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America's War On Islamist Terror . . . Or Is It?

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The following is adapted from a speech delivered in Washington, D.C., on March 5, 2010, in the "First Principles on First Fridays" lecture series sponsored by Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship.

"You are hereby commanded to show cause." The general studied the document in his hands. It was a writ of habeas corpus. A federal judge was presuming, in the midst of war, to order him to report to the courthouse the following morning and explain the basis on which the U.S. Army was holding a prisoner of war.

Habeas corpus: "You shall have the body." It is known as "the Great Writ," an inheritance from the Magna Carta and British common law that was formally established in the American colonies in the 1690s. When the Constitution was adopted in 1787, it became part of our fundamental law, enshrined in Article I, Section 9: "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." The writ, in short, is a time-honored bulwark against tyranny.

But to return to our story: Louisiana had only been a state for about three years when, in early 1815, General Andrew Jackson authorized the arrest and detention of

Louis Louailler. "Old Hickory" had just saved the Republic by defeating the British forces of General Sir Edward Pakenham in the decisive Battle of New Orleans. The Treaty of Ghent, which formally concluded the War of 1812, had actually been signed by British and American foreign ministers over two weeks earlier. But news of the treaty did not reach the U.S. in time to forestall the battle. It was the one great American victory of the war.

Just as Jackson hadn't known about the formal armistice, neither did he know what the British army would do. Would it regroup and attempt another assault? So he imposed martial law. That did not please Mr. Louailler, who took to the newspapers to attack Jackson's decision. Perceiving this as an incitement, Jackson had Louailler arrested. Supporters of the imprisoned man appealed to the Honorable Dominick Augustin Hall, the U.S. District Judge in Louisiana.

Hall, being a jurist, had no responsibility for national security—a responsibility assigned by the Constitution to elected officials. The judge's only duty was to ensure that any litigants properly before him were afforded due process. But Judge Hall was of a mind that he, not General Jackson, personified the rule of law—security or no security.

General Jackson was of a different mind. Instead of responding to the writ as directed, he had Judge Hall arrested and, after a time, escorted by troops several miles outside the city limits and set free.

We've come a long way from Andrew Jackson to Barack Obama—and an even longer way from Louis Louailler to Umar Farouk Abdulmutallab, the so-called Christmas bomber.

* * *

It has become fashionable these days to invoke the "rule of law" as if it means the rule of lawyers—and in particular, the rule of judges. But that has never been the term's meaning. In the U.S., the rule of law is embodied in the Constitution and resides in the statutes, treaties, rules, and regulations adopted pursuant to the Constitution. The rule of law does not refer either to judges or to elected officials, who are themselves servants of the Constitution.

It has also become trendy in recent years, especially among our legal elites, to declaim piously that "the Constitution is not suspended in wartime." And, of course, no true patriot believes that the Constitution could ever be suspended. But the Constitution is not—nor has it ever been—the imposition of judicial rule. Indeed, the Constitution imposes strict limitations on the judicial power, just as it does on Congress and the executive branch. It has never been the case that where judicial power ends, anarchy begins.

General Jackson may have been wrong to lock up Louis Louailler in 1815. In fact, the military court that tried Louailler acquitted him. But Jackson was not wrong in determining that it was his decision to make—not as a tyrant, but within the constraints of military protocols in war time. When formal word of

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the peace treaty reached New Orleans, Jackson immediately reinstated civilian control. But until that time, he—not the civilian courts—was responsible for keeping order. In the state of war, those courts were inadequate for that task—unless one believes that Judge Hall, with his writs, was a match for His Majesty's armed forces, then thought to be the mightiest on earth.

In doing as he did, General Jackson was applying a principle stated with clarity almost a century later by Justice Oliver Wendell Holmes, Jr., writing for a unanimous Supreme Court in the case of *Moyer v. Peabody*:

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

When the life of the state is imperiled, that is, the Constitution does not become suspended; it adapts. In times of armed conflict, it imposes the laws and customs of war, which—under those circumstances—are as consistent with the rule of law as judicial processes are in peacetime.

On this point, it is worth pausing to recall why we have a Constitution. After achieving independence, our country proved unsuccessful in governing itself under the Articles of Confederation. Paramount among the reasons for this was the attempt under the Articles to provide national security by committee—something that proved utterly ineffective in dealing with threats from England, Spain, and the Barbary Pirates. The Constitution remedied this potentially fatal weakness by placing all executive power, including the power of commander-in-chief, in a single elected official—the president—who could act with great energy and dispatch.

The Framers of the Constitution understood that the rights we cherish would be little more than parchment promises unless we could defend

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ourselves and defeat our enemies. Moreover, they understood that—given human nature—we would always have enemies. Unlike opponents of the war against Islamist terror today, they did not believe that we would be able to define our enemies out of existence by not uttering their names—or rationalize them out of existence by insisting that their hostility is somehow our own fault. Nor did the Framers believe that we would be able to indict our enemies into submission in our civilian courts. They believed that we would have to defeat them, which means being able to enforce the protocols necessary to wage war successfully.

These protocols are the laws of war, and they are older than the U.S. itself. They include requiring combatants to wear uniforms, to carry their weapons openly, to be part of a regular armed force, and, most importantly, to refrain from intentionally targeting civilians. They also define wartime powers and privileges. Enemy combatants, for example, may be captured and detained until the conclusion of hostilities. Fighters who adhere to the laws of war are entitled to various protections upon capture. By contrast, fighters who flout the laws of war—such as non-uniformed terrorists who target civilians—are unlawful combatants and may be prosecuted by a military commission for war crimes.

This is not a judicial system, and it is not intended to be. But it is every bit a *legal* system. And throughout our history—at least until recently—this has been well understood. Since 9/11, however, anti-war lawyers have challenged the idea of a separate legal status for unlawful combatants. Here they are up against not only common sense but history.

