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Civil Liberties During War: History's Institutional Lessons. Book Review Of: All the Laws but One: Civil Liberties in Wartime. by William H. Rehnquist

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CIVIL LIBERTIES DURING WAR: HISTORY'S INSTITUTIONAL LESSONS

ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME. By William H. Rehnquist.[1] New York: Alfred A. Knopf, Inc., 1998. Pp. 254. $26.00.

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> What! will you never cease prating of laws to us that have swords by our sides?
>
> Pompey Magnus[3]

> Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. . . . If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.[4]

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2. Law Clerk to the Honorable Donald P. Lay, U.S. Court of Appeals for the Eighth Circuit. J.D. University of Minnesota, 1999, M.A. University of Iowa, 1994. Thanks to Joan Garvin for her patient review of earlier drafts of this paper and for her willingness to re-visit Latin. Thanks also to Professor Michael Paulsen, specifically for reviewing drafts of this piece, but more importantly for three years of artful teaching. Portions of this paper were greatly aided by the work of Diedre McGrath and Heather Esau, Korematsu v. United States: *'Legalized Racism' and the Fallacy of Military Necessity*, an unpublished piece prepared in Spring 1999; Richard Lau, *A Poor Player's Hour Upon the Stage: The Clement Vallandigham Affair*, an unpublished paper prepared in Fall 1997 (on file with the author).

3. Plutarch, *The Lives of the Noble Grecians and Romans*, "Pompey," in 13 *Great Books of the Western World* 499, 503 (Encyclopedia Britannica, Inc., 1990).

4. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

In *All the Laws But One: Civil Liberties In Wartime*, Chief Justice William Rehnquist crafts a compelling narrative of civil liberties during times of *declared* war. Rehnquist devotes two-thirds of the book to the Civil War, presenting that era as the benchmark for later intersections of war and civil liberties. The book details a consistent history of government relegation of civil liberties to the backseat during times of war.[5]

For anyone interested in history, Chief Justice Rehnquist's book is an interesting story of the suspension and suppression of civil liberties during wartime. From the very first line, history comes to life as Rehnquist describes the cold, drizzly day in February 1861, when Abraham Lincoln set off to Washington D.C. where he "hoped to be inaugurated." (p. 3) But for anyone interested in an analysis of the *constitutionality* of the suspensions, *All the Laws But One* has surprisingly little to say. All the chapters, but one, are descriptive—they relate historical events, often colorfully, but do not evaluate them. It is not until the concluding chapter that Rehnquist shifts into analysis and compares the civil liberty infringements of the Civil War with those of the two World Wars and poses normative constitutional questions regarding the propriety of such actions.

In this final chapter Rehnquist identifies three major differences among the infringements: first, the actor who worked the suspension of civil liberties; second, the increasing role of the courts since the Civil War; and third, a trend of government toward more tolerance of wartime criticism. Despite these differences, Rehnquist concludes that the maxim *Inter arma silent leges*, "In times of war the laws are silent," is an apt description for the reality of civil liberties during war.

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5. Rehnquist explicitly limits his discussion to times of *declared* war, asserting: "[w]ithout question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war." (p. 218) Rehnquist's assertion is open to debate, but for purposes of this review the same limitation will be observed. Rehnquist's restriction to times of declared war excludes many of the recent interactions between civil liberties and "war" including those that occurred during the Korean and Vietnam Wars. (The Civil War, however, though not a declared "war," is at the forefront of Rehnquist's discussion.) The limitation precludes discussion of some of the more significant Court decisions defining the scope of executive powers in times of undeclared war or foreign affairs crisis. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The exclusion of *Youngstown* is all the more interesting because of Rehnquist's role as law clerk for the Court at the time the case was heard, a story told in Rehnquist's first book. William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 61-98 (Morrow and Co., 1987).

In light of this conclusion Rehnquist poses two important questions: first, whether the reluctance of courts to decide against the government during war is a necessary evil or a desirable phenomenon; (p. 221) second, whether occasional presidential excesses and judicial restraint in wartime are desirable. (pp. 224-25) Disappointingly, however, Rehnquist, having raised these questions, avoids bringing his vast constitutional experience to bear on them. This lack of critical analysis is evident both in relation to the specific instances Rehnquist relates and in his overall analysis of civil liberties during wartime. This deficiency would be tolerable except for the tantalizing moments when Rehnquist enters the debate and condemns the wartime actions only to retreat without supporting his position.

In Part I of this review, I examine the key historical events discussed in Chief Justice Rehnquist's book and note particular instances where he stops short of analyzing the important questions at stake. In Part II, I review the overall story told by the episodes and attempt to answer Rehnquist's final question—whether judicial restraint during war is desirable.

