

# “WAR” IN THE AMERICAN LEGAL SYSTEM

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My role in this symposium is to analyze the concept of “war” as it has evolved in the American legal system. The idea that the “Global War on Terrorism” (GWOT) is a war in the historic sense has been effectively used to mobilize support for the administration’s actions in the struggle against terrorism, including electronic surveillance, protracted detentions, coercive interrogations, military commissions and the like. How a policy issue is “framed” has a great deal of bearing on its acceptance by insiders and by the public.<sup>1</sup> We note how the political support for the abolition of a certain tax gained power when it was re-characterized as “death tax” rather than an “estate tax” or an “unearned receipts tax.” In much the same way, framing GWOT as a war has changed the political dynamics.

## I. THE EMOTIVE MEANING OF “WAR”

War has a powerful emotional content. It draws upon a long and complex history. Those of us who are of a certain age still think of a war according to standards set in 1941 to 1945. Those of us who were not old enough to be in the services still vibrated with the sacrifices of those who were. They were linked to us by ties of family and friendship, a far cry from the small professional military we have known for the last three decades.

Sacrifices were imposed upon all of us. When we set out to fight in Iraq I asked my colleagues whether I was right in thinking that this was the first “war” accompanied by a major tax cut. The response was that I had gotten it half right, that at the start of previous wars there had been a tax *increase*, namely an excess profits tax. Teenagers were mobilized to pick fruit in the absence of drafted farmers. Civilians manned observation posts to track aircraft that might just possibly be Condor bombers on Hitlerite missions. We were

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1. GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004).

pressed to buy war bonds to prevent inflation. Our sugar, gas, meat and so forth were rationed. Cigarettes and coffee were scarce on the home front.

Less impressive wars followed—Korea and Vietnam. The armed forces were still connected to the rest of America by ties of kinship that made civilians follow events with close attention; it was remarkable how the tensions over the war in Vietnam dropped away when changes in draft procedures immunized so many young Americans from liability to service. GWOT came upon us differently. The fighting in Afghanistan and Iraq has been carried on by professionals quite removed from most individuals. The war seemed a small overseas incident that we could watch as a spectator sport. The movie “Fahrenheit 911” showed the amazement and disdain displayed by Congressional personnel when offered recruiting literature. Instead of being asked to sacrifice we were urged to spend and to travel so as to use the money spared for us by the tax cuts. From a psychological point of view GWOT does not qualify as a war in the traditional sense, even though some Americans are in peril overseas.

## II. THE LEGAL CONCEPT OF WAR

We turn now to the legal concept of war. One starts with the Constitution that in Article I gives to Congress the power to declare war. This can be argued to be an exclusive grant of the power to start wars. That would parallel the argument my colleague Professor Laurence Tribe has made that the constitutional grant of the treaty power to the President and Senate is the exclusive mode of making international agreements.<sup>2</sup> But the exclusiveness of the power to declare war was jettisoned early in our history. In 1800 in *Bas v Tingy*, the Supreme Court had to consider whether the maritime combat with France amounted to a war so that rules relating to vessels retaken from “the enemy” would apply.<sup>3</sup> Congress had not declared war. Nonetheless, Justice Washington found that “hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons and things and this is more properly termed imperfect war . . . It is a war between the two nations. . . .”<sup>4</sup> Justice Paterson in his opinion said “[a]n imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations. . . .”<sup>5</sup> These early judicial reactions can be said to establish the original intent of the constitution as to the meaning of “war.” In the following two centuries there have been only a few “perfect” wars—the Mexican war, the Spanish war and the two world wars. There has been a long list of imperfect wars, most

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2. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

3. 4 U.S. (4 Dall.) 37 (1800).

4. *Id.* at 40.

5. *Id.* at 45.

conspicuously the Korean and Vietnamese conflicts. It is significant that the Cold War was never treated as a war, even an imperfect one, except during those two flare ups. It was only an “emergency,” one that lasted as a matter of law from 1950 to 1976.<sup>6</sup>

The opinions in *Bas v. Tingy* establishing the “imperfect war” concept speak of it as a war “between nations.” It is that boundary line through which the GWOT notion breaks. It is true that were brief periods when combat activities in Afghanistan and Iraq involved fighting with another nation. Both actions changed in quality when we recognized new governments in Kabul and Baghdad and began friendly relations with them. But GWOT began earlier and it has not ended. It is claimed that GWOT nonetheless comes within the scope of the idea of war. That claim has been widely accepted in public discourse and in some opinions of the courts, in ways that show that the momentousness of this boundary-crossing has not been appreciated.<sup>7</sup>

