

## **CIVIL LIBERTIES AND THE WAR AGAINST TERRORISM**

**By Gerald F. Uelmen**

**As we all watched the horrific destruction of innocent life on September 11, we knew that our lives would be forever changed by these events. Along with the vast majority of our fellow Americans, we were ready and willing to accept the burdens that stricter security measures will impose: longer lines at the airport, delays in the delivery of our mail, more intensive searches before entering public events. These burdens are shared by all of us, regardless of social class or ethnicity. The full sharing of these burdens enhances our sense of national unity. Many of us, including me, display the flag on the front porch of our home, to proclaim our solidarity. We are now at war. A different kind of war, to be sure, because our enemy cannot be defined as a nation, but a war nonetheless, which requires a military response led by our commander-in-chief.**

**In recent weeks, however, we learned that many of our most cherished constitutional rights and liberties will be seriously jeopardized by this war. The arrest and imprisonment of hundreds of immigrants, the questioning of thousands more, the expansion of wiretapping authority, eavesdropping on**

privileged lawyer-client communications and religious gatherings, and the establishment of military tribunals to try those accused of terrorist acts are only the most prominent examples. We can rest assured that there will be vigorous national debate over the propriety of these measures. And we can rest equally assured that if and when any of these measures are challenged in the U.S. Supreme Court, they will be upheld. The Supreme Court has eagerly enlisted in every war in our history, and consistently deferred to strong executive power in time of war. So my primary purpose today will not be to marshal the legal arguments against these measures. We face a more formidable task, in the arena of public opinion. We need to convince our fellow Americans that our basic rights and liberties are worth preserving, even when they create obstacles in our war against terrorism. For that task, I suggest we turn to history. We've been down this road many times in the past. Our history teaches consistent lessons: that those in authority always exaggerate the need to restrict our rights, because those rights invariably make their job more difficult. And overstated claims of military necessity have always been asserted to justify government secrecy

What can we learn from the tragic mistakes that were made in conducting our past wars? I would like to offer a lesson from each of five

**previous American wars: the Civil War, World Wars I and II, the War against Organized Crime, and the Drug War. The lessons we can learn from these wars should give us great pause as we contemplate proposals to surrender some of our protections against governmental authority. In each of these wars, our national security was challenged, and in each of these wars, our government met that challenge while at the same time it perpetrated grave abuses of fundamental human rights. In retrospect, we can now conclude that these abuses of human rights accomplished little or nothing to further the war effort. In many cases, the government lied or covered up information that would have exposed the futility of the measures. Thus, our greatest protection lies in insisting upon full visibility of government actions, even when military necessity is offered as a justification for concealment.**

**Let me begin with the Civil War, when insurrection threatened the very existence of our nation. President Abraham Lincoln suspended the writ of habeas corpus, and ordered trials of rebel saboteurs by military tribunals. There is a strong parallel here to the Executive Order signed by President Bush on November 13. That Order authorizes military tribunals to try non-citizens for terrorist acts in secret proceedings, in which hearsay and illegally acquired evidence will be admitted, and verdicts will only require a two-thirds**

concurrence. Widely overlooked is the suspension of the writ of habeas corpus tucked in the order. It provides:

“ . . . military tribunals shall have exclusive jurisdiction . . . and the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, . . . in any court of the United States, or any state thereof, any court of any foreign nation, or any international tribunal.”

Whether habeas corpus can be suspended by Executive Order is an open question. Article I of the Constitution, which enumerates *Congressional* powers, provides that “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 Supreme Court never ruled on the legality of President Lincoln’s order, but it did declare, in *Ex Parte Milligan*, that military tribunals had no authority over civilians when the civil courts were open and available. That ruling came too late, however, to prevent one of the worst miscarriages of justice in American history, the conviction and execution of Mary Surratt for the assassination of Abraham Lincoln. Mary Surratt was the proprietress of the boarding house where John Wilkes Booth plotted Lincoln’s death. On very thin evidence, including a notoriously unreliable snitch, she was convicted

by a military tribunal of complicity in the plot, and hung with no review of her sentence by any civilian court. Her son escaped trial by the military tribunal by fleeing to Europe. He was recaptured two years later, after the *Milligan* decision intervened. He was then tried by a civilian jury. Hearing the same evidence that sent his mother to her death, the jury was unable to reach a unanimous verdict, and the charges against him were dismissed.

The use of military tribunals to try captured enemies in a theatre of war is one thing, but their use to try civilians in the United States, whether citizens or not, is an extraordinary exercise of power. To preclude any judicial intervention to check that power invites grave injustice, like the cruel execution of a woman most historians now concede was innocent.

The First World War also offers some troubling examples of government overreaching in order to suppress the criticism of those who disputed the government's agenda. The Espionage Act of 1917 and the Sedition Law of 1918 were enacted upon the insistence of military authorities that anti-war pamphleteers were impeding enlistments and undermining public support for the war. Both laws were upheld by the U.S. Supreme Court, although they inspired eloquent dissents from Justices Holmes and Brandeis. Socialist Presidential candidate Eugene Debs was imprisoned for

**calling upon his fellow citizens to resist militarism. The Saturday Evening Post and the New York Times were banned from the U.S. mails when editorials criticized the government's war efforts. Attorney General A. Mitchell Palmer organized mass arrests and deportation of aliens.**

