

Book Review: *All the Laws But One: Civil Liberties in Wartime*

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BOOK REVIEW

ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME. By William H. Rehnquist.[#] New York, NY: Alfred A. Knopf, 1998. Pp. 254. \$26.

REVIEWED BY MICHAEL B. BRENNAN*

Inter Arma Silent Leges

"In time of war, the laws are silent"

"The Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

U.S. Constitution, Article I, Section 9, Clause 2.

This Roman dictum, and this constitutional clause, capture the clash between the demands of a government's successful war effort and the compelling need to protect civil liberties. That conflict is the subject of the most recent historical monograph by Chief Justice William Rehnquist.¹ This book describes numerous examples of governmental use of authority which infringe civil liberties during declared wars in American history. It also yields flashes of insight into the views of our country's Chief Justice, including his commentary on Supreme Court precedent in this interesting area of the law.

In *All the Laws But One*,² Rehnquist describes scenes during wartime in which the United States government's activities interfered with the civil liberties of individual citizens who were often opposed to the war. Along with historical explication, Rehnquist briefs the legal cases these clashes produced, critiques the principles underlying those

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1. Other books by Chief Justice Rehnquist include GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); and THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987).

2. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

decisions, and relates the personalities of the individuals involved. Rehnquist uses these examples to support the book's thesis: while *inter arma silent leges* may have described this tension in the past, over time the phrase rings less true in the least justified wartime curtailments of civil liberty.

I. WARTIME CIVIL LIBERTIES

A. Civil War

Rehnquist spends 13 chapters—nearly three-quarters of the book—on the tension between civil liberties and the Union's efforts to fight the Civil War. The bookends of this discussion are a chapter describing Abraham Lincoln's travel to Washington for his inauguration during the troubled months before the Civil War,³ and chapters detailing President Lincoln's assassination and the trial of John Wilkes Booth's accomplices.⁴ Between these events, Rehnquist recounts the major collisions between the federal government fighting a civil war and the power of the great writ of habeas corpus.

1. Suspension of the Writ and Subsequent Cases

In layers of historical detail, including descriptions of the lives and families of the major figures, Rehnquist puts into context President Lincoln's suspensions of habeas corpus. A plot to assassinate Lincoln in Baltimore had been unearthed and forced the President-elect to alter his route into the nation's capital for his first inauguration.⁵ In April 1861, Lincoln had been President for less than one month when the South took up arms against the Union by firing upon Fort Sumter in South Carolina.⁶ Federal troops were sent to the key railroad junction of Baltimore on the way to defend Washington. There, sixteen people were killed during anti-Union riots.⁷ With the approval of Maryland's governor, railroad bridges into Baltimore had been burned to prevent more federal troops from entering the city.⁸ Telegraph lines into Washington had been cut, and Lincoln worried about a naval blockade of the Chesapeake Bay. Fearful that the Maryland state legislature

3. See generally *id.* at 3-11.

4. See *id.* at 155-69.

5. See *id.* at 6.

6. See *id.* at 13-15.

7. See *id.* at 18-21.

8. See *id.* at 22.

would arm that state against the Union, Lincoln consulted with his attorney general about suspending the great writ.⁹ He convened his cabinet to glean their views; observers described him as tense.¹⁰ Given the violence, and possible insurrection of a state so close to the capital, he suspended the writ:

The Commanding General of the Army of the United States:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any 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 the writ.¹¹

The order's explicit reason for the suspension and its geographic specificity disclose that Lincoln understood the magnitude of this step, and show his desire to circumscribe its use.

Nearly a month after Lincoln's order, John Merryman was arrested for participation in the destruction of the railroad bridges after the Baltimore riots. Merryman's counsel petitioned Chief Justice of the United States Roger B. Taney¹² for a writ of habeas corpus.¹³ Taney issued the writ, and made it returnable the following morning. When the court marshal told Taney that the military had blocked attempts to serve the writ, Taney issued a written opinion calling upon Lincoln "to enforce the process of this Court."¹⁴ This precipitated a constitutional crisis: two coequal branches of government, at odds over one branch's power to suspend the Constitution.

Rehnquist questions Taney's reasoning in the *Merryman* opinion. Taney concluded first that because the Founders placed the Suspension Clause in Article I and not Article II of the Constitution, only Congress

9. *See id.* at 22-23.

10. *See id.* at 22.

11. *Id.* at 25.

