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The War On Terrorism And The Constitution

by Michael I. Meyerson

Discussion of civil liberties during wartime often omit the fact that there can be no meaningful liberty at all if our homes and offices are bombed or our loved ones are killed or injured by acts of terror. The Government must be given the tools necessary to accomplish its vital mission. The first priority must be to win the war against terrorism. There are, however, other priorities. The United States, in its just battle for freedom, must ensure that freedom is preserved during that battle as well. And achieving both goals is not always easy.

Chief Justice William Rehnquist is fond of quoting Abraham Lincoln's dismissal of judicial criticism over Lincoln's unilateral suspension of Habeas Corpus at the beginning of the Civil War. Chief Justice Roger Taney, riding circuit, had held the suspension of Habeas Corpus was solely a legislative determination. *Ex Parte Merryman*, 17 F. Cas. 144 (D.Md. 1861). Thus, he held, Lincoln's actions were unconstitutional, and the arrests sanctioned by them were illegal.

In ignoring the court's decree, Lincoln declared that the greater good must be served and that the necessities of war overrode specific rights:

Must [all law] be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?

Abraham Lincoln, "Message to Congress, July 4, 1861" in *The Official Records of the Union and Confederate Armies*, Series IV, I, 311-321.

The limitation of Lincoln's reasoning, though, is that it

creates a false dichotomy: The complete destruction of our system of government which can be prevented if a "single law" which is made in "extreme tenderness of the citizen's liberty" and is violated to only a "very limited extent."

In the real world, though, it is not necessarily obvious that the violation of the single law is either necessary or helpful in ensuring the nation's security. Also, the doctrine espoused by Lincoln has no obvious stopping point, no way to determine how many or how fundamental are the laws which the Government may violate in the name of national security.

An important example is the internment of more than 120,000 Japanese-Americans during World War II. The Supreme Court upheld this action, declaring:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Korematsu v. United States, 323 U.S. 214, 218 (1944).

Many years later, though, it was revealed that this "judgment of military authorities" was quite suspect. The conclusions were largely those of one person, Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, who was responsible for West Coast security. Every entity responsible for advis-

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ing him, the FBI, the FCC, and Naval Intelligence, found that there was no such threat, and that, in the words of Commander Kenneth D. Ringle, an expert on Japanese intelligence in the Office of Naval Intelligence, "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people;...it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population." Evidence also emerged that DeWitt's decision was motivated in no small part by racial animus. He was to declare that "racial affinities are not severed by migration," and in an off-the-record interview, "[A] Jap is a Jap." *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984).

One lesson of history is that the mere declaration of military necessity does not necessarily justify the infringement of civil liberties. Justice Robert Jackson warned that great skepticism was required when Government utilized its so-called "war

power" to justify actions:

It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always...the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.

Woods v. Cloyd W. Miller Co., 333 U.S. 138,

146-47 (1948) (Jackson, J., concurring).

Are We Really At War?

It is sometimes very easy to tell when this nation is at war. The day after Pearl Harbor was bombed, for example, Congress passed a joint resolution stating, "That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared..." However, such formal declarations are rare in American history. The only others occurred during the War of 1812, the Mexican-American War (1848), the Spanish-American War (1898), and World War I.

Most of the more than 100 military actions undertaken by the United States during the course of our history lacked such a declaration. They have been accompanied either by Congressional authorization for the use of force without a formal declaration (as with Desert Storm and, perhaps, the Vietnam War); Congressional funding without actual authorization (such as the Korean War); or Congressional silence (as with the invasion of Grenada in 1983).

Knowing whether we are currently "at war" and against whom, is important for not only determining the legality of the military operations but also the consequential changes in legal rights and responsibilities that follow when our nation is at war.

Before analyzing the current situation, it is useful to recall that, while the Constitution provides that the President is "Commander in Chief of the Army and Navy of the United States," (Art. II, Sec. 2), it is Congress which has the power "to declare war." (Art. I, Sec. 8). To the framers, this was a vitally important distinction. During the debates at the Constitutional Convention, James Madison proposed the final language, changing the original draft which would have authorized Congress to "make war." The purpose of the change was "leaving to the Executive the power to repel sudden attacks." As Roger Sherman of Connecticut stated, "The Executive should be able to repel and not to commence war."

