

DWIGHT D. OPPERMAN LECTURE
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REMARKS OF THE CHIEF JUSTICE
OF THE UNITED STATES

William H. Rehnquist

I am going to talk to you this afternoon about civil liberty in time of war, focusing first on the Civil War and then on World War II. Now, you may say, what an odd choice of subject—the Civil War took place more than a century ago, and World War II ended some fifty years ago. But I have a reason for choosing the topic. I have just finished a book on the subject, which has just been published—so it is a subject I know something about without having to start from scratch.

Abraham Lincoln was elected President in November, 1860, and was inaugurated as President on March 4, 1861. Between the time of his election and his inauguration, the seven states of the deep south—South Carolina, Georgia, Florida, Alabama, Mississippi, and Texas—had seceded from the Union and elected Jefferson Davis as their President. For the first six weeks of Lincoln's administration, the cabinet debated what to do about the Union garrison at Fort Sumter, on an island in the harbor of Charleston, South Carolina. In mid-April, the Confederate shore batteries opened up on the fort, and the garrison surrendered the next day. Lincoln called for 75,000 volunteers to put down the rebellion, and the four states of the upper south—Virginia, North Carolina, Tennessee, and Arkansas—seceded and joined the original seven states of the Confederacy. The Civil War had begun. Washington, D. C., went from being an interior capital to a capital on the very frontier of the Union, exposed to possible raids and even investment and capture by the Confederate forces.

Lincoln, fully aware of this danger, was most anxious that the 75,000 volunteers for whom he had called would arrive in Washington and defend the city against a possible Confederate attack. Many would come from the northeast—Boston, New York, and Philadelphia. But all of the rail connections from the northeast into Washington ran through the city of Baltimore, forty miles to the northeast. Herein lay a problem; there were numerous Confederate sympathizers in Baltimore and the city itself, at that time, had a reputation for unruliness—it was known as "Mob City." To complicate matters further, it was

necessary for passengers en route from the northeast to Washington to change stations in Baltimore.

Shortly after troops from the northeast began arriving in Baltimore on their way to Washington, a riot broke out while soldiers were in transit from one railroad station to another. Some of the troops were riding in railroad cars drawn by horses through the downtown streets of the city, while others were marching in military formation through those same streets. A hostile crowd pelted the troops with stones. The troops in turn fired shots into the crowd. Several soldiers and several bystanders were killed.

That night, the chief of police of Baltimore, who was an avowed Confederate sympathizer, and the Mayor of Baltimore, who was a less open one, spearheaded a group of Confederate sympathizers who took matters into their own hands. They blew up the railroad bridges leading into Baltimore from the north. As a result troops bound for Washington had to be sent on a circuitous journey by ship from a point on the Chesapeake Bay above Baltimore to Annapolis, from which they traveled to Washington by land.

In response to the situation in Baltimore, Lincoln, at the behest of his Secretary of State, William H. Seward, took the first step to curtail civil liberty—he authorized General Winfield Scott, commander-in-chief of the Army, to suspend the writ of habeas corpus at any point he deemed necessary along the rail line from Philadelphia to Washington. Scott took full advantage of this authority, and several weeks later, federal troops arrested a man named Merryman, whom authorities suspected of being a major actor in the dynamiting of the railroad bridges. He was confined in Fort McHenry, and immediately sued out a writ of habeas corpus.

The writ of habeas corpus is something that comes to us from English common law, and was the means by which one who was arrested or confined by governmental authority could ask a court to require the person holding him in custody to show cause why he was being held. The court would then decide whether there was sufficient reason to hold the person, and if there was not would order him set free. It has been rightly regarded as a safeguard against executive tyranny, and an essential safeguard to individual liberty. The United States Constitution provides that the writ of habeas corpus shall not be suspended, except when in time of war or rebellion the public safety shall require it.

