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Theodore C. Sorensen

Abstract

The single greatest enemy of law is war. I refer not merely to the history of foreign dictatorships where repression is tightened still further at a time of military conflict. No, I refer also, sad to say, to the painful experience of our own country. Legal tradition gave way to military pressure. But cannot law be employed as the single most powerful alternative to war? That is the supreme challenge to your generation of lawyers, if it is not already too late.

LAW: THE MOST POWERFUL ALTERNATIVE TO WAR

*Theodore C. Sorensen**

The single greatest enemy of law is war. I refer not merely to the history of foreign dictatorships where repression is tightened still further at a time of military conflict. I refer not only to the history of those countries less wedded to a tradition of legal supremacy and judicial independence, where legal standards are the first luxury tossed overboard whenever the ship of state comes under fire. No, I refer also, sad to say, to the painful experience of our own country.

The government of the United States—a government of laws and not of men,¹ we constantly remind ourselves, but a humanly imperfect institution nevertheless—has had its Watergates and Teapot Domes and Tweed Rings, temporary aberrations of illegality by one branch of government ultimately set right by another. But few if any official misdeeds in our history can compare with the shocking, shameful violation of our fundamental legal standards which was performed with the approval of all three branches of government during the Second World War—the forcible relocation and confinement on ethnic grounds alone of more than 100,000 Americans of Japanese ancestry.² Legal tradition gave way to military pressure.

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. See *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu*, an American citizen of Japanese descent, was arrested for remaining in his home in violation of Civilian Exclusion Order No. 34 promulgated by the Commanding General of the Western Defense Command. The Order directed the exclusion of all persons of Japanese ancestry from a described west coast military area. While the Supreme Court, Black, J., acknowledged that legal restrictions which curtail the civil rights of a single racial group must survive "the most rigid scrutiny," 323 U.S. at 216, the Court nevertheless held the exclusion constitutional as a valid extension of Congress' war powers. See note 4 *infra*.

That is only one example.

When the Navy under Franklin Pierce bombarded a Nicaraguan town into rubble because an unruly crowd threw a bottle at an American diplomat, the courts ruled that the President's decision to take this congressionally unauthorized military action was conclusive.³

America's war in Indochina never declared or expressly authorized by Congress,⁴ was defended in court by pointing to various alleged indications of legislative consent.⁵ But in 1973, after the Gulf of Tonkin Resolution⁶ had been repealed,⁷ after all United States ground forces and prisoners had been removed, after Congress had repeatedly called for all United States participation in the war to halt,⁸ Messrs. Nixon and Kissinger were nevertheless still engaged in the bombing of Cambodia; and yet, when Congresswoman Elizabeth Holtzman sought to enjoin this bombing as clearly unauthorized and illegal, the courts evaded the issue.⁹

3. *Durand v. Hollins*, 8 F. Cas. 111, (C.C.S.D.N.Y. 1860) (No. 4,186). Circuit Justice Nelson upheld the action, an "interposition of the executive abroad, for the protection of the lives and property of the citizen," *Id.* at 112, as an exercise within the President's discretion.

4. Power to declare war is vested in Congress by U.S. CONST. art I, § 8, cl. 11, which provides, "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

5. *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307, 1313-14 (2d Cir. 1973); *see note 9 infra*.

6. Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (repealed 1971).

7. President Nixon signed the repealer on January 12, 1971, Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

8. The Fulbright proviso, appended to military appropriations bills enacted by Congress after the 1970 Cambodian incursion, called in part for "support of actions required to insure the safe and orderly withdrawal or disengagement of United States forces from Southeast Asia . . ." Act of Sept. 26, 1972, Pub. L. No. 92-436, § 601(b), 86 Stat. 784 (1972) (amended 1972); Act of Dec. 18, 1971, Pub. L. No. 92-204, § 738(a), 85 Stat. 716 (1971) (amended 1972); Act of Nov. 17, 1971, Pub. L. No. 92-156, § 501, 85 Stat. 423 (1971).

Later, the Mansfield Amendment, approved Nov. 17, 1971, provided:

It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or forces.

Pub. L. No. 92-156, § 601(a), 85 Stat. 423 (1971).

