

Special Report

The Case For Amending The U.S. Constitution To Define Rules For Fighting Global Terrorism

by

Clinton H. Whitehurst, Jr.

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**THE
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EXECUTIVE SUMMARY

As America debates courses of action to stabilize Iraq and how best to fight and win the war on terrorism, a major problem, and one not given the attention it deserves, is that our military and political leaders must fight global terrorism under rules that were written for a world that no longer exists.

The United Nations Charter (1945) did not envision a conflict of global proportions waged between traditional nation states and numerous, well armed, trained and funded organizations whose adherents number in the tens of thousands, are found on every continent, and have repeatedly shown unbelievable contempt for long established rules of war with respect to combatants and civil populations. Nor did the Geneva Conventions (1864, 1907, 1929, 1977) and the United States Constitution, ratified in 1789, contemplates and make provisions for such conflicts.

The chief enforcement agency of the United Nations, the Security Council, has proved powerless to enforce any meaningful action against terrorist organizations or the countries that fund, arm, and train their members, leaving nations threatened by terrorists to act unilaterally or with organizations outside of the UN.

Lacking agreed upon rules for fighting terrorism our military and civilian leaders have been forced to stretch existing but irrelevant rules to cover needed military, judicial and political actions. This has lead to continuing and acrimonious debate in the U.S. Congress, the media and general public; an environment of priceless value to terrorists and their cause.

Those charged with protecting the United States and its citizens have had to improvise and then defend their positions and actions from critics who contend that the old rules of war are still relevant and must be observed. In particular, that captured terrorists must be treated as traditional prisoners of war and that suspected terrorists living in the United States are no different than American citizens and legal residents with regard to their constitutional rights.

What is certain, from a political and military perspective, is that the rules of engagement in fighting international terrorism must be defined and accepted if a war never dreamed of when the American Constitution, the Geneva Conventions, and the UN Charter were written, is to be brought to a successful conclusion.

Addendum:

On January 22, 2007, the House of Common's Foreign Affairs Select Committee (United Kingdom) called for an overhaul of the Geneva Convention, suggesting that Prime Minister Tony Blair should lead efforts to update the international conventions to reflect the challenge of extremist terrorism.

THE CASE FOR AMENDING THE U.S. CONSTITUTION TO DEFINE RULES FOR FIGHTING GLOBAL TERRORISM

On December 8, 1941, the day following Japan's attack on Pearl Harbor, President Franklin D. Roosevelt asked the Congress for a declaration of war against the Empire of Japan as provided for under Article 1, Section 8 of the U.S. Constitution. It was to be America's last declared war, a war by and large understood by the American public and one not clouded by ambiguity with regard to conduct and purpose. Long established rules with respect to prisoners and non-combatants were generally accepted. Wars ended by negotiation or surrender with terms clear and binding on all parties. The war crimes trials following World War II reaffirmed that rules respecting the conduct of war were to be observed and a heavy penalty exacted for non-compliance.

The Need for Certainty in Rules for Fighting the War on Terrorism

America's Undeclared Wars

The Korean War which began in 1950 and termed a "police action" by politicians, was America's first undeclared war of the 20th century. Unlike World War II the conduct and purpose of the conflict was not well understood by the American public, a fact that became ever plainer as the conflict continued.

America's allies in Korea were not there by previously arranged agreements or treaties as in the case with NATO but rather under the authority of a multinational organization—the United Nations. From the beginning the end game of the conflict was unclear as was how the war was to be conducted, a state of affairs unfamiliar to the American public. In this respect, was a united, democratic Korea the ultimate goal or was the goal a truce and a return to previous borders? Equally unclear was how should an American lead, but UN sanctioned force respond when 300,000 Chinese volunteers entered the conflict on the side of North Korea? These and other questions polarized American public opinion with respect to the purpose and conduct of the conflict, ultimately tarnishing an admired American president and one of the nation's most respected military commanders. (1)

The conflict was not only an undeclared war but a limited war, one that left the aggressor nation standing at its conclusion; a war fought at a cost of over 140,000 American casualties.

The Vietnam conflict in which the United States became actively involved *circa* 1964, was America's second undeclared war of the 20th century, ultimately becoming the most divisive

war in the nation's history with respect to conduct and purpose. Like the Korean War it was limited geographically and also like Korea one where the principals were aided by outside powers—South Vietnam by the United States, North Vietnam by the Soviet Union and the People's Republic of China. While there were civilian atrocities and abuse of prisoners on both sides, some recognized rules of conduct were still observed; prisoners were taken and exchanged, the United States refrained from bombing civilian targets, and the neutrality of contiguous nations was respected in principle if not in practice. At the conclusion of the conflict the aggressor nation was again victorious. America's dead and wounded numbered over 211,000.

