

January 1, 2002 - January 14, 2002

SECTION: FEATURES; Pg. 26

LENGTH: 3408 words

HEADLINE: **War and the Constitution;
Bush's military tribunals haven't got a legal leg to stand on**

BYLINE: BY **GEORGE P. FLETCHER**:

George P. Fletcher is Cardozo Professor of Jurisprudence at the Columbia University School of Law. He is the author, most recently, of *Our Secret Constitution: How Lincoln Redefined American Democracy*.

BODY:

THE MEDIA ARE AWASH IN DISINFORMATION ABOUT military tribunals. Since November 13, when President George W. Bush issued his controversial executive order mandating the use of military commissions to prosecute suspected terrorists, one farfetched claim of law has followed another. The president's lawyers have every right to put the best possible light on their plans for sidestepping the criminal courts. My problem is with the academic lawyers whose offhand opinions fill the op-ed pages and the ears of Congress. Their din reached its climax when two important legal scholars -- Laurence Tribe of Harvard and Cass Sunstein of the University of Chicago -- testified as "liberals" before the Senate Judiciary Committee that Bush's tribunals would be compatible with the Constitution. Of course, everybody these days is responding under pressure, but the law professors have been giving "shooting from the hip" a bad name.

Any serious examination of the sources -- statutes and Supreme Court cases -- should lead a fair-minded scholar to the opposite conclusion: There is no law available to support the proposed Bush tribunals. Leave aside whether the tribunals would be good or bad, kangaroo courts or simply streamlined procedure; the president has no authority to create them.

Tribe argued recently in *The New Republic* that "in wartime, 'due process of law,' both linguistically and historically, permits trying unlawful combatants for violation of the laws of war, without a jury." This single sentence captures many of the mistakes that run, like viruses, through the debate in the press. But let us begin with the fundamental question of whether the Constitution, as Tribe suggests, is different in wartime versus peacetime. In the words of the Supreme Court's 1866 ruling *Ex parte Milligan*, the leading precedent on this issue: "[The] Constitution was intended for a state of war, as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances." When the Sixth Amendment mandates that in "all criminal prosecutions" certain rights should apply, including the right to a jury trial, the framers mean what they say. And the Supreme Court has understood the injunction. It is undisputed law that if the civilian courts are open and functioning, the armed forces cannot convene a military commission or tribunal to try offenses that fall within the civilian courts' jurisdiction.

True, Chief Justice William H. Rehnquist wrote in his 1998 book *All the Laws but One* that in the time of a declared war the government has greater authority to infringe civil liberties. For example, the government can deport enemy aliens. But these infringements on the status of enemy aliens do not affect their right to be tried in civilian court for committing a crime in the United States. The fact of "wartime" does not change the meaning or scope of due process -- either linguistically or historically.

THE SECOND BASIC POINT THAT WE SHOULD CLARIFY IN order to think straight about criminal justice a la

Bush and Attorney General John Ashcroft concerns "unlawful combatants" -- the term that Tribe uses to explain the category of people that can be tried by simplified procedures for "violation of the laws of war." This phrase, "unlawful combatant," appears all over the place as though it could be the talisman that saves Bush's tribunals.

The Supreme Court first used the term in 1942 in *Ex parte Quirin* to solve a particular problem that arose when eight German spies landed in civilian clothes on the beaches of Long Island. The FBI arrested them before they executed any of their planned acts of sabotage. President Franklin D. Roosevelt was resolved to prosecute them for something, and it turned out that there was a suitable law on the books -- a provision of the U.S. Code prohibiting spying in wartime near or around American military installations. That statute required trial by either court-martial or military tribunal and imposed an automatic penalty of death. Roosevelt quickly established the military tribunal that the statute authorized, but the constitutional dilemma remained. To see it, we have to concentrate on one horn at a time.

