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The Case of the Ill-Gotten Intelligence

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NOTES

THE CASE OF THE ILL-GOTTEN INTELLIGENCE

The three defendants, during April, 2090, were all army officers of the Federation of North America serving in the Republic of Pangaea.

Two of the defendants, Lieutenant Short and Major Saster, were Army Intelligence officers assigned to the 17th Army Intelligence Detachment (A. I. Det.). Maj. Saster was the officer in charge of the Prisoner Interrogation Teams. Lt. Short was one of his interrogators.

The third defendant, Captain Gee, was attached to the 6th Pangaean Prisoner of War Interment Camp as an adviser to the Army of Pangaea.

Sometime during April, 2090, Federation forces captured an enemy soldier named Quyet Thang. Quyet Thang was identified by other prisoners as a ranking officer of the enemy's 22nd Regiment, confirming information from other sources. Based upon Quyet Thang's rank, position and other intelligence, it was felt that he had information of immediate tactical value to the Federation and Pangaean forces; therefore, Thang was evacuated to a rear area and turned over to the 17th A. I. Detachment.

Lt. Short and an interpreter began interrogating Thang on the morning of 16 April 2090. On the evening of 16 April, Lt. Short sent the following message to Maj. Saster:

"Sir:

"Thang admits he is the I & R (Intelligence and Reconnaissance) officer of the 22nd Regiment but that's all he will say. I talked to the two prisoners captured with him and they said they had been reconnoitering Federation positions and Thang had sent his info back to the 22nd Base Camp. They further stated that they and Thang were moving to an unknown point to rendezvous with the 22nd which would be moving to attack a Federation unit.

"Sir, the 22nd is a strong, well-armed unit near full strength. If they surprise a smaller Federation unit, it could be a massacre. On the other hand, if Thang can be made to pin point the rendezvous point in time for us to prepare a proper welcome, we could really put the hurt on the 22nd.

"Thang won't talk for us, but I believe he has information of immense tactical value to Federation forces; therefore, I recommend he be turned over to the Pangaeans so he can be made to talk.

Lt. Short"

Maj. Saster, upon receiving Lt. Short's recommendation, called Cpt. Gee. Maj. Saster and Cpt. Gee agreed that the gist of this conversation was as follows:

(1) Quyet Thang, an important enemy officer, had been captured.

(2) He was withholding needed information from Federation interrogators.

(3) Cpt. Gee was to pick up Thang and turn him over to the Pangaeans to "extract the info by any means possible."

Cpt. Gee, as ordered by Maj. Saster, delivered Quyet Thang to the Pangaean Prisoner Camp where Cpt. Gee related to the Pangaean interrogators the situation. The Pangaeans, by various means, tortured Quyet Thang and elicited the desired intelligence. Based upon the intelligence thus obtained, Federation forces proceeded to the rendezvous point, engaged the 22nd Regiment and inflicted heavy casualties on the enemy. Captured documents established that the 22nd had had the following mission: The 1st Battalion was to act as a screening force, attacking several Federation bases with rockets and mortars allowing the 2nd and 3rd Battalions to move between Federation positions. The 2nd Battalion was to attack the Town of La Place, take the newly harvested rice crop and assassinate the newly elected officials as well as the teachers at the new town school. The 3rd Battalion had the mission to destroy a Federation company guarding the town.

In January, 2091, Maj. Saster, Cpt. Gee and Lt. Short were indicted for the torture of Quyet Thang.

PRIMUS, C. J.

As a member of the highest judicial body of this land, it is my duty to uphold the laws of this land as enacted by the Assembly so long as the enactment is constitutional. The case before us today concerns an alleged violation of Act 16-51-35 of the Uniform Federation Laws, commonly known as the Howe-Cohen Act. This specific section of the Howe-Cohen Act is but one of several which was enacted to give the force of law to the "rules of war" embodied in the Tenth Geneva Accords. Act 16-51-35 is titled "Rules Relating to Treatment of Prisoners of War" and Paragraph (b) states ". . . no prisoner of war will be abused, mistreated or tortured in any manner whatsoever by members of the Armed Forces of the

Federation . . . ." The three defendants stand accused of violating this statute in the chain of events leading to the torture of a prisoner of war.

The Indictment alleged that Lt. Short recommended, Maj. Saster ordered, and Cpt. Gee acquiesced and aided in the torture of one Quyet Thang by the Pangaean Army. I am unable to sustain the lower Court's conviction of these defendants and, since this is a situation of first impression in this Court, I feel I must present my reasoning in some detail.

The first prerequisite to conviction for violating a given law is the determination of the existence of that law. In other words in a case such as the one before us, we must determine if the alleged law is valid or invalid, for obviously if a "law" is invalid, it does not exist and a non-existent law cannot be violated.

As I have already stated, it is incumbent upon this Court to uphold the legislative enactments of the Assembly so long as they are not unconstitutional. It is true that laws are often declared unconstitutional because they are unreasonable and thereby violate the due process clause of our Constitution; however, this case concerns a treaty, the Tenth Geneva Accords, between the Federation and the other signatories. The treaty contains a provision under which each of the contracting powers would undertake to pass laws to effectuate the provisions of the Accord. Therefore, the first question is whether this provision of the Howe-Cohen Act can be attacked on the grounds of unconstitutionality, either because of unreasonableness or any other constitutional ground.