The day after Merryman sought the writ, Chief Justice Roger Taney, sitting as a circuit judge in Baltimore, ordered the government to show cause why Merryman should not be released. A representative of the commandant of Fort McHenry appeared in court for the government to advise Taney that the writ of habeas corpus had been suspended, and asked for time to consult with the government in Washington. Taney refused, and issued an arrest warrant for the

commandant. The next day, the marshal reported that in his effort to serve the writ he had been denied admission to the fort. Taney then issued an opinion in the case declaring that the President alone did not have the authority to suspend the writ of habeas corpus—only Congress could do that—and holding that Merryman's confinement was illegal. The Chief Justice, knowing that he could not enforce his order, sent a copy of it to Lincoln.

Lincoln ignored the order, but in his address to the special session of Congress which he had called to meet on July 4, 1861, he adverted to it in these words:

Must [the laws] be allowed to finally fail of execution even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws *but one* to go unexecuted, and the government itself go to pieces less that one be violated?

Lincoln, with his usual incisiveness, put his finger on the debate that inevitably surrounds issues of civil liberties in wartime. If the country itself is in mortal danger, must we enforce every provision safeguarding individual liberties even though to do so will endanger the very government which is created by the Constitution? The question of whether only Congress may suspend it has never been authoritatively answered to this day, but the Lincoln administration proceeded to arrest and detain persons suspected of disloyal activities, including the mayor of Baltimore and the chief of police.

Newspaper publishers did not escape the government's watchful eye during the Civil War either—particularly the New York press, which had a disproportionate impact on the rest of the country. Newspapers in smaller cities frequently simply reprinted stories which had run earlier in the metropolitan press. In August 1861, a grand jury sitting in New York was outraged by an article in the *New York Journal of Commerce*—a paper which opposed the war—that listed over one hundred Northern newspapers opposed to “the present unholy war.” Without hearing any evidence or receiving any legal instructions from the judge, the grand jury made a “presentment” as to five anti-war New York newspapers—a written notice taken by a grand jury of what it believes to be an indictable offense.

On this thin reed, the administration proceeded to act. Postmaster General Montgomery Blair directed the Postmaster in New York to exclude from the mails the five newspapers named by the grand jury. Gerald Hallock, the part owner and editor of the *Journal of Commerce*, was obliged to negotiate with the Post Office Department to see what the paper would have to do to regain its right to use of the mails. The Post Office Department told him that he must sell his ownership in the newspaper. Hallock reluctantly agreed, and retired, thereby

depriving the paper of its principal editorialist opposing the war.

The *New York News*, owned by Benjamin Wood, brother of New York Mayor Fernando Wood, decided to fight the ban against his paper. He sought to send its edition south and west by private express, and hired newsboys to deliver the paper locally. The government ordered U.S. Marshals to seize all copies of the paper. One newsboy in Connecticut was arrested for having hawked it. Eventually, Wood, too, gave up. The other New York newspapers did not rally to the cause of the anti-war newspapers, shouting "First Amendment," as they surely would today. Quite the contrary, they gloated. James Gordon Bennett's *Herald* was "gratified" to report the death of the *News*, and the *Times* observed that Ben Wood should be thankful he could "walk the streets."

Even clergy were subject to detention for perceived disloyalty. Perhaps the most egregious example was that of the Reverend J. R. Stewart, the Episcopal rector at St. Paul's Church in Alexandria, Virginia, who was undoubtedly a southern sympathizer. For two Sundays in a row, he had omitted the customary Episcopal prayer for the President of the United States in the course of the service. On the second of these occasions, he was arrested in the pulpit of the church, and briefly detained until cooler heads prevailed.

As the Civil War drew to a close in 1864, there was considerable disaffection and war-weariness in what were called the states of the old northwest—Ohio, Indiana, and Illinois. There was evidence of a conspiracy on the part of members of secret societies, such as the Knights of the Golden Circle and the Sons of Liberty, to assassinate the Governor of Indiana, free Confederate prisoners held near Chicago, and seize the federal arsenal at Rock Island, Illinois. These plans were thwarted when, in the summer of 1864, a cache of arms and incriminating correspondence was found in the Indianapolis home of the state commander of the "Sons of Liberty." Edwin Stanton, Lincoln's Secretary of War, decided that the suspects in this conspiracy should be tried, not in a regular civil court by a jury, but by a military commission, composed of senior army officers.