I. HISTORICAL INTERSECTIONS OF CIVIL LIBERTIES AND WAR

A. THE CIVIL WAR[6]

1. Suspending the Writ of *Habeas Corpus*

Lincoln came to office as a sectionally elected president and immediately confronted a country literally splitting apart with the early secessions of South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana. (pp. 3-4) Barely a month af-

6. Rehnquist focuses on a handful of key incidents during the Civil War, and this review traces those incidents. The only episode in Rehnquist's book excluded from this review is the death of President Lincoln and the cast of characters who either helped orchestrate the events of that night or aided after-the-fact. While some of the alleged conspirators may have had their rights violated during the investigation and court proceedings, these acts occurred after the war and seem to arise more out of frenzied patriotism than a systematic denial or trumping of civil liberties by a government. For studies of the Lincoln administration and civil liberties, see James G. Randall, *Constitutional Problems Under Lincoln* (U. of Illinois Press, revised ed. 1951); Robert S. Harper, *Lincoln And The Press* (McGraw-Hill, 1951); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford U. Press, 1991); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 Wm. & Mary Bill Rts. J. 105 (1998). See also James M. McPherson, *Battle Cry Of Freedom: The Civil War Era* 287-90 (Oxford U. Press, 1988).

ter the inauguration, on April 12, 1861, confederate forces of South Carolina fired on Fort Sumter. Two days later, Union troops surrendered the Fort. (p. 15) Lincoln immediately summoned the active duty militia. In response to Lincoln's call to arms, several more states seceded, including Virginia. Coupled with Maryland's threatened secession, this left the Capital nearly surrounded by secessionists and their sympathizers. (pp. 16-18) When Massachusetts, in answer to Lincoln's call, sent troops to Washington, the troops made it as far as Baltimore, where confederate sympathizers attacked them. (pp. 20-21) The governor of Maryland then shut down the rail lines, essentially cutting off Washington from reinforcements.[7] (pp. 21-22)

It was in this context that Lincoln first authorized the suspension of the writ of *habeas corpus* on April 27, 1861. (p. 25) In a letter addressed to Lieutenant General Scott, Commanding General of the Army, Lincoln wrote:

> You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the [] military line, which is now [or which shall be] used between the City of Philadelphia and the City of Washington . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where . . . resistance occurs, are authorized to suspend that writ.[8]

On May 25, 1861, Union forces arrested John Merryman for speaking out against the Union, recruiting soldiers to serve in the Confederate Army, and participating in the destruction of rail lines.[9] (p. 21) Merryman petitioned Chief Justice Roger Taney for a writ of *habeas corpus*. Taney issued the writ on May 26, 1861. Citing Lincoln's suspension of the writ, General George Cadwalader refused to comply and Chief Justice Taney immediately issued an attachment for contempt. (p. 33) When the dispatched marshal was refused entrance at the fort, Taney wrote his famous opinion in *Ex parte Merryman*.[10] (p. 34)

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7. McPherson, *Battle Cry Of Freedom* at 90 (cited in note 6).

8. Letter from Abraham Lincoln to Winfield Scott (April 27, 1861), in Roy P. Basler, ed., 4 *The Collected Works of Abraham Lincoln* 347 (Rutgers U. Press 1953).

9. See also Sherrill Halbert, *Lincoln Suspends the Writ of Habeas Corpus*, in Allan Nevins and Irving Stone, eds., *Lincoln: A Contemporary Portrait* 95, 98 (1962).

10. *Ex Parte Merryman*, 17 F. 144 (C.C.D. Md. 1861). One of the more interesting character sketches that Chief Justice Rehnquist draws is that of Chief Justice Taney. Rehnquist describes Taney's political history from his position as Attorney General under President Andrew Jackson to his appointment to the Court in 1835. (pp. 27-28)

Taney's opinion is a vigorous defense of the position that Congress alone has the power to suspend the writ. The opinion is grounded in an analysis of the structure of the Constitution; the placement of the suspension clause in Article I; the executive's duty to faithfully carry out the laws; and a rejection of the argument that necessity trumps the Constitution.[11] (pp. 36-38) Recognizing his lack of power to enforce the decision, Taney sent a copy to President Lincoln, noting in the opinion that "[i]t will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[12] (p. 38)

Despite this direct appeal, Lincoln all but ignored the *Merryman* decision until Congress reconvened in July. He then argued two points: 1) the exigency of the situation demanded that he act pursuant to his higher duty of protecting the union from destruction; and 2) no laws had been broken because the executive possesses independent authority to suspend the writ.[13] On July 5, 1861, Attorney General Edward Bates presented a further defense of the actions arguing that the branches of government are coordinate and coequal.[14] (p. 44) Congress took no immediate action in the face of this exchange between the judiciary and the executive.[15]

Rehnquist then describes the infamous Dred Scott decision of March 6, 1857, in which the Court held that slaves could not be citizens and that Congress lacked the authority to enact the Missouri Compromise. This decision evoked hugely negative public response, including Lincoln's, in the North. As Rehnquist describes, Lincoln's response went from a mild criticism to a stinging rejection. In his first inaugural address, Lincoln made a thinly-veiled criticism of the decision: "the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal." Abraham Lincoln, First Inaugural Address (March 4, 1861), in 4 *The Collected Works of Abraham Lincoln* at 249, 268 (cited in note 8). Rehnquist uses this history to set the scene for the later interaction between Lincoln and Taney following the *Merryman* decision.

11. *Ex Parte Merryman*, 17 F. at 146-49.

12. Id. at 153.

13. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 *The Collected Works of Abraham Lincoln* at 421-41 (cited in note 8).

14. 10 Op. Att'y Gen. 74, 76 (1861). For elaboration see Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81, 95-97 (1993).

