Stewart Rhodes on Enemy Combatant Status

by Elias Alias , November 16, 2014

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Stewart Rhodes Photo by Joel Franklin

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http://stewart-rhodes.blogspot.com/2006/10/enemy-combatant-status-no-more.html

Note from Stewart Rhodes: This article was first published in the Summer 2005 edition of The Warrior, the Journal of Gerry Spence's Trial Lawyers College. This article serves as a short summary of my research and analysis of "enemy combatant status" as it is being used in the so-called war on terrorism. The recent Military Commissions Act is simply codification of this doctrine – of the ongoing violation of the Bill of Rights that both the executive branch and the judiciary have engaged in for years. As discussed in this article, the sell-out of the Bill of Rights, as a matter of modern constitutional law, happened in 2004, with the Supreme Court's Hamdi decision….a more detailed analysis of the history and case-law that has created this very dangerous legal doctrine exists in my full length research paper, ***Solving the Puzzle of Enemy Combatant Status***, which won the 2004 Yale Law School William E. Miller Prize for best paper on the Bill of Rights. – Stewart Rhodes, U.S. Army Airborne Class of '83.

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INTRODUCTION: NO GREATER THREAT

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NO GREATER THREAT TO OUR CONSTITUTION AND OUR BILL OF RIGHTS HAS EVER EXISTED THAN THE CURRENT DOCTRINE OF "ENEMY COMBATANT STATUS" (ALSO KNOWN AS "UNLAWFUL COMBATANT" STATUS). THIS DOCTRINE IS LIKE A TOXIC, POISONOUS WEED THAT, IF NOT PULLED OUT BY THE ROOTS, WILL GROW TO CHOKE AND KILL THE TREE OF LIBERTY. IT THREATENS TO WIPE OUT OUR BILL OF RIGHTS AND PLUNGE US INTO A NIGHTMARE OF MILITARY SUPREMACY OVER THE CIVILIAN POWER AND UNCHECKED EXECUTIVE RULE BY DECREE, WHERE THE COURTS, RATHER THAN SERVING AS DEFENDERS OF LIBERTY, ARE MERE WILLING ADMINISTRATORS OF A NEW KAFKAESQUE SYSTEM OF INDEFINITE MILITARY DETENTION AND TRIAL. WE MUST FIGHT THIS DOCTRINE OR SEE OUR FREEDOMS PERISH, AND WITH THEM, THE LAST RESTRAINTS ON THE U.S. WAR MACHINE. TO FIGHT IT, WE MUST KNOW THE FACTS OF ITS ILLEGITIMATE BIRTH AND SILENT NURTURING AT THE HANDS OF POLITICIANS, GENERALS, GOVERNMENT LAWYERS AND COMPLICIT JUDGES. WE MUST BE WILLING TO ACKNOWLEDGE THAT LINCOLN, FDR, THE NEW DEAL COURT, AND NOW EVEN THE LIBERALS ON THE CURRENT COURT HAVE ALL BEEN WILLING MIDWIVES TO THIS MONSTROSITY. AS PATRICK HENRY SAID, "WHATEVER ANGUISH OF SPIRIT IT MAY COST, [WE MUST BE] WILLING TO KNOW THE WHOLE TRUTH, TO KNOW THE WORST, AND TO PROVIDE FOR IT."

THE HAMDI DECISION: A DEFEAT AND DEADLY PRECEDENT

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The 2004 Supreme Court decision in the case of Yasir Hamdi has been touted by many, including the ACLU, human rights organizations, and the mainstream press, as a victory for civil rights, the Constitution, and the rule of law. It is nothing of the sort. While the Hamdi majority paid lip service to limits on the executive in time of war and to "due process," it joined Bush as a willing accomplice in his current attempt to murder the Bill of Rights.