Thus, it is the task of the President to act, unilaterally if necessary, to oppose "sudden attacks," but otherwise the de-



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cision to begin a war rests with Congress. The reason for this was the framers' well-founded distrust of monarchs and other leaders who carry their people into unwise conflict. As James Madison wrote to Thomas Jefferson, "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."

The exclusive power of Congress to "commence" war may not be implicated, however, when others have already declared war on the United States. At the birth of our Republic, the Barbary pirates attacked the ships of nations which did not pay protection money, known then as "tribute." After Thomas Jefferson became President in 1801, he stopped such payments, and the ruler of Tripoli (the "dey") declared war on the United States. Jefferson sent war ships to the Mediterranean, which were then attacked by a Tripolitan ship. After the American frigates prevailed in battle, the enemy ship was disarmed and released. Jefferson explained to Congress that the reason the ship was not captured was that, since Congress had not declared war, the rules of war permitting such capture did not apply. (Thomas Jefferson: First Annual Message to Congress, December 8, 1801)

Alexander Hamilton mocked Jefferson's highly formalistic analysis as an "absurdity" which was "so repugnant to good sense, so inconsistent with national safety..." (Alexander Hamilton, *The Examination*, no. 1, Dec. 17, 1801). Hamilton argued that the Congressional power to declare war meant that, when our nation was at peace, only Congress could change it to a state of war. But, he stated, "when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory: it is at least unnecessary."

Under Hamilton's analysis, it could well be argued that no declaration of war was necessary at all after September 11 to combat the terrorists who planned and launched the attack. As if this attack were not sufficient by itself

to initiate a state of war, Osama bin Laden had previously declared war against the United States; in 1998, he called for the killing of American civilians as well as soldiers, "in any country in which it is possible to do it."

One puzzling aspect is that the War on Terrorism is not waged against a particular nation. Nonetheless, it is certainly possible to be in a state of war that is not so directed. As the Supreme Court held in finding that the country was in a state of war during the Civil War, "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States." *The Brig Amy Warwick [The Prize Cases]*, 67 U.S. 635 (1862). Thus, the Congressional authorization of force was arguably not necessary to create a state of war between the United States and those behind September 11. What is noteworthy about that authorization, though, is that it may be read as a specific *limitation* on the President's authority.

On September 15, 2001, Congress approved a joint resolution which declared, "That the president is authorized 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 Sept. 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. Authorization for Use of Military Force, Pub. L. No. 107-40, 11 Stat. 224 (2001).

Even though this does not contain a formal declaration of war, it certainly should be seen as resolving any lingering doubt about military action against those who planned, carried out, or harbored those involved in September 11. What is significant is that this authorization is explicitly not a blank check for a generalized "war on terrorism." According to *The Baltimore Sun*, Congress rejected White House language which would have permitted the president to initiate military action against terrorists not linked to the attacks of September 11. (Karen Hosler, "Congress endorses the use of force," *Baltimore Sun* September 15, 2001, at 1A) The plain language of the resolution confirms the

statement of Senator John Kerry (D-Mass.) that while the resolution gave the President broad authority to retaliate against those associated with September 11, it did withhold authorization for a military attack on "any self-defined terrorist group that you simply don't want to see around anymore."

Accordingly, the attack on the Taliban in Afghanistan was a military action undertaken pursuant both to Congressional authorization, and the inherent powers of the President as Commander-in-Chief to respond to a state of war declared by an adversary. By contrast, unless new information surfaces linking Iraq to September 11, the much-discussed invasion of Iraq would not appear authorized. Initiating a preemptive strike would seem to be just the sort of action to "commence" a conflict which the framers entrusted only to Congress.

Emergency Powers and Civil Liberties

After September 11, the Executive Branch claimed broad powers for dealing with those it believed either were terrorists or were assisting terrorists. First, it claimed the right to try non-citizens before a military tribunal, with rules far different from normal criminal trials. Next, it asserted the right to categorize both citizens and non-citizens as "enemy combatants." The significance of this label, according to the Government, is that it permits the Government to hold even citizens indefinitely without charging them with a crime and without access to a lawyer.