The case of *Gaines v. Dailey,* 22 Federation 99, (2137), relying heavily on an Old United States case of *Missouri v. Holland,* 252 U.S. 416 (1920), answered this question in the negative, saying "Acts of the Assembly must be made in pursuance of the Constitution, but treaties and statutes pursuant to them are valid when made under the authority of the Federation. This is not to say there are no qualifications to the treaty-making power, but these qualifications must be ascertained in a different way."

Now we reach the crux of the problem. Because the statute was enacted pursuant to a treaty, it is not limited by the Constitution but it is limited by other, as yet unnamed, "quali-

fications"; therefore, the problem before us now is to identify these qualifications. To answer this question it is necessary to examine the reason the treaty-making power must exist and why it is not subject to normal constitutional limitations.

"It is obvious that there arise from time to time matters of the sharpest exigency for the national well-being that an act of the Assembly could not deal with but that a treaty followed by such an act could deal with, and it is not lightly to be assumed that in matters requiring national action a power which must belong to and reside somewhere in every civilized government is not to be found." *Gaines* at 103 paraphrasing *Missouri.*

What the Court is saying in effect is that because of the realities of the world situation there is a power inherent in our government, as in all governments which exist as sovereigns in a community of nations, to enter into such agreements with other nations as the national interest requires and that this power is not necessarily limited by the Constitution. But this power is not without qualifications or limits. The most readily apparent qualification is that this power be used in the national interest. However, this determination is made by the Assembly. Are there other limits on this power? I think—yes.

The treaty-making power is an inherent power of all sovereign governments, but there are also inherent limits on this power. The sovereign cannot command the impossible. King Canute demonstrated this when he had himself carried to the sea shore and ordered the tide not to come in. He did this to prove to his subjects that he was not all powerful, for he recognized inherent limits on his powers. In like manner the sovereign cannot require men to do the impossible. I do not think anyone would argue that a statute or a treaty that required men to bear children would be valid. Such an order would be unreasonable and without effect.

If a sovereign cannot legislate control over the elements nor over the biological composition of men, can it be said he can validly legislate the psychological make-up of men? The answer is no. Just as the sovereign cannot validly legislate by law or treaty that which is biologically impossible, he cannot legislate that which is psychologically impossible. These defendants, three Federation soldiers, were fighting in a war.

Hundreds of other Federation soldiers were being killed by the enemy every week, and the lives of all our soldiers, including the lives of these defendants, were in constant danger. They were not in the chambers of a courtroom; they were at war and wanted to survive. If man has any instinct at all, it is the instinct to survive and to protect those whom he loves. The enemy was moving to attack, to kill. Who were to be his victims was unknown—maybe these men, maybe their friends, maybe innocent civilians.

When a prisoner has become captured and is believed beyond a reasonable doubt to possess information vital to the defense and lives of our forces and he is refusing to divulge that information, he is continuing to resist and constitutes an immediate threat to our forces, just as if he still had a weapon and was firing on our men. To forbid our forces while engaged in war to neutralize the danger thus confronting them would be equivalent to forbidding them the right to protect and defend their lives. This is an unreasonable restraint upon their right of survival. In time of war, man's natural, involuntary, instinctive determination to survive demands that he take the necessary steps to protect himself, and no government possesses the power to legislate away this instinct to survive. It is as much beyond their power as the tides were beyond Canute's.

For this reason, I conclude that the statute under which the defendants were charged is without force and effect, and the conviction should be set aside.

TRAY, J.

While I concur with the decision reached by my brother, Primus, I find his reasoning completely unconvincing. I might agree with my brother that a statute which commands the impossible should not be given the effect of law, but the reason for this arises from the very nature and purpose of law.

As I see it, the purpose of law is to regulate human conduct by setting standards which deviation from or conformity to will bring into play sanctions or benefits enforced by the powers of the government. From this I deduce three elements necessary to every law: (1) First a law must set *standards.* (2) Secondly, these standards must have as their object the *regulation of human conduct.* (3) The standards must be *governmentally enforced.*

I will discuss these necessary elements of every law in reverse order. First, the standards must be *governmentally enforced.* Governmental enforcement distinguishes law from morality or private orders. Imagine these three situations: First, a thief orders "Your money or your life." Secondly, a religion, whose tenets are believed by the majority, has a doctrine which states "Half of everyone's income must be donated to the church or their souls will be lost." And thirdly, a properly enacted statute which states "Each individual will be taxed fifty percent of his gross income or serve two years in jail." Which of these orders is a law? Obviously, only the last, the properly enacted statute, is law.

Why? Because the government is recognized by citizens of this body politic as the only body with the legitimate right to make or enforce laws.

No problem arises with respect to laws that government officials themselves enforce, but what about situations in which private citizens are empowered to enforce the law. Does this violate our third necessary element of all laws? No, because private citizens can only validly enforce laws when empowered to so do by law.

In the medieval days a man who committed certain crimes was declared an outlaw by the government. Part of his punishment was the withdrawing of governmental protection over his person. The outlaw's life was forfeit to any individual who could take it. But even this is not an example of an individual enforcing a law, for the individual was acting with governmental approval and was in effect an agent of the government. Today we have pollution laws which allow private citizens to institute proceedings against pollutors; but this is not an example of private law enforcement. Even in this situation, the private citizens are acting as quasi-governmental officials. They are proceeding against pollutors as defined by the government in a statute in a judicial system provided by the government and in a manner set forth and approved by the government.