15. "President Lincoln claimed the right for the Executive. . . . Congress, in the face of this claim, chose to do nothing." Halbert, *Lincoln Suspends the Writ* at 110 (cited in note 9). The Thirty-seventh Congress did debate the issue of authority to suspend but it

Rehnquist is critical of the dialogue between Lincoln and Taney on two grounds: First, Rehnquist finds Lincoln's response to Taney to be rhetorical rather than legal. He notes that Lincoln was "the advocate at his very best." (p. 38) Second, Rehnquist is critical of Taney's hasty decision-making that ignored the deliberative nature of the judicial process.[16] (pp. 40-41) Rehnquist does not, however, critically engage either of the two important constitutional questions that arise from Lincoln's suspension of the writ: 1) which branch of government has the power to suspend the writ; and 2) whether Lincoln's rejection of Taney's *Merryman* decision was constitutionally proper. Rehnquist essentially ignores the first question despite the prolific literature on the topic.[17] With respect to the latter question, Rehnquist flatly asserts that the proposition that the President is not subordinate to the judicial branch "had been refuted by Chief Justice Marshall's opinion in *Marbury v. Madison* more than half a century earlier." (p. 44) This one line dismissal of the argument ignores a well-developed and very contentious academic debate regarding the power of the executive branch to engage in independent constitutional interpretation.[18] While

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was not until March 3, 1863, that Congress passed the Habeas Corpus Act of 1863, which tacitly approved of Lincoln's acts. See Randall, *Constitutional Problems* at 130 (cited in note 6). The language of the Act can be read either as a grant of authority to the president or as a recognition of a pre-existing power. Id. Interestingly, even after the passage of this Act, Lincoln continued to justify the suspension on either his independent constitutional power or on the situational exigencies; his cabinet, however, began to rely on the Act. See Neely, *Civil Liberties And Civil War* at 68 (cited in note 6).

16. Rehnquist's analysis here provides insight into his view of how law and judicial review ought to work. He notes that "[t]he fact that [Taney] may have reached the correct result on the merits of the case cannot excuse this want of process." (p. 41) Rehnquist eventually falls prey to this same deficiency when he fails to engage the well-formed debates regarding the constitutionality of executive autonomy.

17. See, e.g., Randall, *Constitutional Problems* at 118-39 (cited in note 6); William F. Duker, *A Constitutional History Of Habeas Corpus* 24 (Greenwood Press, 1980); Martin S. Sheffer, *Presidential Power to Suspend Habeas Corpus: The Taney-Bates Dialogue and* Ex Parte Merryman, 11 Okla. City U. L. Rev. 1 (1986); Arthur M. Schlesinger, Jr., *War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt*, in Grabor S. Boritt, ed., *Lincoln, The War President* 152 (Oxford U. Press, 1992); Mark J. Rozell, *Executive Prerogative: Abraham Lincoln and American Constitutionalism*, in Frank J. Williams and William D. Pederson, eds., *Abraham Lincoln: Contemporary* 135, 140 (Savas Woodbury Pub., 1995).

18. See the symposium in 15 Cardozo L. Rev. 1-523 (1993)—especially Paulsen, 15 Cardozo L. Rev. 81 (cited in note 14); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 Cardozo L. Rev. 113 (1993); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev 43 (1993); Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 Cardozo L. Rev. 137 (1993). See also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L. Rev. 217 (1994); Geoffrey P. Miller, *The President's*

Rehnquist gives his reader a palpable sense of history, he offers no thoughtful evaluation of the lawfulness of Lincoln's suspension of the writ or of the Lincoln administration's assertion that coequal branches of government possess coequal power to interpret the Constitution. For those the reader must turn elsewhere.

2. The *Vallandigham* Affair—Military Arrests and Trials

On September 24, 1862, Lincoln issued a proclamation providing that persons "discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels" should "be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission."[19] (p. 60) Pursuant to this directive, on April 19, 1863, General Ambrose Burnside, the Commanding General of the Department of Ohio, issued General Order 38.[20] General Order 38 provided, in part, that "'[t]he habit of declaring sympathy for the enemy' . . . would no longer be tolerated in the Department of the Ohio; persons 'committing such offenses' would be arrested and subject to military procedures." (p. 63)

In a speech on May 1, 1863, Clement L. Vallandigham denounced President Lincoln, the war policies, and General Order 38.[21] (pp. 65-66) Four days later General Burnside ordered Vallandigham's arrest. (p. 66) He was tried before a military commission, found guilty and sentenced to imprisonment for the duration of the war. (p. 67) Lincoln eventually commuted the sentence to banishment from the Union.[22] Vallandigham sought a writ of *habeas corpus* from District Judge Humphrey H. Leavitt but was denied. (p. 67) Vallandigham sought review of the denial from the Supreme Court—but the Court held the military commission's actions unreviewable:

Power of Interpretation: Implications of a Unified Theory of Constitutional Law, 56 Law & Contemp. Probs. 35 (1993); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Geo. Law. Rev. 347 (1994); Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267 (1996); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 259-65 (Yale U. Press, 2d ed. 1986).

19. Curtis, 7 Wm. & Mary Bill Rts. J. at 117-18 (cited in note 6).

20. Frank L. Klement, *The Limits Of Dissent: Clement L. Vallandigham & The Civil War* 149 (U. Press of Kentucky, 1970).

21. Curtis, 7 Wm. & Mary Bill Rts. J. at 121 (cited in note 6).

22. Despite internal discussions among Lincoln and his cabinet disagreeing with Burnside's summary action, banishment of Vallandigham was the only official action taken by the executive. (p. 67) See Klement, *The Limits Of Dissent* at 177 (cited in note 20); Curtis, 7 Wm. & Mary Bill Rts. J. at 136 (cited in note 6).

> Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the [Judiciary Act of 1789]; and further, that the court cannot, without disregarding its frequent decisions and interpretations of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission.[23]

Lincoln came under heavy criticism for the *Vallandigham* Affair. This criticism included a set of resolutions drafted in May 1863 at a meeting of Democrats in Albany, New York.[24] In response to the Albany Resolves Lincoln articulated two defenses: first, the entire country was a war zone and military arrests were justified anywhere the enemy used speech or the press to conduct war; and second, the arrest was not for Vallandigham's speaking in public but for his war on the military. (pp. 72-73) In this defense, Lincoln used his famous line, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"[25] (p. 73)

Rehnquist criticizes the *Vallandigham* Affair on two fronts. First, Vallandigham's trial and conviction by the military commission were based on violation of a General's order, not an Act of Congress or state legislature—the proper grounds for charging a defendant. (p. 68) Second, the asserted authority under which Vallandigham was prosecuted and convicted was Lincoln's proclamation of martial law; yet the scope and definition of martial law was unclear at the time. (pp. 68-72) Each of these criticisms presents an interesting challenge to the constitutionality of the actions taken in the *Vallandigham* Affair; yet, Rehnquist merely identifies them and does not analyze or evaluate them. Instead, Rehnquist merely asserts that "Lincoln's defense of his actions . . . was addressed to the general public, and not to constitutional lawyers." (p. 73) The same is true of Rehnquist's description of events.

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23. *Ex parte Vallandigham*, 68 U.S. 243, 251-52 (1863). The Court never addressed the scope of the military's authority although it did note that it presumed the President was conscious of his constitutional limits and that he would act within them. Id.

24. Neely, *Fate of Liberty* at 196 (cited in note 6).

25. Curtis, 7 Wm. & Mary Bill Rts. J. at 160-62 (cited in note 6). See also McPherson, *Battle Cry Of Freedom* at 598-99 (cited in note 6).

3. The Indianapolis Treason Trials—the *Milligan* Case

Less than two years after the *Vallandigham* Affair the Court faced a parallel case. In October 1864, General Alvin Hovey, Commander of Indianapolis, ordered the arrest of a group of men for conspiracy against the United States.[26] (pp. 83, 90-99) Milligan and the others were tried before a military commission and, on relatively minimal evidence, (pp. 89-100) were convicted and sentenced to hang. (p. 102) Milligan petitioned the Circuit Court for a writ of *habeas corpus* arguing that a military court could not impose sentence on civilians who were not in a theater of war. The Circuit Court certified the question to the Supreme Court and arguments were set for March, 1866. (pp. 104, 117)

The government argued that imposition of martial law allowed military commissions to hear cases and that only military authority could review the determinations of such commissions. Further, the government argued that the Bill of Rights was composed of "'peace provisions of the Constitution, and like all other conventional and legislative laws and enactments are silent amidst arms, and when the safety of the people becomes the supreme law.'" (p. 121) The petitioners argued that martial law could be imposed only by Congress and only where necessitated by war and, moreover, that civil liberties do not disappear during war. (pp. 121-27) On April 3, 1866, the Court entered an order directing the writ of *habeas corpus* to issue. (p. 128) The Court explicitly recognized the importance of timing to its decision:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings . . . prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.[27]

The Court concluded that martial law could not exist from a merely threatened invasion but required a real invasion; more-

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26. Randall, *Constitutional Problems* at 181 (cited in note 6). Rehnquist identifies a curious fact about the *Milligan* arrests: the charges and specifications brought against the defendants made no reference to any specific federal statute that criminalized their conduct. (pp. 84-87) Rehnquist describes this discrepancy between the military commission's charges and the law but does not discuss the ramifications of such discrepancy.

27. *Ex parte Milligan*, 71 U.S. 2, 109 (1866).

over, "[m]artial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction."[28] (p. 131) The majority opinion went on to state that even Congress could not provide for trial by a military commission.[29] (p. 131).

In discussing the Court's decision in *Milligan*, Rehnquist criticizes its form but not its content. He chastises the Court for its dicta regarding the scope of Congress' power, concluding that the Court ignored the traditional rule of not reaching constitutional issues if not necessary.[30] (pp. 134-36) Again Rehnquist does not evaluate the merits of the case; rather, he makes an unargued-for judgment that "[t]he *Milligan* decision is *justly* celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime." (p. 137, emphasis added) While civil libertarians may agree with such a conclusion, Rehnquist presents no constitutional argument to justify it.

B. WORLD WAR I—THE FIRST AMENDMENT.

Rehnquist turns to the First World War as the next great occasion when war came into conflict with civil liberties. He discusses the initial isolationist policy of the United States and the preparedness movement, including the enactment of the conscription law. (p. 172) The focus of the chapter, however, is the Espionage Act passed in June 1917, and the amendments thereto, known as the Sedition Act. Title I, Section Three of the Act criminalized any interference with military operations and any acts causing "insubordination, disloyalty, mutiny, or refusal of duty"; Title XII, Section Two declared certain materials unmailable if they contained "any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States."[31] (p. 173)

Rehnquist surveys a number of cases decided under this Act.[32] He begins with the arrest and conviction of Charles T.

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28. Id. at 127.

29. Id. at 121-22.

30. Rehnquist defends this rule by noting that the Court's dicta led to later problems. Specifically, he refers to the World War II case of *Ex parte Quirin*, 317 U.S. 1 (1942), which involved the trial of Richard Quirin and seven other German soldiers who landed on the United States shore with the intent to bomb. A military tribunal was established to hear the case. The Court upheld the government's action but had to strain to distinguish the *Milligan* dicta regarding the scope and timing of military commissions.

