



**Strategic View:**

# DECLARING WAR AGAINST AL QAEDA

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**By Kenneth E. Brooten, Jr.**

What experience and history teach is this—that people and governments never have learned anything from history, or acted on principles deduced from it.

The history of the Twentieth Century is replete with “undeclared wars,”—Korea, Viet Nam, Grenada, Desert Storm and Somalia. The dawn of the Twenty-First Century began with more undeclared Wars in Afghanistan and Iraq.

Article I, Section 8, of our *Constitution* clearly mandates: “Congress shall have Power to declare War.” Implicit in the unequivocal language of the *United States Constitution* is the Constitutional obligation of the Congress to Declare War. The Constitutional mandate that Congress and not the President declare war is addressed in *The Federalist* No. 69.<sup>2</sup>

The power of the President to wage war was further discussed by Chief Justice John Marshall in *Ex parte Milligan*, 31 U.S. 2 (1866). “The whole powers of war being, by the *Constitution of the United States*, vested in Congress, the acts of that body alone can be resorted to as our guides to this inquiry.”

Constitutional issues relating to the obligation of Congress to declare war arose during the Presidency of Thomas Jefferson when United States merchant ships were being attacked in the Bay of Tripoli. President Jefferson sent armed U.S. frigates to protect American merchant shipping in the Mediterranean Sea.

Attacked by a Tripolean cruiser, one of the frigates subdued it, disarmed it and, pursuant to instructions, released

it. President Jefferson, in a message to Congress, announced that his actions were in compliance with “constitutional limitations on his authority in the absence of a declaration of war.”<sup>3</sup>

Sixty years later the Supreme Court of the United States approved a blockade order issued by President Lincoln, as an exercise of Presidential power alone, on the ground that a state of war was a fact. “The President was bound to meet it in the shape it presented itself, without **waiting** for Congress to baptize it with a name; and no name was [*sic*] given it by him or them could change the fact,”<sup>4</sup>

Hugo Grotius’ comprehensive treatise, *De Jure Belli Ac Pacis*, “The Law of War and Peace,”<sup>5</sup> codified well-established international legal principles which are predicated primarily on theology and philosophy. Those fundamental principles had been articulated by scholars and philosophers from Aristotle to the Apostles, the Roman Emperors Marcus Aurelius and Justinian, and the theologian Augustine.

Grotius, discussing the issue of what constitutes a legal cause for war, or “*causa belli*,” quoted Dionysius of Halicarnassus: “This, I think, ought to be your first concern, that you have a **cause** for war which is free from reproach and just.”<sup>6</sup> Grotius then enumerated various “just causes for war” which include:

**Attacks upon national sovereignty; defense of persons and property; the**

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**right of self defense in the face of an act of war by another entity or sovereign.**

Prior to September 11, 2001, the United States had been subjected to multiple, well-recognized “*causa belli*.” Each separate, individual hostile act is

well recognized as constituting a “just cause for war.” Thus, our analysis will begin with an application of fundamental international legal principles which have been long recognized as constituting a “just *causa belli*.” Our analysis will only

be limited to those terrorist attacks that Al Qaeda claimed to have carried out. The unprovoked World Trade Center bombing on February 26, 1993; The First Battle of Mogadishu, Somalia, October 4, 1993; Issuance of a “Fatwa, Declaration of War against the Americans,” Osama bin Laden, August 1996;<sup>7</sup> simultaneous bombings of two sovereign United States Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, on August 7, 1998; the unprovoked attack on the Man of War, The U.S.S. Cole in the Gulf of Yemen on October 12, 2000, and the four unprovoked attacks within the continental United States on September 11, 2001, consisting of two hijacked airliner attacks on the Twin Trade Towers in New York City, the hijacked airliner attack on the Pentagon, and the crash of hijacked United Airlines Flight 93 in Pennsylvania.