The military has used special tribunals since the Revolutionary War. Major John Andre, Adjutant-General to the British Army, and co-conspirator with Benedict Arnold, was tried by a "Board of General Officers" appointed by General Washington. He was found guilty of spying and hanged on October 2, 1780. The first formal military tribunals were established by General Winfield Scott during the Mexican-American War in 1848.

The Civil War saw extensive use of these tribunals, highlighted by two interesting Supreme Court decisions. In the first, *Ex Parte Vallandigham*, 68 U.S. 243 (1863), the Court refused to disturb the conviction of former Ohio congressman Clement Vallandigham "for having uttered, in a speech at a public meeting, dis-

loyal sentiments and opinions..." The Court stated that it had no power to "review or reverse...the proceedings of a military commission."

A few years later, the Supreme Court overturned the death sentence imposed by a military tribunal against Lamdin P. Milligan for "conspiracy against the United States," and freed the prisoner. *Ex Parte Milligan*, 71 U.S. 2 (1866). The Court ruled that neither the laws of war nor the authority of military tribunals could be "applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

The most relevant cases for the current situation come from the Second World War, and show both the strengths and weaknesses of military tribunals. The first case, *Ex Parte Quirin*, 317 U.S. 1 (1942), involved eight saboteurs, trained at a "sabotage school" near Berlin. They landed on the shores of the United States, four in Florida and four in New York, discarded their uniforms, put on civilian clothes, and hid their cache of explosives and incendiary devices. They were captured before they could execute their plan to blow up war industries and war facilities.

President Roosevelt appointed a Military Commission and directed it to try the eight saboteurs for offenses against the law of war (Order of July 2, 1942, 7 Fed. Reg. 5103 (1942)). The Court upheld the use of the military tribunals. First, the Court said that it was appropriate to term the saboteurs "unlawful combatants": "[T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."

Next, the Court stated that the fact that one of the saboteurs may have been a U.S. citizen was irrelevant: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents..."

Two of the saboteurs who cooperated were sentenced to jail. The other six were executed three days after the Tribunal an-

nounced its sentence.

Considering the nature of the offense and the status of the war in 1942, the outcome of *Quirin* seems reasonable. By contrast, another tribunal case, *In re Yamashita*, 327 U.S. 1 (1946), shows the perils of such tribunals.

Tomoyuki Yamashita was the Commanding General of the Japanese Army in the Philippines. After surrendering to the Americans, he was charged with violating the laws of war by permitting his soldiers to commit atrocities against the civilian population. He was convicted by a military tribunal and sentenced to death.

Although the Supreme Court upheld the tribunal, two Justices, Frank Murphy and Wiley B. Rutledge, delivered poignant dissents which reveal the dangers of tribunals. They made the following observations:

1) The charge against Yamashita was improper. He was charged with failure to control his troops, but such control was made impossible by the American attack of the Philippines: "To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."

2) He was given inadequate time to prepare. On the day of arraignment, October 8, three weeks before the trial began, petitioner was served with a bill of particulars specifying 64 items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command. Three days before trial, on October 26, the prosecution filed a supplemental bill of particulars, containing 59 more specifications. The tribunal denied repeated defense requests for a continuance, even though the attorneys [all military personnel] had been "working day and night," with "no time whatsoever to prepare any affirmative defense," as they had been fully occupied trying "to keep up with that new Bill of Particulars."

3) The rules of evidence violated all principles of fundamental fairness. The only evidence the tribunal heard concerning Yamashita's knowledge

of the atrocities was in the form of *ex parte* affidavits and depositions. He was never given the opportunity to cross-examine any witness on this crucial issue.

The tribunal was permitted to admit any evidence "as in its opinion would be of assistance in proving or disproving the charge...[or] would have probative value in the mind of a reasonable man." The tribunal was also free to determine what weight to give any of the evidence received without restraint. What followed was a cascade of hearsay, second and third-hand reports, and even an army "propaganda film." In the words of Justice Rutledge, "[P]etitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military..."