Apologists for the Court point out that Bush did not get all that he wanted. That is true. Bush wanted absolute and plenary power to designate anyone, citizen or not, an "enemy combatant" and do as he pleased with them – detaining, interrogating, even torturing and executing them if he saw fit – with no judicial interference at all. Instead, the Court insisted that there be some manner of a deferential administrative hearing before Bush got to do as he wished. That is the only difference of any substance.

Rather than insisting that Hamdi, a U.S. citizen, receive all of the protections of the accused which are his

due under the Bill of Rights, the Court breathed new life and legitimacy into this destructive doctrine that had lain around unused and nearly forgotten, like a dusty, but still dangerous "loaded weapon," since the World War II Ex Parte Quirin decision (1942). The Hamdi Court, citing Quirin, stated unequivocally that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." According to the majority on the Court, the mere labeling of a person as an "enemy combatant" removes the shield of the Bill of Rights and replaces it with a new judge-created system of minimal administrative process to "challenge" that designation.

Under this system, the accused will have none of the procedural protections of our Bill of Rights: No Grand Jury indictment; no trial by jury with its requirement of a unanimous verdict of twelve of one's peers; no possibility of an unreviewable acquittal and immunity from further prosecution; and no protection against compelled self incrimination. The presumption of innocence is gone, as is the requirement of a showing of guilt beyond a reasonable doubt. Instead, the government will enjoy a presumption that its allegations are accurate. The accused will have the burden of proving his innocence, but will have no right to compulsory process of witnesses and no right to confront the secret evidence and witnesses against him.

At most, according to the Hamdi majority, "a citizen held in the United States as an enemy combatant [will] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker" and access to counsel to assist (as best they can) in that hearing. The Court made clear that the definition of "a meaningful opportunity" will have to be fleshed out by subsequent courts, and a military tribunal may qualify as a "neutral decision maker" for that minimal, administrative hearing to determine status. And this is touted as a victory.

How did we get here? As war is the greatest engine of tyranny known to man, it should come as no surprise that like many such usurpations before it, this doctrine of absolute power was born in the fires of war.

The Origin of This Gravest Threat: The Civil War

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Until the "war on terrorism" this claimed power of the president to operate outside the Bill of Rights was asserted on only two other occasions in our history: The Civil War and World War II. In the Civil War, the southern states that broke away formed their own nation with a constitution, a legislature, a president, an army, and a navy. They printed their own money, sent and received ambassadors, etc. The North and South exchanged prisoners, followed the laws of war in the treatment of POWs, negotiated cease-fires and conducted a formal surrender at the end. Only in this anomalous situation of a civil war, where a part of the U.S. had broken off, were U.S. citizens from the South treated as foreign enemies for purposes of military jurisdiction. There was no way to avoid that, as all of the southerners were U.S. citizens till they broke away.

However, Lincoln did not just treat the citizens and soldiers of the rebel states as the enemy. During the Civil War, more than 13, 535 Northern civilians were arrested by the military and at least 4,271 of these were tried before military tribunals, with some of them being executed. Typical charges were vague accusations of violating the laws and customs of war. In one such case, a man was found guilty of violations of the laws of war for letting rebels lurk in his neighborhood without reporting them. Others were accused of harboring rebels or engaging in guerilla warfare. This treatment of northern civilians as the enemy is what the Milligan Court ruled unconstitutional after the war.

The Supreme Court Attempts to Kill the Monster in its Infancy

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Ex Parte Milligan (1866), is a Supreme Court rarity: a decision on wartime powers issued after the end of a war, with the Court explicitly conscious that it is righting the constitutional ship of state after a storm. The U.S. government had charged Mr. Milligan with "Conspiracy against the Government of the United States;' 'Affording aid and comfort to rebels against the authority of the United States;' 'Inciting Insurrection;' 'Disloyal practices;' and 'Violation of the laws of war.'

The government did not try to argue that Mr. Milligan was in fact a member of the Confederate army or a Southern resident, and acknowledged that the courts in Indiana were at all times open, and yet the government argued that the laws of war still applied to Milligan and that "[a] military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed." Of the Bill of Rights, the government lawyer had this to say:

These, in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law. By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President.