12. Rehnquist portrays his predecessor in the center chair of the Supreme Court as irascible, and includes a discussion of the history behind and reasoning of Taney's majority opinion in the infamous *Dred Scott* decision. *See id.* at 26-32.

13. *See id.* at 26.

14. *Id.* at 36 (quoting BALTIMORE AMERICAN, May 29, 1861).

may suspend the writ.¹⁵ This conclusion would rule out any express or implied authority the President might have under his war powers in Article II, Section 2 of the Constitution. Taney also concluded that only a soldier could be detained in prison or brought to trial before a military commission.¹⁶ Rehnquist finds more strength in this argument. Taney considered whether the President could suspend the writ himself, or whether it required the approval of Congress.¹⁷ To Taney, civilian Merryman could be detained, charged, and tried only pursuant to an order of the federal courts as long as they were open and functioning.¹⁸

Extraordinarily, the Lincoln administration made no direct response to Taney's opinion. (Imagine the outcry today if a President ignored a Supreme Court order.) But in a July 4, 1861 speech to a special session of Congress, Lincoln noted that the Constitution was silent as to which branch of government might exercise the authority to suspend the writ. He asserted that in an emergency, when Congress was not in session, the President had that authority.¹⁹

Merryman was freed on bail but was never brought to trial on an indictment for conspiracy to commit treason. Taney insisted that Merryman (and others) not be tried in his absence, yet Taney refused to participate in the trials in his role as the sitting circuit justice.²⁰ Each branch looked the other way, averting a constitutional crisis.

2. Suspension of the Writ is Expanded

The original, well-circumscribed suspension of the writ of habeas corpus lasted for just over one year. When in 1862 Edwin M. Stanton became Secretary of War, Lincoln issued "Executive Order No. 1, Relating to Political Prisoners," in which he justified suspending the writ of habeas corpus based on the unprecedented nature of the Civil War, the treason prevalent in 1862, and the early military losses suffered by Union troops. Six months later Stanton issued an order "by direction of the President" suspending the writ nationwide for "persons arrested for

15. *See id.* at 36-37.

16. *See id.* at 37-38.

17. Later in the Lincoln administration, Congress expressly authorized the President to suspend the writ under certain circumstances. *See id.* at 37.

18. *See id.* at 37.

19. *See id.* at 38.

20. This was ironic: a keystone of Taney's written opinion was that because the federal courts were open and functioning, anyone who violated the law could be indicted and tried there, rather than before a military tribunal. *See id.* at 39.

disloyal practices."²¹ Rehnquist contrasts the number and kind of cases resulting from suspension of the writ during its previous administration by Secretary of State William H. Seward—less than 900 civilians were arrested in the field during insurrectionary operations, none of whom were tried before military tribunals—with the administration of the suspension by Secretary Stanton, where about 13,000 civilians were detained, most without charges, and convicted in and sentenced by military courts.²²

This nationwide suspension of the writ was tested in Wisconsin. Nicholas Kemp, a leader of a riot against the Civil War draft in Port Washington, Wisconsin, was arrested and imprisoned at Camp Randall in Madison, Wisconsin. Kemp's lawyer obtained a writ of habeas corpus from the Supreme Court of Wisconsin, but when presented with the writ, the military jailer responded that President Lincoln had suspended the writ nationwide.²³ The Wisconsin high court was presented with the same question Chief Justice Taney faced in *Merryman*. The justices decided that the President did not have the authority by himself to suspend the writ of habeas corpus, and that martial law could not control in areas of the country where there was no insurrection or combat.²⁴ Nonetheless, "'out of respect to the national authorities,'" the court refused to arrest Kemp's military custodian.²⁵

Another test of this nationwide suspension took place in Ohio. In the spring of 1863, Clement Vallandigham, a civilian and a lawyer, hoped to receive the Democratic nomination for Ohio governor. When party leaders rejected him, he decided to get himself arrested and ride a favorable tide of public opinion into office. Vallandigham publicly criticized the Union's war effort, including its practice of trying civilians before military commissions.²⁶ General Ambrose Burnside, in charge of the Union army in Ohio, had issued General Order Number 38, which provided "'[t]he habit of declaring sympathies with the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested with a view to being tried as above

21. *Id.* at 59-60 (quoting 4 ROBERT N. SCOTT, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, Series II, 358-59 (Gettysburg, National Historical Society, 1971-72)).

22. *See id.* at 49.

23. *See id.* at 61-62.

24. *See id.* at 24.