The First Gulf War which began in January 1991, like Korea, was one in which a multinational force under UN auspices engaged the forces of an aggressor nation. The war was limited geographically with a limited goal; evicting military forces that had invaded a neighboring state. At the conclusion of hostilities, however, the aggressor government was left in place. And also like Korea, the question in many American minds was—why an armistice and not total victory?

The second Gulf War, Iraqi Freedom, differed in several respects from other post World War II conflicts in which the United States was engaged. First, there was no aggression, only the possibility of aggression. Second, while American forces were part of a multinational force, the force was not sanctioned by the United Nations. And last, while coalition forces essentially achieved a military victory and unconditional surrender of the existing government, conflict not only continued but intensified.

Besides fighting wars against nation-states, at various times in its history the United States has militarily dealt with threats to its national interests including naval operations against Barbary pirates, fighting undeclared wars against numerous North American Indian nations, insurrection in the Philippines at the end of the Spanish-American War and attacks on Americans and American interests in South and Central America as well as worldwide. In the 40 year long cold war with the Soviet Union the United States militarily supported nations threatened with a communist takeover of their government in addition to taken sides in a number of civil wars.

In all of the above undeclared wars and military operations some semblance of humanitarian considerations remained. While innocent civilians were casualties, when they were overtly targeted world condemnation followed.

* * * * *

Chronology of Islamic Terrorist Attacks Against Americans and American Interests

Terrorism is not a new phenomenon or is it confined to attacks on a single country's citizens and interests. As a political and military strategy its origins are lost in time. However, in the sixty years since the end of World War II, the tactics of terrorist organizations have become more ruthless, more sustained and more centrally directed. If, at one time, terrorist organizations

adhered to any semblance of rules of conduct with respect to non-combatants and rules of engagement, that time has passed.

Dozens of nations, large and small, rich or poor, militarily strong or weak, have had to deal with acts of terror. In many instances the issues sustaining terrorist activity have been local; several with religious overtones.

In 2006 the United States and its allies are again fighting an *undeclared war*. This time, not against a nation state such as North Korea, North Vietnam and Iraq, but rather a worldwide insurgency lead by extremist factions of one of the world's largest religions---Islam. These terrorist groups have different names ---Hezbollah, Al-Qaeda, Islamic Jihad, Abu Nidal, the Palestine Liberation Organization (Front), the Taliban and Hamas, among others. And while names and locales differ the basic goal is the same; destroy Western influence and investment in the Muslim world in general, and specifically in that region known as the Middle East. The United States as the pre-eminent western power is also the pre-eminent target of these groups.

A chronology of Islamic terrorist attacks against Americans and American interests are cited below. It is not an exhaustive list. Attacks in Afghanistan and Iraq after military operations began are excluded.

1979 Iranian Hostage Crisis. Sixty six American diplomats taken hostage. (Iranian radical students. Iranian government did not intervene)

1983 U.S. Embassy in Beirut attacked. Seventeen Americans killed. (Hezbollah)

1983 Attack on U.S. Marine barracks in Beirut. Two hundred forty one American military personnel killed. (Hezbollah)

1984 Attack on U.S. Embassy Annex in Beirut. Two Americans killed. (Hezbollah)

1984 Restaurant near U.S. Air Force Base in Spain bombed. Eighteen U.S. servicemen killed. (Hezbollah)

1985 TWA Flight 847 hijacked in Beirut. One American murdered. (Hezbollah)

1985 Cruise ship *Achille Lauro* hijacked. One American murdered. (Palestine Liberation Organization)

1986 Discoteque in Berlin, Germany bombed. Two U.S. soldiers killed, 79 wounded. (Libyan terrorist organization)

1988 Bombing of Pan Am flight 103. Two hundred fifty nine killed. (Libyan terrorist organization)

1988 U.S. Embassies bombed in East Africa. Thirteen Americans killed, seven injured. (Usama Bin Laden-Al Qaeda)

1988 Colonel William Higgins, U.S. Marine serving with UN in Lebanon kidnapped/murdered. (Hezbollah)

2000 *USS Cole* attacked in Aden, Yemen. Seventeen sailors killed, 39 wounded. (Usama Bin Laden-Al Qaeda)