As a fallback argument, the government asserted that:

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates."

Sound familiar? We are now hearing exactly the same arguments from the Bush administration. This was the precursor to "enemy combatant" status. Here was the Milligan Court's response, in its decision, to this attempt to circumvent the Bill of Rights:

[E]VEN THESE PROVISIONS, EXPRESSED IN SUCH PLAIN ENGLISH WORDS, THAT IT WOULD SEEM THE INGENUITY OF MAN COULD NOT EVADE THEM, ARE NOW, AFTER THE LAPSE OF MORE THAN SEVENTY YEARS, SOUGHT TO BE AVOIDED. THOSE GREAT AND GOOD MEN [WHO WROTE THE CONSTITUTION] FORESAW THAT TROUBLOUS TIMES WOULD ARISE, WHEN RULERS AND PEOPLE WOULD BECOME RESTIVE UNDER RESTRAINT, AND SEEK BY SHARP AND DECISIVE MEASURES TO ACCOMPLISH ENDS DEEMED JUST AND PROPER; AND THAT THE PRINCIPLES OF CONSTITUTIONAL LIBERTY WOULD BE IN PERIL, UNLESS ESTABLISHED BY IRREPEALABLE LAW. THE HISTORY OF THE WORLD HAD TAUGHT THEM THAT WHAT WAS DONE IN THE PAST MIGHT BE ATTEMPTED IN THE FUTURE. THE CONSTITUTION OF THE UNITED STATES IS A LAW FOR RULERS AND PEOPLE, EQUALLY IN WAR AND IN PEACE, AND COVERS WITH THE SHIELD OF ITS PROTECTION ALL CLASSES OF MEN, AT ALL TIMES, AND UNDER ALL CIRCUMSTANCES. NO DOCTRINE, INVOLVING MORE PERNICIOUS CONSEQUENCES, WAS EVER INVENTED BY THE WIT OF MAN THAN THAT ANY OF ITS PROVISIONS CAN BE SUSPENDED DURING ANY OF THE GREAT EXIGENCIES OF GOVERNMENT.

IT IS VITAL THAT WE SEE CLEARLY THAT THE MILLIGAN COURT REJECTED THE ARGUMENT THAT A U.S. CITIZEN COULD EVER BE AN "ENEMY." THE COURT AFFIRMED THE USE OF MILITARY JURISDICTION OVER TWO CATEGORIES OF PERSONS: THOSE IN THE U.S. MILITARY (AND IN THE MILITIA WHEN CALLED INTO SERVICE) AND THE ENEMY. IN THE PECULIAR CIRCUMSTANCE OF THE CIVIL WAR, THE COURT HAD NO PROBLEM AT ALL WITH USING MILITARY JURISDICTION FOR DETENTION AND TRIAL OF THE SOLDIERS AND EVEN CIVILIANS OF THE BREAKAWAY SOUTH WHO HAD EFFECTIVELY RENOUNCED THEIR U.S.

CITIZENSHIP. HOWEVER, THE COURT POINTED OUT THAT MR. MILLIGAN WAS NOT IN THE MILITARY (THE UNION ARMY) AND WAS NOT A RESIDENT OF ONE OF THE REBELLIOUS STATES. THIS IS REALLY THE SAME AS SAYING HE WAS NOT A CITIZEN OR RESIDENT OF A FOREIGN NATION WITH WHICH WE WERE AT WAR. IT DID NOT MATTER TO THE MILLIGAN COURT WHAT MILLIGAN HAD DONE, OR WHAT LAWS OF WAR HE MIGHT HAVE VIOLATED. WHAT COUNTED WAS WHO HE WAS. IF HE WAS A NORTHERN CIVILIAN, HE COULD NOT BE TRIED BY TRIBUNAL FOR ANY ACTIONS NOR HELD AS A POW OR "UNLAWFUL COMBATANT"