25. *Id.* at 63 (quoting *In re Kemp*, 16 Wis. 359 (1863)).

26. *See id.* at 65.

stated or sent beyond our lines and into the lines of their friends."²⁷

Burnside sent observers to Vallandigham's speeches, including one which ended with a plea to citizens who valued their rights to exercise their franchise and "hurl King Lincoln from his throne."²⁸ Burnside had Vallandigham arrested and tried in a summary manner before a military tribunal in Cincinnati. Two days after the military commission's verdict and sentence, Vallandigham's attorney sought a writ in federal court, arguing that habeas corpus had not been suspended in Ohio. The judge ruled for the government.

Public opinion, shared by members of Lincoln's cabinet, was that Burnside had acted precipitously. Doubt existed as to whether Vallandigham had counseled resistance to the laws, and his statements had arguably contravened only Burnside's order, not any federal statutes.²⁹ Lincoln commuted Vallandigham's sentence from imprisonment for the duration of the war to banishment beyond the Union lines into the Confederacy.³⁰

Although the executive branch prevailed in *In re Kemp* and *Ex Parte Vallandigham*, it did so as a result of pragmatic political judgments, rather than the strength of its positions. The expansion of Lincoln's original suspension order resulted in weaker cases for the government. The necessarily compelling case for a nationwide suspension of civil rights had not been made.

3. *Ex parte Milligan*

Rehnquist also describes the treason trials during the summer of 1864 in Indianapolis of some "copperheads"—Northerners sympathetic to the South who had been disloyal to the Union—out of which arose the famous Supreme Court case *Ex parte Milligan*.³¹ The government charged the defendants with conspiracy against the United States, including planning for an armed uprising to seize Union munitions, planning to free Confederate prisoners of war in Illinois, and even to abduct the Republican governor of Indiana.³²

Rehnquist synthesizes the events of the trials in detail, at points

27. *Id.* at 64 (quoting SCOTT, *supra* note 21, at series I).

28. *See id.* at 65-66.

29. The Supreme Court held that it had no jurisdiction to review the decision of the military commission. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251 (1863).

30. *See* REHNQUIST, *supra* note 2, at 67.

31. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

32. Of interest is when Rehnquist explains the federal conspiracy statutes of that day and teaches how that area of law has evolved since. *See* REHNQUIST, *supra* note 2, at 86-88.

reprinting pages of testimony to demonstrate the strengths and weaknesses of the government's cases against different defendants.³³ The military commission found the defendants guilty and sentenced them to life in prison at hard labor. They filed habeas corpus petitions.

Rehnquist spends a chapter relating the backgrounds of the Supreme Court justices at the time *Milligan* was argued and decided.³⁴ He spends another chapter discussing the highlights of the six consecutive days of oral arguments of the case, including critiques of the reasoning and styles of the various advocates,³⁵ and analyzing the Court's decision rejecting the government's contention that the Bill of Rights was suspended during war or rebellion and directing that the writs of habeas corpus be issued because the military commission had no jurisdiction to try and sentence the defendants.³⁶

Although the Court's ruling was made up of two opinions, they were in accord on the fundamental issues of the case. Suspension of the writ under Article I, Section 9 of the Constitution permitted the government to detain suspected persons, but not to try them outside of the normal judicial process so long as civil courts were open. Accordingly, the Constitution required that *Milligan* be tried before a court composed of judges holding office for life, not a military commission.³⁷ In an Act of Congress of March 3, 1863, suspects were allowed to be detained only until a grand jury had met in the district in which they were held; if they were not indicted by the time the grand jury adjourned, they were discharged from custody. To the Court, this law meant that a prisoner in *Milligan's* position must either be indicted and tried in the civil courts, or discharged from custody.

Under this view, there was no occasion for the justices to consider what might have been the result if Congress had provided for civilian *Milligan* to be tried before a military commission.³⁸ But the Court in *Milligan* went further. The concurring justices explained why they thought Congress did not have the power to authorize such a trial, a question that did not come before the Court until two years later in *Ex parte McCardle*.³⁹

33. See *id.* at 91-100.

34. See *id.* at 105-17.

35. See *id.* at 118-27.

36. See *id.* at 128-37.

37. See *id.* at 128-31.

38. See *id.* at 131.

39. 74 U.S. (7 Wall.) 506 (1869).