1993 World Trade Center bombed. Six killed, 1,000 injured (Abd Al-Rahman, Egyptian cleric/organization)

1996 Khobar Towers bombed, Dhahran, Saudi Arabia. Nineteen U.S. military killed, 240 wounded. (Al Qaeda/Hezbollah)

2001 World Trade Center attacked using hijacked U.S. aircraft. Both towers collapsed killing 2,973 with 24 still listed as missing. (Al Qaeda)

2004 U.S. Consulate attacked in Saudi Arabia. Five killed, 9 injured. None were Americans. (Al Qaeda)

2006 Two Fox News reporters kidnapped in Gaza, Palestine. Forced at gunpoint to embrace Islam. Later released. (Hamas)

While United States citizens were the targets in the above list, other nations and their nationals have been victims of terrorism including Spain, the United Kingdom, Saudi Arabia, Indonesia, the Philippines, and Israel among others.

It is not unfair to state that the American public is increasingly frustrated with the nation's quarter century undeclared war against Islamist terrorists, a frustration that crosses the entire political spectrum, and a frustration that has spilled over into nominally domestic political issues such as high energy prices, consumer confidence in the economy, unemployment, trade policies, and a stock market that reacts as much to terrorist activities in Iraq and worldwide as to economic data.

Further fueling this frustration is the collateral issue of how to contain Iran's drive to become a nuclear power and end its financial and military support of Hezbollah. Equally frustrating is 58 years of supporting Israel, economically and militarily, as it copes with Islamic terrorist organizations dedicated to its total destruction and at the same time maintain a degree of influence in the Middle East.

* * * * *

Legislation and Presidential Prerogatives in Fighting Terrorism: Debate and Criticism

As the war on terror against Muslim extremists that, for lack of a better date, began with the Iranian hostage crisis in 1979, enters its 29th year, there is greater uncertainty with respect to the war's goals and rules of conduct than was the case in any post World War conflict. e.g. Korea and Vietnam.

One major difficulty with respect to bringing a degree of certainty with respect to the rules of conduct of a war on terrorism is the fact that the documents, treaties, and conventions agreed to by the nations of the world and decisions by United States and international judicial bodies that define the rules of conduct between warring parties and nations, essentially *precede* the war on terrorism. Exacerbating the difficulty is the attempt to apply (stretch) these rules in a world that no longer exists.

Documents, or provisions of documents that beg clarification include:

*United States Constitution, Article 1 that defines the powers of Congress with respect to declaring war, the punishment of pirates and felonies...and offenses against the law of nations.

*United States Constitution, Article 2 that defines the powers of the President of the United States.

*United States Constitution, Article 3 that defines the judicial power of the United States with respect to defining treason against the United States and the punishment thereof. (2)

*Charter of the United Nations, Article 7 that established the International Court of Justice (World Court, ICJ). (3)

*Charter of the United Nations, Article 39 that defines the role of the Security Council with respect to breaches of the peace and acts of aggression. (4)

*The International Criminal Court (ICC) as prosecutor of individuals accused of crimes against humanity and war crimes. (5)

*Geneva Convention (Treatment of Prisoners of War) Article 4 that defines the responsibilities of organized resistance movements that belong to, or act in behalf of, a party to the conflict.

*Geneva Convention (Fourth Convention) Common Article 3 that defines the protection of civilians in time of war. (6)

*Treaty on the Non Proliferation of Nuclear Weapons

*States of National Emergency and Presidential Executive Orders.

Appendices A and B define and cite authority for issuing a state of national emergency and a presidential executive order.

* * * * *

The United States Constitution, the Charter of the United Nations, the International Court of Justice and the International Criminal Court are institutions that were put in place to define the rules of conduct of the signatory parties over common issues *over the long term*. By design, amending these documents is not an easy task.

In the case of the United States the 217 year old American Constitution has been amended only 26 times. And while the UN Charter and post world War II international tribunals have relatively short histories, they also were created to define basic rules of conduct for the world's nations over time. What these documents could not contemplate, however, and hence could not define, were rules of conduct for those nations fighting global terrorism.

Short of a cataclysmic break up of the United Nations. e.g. the United States and/or other nations withdrawing from the organization, the UN Charter is not likely to undergo major changes (7) Granting this and the likelihood that the war against terrorism will be long and possibly never brought to a final conclusion, the question becomes—how does the United States, the prime target of worldwide terrorism, defend itself and make clear to its own citizens, its allies and the rest of the world that some of the pre-terror rules of conduct in war are obsolete and must be changed? (8)

Difficult as it may be, argued here is that consideration must be given to amending the American Constitution to reflect a world situation unlikely to change in the near future and to bring a degree of certainty with respect as to how the United States will conduct its war on terrorism.