The first problem was that these spies were members of the German army. We were at war with Germany and therefore the eight captives were arguably just like soldiers who might have crossed the Canadian border in tanks. And if they were combatants, then by the rules of international law we were not entitled to try them for acts committed in the pursuit of legitimate aims of war. As Chief Justice Harlan Fiske Stone wrote for the Supreme Court in *Quirin*: "Lawful combatants are subject [only] to capture and detention as prisoners of war by opposing military forces." The reason for this rule lies in the general understanding that a soldier is simply a servant of the state. He does not do anything in his own name. He cannot be held personally liable for the ravages of war.

Now, admittedly, there are various ways around the rule. One is to deny that the military engagement is a war and call it instead some kind of police action. But the danger of trying too hard to deny the combatant status of those engaged in military battle is that we then encounter the second horn of the dilemma: If these are merely criminals who have committed crimes against the United States, they must be tried in a federal district court. That is the holding in the 1866 decision *Milligan*. In fact, it seems to be the tack taken by Harvard University law professor Anne-Marie Slaughter, who argued against Bush's tribunals in *The New York Times*, saying that al-Qaeda members fighting in Afghanistan are really just "common criminals" and shouldn't be dignified with the status of combatants.

Here, then, was the quandary faced by the Supreme Court in 1942: Either the eight German spies were combatants or they had to be tried in federal district court -- with full procedural protections -- for their apparent conspiracy to commit sabotage. To find a way out of this predicament, the Court invented the category of "unlawful combatant." Eureka! The spies fell conveniently between the stools of international law (no trial for combatants) and the rule in *Milligan* (an obligatory trial in available civilian courts); thus, they could be tried in Roosevelt's tribunal. The soldiers were "unlawful" because they wore civilian clothes when they slipped behind enemy lines to spy. They did not deserve to be treated as combatants exempt from prosecution because by virtue of their deception they had not run the risk that all combatants run, namely of being shot when they cross into enemy territory.

But if there is one idea that those now commenting on Bush's proposed tribunals systematically distort, this is it. They use the word "unlawful" as if it were the equivalent of "violating the laws of war." Recall Tribe's line: "In wartime, 'due process of law' . . . permits trying unlawful combatants for violation of the laws of war." His logic seems to be that any soldier who commits a war crime would be an unlawful combatant and subject to trial by military tribunal.

Alberto Gonzales, the chief White House counsel, betrayed the same root mistake when he addressed the American Bar Association in late November. He tried to demonstrate the limited scope of the tribunals by saying that the administration was only after "enemy soldiers." Then someone reminded him that enemy soldiers are protected by the Geneva Conventions and cannot be prosecuted at all. He corrected himself by saying that tribunals were after "unlawful combatants." He, too, seems to believe that the category of "unlawful combatant" is so broad that it includes anyone the administration might want to prosecute in a special tribunal -- anyone who has done something unlawful and is a combatant. But that is not the meaning of the *Quirin* precedent.

MUCH OF THE CONFUSION ARISES FROM THE FAILURE to recognize that there are two bodies of law -- both

called "the law of war." To understand the difference between them, we have to think ourselves back into the period before the Nuremberg trials, before the Japanese war-crime trials, when the law of war was not primarily about crimes; it was about how you conducted yourself as someone embedded in a chain of command and therefore qualified for the immunity from prosecution promised to combatants. It meant, among other things, that you had to wear a uniform, fight with your company, and cease fighting when the army surrendered.

During World War II, the "law of war" came to refer primarily to war crimes that violated basic principles of morality and decency. But when the Quirin case was decided, that transformation had not yet become apparent. There was nothing immoral -- by contemporary standards -- about the Germans spying in the United States. The Americans would surely have done the same thing in enemy territory (and probably did if they were smart). Perhaps there was something duplicitous about crossing enemy lines in civilian clothes, but one could hardly imagine bringing a case to The Hague on those grounds. Quirin did not incorporate the universal standards of morality that we now associate with the principles of the Geneva Conventions and the Rome Statute of July 1998 proposing an International Criminal Court.

