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Back to Article

The Guantánamo facility at 10: an assault on our constitutional government

It came as something of a shock to me when Alberto Gonzalez, John Yoo and Robert Delahunty began issuing legal opinions that the Geneva Conventions, a treaty incorporated into our law, were quaint and did not apply, or that the president could, at his or her sole discretion, suspend them.

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The 10th anniversary of the opening of Guantánamo Bay, Cuba, as a detention facility and the diversion of terrorism prosecutions into a new military commission system is now upon us. Consequently, I thought I would take this opportunity to briefly explain why I, an Army Reserve Judge Advocate General officer with more than 30 years of active and reserve military service, would volunteer as defense counsel for prisoners being held there.

I might add that I consider myself to be a conservative. In the United States of America, that means to conserve the legal order that this nation was founded upon, the Constitution. In fact, as a member of the military, I took an oath to defend the Constitution against all enemies, foreign and domestic. I did not take an oath of allegiance to the "leader," or to the "state," as required in some other nations. Thus, it came as something of a shock to me when Alberto Gonzalez, John Yoo and Robert Delahunty began issuing legal opinions that the Geneva Conventions, a treaty incorporated into our law, were quaint and did not apply, or that the president could, at his or her sole discretion, suspend them.

I will admit a particular sensitivity to the enforcement of the Geneva Conventions as my father, along with thousands of other American and Philippine prisoners of war, survived the Bataan Death March. This was despite the best efforts of soldiers who set aside the Geneva Convention of 1929 because of their oath of allegiance to the Japanese emperor. Following that war, my father's former captors and their legal advisers were put on trial and convicted of war crimes, including waterboarding and punishing prisoners without fair trials, as required under the 1929 Geneva Convention. This treaty was replaced by the Four Geneva Conventions of 1949 due to the mistreatment of prisoners like my father.

Back in 2001 and 2002, when these legal opinions were being issued, astute critics immediately recognized that these opinions were regurgitated leftovers of President Richard Nixon's belief that if the president did something, it could not be illegal — the dictator's prerogative. But this crude anti-American notion had been refined into the "unitary executive theory." Vice President Richard Cheney seemed to take credit for it. But more astute commentators noted that these ideas were actually legal theories expounded by Carl Schmitt, the Nazi "Crown Jurist" of the 1930s. But that seemed a little extreme, or at least bad manners, to point out.

Once the unitary-executive theory began to gain credibility, other advocates of this form of government came out of the shadows, perhaps from "the dark side." One was Harvard Professor Harvey Mansfield in *The Wall Street Journal* in 2007, who opined about the benefits of "one man rule." But it remained to two law professors, dedicated to the study of arcane legal texts, Adrian Vermeule of Harvard Law School and Eric Posner of the University of Chicago Law School, to openly resurrect Schmitt's authoritarian legal ideology. Or, as they put it, "political theorists interested in emergency powers, and some academic lawyers as well, are much taken with Schmitt; nearly every discussion of emergencies pores over the

canonical texts yet again."

In fairness to Vermeule and Posner, leaving them to pore over the Nazi's canonical texts, it should be remembered that Schmitt was not a founder of the Nazi movement. Schmitt only joined the Nazi party when it triumphed over its rival elements in the German military establishment. Schmitt had been legal adviser to those rivals, particularly General Kurt von Schleicher. But what should equally be remembered is that this military faction was seeking to impose its own brand of militaristic dictatorship on Germany, along with an expansionistic foreign policy. These German generals aspired to the form of governance most recently practiced by the dictator Hosni Mubarak and the Egyptian Supreme Council of the Armed Forces.

Schmitt's writings consistently were an apologia for dictatorship and centralized power, whether under military dictatorship of the German High Command or under the Nazis, having further developed his ideas from his book, *Die Diktatur*. These ideas culminated in 1934, when he justified the murders following the "Night of the Long Knives" as the "highest form of administrative law." Most odiously, he legitimated the authority of Hitler afterward with a paean translated in English as "The Leader Defends the Law."

In Terror in the Balance, Posner and Vermeule argued that the threat of terrorism constitutes a state of emergency necessitating the suspension of our Constitution. Consequently, "Constitutional rights should be relaxed so that the executive can move forcefully against the threat. If dissent weakens resolve, then dissent should be curtailed. If domestic security is at risk, then intrusive searches should be tolerated." Posner and Vermeule followed this in 2010 with *The Executive Unbound: After the Madisonian Republic*. Cribbed from Schmitt's *Legality and Legitimacy*, it seeks to legitimize the administrative state of the sort Schmitt worked to create. Any concern with this centralization of power in our system is dismissed as "tyrannophobia." Evidently, a mental disorder that our founders were afflicted with. As in Schmitt's "dual state," they seek to move us toward a constitutional breakdown through the creation of an administrative state under the exclusive control of the executive, "the Extraordinary Lawgiver" in Schmitt's terminology. Or as Posner and Vermeule ask and answer: "What comes after the Madisonian regime of liberal legalism and the separation of powers? Our answer is a new political order in which government is centered on the executive."

Why does all of this matter? In part, because constitutions and constitutional ideas matter. As evident in Yoo and Delahunty's legal memos asserting unitary executive authority, the legal theory underpinning Guantánamo and the military commissions were an assault upon the structure of our form of constitutional government; lawfare. It was not the inevitable conclusion required by the Sept. 11 attacks, but the exploitation of a tragedy to import a foreign legal ideology, a legal bacillus, into our legal system.

But it matters also because on this 10th anniversary, Guantánamo and the military commissions are metastasizing into our whole legal system. As the French war against the anti-colonialist insurgents of Algeria highlighted, the growing disrespect for "legal niceties" would come to be applied in France itself against political adversaries. Could that happen here? Posner and Vermeule suggest that dissent to policy may need to be controlled, that is, free speech curtailed. Putting aside the potential for misuse against political enemies, is that even desirable for national security? Our allowance of dissent led to our withdrawal from the Vietnam War before the collapse of our economy which, with hindsight, few question any more. Contrast that with the Soviet Union's defeat and total collapse resulting from its war in Afghanistan, purely at the insistence of the Communist leadership.

We have used the vague and overbroad charge of "material support for terrorism" as cause to investigate anti-war groups in Chicago and Minneapolis, predictably chilling speech and dissent. Critics have suggested that recent legislation passed would now require the military to detain such dissidents. Or what about gun store owners, gun manufacturers and the National Rifle Association, all of whom could be accused of having a hand directly or through propaganda in providing firearms downstream to drug cartels in Mexico, alleged to have ties with Mideast terrorist groups? Military detention for them?

We must ask ourselves, because we are passing this nation on to our children and their children: Were the authors of the American Constitution wrong or suffering from a mental disorder (tyrannophobia as described) in believing that blind faith was not sufficient as a bulwark against incompetence, if not tyranny? My father and my uncles, along with the rest of the Greatest Generation, did not think so when they fought against the political ideas of Carl Schmitt in World War II. I think Schmitt's ideas are still worth fighting against today.

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