Public Right of Access to America's War on Terror

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Abstract

The saga of Guantanamo Bay litigation continued into a new area of law earlier this year. In an opinion written by Judge Justin Walker, the United States Court of Appeals for the DC Circuit dismissed an attorney's petition to observe a tribunal hearing of an Islamic terrorist. While Judge Walker's opinion ultimately dismissed the attorney's petition, the opinion left open the possibility that American citizens could demand access to Guantanamo hearings under the First Amendment. Lively debate exists over whether or not enemy combatants enjoy certain constitutional rights. But regardless of whether a terrorist has a Sixth Amendment right to a public trial, American citizens – under the original understanding of the First Amendment – have a qualified constitutional right to observe the hearings of enemy combatants.

I. Introduction

The saga of Guantanamo Bay litigation continued into a new area of law earlier this year. Instead of habeas corpus litigation on behalf of detainees, "a defense attorney… (with no client) petitioned a court (with no jurisdiction) to reverse a procedural ruling (excluding the public from a classified hearing) in an appeal filed by other attorneys who…have no client."[1] If that sounds convoluted, then as Judge Walker said in his opinion in this case: "welcome to Guantanamo Bay."[2] While Judge Walker's opinion ultimately dismissed the attorney's petition, he left open the possibility that American citizens could demand access to Guantanamo hearings under the First Amendment. Rightly so. The original understanding of the First Amendment surely guarantees a right to access hearings of Guantanamo Bay detainees.

II. Background

Ibrahim al Qosi is an Islamic terrorist. Ten years ago, he was arrested and charged with two counts of terror-related charges. During the criminal proceedings, attorneys from the Military Commissions Defense Organization represented al Qosi. Counsel for al Qosi, either employed by the Department of Defense, or civilian defense counsel retained by the accused at his own expense[3], ultimately entered two pleas of guilty. In exchange for the pleas of guilty, the government released al Qosi after a prison sentence of only two years. After being released to Sudan, al Qosi had no contact with his defense attorneys. Once back in Sudan, al Qosi joined al Qaeda, became a leader in the organization, and began encouraging terror attacks on the United States.

Mr. al Qosi has yet to be eliminated, and is still at large.[4] In spite of al Qosi's continued terrorist actions, and the fact that he has had no subsequent contact with his counsel, the DoD attorneys who represented him "continue to challenge [al Qosi's] conviction."[5] This is where Philip Sundel comes into the picture. Mr. Sundel works as an attorney for the Department of Defense, but is not – and never was – counsel al Qosi. Nevertheless, Mr. Sundel wished to attend a closed-to-the-public classified hearing on the al Qosi case. After asking both the military judge and then the Court of Military Commission Review for access to the hearing and both denied his petitions. Mr. Sundel appealed to the United States Court of Appeals for the D.C. Circuit, asking for access to the hearing.

III. The Court's Ruling

The D.C. Circuit, in a panel made up of Judges Henderson and Walker, and Senior Circuit Judge Silberman, dismissed Mr. Sundel's petition for lack of subject matter jurisdiction. The court found that it could "review a challenge only if it is, among other things, a final

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[1] *Philip Sundel v. United States,* No. 19-1234, 1 (D.C. Cir. Jan. 26, 2021).
[2] *Id.* at 2.
[3] Office of Military Commissions, *Organization Overview,* Department of Defense (Last accessed April 28, 2021). https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx
[4] *Supra* note 1 at 2.
[5] *Id.*

judgement."[6] Since Mr. Sundel was appealing the military judge's decision to seal the hearing, the court found that Mr. Sundel's appeal concerned a decision rather than a judgement.[7] The court, however, carefully emphasized that "it is an open question whether the public has a First Amendment right to attend hearings related to detainees at Guantanamo Bay."[8]

IV. The First Amendment Versus National Security

Military tribunals are a curious forum of adjudication in America. They have often appeared during times of conflict, and disappeared soon after. Yet, one constant in these military tribunals is that government officials have sought to keep them confidential, often under auspices of national security. While the First Amendment extends a right of access to Article III judicial proceedings, no court has considered whether or not that right applies to military tribunals.[9] This permits courts to seal tribunals for national security purposes, and to erode "the primary purpose of the First Amendment [which is that citizens] understand the issues which bear upon our common life."[10] With this vital civil liberty being balanced against the government's interest in maintaining national security, the touchstone for determining how far the government may go is the original understanding of the First Amendment.

V. Original Understanding of the Right to Access

At the time of the Founding, the public considered freedom of the press (from which the right to access flows) to be of paramount importance. In his essay ``Rights of Man" Thomas Paine lamented that the English government had corrupted the press, "most English newspapers are directly in the pay of the government or, if indirectly connected with it, always under its orders."[11] Paine further explains that this severe and dangerous restriction on press came as a result of the "miseries of war and the flood of evils it spreads over a country."[12] Far from seeing war as justifying restrictions on the First Amendment, Paine argued that governments abused their powers in war time to curtail fundamental rights.

