

## **Billy Budd and the Aftermath of 9/11**

Cicero: "In time of war, the law falls silent."

Benjamin Franklin: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

William Rehnquist: "There is no reason to think that future wartime presidents will act differently from Lincoln [presidential suspension of the writ of habeas corpus], Wilson [prosecuting US citizens for "disloyal, profane, scurrilous, or abusive language"], or Roosevelt [internment of 115,000 Japanese-Americans], or that future Justices of the Supreme Court will decide questions differently than their predecessors."

In Billy Budd, Captain Vere appears to be so influenced by the recent mutinies in the British Navy that he decides to act extra-legally and proceed on a course of action that dispenses with the normal safeguards for those accused of a capital offense. Viewed through that lens, the unjust hanging of Billy can be seen as a cautionary tale with special relevance to our current situation.

### I. Congress vs. the Courts

Immediately after the 9/11 terrorist attack, new laws were enacted that greatly expanded the power of the federal government and, in particular the President, to conduct electronic surveillance, conduct searches and seizures, indefinitely detain immigrants, and deny those captured in the "war on terror", including US citizens, access to the courts. These laws include:

The Authorization for Use of Military Force (AUMF), (September 2001), which authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such

organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

USA PATRIOT Act (October 2001), which, among other things, authorizes the indefinite detentions of immigrants; gives permission to law enforcement officers to search a home or business without the owner's or the occupant's consent or knowledge; expanded the use of National Security Letters, which allows the FBI to search telephone, e-mail, and financial records without a court order; and the expanded access of law enforcement agencies to business records, including library and financial records

Guantanamo Bay Detention Camp was opened in January 2002

A sequence of Congressional acts seeking to deny to Guantanamo detainees due process rights have been countered, at least partially, by Supreme Court decisions.

In Rasul v. Bush (June 2004), the Supreme Court held that the federal courts have jurisdiction to review habeas corpus petitions of non-US citizens held at Guantanamo

In December 2005, Congress responded by passing the Detainee Treatment Act (DTA), which explicitly stripped detainees of any right to petition courts for habeas review.

In Hamdan v. Rumsfeld (June 2006), the Supreme Court found that courts had jurisdiction to hear those detainees' petitions which had been filed before the DTA was enacted and found further that the Combatant Status Review Tribunals (CSRTs) created by the DTA violated the Geneva Conventions standards enacted in the Uniform Code of Military Justice.

In 2006, Congress responded by passing the Military Commissions Act which gave statutory authorization to the CSRTs and was explicit in retroactively stripped detainees of any right to petition courts for habeas review.

In Boumediene v. Bush (June 2008), the Supreme Court held that the detainees had a right to petition federal courts for writs of habeas corpus under the United States Constitution.

## II. Torture

“Enhanced interrogation techniques” conducted at Guantanamo Bay in Cuba, abu Ghraib in Iraq, and at various CIA “black sites” around the world, although defended by Vice President Dick Cheney and others in the Bush administration, were widely condemned as torture. In 2014, the Senate Intelligence Committee released the findings of a report on the CIA’s Detention and Interrogation Program.

The Senate report found that the program violated “U.S. law, treaty obligations, and our values.” Moreover, the Committee concluded that the program was ineffective and, in some cases, detrimental to national security.

The report detailed numerous examples of harsh interrogation practices by the CIA, including: waterboarding; “rectal rehydration”; week-long sleep deprivation; immurement in coffin-size boxes; abdominal slapping; slamming into walls; being forced to stand in painful positions; being chained to the ceiling clothed with a diaper and deprived of access to a toilet so that the detainee soiled himself; being doused with cold water; being subjected to dietary manipulation; and, repeatedly threatening the detainee with death.

### III. Drone Targeted Killings

Although estimates vary widely, the number of people killed by US drone strikes is thought to be over 2,500. All of these have been carried out in countries that we are not at war with and increased markedly during the Obama administration.

#### Legality

UN Charter prohibits the use of force by one state within the borders of another sovereign state without that state’s permission, with two exceptions:

- a) Force approved by Security Council to maintain or restore international peace and security
- b) Self-defense. The unilateral use of force for self-defense limited to:

Response to recent armed attack

## Response to “imminent” threat of future attack

### US Justice Department Opinion

The DOJ has stretched the concept of “imminent” threat so drastically that it is now virtually meaningless. In the DOJ’s opinion, the US does not have to have clear evidence that a specific attack on US interests will take place in the immediate future, since al Qaeda and its “associated forces” [undefined] would engage in such attacks regularly if they were able to do so. Because the US may not be aware of all the plots being developed, it cannot be confident that none is about to occur. Therefore, al Qaeda and its associated forces present an imminent threat at all times, allowing the US to lawfully kill such persons at all times, even without specific knowledge relating to planned future attacks.

The criteria by which a decision is made to go forward with a targeted killing are undisclosed, including the amount and sufficiency of the facts upon which such a decision is based (e.g., is the targeted person, in fact, an al Qaeda operative). So with zero transparency, the US acts as prosecutor, judge, jury, and executioner, all rolled into one.

Ironically, an initial draft of Authorization for Use of Military Force included language granting the power “to deter and preempt any future acts of terrorism or aggression against the United States.” Since members of Congress were concerned that this would provide “a blank check to go anywhere, anytime, against anyone the Bush administration or any subsequent administration deemed capable of carrying out an attack” the language was removed. Now, the Justice Department’s opinion concerning “imminent threat” has gone a long way to providing such a blank check.

In addition to the illegality of the targeted killings as they relate to the targets, the use of lethal force within the borders of another country violates that nation’s sovereignty, unless that nation has consented to the US action. But in the absence of such consent, the US has created a convenient escape clause. If the country in question is “unwilling or unable” to suppress the threat identified by the US, then the US can take action

without the country's consent. And the US is the sole arbiter of whether the country is "unwilling or unable".

Question:

Is there any principled distinction between US drone-strike killings in a foreign sovereign nation, without that nation's consent, and the assassination (by VX nerve gas) of Kim Jong Nam, estranged half-brother of North Korean dictator Kim Jong Un in Kuala Lumpur in 2017 or the assassination (by plutonium poisoning) of Alexander Litvinenko, former Russian secret service agent and persistent critic of Russian president Vladimir Putin in London 2006. (Aside from the fact that, unlike the US, North Korea and Russia have denied any involvement.)

Comment:

Although some of the most controversial anti-terrorist practices of the Bush administration have been discontinued, drone strikes continue to occur and the extraordinary domestic surveillance apparatus that was put in place after 9/11 continues to operate. Further, it appears President Trump's stated preference for subjecting terrorist suspects to torture has not been effectuated due mainly to the contrary position of Secretary of Defense Mattis, who along with his reservations is subject to dismissal by the president at any time. Under these circumstances, balancing the imperatives of protecting our national security in times of heightened threat with a measured and rational response that keeps the deviation from the rule of law and the infringement of our liberties to a minimum is crucial to our American way of life and demands an ongoing effort.