BECAUSE HE JUST WAS NOT IN ONE OF THE TWO CATEGORIES OF PEOPLE SUBJECT TO THE MILITARY. HE WAS A NORTHERN CITIZEN WHO WAS MAKING WAR ON HIS NATION AND AIDING THE ENEMY. THE PROPER REMEDY FOR SUCH IS A TRIAL FOR TREASON, OR AT LEAST FOR VIOLATION OF A STATUTE, BEFORE A JURY IN AN ARTICLE III COURT, NOT A MILITARY TRIAL.

What the Milligan Court upheld is the Constitution's separation of civilian and military jurisdiction. The founders, and the people who ratified the Constitution, were very concerned about overreaching military power. In fact, prior to the Revolution, the Colonists had even been upset about British soldiers being tried by tribunals, rather than civilian juries, for offenses committed off duty. The Colonists considered such tribunals a violation of the Rights of Englishmen. The founders knew the sad English history of the abuse of special military and executive courts, such as the infamous Star Chamber, during England's many upheavals and coups and endeavored to prevent their recurrence.

The Constitutional Trial Mechanism for Traitors

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The Article III Treason Clause provides the only constitutional trial remedy for those who make war against their own nation or give aid and comfort to its enemies. Up to the Civil War, in every rebellion, from Shay's rebellion, to the Whiskey Rebellion, to Aaron Burr's attempt to raise an Army against the U.S., to John Brown's attack on Harper's Ferry, each person tried for their actions of taking up arms against their nation or aiding the enemy were tried for treason, before a jury, in a civilian court. None of them were brought before a military tribunal. If the Founders had intended to give the military jurisdiction over such people, what was the point of the Treason Clause?

The unconstitutionality of such military jurisdiction is made all the clearer when we consider the Fifth Amendment's exception to the requirement of Grand Jury indictment for those in the military or in the militia during actual service. What was the point of that exception if the President retains a power to deny the protections of the Fifth Amendment to any citizen, in the military or not? If the President has such an implied power over civilians and the Fifth Amendment did not impair it, then surely he retained an implied power to use military jurisdiction over his own troops, thus making the exception clause superfluous. Apparently the Founders considered the clause necessary to preserve military jurisdiction over soldiers because the Fifth Amendment would otherwise have wiped out the power. Why would the writers of the Fifth Amendment not also feel compelled to carve out such a power over citizens who are the enemy if they meant military jurisdiction to apply to them? They had no such intention, having already provided for trial for treason in Article III. It is absurd to assert that the American people, who had only recently thrown off a tyrannical government, understood the Constitution and Bill of Rights to give presidents the power to set aside their hard won liberties with a stroke of a pen. Even the claim that such a power was given to Congress is historic revisionism at its very worst.

The Constitutional Detention Mechanism

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Only the Article I Habeas Suspension Clause that allows for executive preventive detention of civilians in time of invasion or insurrection, when the public safety requires it. Habeas suspension, which can be done only by congressional statute, denies access to the courts altogether. It is truly a draconian denial of due process and hence liberty, limited to times of actual invasion or rebellion. In fact, I have some strong

reservations about the habeas suspension clause trumping the Bill of Rights, which came later in time. But setting that aside, at least habeas suspension preserves the principle of separation of powers, and the integrity of the federal courts and the Bill of Rights, which are still intact though unavailable. There is no involvement of the courts in a watering down of the Bill of Rights that can be normalized and made permanent. A person either has full access to courts that must enforce the full Bill of Rights or no access to courts at all –not some perpetual twilight zone in the middle. In addition, a court could still rule a suspension unconstitutional by finding that there is no invasion to justify it. Lastly, such a habeas suspension only allows detention, not trial by tribunal, and it also does not "make it legal" for the government to torture people, or summarily execute them. The Bill of Rights commands preventing such mistreatment are not suspended – just the ability to challenge their violations in court. Government officials might still be guilty of violating the rights of detainees, as Justice Thomas noted in his dissent in Hamdi.