This impression of the importance of public access continued through to the historic trials of Thomas Preston and William Wemms in 1770. Preston and Wemms – two English soldiers – stood trial for the Boston Massacre. Inflamed passions were the obvious result of the massacre, and the court delayed the trial to let passions cool, so as to not taint the proceedings with unfair prejudice.[13] During the delay in the trial, both sides used the press to air their versions of events.[14] Once trial began, however, the press motioned to sell accounts of the massacre itself, but was

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[6] *Supra* note 1 at 5.
[7] *Id.*
[8] *Supra* note 1 at 4.
[9] *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (Plurality opinion).
[10] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government,* 75 (1948).
[11] Thomas Paine, *Common Sense, Rights of man, and Other Essential Writings of Thomas Paine,* Signet Classics ed., 131 (2003).
[12] *Id.*
[13] Indeed, the colonists deeply desired a fair trial for these soldiers because of the vindication that comes with a properly wrought guilty verdict. To this end, the Defense was furnished with high-quality counsel including future president John Adams.
[14] Hiller Zobel, *The Boston Massacre* 206, 221 (1970).

denied out of concern that such accounts could "unduly prejudice those whose lot it might be, to be jurors to try these causes."[15]

In spite of these restrictions, the trial of Preston and Wemms remained open to the public, and the public attended regularly. Eventually, Preston and Wemms were acquitted, and a jury found only two soldiers (in a different trial) guilty. The Boston Massacre trials evidence that, even in one of the most divisive times in American history, the public demanded access to the trial of foreigners who had murdered Americans.

The *Boston Gazette* lent even more support to this expectation of free access and freedom of the press when they lamented that British authorities had started suppressing speech about the quartering of British soldiers in American homes. The author argued that "since those journals have been discontinued, our troubles from that quarter have been growing upon us."[16]

This expectation of openness continued after the Founding. The Sedition Act Trials further demonstrate that the freedom of speech and press extends to watching trials implicating national security.[17] Between 1798 and 1801, the United States prosecuted at least 26 individuals with "publishing false information, or speaking in public with the intent to undermine support for the federal government."[18] Taking a step back, the Federalist Congress passed the Sedition Acts in response to international conflict with France and to target Republican authors and speakers who criticized the Adams Administration.

The government, in all of these cases, alleged that the defendants attempted to stir up sedition, and undermine the American government itself. In spite of this, none of these trials were sealed and the public could access them freely. So free was the press coverage and access to these cases that one defendant, Matthew Lyon, "wrote a widely publicized account of the trial…[and]…won reelection to the U.S. House of Representatives."[19] The wide media coverage "reflected public interest in the sedition trials, many of which became public events that attracted large and often prominent audiences."[20] So intense was the debate over the sedition acts that it "prompted debates on the nature of constitutional government itself" including two state attempts to nullify the federal law on First Amendment grounds.[21] In 1800, a Senator Charles Pinckney supported Thomas Jefferson's candidacy for president by "arguing that sedition prosecutions were a threat to the public's right to free discussion of public affairs."[22]

Fast forward to the American Civil War. President Abraham Lincoln suspended the writ of habeas corpus, and had begun trying American civilians in military tribunals. In Indiana, the government arrested one man, Lambdin Milligan, who challenged his detention (in part) on the

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[15] Article Signed "Vindex" (Boston Gazette, Dec. 31, 1770), The Writings of Samuel Adams 110 (1904-1908).
[16] Boston Gazette (March 12, 1770).
[17] The irony of using Sedition Act prosecutions as evidence of an American fidelity to free speech is apparent. But while the rights of the defendants may have been trampled, the fact that the public had to these trials demonstrates the importance of free access under the First Amendment.
[18] Bruce A. Ragsdale, *The Sedition Act Trials,* 1 (2005).
[19] *Id.* at 4.
[20] *Id.* at 43.
[21] *Id.* at 43.
[22] *Id.* at 44.

grounds that the government denied him his right to a "public trial before an impartial jury."[23] As it relates to the right of access, the Supreme Court ruled that, in order to abrogate American civil liberties "necessity must be actual and present, the invasion real, such as effectually closes the court and deposes the civil administration."[24]

VI. Limits of the First Amendment

Even accepting this long history as true, it may be argued, it is irrelevant to modern military tribunals because the defendants are enemy combatants, and that the defendants do not have any rights under the Constitution. On this point there is much debate, but the resolution of such debate is not relevant to the point here. The question here is not whether *enemy combatants* have a Sixth Amendment right to a public trial, but whether *American citizens* have a First Amendment right to access military tribunals. The government did restrict the press in the Boston Massacre case, and the *Milligan* court recognized that civil liberties could be curtailed in situations of actual military necessity, but these restrictions were always narrowly tailored, and were the least restrictive means by which to achieve the government's compelling interest in national security. For better or worse, the First Amendment is not absolute, and there are cases where a judge could reasonably seal a military tribunal for actual military necessity. But the original understanding of the First Amendment strongly supports a presumption that military tribunals be open to the public, just as other judicial proceedings are.

VII. Conclusion

Even in the times of deepest division in America, from the Revolution, to suspicions of sedition, to a Civil War, the American public enjoyed wide-open access to all manner of proceedings. Limits were imposed, but the American people ratified the First Amendment with the understanding that it prevents the government from restricting their right of access to hearings and tribunals.

This brings us back to Judge Walker's open question in 2021: is there a First Amendment right of access to detainee hearings? The original understanding of the First Amendment certainly suggests that, while there may be limits, the First Amendment does protect that right. Hopefully a court addresses this issue soon and closes the issue. The longer it remains unanswered, the easier it is to "slide from a case of genuine military necessity, where the power sought to be exercised is at least debatable, to one where the threat is not critical and the power either dubious or nonexistent."[25]

The meaning of the First Amendment has not changed since the states ratified in 1791. Whether or not the Guantanamo detainee has a right to a public trial, American citizens have a Constitutionally protected right to keep a watchful eye on governmental prosecution.

[23] *Ex Parte Milligan,* 72 U.S. 2, 62 (1861).
[24] *Id.* at 127.
[25] William Rehnquist, *All the Laws but One,* Vintage Books, 224 (2000).