The key case in the transition to the modern law of war was the 1946 appeal to the U.S. Supreme Court by the Japanese General Tomoyuki Yamashita. A military tribunal in the Philippines, established by the postwar commander of the islands, Lieutenant General Wilhelm Styer, had charged Yamashita for allowing his troops to go on a rampage and commit atrocities against local civilians. The military tribunal had invented a new war crime that amounted, in effect, to a commander's negligent supervision of his troops, and the Supreme Court affirmed that it could do so. Thus was born the idea of a war crime under the law of war.

If President Bush had a precedent on his side of the argument, it would be *Yamashita v. Styer*. According to this case, he surely has the power to use tribunals to prosecute war crimes (in the modern sense) that -- like the atrocities in the Philippines -- occur entirely outside the jurisdiction of the United States courts. Anyone who looks into the Yamashita case, however, will find that it stands together with *Korematsu v. United States*, the 1944 decision upholding the military internment of American Japanese, as one of the disgraceful episodes of World War II jurisprudence. Among other things, the Yamashita decision violated the Geneva Convention of 1929, which provides that prisoners of war may be convicted and sentenced "only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

In other words, General Yamashita and every foreigner suspected of a war crime should have received the same procedural protection as was available in an American court-martial. (Thus, under the Geneva Conventions, Bush's executive order mandating military tribunals is unacceptable because it permits, among other things, a death sentence based on a two-thirds vote, while an American court-martial requires a unanimous vote.) The weakness of the Supreme Court's reasoning in Yamashita is exposed in stinging dissents by Justices Frank Murphy and Wiley Rutledge.

It is not surprising, then, that in the current discussion no one invokes the precedent of Yamashita. But even if those who argue for the president's tribunals wanted to invoke the case, they would have to contend with the fact that General Yamashita was not subject to prosecution in the federal courts for acts committed in the Philippines against the local population. The implication of the Yamashita case is that Taliban and al-Qaeda fighters who are taken prisoner could be prosecuted by military tribunals (or more properly by American courts-martial) but only for war crimes committed in Afghanistan. As for suspects who allegedly participated in a conspiracy to commit the crimes of September 11, they are liable for a crime on American soil and are therefore subject to prosecution in the federal courts. In the end, Yamashita -- whether it is still good law or not -- does not help the president's case, for the precedent is limited to cases beyond the competence of the American civilian courts.

To return, however, to the two different meanings of the law of war, what we've seen since World War II is a remarkable shift in emphasis from the law of war as a set of rules about fair fighting to the law of war crimes as a set of norms about decent behavior toward civilians and prisoners of war. And those who argue in favor of the president's tribunals typically confound the two. Because military tribunals do have jurisdiction over unlawful combatants, as the Quirin decision established, proponents claim that military tribunals can prosecute war crimes, or

violations of the law of war in the modern sense. For example, in his testimony to the Senate Judiciary Committee, Cass Sunstein cited Quirin as though it were sufficient in itself to establish the constitutionality of Bush's tribunals.

Here is how Ruth Wedgwood, a Yale University law professor, defended the president's order in *The Wall Street Journal*: "Military courts are the traditional venue for enforcing violations of the law of war." The statement is true if she is talking about Quirin-type violations of the law but grossly misleading if the focus is on war crimes in the modern sense. There is no tradition or constitutional authority legitimating trial by a military tribunal when the crime is subject to prosecution under American law and the appropriate American courts are open and functioning. And ever since the postwar period, anyone suspected of a grave breach of the Geneva Conventions against American nationals is, by law, subject to prosecution in a federal district court.

ONE OF THE MORE DISCONCERTING ASPECTS OF TRIBE'S testimony to the Senate Judiciary Committee is that he preached congressional approval as a way of remedying the defects in the Bush executive order. It never occurred to him, apparently, that Congress has no clear constitutional basis for adding to the very limited categories of crimes committed under American law that can be prosecuted in military tribunals.

In fact, the Bill of Rights guarantees a civilian court trial to anyone accused of crimes in violation of federal statutes, with only two historically entrenched exceptions. One is court-martial jurisdiction over the U.S. armed forces and the other is the limited case of spying upheld in the Quirin case. (Yamashita does not count here because it attaches to crimes committed outside the jurisdiction of American courts.) The narrow exception for court-martial jurisdiction is made explicit in the Fifth Amendment ("except in cases arising in the land or naval forces"), and the Supreme Court justified the narrow exception for the spying statute on the ground that military tribunals for spying functioned before the nation's founding and therefore were "grandfathered" into the Constitution.

