

Would All The Laws But One Be Close Enough For Government Work?

WILLIAM H. REHNQUIST
ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME
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EDWARD ZWICK
THE SEIGE
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PRESIDENTIAL proclamations are really dull. President Bush in 1992 proclaimed National Safe Boating Week (did he read that one before he went barreling around Walker's Point in his speed boat?), National Recycling Day, National Scleroderma Awareness Month (it takes a whole month to learn how to pronounce it), Education and Sharing Day, and that all persons engaged in insurrection in the City and County of Los Angeles, and other districts of California, were to cease and desist therefrom and to disperse and retire peaceably forthwith.¹

President Bush's proclamation of May Day

1992 wasn't the first time the chief executive had read someone the Riot Act, now found at 10 U.S.C. 331 et seq. That would be when the other George rode out to put down the whiskey boys, boisterous western Pennsylvanians who had some fun when the revenuers came to collect an excise on their favorite beverage. Maybe Washington was thinking about that ride when he said, "Government is not reason, it is not eloquence – it is force."² Or maybe that thought came to him when he'd just gotten through paying his own whiskey tax.

President Washington's statement, and his and President Bush's proclamations, provoke

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¹ Proclamation 6427 of May 1, 1992, 57 Fed. Reg. 19359 (1992). Actually, President Bush, understated Yalie that he was and is, didn't refer to insurrection. He used the more polite but equally constitutionally authentic phrase "domestic violence." Compare U.S. Const., Art. I, sec. 8, para. 15 (Congress shall have power to provide for calling forth the militia to "suppress Insurrections"), with *id.*, Art. IV, sec. 4 (United States shall protect each State against "domestic Violence").

² George Seldes, *THE GREAT QUOTATIONS* 727 (1966).

the question whether America's well-loved government of laws is therefore also a government of force, and if so, what that implies. Who better to give us some historical context on this than the living symbol of the rule of law (or not), the Chief Justice of the United States? Chief Justice Rehnquist's latest book, *All the Laws But One*, is about civil liberties in wartime.³ The title alludes to President Lincoln's famous confession-and-avoidance in his special message to Congress of July 4, 1861. Lincoln suggested that his suspension of habeas corpus had been lawful, but then just in case asked whether he was to allow "all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated." P. 38.

The book is about locking people up without trial, and hanging them without judicial proceedings, because there is a war on. For those who want Hollywood rather than dry print made drier by its Rehnquistian tone, there's *The Siege*, starring Denzel Washington, Bruce Willis, and Annette Bening. It's about locking people up without trial, and shooting them without judicial proceedings, because there's a war against terrorism on. In Brooklyn.

After a brief description of the book and an even briefer description of the movie, I'll recruit them (mainly the book) for the light they shed on two problems concerning the relation between law and force. Because of the Chief Justice's understandable reluctance to venture a lot of opinions, I will discuss the implications of his book more than I will enter into controversy with it: he has not left many

hand-holds for those who would grapple with him on interpretive or policy questions. As for fruitful controversy with *The Siege*, well, it has some good explosions.

The Chief Justice's book deals with the three great wars that have been fought under the Constitution. It is concerned mainly with the Civil War, but also considers the First and Second World Wars. Each time, the book discusses the threat faced by the United States government and the extraordinary steps that were taken to meet it. The parts about the Civil War, which comprise the bulk of *All the Laws But One*, focus on the Lincoln Administration's end-runs around the judiciary, including especially the *Merryman* episode at the very beginning of the war, and the use of military commissions to try domestic opponents of the war, a process that gave rise (once the war was over) to *Ex Parte Milligan*. *Merryman* arose when Maryland saboteurs were making it difficult for troops from the North to get through to Washington. John Merryman, believed to be such a saboteur, was seized and held by the military. Chief Justice Taney, apparently sitting on the Circuit Court, ordered Merryman released, reasoning that only Congress and not the President could suspend the privilege of the writ of habeas corpus, and Congress had not yet done so. In one of the most remarkable events in American history, President Lincoln ignored the Chief Justice's order.⁴ *Milligan*, described a little more below, arose out of the trial before a military tribunal of northern civilians accused of aiding the southern war effort.

³ We know that because its subtitle is *Civil Liberties in Wartime*. The Chief Justice, a subtle man, also knows when to be obvious.

⁴ Chief Justice Taney's opinion appears in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

Those wild events in Baltimore gave rise, not only to a famous lawcase, but to *Maryland, My Maryland*, the Free State's official song. Whether the more openly anti-Union verses are still sung at official meetings I don't know. Those verses may have unpleasant associations, but if so Maryland is in the best of company. To this day the Seal of the Commonwealth of Virginia bears the motto *sic semper tyrannis*, words that figure elsewhere in Rehnquist's narrative.