Our statement of the third necessary element of a valid law was that "The standards (set forth in the law) must be governmentally enforced." We have shown that any enforcement of a law is always of a governmental nature. But can there be a valid law if no means of enforcement are prescribed?

Let us postulate a situation in which the Assembly promulgates a statute which says "All persons will remove hats when entering government buildings," but no sanctions are provided. Is this a law? The statute establishes the necessary standards and is designed to regulate human conduct but no means are provided for its enforcement. It is, therefore, not a law but only a resolution of the Assembly. Moral principles set standards for and are designed to regulate human conduct but are not laws because they are not enforced by the government. Therefore, we can conclude that "it is a necessary element of a valid law that the standards set forth in the statute" must be *governmentally enforced.*

The second necessary element for a valid law is that "these standards (set forth in the law) must have as their object the *regulation of human conduct.*" I would agree with Judge Primus that there cannot at present be a valid law designed to regulate the ebb and flow of the oceans' tides nor the rising and setting of the sun. These are instances of physical elements in our world that at present are utterly beyond our control; and, therefore, beyond our power to regulate or legislate. But we can and do legislate man's relationship to these elements. An individual's title rights stop at the mean high tide mark and certain human activities are forbidden at night.

Since in the past generation we have learned how to control the amount of rainfall in a given locale, some will point to a law stating "X area is to receive between thirty to forty inches of precipitation a year" as a law regulating the environment and not human conduct. This is incorrect. The correct view of this law is to view it as one directing and empowering the personnel of the Weather Bureau to supply this amount of precipitation each year. Thus, this law is regulating the conduct of humans in their relationship among themselves and the amount of precipitation.

There is a law in many jurisdictions of the Federation to the effect that dogs found running in packs will be shot. Properly viewed, this law is not designed to regulate the activities of dogs, for obviously animals are incapable of perceiving laws. This law is designed to put the dog owners on notice of the possible results of failing to keep their dogs under control and empowers law enforcement officials to kill

dogs running in packs without being liable to the dogs' owners. Therefore, this law is designed to regulate the activities, rights and duties of men in connection with the behavior of dogs.

The only creature capable of conceiving, perceiving, understanding and conforming to laws is man; therefore, it is axiomatic that the regulation of human conduct, including the activities, rights, duties and relationships of men, is the only proper object of law.

The remaining necessary element of all laws requires that they must *set forth standards*. We have already shown that the regulation of human conduct is the only proper object of laws. Only man is able to understand and conform to laws; but if a "law" does not set forth sufficient standards by which a man may judge his conduct, he is in no better position than a brute creature.

If a man does not know and cannot ascertain the standards he must follow in order to be in compliance with an enactment, this enactment is not law for it must fail in its primary purpose—the regulation of human conduct. Men cannot obey nor government enforce a law whose standards and requirements cannot be discovered by anyone. There are many laws in this land that are unintelligible to most people. Among these laws I would number our tax laws. But at least the standards and requirements these laws place on human conduct can be ascertained by specialists. I have no quarrel with complex laws having complex standards, but I do object most strenuously to enactments that set forth no standards at all; and it is these standardless enactments that I would deny the force of law.

The statute under which the present action was brought complies with the three necessary elements of law which I have set forth. It is designed to regulate human conduct and there are provisions for its enforcement by the government. The statute also provides the necessary standards to govern conduct.

Once a statute complies with these three prerequisites it is a valid law and the standards encompassed in it must be applied to the instant situation to determine if the defendants have failed to measure up to the required standards. The statute states "no prisoner of war will be abused, mistreated or

tortured." It is admitted Quyet Thang was a prisoner of war and was tortured. The statute further states the forbidden acts will not be done "by members of the Armed Forces of the Federation." It is this phrase in the statute which destroys the prosecution's case. The prisoner, Quyet Thang, was not tortured by the defendants but by members of another army.

The prosecution would use a conspiracy theory to convict the defendants, imputing the torture of the prisoner by the Pangaeans to the defendants. The potential harm of accepting such a theory is catastrophic. What standards would be left by which men could judge their acts?

Under the conspiracy theory, Maj. Saster, who ordered the prisoner turned over to the Pangaeans, would be guilty. What should Maj. Saster have done? Our forces do not maintain P. O. W. camps. All prisoners, within a short time, are turned over to the Pangaeans. In this case the Pangaeans knew the importance of Quyet Thang and it is likely they would have tortured the prisoner without any prompting. Even if he had not suggested torture, it is possible, under the charge of conspiracy, to convict Maj. Saster if he turned the prisoner over to the Pangaeans believing he would be tortured, yet if he had refused to turn the prisoner over he would have been in violation of Military Regulations. Where are the necessary standards?

Lt. Short was under orders to interrogate Quyet Thang and recommend a course of action to follow. Under the conspiracy theory if this situation arises again, what should the soldier do?

