Zanesville TimesRecorder.com

January 21, 2010

Is the U.S. getting rid of laws of war?

BY NAT HENTOFF

When the Supreme Court in Boumediene v. Bush strongly rebuked the Bush Administration for claiming overwhelming executive-branch power over terrorism suspects at Guantanamo, Justice Anthony Kennedy said sharply: "To hold that the political branches may switch the Constitution on and off at will would lead to a regime in which they, not this Court, say 'what the law is.'"

Accordingly, by a 5-to-4 vote, the Supreme Court in Boumediene gingerly brought the Guantanamo prisoners into the Constitution by allowing them into our federal courts with the constitutional right to challenge the authority by which they were being held.

But Justice Kennedy, what if not only a president switched the Constitution off, but a lower court in our federal system takes away those habeas rights you gave these prisoners?

This is what actually happened on Jan. 5 when the District of Columbia Circuit Court of Appeals, which often is the highest lower court to deal with wartime constitutional issues, delivered an expansive decision, accurately headlined by The New York Times: "Court Backs (Government) War Powers Over Rights of Detainees."

In a kick to the teeth to the 2008 Supreme Court decision, the D.C. Circuit in Al-Bihani v. Obama ruled that Ghaleb Nassar al-Bihani of Yemen -- a former cook for a Taliban paramilitary brigade -- can remain a prisoner until the end of hostilities because, as The New York Times reported, "The presidential war power to detain those suspected of terrorism is not limited even by international law of war." Mr. al-Bihani has had a room at Guantanamo since 2002.

This decision affects all Guantanamo detainees and could extend to other terrorism suspects if this case goes to the Supreme Court. If that happens, it's important to underline that a dissenter in the Boumediene decision is the chief justice of the U.S. Supreme Court, John Roberts, who said detainees who want to challenge why they're being held should not go before civilian judges, who are forbidden to even see certain national security data. Put these prisoners in front of military tribunals, he added. But key parts of constitutional due process are alien to those tribunals. There is no indication he has changed his mind.

To give you an idea of how sweeping this D.C. Court of Appeals scenario is, one of the judges on the panel, Stephen Williams, in a separate opinion concurring with the decision, was troubled by the majority deciding that the president's war powers can countermand the international laws of war. That deep bow to executive powers, Judge Williams said, "goes well beyond even what the government has argued in this case."

Not surprisingly, in view of the recession-hit news business these days, little attention is being paid to this powerful victory not only for the Bush regime in retrospect but also for President Obama, who is largely following in those imperious footsteps.

Many Americans concerned with the separation of powers -- a very hot subject during the 1787 Constitutional Convention but seldom taught in our schools these days -- might understand the chill I feel for what could lie ahead when I read this part of the majority opinion by Judge Janice Rogers Brown:

"War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure or other prior frameworks are ill-suited to the bitter wine of this new warfare.

"We can no longer afford diffidence." (To the Constitution?)

"This war," Judge Brown continued, "has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort. We do so at our grave peril."

A pity she didn't give us any details about these new rules. But President Obama -- with his deep interest in permanent imprisonment of terrorism suspects in one of our supermaxes (because their having previously been tortured keeps them out of our regular courts) might well be interested in creating new rules better suited to "the bitter wine of this new warfare."

So might his successors in the Oval Office if this D.C. Circuit Court of Appeals' harsh trashing of the old wineskins of international law remains the scalpel cutting into the "outdated" sections of our constitutional law.

What are some of these anachronistic, dried-out wineskins? Among others, Common Article 3 of the Geneva Conventions demanding that anyone held in what Bush and Obama blandly called "detention" in the course of any international armed conflict "shall in all circumstances be treated humanely." And there are such other inconveniences as the international Covenant Against Torture and the Universal Declaration of Human Rights.

The laws of war to be trumped by U.S. presidential war powers are embedded in treaties the United States has signed, and those, declares Article VI, paragraph 2 of the old-timey Constitution, shall be (part of) the Supreme Law of the Land.

Does this "new and frightening paradigm" that Judge Janice Rogers Brown holds before us include the prospect during global jihad that "the law must adjust" in yet other ways?

After Abraham Lincoln suspended habeas corpus during the Civil War, the Supreme Court, in Ex parte Milligan (1866) ruled: "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."

Was that strong affirmation of the Constitution, in Judge Brown's term, illusory? It has sometimes been during our history, from President Woodrow Wilson suspending the First Amendment during World War I to the Japanese-American internment camps.

What's next?