31. 40 Stat. 217, 219, 230 (1917).

32. Most thoroughly, *Masses Publ'g Co. v. Patten*, 246 F. 24 (2d Cir. 1917); *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v.*

Schenck for mailing leaflets opposing conscription.[33] (p. 174) In upholding Schenck's conviction the Supreme Court announced its "clear and present danger" test by which to judge whether speech is protected by the First Amendment. (p. 174) The Schenck Court expressly recognized that the timing of the case—war time—affected the outcome: "When a nation is at war many things which might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight . . . no Court could regard them as protected by any constitutional right."[34] (p. 174) Rehnquist contends that *Schenck* "put some flesh and bones on the First Amendment" but that the test established was less than clear. (p. 174) Without more, he turns to other incidents and court decisions following *Schenck*.

Rehnquist does not thoroughly analyze the constitutionality of any of the incidents or cases he identifies nor does he provide a clear picture of how the First Amendment should work during war. In fact, Rehnquist rarely injects himself into the discussion of these cases. He does, however, make two points: First, he criticizes the Court's failure to distinguish between actual advocacy of unlawfulness and strongly worded criticism and notes, "if freedom of speech is to be meaningful, strong criticism of government policy must be permitted even in wartime. . . . Advocacy which persuades citizens that a law is unjust is not the same as advocacy that preaches disobedience to it." (p. 178) Thus, Rehnquist provides a terse statement of his view of protected speech but does not address the courts' constitutional analysis or articulate a more appropriate test for the First Amendment during war. Rehnquist's second point is that later cases do not follow logically from the "clear and present danger" test of *Schenck*. (p. 182) But he refrains from going further and analyzing this disjuncture or positing a resolution.

Rehnquist, however, does draw some generalizations regarding the state of civil liberties during World War I as compared with the Civil War. He asserts that the Wilson administration, like the Lincoln administration, desired to suppress criticism of the war. (p. 182) He then identifies several differences: during World War I, it was Congress, as opposed to the

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United States, 250 U.S. 616 (1919); *Pierce v. United States*, 252 U.S. 239 (1920).

33. See Richard Polenberg, *Fighting Faiths: The* Abrams *Case, The Supreme Court, And Free Speech* 212 (Viking, 1987).

34. *Schenck*, 249 U.S. at 52.

president, that acted; judicial review occurred more often; there was no suspension of the writ of *habeas corpus*; there were no trials of civilians before military courts (although Congress attempted to authorize such); and while there were arrests and deportations, they occurred after hostilities ceased. (pp. 182-83) Rehnquist does little beyond naming these five differences. The only evaluative comment is one made summarily: "Though the courts during this period gave little relief to civil liberties claimants, the very fact that the claims were being reviewed by the judiciary was a step in the right direction for proponents of civil liberties during wartime." (p. 182) Rehnquist applauds judicial review during wartime but does not say what the substance of that review should be. He provides a clear and concise description of the war cases, but without any evaluation or argument.

C. WORLD WAR II

1. The Japanese Internment

Rehnquist presents a brief overview of the beginnings of World War II, including Pearl Harbor and the effect that that attack had on the west coast's fear of imminent invasion and view of persons of Japanese ancestry. (pp. 184-90) On February 19, 1942, President Roosevelt signed Executive Order 9066 that gave the Secretary of War the legal power to exclude all persons, citizens and aliens, from designated areas on the west coast.[35] (p. 192) On March 21, 1942, Congress passed a law imposing criminal penalties for violating the Order or any regulations promulgated to implement it. (p. 192) The regulations passed pursuant to the order included a curfew, a requirement to report to relocation centers, and the removal of persons from designated areas.[36] (p. 192) These regulations resulted in four cases reaching the Supreme Court—those involving Gordon Hirabayashi, Minoru Yasui, Fred Korematsu and Mitsuye Endo.

In *Hirabayashi*[37] and *Yasui*[38] the Court narrowed the scope of review to the issue of the curfew and unanimously upheld the regulation. (p. 198) The Court cited the pervasiveness of the

35. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942). On its face the order was not racially based; however, it was commonly understood to be targeted at the Japanese.

36. See Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perceptive*, 19 U. Haw. L. Rev. 649, 651 (1997).

37. *Hirabayashi v. United States*, 320 U.S. 81 (1943)

38. *Yasui v. United States*, 320 U.S. 115 (1943)

war power and found that the "war power of the national government is 'the power to wage war successfully'."[39] (p. 199) The Court did not engage in an independent analysis of the government's alleged facts regarding the military threat.[40] Instead, the Court concluded as follows:

> That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.[41]

The Court decided the *Korematsu* case next, addressing the general relocation program. (p. 200) Again the Court upheld the conviction—although no longer unanimously.[42] The majority opinion relied on the *Hirabayashi* decision, again did not identify any independent evidence of military necessity or imminent danger from Japanese-Americans, and again deferred to the government.[43] (pp. 200-01)

The fourth case, *Endo*,[44] was argued and decided at the same time as *Korematsu*. The issue in this case was not a direct challenge to the regulations; instead, Endo sought a writ of *habeas corpus* claiming that she could not be held after proving her loyalty. The Court unanimously agreed that Endo was entitled to be released. It based this decision on the scope of the Act of Congress and the Executive Order rather than on the Constitution but hinted that there might be constitutional difficulties as well. (pp. 201-02)

Rehnquist briefly injects commentary at this point, recognizing the importance of timing to these decisions, yet asserting that timing ought not to dictate outcomes. (p. 202) He does not specifically analyze the rationales or constitutional reasoning of the Court in any of the cases. However, in the book's most inventive and critical chapter, Chapter 16, Rehnquist engages and analyzes the post-war criticisms of the Japanese relocation and internment programs. First, he asserts that the Court's decision

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39. *Hirabayashi*, 320 U.S. at 93 (citation omitted).