In so doing, he went a good deal further than simply suspending the writ of habeas corpus. Trial before such a commission would raise serious questions, for example, about denial of the right to jury trial guaranteed by the Bill of Rights. The suspects were duly tried before such a commission in Indianapolis, and several were sentenced to be hanged. They appealed to the Supreme Court, which in a case called *Ex Parte Milligan* decided in 1866—more than a year after the Civil War was over, by a vote of five to four that civilians not in the military—and that is who these defendants were—could not be tried by a military commission so long as the civil courts were open for business. Justice Samuel Miller, an Iowan from Keokuk, joined the dissenting opinion of Chief Justice Chase.

Here we have an illustration of an old maxim of Roman law—*Inter Arma Silent Leges*—which loosely translated means that in time of war the laws are silent. All during the Civil War the courts were unable or unwilling to ride herd on the Lincoln administration's policies which seriously interfered with civil liberty. Only after the end of the war was a decision handed down which upheld that liberty.

Let us now move forward to World War II. I am one of the few in this room who can remember back to the Japanese attack on Pearl Harbor on December 7, 1941. Since World War II began for the United States by Japan's attack on Pearl Harbor, and Hitler's declaration of war, there was strong support for the war effort across the political spectrum in this country. It was "the good war," as Studs Terkel calls it in his book. Fourteen million people were in the armed services; on the home front there were sacrifices, and slogans such as "Buy Bonds" and "A Slip of the Lip May Sink a Ship." Even restaurants got into the act, with the slogan "Food Will Win the War." On this sign at one restaurant, a customer scrawled, "Yes, but how can we get the enemy to eat here?"

In June of 1942, six months after Pearl Harbor, Richard Quirin and seven other members of the German armed forces were secretly landed in the United States. They had been trained in the use of explosives and secret writing at a sabotage school near Berlin. Four of them were transported by German submarine to Amagansett Beach on Long Island, New York. They landed under cover of darkness in June 1942, carrying a supply of explosive and incendiary devices. At the moment of the landing they wore German uniforms, but immediately afterwards they buried their uniforms on the beach and went in civilian dress to New York City. The remaining four who had been trained at the sabotage school were taken by another German submarine to Ponte Vedra Beach, Florida. They went through the same procedures as those who landed on Long Island, and proceeded to Jacksonville in civilian dress. All were ultimately arrested by the FBI in New York or Chicago; all had been instructed to destroy war industries in the United States.

President Franklin Roosevelt appointed a military commission to try Quirin and his cohorts for offenses against the laws of war and the Articles of War enacted by Congress, and he directed that the defendants have no access to civil courts. While they were being tried by the military commission, which sentenced all of them to death, they petitioned the Supreme Court of the United States for review of the procedures under which they were being tried. The Supreme court convened in a special term on July 29, 1942, to hear arguments in their case.

One of the principal arguments made by able counsel for the petitioners was that the civil courts throughout the United States were open at the time, there had been no invasion of any part of the country, and therefore under the *Milligan* case there could be no resort to trial by a military commission. Counsel noted

that one of the petitioners, Herbert Haupt, had been born in the United States and was a United States citizen. At the conclusion of the arguments in the case, and after deliberation, the Court on July 31st announced its disposition of the case upholding the government's position, but its full opinion did not come down until October 1942. In that opinion the Court sharply cut back on the dicta in the *Milligan* case, saying that even though the civil courts were open, and even though it was assumed that one of the German soldiers was a United States citizen, these defendants could nonetheless properly be tried and sentenced to death by a court martial.

It is worth noting that this decision was made in the dark days of the summer of 1942, when the fortunes of war of the United States were just beginning to recover from their lowest ebb. The United States Navy had suffered serious damage to its fleet at Pearl Harbor, and Japanese troops invading the Philippines had pushed the United States troops back onto the Bataan Peninsula, resulting in the grisly Bataan death march. In North Africa, German forces had recaptured Tobruk and were within striking distance of Cairo, threatening the entire Mid East. Civil liberties were not high on anyone's agenda, including that of judges.