There are several important lessons for our current situations. First, military tribunals come with a price in terms of reliability and fairness. Especially when our civil and criminal courts are functioning, we should be reluctant to relinquish the protections of the Fifth and Sixth Amendment. After all, the Government was able to conduct trials of both Timothy McVeigh and the terrorists who, in 1993, detonated a bomb in the World Trade Center.

Second, it is indisputable that the Supreme Court has jurisdiction to review Government claims as to who is a combatant properly subject to military tribunals. In arguing that Yaser Esam Hamdi (a U.S. citizen who was found among captured Taliban prisoners held at the Guantanamo Bay) should not be permitted to see a lawyer, the Government made the extraordinary claim that the court was not empowered to review at all the Government's designation of an American citizen as an enemy combatant: "Given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." *Hamdi v Rumsfeld*, ___ F.3d ___ (4th Cir. July 12, 2002).

Similar claims repeatedly have been

rejected by the Court. While granting great deference to the President, the Supreme Court in *Quirin* declared, "[N]either the [President's] Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." As Justice Murphy observed in *Yamashita*, the Court assumed jurisdiction to hear the claim: "Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably."

Concluding Thoughts

Chief Justice William Rehnquist has apparently adopted much of the war-time philosophy of Abraham Lincoln. In fact, he chose Lincoln's phrase "All the Laws but One," as the title for his book on civil liberties during times of war. In a recent speech, Rehnquist reviewed cases from both the Civil War and World War II and noted that in both conflicts, "The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over." To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned." *Remarks of Supreme Court Chief Justice William A. Rehnquist, Director's Forum, Woodrow Wilson International Center for Scholars, November 17, 1999.*

Cases such as *Ex Parte Vallandigham* and *Korematsu v. United States* occurred during war-time. Meanwhile, cases such as *Ex Parte Milligan* (holding that the military cannot substitute its tribunals for civil courts which are able to function) and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (same), occurred after the end of the conflict.

The Chief Justice may be overlooking a more recent trend, which indicates that war-time courts may no longer be as deferential or intimidated, depending on one's point of view. During the Korean War, the Supreme Court struck down

President Truman's attempt to take over the steel mills. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Similarly, during the Vietnam War, the Court rejected an attempt by President Nixon to suppress publication of a classified study of that war [the Pentagon Papers], despite the Government's claim that release of the papers posed a grave and immediate danger to the security of the United States. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

One of the most interesting things to note about both those cases is that they reveal that claims of emergency cannot always be taken at face value. For example, President Truman had announced that, "any stoppage of steel production would immediately place the Nation in peril." *Youngstown Sheet & Tube Co.*, 343 U.S. at ___ (Vinson, C.J., dissenting). Nonetheless, despite the steelworkers going on strike for fifty-three days following the Court's ruling, there was no steel shortage or harm to the war effort. See generally M. Marcus, *Truman and the Steel Seizure Case* (1977).

Similarly, the Government declared that publication of the Pentagon Papers would create a "grave and immediate danger to the security of the United States." Brief for the United States, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), at 7. Again, history does not reveal that any danger resulted other than the "embarrassment" of the Government predicted by Justice Douglas ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing

information." *New York Times Co.*, 403 U.S. at 723-24 (Douglas, J., concurring)).

We, as lawyers and as citizens, need to maintain a difficult balance between patriotism and skepticism. The horrors of September 11 must never be repeated, and it falls to the Federal Government in general and the President, in particular, to accomplish this formidable task.

At the same time, we must ensure that our democratic system of government is protected. Justice Felix Frankfurter stated that it was "absurd" to worry that Harry Truman, that "representative product of the sturdy democratic traditions of the Mississippi Valley," would become a dictator. *Youngstown Sheet & Tube Co.*, 343 U.S. at 593 (Frankfurter, J., concurring). Nonetheless, Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

There is one final peril of which we must be aware. It almost seems unfair that we confront those who killed thousands of innocent civilians, who rejoice at destruction and heartache, while we attempt to follow the commands of our own Constitution. Nevertheless, as Justice Frank Murphy wrote in 1946, the brutality and ruthlessness of those we oppose cannot, "justify the abandonment of our devotion to justice... To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals." *In re Yamashita*, 327 U.S. 1 (1946) (Murphy, J., dissenting). ⚔

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