Rehnquist concludes that the Court in *Milligan* ignored the sound advice of many of its own opinions that it should declare an Act of Congress unconstitutional only if there was no other ground for deciding the case.⁴⁰ This is especially true since the Court was working under the recent cloud of its decision in *Dred Scott v. Sandford*,⁴¹ in which it had stretched to declare an Act of Congress unconstitutional on doubtful grounds. Rehnquist justly compliments the *Milligan* decision for its rejection of the government's position that the Bill of Rights has no application in wartime. But he also correctly emphasizes how much more widely approved the decision would have been over time if the Court had not gone out of its way to declare that Congress had no authority to do what Congress never tried to do: enact a law authorizing trials of civilians by military commissions during wartime.⁴²

B. World War I

In June 1917, Congress enacted the Espionage Act, which proscribed traditional spying but also contained two statutes that affected civil liberties: false reports or statements made with the intent to interfere with the operation or success of the U.S. military were punishable by imprisonment and a fine; and every letter or other writing advocating or urging treason or insurrection to any U.S. law could not be mailed, and the author could be imprisoned and fined.⁴³

Charles Schenck was convicted of violating the Espionage Act by printing and distributing leaflets to draftees that urged draft resistance. Schenck argued that his conviction violated the First Amendment's guarantee of freedom of the press. In a unanimous opinion by Justice Oliver Wendell Holmes, the Supreme Court upheld Schenck's conviction reasoning that once the leaflet was found to have been intended to obstruct armed forces recruiting, its words created "a clear and present danger" of bringing about conduct Congress could try to prevent.⁴⁴ Rehnquist agrees with the conviction and affirmance, reasoning that draft evasion was conduct Congress had a right to prevent, and Schenck had distributed the pamphlets to draftees, leaving no doubt as to his intent.⁴⁵

40. See REHNQUIST, *supra* note 2, at 134-36.

41. 60 U.S. (19 How.) 393 (1856).

42. See REHNQUIST, *supra* note 2, at 137

43. See *id.* at 173.

44. *Id.* at 174.

45. See *id.*

How was Justice Holmes's "clear and present danger" test applied in later cases? In 1917, U.S. Postmaster General Albert Bursleson employed the provision of the Espionage Act banning any writing "containing any matter advocating or urging treason."⁴⁶ This provision denied use of the mail to *The Masses*, a magazine which contained four cartoons and four pieces of text which the postmaster deemed anti-war and violative of the Espionage Act. The publishers sought an injunction upholding their right to mail their publication, and the case was heard by then-U.S. District Judge Learned Hand. Rehnquist quotes liberally from Judge Hand's decision in favor of the publisher, in which he distinguished between strongly worded unpatriotic criticism of the draft and actual advocacy of unlawful resistance to it.⁴⁷ Four months later, the United States Court of Appeals for the Second Circuit reversed Judge Hand's decision, concluding that because the cartoons might interfere with enlistment in the military, they violated the Espionage Act.⁴⁸ Rehnquist agrees with Judge Hand's distinction: "Advocacy which persuades citizens that a law is unjust is not the same as advocacy that preaches disobedience to it. But if freedom of speech is to be meaningful, strong criticism of government policy must be permitted even in wartime."⁴⁹

Rehnquist also discusses other cases brought to the Supreme Court under the Espionage Act, and President Woodrow Wilson's desire to suppress criticism of America's war effort in World War I. To achieve this end, the Wilson administration relied more on federal statutes than executive fiat, while courts of the day gave only small relief to civil libertarians. Rehnquist notes that the judiciary's review of such claims was an advance in the cause of civil libertarians.⁵⁰ Although the government never suspended the writ of habeas corpus during World War I, more than 2,000 people were prosecuted under the Espionage Act during the war and shortly thereafter, with few more than 1,000 convicted.⁵¹ Litigation under the Act exemplified the tension Rehnquist explores in this book. Although the executive branch had prevailed again, courts were balancing civil liberties with the war effort.

46. *Id.* at 173 (quoting Espionage Act, Title XII, § 2, 65 Stat. 230 (1917)).

47. *See id.* at 178.

48. *See id.* at 177-78.

49. *Id.* at 178.

50. *See id.* at 178-82.

51. *See id.* at 183.

