the only tools that you really have that are available to do that. We have to project that in the War on Terror and that is a hard reality.

The airline plot that was just broken up where the terrorists were going to take ten airplanes and fly them into the United States from Britain—one of the terrorists was a female that just had a baby. The baby was 60 days old, and she was going to bring that baby on the plane with her with the explosives in the milk formula. That is dedicated! She was going to kill herself and her child. Whatever we say about these people, they are dedicated to the mission. These people want to die for the cause.

Yet another example of this conviction is the young men in London. One year ago, these men stepped on board a train with backpacks on. They could have stepped off the trains, set the timers, and walked away. They wanted to ride the train down for the cause. These people want to kill us in very large numbers and when you mix into the equation weapons of mass destruction, you have a witch’s brew. So, I say to any of my legal colleagues that do not want to give an inch on civil liberties, we can give an inch on civil liberties. We have to put rhetoric aside and give our law enforcement and the military the tools that they need to fight this war.

We have not defined terrorism. The international committee cannot define terrorism. So how do you fight something that you cannot define? That's another critique I have with this phrase "War on Terror." We have a lot of domestic definitions of terrorism, but the international committee has never been able to come up with a definition of terrorism. Why? Because "one man's freedom fighter is another man's terrorist." I was in Egypt recently, and the anti-American and the anti-Israeli propaganda is just horrific. On the panel I was part of was the number two leader in the Egyptian government, who would be president if Hosni Mubarak were killed, and their top spiritual leader. I didn't leave the hotel after I gave my remarks because I pointed out to them that the Israelis were not the aggressors. The mind set of many of these people over there where militant Islam grows is just amazing. You can sit there and talk to someone and see how they approach issues. They approach issues from very different perspectives than we do. But again, this war is not against militant Islam. We have several Islamic consultants that are associated with our terrorism law program—one from Iran, one from Pakistan—and we always make that point very clear. It's against a very narrow segment of Islam, but it's a lot. About 40,000 to 60,000 terrorists went through the al Qaeda training camps before we closed them down.

This war came to us, and we have to fight it under the rule of law. If we are the good guys, we have to have moral clarity. And the war is not just about putting bombs on a target. There is an enemy propaganda aspect to it, no doubt about it and that is what sells newspapers. In other words, an American soldier does something bad—that makes the front pages. That's just a reality. So, how do we deal with it? Well, we are doing a great job because we learned the lessons in My Lai. You don't cover it up. If you have a soldier that commits a war crime or crime, then you investigate, you employ transparency, and you move on. That is all we can do because that phenomenon of collective responsibility will never go away. In other words, one soldier does it, and all are labeled. The only way to fight that is to be transparent in dealing with our soldiers.

How long is the war going to be? We're going to ask that question a lot in the coming years. We are used to four-year wars, five-year wars—our American Civil War, World War II, World War I, even Vietnam was seven or eight years. I mean, they're relatively short. Did you ever hear of the Hundred Years War or the Thirty Years War? This is going to be a Hundred Years War. The al Qaeda and their sympathizers are growing. And some

argue that, well, if we had not responded to the attacks of September 11th, they would not have grown so much. But we had to respond. When people emphasize peace as their number one value, that nation will be destroyed. When people emphasize freedom as their number one value, then we are going to have to fight for freedom. This is our generation's turn and you are the swords that are in the hands of our people and you have got to fight them. We all have to fight them and hopefully, the Center for Terrorism Law provides a platform where we can discuss the issues and talk about them in a rational way.

We have to rationally look at the law. Are we at war? Yes, our government tells us that we are at war. It is not a metaphor. Therefore, the policies that we're pursuing are the correct policies. The Combatant Status Review Tribunal of 2004, was set up in response to the Supreme Court decisions. I wish Congress at that time would have said, "Okay, Supreme Court we can hear you; the President can declare somebody an enemy combatant, but you want an independent body, a judicial body to look over his shoulder and make sure he got it right." This is reasonable when you are fighting a virtual state and these folks do not wear uniforms. We do want to make sure we have got it right. What a golden opportunity for our Congress to have stood up and said, "Okay, Democrats and Republicans, retired jurists, they are going to form this tribunal." Unfortunately, the Congress did not do anything. The Department of Defense had to step up to the plate, but now the Congress' Military Commissions Act has legitimized the Combatant Status Review Tribunal.

As a nation at war, we have got to fight this war under the rule of law. We have the finest military the world has ever seen. We are in trying and difficult circumstances these days and, more than ever, we need firm and solid legal advice from our legal community to set the course and to be the watchdogs for justice in the War on Terror.

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