On "Unprivileged Enemy Belligerents"

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15 May 2011

The U. S. Senate has now before it S. 3081, "The Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010", which would allow the President to assign a certain designation to persons, and thereby authorize they be detained indefinitely without trial. The provision reads, in part:

> An individual, including a citizen of the United States, determined to be an unprivileged enemy belligerent under section 3(c)(2) in a manner which satisfies Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of war may be detained without criminal charges and without trial for the duration of hostilities against the United States or its coalition partners in which the individual has engaged, or which the individual has purposely and materially supported, consistent with the law of war and any authorization for the use of military force provided by Congress pertaining to such hostilities.

The aforementioned section 3(c)(2) reads:

> FINAL DETERMINATION- As soon as possible after receipt of a preliminary determination of status with respect to a high-value detainee under paragraph (1), the Secretary of Defense and the Attorney General shall jointly submit to the President and to the appropriate committees of Congress a final determination whether or not the detainee is an unprivileged enemy belligerent for purposes of this Act. In the event of a disagreement between the Secretary of Defense and the Attorney General, the President shall make the final determination.

It was sponsored by Senators McCain, Lieberman, Inhofe, Brown, Wicker, Chambliss, LeMieux, Sessions, and Vitter.

Some critics of the provision have opposed it on the grounds that it violates the fifth and sixth Amendments to the U. S. Constitution. Actually, it is worse than that: it violates the entire spirit of the Constitution; it violates the Constitution even if the fifth and sixth Amendments had never been passed.

Article 1, Section 9 of the U. S. Constitution, which defines the general powers of the Congress (which possess all legislative powers under the Constitution), reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of actual rebellion or invasion the public safety may require it."

Alexander Hamilton, defending the proposed Constitution in The Federalist # 84, which as proposed, did not contain a bill of rights, addressed the importance of the habeas corpus provision. He notes the provision of habeas corpus, the prohibition on ex post facto laws, and the prohibitions upon conveying titles of nobility in the proposed federal Constitution and points out the lack thereof in the constitution of the state of New York. He then proceeds to quote from the famous English jurist William Blackstone the underlying importance of the habeas corpus provision. Hamilton wrote:

> It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex-post-facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provision in our Constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things

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> which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, [says he,] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas-corpus* act, which in one place he calls "the BULWARK of the British Constitution."

If this proposal becomes law, we will have two classes of citizens: the privileged, for whom the writ of habeas corpus still prevails, and the rest of the people, who may be spirited off to jail for the duration of hostilities because some bureaucrat somewhere has convinced the President that doing so aids in the prosecution of hostilities.

It used to be that even traitorous lowlifes got their day in court. They were vigorously tried based on evidence; a jury decided their guilt or innocence in a fair trial; and they were honorably shot or hanged if convicted. But that process appears to be too much of an inconvenience to the government in these modern times. So, we see the continual attempts to encroach upon not just the liberty of individuals, but to encroach upon the basic tenets of limited government -- that is, a free society.

A supporter of S. 3081 may claim that the cases are different; that the designation of enemy belligerents does not fall under the "arbitrary imprisonments" that Blackstone rightfully complains of, since S. 3081 requires a formal designation by the President. But I say they are exactly the type discussed by Blackstone. If a medieval English king ordered someone to be sent to the Tower, did he not first designate that victim by name under some rationale? Of course - how else would the police know who to arrest, and thus satisfy the tyrant? The process here is exactly the same, and should be rejected for the same reasons.

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