C. World War II

An account of the controversial wartime internments of Japanese-Americans is given in two chapters.⁵² Rehnquist gives context to the government's actions and its claim of military necessity, by describing in detail the war in the Pacific and its impact on the West Coast of the United States. After the Japanese attack on Pearl Harbor, President Franklin Roosevelt appointed a special commission to ascertain and report on the threat of further Japanese attacks on the United States. That commission discovered Japanese espionage in Hawaii. At that time, one hundred thousand "Issei" (first generation Japanese immigrants) and "Nisei" (children of the Issei born in the U.S.) resided on the American West Coast. In February 1942, in response to this report, President Roosevelt issued Executive Order Number 9066, imposing a curfew on ethnic Japanese, requiring them to report to relocation centers, and then moving them to camps located in the interior of California and the mountain states. Rehnquist quotes from the memoirs and correspondence of the men who decided upon these forced evacuations. Secretary of War Henry Stimson wrote how "Japanese raids on the West Coast seemed not only possible but probable in the first months of the war."⁵³ Attorney General Francis Biddle speculated on President Roosevelt's feelings about the internments: "Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war."⁵⁴

The internments resulted in constitutional litigation. Rehnquist discusses the Supreme Court cases of *Hirabayashi v. United States*,⁵⁵ *Korematsu v. United States*,⁵⁶ and *Ex parte Endo*,⁵⁷ all involving Nisei Japanese-Americans. Each contended that Executive Order Number 9066 was unconstitutional because it presumed that the entire racial group was disloyal, rather than securing individual determinations of disloyalty.⁵⁸ Because of procedural variations, the three cases each

52. See *id.* at 184-202, 203-211.

53. *Id.* at 190.

54. *Id.* at 191-92 (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962)).

55. 320 U.S. 81 (1943).

56. 323 U.S. 214 (1944).

57. 323 U.S. 283 (1944).

58. See REHNQUIST, *supra* note 2, at 195.

reached the Supreme Court at different times.

In *Hirabayashi*, decided in June 1943, Chief Justice Harlan Stone greatly narrowed the scope of the case by deciding that because *Hirabayashi* had been convicted of and received concurrent sentences for violating a curfew *and* not reporting to the relocation center, the Court only needed to rule on the validity of the curfew requirement, which it upheld, relying on the "military necessity" argument of a threat by the Japanese navy to the Pacific coast immediately after the bombing of Pearl Harbor.⁵⁹ On the charge that distinctions based on race alone were constitutionally impermissible, Rehnquist lets another of his predecessors, Chief Justice Stone, defend the Court's opinion: "'The fact alone that the attack on our shores was threatened by Japan rather than another enemy power sets these citizens apart from others who have no particular associations with Japan.'"⁶⁰

Korematsu did not come to the Supreme Court for oral argument until October 1944.⁶¹ In that case, the Court had to confront the relocation requirement as well as the curfew. The Court upheld the relocation requirement based on the military necessity reasoning in the *Hirabayashi* decision. Again, Rehnquist lets the authoring justice, Justice Hugo Black, defend the opinion: "'To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.'"⁶²

In *Endo*, decided at the same time as *Korematsu*, an interned Japanese-American woman submitted to an evacuation order, but claimed that she was a loyal American citizen against whom no charge had been made, and therefore that she was entitled to a writ of habeas corpus.⁶³ The government agreed that *Endo* was loyal, and had not charged her with any offense. Under these circumstances, the Court decided that she must be released from confinement.⁶⁴

Rehnquist devotes a chapter to postwar criticism of the Court's decisions on the internments. He finds some of the criticism justified and some not. The military necessity distinctions the government offered might have been legally adequate in time of war and under the Alien Law of 1798 to support a difference in treatment between the Issei

59. See *id.* at 198-99.

60. *Id.* at 200 (quoting *Hirabayashi*, 320 U.S. at 100-01).

61. 323 U.S. 214 (1944).

62. REHNQUIST, *supra* note 2, at 200 (quoting *Korematsu*, 323 U.S. at 223-24).

63. 323 U.S. 283 (1944).