In 2006 the American body politic has become polarized, not unlike during the Vietnam War, over issues such as the power of the President, Congress and the Judiciary in conducting a war on terrorism and the extent to which the United States will be bound by international treaties, conventions and the UN Charter.

While it can be argued that Congress can pass any needed legislation to prosecute the war on terrorism, it can also be pointed out that what one Congress passes, another can repeal. (9) If, as most authorities agree, the war on terror will be a war of indeterminate length, Congressional action can only grant certainty with respect to the political and military conduct of the war in the short term. (10)

* * * * *

War Powers Act of 1973

Foreign Intelligence Surveillance Act of 1978

USA Patriot Act of 2001

USA Patriot Act Improvement and Reauthorization Act of 2005

States of National Emergency and Presidential Executive Orders

Military Commissions Act 2006

The War Powers Act of 1973 was an attempt to define the role of the President and Congress in cases where a President commits American military forces into situations where hostilities are in progress or there is a likelihood of imminent hostilities. Passage of the legislation was not without debate, particularly with respect to the commitment of forces in a *national emergency*. The Introduction to a 1973 Senate Report summarized the situation.

A majority of the people of the United States have lived all of their lives under emergency rule. For 40 years [**now 66 years**] , freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency...(11)

The Foreign Intelligence Act of 78 (FISA) defined the procedures for collecting foreign intelligence information, i.e., information to protect the United States against an actual or potential attack. (12) With respect to physical searches and electronic surveillance, the Act is limited to targeting foreign powers or their agents. Excluded are U.S. citizens, U.S. corporations, and resident aliens. The Act allows electronic surveillance with and without a court order. In the latter case, surveillance is limited to one year and only for foreign intelligence. In the former case, the government may request the Foreign Intelligence Surveillance Court (established under the Act) to authorize electronic surveillance against suspected foreign intelligence agents operating inside the United States.

In 2001 President Bush authorized warrantless wiretapping of U.S. citizens as well as foreign nationals within the United States by the National Security Agency, i.e. without approval of the FISA Court.

The Bush Administration argues that the wiretapping program is only used when intelligence agencies have “a reasonable basis to believe” that the individuals or groups targeted belong to al Qaeda or other terrorist organizations. Also argued is (1) that surveillance warrants are often difficult to obtain quickly, (2) that FISA would be unconstitutional if it limits the power of the commander in chief in a national emergency, and (3) that the joint resolution passed by Congress after 9/11 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.” (13)

Critics argue that the administrations warrantless surveillance program is a criminal violation of FISA. Cited in this respect is the Fourth Amendment requirement that government

searches be only instigated by probable cause “supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

Various attempts have been made to reach a compromise acceptable to the administration and critics of the National Security Agency’s warrantless surveillance program. As of October 2006 the Congress has yet to act.

Following terrorist attacks on New York City and Washington DC. Congress passed and the President signed into law the *USA Patriot Act of 2001*. “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. ” The legislation passed the Senate on October 25, 2001 by a vote of 98-1 with one absent. The House vote was 356-56.

The Act had ten titles—Enhancing Domestic Security Against Terrorism, Enhanced Surveillance Procedures, International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Protecting the Border, Removing Obstacles To Investigating Terrorism, Providing For Victims of Terrorism, Public Safety Officers, And Their Families, Increased Information Sharing For Critical Infrastructure Protection, Strengthening The Criminal Laws Against Terrorism, Improved Intelligence, and Miscellaneous.

Passage of the Act was not without debate. Major objections focused on threats to civil liberties as outlined in the U.S. Constitution.

USA Patriot ACT Improvement and Reauthorization Act of 2005. When the time came to renew part of the 2001 Patriot Act in October 2005, opposition in Congress to certain provisions had increased to a point where the Act had to be temporarily renewed to give legislators and the Administration time to work out a compromise.

As was the case with the 2001 Act, opposition centered on provisions considered threats to civil liberties, particularly with respect to intrusions on privacy, i.e., surveillance techniques employed by the National Security Agency. The vote for renewal in the Senate was 89-11; in the House 280-138.