9. On July 25, 1973, a U.S. district court enjoined James R. Schlesinger, Secre-

To be sure, a Supreme Court majority in 1952 required President Truman to turn back the steel mills he had seized during the Korean War emergency,¹⁰ but it said not a word about his authority to declare an emergency without Congressional ratification in the first place.¹¹

And to be sure, a Supreme Court majority in 1866 denied in sweeping, eloquent language Abraham Lincoln's Civil War orders to suspend habeas corpus and initiate martial law. That was the famous case of *Ex parte Milligan*,¹² which your constitutional law textbook may well have cited as a landmark limitation on Presidential powers. Unfortunately, when that decision was handed down, the war was over, Lincoln was dead, and so was Milligan.¹³ Three years earlier, when it would have mattered, the court in the *Prize Cases*¹⁴ had placed no limits on the President's wartime authority and had in a series of lower court cases permitted, or suffered, Presidential defiance of judicial orders for habeas corpus.¹⁵

This sad history is disturbing; but perhaps it is not surprising. War requires power; law limits power. War feeds on emotion; law is based on reason. War justifies emergency measures; law requires a long-range perspective. War weakens law, distorts it, abuses it, overrides it, suspends it. War, I repeat, is the single greatest enemy of law. Beware.

But cannot law be employed as the single most powerful

tary of Defense, from bombing or participating in any other military activities in or over Cambodia. *Holtzman v. Schlesinger*, 361 F. Supp. 553, 586 (E.D.N.Y. 1973). The Supreme Court stayed this order in *Schlesinger v. Holtzman*, 414 U.S. 1321, 1329 (1973) and on August 8 the United States Court of Appeals for the Second Circuit heard the appeal. Mulligan, J., reversed and remanded the action with instructions to dismiss on the grounds that the challenge to the military actions presented a political and not a justiciable question. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). *See also* *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972).

10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

11. Rather, the decision focused on the separation of governmental powers, with six Justices holding that legislative authority controlled, *id.* at 589, and three dissenters favoring a theory of inherent executive power, *id.* at 683-85.

12. 71 U.S. (4 Wall.) 2 (1866).

13. The decision in *Ex parte Milligan* was handed down on April 3, 1866. The Army of Northern Virginia surrendered to Grant at Appomattox Court House, Virginia, on April 9, 1865. Abraham Lincoln died on April 15, 1865.

14. 67 U.S. (2 Black) 635 (1863).

15. *E.g.*, *In re Fagan*, 8 F. Cas. 947 (D.C.D. Mass. 1863) (No. 4,604); *In re Dunn*, 8 F. Cas. 93 (D.C.S.D.N.Y. 1863) (No. 4,172).

alternative to war? That is the supreme challenge to your generation of lawyers, if it is not already too late.

Can laws curb wars? Can lawyers make a difference? The record is not encouraging. International law, even on non-military issues in peacetime, is woefully weak. Iran pays no attention to the World Court's decisions on the illegal seizure of diplomatic personnel as hostages.¹⁶ Most OPEC nations pay no attention to the legally binding clauses on prices in their crude oil supply contracts.¹⁷ The Soviet Union pays no attention to the rights of an Andrei Sakharov under the Universal Declaration of Human Rights.¹⁸

There is today no world law, no world government, no world policeman; nor could the nations of the world ever agree on one.¹⁹ The United Nations General Assembly passes resolutions, not laws.²⁰ The road to virtually every war in modern history has been paved with the parchment of treaties, agreements and other legal documents solemnly signed by the same parties who would subsequently find them inconvenient. No major power today could conduct its national security affairs in an informed manner without the aid of an intelligence service that depends for its information on daily violations of someone else's laws: on the interception of confidential communications, on the bribery or blackmail of trusted of-

16. On Nov. 4, 1979, militant Iranian students seized the United States Embassy in Teheran. N.Y. Times, Nov. 5, 1979, at A1, col. 4. The United States petitioned the International Court of Justice for relief and the Court ordered the immediate release of all hostages and the return to U.S. control of the U.S. Embassy in Teheran and the consulates in Tabriz and Shiraz. *United States v. Iran*, [1979] I.C.J. 64. See 19 INT'L LEGAL MATS. 553 (1980). As of publication Iran has made no movement to this end.

17. See Amuzegar, *OPEC in the Context of the Global Power Equation*, 4 DEN. J. INT'L L. & POL'Y 221, 227 (1974). For a discussion of OPEC's pricing policy, see Z. MIKDASHI, *THE INTERNATIONAL POLITICS OF NATURAL RESOURCES* 65-78 (1976).

18. G.A. Res. 217A, U.N. Doc. A/810 (1948). Article 19 of the Declaration provides: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

19. During the United Nations' organizational meetings held in San Francisco, the Filipino delegation proposed that the General Assembly have authority to enact rules of international law which would become binding on the members of the Organization once they had been approved by the Security Council. The Council overwhelmingly rejected the proposal by 26 votes to 1. J. CASTEÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 197 n.2 (1969).