Cpt. Gee, according to the conspiracy theory, should be convicted because he acquiesced and aided in the torture. Specifically, Cpt. Gee picked up and delivered Quyet Thang to the Pangaeans and relayed Maj. Saster's suggestions. If we convict Cpt. Gee, what standards do we have to guide men in similar situations? Should Cpt. Gee have refused the order, valid on its face, to pick up the prisoner and risked a Court Martial for refusal to obey an order in time of war?

If we accept the conspiracy theory, why are only these three defendants before us? Should not the clerk typist who typed the prisoner's transfer orders also be indicted for he too knew Thang was likely to be tortured. Where are the standards for him? Should he refuse to type? Where is Cpt.

Gee's driver? Should he not also be charged with facilitating the torture for he personally transported the prisoner to the Pangaeans and he knew of Maj. Saster's suggestions. Should the driver have refused to drive? Where are the generals who knew of these practices but who did nothing to halt them?

If we accept the conspiracy theory in this situation and proceed into a standardless wilderness, would it not be possible to use a variation of the "fruit of the poisonous tree" doctrine to forbid our forces from acting on such ill-gotten information. After Thang had been tortured, the information obtained was given to a Federation soldier who transmitted it to our fighting units. Could this soldier not be an accessory after the fact? In the future should he refuse to pass on needed intelligence? Since this intelligence was "fruit of the poisonous tree" were the commanders of our combat units guilty of misdeeds when they acted on it? In the future should they refuse to use ill-gotten intelligence, thereby risking a Court Martial, and letting Federation soldiers suffer the consequences or should they continue to press intelligence officers to get the information they need and perhaps be accessories before the fact? Where are the necessary standards?

Were I to accept the conspiracy theory in this case, I would have to strike down the statute as lacking the necessary standards. Therefore, in order to save the statute it must be interpreted narrowly. Since the defendants did not personally engage in the torture of the prisoner, their conviction must be reversed.

SUMMERFALL, J.

I am quite disappointed in the opinions and decisions of my colleagues, Primus and Tray. The law is quite plain ". . . no prisoner of war will be abused, mistreated or tortured in any manner whatsoever by members of the Armed Forces of the Federation . . . ." Judge Primus' opinion notwithstanding, there is nothing unreasonable about this law. It does not demand the impossible. It only asks, nay demands, that our soldiers refrain from the barbarous practice of tormenting soldiers of other nations that fall into their hands and are completely at their mercy. There are instances on record of men in similar circumstances acting in a manner in accord with the law. Judge Primus believes that basically this law and others of a like ilk are an unwise limitation on

our armed forces and it offends his sense of justice to punish men for doing what he believes the necessities of war demanded. Judge Primus in effect places his idea of the necessities of war in a position superior to the law. This is a grave judicial error.

We are a government of laws, not men. This means in effect that what is legal is just and that which is illegal is unjust. Our laws are enacted by our Assembly as the embodiment of the will of the people. And when our people, through the Assembly, enact legislation they are stating the standard of justice, of laws, to be enforced in our land. If the Assembly declares that corporations will be taxed $.75 on the dollar and individuals, $.25 on the dollar, then the people feel this is just and what judge would have the audacity to declare that this act is unjust and invalid? But this is what Judge Primus has done in the case before us, though he tried to disguise his motives by postulating it in terms of impossibility, unreasonableness and inherent limits on the enacting of valid laws.

As an aside I would like to take issue with those who look aghast at my statement that "what is legal is just and that which is illegal is unjust" and would transpose the words to state that what is just is legal and that which is unjust is illegal. The validity of the latter statement is utterly illusionary. Undoubtedly it has appeal since such a theory would recognize only "just" laws as valid and thus any law which was unjust would, of course, be invalid, an "unlaw" if you will, and not worthy of recognition or obediency. Such a theory would give moral sanction to, if indeed it did not command, the contravention of these unjust unlaws.

How is it that I a *Justice* on our Supreme Court can oppose a theory that would allow only just laws to exist? The answer is very simple, I am a judge not a philosopher, I deal in laws not theories, I am interested in the practical amelioration of harsh conditions, not in the impractical pursuit of perfection.

In this world most things are transient, few constant. Among those which I would number constant are people, governments, and laws. These three in some form have existed since the beginning of recorded history and perhaps it is time we learned from history instead of just memorizing it. Wherever people are found they are organized, be it into clans,

tribes, or nations. All of which constitute various forms of governments and all these governments attempt to regulate the conflicts between individuals by means of various rules, be they custom or governmental rules, called laws. Since whenever men are found in groups we also find government and law it is not amiss to realize that they are necessary for the existence of man and therefore any theory which would render ineffectual either the government or law would destroy the prerequisites of man's existence and would therefore undoubtedly be false.

A theory postulating that what is just is legal and what is unjust is illegal could be paraded forth anytime someone needed a justification for some action. So long as the alleged reason for the act was claimed to be just such a theory would hold that it was legal; but since men have never been able to agree on what is just such a theory would leave them unable to collectively ascertain what was legal. Thus, every man would be a law unto himself and the result would be anarchy, or the lack of effectual government and law, which history has shown to be inimical to the existence of man. Therefore, a theory which states that what is just is legal and what is unjust is illegal is unworkable and thereby false.