The Act made permanent 14 of the 16 provisions in the 2001 legislation and placed a four year sunset requirement on the remaining two provisions. Major amendments included greater security for American seaports and increased protection for mass transit. A summary statement by the Department of Justice concluded:

Today (March 2, 2006) following several months of intense debate, Congress passed the USA Patriot Act Improvement and Reauthorization Act of 2005 (H.R. 3199). This legislation reauthorizes all expiring provisions of the USA Patriot Act, adds dozens of additional safeguards to protect Americans’ privacy and civil liberties, strengthens port security, and provides tools to combat the spread of methamphetamine. The reauthorizing

legislation provides essential support for our efforts to protect both Americans and the values that Americans cherish. (14)

States of National Emergency and Presidential Executive Orders. In 2006 when a President declares a national emergency or comes into office in a declared national emergency, he may issue or implement existing executive orders relative to a military threat to the nation. He may also issue executive orders he considers necessary to improve the well being of the nation. Most authorities trace the beginning of these presidential prerogatives to March 1933 when President Franklin D. Roosevelt proclaimed a state of national emergency under the War and Emergency Powers Act of 1933. In addition to the present state of national emergency with respect to the war of terror, states of national emergency have been declared during the Korean and Vietnam Wars.

The greatest use of a presidential executive order was by President John F. Kennedy. He not only issued executive orders with respect to national security but many dealing with domestic issues. (15)

Critics argue that the powers claimed by Presidents during national emergencies and the attendant executive orders issued exceed the powers granted to a President under the Constitution. Senate Report 93-549, cited above, summarizes critic's concerns.

Since March 9, 1933, the United States has been in a state of declared national emergency.

.....

Under the powers delegated by these statutes, the President may: seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communications; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all Americans. (16)

A main difficulty with respect to resolving the question of presidential powers during a national emergency is that there is no agreed upon definition of a national emergency. In practice, Congress has made no distinction between a state of national emergency and a state of war as defined in the Constitution. e.g., Korean and Vietnam Wars.

One caveat should, however, be added. The above cited powers of a President come into being *only if invoked*. As a general proposition, the most recent use of national emergency powers have involved threats to national security.

Military Commissions Act of 2006. Perhaps the most contentious question faced by a President and Congress in conducting the war on terrorism is the status of captured terrorists. Prior to September 11, 2001, the number of terrorists detained, awaiting trial, or considered as fugitives was measured in the dozens not hundreds. Nor was there great debate concerning their status and

punishment since, in most cases, they took credit for their terrorist acts. All that changed, however, as large numbers of Taliban and Al-Qaeda fighters loyal to Osama bin Laden were taken prisoners in the American lead invasion of Afghanistan and later in the 2003 Iraq War (2003). Since Osama bin Laden was an admitted terrorist, the chief sponsor of the September 2001 attacks on New York City and Washington, DC, it followed that Al-Qaeda prisoners were also terrorists.

The question immediately became—what was the status of these prisoners with respect to the *Geneva Convention Relative to the Treatment of Prisoners of War*? Article 4 of the Convention goes into elaborate detail as to who may be considered a prisoner of war but still raises as many questions as it answers. Even more ambiguous is Common Article 3 (1) (c) which prohibits “outrages upon personal dignity, in particular humiliation and degrading treatment.” In the context of Article 3, what then are the limits on interrogating terrorist prisoners? What treatments are acceptable? Which are not? Many authorities consider the Article purposely ambiguous in order to achieve a compromise acceptable to states with different views of humanitarian law with respect to non-international conflicts. (17)

The Bush Administration argues that the interrogation of terrorist prisoners has yielded valuable information with respect to preventing future attacks on the United States. Interrogation methods used by the Central Intelligence Agency and others have not been specified, only that the prisoners have not been subjected to torture. Many in Congress are fearful that the Administration is rewriting Common Article 3. Their main argument is that should this be the case, American prisoners in future conflicts could be interrogated without any restraint on their captors.

A second vexing problem is whether terrorist prisoners can be held indefinitely or at some point must they be granted a trial, i.e., whether a writ of habeas corpus is applicable. And if a trial is granted, where will it be held? In federal courts or by a military tribunal. Criticism of the limbo in which Al-Qaeda and other terrorist suspects have been held has not been limited to Congress and the American public but increasingly by foreign governments, many allied with the United States in the war on terror.

As in the case of government (NSA) surveillance methods and practices, the issue of the status of prisoners (detainees) was equally divisive, not only as between the Bush Administration and Congress but with the Congress as well.

The issue has been settled (for the present) with passage of the *Military Commissions Act of 2006*. It was a compromise statute. Provisions include:

- *A number of specific abuses (of prisoners of war) as cited in Common Article 3 of the Geneva Convention are prohibited.