Some politicians have questioned, How do we declare war against an unconventional elusive enemy who has no affiliation with a recognized nation? However, when subjected to a historical analysis, waging unconventional war is neither new nor novel – it is as old as the history of humankind. Ambushes, assassination and intimidation are simply tactics utilized by the enemy in an unconventional war. Unconventional tactics require unconventional analysis and flexible adaptability. Flexible adaptability is often contrary to conventional strategy and military doctrine, but that does not mean that we are powerless to meet the enemy as he presents himself. Unconventional enemies and unconventional war simply mean that we must redefine the battlefield and train our troops to fight utilizing unconventional tactics to adapt to the reality on the ground. Politicians often worry more about defining the enemy than engaging him.

Global Jihad has demonstrated a total disregard for long and well-established international conventions relating to rules of war and conflict which are codified in the Third Geneva Convention (1949).<sup>8</sup> Of particular significance for purposes of our analysis is the obvious fact that neither Al Qaeda nor its affiliates are signatories to the Geneva Convention. Those who engage in global Jihad have demonstrated by their crude barbaric actions their complete repudiation of the Geneva Convention, relying instead on Islamic Law.

The law of war and peace in Islam is as old as the Quran itself... In Islamic international law this conduct [of one state in relation to another] is, strictly speaking, regulated between Muslims and non-Muslims, there being viewed from Islamic perspective, no other nation... *In Islam, of course, no nation is sovereign since Allah alone is the only sovereign in Whom all authority vests.*<sup>9</sup>

Consistent with the repudiation of the Third Geneva Convention are the patently barbaric actions which international law recognizes as constituting “crimes against humanity.” Their crude acts are consistent with the time of Muhammad. Those tactics include the beheadings of captured American servicemen; dead American soldiers being dragged through the streets of Mogadishu, Somalia, on October 4, 1993; numerous filmed beheadings of multinational personnel—some, innocent volunteer medical missionaries who placed themselves in harm’s way to provide needed medical care and treatment to the victims of war; the desecration of the bodies of four American contractors left hanging from a bridge in Iraq; and, more recently, cutting off and delivering the severed fingers of captive American and foreign contractors. Those acts are clearly indicative of strict

“Terrorists need to be right once. We need to be right 100% of the time.”

— President George W. Bush

adherence to Islamic law and bear no semblance to the well-recognized rights of combatants accorded by the Geneva Convention. Why, then, do we accord enemy combatants rights that they do not accord to American military personnel and our Western coalition allies?

Why have we not legislated that those who engage in Jihad cannot avail themselves of the protections of the Third Geneva Convention? To argue otherwise violates even the most fundamental tenets of international legal reciprocity. "A Treaty will be observed only so long as the conditions remain the same." Clearly those engaged in global Jihad have rejected the Geneva Convention from the inception of the commission of acts in furtherance of Jihad. They have forfeited any claim to the protections of such Convention.

Any critical analysis of the consequences of the United States Congress failing to vote a formal declaration of war must of necessity be viewed in light of the formal declaration of war against the Americans by Osama bin Laden in August 1996. A formal declaration of war was issued against the Americas and neither the President nor the Congress took any action. One need not be an international legal scholar, but need only apply simple common sense to conclude that when Osama bin Laden issued his Islamic fatwa declaring war on the Americas, we should have taken some action. When Iran issued a Fatwa against Salman Rushdie for writing and publishing his "Satanic Verses," Rushdie immediately went into hiding. Rushdie understood the significance of a Fatwa; the Government of the United States didn't. Therefore we must examine the events following that declaration of war in view of their consequences and how they have affected our ability to effectively

wage war against al Qaida and its affiliates who committed the unprovoked attacks of September 11, 2001.

In time of declared war, each of the following public disclosures would and should have constituted acts of treason. Many of the multiple legal issues that have been the subject of lengthy debate would never have been considered had a formal declaration of war been voted by Congress. There would be no issue of "detainment" or rights of enemy combatants or secret prisons or intelligence gathering methods. However, absent a formal declaration of war, decisions were required to be made by the Supreme Court of the United States. Guantanamo never would have become a household name associated with imprisonment of enemy combatants. Guantanamo would only be an American military base in southern Cuba. More than two years elapsed since the issuance of the fatwa declaring war against the Americas when each of the following disclosures occurred.