It is important to remember the consequences of extending war beyond state-to-state combat. GWOT has no definite beginning. Did it start with the 9/11 attack on the World Trade Center and the Pentagon? Did it start with the first attack on the World Trade Center? Or with the Khobar Towers attack in Saudi Arabia? Or even earlier, in the attack on marines in Lebanon? And when will it end? With the capture of bin Laden? Or of his last adherent? With a year of no terrorist attacks from any source? What if there are terrorist acts not executed inside the United States or aimed at it? The Civil War was deemed to have ended when the regular Confederate armies in the field gave up the fight, even though those terrorists who called themselves the Ku Klux Klan continued to kill union soldiers, blacks and white unionists.<sup>8</sup>

GWOT has no theatre of operations or any other spatial dimensions. Padilla can be picked up as a “combatant” (another war-linked term) in Chicago or presumably anywhere else in the United States. With no limits of time or space GWOT is quite precisely equivalent to the state of affairs George Orwell warned us about in 1949 in his classic *Nineteen Eighty Four: A Novel*. There the people acquiesce in the regime of Big Brother because of the persistence of intermittent combat that makes them tolerate thought control and other intrusions on their private life.

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6. The emergency that began in 1950 was terminated by the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (1976 & Supp. IV 1980)).

7. A striking example is the application of wartime concepts to the bombing of a chemical factory in the Sudan that was thought to be an al-Qaeda operation. *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.2d 1346, 1362-65 (Fed. Cir. 2004). Some skepticism of the idea that fighting in Afghanistan, originally a state to state combat, can go on indefinitely being a “war” is expressed in *Hamdi. v. Rumsfeld*, 542 U.S. 507, 521-22 (2004).

8. *See, e.g., The Protector*, 79 U.S. (12 Wall.) 700 (1871).

## III. THE LEGAL CONSEQUENCES OF WAR

What are the legal consequences of there being a war? There are quite a number of them since both the constitution and the statutes confer powers during wartime that are not available otherwise. Some of those rules seem to hinge on the presence of a perfect war. For example, there were statutes authorizing the seizure of industrial property involved in labor disputes that were available to President Roosevelt during World War II that were regarded as not available to President Truman during the Korean War. This was one of the issues in the Steel Seizure case.<sup>9</sup> As Justice Frankfurter noted in his opinion, "In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General."<sup>10</sup> There is a statute dating to 1917 but still on the books that makes it a crime during time of war to send written messages into or out of the United States except through the postal service.<sup>11</sup> This rule is designed to ease the task of censoring such messages. If it were in force today as a consequence of GWOT there would be many felons among the readers of this symposium. It would seem clear that such a statute would be held unconstitutional except in time of war and probably only during a perfect war. In the classic anti-censorship case, *Near v. Minnesota*, the Court was careful to distinguish cases arising "[w]hen a nation is at war."<sup>12</sup> In wartime the publication of the sailing dates of troop transports can clearly be subject to prior restraint. The Court of Military Appeals has said that only in time of declared war can Congress extend court martial jurisdiction to persons accompanying the armed forces overseas.<sup>13</sup> The power to order trials by military commissions would seem to be linked to the presence of a war.<sup>14</sup> There is an important statute relating to enemy aliens which grants powers only in time of declared war.<sup>15</sup>

Certainly GWOT rises to the level of a national emergency and the presence of an emergency gives the government and the president a great deal of power. This includes the imposition of sanctions on trading with foreign

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9. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1950).

10. *Id.* at 613.

11. 50 U.S.C. App. § 3(c) (2000).

12. 283 U.S. 697, 716 (1931).

13. *United States v. Averette*, 19 C.M.A. 163 (1970).

14. The Supreme Court never decided whether military commissions were lawful after the Civil War had ended because of procedural problems. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). The leading historian of the Court in that period believes that it would have invalidated the legislation authorizing commission. See Charles Fairman, *Reconstruction and Reunion, 1864-88*, in 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 509 (Paul A. Freund, ed., 1971).

15. 50 U.S.C. § 21 (2000).

countries and currency controls. But those powers are not as sweeping as those available when there is a war in a legal sense.

Acceptance of the idea that GWOT is a war in the full constitutional and statutory sense is a major threat to civil liberties and democratic institutions. That is particularly true since the administration and its lawyers are making sweeping claims about the extent of presidential powers during war.<sup>16</sup> Over the years, probably decades, in which GWOT will continue, citizens of the United States may find themselves in a long Orwellian epoch. There are powerful reasons for rejecting this concept and the consequences that follow from it.

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16. Probably the most extravagant of these claims are to be found in JOHN YOO, *THE POWER OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).