* * *

President Lincoln, of course, suspended habeas corpus upon the outbreak of the Civil War. (Not as often mentioned is the fact that Congress—which was out

of session at the time—later endorsed Lincoln's action.) When Lincoln's action was eventually brought before the Supreme Court, the issue was not whether habeas corpus could be suspended in case of rebellion—as we have seen, that is clearly provided for in the Constitution—but which elected branch of government could suspend it. Chief Justice Roger Taney concluded in the case of *Ex parte Merryman* that because the Suspension Clause is in Article I, it must have been understood as a power of Congress rather than the president—a reasonable interpretation, though hardly indisputable. What was *unreasonable* about the decision was Taney's claim that if the courts were open and functioning, even in wartime, federal judges—not the political branches—should have the final word on what actions could be taken in defense of the nation. That claim had no constitutional support—it was a power-grab pure and simple, and a foolish and undemocratic one.

At the time Lincoln suspended habeas corpus, the survival of the Union hung in the balance, with Confederate sympathizers sabotaging railways and otherwise impeding the movement of Union forces and supplies. It is for just such exigencies that the Suspension Clause exists. As Lincoln reasoned in a message to a special session of Congress on July 4, 1861, if the writ of habeas corpus—"fashioned with such extreme tenderness to the citizens' liberty"—were as sacrosanct as Taney contended, it would allow "all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated." Taney's claim is preposterous on its face. What of the President's obligation "to preserve, protect and defend the Constitution"? What of the central purpose of government "to provide for the common defense"? What becomes of our rights if the structure so carefully crafted to defend them vanishes?

President Roosevelt grappled with similar challenges during World War II. In June 1942, when the outcome of the war was anything but clear, eight German saboteurs were captured after landing on the coasts of Long Island and Florida. They had been sent by Hitler to commit acts of terrorism against civilian infrastructure, and Roosevelt decided to make an example of them. He wasn't concerned with the fact that the federal courts were open and functioning. Nor was he swayed by the fact that one of the saboteurs was an American citizen. He directed that all eight of them be detained as enemy combatants and tried by a military commission. Nor did he perceive the need to festoon the proceedings with trappings of a martial setting: the trial took place in an FBI conference room in what is now the Robert F. Kennedy Department of Justice Building.

The saboteurs' defense lawyers naturally cried foul, filing a petition for a writ of habeas corpus in the Supreme Court and claiming that this military commission violated the Constitution. Upon hearing of the petition, Roosevelt summoned Attorney General Francis Biddle and directed him to tell the Chief Justice that he did not care what the Supreme Court thought; that the Constitution made him, not the justices, responsible for the lives of the American people and the successful prosecution of the war; and that he would not be releasing the prisoners, regardless of the Court's disposition of the case.

This provided a judicial "king has no clothes" moment of clarity such as we have not had in the ensuing 68 years. The fact is that courts have no power to enforce their edicts. Roosevelt was willing to bet, if it got down to brass tacks, that the American people would agree that the president they had elected—and who would have to face their judgment again in the next election—should be prosecuting the war, rather than a tribunal of unelected judges. In the event, the Supreme Court agreed, and in the case of *Ex parte Quirin* it upheld all of Roosevelt's actions. Most of the saboteurs were subsequently executed, following military trial, approximately seven weeks after their capture.

How do we get from the decisive actions of Jackson, Lincoln, and Roosevelt to the Obama administration's

stunning mishandling of Umar Farouk Abdulmutallab? Recall that this terrorist tried to detonate a chemical bomb on an airplane—an attack that would have killed all 288 innocents onboard and an untold number of Americans on the ground. Recall that he was a trained operative of al Qaeda—a transnational terrorist network with which we are at war. Recall that he was a Nigerian national sent from Yemen to attack us, and had no claim whatsoever on the protections of civilian due process. What's more, our intelligence community tells us that Yemen is now one of the prime launch points of Islamist terror. Abdulmutallab had spent four months there. He knew the training camps, the trainers, and the identities of other terrorists (evidently, scores of them). In light of these facts, his capture alive should have been one of the great intelligence coups of the war. Instead, he was questioned for a mere 50 minutes before being given Miranda warnings and a lawyer—at which point he invoked his supposed right to remain silent, was consigned to the civilian justice system, and was charged in an indictment that gave him plea-bargaining leverage in any further negotiations over what he would tell us.

This approach was not only unnecessary, it was wrong. The terrorist could and should have been designated an enemy combatant and interrogated without the interference of a lawyer or the complications of a civilian prosecution. Even if one believed—as the Obama administration says it believes—that it is important to our reputation around the world to endow him with the rights of the Americans he was trying to slaughter, there was no legal requirement that that be done immediately. He could have been turned over to civilian authorities two or three years from now, once his intelligence reservoir was fully tapped. We'd have lost nothing in the meantime except the ability to introduce any confession at trial—and no confession is needed when a terrorist tries to bomb an airplane in front of nearly 300 witnesses.

* * *

Robert Jackson—the U.S. Attorney General from 1940-41, a Supreme Court Justice from 1941-54, and the chief prosecutor at the Nuremberg Trials—wrote the following in a 1948 Supreme Court case, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*:

> The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

The Constitution of Justice Jackson—like the Constitution of Presidents Jackson, Lincoln, and Roosevelt—is that of a free, self-governing people. Such a people does not surrender control of the most fundamental political decisions—such as those concerning national defense—to officials who are not politically accountable. Nor should our elected officials voluntarily surrender control of those decisions. We must reject the idea of entrusting our security to judicial processes or we shall eventually find ourselves neither secure nor free. ■