- *The President may specify what interrogation techniques are allowable.

- *The Writ of habeas Corpus is suspended for prisoners (detainees). (18)

*Military tribunals are set up to try detainees.

*Enemy combatants are defined to include non citizens living in the United States and those who support terrorism with money and weapons.

Although the legislation was non-partisan; the vote in the Senate being 65-34 and in the House 250-170, the bill was not without its critics. Senate Minority Leader Harry Reid argued it did not grant terror suspects a number of the same rights granted U.S. citizens facing trial in federal courts. He predicted the legislation would be found unconstitutional by the Supreme Court. (19) Patrick Leahy, ranking Democrat on the Judiciary Committee stated that the bill is not a check on the administration but a “voucher for future wrongdoing.” (20). *The New York Times* called the bill a “tyrannical law that will rank with the low points in American democracy.” (21)

* * * * *

While the United States has not declared war as specified in the Constitution since December 8, 1941 wars in every sense of the word, have been fought under *states of national emergency*, the war on terrorism being the most recent. At the same time, Congress has yet to specifically address what, in fact, is a state of national emergency. Rather it has chosen to let the ambiguity between a constitutional war and a war in times of national emergency remain unresolved. Resolutions authorizing the use of military force have replaced declared wars, the rationale being the need to respond quickly and that formal debate is time consuming when time is of the essence. In point of fact, it is likely that the hours spent on debating war resolutions can equal or exceed debates with respect to a Constitutional declaration of war.

As these undeclared wars stretched into years with increasing costs in casualties and national treasure and unclear goals, criticism mounted to a point where the conflict was terminated without victory and with no clear resolution of the original purpose of committing American forces.

* * * * *

It would be fair to say that after the terror attacks on New York City and Washington, DC, Americans for the first time took seriously the threat to their internal security, i.e., attacks on American soil. It is not to say that the United States did not respond to previous attacks on its citizens and interests, rather the responses were limited to addressing a specific terrorist act and conditioned on expected public reaction, particularly with respect to collateral damage, i.e., civilian casualties. (22)

While, after 9/11, it was recognized that the war on terrorism was global, what was not publicly emphasized was that most, if not all, terrorist acts were carried out by Muslim extremists, extremists yes, but Muslims non the less. This salient fact has complicated the problem of identifying potential terrorists, that is, authorities cannot single out, concentrate efforts on, screen and initiate surveillance on Muslim individuals or groups without the risk of

running afoul of anti-discrimination statutes, constitutional restraints, and political correctness doctrine. The question of how to handle the “Muslim issue” remains unclear, controversial and unresolved.

As noted in the earlier list of terrorist attacks against American citizens and interests since 1979, Hezbollah was the responsible group for 7 of the 17. Equally known and understood is that Iran is the creator, sponsor and source of funding for Hezbollah which raises the questions (a) when is a terrorist organization such as Hezbollah considered a part of the armed forces of the sponsoring country, and (b) is the sponsoring country responsible for the acts of its surrogate?

The much cited Common Article 3 of the Geneva Conventions specifies four acts prohibited by captors of civilians taking no active part in hostilities. (23) Hezbollah has not observed any of the four and, in fact, has disregarded such prohibitions on numerous occasions. Nor has it observed Article 4 (d) of the Convention that imposes a requirement on armed groups “to conduct their operations in accordance with laws and customs of war.”

The Bush Administration has espoused the doctrine of “pre-emptive strikes” against terrorist states and organizations when it is clear that there is an imminent threat to American lives and interests. In the context of the pre-emptive strike doctrine, is an attack on Iran justified when Hezbollah commits terrorist act against American citizens and property? While logic suggests that a pre-emptive strike is probably justified, Chapter VI, Article 33 of the UN Charter states that parties to a dispute that might endanger international peace seek a solution by negotiation. In the reasonable expectation that such negotiations, even if begun, would fail, the United States could then make it clear that a declaration of war as provided for in the American Constitution is an option. (24)

Conclusion

Granting that the war on terror will be long, stretching over different administrations and Congresses, it is imperative that a degree of certainty replace uncertainty with respect to presidential, congressional and judicial authority as outlined in the U.S. Constitution, i.e., the power of a president to proclaim national emergencies and issue executive orders, the limits of congressional restraint on this authority, and the power of the judiciary to review anti-terrorist laws.(25)

Perhaps the best case for enshrining the powers of the three branches of government in a constitutional amendment(s) with respect to fighting a prolonged war on terrorism is the 350 page report “*The Constitution in Crisis: The Downing Street Minutes and Deception, Manipulation, Torture, Retribution, And Coverups in the Iraq War, and Illegal Domestic Surveillance*” by Representative John Conyers (D. Michigan) the ranking minority member on the House of Representatives Judiciary Committee. The report lists four statutes that Representative Conyers alleges the President violated prior to the invasion of Iraq.