64. See REHNQUIST, *supra* note 2, at 201.

and the Nisei.⁶⁵ But the military's submissions showed no particular factual inquiry into the likelihood of espionage or sabotage by the Nisei, but rather showed only generalized conclusions that they were "different" from other Americans.⁶⁶ Under present law, this would not justify dislodging the Nisei, who were American citizens, from their homes on the basis of ancestry and treating them differently than other American citizens.⁶⁷

Rehnquist comments on the disingenuity in the sequence of the three opinions: "There was no reason to think that Gordon Hirabayashi and Fred Korematsu were any less loyal to the United States than was Mitsuye Endo."⁶⁸ The United States' military position was much more favorable in the fall of 1944 than in the spring of 1942.⁶⁹ Rehnquist links the outcomes in these cases to the United States' fortunes in the war: as they improved, the Supreme Court came around to the view that a Japanese-American could be entitled to release upon a finding of loyalty.⁷⁰

II. A TREND AGAINST CURTAILMENTS OF CIVIL LIBERTY DURING WARTIME?

In *All The Laws But One*, Rehnquist relates governmental imposition on individual liberties to the country's strength and stability: the greater the threat a war posed to domestic order, the greater deference exists to the executive's suspension of civil liberties. In the Civil War, the existence of our country was at stake. Because the threat was internal—the combatants dying on both sides were Americans, and all fighting took place on American soil—infringements on civil liberties were numerous. But during World War I, the United States was more mature as a nation, and there was no direct attack on American soil. The United States had a large immigrant population some of whom were perceived to have uncertain loyalties. Curtailments of civil liberties still existed, but at times the courts intervened. During World War II, given a direct and brutal attack on American soil, the military necessity argument enjoyed some, but not unlimited, traction.

65. *See id.* at 209-11.

66. *See id.* at 209.

67. *See id.* at 206.

68. *Id.* at 202.

69. *See id.*

70. Rehnquist also includes an interesting chapter on Hawaii under martial law during World War II. *See id.* at 212-17.

Upon this premise, Rehnquist constructs his thesis that the government's authority to engage in conduct that infringes civil liberty is greatest in time of a declared war, but that this authority is ameliorating.

There are marked differences among the government's activities during the Civil War, World War I, and World War II. While President Lincoln relied purely on presidential authority or the orders of military commanders to suspend the writ of habeas corpus during the Civil War, during World War I Postmaster General Albert Burleson at least acted under a provision of the Espionage Act. And although President Roosevelt acted unilaterally to authorize the internment of west coast Japanese during World War II, Congress ratified his order immediately. From this trend, Rehnquist concludes that the President may do many things in carrying out a congressional directive that he may not be able to do on his own, as well as that Congress may not always grant the President all of the authority for which he asks, such as President Wilson's request for censorship during World War I.⁷¹

Since the Civil War, those claiming infringement of their civil rights also have increasingly resorted to the courts. This is partly due to the limited jurisdiction of federal courts in the 1860's. "Not until 1875 did Congress grant lower federal courts authority to hear cases where the plaintiff based his lawsuit on a violation of the federal Constitution."⁷² Although such a pre-1875 plaintiff would not have been precluded from filing his claim in state court, this would not necessarily have resulted in vindication.⁷³

Rehnquist also finds the federal government's attempts to suppress public criticism of the government's war effort growing weaker over time. Such efforts were heavy-handed in the Civil War. Although Postmaster Burleson's endeavors were largely successful during World War I, the federal courts at least reviewed them. And by the time of World War II, the government did not even attempt to squelch any public criticism of war policy.⁷⁴

While Rehnquist casts doubt on the *prescriptive* truth of *inter arma silent leges*, he finds in the maxim a *descriptive* truth: courts are naturally reluctant to decide a case against the government on an issue of national

71. See *id.* at 219.

72. *Id.* at 220.

73. For example, in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), the Supreme Court of the United States strongly overruled the Supreme Court of Wisconsin in its attempt to free a prisoner held in the custody of a federal marshal. See REHNQUIST, *supra* note 2, at 220.

74. See REHNQUIST, *supra* note 2, at 221.

security during a war. While judicial reluctance to hinder a war effort might result in judges abstaining from unnecessary constitutional interpretation, it hurts individuals actually deprived of their civil liberties. In a wonderful passage in the book, Rehnquist inquires into the nature of civil liberty itself.⁷⁵ The word "civil" takes its root from the Latin term *civis*, meaning citizen. Rehnquist considers a citizen not someone free from governmental restraint, but a person who owes allegiance to an organized government. "In any civilized society the most important task is achieving a proper balance between freedom and order."⁷⁶ In wartime, this balance shifts toward order, in favor of the government's ability to confront conditions that threaten the nation. For that reason, Rehnquist believes that President Lincoln was correct to avoid "all the laws but one"—the writ of habeas corpus—being enforced.⁷⁷

As declared wars become less common, will the trend Rehnquist describes against curtailments of civil liberty continue? Suspension of the writ of habeas corpus is the primary indicator of martial rule, an often misunderstood concept. As Justice Field pointed out in *Ex parte Milligan*: "'strictly there is no such thing as martial law. . . . Let us call the thing by its right name; it is not martial law, but martial rule.'"⁷⁸ Today, the President retains authority to mobilize the national guard. A state governor also can request that the President call up federal troops. In doing so, the governor in effect has turned over part of that state to federal rule. Although the rationale often given for this transfer is the "unity of command" of law enforcement authorities, martial rule is in effect, and authorities may infringe citizens' civil rights.