Returning to the case at bar, at least Judge Primus was addressing himself to the case at bar, not propounding a theory on the necessary elements of a law. It is not necessary that a law contain Judge Tray's three elements before it is valid. The prerequisites for validity of laws are set forth by every people in their constitution, be it written or unwritten. It is possible for a people to say in effect "We recognize every wish of the lawgiver as law" and, if the people do so recognize, then the every wish of the lawgiver is law. If the lawgiver commands that every man bear a child or be fined $100, that is the law even if impossible. Why is it law? Because it is recognized as law by the people. Nor must the lawgiver set standards before his laws are valid. The lawgiver may walk the streets of this capital decreeing laws as the whim strikes him, disposing of property and lives without any standards at all. To decide this case we need not look to inherent limits on laws in order to do justice; for what the people, through laws properly enacted by our Assembly, command is justice. Nor do we look to theoretically necessary elements of

law for the only limits to the validity of laws are those prescribed in our Constitution.

I am cognizant that one of the defenses raised by the defendants was that they did not personally torture Quyet Thang and the statute only forbids torture ". . . by members of the Armed Forces of the Federation . . . ." I am not persuaded by this argument. If a man murders another with a pistol, he will not be heard to raise the defense that the pistol, not he, did the killing, for the pistol would be just an instrument of his will. In this situation the defendants knew the Pangaeans would comply with their request for this was in military parlance a standard operating procedure. Thus, the Pangaeans were just as much an instrument of the defendants' will as the pistol in the hypothetical.

I would like to warn my colleagues and my beloved nation of one possible consequence should the convictions of the defendants be overturned. There are two ways of policing war crimes: (1) self regulation in which the parent nation punishes its citizens who transgress the laws of war; or, (2) await the enforcement of the laws of war by international tribunals.

If a nation does not police itself, the international tribunals can be expected that only the vanquished nation would allow itself to be placed on trial as was the case in the "Nuremberg Trials." Though in their day these trials were heralded as a great advance in international jurisprudence and the cause of justice, they might more appropriately be viewed as a return to the barbarous practice of execution of the vanquished by the victor. Those "trials" remind one of Roman Triumphs in which the rulers and important personages of vanquished nations were paraded in public view to glorify their victors prior to being executed. At least the prevailing rulers of World War II did not use their defeated counterparts' gold plated skulls as drinking vessels, as some "ancient" barbarian conquerors were wont to do; but it is doubtful if this fact was any consolation to the executed rulers.

It is precisely because of my aversion to the victors' passing judgments on the losers that I feel that each nation must police the acts of its own soldiers. In order to effectuate this self-regulation our nation has enacted domestic statutes defining war crimes. But there are those who would emasculate

these statutes by an insidious use of the doctrine of "military necessity" or the concept of "proportionality."

Under the doctrine of military necessity if an act was committed which had been declared illegal but which act was necessary for the successful prosecution of the war, then the act was lawful; however, if the act was unnecessary or unrelated to the achievement of war aims it was illegal and should be punished. Under the doctrine of "proportionality" the only acts that would be illegal and therefore punishable would be those that were disproportionately brutal to those engaged in by the enemy.

If either of these doctrines was given official sanction by this Court, it could be used to invalidate a statute duly enacted by the representatives of the people of the Republic. A general could order an act in direct contravention of a statute of the Federation and then perhaps effectively justify his act as a "military necessity" or as being "proportionate" to the acts of the enemy. In fact, were the doctrine of proportionality adopted we would be faced with the ultimate irony of our enemy in time of war being empowered to repeal the laws of war of the Federation. For by the commission of a heinous act of war by the enemy the enemy will have nullified any domestic prohibition against any proportionally brutal acts by our troops. Such a result is preposterous.

We have a duly enacted statute regulating the acts of our soldiers in time of war. It is time we recognize this fact and deal with the present situation in light of the existing law.

I have no problem disposing of this case under a simple conspiracy theory. The lieutenant who recommended, the major who ordered, and the captain who knowingly facilitated the torture were all engaged in a conspiracy to violate a law of the Federation. Neither good intentions, selfless motives nor beneficial results vitiates their actions, for the salient fact remains, these men violated a law of the Federation and it is not within our power to forgive their deeds.

I know my opinion will be attacked as unduly harsh, as being in fact unjust. I will be scathingly attacked for equating justice with law and I will admit that for the layman the law may often seem unjust; but I and my colleagues are judges. Hopefully, we dispense justice. This is our aim. But what standards, what yardstick, what scales are we to use to arrive

at justice? Every group, nay every man, has his own idea of justice and I, as a man, have my own ideas of justice. But, when I enter this courtroom, I enter not as an individual but as a judge, a representative of the people. It is incumbent upon me, a duty of this office, that I leave all my prejudices and personal feelings, even my personal ideas of justice, outside this courtroom. As a judge, my standard of justice is provided for me and this standard is called the law.

Provided the correct procedural steps set forth in our Constitution are followed, the laws enacted are valid. These laws represent the will of the people acting through their elected representatives in the Assembly. Imperfect though this system may be, it does allow competing ideas of justice, of oughts and ought nots, of rights and wrongs, of philosophy, of political ideas and ideals to meet in combat and to compromise and synthesize into one result binding on all, the law. It is highly improbable that any one man will ever agree with all our laws or that all men will ever consider any one law just. Each individual will consider many of them unjust and this is his right as a citizen. But when that individual sits upon the bench, he is sworn to uphold the laws of this great nation, not his own personal ideas of justice. We pride ourselves on being a nation governed by laws, not men, and any theory which allows one man to place his own ideas, be they on justice or politics, above the laws of this land perverts the very system he is sworn to uphold. Judges *must* accept the laws of this nation as their standard of justice and render decisions in accord therewith. If the people become dissatisfied with this brand of justice according to law, then they may change the law and provide the judges with a new standard of justice. If, however, judges dispense justice not according to law, but according to their own personal and private ideals, how then can the people, if dissatisfied with this brand of justice, change it?