*Committing a Fraud Against the United States [18 U.S.C.371]

*Making False Statements to Congress [18 U.S.C. 1001]

*War Powers Resolution [Public Law 93-148]

*Misuse of Government Funds [31 U.S.C. 1301]

Further on the report lists and additional three laws that Congressman Conyers claims the Bush Administration violated.

*Anti-Torture Statute [18 U.S.C. 2340-40A]

*The War Crimes Act [18 U.S.C. 2441]

*Material Witness [18 U.S.C. 3144] (26)

This paper takes no position with respect to the legality of laws and rules under which the war on terrorism has been fought since passage of the USA Patriot Act 2001. Rather, a case has been made for clarity and certainty with respect to those rules, all the time recognizing that amending the Constitution is a solemn undertaking but one that must be considered. (27)

NOTES

(1) President Harry S. Truman and General of the Army Douglas MacArthur.

(2) The Supreme Court sets a high bar for conviction of treason and sedition. Only three indictments on these charges have been handed down since the end of World War II.

In 1951 Julius and Ethel Rosenberg were executed and Morton Sobell sentenced to 30 years for aiding the Soviet Union in developing the A-Bomb. They were convicted, however, under the Espionage Act of 1917, not Article 3 on the Constitution. In 1956 John and Sylvia Powell and Julian Shuman were indicted by a grand jury on sedition charges for publishing term warfare allegation against the United States. The U.S. military for unknown reasons refused to cooperate in the prosecution and the charges were dropped. In October 2006 Adam Gadahn was indicted on a charge of treason for publicly supporting Al-Qaeda. He remains at large and is believed to be in Pakistan.

(3) Charter of the United Nations, Article 7, established the International Court of Justice (World Court, ICJ). The primary purpose of the court is to settle legal disputes between UN member states. In 1986 the United States denied compulsory jurisdiction of the court, i.e., it accepts jurisdiction only on a case to case basis.

(4) A principle weakness of Article 39 is that a permanent member of the Security Council may veto any resolution put forward by another member of the Council. All permanent members of the Council have used their veto power in this respect. If the Security Council fails (due to a veto) to enforce a judgment, for example, by the International Court of Justice or the International Criminal Court, there is no other option under the UN Charter for such an enforcement.

(5) The International Criminal Court (ICC) was established in 2002 to prosecute individuals for crimes against humanity and war crimes. The United States has not ratified the treaty establishing the court and as of 2006 has indicated that it will not do so. The principle objections of the United States are the possibility of political prosecutions of U.S. nationals and threats to its national sovereignty. In 2002 the U.S. Congress passed the American Service Members Protection Act that imposes economic penalties on countries that cooperate with the ICC, with exceptions. Also, the President is authorized to use military force to free any military personnel held by the Court.

(6) Common Article 3 lists the acts that are prohibited with respect to the detention of civilians taking no part in hostilities and members of the armed forces that have laid down their arms.

(7) One *possible* change with respect to the Security Council would be its enlargement to include major economic powers that have come on the scene since the original charter was put in place. e.g. Japan, Germany, Brazil, and India.

(8) The U.S. lead North Atlantic Treaty Organization (NATO) have been divided over how best to combat worldwide terrorism. NATO's original purposed was to discourage a Soviet attack on

Western Europe, a purpose that was clear and unambiguous. In 2006 this clarity of purpose does not exist with respect as to how best to wage a global war on terror and those nations that sponsor terrorist organizations.

(9) An example would be proposed legislation, HR 5371, *Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA (LISTEN) Act*, that would strictly define NSA rules for conducting surveillance under the Foreign Intelligence Surveillance Act (FISA) of 1978. The rationale for introducing the LISTEN Act is alleged unlawful operations by the National Security Agency (NSA) with respect to FISA.

(10) Senate Majority Leader, William Frist, in an interview with the *Greenville News* (SC), on August 24, 2006 stated “When you look at the worldwide growth of radical Islamic extremism, it’s a long term battle; that’s the reality of it... The United States and the West face a 30 to 40 year challenge.”