**In time of war, criticism of government leaders will be deeply resented, and labeled unpatriotic. Attorney General John Ashcroft recently responded to the criticism of some of his initiatives by describing his critics as "eagerly assuming the worst of their government before they've had a chance to understand it at its best." Perhaps the Attorney General needs to be reminded of the lessons of history -- that government often behaves at its worst when it succeeds in insulating its conduct from public scrutiny, and many of us don't perceive the dirty business of eavesdropping on privileged communications as "government at its best."**

**The interval between the Civil War and World War I did see at least some improvement, though. President Woodrow Wilson condemned a Senate proposal declaring the entire United States "a part of the zone of operations conducted by the enemy," and providing for military tribunals to try those accused of sedition. The measure was defeated.**

**We are all familiar with the grave injustice perpetrated against Japanese**

**Americans during World War II. Congress recently apologized and provided for reparations. What we may not be familiar with is the compelling demonstration on behalf of Fred Korematsu and Gordon Hirabayashi forty years later of the military lies and cover-ups used to justify the internment orders. I was reminded of that sordid chapter of our history when the demand for a full government accounting of the fate of those who have been arrested and detained since September 11 was rejected because such information might prove useful to Osama bin Laden. Claims of “military necessity” to justify concealment and secrecy in the disposition of arrested persons should not go unchallenged. This is not Argentina. We may be on the road back to World War II internment camps. History demonstrates it's a very short road, indeed. The day after Pearl Harbor, nearly every newspaper in California editorialized about how loyal Japanese Americans were not the enemy. Six months later, those same newspapers were howling for wholesale internment. The shift in public opinion, it turns out, was engineered by false and spurious governmental warnings of sabotage and seditious activity by Japanese Americans.**

**Once again, World War II witnessed a resurgence of the demand for military tribunals. The Supreme Court struck down the use of martial law in**

**Hawaii, but upheld the sentences of death imposed by military tribunals against Nazi saboteurs captured in Connecticut. New York Times columnist William Safire recently revealed that the chief motivation for military tribunals in that case was to cover up FBI incompetence in the investigation that preceded it.**

**Although it was not an officially declared war, the American battle against organized crime offers a particularly relevant example for comparison to our war against terrorism. Attorney General John Ashcroft has embraced Robert Kennedy as his role model. In celebrating the enactment of the USA PATRIOT Act by Congress, the Attorney General announced:**

**“Robert Kennedy’s Justice Department, it is said, would arrest mobsters for spitting on the sidewalk if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.”**

**Since I was a veteran who fought in that war, I can speak with some experience about the war on organized crime. For five years, I served as a federal prosecutor specializing in organized crime cases. I even received a personal handshake from J. Edgar Hoover for the effectiveness of my efforts.**

**I always felt a little bit uneasy, however, about how Mr. Hoover determined who the enemy was in that war. The law contained no definition of “mobsters” or “racketeers” or “organized crime.” Although it was said in jest that the case was an “organized crime” case if the defendant’s last name ended in a vowel, that jest contained more than a grain of truth.**

**The USA PATRIOT Act contains no definition of “terrorist.” It defines the powers it confers on federal prosecutors quite broadly, trusting to their discretion to focus on the target of “terrorism.” That is an extremely dangerous approach. When we focus on an “enemy” without carefully defining who the enemy is, the identification of the target inevitably becomes infected with racial and ethnic stereotypes and biases.**

**The final example of a historical American war I would offer is the drug war. Again, an undeclared war, but one in which we have invested lots of resources and American lives, and one which offers perhaps the closest parallel of all to our war against terrorism. We’ve been fighting the Drug War for thirty-five years with little measureable success, and it has been used to justify a steady government encroachment of our civil liberties, especially our Fourth Amendment rights to privacy. At least we never found it necessary to use military tribunals, even when we extradited General Noriega from**

**Panama. It's clear that most Americans will accept further encroachments of their privacy if it will help counter terrorism, so I'll spare you my usual lament for the Fourth Amendment. There is another very sad legacy of the Drug War that we should avoid at all costs, however. The Drug War has literally transformed our criminal justice system into a marketplace of snitches. The government buys and sells testimony in this marketplace like it were buying and selling pork-bellies, except the commodity it is trading is human liberty. We can no longer distinguish the good guys from the bad guys in the Drug War, because the bad guys are magically transformed into good guys as soon as they accept the government rewards available for snitches.**

**We now face the very real prospect that our entire American system of immigration and naturalization will be similarly transformed into a marketplace of snitches. The quickest path to a lawful visa and eventual citizenship will be to find another alien who can be snitched on as a "terrorist." The "snitch visa" has already become the immigrant's equivalent of a government motion for departure from the sentencing guidelines. We will need to rewrite the Emma Lazarus poem on our Statute of Liberty. It will no longer read, "Send these, the homeless, tempest-tossed to me." It will be "send me your squealers and snitches, who will trade the liberty of another for their**

own.”

Looking back at the history of our past wars can be a source of enormous pride for patriotic Americans. We broke the chains of slavery, made the world safe for democracy, and liberated many from yokes of oppression. But we’ve made some serious mistakes along the way that we should not repeat. The safest way to avoid repetition of those mistakes is to insist upon visibility and accountability from government officials, and trust in the procedures our constitution establishes to dispense justice fairly. We should greet claims of “military necessity” with skepticism, and reject any attempt to separate citizens from non-citizens in dispensing justice in our courts. When we loudly insist upon openness and vigorously assert our constitutional rights, we are not disloyal obstructionists, but patriots who have learned the lessons of history. As Justice Brandeis warned:

“Those born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

We can prevail in the American war against terrorism without sacrificing the liberties we are fighting to preserve.