In that dissent, Thomas supported the government view in its entirety and argued that the habeas suspension clause was not an effective or practical alternative to enemy combatant status for Citizens because habeas suspension had such an infamous history from its use by Lincoln that it would be nearly impossible to secure a suspension in Congress. Justice Thomas also noted that government officials could be guilty of violating the constitutional rights of detainees, even during a habeas suspension. Therefore, Thomas argued, the government needed a more effective tool to fight the "war on terrorism" – enemy combatant status. Evidently, Thomas was not so much concerned with original intent as he was in finding a way to circumvent that original intent, and the entire Bill of Rights, so that government agents could torture detainees, try them before a hand-picked tribunal answerable only to the President, and then execute them.

Now, with the current Court's blessing, "enemy combatant" status is a perpetual executive detention and military trial power, always in effect in this perpetual "war" against terrorism, even when we are not being invaded. No lower court in the land can strike these detentions down as violations of the Bill of Rights since the Supreme Court has decreed that the Bill of Rights no longer applies. Rather than a detainee being temporarily denied access to courts which are chomping at the bit to protect his liberty with the still intact shield of the Bill of Rights, he will be processed through courts which have themselves joined his tormenters as part of the machine of detention, military trial, and execution by applying some mere administrative standard which is below and outside the Bill of Rights. Thus, judges have been drafted to serve the executive branch by giving this "process" the gloss of constitutionality.

With the current Court's assistance, the Milligan decision has been turned upside down, precisely as if the government had prevailed in that case when it asserted that the amendments in the Bill of Rights are "peacetime provisions only …are silent amidst arms, and when the safety of the people becomes the supreme law… [and b]y the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President." The Bill of Rights, as any real barrier to government power in time of war, has been effectively written out of the Constitution. We are left with only "political" checks on the scope of this "war" power. How is it that, after the Milligan Court so emphatically stamped out this pernicious weed, it survived to once again assault our liberties?

Quirin, Korematsu, and the Dark Days of World War II

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Such a violation of the Constitution was not repeated until World War II, when over 120,000 Japanese-Americans, including citizens and legal residents, were interned in concentration camps. This dark stain upon our nation was upheld by the FDR appointed New Deal Court in the Hirabayashi and Korematsu decisions. While these decisions have never been overruled and are technically still good law, they have been "overturned" by near universal condemnation in the court of public opinion.

Unfortunately, critics of the internment tend to focus on its racial discrimination and inequality without seeing that these Americans were being treated just as if they were the occupied enemy civilian population of Japan, just as Milligan had been treated like the enemy. In fact, supporters of the internment justified the imposition of military rule over these citizens on the grounds that the necessities of modern warfare made obsolete the Milligan decision's requirement that there first be an actual invasion such that the courts were closed before the military could have temporary jurisdiction over civilians. It should be no surprise that the Bush Administration does not cite to the internment decisions though they are certainly "on point.' Instead it cites to another World War II case by the same Court -Ex Parte Quirin (1942), which asserts the same principle but has not been repudiated by public scorn.

Quirin was a one-time, expedient decision to justify the predetermined actions of FDR, a very powerful wartime president, who made it very clear that he was not going to turn the eight German saboteurs over to civilian courts. Whatever the Court decided, FDR intended to convict these men before his own hand-picked military tribunal and execute them. In fact, by the time the Court wrote its decision, months after oral argument, the saboteurs were already dead.
One of the eight German soldiers claimed U.S. citizenship. To make military jurisdiction over U.S. citizens "constitutional" the Court butchered both the Constitution and the Milligan decision. The Quirin Court said that there are certain acts, which while subject to military tribunals elsewhere, are not tried by tribunals here in the states and it was on such grounds that the Milligan Court had simply ruled that Mr. Milligan had not committed acts considered to be violations of the laws of war and triable by tribunal.