1. *The Washington Times* (1998) ran a profile of the al Qaeda leader Osama bin Laden, reporting that he "keeps in touch with the world via computers and satellite phones." The 9/11 Commission concluded that such disclosure hindered the ability of the United States to find, capture or kill Osama bin Laden.

2. *The Washington Post* on November 2, 2005, disclosed a network of secret CIA detention facilities for suspected terrorists.

3. *The New York Times* on December 16, 2005, disclosed, in a front-page report, that in 2002 the National Security Agency began monitoring international phone calls and e-mails of some U.S. residents, in secret and without court warrants, to uncover possible

connections to terrorist organizations.

4. *The New York Times* on June 23, 2006, disclosed that in 2001 the Bush administration began secretly monitoring financial transactions between people within the U.S. and others overseas.

5. **The Supreme Court of the United States in *Hamidi v. Rumsfeld*, 542 U.S. 507 (2004)**, reversed the dismissal a *habeas corpus* petition brought on behalf of Yaser Esam Hamidi, a U.S. citizen being detained indefinitely as an "Illegal enemy combatant." The Supreme Court ruled that a U.S. citizen being detained indefinitely as an "illegal enemy combatant" violated the United States Constitution.

6. **The Supreme Court of the United States in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)**, held that the military commission established to try Hamdan was never authorized by an Act of Congress.

These are only a few of the many consequences of the Congress failing to vote a formal declaration of war against Al Qaeda and its sisters. If we as a nation are to defeat an enemy which is growing daily with the spread of its franchises throughout the world and within the United States where it is rapidly increasing within the inmate populations of our federal and state prisons, then we must recognize that the enemy has arrived in America. We are dealing with an enemy committed to the destruction of America and Western civilization, and we must carefully examine who we are fighting and what we legally need to do to protect our nation. If we are to continue to have a Constitution which we are sworn to "preserve and protect," then we must, of necessity, protect our means and methods of collecting intelligence to properly prosecute a war which must be won.

Our intelligence agencies, and the agencies which comprise the Department of Homeland Security and federal, state and local law enforcement, have paid the price of the President and the Congress failing to carry out their Constitutional mandate. The 9/11 Commission concluded that the *Washington Times* Report in 1998, two years after Osama bin Laden issued his "Fatwa Declaring War against the Americas," hindered the ability of the United States to find, capture or kill Osama bin Laden. The United States is in a state of declared war by Al Qaeda. Why have we responded to ten separate and distinct causes of war with only a single Joint Congressional Resolution authorizing the use of force?

Has our Government not learned from history or acted on the principles deduced from it? •

## ENDNOTES:

<sup>1</sup> G. W. F. Hegel, *Philosophy of History* (1842).

<sup>2</sup> *The Federalist* No. 69. (Modern Library ed. 1937).

<sup>3</sup> *Messages and Papers of the President*, J. Richardsen ed. (Washington 1896).

<sup>4</sup> *The Prize Cases* 2 BI 67 U.S. 635 (1863).

<sup>5</sup> *The Law of War and Peace*, Carnegie Endowment for International Peace, Division of International Law, Special Edition, © 1984, Legal Classics Library.

<sup>6</sup> *The Law of War and Peace*, 169.

<sup>7</sup> Published in *Al Quds Al Arabia*, London, August, 1996.

<sup>8</sup> Geneva Convention, relative to the treatment of prisoners of war, adopted on 12 August 1949 by the Diplomatic

Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva, from 21 April to 12 August 1949, *entry into force* 21 October 1950.

<sup>9</sup> Volume 1, Book 2, Number 25, Narrated by Abu Huraira.

## ABOUT THE AUTHOR

*Mr. Brooten is the former Chief Counsel, and Special Counsel, House Select Committee on Assassinations, United States Congress. He has Professional and Graduate Degrees in International Journalism, Law and International Law and Trade from the University of Florida, Trinity College, Cambridge, U.K. The Institute of Legal Sciences of the Polish Academy of Sciences in Warsaw, Poland.*

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