(11) Introduction to Senate Report 93-549 (93rd Congress, 1st Session, (1973)

(12) The Foreign Intelligence Surveillance Act of 1978 was amended by the USA Patriot Act of 2001. The preface to the 2001 Act states its purpose as “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. Its 10 titles increased the power of the Executive Branch in fighting terrorism.

(13) Joint Resolution of Congress (107th Congress, 1st Session) “Authorization For Use of Military Force,” passed on September 14, 2001 states “the President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”

(14) U. S. Department of Justice. *Fact Sheet (March 2, 2006) USA Patriot Act Improvement and Reauthorization Act of 2005.*

(15) Executive Orders issued by President Kennedy that dealt with domestic, non-military issues include establishment of the Peace Corps, Commission on the Status of Women, and Council of Aging.

(16) *Forward to Senate Report 93-549.*

(17) M. Gandhi. “Common Article 3 Of Geneva Conventions, 1949 In The Era of International Criminal Tribunals,” *ISIL Year Book of International Humanitarian and Refugee Law.*

(18) An amendment to the Act sponsored by Arlen Specter (R-PA) and Patrick Leahy (D-VT) to keep in place the writ of habeas corpus for detainees was defeated by a vote of 51-48.

(19) Charles Hurt. “Senate approves detainee tribunal bill,” *The Washington Times* (October 2, 2006) p. 28.

(20) Danielle Knight. "A Last-Minute Deal on Detainees," *U.S. News and World Report* (October 9, 2006) p. 30.

(21) "Military Commission Act of 2006-Official Statements," *Wikipedia Encyclopedia* (October 9, 2006)

(22) One example, out of a number, would be the August 1998 missile attacks on Afghanistan and Sudan ordered by President William Clinton in response to the bombings of U.S. embassies in Kenya and Tanzania.

(23) The prohibited acts are (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, (b) taking of hostages, (c) outrages upon personal dignity, in particular humiliating and degrading treatment, and (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(24) It is recognized that should this option be proposed it would be bitterly contested in the Congress, the press, and the general public worldwide.

(25) Two advantages to a tightly drawn constitutional amendment are (1) it would be difficult for courts to change the intent of the amendment, and (2) the message it would send to terrorists and foreign governments, friendly and unfriendly alike, with respect to American policy on global terrorism.

(26) Byron York. "The Democrats' Impeachment Road Map," *National Review Online 2006-2007* (August 7, 2006)

(27) A Constitutional Amendment(s) would, by definition of the amending process, be non-partisan and well understood by the American public.

APPENDIX A

EXECUTIVE ORDERS

An executive order is an edict issued by a member of the executive branch of government, usually the head of that branch. The term is used mostly by the United States Government. In other countries, similar edicts may be known as decrees, or orders-in-council.

Presidents of the United States have issued executive orders since 1789. There is no U.S. Constitution provision or statute that explicitly permits executive orders aside from the vague grant of “executive power” found in Article II, Section 1 of the Constitution and the statement “take Care that the Laws be faithfully executed” in Article II, Section 3.

Most executive orders are issued by the President to executive officers to help direct their operation....Some do have the force of law when made in pursuance of certain Acts of Congress due to those acts giving the President discretionary powers.

Types of Executive Orders other than to executive officers are:

- *National Security Directives
- *Homeland Security Presidential Directives
- *Presidential Decision Directives

The Congress may overturn an executive order by passing legislation in conflict with it or by refusing to approve funding to enforce it.

Source: Wikipedia, the free encyclopedia.

APPENDIX B

STATES OF NATIONAL EMERGENCY

A state of national emergency is a governmental declaration that may suspend certain normal function of government, may work to alert citizens to alter their normal behaviors, or may order government agencies to implement emergency preparedness plans. It can also be used as a rationale for suspending civil liberties. Such declarations usually come during a time of natural disaster, during period of civil unrest, or following a declaration of war.

In the United States, the chief executive is typically empowered to declare a state of emergency. The President of the United States, a governor of a state, or even a local mayor may declare a state of emergency with his or her jurisdiction.

The courts in the United States are often very lenient in allowing almost any action to be taken in the case of a declared emergency, if it is reasonably related. For example, habeas corpus is the right to challenge an arrest in court. The U.S. Constitution says, "The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." (Article I, Section 9)

Since the September 11, 2001 attacks on New York City and Washington, DC, President George W. Bush has claimed emergency authority to detain individuals and conduct warrantless surveillance.

Source: Wikipedia, the free encyclopedia.

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