For the First World War the focus is on the Wilson Administration's attacks on domestic subversives through control over the mails and Espionage Act prosecutions. As the Chief Justice explains, Congress and the President made a systematic attempt to suppress dissent through ordinary legislation enforced by the ordinary courts. Obstruction of the war effort was made a crime, and statements criticizing the draft were treated as obstruction. Anti-government materials were also kept out of the mails, providing an early example of the problem with the right-privilege distinction. Most of the part about the Second World War is concerned with the Japanese exclusion cases, most famously *Hirabayashi* and *Korematsu*.⁵ They arose from presidential and congressional action that first imposed a curfew on Japanese immigrants and Americans of Japanese descent living on the West Coast,

and then forcibly relocated them to concentration camps.

Chief Justice Rehnquist manages to make these exciting stories exciting despite his prose, which is as flat as his voice (and that, for the few readers who completely checked out of the impeachment process, is as flat as Kansas). He follows standard historical sources, pausing for biographical sketches when important proper names appear.⁶ This is popular history, not the scholarship Professor Rehnquist would have written had the Chief Justice continued in graduate school rather than turning to law. As I mentioned, he keeps the editorializing to a minimum (even though he's faced his last Senate confirmation hearing), but there is a little bit of commentary from time to time.

The Siege is this issue gone Hollywood.⁷ Terrorist bombs rock New York, sucking in

5 See *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 319 U.S. 432 (1943).

6 The potted biography of Secretary of War Edwin M. Stanton, for example, discusses Stanton's role as counsel for Pennsylvania in that memorable legal collision, *Pennsylvania v. The Wheeling and Belmont Bridge Company*, 54 U.S. 518 (1852). Pennsylvania sued the bridge company in the Supreme Court's original jurisdiction (it's fun being a State of the Union), arguing that the Wheeling Bridge, which spanned the Ohio River at Wheeling, Virginia, was a nuisance because it obstructed interstate commerce: "The bridge's central span was ninety feet above the low-water mark, not sufficiently high to allow clearance by the tall smokestacks on the large river steamers." P. 54. Traffic from Pittsburgh was blocked. The Court's conclusion in Pennsylvania's favor "was no doubt influenced by Stanton's dramatic gesture in chartering a river steamer and having it run full tilt under the bridge, only to have its eighty-five-foot-high smokestack sheared off by the span." Pp. 54-55. If it doesn't fit you must acquit. (Congress, captured by friends of the Wheeling Bridge, then passed a statute declaring it to be lawful, and for good measure making it a post road.)

As close students of the Supreme Court know, the Chief Justice loves not only history but geography. No surprise, then, that his discussion of southern sympathizers in the Midwest pulls in a discussion of settlement patterns which in turn pulls in a discussion of the geologic past: "The Midwest ... had been scoured by glaciers, which carried with them precious topsoil. The northern portions of Indiana, Illinois, and Ohio, as a result, were extraordinarily fertile and suitable for agriculture. But the glaciers had penetrated only sporadically into the southern belt of the region, and these parts were markedly less fertile, less suitable for farming." P. 78.

As is also known to aficionados, Rehnquist is fascinated with the weather. Thus Chapter 1 begins with a quotation from Carl Sandburg's Lincoln biography that describes the cold drizzle as Lincoln left Springfield for Washington to begin his term as President. P. 3.

7 Maybe everything in history happens twice, the first time as tragedy, the second time in the movies. As the Chief Justice describes, in early 1861 federal troops were trying to keep order in Baltimore while President Lincoln was trying to keep Maryland and the other border and Upper South States in the Union, and disunionists, including Baltimore's Mayor, were trying just as hard to take Mary-

the FBI's anti-terrorism crew led by Denzel Washington, plus shadowy American intelligence forces personified by Annette Bening, and eventually plus elements of the United States Army led by Bruce Willis. The siege proper takes place when Willis' forces impose martial law in Brooklyn, conducting house-to-house searches and detaining Arab-looking young men in outdoor jails. Eventually the forces of ordinary law (the FBI) get the job done and the Army, after some outrageously abusive action, backs down.

From these rich texts I will take two issues, the first legal and the second practical. On the legal side, the Chief Justice's book shows us that a separation of powers problem that often seems quite technical and relatively unimportant has as a sub-problem one of the most amazing and frightening gaps in American constitutional law. The sub-problem is this: sometimes the most basic substantive and structural principles that protect life and liberty are suspended, and no one knows exactly

when and no one can explain why. Those principles have to do with the distinction between judicial and executive power or, to return to the theme here, law and force.

