

THE BILL OF RIGHTS AND THE MILITARY

by Earl Warren

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It is almost a commonplace to say that free government is on trial for its life. But it is the truth. And it has been so throughout history. What is almost as certain: It will probably be true throughout the foreseeable future. Why should this be so? Why is it that, over the centuries of world history, the right to liberty that our Declaration of Independence declares to be "inalienable" has been more often abridged than enforced?

One important reason, surely, is that the members of a free society are called up-on to bear an extraordinarily heavy responsibility, for such a society is based upon the reciprocal self-imposed discipline of both the governed and their government. Many nations in the past have attempted to develop democratic institutions, only to lose them when either the people or their government lapsed from the rigorous self-control that is essential to the maintenance of a proper relation between freedom and order. Such failures have produced the totalitarianism or the anarchy that, however masked, are the twin mortal enemies of an ordered liberty.

Our forebears, well understanding this problem, sought to solve it in unique fashion by incorporating the concept of mutual restraint into our Nation's basic Charter. In the body of our Constitution, the Founding Fathers insured that the Government would have the power necessary to govern. Most of them felt that the self-discipline basic to a democratic government of delegated powers was implicit in that document in the light of our Anglo-Saxon heritage. But our people wanted explicit assurances. The Bill of Rights was the result.

This act of political creation was a remarkable beginning. It was only that, of course, for every generation of Americans must preserve its own freedoms. In so doing, we must turn time and again to the political consensus that is our heritage. Nor should we confine ourselves to examining the diverse, complicated, and sometimes subordinate issues that arise in the day-to-day

application of the Bill of Rights. It is perhaps more important that we seek to understand in its fullness the nature of the spirit of liberty that gave that document its birth.

Thus it is in keeping with the high purposes of this great University that its School of Law sponsor a series of lectures emphasizing the role of the Bill of Rights in contemporary American life. And it is particularly appropriate, after the splendid lectures of Mr. Justice Black (1) and Mr. Justice Brennan (2) on the relationship of the Bill of Rights to the Federal and State Governments, respectively, that you should delegate to someone the task of discussing the relationship of the Bill of Rights to the military establishment. This is a relationship that, perhaps more than any other, has rapidly assumed increasing importance because of changing domestic and world conditions. I am honored to undertake the assignment, not because I claim any expertise in the field, but because I want to cooperate with you in your contribution to the cause of preserving the spirit as well as the letter of the Bill of Rights.

Determining the proper role to be assigned to the military in a democratic society has been a troublesome problem for every nation that has aspired to a free political life. The military establishment is of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military--or at least a militant organization of power--that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all of the formal trappings of constitutional democracy.

Not infrequently in the course of its history the Supreme Court has been called upon to decide issues that bear directly upon the relationship between action taken

in the name of the military and the protected freedoms of the Bill of Rights. I would like to discuss here some of the principal factors that have shaped the Court's response. From a broad perspective, it may be said that the questions raised in these cases are all variants of the fundamental problem: Whether the disputed exercise of power is compatible with preservation of the freedoms intended to be insulated by the Bill of Rights.

I believe it is reasonably clear that the Court, in cases involving a substantial claim that protected freedoms have been infringed in the name of military requirements, has consistently recognized the relevance of a basic group of principles. For one, of course, the Court has adhered to its mandate to safeguard freedom from excessive encroachment by governmental authority. In these cases, the Court's approach is reinforced by the American tradition of the separation of the military establishment from, and its subordination to, civil authority. On the other hand, the action in question is generally defended in the name of military necessity, or, to put it another way, in the name of national survival. I suggest that it is possible to discern in the Court's decisions a reasonably consistent pattern for the resolution of these competing claims, and more, that this pattern furnishes a sound guide for the future. Moreover, these decisions reveal, I believe, that while the judiciary plays an important role in this area, it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility.

Before turning to some of the keystone decisions of the Court, I think it desirable to consider for a moment the principle of separation and subordination of the military establishment, for it is this principle that contributes in a vital way to a resolution of the problems engendered by the existence of a military establishment in a free society.

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. To strangers this might seem odd, since our country was born

in war. It was the military that, under almost unbearable conditions, carried the burden of the Revolution and made possible our existence as a Nation.

But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington's qualities of leadership and, above all, his abiding respect for civil authority. (3) This trait was probably best epitomized when, just prior to the War's end, some of his officers urged Washington to establish a monarchy, with himself at its head. He not only turned a deaf ear to their blandishments, but his reply, called by historian Edward Channing "possibly, the grandest single thing in his whole career," (4) stated that nothing had given him more painful sensations than the information that such notions existed in the army, and that he thought their proposal "big with the greatest mischiefs that can befall my Country." (5)

Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly. Their viewpoint is well summarized in the language of James Madison, whose name we honor in these lectures:

The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world. Not the less true is it, that the liberties of Rome proved the final victim of her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A

standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.(6)

Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution. The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies, with the added precaution that no appropriation could be made for the latter purpose for longer than two years at a time--as an antidote to a standing army. Further, provision was made for organizing and calling for the state militia to execute the laws of the Nation in times of emergency.

Despite these safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troop in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of

history, it is not unreasonable to believe that our Founders' determination to guarantee the pre-eminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.(7)

Earl Warren, former Chief Justice of the United States.

*This article was delivered as the third James Madison Lecture at the New York University Law Center on February 1, 1962.

FOOTNOTES

(1) Black, *The Bill of Rights*, 35 N.Y.U.L. Rev 865 (1960)

(2) Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961)

(3) 5 Freeman, *George Washington* 477 (1952)

(4) 3 Channing, *A History of the United States* 376 (1912).

(5) 24 *Writings of Washington* 272 (Fitzpatrick ed. 1938)

(6) *The Federalist* No. 41, at 251 (Lodge ed. 1888) (Madison).

(7) See, e.g., Pinkney's recommendations to the Federal Convention, 2 *Records of the Federal Convention* 341 (Farrand ed. 1911), and the discussion by Mason and Madison, *Id.* at 617; *Resolutions on Ratification of the Constitution by the States of Massachusetts, New Hampshire, New York and Virginia*, reprinted in *Documents Illustrative of Formation of the Union of American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1018-20, 1024-44 (1927).