40. Grossman, 19 U. Haw. L. Rev. at 659 (cited in note 36).

41. *Hirabayashi*, 320 U.S. at 94.

42. *Korematsu v. United States*, 323 U.S. 214 (1944). Justices Roberts, Jackson, and Murphy dissented.

43. For a discussion of the Court's failure to identify independent evidence see Leslie T. Hatamiya, *Righting A Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988* at 218 (Stanford U. Press, 1993).

44. *Ex parte Endo*, 323 U.S. 283 (1944).

to deal only with the curfew in *Hirabayashi* was one grounded in the well-established and sensible rule of avoiding constitutional decision-making when possible. (p. 205) Second, while admitting that too much deference to government is troubling, he recognizes inherent and institutional difficulties of reviewing military judgments. (p. 205) Third, he analyzes the criticisms of racism leveled against the programs and notes that, while some of the criticism is justified, there should be a distinction between the Issei—immigrants from Japan, and the Nisei—the children of those immigrants born in the United States and therefore citizens of this country by birth. (pp. 203, 206) Finally, Rehnquist argues that while there were different treatments of the German and Italian nationals during the war, there may have been facts sufficient to differentiate these situations. (p. 211)

2. Martial Law in Hawaii

Just hours after the bombing of Pearl Harbor, the territorial governor of Hawaii issued a proclamation of martial law and suspended the writ of *habeas corpus*.[45] (p. 212) Pursuant to this proclamation, Lieutenant General Walter Short became the military governor of Hawaii and issued a number of orders regulating conduct of citizens. (pp. 212-13) A number of cases challenging martial law came before the federal courts and caused a great deal of tension between the federal courts and the military command. One such case involved Judge Delbert Metzger, a federal district judge, who issued a show cause order for two imprisoned naturalized German-Americans. (pp. 214-15) Lieutenant General Robert Richardson, Commander of the Military Department of Hawaii, successfully evaded the marshall who was attempting to serve the order. (p. 215) This stand-off resulted in Metzger declaring Richardson in contempt of court and Richardson ordering Metzger to retract and no longer issue writs of *habeas corpus*. (pp. 214-15) Only the intervention of the Secretary of War prevented the issue from being litigated further. (p. 215)

A later challenge to martial law did progress through the court system but only after the war had ended—*Duncan v. Kahanamoku*.[46] Two American-born citizens were convicted and

45. For an in-depth discussion of martial law in Hawaii, see Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. Haw. L. Rev. 477 (1997).

46. 327 U.S. 304 (1946).

sought a writ of *habeas corpus*; the Supreme Court held that the District Court's issuance of the writ was proper. (p. 216) Justice Black wrote for the Court and concluded that the Act that authorized martial law did not intend the military regime to supersede the civilian regime any more than war necessitated.[47] (p. 216)

Rehnquist briefly considers the importance of post-war timing to the *Duncan* decision and contends that the crimes at issue, embezzling and brawling, could not easily be classified as national security threats. (p. 217) He then asserts that even during the more restrictive Civil War there was never a suggestion that military courts try ordinary civilian crimes. (p. 217) Based on these brief observations, Rehnquist concludes: "The post-World War II court *surely* reached the right result in *Duncan*." (p. 217, emphasis added) Although, Rehnquist's conclusion may be correct, he does not argue for it or provide any foundation to support it. The reader is left with yet another description of events with no analysis of the constitutionality of the acts.

II. THE REALITY OF CIVIL LIBERTIES IN WAR

> I do not think [President Roosevelt] was much concerned with the gravity or implications of this step. He was never theoretical about things. What must be done to defend the country must be done.... Nor do I think that the constitutional difficulty plagued him—the Constitution has never greatly bothered any wartime President.[48]

Rehnquist's book provides a survey of civil liberties during wartime that, taken together, shows that war efforts will take precedence over civil liberties during the perceived crisis. According to Rehnquist's analysis there are significant differences among these historical intrusions: 1) the actor who worked the intrusion;[49] 2) the courts more often reviewed cases during the World Wars, resulting in more Supreme Court precedent; (p. 220) and 3) the administrations moved away from the "heavy-

47. Id. at 316-17.

48. Francis Biddle, *In Brief Authority* 219 (Doubleday & Co., 1962).

49. During the Civil War, President Lincoln's unilateral actions resulted in civil liberty infringements; during World War I, the Postmaster General acted pursuant to congressional authorization; during World War II, President Roosevelt acted—but was rapidly supported by Congress and endorsed by the courts. (p. 219)

handed" approach of the Civil War toward World War II's lack of any generalized effort to condemn criticism.[50] (p. 221)

Regardless of these differences, review by the Supreme Court has historically followed a predictable pattern: in all the cases, but one, review during times of war has resulted in a decision upholding government action (*Vallandigham, Schenck, Abrams, Hirabayashi, Korematsu*);[51] whereas, post-war review has provided the occasion for judicial rejection of executive or congressional excesses and reinvigoration of civil liberties (*Milligan, Endo, Duncan*). The Court's review during time of war can be classified into three types of decision: 1) decisions upholding the executive/congressional action; 2) decisions holding the issue non-justiciable or outside the Court's jurisdiction; and 3) decisions holding against the executive/congressional action. Interestingly, *each* of these outcomes led to a negative impact on civil liberties.