Law and force are both separated and united in the trinitarian structure of the American national government. It is one government in three branches. The judicial branch, we have it on eminent authority, has neither force nor will but only judgment. It is the least dangerous, goes that authority, because purse and sword are in other hands.⁸ We know who holds the sword of this community: that's the officer who calls on insurrectionists to disperse and retire peaceably to their homes. Judiciary and executive, law and force.⁹

Like presidential proclamations, the inquiry into the respective roles of the judicial and executive powers can be pretty dull. The constitutional separation of executive and judicial power has given rise to some of the Supreme Court's most notoriously arcane,

land out. The Mayor and his cohorts blew up a railroad bridge so that militia units from New York and New England could not make it to the capital.

American tragedy in the making. About 136 years later, I had a brush with what looked awfully similar. In March 1998, like some of those Union troops, I was trying to get from New York to Washington, D.C. My cab's way across the Brooklyn Bridge was blocked, not by rebels, but by serious-looking people wearing the uniform of the United States Army and carrying rifles. This troubled me – as a schoolboy I was of course taught about the subordination of the military to the civil power – but once we made it to LaGuardia my more immediate fear of air travel displaced the fear that the military had staged a coup, or that the President had decided to help Mayor Giuliani get really, really tough with those squeegee men. We landed at Reagan National Airport without incident and when I didn't see more troops than usual in the streets of Washington I put the episode out of my mind.

That was until I saw a trailer for *The Siege*, in which Brooklyn is occupied by Army units commanded by Bruce Willis. Then I understood. Probably they needed the Bridge for an establishing shot, Ebbetts Field being gone.

⁸ Federalist 78.

⁹ I don't mean to push this rhetorical dichotomy too far, if only because good rhetoric can be made of the point that the executive is to combine force and law. The President, not the judiciary, is enjoined by the Constitution to take care that the laws be faithfully executed, U.S. Const., Art. II, sec. 3, and he alone must make the distinctive promise to preserve, protect, and defend the supreme law, the Constitution, *id.* at sec. 1, para. 8. Indeed, *The Siege* concludes with a confrontation between two sets of the President's subordinates, the Army and the FBI, with one standing for force and the other for law. In strictness we should say that the courts are all law, whereas the executive must mediate the two.

tedious, and unedifying decisions. These include *Murray's Lessee v. Hoboken Land & Improvement Co.*,¹⁰ which has a neat name and amusing underlying facts – the Collector for the Port of New York, himself with the neat name of Samuel Swartwout, mixed the people's funds with his own and sailed off with the boodle – but which muddied an already turgid doctrinal pool, and the more recent *Commodities Futures Trading Commission v. Schor*,¹¹ in which the majority more or less threw up its hands and announced that one of the Constitution's main architectural features was to be understood through, of course, a balancing test. *Murray's Lessee* was about distress warrants, a non-judicial process through which the government summarily seizes the assets of its defalcating agents, like Swartwout. *Schor* was about whether the Commodities Futures Trading Commission, which is not a court, may have limited decisional finality when a commodities broker who has been brought before the Commission by a complaining customer brings a state-law counterclaim on the grounds that the customer not only has not been defrauded but has not paid the bill. Strong jurists blanch, students' eyes glaze over, and professors reach for the nearest source of caffeine when the problem of adjudication by executive agencies comes up. Bor-ing.

Except when the executive agency is a military commission and President Lincoln has empowered it to try and punish the disloyal, which includes people who say that President Lincoln is acting like a military dictator by, for example, appointing military commissions to try and punish people who accuse him of acting like a military dictator. Most of the Chief Justice's book is concerned with the Civil War, and the core of that section discusses the work of and legal issues connected with those com-

missions. They operated in loyal States, and they tried and punished civilians. Some of the civilians brought before those commissions had actually conspired to attack federal facilities in aid of the Confederate cause, treason plain enough. Others, like Indiana lawyer Lambdin Milligan, were alleged to have belonged to doubtful organizations and to have criticized the government in harsh terms. Milligan, along with two others, was convicted by a military tribunal, not a state or federal court sitting with a jury, and sentenced to be hanged.

The Supreme Court came on the battlefield after the war was over (this time literally) to shoot the wounded (that part's metaphorical). In *Ex parte Milligan* the Court held that military tribunals could not exercise criminal jurisdiction over civilians in a loyal State where the civilian courts were open.¹² In so holding the majority rejected a statutory ground of decision suggested by four concurring Justices, one of whom was Chief Justice Chase.

Milligan's broad principle may seem plainly correct. If there is any exclusive sphere for the judicial power, surely it is in dealing with criminal charges, where life and liberty are at stake and impartiality is crucial. Moreover, Article III states and the Sixth Amendment reaffirms that defendants are entitled to a jury. Milligan had none, and that was no accident as far as Lincoln was concerned; a jury might have acquitted. Judicial proceedings must have been required in his case.