It is therefore necessary that judges decide the cases before them in accordance with the law, whether or not they personally agree with the law. When a judge attempts by legal sophistry to circumvent the result demanded by law, solely because of a personal predilection at variance with the law, then that judge is unfit for the office he holds. If my colleagues will dissociate themselves from their personal prejudices and apply the facts of the case before us to the law

given to us to govern in situations such as that before us, they will conclude, as I have, that the conviction on these three defendants must be sustained.

KATZ, J.

This law has been attacked as being unreasonable, because it would have forced the defendants to restrain from doing an act which would further their interests. It has also been labeled an unjust law, because our citizens do not like our laws punishing our own soldiers for acts which, it is felt, duty as well as their innate patriotic ardor impelled them to do. Our people are schizophrenic about the subject of torture in war. They decry as barbaric the torture of our men by the enemy, claiming that our men should only be required to give their name, rank and service number and date of birth. We have, in fact, convicted many enemy soldiers in previous wars of committing war crimes of the very type before us today. Now, many of our people object to our punishing our own soldiers for commiting such acts. However the objection is phrased, be it in terms of law or human nature, it can all be reduced to one simple fact: We demand the right to torture the enemy prisoner, but deny our enemy a like right. Individuals of this persuasion claim it is unjust for us to punish these defendants; but they would be the first to demand, in the name of justice, that we punish an enemy guilty of torturing any of our men. The men holding such ideas completely misunderstand the purpose of laws and the nature of justice. It was about such men as these that Plato spoke in a passage of his *Republic,* concerning the origin and nature of justice:

> "They say that to do injustice is, by nature, good; to suffer injustice, evil; but that the evil is greater than the good. And so when men have both done and suffered injustice and have had experience of both, not being able to avoid the one and obtain the other, they think that they had better agree among themselves to have neither; hence there arise laws and mutual covenants; and that which is ordained by law is termed by them lawful and just. This they affirm to be the origin and nature of justice; —it is a mean or compromise, between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice, being at a middle point between the two is tolerated not as a good, but as the lesser evil, and honoured by reason of the inability of men to do injustice. For no man who is worthy to be called a man would ever submit to such an agreement if he were able to resist; he would be mad if he did. Such is the received account, Socrates, of the nature and origin of justice." (Republic,

Book II, First Dialogue Between Socrates and Glaucon, Jowert Translation).

Since we as a nation are unable by brute force to prevent the torture of our soldiers by the enemy, we are in the position of two men having suffered and inflicted hurt on each other. The only rational, the only reasonable course is to mitigate the hurt and it is to this end that laws are enacted. Thus, *justice is in fact simply a compromise between doing and suffering hurt* and law is the means agreed upon to effectuate justice.

Individuals who operate on a visceral level often equate justice with that which *they desire.* It is about these individuals (or nations) that Thomas Hobbes in the Leviathan spoke, saying:

> "But whatsoever is the object of any man's appetite or desire, that is it which he for his part calls good; and the objects of his hate and aversion, evil; and of his contempt, vile and inconsiderable. For these words of good, evil and contemptible are ever used with relation to the person that uses them, there being nothing simply and absolutely so, nor any common rule of good and evil to be taken from the nature of the objects themselves . . ." (Chapter 6, p. 53—1958 Bobbs-Merrill Co., Inc. Edition)

Then there are those other individuals who, operating on a more esoteric level, perhaps aspiring to be "philosophers," equate justice with that which they believe *they should desire.* These "noble" men attempt to disassociate themselves from their base instincts and search for the pure, ultimate truth. The truth having always existed, being immutable and unchangeable, though undiscovered until revealed by the "noble philosopher." While these individuals could be answered by Hobbes' previous statement, I would prefer to answer them in the words of Friedrich Nietzsche:

> "In every philosophy there comes the point where the philosopher's 'conviction' enters the scene—or, in the words of an ancient mystery,
> *adventavit asinus*
> *pulcher et fortissimes.**
>
> (Beyond Good and Evil—Sec. 8)
>
> . . . It (philosophy) always creates the world in its own image; it cannot do otherwise, for philosophy is this tyrannical desire; it is the most spiritual will to power, to 'creation of the world' to the *causa prima.*"
>
> (Beyond Good and Evil-Latter part, Sec. 9)

* Entered now the ass
Beautiful and most strong.