First, as Rehnquist's history reveals, when the Supreme Court reviews cases and reaches the merits during times of war it tends to uphold executive action, accepting executive claims of necessity and deferring to the President. *Korematsu* is the most egregious example of the Court genuflecting to executive claims. The Supreme Court accepted the War and Justice Departments' assertions of emergency and threat with little or no independent analysis of the basis of those claims.[52] This acceptance of the executive's claims is not necessarily due to any malfeasance on the part of the judiciary; rather, both institutional and human limitations may act to restrain judicial review during war.[53] Regardless, *Korematsu* is the rule, not the exception: courts finding themselves at the mercy of executive characterizations of war often accept those characterizations. The long-term impact of

50. Rehnquist identifies the Lincoln era as the most egregious in terms of aggressive infringements on civil liberties. This point can be debated. See, e.g., Neely, *Fate of Liberty* (cited in note 6); Randall, *Constitutional Problems* (cited in note 6).

51. The exception was Chief Justice Taney's decision in *Merryman*.

52. *Korematsu*, 323 U.S. at 218. Peter Irons conducted intense post-war investigation into the government's assertion of military necessity and threat from the Japanese-American population and argues that racism rather than necessity guided the action and that the War and Justice Departments each were guilty of suppressing critical information. See Peter Irons, *Justice At War* (Oxford U. Press, 1983).

53. See Christopher N. May, *In The Name Of War: Judicial Review and the War Powers Since 1918* at 256 (Harvard U. Press, 1989) (pointing out that judges face obstacles in obtaining necessary information for resolving questions); Clinton Rossiter and Richard P. Longaker, *The Supreme Court And The Commander In Chief* 91 (Cornell U. Press, expanded ed. 1976) (arguing that courts and judges are not immune to nationalism and a desire to win the war).

blindly upholding executive action, as the Court did in *Korematsu*, is the creation of a questionable line of precedents. Alexander Bickel has noted the legitimating function of judicial review: "Not only is the Supreme Court capable of generating consent for hotly controverted legislative or executive measures; it has the subtler power of adding a certain impetus to measures that the majority enacts rather tentatively."[54] Consequently, after the war we are left with precedents of expanded governmental power, and diminished civil liberty, that the Supreme Court has blessed with its stamp of constitutional approval. Thus, "[b]y engaging in what was merely a formal exercise, the justices not only denied relief to the aggrieved individuals but left behind a series of decisions which are still part of our constitutional law."[55] These precedents may result in increased restrictions on individual civil liberties both post-war and, importantly, during the next war.

Second, the Court may invoke doctrines of justiciability to avoid deciding a question. During the Civil War the Court faced the case of *Vallandigham* and held that it had no jurisdiction to review the actions of a military commission. By adopting this stance the Court permitted power to go unchecked. Even more troubling, the Court's decision could have resulted in permanent abdication of review; the Court, however, was fortunate enough to be confronted with a parallel case immediately post-war—*Milligan*. As discussed above, the only substantive difference between *Vallandigham* and *Milligan* was timing—the former occurred during the war and the Court chose to avoid its adjudication, while the latter occurred post-war and the Court granted review. While the Court did eventually reverse itself in terms of review of military commissions, such an about-face is not always accomplished easily. Thus, while certain justiciability doctrines may aid the Court in deferring cases until independent post-war review is possible, others risk permanent forfeiture of review.

Third, when courts exercise independent review and hold against the executive they risk executive rejection of their authority.[56] While this has only occurred once, in *Ex parte Mer-*

54. Bickel, *The Least Dangerous Branch* at 30-31 (cited in note 18).

55. May, *In The Name Of War* at 264 (cited in note 53). Although the *Korematsu* decision has been questioned by many, it is still considered good law.

56. Most scholars agree that the President has an obligation to enforce specific judgments rendered by courts regardless of his or her own interpretation of the constitutionality thereof. Michael Stokes Paulsen is the exception to this, arguing that the executive is a fully co-equal branch. See Paulsen, 83 Geo. L. R. 217 (cited in note 18). Cf.

ryman, the potential for executive rejection exists. Rehnquist dismisses such presidential power as unconstitutional. As noted earlier, this dismissal ignores the very live academic debate regarding the scope and degree of executive autonomy.[57] Thus, despite Rehnquist's repudiation of Lincoln's actions, history and constitutional theory reveal the executive *might* refuse to defer to the Court's judgment.

After presenting a history demonstrating these three negative possibilities of wartime review, Rehnquist fails to describe an alternative image of how or when the courts should act during war. The outcomes illustrated by the described episodes all fall short of an ideal Court acting as a check on the executive and protector of civil liberties.

A possible alternative view of the Court's role can be found in *Youngstown Sheet and Tube v. Sawyer*,[58] the landmark case on which a young William Rehnquist worked as a law clerk for Justice Robert Jackson, a story Rehnquist told at length in one of his earlier books, but does not discuss in *All the Laws But One*. Justice Jackson's famous concurrence in *Youngstown* articulated a three-tiered analysis of executive authority.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.... When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain

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Lawson and Moore, 81 Iowa L. Rev. at 1321-24 (cited in note 18); Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 Minn. L. Rev. 1421, 1425 (1999).

