

Texas Lawyer's 2001 Year End Review

Constitutional Law

by ROB SCOTT

The United States Supreme Court has considered and decided many important issues during 2001. The most significant constitutional development of 2001, however, may not be found among the cases actually before the Court – the most significant constitutional development may be the tragedy of September 11th.

There are, of course, obvious, more traditional constitutional implications to nearly every issue raised by September 11th. The Constitution's role appears, for instance, in the federal government moving to federalize airport security forces under its commerce-clause authority. The Constitution's war-making provisions are once again left unclear as Congress and the President forgo any formal declaration of war and skirt the provisions of the War Powers Act by congressional resolution and presidential executive orders.

But most important, by placing the nation on what amounts to a wartime footing, the events of September 11th sharply altered the constitutional landscape. Other than the Article I, section 9 provision allowing for the suspension of habeas corpus, the Constitution's guarantees and protections are ostensibly not diminished by war. War conditions do often result in an expansion of governmental powers to meet the emergency, creating tension with those constitutional provisions.

Indeed, the exigencies of war often lead to the curtailment of civil liberties that are taken for granted during peacetime. As the old Latin maxim states, *inter arma silent leges* "in time of war the law is silent." Chief Justice Rehnquist himself acknowledged this reality in his 1998 book, *All the Laws But One: Civil Liberties in Wartime*, noting that "it is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."

While Congress has not formally declared war, the "war on terrorism" has already resulted in a number of measures that will inevitably raise new constitutional questions. And these questions may be answered differently today than they might have been on September 10th, as the courts balance heightened national security claims against individual liberties in a time of conflict and tension. For instance,

The PATRIOT Act,¹ greatly expands government investigative authority and sharply trims the rights of resident aliens and visitors. The government may now conduct "sneak and peek" searches whereby government agents can search one's property without giving prior warning. The government also has new, broader authority to conduct internet and e-mail surveillance and has increased the requirements for businesses to report large cash transactions.

¹H.R. 3162 – The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001.

Section 215 of the Patriot Act authorizes the FBI to acquire any business records by order of a secret court, with the recipient of the search order forbidden from disclosing to anyone that such a request has been received.

The president has ordered that terrorist suspects may be tried before secret military tribunals. It is uncertain whether World War II-era precedents allowing for such secret trials in wartime will apply when no war has been declared, or whether such trials would be barred under the 1866 decision of *Ex Parte Milligan*, where the Supreme Court held that martial law could not be applied to civilians where civil courts are open. *Ex Parte Milligan*, 4 Wallace 2 (1866). These secret tribunals also raise the question of whether the president, by executive order, may simply exempt a class of persons (accused terrorists) from Constitutional due process protections when no formal state of war has been declared.

We now face a situation not seen since 1945. The Constitution's role in wartime is already coming to the fore as the federal government responds to terrorism's threats. Throughout American history, the government, when confronted by the dangers of war, has often responded by paring back traditional constitutional protection, with the courts' acquiescence. This pattern is emerging once again after September 11th. As Chief Justice Rehnquist has written, "there is no reason to think that future wartime presidents will act differently from Lincoln, Wilson or Roosevelt, or that future justices of the Supreme Court will decide questions differently from their predecessors." For as long as the government remains at "war" with terrorism, history indicates that citizens may not be able to rely on the courts as they otherwise might to protect their civil liberties from executive and legislative

excesses. In this new landscape, where strong political forces clash with traditional ideas of liberty, the constitutional significance of September 11th is only now becoming apparent.

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