Speaking to the metaphysicians solemnly searching for their "truth," Nietzsche had this to say:

> "The basic faith of all metaphysicians is *faith in the antithetical nature of value.* It has never occurred to the most cautious of them, even though they had taken a vow to "doubt everything," to pause in doubt at the very threshold where doubt would have been most necessary. But we may indeed doubt; first, whether antitheses exist at all, and second, whether those popular valuations and value—antitheses upon which the metaphysicians have placed their stamp of approval are not perhaps merely superficial valuations, merely provisional perspectives—and perspectives from a right corner at that, possibly from below, a "worm's eye view" so to speak. Admitting all the value accorded to the true, the faithful, the selfless, it is nonetheless possible that a higher value should be ascribed to appearance, to the will to deception, to self-interest, to greed—a higher value with respect to all life. Furthermore, it is quite possible that the very value of those good and honored things consists, in fact, in their insidious relatedness to these wicked, seemingly opposite things—it could be that they are inextricably bound up, entwined, perhaps even similar in their very nature. Perhaps! But who is willing to be troubled by such a perilous Perhaps? We must wait for a new species of philosopher to arrive, who will have some other, opposite taste and inclinations than the previous ones. Philosophers of the Perilous Perhaps, in every sense. And seriously, I can see such new philosophers coming up over the horizon.
>
> (Beyond Good and Evil—Sec. 2)

For too long man has reasoned that justice must be the antithesis of injustice. Justice being viewed as positive, injustice being negative, justice as good, injustice as bad. There is also the view that there always exists a just solution; that this just solution is good for all and that where justice exists injustice by definition does not exist. Viewed thusly, justice and injustice appear to be the antithesis of each other, the existence of one denying the existence of the other within the same sphere. Philosophers have come and gone, influencing men and nations for longer or shorter periods of time but none have been able to satisfactorily define what justice is in a positive sense. For thousands of years men have tried to define justice in terms of its elements, to give it a positive nature; but all the definitions have proven fallacious. Since man has been unable to discover the positive of justice *perhaps* the reason for this lies in the essence of justice, perhaps (Nietzsche's perilous perhaps) justice is not positive.

It is time to reevaluate justice and demand of it not the effectuation of good but instead merely the minimalization of harm. We must not pursue a utopia but instead seek realism

and rationality. History has shown the limited and imperfect character of human nature, and that man is often motivated by ambition, avarice, lust, revenge, hate, ignorance, sagacity, anger, resentment, jealousy, stupidity, and irrationality. It is time for us to deal with men and their institutions as they are and as they have been throughout history and to realize that if men were angels no government would be necessary. It is time to awaken from the deceitful dream that somewhere there exists a golden orb which if only discovered will dispense justice to all and adopt a practical maxim for the direction of human activities. The minds and behavior of citizens are continually disturbed and corrupted by self-interest and different opinions will always be formed. Out of the difference of opinions will rise conflicts and tensions that must be ameliorated.

Men always would prefer to have their own way. But being unable to achieve this and fearing the imposition of others' will on them they look for means to ameliorate the harm they might suffer and to this end they enact laws which embody compromises between the various competing interests and to the extent that the laws mitigate the hurt each party might suffer the laws are just.

There are those who say that if their position is just, then to compromise is unjust; that to compromise justice with injustice is an injustice. Perhaps, those men are wrong. Perhaps, if after thousands of years men have been unable to distinguish justice from injustice we should examine our basic premises. Perhaps, justice and injustice are not unrelated. Perhaps, justice does not have an independent existence separate from injustice. Perhaps, we demand too much of justice.

Man has attempted to assign a positive value to justice—the promotion of good—but has been unable to identify and agree upon what is just using this view. Since justice has been assigned a positive value and negative value—the promotion of evil. This view is unrealistic and wrong.

What we call justice is merely man's attempt to mitigate man's injustice to man. That is to say, it is a compromise between doing and suffering injustice. Contrary to being the antithesis of injustice, justice is the middle ground between injustices. Justice is not the antithesis of injustice but the synthesis of injustice. It is not a positive force, but a neutral-

izing or mitigating force, designed to neutralize or minimize harm.

Viewed in this light, it can be seen that the law before us in in fact just. And contrary to the opinion of some, it is not unreasonable. It is in fact the only reasonable path for a solution to the problem of mutual torture of prisoners. If this problem and others of a like nature between nations are ever to be solved, the compromise theory of justice must be adopted and laws enacted to effectuate this theory must be enforced. I must, therefore, affirm the conviction of the defendants.

ORDO, J.

I am deeply disturbed by this case and the previous opinions. If any of the theories set forth in these decisions were to be adopted by this nation, it would be destructive of our legal system. Actually, I am not very surprised at Judge Summerfall's opinion, for he has long and tediously labored against any restraints on the power of the government. Judge Summerfall dislikes the fact that the purpose of our Constitution and our fundamental principles of justice are designed to limit the power of the government, our sovereign. He would apparently agree as Thomas Hobbes said in his *Leviathan* ". . . no law can be unjust. The law is made by the sovereign power, and all that is done by such power is warranted and owned by everyone of the people; and that which every man will have so, no man can say is unjust." But, if I may, I would hasten to remind my brother that Hobbes died in 1679, many years prior to the writing of our Constitution. The drafters of our Constitution knew of the writing of Hobbes and rejected them by implanting in our Constitution limits on the power of our government to enact laws. This Constitution is the fundamental law of our land; it is the standard by which I must judge any enactment of the Assembly. It may be true that we must judge the acts of individuals by the standards provided by our laws, but let us not forget that we must judge and pass upon the validity of our laws by the standards provided in our Constitution.

