

Addressing the “War on Terror” under the “Rule of Law”

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I. INTRODUCTION

*All I know is just what I read in the papers.*¹

Will Rogers

The three pronged terror attack of September 11, 2001, by al-Qaeda unlawful enemy combatants² was not unprecedented in terms of ferocity. To be sure, the events of 9/11 affected the well being of the nation, but it also spawned tremendous levels of confusion regarding the crafting and application of a national response firmly rooted under the rubric of a proper rule of law. As the Congress and Executive branches quickly acted to frame 9/11 in terms of an “armed attack” under the law of war, some objected to the use of the law of war and strongly argued instead for the use of domestic and international criminal law only. Amazingly, well over a decade later, those voices still rail on – debate about the proper rule of law to be used in the War on Terror still swirls about in the media, academia, and government.³ Spearheaded by the American Civil Liberties Union (ACLU) and others, the three primary objections center on: (1) indefinite detention of detainees; (2) the legality and use of military commissions; and (3) the employment of violence to include so-called targeted killing.⁴

On the other hand, what fuels the debate is not simply a matter of ideologues advancing political or social agendas; the new phenomenon of al-Qa’eda-styled warfare is actually a hybrid between the actions of a nation state at war and a criminal organization engaged in violent behavior. Genuine concerns remain about how the law of war, which was intended to apply to nations at war, should be employed to address a non-state actor, like al-Qa’eda. Although the law of war is not a perfect fit, it has nevertheless been forced into the mold. The purpose of this paper is to explore the development of this process and to give air to both sides of the debate. For the sake of the continued viability of the rule of law, if clarity can be obtained, it is time to find it.

¹ CHARLES HURD, A TREASURY OF GREAT AMERICAN QUOTATIONS 273 (1968).

² See generally 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–46 (2004) (setting out a final analysis by the United States government of all the issues associated with the 9/11 attacks by al-Qaeda. On September 11, 2001, 19 members of the radical Islamic terror group named al-Qaeda hijacked four U.S. passenger aircraft while in flight (five terrorists each in three of the planes and four in the fourth that went down in Pennsylvania). The al-Qaeda foot soldiers intentionally crashed two of the aircraft into the Twin Towers of the World Trade Center in New York City. A third aircraft targeted the Pentagon in Northern Virginia. The fourth plane, United 93, went down in a field in Pennsylvania, most likely as a result of the heroic efforts of some of the passengers who stormed the al-Qa’eda pilots. Almost 3,000 people were killed in the attacks. *Id.*

³ Devlin Barrett, Siobhan Gorman, & Tamer El-Ghobashy, *Bin Laden Kin Nabbed*, WALL ST. JOURNAL, Mar. 8, 2013, at A1 (discussing the objections to trying an al-Qa’eda enemy combatant in federal court).

⁴ See Wayne Zaideman, *Fortifying Legal Approaches to the War on Terror: Methodologic Considerations*, in PERSPECTIVES ON DETENTION, PROSECUTION AND PUNISHMENT OF TERRORISTS IMPLICATIONS FOR FUTURE POLICY AND CONDUCT 23 (Yonah Alexander et al. eds., 2011) (arguing that after the 9/11 attacks, the government elevated counterterrorism as the first priority of the FBI in order to stop terror attacks on the United States before they occur).