20. U.N. CHARTER art. 18, para. 2. While the language of the Charter authorizes the General Assembly to make "recommendations," there is no clear distinction between the concepts of "recommendation" and "resolution." J. CASTEÑEDA, *supra* note 19, at 6.

ficials, on the theft of secret documents, on the presentation of false identity papers, on the penetration of national air space, and all the other techniques of modern intelligence-gathering.²¹

Let us be realistic. We live in a dangerous world in dangerous times. Our concepts of legal restraint are not recognized by the vast majority of nations. Our total reliance upon principles of fairness and rules of logic and appeals to reason are viewed with more disdain than respect. Terrorists acting independently of any government, revolutionary movements seeking to overthrow governments, extremist leaders who have no continuing relationship with their own, much less other, governments, are not interested in or influenced by some code of international behavior fashioned by diplomats to preserve the status quo. No country, including the United States, can be successfully deterred today by international law from taking military action it deems essential to its survival or security; and no country, including the United States, can successfully invoke international law today to halt the military action of those determined upon it.

And yet there is hope—not for this year, perhaps not for my generation, I fear—but hope that by the year 2000 your generation of lawyers will have succeeded where others have failed. There is no hope for a utopian system of international adjudication of national conflicts of interest in accordance with immutable and abstract global rules. But there is hope for increasing worldwide recognition of the practical uses of law, its tools and techniques, to provide procedures, rules and substantive solutions for the lessening of conflict and risk, for the avoidance of miscalculation and escalation, for the establishment of acceptable conduct and common interests, and for the settlement or management of disputes without bloodshed. There is hope because an ever larger part of the world has an ever larger stake in world order, an ever greater hope for a life of dignity and decency, ever closer ties to other parts of the world, and an ever increasing understanding of the basic concepts of law.

I have hope because the alternative is despair. I have hope because you are young and intelligent and energetic and bent on making this a better, more peaceful world—and so are young lawyers everywhere. I have hope because my legal practice, as it takes me around the globe, enables me to see lawyers and law schools

21. See Civiletti, *Intelligence Gathering and the Law: Conflict or Compatibility?* 48 *FORDHAM L. REV.* 883, 887 (1980).

and legal reasoning where a generation or two ago there was only colonial repression and ignorance. I have hope, finally, because, in my own experience in the White House, I saw the processes of law bring to a halt the testing by the United States and the Soviet Union of nuclear weapons in the atmosphere, which has never been resumed;²² I saw the processes of law shape the permanent resolution of a civil war in the Congo;²³ and, most dramatically, I saw the processes of law influence both Soviet and American behavior during the Cuban missile crisis and help resolve that potential nuclear confrontation in a mutually acceptable fashion.²⁴

I do not deny that each nation in that crisis, as in any other crisis, followed its own self-interest rather than some idealized concept of the world's legal standards. But that is not cause for despair, for decrying the role of law. Most of us obey the law in our society out of our own self-interest, not because the alternative is jail but because the alternative is chaos. The acceptance of law in this country rests ultimately not with the policeman but with each individual. The acceptance of law in this world, when it comes, will rest ultimately not with some international court or sanctions but with each individual nation-state recognizing its own best self-interest.

The goal is clear but the method is not. The task is yours, if the world will only await its fulfillment. You had better hurry!

22. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed Aug. 5, 1963, and entered into force Oct. 10, 1963, 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43. The treaty banned weapon tests only in the named environments, but obligated signatories to seek "to achieve the discontinuance of all test explosions of nuclear weapons for all time." *Id.* at preamble. For a discussion of developments and shortcomings to this end, see Note, *Proposals for a True Comprehensive Nuclear Test Ban Treaty*, 27 STAN. L. REV. 387 (1975).

23. In July, 1960, shortly after the Congo gained independence, soldiers of the Congolese Force Publique mutinied against their Belgian officers. In response to the rioting, looting and mistreatment of Belgian civilians by the mutinous troops, Belgium airlifted soldiers into the Congo to restore order and supervise the evacuation of Belgian and other European nationals. On July 10, 1960, unable to maintain order or evict the Belgian troops, the Congolese leaders called on the United Nations for assistance. Over the next four years the UN stationed as many as 20,000 troops in the Congo in an effort to expel the Belgians, to end secession, to prevent civil war and maintain law and order generally and to build up the administration of the shattered country. See Luard, *The Civil War in the Congo*, in THE INTERNATIONAL REGULATION OF CIVIL WARS (E. Luard ed. 1972). For an interesting legal analysis of the UN actions by the then Director, General Legal Division, United Nations, see Schachter, *Preventing the Internationalization of Internal Conflict: A Legal Analysis of the U.N. Congo Experience*, in 1963 PROC. AM. SOC'Y INT'L L. 216.

24. See generally A. CHAYES, THE CUBAN MISSILE CRISIS (1974).