Martial rule is not just a legal antiquity. Consider the federal and state governmental responses to the riots and looting in Los Angeles after the acquittals in state court of police officers charged with beating Rodney King. An instance of international terrorism, such as the bombing of the World Trade Center in New York City, also could precipitate martial rule. Whether the direction Rehnquist discerns will continue cannot be predicted, but in the circumstances listed, Rehnquist's premise may hold true: as the threat to domestic order increases, so will deference to the executive's suspension of civil liberties.

75. See *id.* at 221.

76. *Id.* at 222.

77. See *id.* at 223.

78. 71 U.S. at 58.

III. FINDING THE CHIEF JUSTICE BETWEEN THE LINES

All The Laws But One is well worth the read. Rehnquist defends his thesis skillfully and thoroughly. Many readers will find interesting how a sitting Supreme Court chief justice interprets seminal cases authored by his predecessors. Readers of more technical legal works may find Rehnquist's writing too easily within the reach of lay readers, but he sets this as a goal to include non-lawyers in his audience.⁷⁹ All readers will find his writing clear and succinct; he brings historical scenes alive.

Treatment of and emphasis on a subject can tell the reader much about an author. Finding an author between the lines is especially interesting when he is the most powerful judge in the United States. Glimpses can be had of Chief Justice Rehnquist's legal philosophy and views through his telling of history and in his explanation of cases.

At times, Rehnquist the lawyer comes through. In his discussion of the Indianapolis treason trials which led up to *Ex parte Milligan*, he emphasizes how the government must have the proper jurisdictional and statutory basis for action.⁸⁰ He reviews the exact allegations in the indictment as well as the trial testimony, witness-by-witness. He details the connections, or lack thereof, between incriminating facts and each individual defendant.⁸¹

Throughout the book, however, Rehnquist the judge is ever-present. His interest in and mastery of separation of powers issues can be seen in his description of Chief Justice Taney's rebuke of President Lincoln in the *Merryman* case.⁸² Why Rehnquist avoids discussing the political question doctrine,⁸³ which is arguably implicated by the interplay of the politics of war and the justiciability of civil liberties suits, is not clear.

Rehnquist's critique of the World War II internment cases illustrates his view of the legal process in the tension between a government at war and an individual's civil liberties: "Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'"⁸⁴ Of interest is his use of the oral argument transcripts from *Ex parte Milligan* to critique the quality of advocacy in that case; modern-day advocates can learn from these pages what *not* to

79. See REHNQUIST, *supra* note 2, at xiii.

80. See REHNQUIST, *supra* note 2, at 85-88.

81. See *id.* at 91-100.

82. See *id.* at 32-39.

83. See *Baker v. Carr*, 369 U.S. 186, 209 (1962).

84. See REHNQUIST, *supra* note 2, at 205.

do in a Supreme Court argument before the author.⁸⁵

Rehnquist delves into the background of the justices deciding these cases. Does the Chief Justice's legal philosophy include a touch of legal realism? Perhaps, such as when he links the outcome in Supreme Court's decisions in the World War II internment cases to the United States' war fortunes.⁸⁶

Most importantly, between the lines one finds a judge attuned to the hardship of an individual litigant attempting to protect his civil liberties, who is at the same time cognizant of the government's role in keeping order during wartime.⁸⁷ Rehnquist's ability to see both sides of this tension is the sign of a great judge. A compliment made of Judge Learned Hand could apply to Chief Justice Rehnquist:

The values he served were at once higher and more subtle: impartiality, intellectual detachment, respect for the higher authority of sometimes murky Supreme Court guides, an awareness of the limited authority in which courts must operate to justify their untouchable independence, and the belief that reason must lead to result, not vice versa.⁸⁸

85. *See id.* at 118-27.

86. *See id.* at 202.

87. *See id.* at 222-23.

88. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 598 (1994) (quoting *THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND* 298 (Hershel Shanks, ed., 1968)).