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When to Go to War

BUT WAR IS NO PASTIME; NO MERE PASSION FOR VENTURING AND WINNING; NO WORK OF A FREE ENTHUSIASM; IT IS A SERIOUS MEANS FOR A SERIOUS OBJECT.

Clausewitz, On War (1832), Book I, Chapter i. [1]

WHEN DO YOU TAKE A CASE TO TRIAL? SOMETIMES THAT QUESTION IS EASY TO ANSWER. Obvious situations occur when the client refuses to plead guilty, when the prosecutor's offer is close to the maximum possible sentence, or when the client is facing a mandatory life sentence if convicted.[2] But what about the more usual case, where defense counsel has to exercise his judgment and advise the client what to do?[3] If warfare and litigation both are manifestations of conflict, the considerations in deciding whether to open a war are more or less the same as those in deciding whether to go to trial.

General Colin Powell has created a sort of rubric, known as the "Powell Doctrine," to guide those who have the authority to decide whether or not a nation should undertake a war. It consists of a set of questions to be answered before opening hostilities.[4] Paraphrasing, they might be listed as follows:

1. Is a vital national security interest threatened?
2. Do we have a clearly defined objective?
3. Have the risks and costs been fully and frankly analyzed?
4. Have all other non-violent policy means failed?
5. Is there a plausible exit strategy to avoid endless entanglement?
6. Have the consequences of our action been fully considered?
7. Is the action supported by the American people?
8. Do we have genuine broad international support?

General Powell holds that only if all these questions can be answered affirmatively should war commence.[5] Although Powell cautions strongly against using a "fixed set of rules,"[6] they do provide a method for considering the important issues in reaching a decision on whether to fight a war.

Generalizing, it might be said that these questions, properly modified for context, can govern the decision to engage in any sort of consequential conflict, including the trial of a criminal case. Let's examine each in turn and apply them to the issues that defense lawyers (and their clients) must face.

1. Is a vital national security interest threatened? Are the client's important interests threatened? This is an easy one. Any criminal charge affects the client's most serious interests: His liberty, his financial security, his reputation, among others. What would seem to be relatively trivial accusations such as Class C theft, public intoxication or disorderly conduct might have future effects. For the present purposes, we can almost always answer this question affirmatively.

2. Do we have a clearly defined objective? This one at first glance seems easy as well. Of course we do\the objective is to win. But what is to be "won" by going to trial? Is the case one in which the mere conviction, not the possible punishment, carries the consequences? This would be true in a Class C theft; the client can probably afford the fine and costs, but the conviction could result in immigration, employment or probation consequences. Here the objective is to avoid the conviction. Or is the issue not guilt but the punishment, the objective being to improve on the prosecutor's offer? What, precisely, is the objective of the trial? I have had clients tell me that their reason for having a trial was to "embarrass the vice officers," to "stand up to the ex-wife," etc. I suggested that these were perhaps not proper objectives for criminal jury trials.

3. Have the risks and costs been fully and frankly analyzed? Here is where things get tough. Lacking any reliable means to tell the future, the lawyer has to apply his experience to a unique situation and decide what his client's risk is. The variables are almost infinite, but some thought must be given to the relative risks involved. The risk parameters may be set to a great extent by the prosecutor's plea-bargain offer. If the defendant is facing a first degree range of punishment, and is

probation eligible, turning down a three-year offer implies a different risk than would rejecting 35.

4. Have all other non-violent policy means failed? Is a favorable compromise really out of reach? How creative was the counteroffer? If the prosecutor offers "aggravated" pen time, the defense might counter with a longer sentence but with a reduction to a non-aggravated felony. If a particularly onerous condition of probation is holding up an agreement, perhaps the parties could agree to some other condition that the defendant finds less oppressive, e.g., a larger fine in exchange for shorter community service. Sometimes even a bit of personal diplomacy is in order.

5. Is there a plausible exit strategy to avoid endless entanglement? Will trying this case end the defendant's legal troubles? Or is it merely the first battle in a long war? Let's suppose the client has several felony charges pending, or there are other cases the prosecutor could file. Do you go to trial on that first charge, if winning an acquittal would not substantially improve the client's position?

6. Have the consequences of our action been fully considered? Surely the defense has considered the possible sentence, but this question is also asking about the collateral consequences. What could happen if the trial is lost?

Suppose the defendant is on parole. You believe that if he turns down the prosecutor's offer and is convicted of a felony, the parole board will revoke him. But the prosecutor is offering a reduction to a misdemeanor, and there is the possibility that the parole board will not revoke on a misdemeanor conviction. You might consider whether the parole consequences of a felony conviction make the risk of going to trial unacceptable.

7. Is the action supported by the American people? The constituent of the politico-military establishment is the people. The lawyer's constituent is the client. Does the client want to go to trial, or is the lawyer bringing the client into a trial against his wishes? We are all too familiar with lawyers leaning on defendants to plead guilty, but it is possible to do just the opposite. It's easy to inject personal motives into the decision. Is the case being tried because of animus against the judge? To avenge a previous defeat from the prosecutor? To show a particular prosecution witness who's boss? Because the case contains a legal or political issue the advocate personally finds compelling?

8. Do we have genuine broad international support? President Eisenhower warned that "Without allies and associates the leader is just an adventurer like Genghis Khan."[7] Although true in military action, this is not quite the case in the context of a criminal proceeding. But perhaps the question should be considered whenever there are co-defendants. Although the presence of co-defendants at the trial does not always help, there are cases where a united front might be helpful to your individual client. If the putatively helpful co-defendants have (at best) opted to cut their losses by pleading, and (at worst) have agreed to cooperate, or are threatening to, the client's lack of an "alliance" may signal that a trial is not in his interest.

[1] Trans. Col. J.J. Graham (1873); clausewitz.com.

[2] *I.e.*, when he is indicted as a repeat sex offender, Tex. Penal Code Sec. 42.12 (c) (2).

[3] "The defendant has only three decisions to make . . . . To plead guilty or not guilty; to have a jury or non-jury trial; and to take the stand or not." Warren Burger, speech to the National Defender Conference (1969), 5 Criminal Law Reporter 2161; quoted in **Landers v. State**, 550 S.W.2d 272 (Tex. Crim. App. 1977)(op. on reh'g). To which I might add that in Texas, the client should decide on judge or jury punishment. "[A] lawyer shall abide by a client's decisions: . . . (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." **Texas Disciplinary Rules of Professional Conduct, Rule 1.02, Scope and Objectives of Representation.**

[4] General Powell never formally published his Doctrine. He expressed it in a number of speeches and articles, *see, e.g.*, "U.S. Forces: Challenges Ahead," *Foreign Affairs* (Winter 1992-1993). He based it on the "Weinberger Doctrine." Caspar Weinberger, "The Uses of Military Power," speech to the National Press Club at Washington, DC (1984).

[5] I would argue that on December 8, 1941, considering the situation with Germany and Japan, each of these questions could have been answered "yes." Now ask them again, trying to avoid hindsight, with respect to Vietnam in 1964, Iraq in 1990 and Iraq in 2002.

[6] Powell, *op. cit.* Some factors may overshadow others. One could, for instance, envision a situation in which the threat to the national interest is existential, and there is no time to exhaust diplomacy or recruit allies.

[7] In World War II and in Iraq in 1990, the U.S. had broad international support and important allies. In Vietnam and in the present war in Iraq, it did not.