57. See notes 18 and 56.

58. 343 U.S. 579 (1952).

> exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[59]

Justice Jackson was specifically talking about the scope of presidential powers. But his analysis can be mapped onto judicial review of wartime actions to determine the proper timing of such review.

What was crucial in *Youngstown* was that not only was President Truman's conduct *un*authorized by Congress, but in fact, it ran contrary to an existing statutory process for handling labor disputes.[60] This stands in contrast to the wartime events described in Rehnquist's book. In those cases Congress preapproved the executive's actions, quickly acted to ratify them, or chose not to respond immediately. The executive always acted either within its own prescribed powers or at least within Jackson's "twilight zone" of power.

Employing Jackson's *Youngstown* approach, coupled with what Alexander Bickel has labeled the "passive virtues"[61]—those techniques of the Court allowing it to not decide a case—one can construct a methodology for the timing of judicial review of wartime actions. When the executive acts during war with either explicit or implicit authorization of Congress it is acting with considerable authority. During these times the judiciary ought to remain silent until post-war when it can act independently, deliberatively, and with less risk of executive rejection. If, however, the executive branch acts contrary to an explicit position of Congress, its power is at its "lowest" ebb and the Court ought to act, even during war. When the Court reviews such unilateral and unsupported executive actions it can avoid the pitfalls exhibited by history and can truly act as a check on the executive. Only when two branches of government independently reach the conclusion that executive action is unconstitutional are the benefits of the Court's temporary silence outweighed by the need for a check on the executive's power.

While post-war review does not rectify the indignities exacted on individuals during the war, it can provide precedents which may curtail future governmental excesses. As Christopher May has noted:

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59. Id. at 635-38 (Justice, J., concurring) (footnotes omitted).

60. May, *In The Name Of War* at 259 (cited in note 53).

61. See Bickel, *The Least Dangerous Branch* at 111-98 (cited in note 18); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

> Delaying review without foregoing it entirely strengthens the Constitution in time of emergency. This "technique of the mediating middle" allows the executive to act unencumbered while the crisis rages, while helping to ensure that its conduct will not become an exercise in tyranny. Those who wield emergency power will act with the knowledge that they may later have to answer for their conduct. If judges defer intervention until they are able to function in an independent manner, courts can play an important role in this process of accountability.[62]

Thus, if the Court refrains from reviewing cases during war when the executive is acting either at the height of its power or in the twilight zone, it may avoid the pitfalls exhibited by the episodes related by Chief Justice Rehnquist and yet preserve the opportunity for significant post-war decision-making.

CONCLUSION

Rehnquist poses the question of whether occasional presidential excesses and judicial restraint during wartime are desirable and concludes:

> 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. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice. (pp. 224-25)

While Rehnquist posits this move toward more careful court review and a "different voice" of laws, he stops short of describing what this would look like or when it would occur. This rather prosaic conclusion exemplifies Rehnquist's unexpected lack of insight in addressing such an important issue.

If Chief Justice Rehnquist wrote a book to entertain and intrigue, he has succeeded—but one expects more when reading a book by the Chief Justice on issues of constitutional importance. The title of Rehnquist's book refers to President Lincoln's message to Congress on July 4, 1861 and suggests that the book may offer an answer to Lincoln's rhetorical question, "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" While the title is enticing,

62. May, *In The Name Of War* at 269 (cited in note 53).

Rehnquist provides no answer to the question that Lincoln posed. Instead, he concludes the book with a chapter entitled *Inter Arma Silent Leges*, "In times of war the laws are silent." [63] This phrase, like most of Rehnquist's book, is merely descriptive of the historical intersections of war and civil liberties. Throughout the book Rehnquist exhibits a hesitance for openly critiquing and analyzing the historical events that he relates and leaves the reader with only a vacant sense of the errors of history and no tangible alternative for the future. One possible alternative future can be culled from the episodes that Rehnquist relates. When the judiciary injects itself into wartime actions, in any circumstance other than when the executive and Congress disagree, the possible outcomes are negative. Perhaps the lesson to be learned from Rehnquist's historical survey is that, generally, judicial review ought to be stayed during times of war and that the proper maxim should be *Silete leges enim inter arma*, "For the laws ought to be silent in times of war."

63. This Latin phrase is actually a paraphrase of the Ciceronian maxim: *Silent enim leges inter arma*, "During times of war the laws are truly silent." The phrase is taken from a speech Cicero wrote in defense of Titus Annius Milo who was on trial for murder during a time of martial law and when the formal trial procedures were being arbitrarily changed. Paul MacKendrick, *The Speeches Of Cicero: Context, Law, Rhetoric 372* (Duckworth & Co., 1995). It is interesting to note the reversed arrangement of the phrasing of the original line and the one employed by Rehnquist. Arrangement of Latin is governed by two elements: grammar and rhetoric. The rhetorical element effects emphasis and can specifically be produced by reversing the ordinary position of the words. See B.L. Gildersleeve and Gonzalez Lodge, *Gildersleeve's Latin Grammar* 428-29 (Macmillan and Co., 3d ed. 1960). The removal of the modifier "*enim*" and the reversal of the arrangement may be read to minimize the forcefulness of the phrase.