This wildly misreads the Milligan decision. Mr. Milligan had been accused of plotting to kidnap the governor of Indiana, break into an Army armory and steal weapons, set Southern POWs free, and then spark an insurrection in Indiana so the South could invade. The government expressly accused him of violating the laws of war. The Milligan decision did not just invalidate some narrow use of military jurisdiction for certain acts, it categorically denied the use of any such jurisdiction for any offense whatsoever for persons who did not fit into the categories of U.S. soldiers or the enemy.

While the Milligan decision is concerned with categories of people, Quirin focuses on the actions of the accused. The Quirin decision strives to minimize and narrowly define what actions are covered by the Bill of Rights, moving from clause to clause as it attempts to show that each did not apply to acts in violation of the laws of war, when the real focus should have been on whether the person in question belonged in the category of the enemy or of a member of the armed forces.

In fact, the Quirin Court did not even have to address the issue of citizenship at all. At the time, the Nationality Act of 1940 stipulated that any citizen serving in a foreign army without permission had automatically lost his citizenship. So, according to that statute, Haupt, the saboteur who claimed citizenship, was not even a citizen. The government was prepared to argue just that point, and the Court could easily have ruled on the narrow grounds that Haupt's citizenship claim was void, making him just like the other German soldiers, subject to military trial. But the Court went ahead and ruled on the issue of citizenship when it did not need to. Why did it do this?

Recall that this was 1942, the very darkest hours of World War II, and the Court had to know about the mass internment of the Japanese-Americans. The Court also had to know that Hawaii was then under martial law, and U.S. citizens there were being tried by military tribunal for even petty crimes. In addition, FDR had issued a very broad tribunal order (even broader than the one Bush has issued) that called for the use of military tribunals on any persons who acted on behalf of an enemy nation, and this would include

citizens and legal resident civilians, not just enemy soldiers and foreign spies. Thus, the Quirin Court wrote a sweeping decision that left the President as much flexibility and freedom to act as he might require in the uncertain years ahead.

Quirin, The Nearly Forgotten Constitutional Ticking Time Bomb

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JUSTICE JACKSON, IN HIS FAMOUS DISSENT IN KOREMATSU, WARNED THAT:
[O]NCE A JUDICIAL OPINION RATIONALIZES SUCH AN ORDER TO SHOW THAT IT CONFORMS TO THE CONSTITUTION, OR RATHER RATIONALIZES THE CONSTITUTION TO SHOW THAT THE CONSTITUTION SANCTIONS SUCH AN ORDER, THE COURT FOR ALL TIME HAS VALIDATED THE PRINCIPLE … [WHICH] THEN LIES ABOUT LIKE A LOADED WEAPON READY FOR THE HAND OF ANY AUTHORITY THAT CAN BRING FORWARD A PLAUSIBLE CLAIM OF AN URGENT NEED. EVERY REPETITION IMBEDS THAT PRINCIPLE MORE DEEPLY IN OUR LAW AND THINKING AND EXPANDS IT TO NEW PURPOSES. ALL WHO OBSERVE THE WORK OF COURTS ARE FAMILIAR WITH WHAT JUDGE CARDOZO DESCRIBED AS "THE TENDENCY OF A PRINCIPLE TO EXPAND ITSELF TO THE LIMIT OF ITS LOGIC." A MILITARY COMMANDER MAY OVERSTEP THE BOUNDS OF CONSTITUTIONALITY, AND IT IS AN INCIDENT. BUT IF WE REVIEW AND APPROVE, THAT PASSING INCIDENT BECOMES THE DOCTRINE OF THE CONSTITUTION. THERE IT HAS A GENERATIVE POWER OF ITS OWN, AND ALL THAT IT CREATES WILL BE IN ITS OWN IMAGE. NOTHING BETTER ILLUSTRATES THIS DANGER THAN DOES THE COURT'S OPINION IN THIS CASE.