Hawaii was placed under martial law within days after the attack on Pearl Harbor, and it remained under that regime until it was lifted in the Autumn of 1944. Such a regime would seem to have been quite justified in the period immediately after the bombing of Pearl Harbor, when actual invasion of the islands by Japanese forces was feared. But after the battle of Midway in June 1942, that possibility was all but eliminated. Yet martial law remained in effect until the Autumn of 1944, when it was lifted by presidential proclamation.

One of the principal incidents of this martial law was that the civil courts in Hawaii were closed the day after Pearl Harbor, and only gradually permitted to resume some of their previous functions. They were closed not because of any external necessity, but because the military governor of Hawaii ordered them closed. Provost courts, composed of officers appointed by the military governor, tried criminal cases. Lloyd Duncan, a civilian shipfitter, was charged with assaulting two military guards at the Pearl Harbor Navy yard, where he worked. He was tried by a provost court and sentenced to six months in jail. Harry White, a stockbroker, was charged with having embezzled funds from a client—surely an offense as far removed from considerations of public order or security as one can imagine. He was tried by a provost court and sentenced to four years in prison. Both of the defendants challenged their convictions by habeas corpus in the federal courts. When their cases finally reached the Supreme Court, a majority of the Court in the case of *Duncan v. Kahanamoku* held that extension of martial law so long after the threat of invasion had ceased was illegal. Chief Justice Stone commented in a concurring opinion that if the bars and restaurants could be reopened within two months after Pearl Harbor, it was hard to see why

the courts should not have been able to reopen a full year later.

The good news for civil liberty in the *Duncan* decision was that the martial law regime was held to be illegal; the bad news was that the Supreme Court handed down its ruling in February 1946, six months after Japan surrendered, and a year and a half after martial law had been lifted by the President.

One of the most controversial actions of the government during World War II was the forced relocation of both Japanese aliens and American citizens of Japanese ancestry away from the west coast. The Supreme Court reluctantly upheld this program during the war, but the judgment of history has been that a serious injustice was done these people, because there was no effort to separate the loyal from the disloyal. As often happens, the latter-day judgments, in my view, swing the pendulum too far the other way. With respect to the forced relocation of Japanese-Americans who were born in the United States of Japanese nationals—and were therefore United States citizens—even given the exigencies of wartime it is difficult to defend their mass forced relocation under present constitutional doctrine. But the relocation of the Japanese nationals residing in the United States—typically the parents of those born in this country—stands on quite a different footing. The authority of the government to deal with enemy *aliens* in time of war, according to established case law from our Court, is virtually plenary.

There were considerable differences between the way the Lincoln administration infringed on civil liberty and the way FDR's infringed on it. Lincoln often acted without any authority from Congress, and some of his measures unabashedly suppressed dissent. There was no such suppression of dissent in World War II, and most of the administration's acts hostile to civil liberty were based on laws passed by Congress. So the general trend from the 1860s to the 1940s was in the direction of greater sympathy to claims of civil liberty. But neither Lincoln nor FDR—nor Woodrow Wilson during World War I—could be described by any stretch of the imagination as a supporter of civil liberty.

Surely Abraham Lincoln is the greatest of American Presidents, and Franklin Roosevelt ranks high among the runners up. Lincoln did not himself approve in advance of most of the arrests, detentions, and trials before military commissions which took place during the Civil War. His cabinet secretaries and other advisors did that, but Lincoln acquiesced in almost all of their decisions. The same may be said for Franklin Roosevelt during the Second World War; he did not originate the plan for the relocation of the Japanese from the west coast, but he unhesitatingly acquiesced in it when he was told that it was a necessary war measure.

Lincoln felt that the great task of his administration was to preserve the Union. If he could do it by following the Constitution, he would; but if he had to

choose between preserving the Union or obeying the Constitution, he would quite willingly choose the former course. Franklin Roosevelt felt the great task of his wartime administration was to win World War II, and, like Lincoln, if forced to choose between a necessary war measure and obeying the Constitution, he would opt for the former.

This is not necessarily a condemnation. Both Lincoln and FDR fit into this mold. The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim *Inter Arma Silent Leges*—in time of war the laws are silent.

To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later. While we would not want to subscribe to the full sweep of the Latin maxim—*Inter Arma Silent Leges*—in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.