I am also distressed by Judge Tray's opinion, but will address myself to only one point therein. He states that a law must be governmentally enforced and that, if not, it is not a valid law and would presumably be without force. If we accept this line of reasoning then our Constitution, which is funda-

mental law, is invalid; for although it gives or restricts our rights and powers it does not contain within itself sanctions to be enforced if someone acts in an unconstitutional manner.

I could continue criticizing my brother, but this would not alleviate the problem with which I am now faced; namely, how do I decide this case. My initial reaction was to condemn the acts of the defendants as immoral, but is it not possible that the moral duty the defendants owed their fellow soldiers superceded any other moral duty? I do not know what course of action I would have felt bound to follow in a similar situation; therefore, I cannot find it in my heart to subject these men to moral condemnation, whatever is the outcome of this case.

Concerning the interpretation of the statute under which the defendants were indicted, there are two avenues open to us. First, we could interpret the statute broadly and impute the acts of the Panagaeans to the defendants since they did aid and abet the acts of the Panagaeans. Or, we can interpret it very narrowly and find the defendants not guilty since they did not personally participate in the acts of torture.

We as judges serve two masters, the law and justice, and where one of our masters, in this case the law, does not give us adequate guidance, we must look to the other. Since we have a choice of interpretations, it behooves us to take the path that is more just.

What would be the effect of interpreting this statute broadly? Another section of this Act states in effect that P.O.W.'s will be accorded the same medical treatment as that given our own forces. It is also a fact that in war there are often shortages in medical supplies. Let us now imagine a situation in which eight seriously wounded men, four Federation soldiers and four enemy soldiers are brought to a medical officer. Let's also imagine that all of these men will die without certain medication but that the medical officer only has enough for four men. This officer now has a dilemma, for he must choose four men to die.

What is the medical officer's moral duty in this situation? If he cannot save them all, is not his primary duty to save his comrades first and his enemies second? Our nation would be outraged if the medical officer saved two Federation and two enemy soldiers and allowed our other two men to die

because of lack of medication; but is this not the result that the statute decreeing equal medical treatment may demand? Is it possible our legislators meant to punish doctors for saving our soldiers first? Or, was it not actually our legislators' intent to halt the practice of maliciously depriving P. O. W.'s of medical treatment? I believe the latter to be the purpose of the P. O. W. medical treatment statute and, therefore, the medical officer would not be guilty.

The defendants before us were faced with a choice similar to the one that the doctor faced. They could leave the prisoner alone and thereby sentence Federation soldiers to death or they could have the Pangaeans inflict pain on the prisoner and save Federation lives. If we would find the doctor not guilty in our imagined situation, because he acted without malice, should we not apply the same principle to the defendants?

I feel justice demands that laws such as the one before us be applied with due regard to the necessities of war. This principle has been adhered to in applying similar laws in other wars. Prior to World War II aerial bombardment of populated areas had been outlawed. Note, however, that in the trials following that war no one was convicted for committing these acts. The reason for this is quite obvious; these acts were done because of military necessity and without malice.

All nations have certain inherent rights and this includes the right to declare war and send the soldiers to fight. The right to war is a basic right of a sovereign to insure its continued existence. The existence of a state of war between sovereign entities admits of an irreconcilable difference that has erupted into a struggle which of necessity endangers the existence of the sovereign entities. As with any being whose continued existence is threatened, the embattled state has the right to take such actions as are necessary to obviate the danger of oblivion. Since a sovereign state in time of war has a right to engage in actions sufficient and necessary to insure its existence, it follows that soldiers, in fulfillment of their duty to defend their nation in time of war, are required to take any steps that are militarily necessary to further the successful prosecution of the war.

Granting that all sovereign entities have an inherent right, perhaps, even a responsibility to take whatever acts are

necessary to prevent adverse military results in time of war, it should be obvious that statutes such as that before us today are not designed to prohibit acts that are militarily necessary but is instead only designed to prohibit the designated acts when engaged in without the justification of military necessity. Any other interpretation would verge on the criminally ridiculous.

To refuse to recognize the doctrine of military necessity so urged by Justice Summerfall could and would place the soldiers in an impossible dilemma. Soldiers in situations similar to the one faced by these defendants would have to decide between death for their comrades or prison for themselves. To give free rein to our imagination, let us postulate a future situation in which the Federation has developed weapon X and that a statute has been enacted barring its use in time of war. Let us further assume that the Federation is losing the war and is in danger of enslavement by the enemy nation. What would Justice Summerfall have the soldiers in charge of weapon X do? Would he have them heed his interpretation of this statute and stay their hands, submitting our nation to slavery, or would he have them use weapon X and save the nation by what he would term a breach of the law. If these saviors of the nation were brought before Justice Summerfall, would he have them committed to prison for violating a law of the Federation? It would be the ultimate irony to use the very laws these men preserved to imprison them for the very act that preserved the laws. Such an interpretation of the statute is unreasonable and therefore incorrect. The differences in the situation and acts of the soldiers in the hypothetical situation and that of the defendants before us today are only of degree, not substance.

I believe that justice, justice for our fighting men, and our nation, decrees that the statute before us be interpreted and applied in a manner that allows our soldiers to do what the necessities of war demand. The conviction of the defendants should be reversed.

PRIMUS, C. J.

It is, therefore, the judgment of this Court that the decision of the lower Court be reversed.

WILLIAM R. BYARS, JR.