AS IT TURNED OUT, IT WAS QUIRIN, NOT KOREMATSU, WHICH HAS LAIN ABOUT LIKE A LOADED WEAPON FOR SIXTY YEARS BEFORE FINALLY BEING PICKED UP BY ANOTHER WILLFUL WARTIME PRESIDENT WHO IS NOW EXPANDING IT TO NEW PURPOSES. WHILE THE QUIRIN DECISION INVOLVED EIGHT ADMITTED GERMAN SOLDIERS IN A DECLARED WAR, THE RESURRECTED DOCTRINE IS NOW BEING EXPANDED EXPONENTIALLY IN A VAGUE, PERPETUAL "WAR" AGAINST TERRORISM, WHICH IS A TECHNIQUE OF CONFLICT RATHER THAN AN IDENTIFIABLE ENEMY, TO APPLY TO ANYONE ON THE PLANET THE PRESIDENT CARES TO SIMPLY ACCUSE OF BEING A "TERRORIST" OR SUPPORTING TERRORISTS. THE HAMDI COURT, BY ITS UNCRITICAL ACCEPTANCE OF A FLAWED DECISION THAT SHOULD HAVE BEEN AS DISCREDITED AS KOREMATSU, HAS NOW MULTIPLIED THAT WARTIME ERROR BY MAKING THIS MODERN, WILDLY EXPANDED VERSION THE DOCTRINE OF THE CONSTITUTION AND THUS THE SUPREME LAW OF THE LAND.

MOST OF THOSE WHO OPPOSE BUSH'S PARTICULAR ARTICULATION OF THIS DOCTRINE HAVE NOT BEEN WILLING TO DIRECTLY ATTACK QUIRIN OR ITS AFFIRMATION IN HAMDI. INDEED, EVEN THE OPPOSITION BRIEFS SUBMITTED TO THE SUPREME COURT IN THE HAMDI AND PADILLA CASES MERELY ARGUED THAT THE PRESIDENT MUST FIRST GET THE PERMISSION OF CONGRESS BEFORE STRIPPING CITIZENS OF THEIR PROTECTIONS UNDER THE BILL OF RIGHTS AND THAT, AT MOST, A DETAINEE WAS ENTITLED TO COUNSEL AND SOME MEASURE OF A HEARING TO DETERMINE THEIR STATUS AS AN ENEMY COMBATANT.

THUS, EVEN THE SUPPOSED DEFENDERS OF OUR RIGHTS ACCEPTED QUIRIN AS GOOD

LAW AND HENCE AGREE THAT THE BILL OF RIGHTS IS AT THE LEVEL OF A MERE STATUTE SINCE IT CAN BE EFFECTIVELY CIRCUMVENTED BY A CONGRESSIONAL AUTHORIZATION GRANTING THE PRESIDENT THE AUTHORITY TO TREAT U.S. CITIZENS LIKE FOREIGN ENEMIES, WHILE MAKING THE COURTS COMPLICIT IN ITS VIOLATION.