Contrary to Sunstein's testimony, there is no general exception recognized in American law for war crimes committed against civilians. In fact, since World War II, all war crimes committed by U.S. troops or against American nationals have been federal offenses subject to the jurisdiction of the federal courts. Nor can you make the Quirin argument that jurisdiction over these crimes antedates the Constitution, for there were no war crimes (in the post-Nuremberg sense) at the time and there was certainly no war crime based on attacks against the civilian population. Also, it is worth noting that in the language of the spying statute -- which provides the only congressionally authorized military tribunal to date -- Congress took pains to bring the crime within the framework of court-martial jurisdiction. The offense is described in the statute as "lurking as a spy" in or around a military facility. This falls within the penumbra of court-martial jurisdiction over military bases.

The arguments concerning congressional authority do not satisfy. And if there is a good argument for the president's having inherent authority to establish the tribunals, I have yet to hear it. Ruth Wedgwood made a stunningly inaccurate claim in *The Wall Street Journal* that the president has implied power as commander in chief to set up military tribunals. She said this principle is "acknowledged by Chief Justice Stone in a 1942 opinion." The opinion she was referring to is -- once again -- the Quirin case, and here is what the chief justice actually wrote: "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation." Who knows what she could have been thinking.

Wedgwood also claimed that Congress has already "agreed" to the president's power to invoke military tribunals. This, too, is false. The most Congress has ever done is recognize the possible existence of military tribunals. For instance, a provision of the 1950 Universal Code of Military Justice recognizes the authority of the executive branch to prescribe rules of evidence for military courts, including existing and authorized military tribunals. But that law does not grant the president authority to convene tribunals, and it specifies no criteria as to when a tribunal should hear a case that would otherwise go to the regular civilian courts.

The fact is that the president has no apparent authority to convene military tribunals for the crimes of September 11. Of course, we do not know the circumstances in which the Defense Department will try to invoke this power to sentence supposed international terrorists to death. When it does, though, we can be sure that there will be

litigation; and if the Supreme Court reads its own cases faithfully, it will uphold the rule in *Ex parte Milligan* and strike down the conviction of anyone who should have been tried in federal court.

In the meantime, the very existence of the executive order of November 13 is creating an international scandal. European countries refuse to extradite suspects to us on the ground that they can be sentenced to death in summary proceedings. And an argument is in the offing that the very threat of capital punishment against "enemy soldiers," the phrase that Alberto Gonzales let slip, can constitute a war crime by the United States. According to the Rome Statute, it is a crime for one army to declare that "no quarter will be given" to the other side. Enemy soldiers, in other words, have the right to surrender without being harmed. Yet if we threaten them with the death penalty by summary proceedings, we are in effect depriving them of their right to a safe surrender and thus declaring that "no quarter will be given."

The irony is that the administration has ably pursued its war aims. In this area of demonstrating respect for the Constitution and international law, however, it has failed miserably. Perhaps that is because the Bush team has been uncertain whether they are fighting a war or trying to arrest those who financed and organized the attacks of September 11. They cannot quite decide whether this was a collective crime of al-Qaeda and the Taliban, in which case war is the proper response, or the individual crime of Osama bin Laden and other as yet unidentified individuals, in which case a criminal prosecution is the correct action. The military tribunals offer a halfway-house approach that they may see as prosecuting the war while also bringing the bad guys to justice.

Sooner or later, however, despite the failure of our "liberal" law professors, the truth will win out: The prosecution of suspects for crimes committed on American soil must -- if the charges were not prosecuted in tribunals at the time of the Constitution -- come before the federal courts. Neither the president nor Congress has the authority to suspend that constitutional guarantee.

GRAPHIC: Picture, no caption, SCALA/ART RESOURCE, NY

LOAD-DATE: January 7, 2002