OF COURSE, A PLURALITY OF THE HAMDI COURT DID THEM ONE BETTER BY FINDING THAT CONGRESS HAD ALREADY GIVEN AUTHORIZATION TO DETAIN CITIZENS SIMPLY BY PASSING ITS 2001 AUTHORIZATION FOR USE OF MILITARY FORCE. AS ASKED, THE HAMDI COURT RULED THAT SUCH DETAINEES COULD HAVE A LAWYER AND A "MEANINGFUL DETERMINATION" OF STATUS, BUT NOTHING ELSE IN THE BILL OF RIGHTS. AND STILL, THE VAST MAJORITY OF THE PUNDITS, THE PROFESSORS, AND THE HUMAN RIGHTS ORGANIZATIONS CLAIMED VICTORY. OUR FREEDOM WILL NOT SURVIVE ANOTHER "VICTORY" LIKE THIS ONE. THE NEXT TIME THE GOVERNMENT "CAPTURES" A U.S. CITIZEN HERE AND DESIGNATES THAT CITIZEN AN "ENEMY COMBATANT" JUST AS JOSE PADILLA WAS "CAPTURED" AT O'HARE INTERNATIONAL AIRPORT, THE COURT MAY FIND SUCH A DETENTION PERFECTLY CONSTITUTIONAL, ESPECIALLY NOW THAT CONGRESS HAS GIVEN ITS STAMP OF APPROVAL WITH THE MILITARY COMMISSIONS ACT AND ITS EXTREMELY BROAD DEFINITION OF WHO MAY BE SUCH AN ENEMY COMBATANT (TO INCLUDE CITIZENS, OF COURSE). SUCH A DECISION MAY JUST BE THE OTHER BOOT THAT WILL DROP, FINALLY SMASHING DOWN TO DRIVE US INTO GEORGE ORWELL'S INFAMOUS VISION OF THE FUTURE AS A "BOOT STAMPING ON A HUMAN FACE –FOR EVER."

Why Have We Abandoned Our Bill of Rights?

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Conservatives, sadly, are for the most part silent simply because it is their man in the White House. Most lack the vision to look past their time in power to the day when a future Democratic president, Hillary Clinton for example, may consider gun owners and tax protesters to be "terrorists." Conservatives are so fixated on prosecuting this "war on terror" that they have forgotten Ruby Ridge, Waco, and the finger pointing and witch-hunts that followed the Oklahoma City bombing. They have forgotten their own distrust of federal power and the reality that political winds change. But why are so many liberals, so clearly opposed to Bush's policies at nearly every turn, also willing to accept the circumvention of the Bill of Rights through "enemy combatant status" so long as detainees get a lawyer and a meager hearing before some elitist judge? Why have they ignored the stinging dissent in Hamdi by Justices Scalia and Stevens that confirms our constitutional design, refutes Quirin, and levels a devastating criticism of the majority decision as a "Mr. Fixit" approach intended to sustain an illegitimate power? Perhaps liberals are simply unwilling to acknowledge that the New Deal Court left such a vile doctrine laying about to now be used by Bush and his neo-con Chicken Hawks. Perhaps many of them, especially the "limousine liberals" have an unwarranted faith in judges. Perhaps, but I fear the answer is deeper and more dangerous.

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Forsaking the Bill of Rights for Equality's Sake

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I fear that the answer lies in liberals' devotion to equality. They want so much to treat everyone in the

world no differently than they are treated that many of them are willing to erode our own protections under the Bill of Rights to attain a rough leveling of due process for “all citizens of the world.” This is a tragic mistake. The way to lead the world to freedom is by first preserving our own freedom here at home while working to confine military jurisdiction to only the populations of enemy nations in declared wars, and finally, by expanding the application of the Bill of Rights to all people, all over the world, against whom our government operates –which will of course require an end to this insane “war against terror.” To do these things, we must remain free.

We must not, in the interest of equality for all humankind, rip down our Constitution’s wall of separation between civilian and military rule and apply to ourselves the same military jurisdiction and low level of administrative process our government can give foreign enemies under our constitutional design. If we do so, we will hand over to the war mongers and empire builders our last weapon of liberty, the one shining gift America has given to this world: our Bill of Rights. Without it, we will be powerless to stop our own government as it – finally free to act without even a pretext to our consent- unleashes its raw, unrestrained power on the whole world. Who better to put a stop to it than us, and how will we do so if we give up our tools of peaceful revolution, our Bill of Rights?

The fate of liberty is in our hands. We must either be warriors who stand and fight to bring the world back from the brink of a universal tyranny, or, surrendering our Bill of Rights, bow down as impotent slaves who can only join the other victims at the edge of the ditch. I know not what course others may take, but as for me …

Categories: Academy, Academy-Stewart-Rhodes-Writings, All, Featured

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