Or maybe not. Milligan was sentenced to be hanged. If there is one proposition that the Constitution does not stand for, it is that the Army may not kill someone without getting the go-ahead from a court. To be sure, Milligan was not shot during battle. He had been

¹⁰ 59 U.S. 272 (1855).

¹¹ 478 U.S. 833 (1986).

¹² 71 U.S. 2 (1866).

arrested and at the time of his trial and sentence posed no serious threat to the security of the United States. Neither does a captured enemy soldier who is charged with violating the law of war by, for example, conducting military operations while not in uniform. But spies are hanged, sometimes summarily and sometimes after military trial, without benefit of the Article III judiciary. As Chief Justice Rehnquist explains, Richard Quirin was hanged in 1942. Quirin was a German saboteur, arrested by the FBI, brought before a military tribunal, and condemned to death under the law of war.

Although President Roosevelt had ordered that the captured Germans were to have no access to the civilian courts, they sought relief through habeas corpus and the Supreme Court convened in special term to decide their fate. Theirs was the usual fate of spies caught red-handed, and in affirming it the Court limited, or depending on how you count overruled, *Milligan*. The Court said that habeas corpus was not available to review the legality of Quirin's detention, or that of the other prisoners.¹³ One of those other prisoners, Herbert Haupt, claimed to be a citizen of the United States; the Court found it unnecessary to decide whether he really was. Haupt's possible American citizenship didn't bother the Court, nor did the fact that all relevant events had taken place in the United States, the territory of which was much more secure from enemy invasion than it had been when *Milligan* was arrested.

It is hard to find much legal difference between *Milligan's* situation and Haupt's. *Milligan* was, and the Court said Haupt may have been, an American citizen charged with

working for the enemy. Haupt was guilty and *Milligan* probably innocent, but that shouldn't have anything to do with the question of who decides guilt or innocence. Indeed, as the Chief Justice explains, the back-tracking from *Milligan* began while the events that gave rise to it were still too recent to be called history. Those members of the Lincoln assassination conspiracy who were taken alive were tried by a military commission, and some of them were hanged. Dr. Samuel Mudd (yes, his name was) got off comparatively easily, with life imprisonment at hard labor. A few years into his sentence he sought habeas relief, which was denied by the lower federal court. Dr. Mudd, the court reasoned, was no different from an enemy spy: Washington had been a fortified capital and the conspirators' target was the Commander in Chief. So *Milligan* was not on point. Except that *Milligan* had been charged with essentially the same thing, only on less striking facts.¹⁴

These cases leave us with this quandary: The executive, and in particular the military, may enforce the law of war, which includes rules that regulate individual conduct and impose severe penalties for their violation; the law of war, that is to say, is very much like the criminal law. In doing so the executive may perform a function normally reserved to courts, and under the Constitution normally reserved to courts staffed with life-tenured judges pursuant to Article III. That function is conclusive decision concerning guilt or innocence and, when guilt is found, the alteration of people's legal rights. The latter includes the ultimate alteration, deprivation of the right to life, as a result of which execution is not murder (at least in the eyes of the law).

¹³ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁴ As the Chief Justice notes, the Mudd story concludes with heroism and clemency. During his confinement on the Florida prison island of Dry Tortugas (imagine being confined at hard labor to a place called Dry Tortugas), Dr. Mudd worked bravely to stem a yellow fever epidemic. In recognition of that service President Johnson, shortly before leaving office, pardoned Mudd. P. 166. For some reason the Constitution places the sword of justice and the oil of mercy in the same hands.

But the Constitution nowhere mentions the law of war, and in particular nowhere suggests that the law of war has anything to do with the respective spheres of the executive and judicial powers. That did not keep counsel in *Milligan* and *Quirin* from assuming that under some circumstances the law of war applied to the exclusion of the ordinary courts. And it is very unlikely that any but a handful of lawyers and judges would disagree. The tricky part comes in identifying the circumstances.

How can it possibly be that the Constitution contains this implicit exception to the separation of powers, an exception worth *Quirin's* life and *Mudd's* liberty? One possible explanation is simply *inter arma silent leges*. There are special rules for war, which should surprise no one. Yes, but *expresio unius est exclusio alterius*. The Constitution has some special rules for war and rebellion, including a limitation on the power to suspend habeas corpus. It doesn't have any rule authorizing Congress to suspend the distinction between executive and judicial power. Where does the exception for the law of war come from?

Good question. And where do the exceptions for distress warrants, CFTC counterclaims, and the National Labor Relations Board come from? That we have no good answer to the latter questions was the conclusion, derived with nihilistic relish, of Justice White's classic dissent the last time the Court came close to even trying to produce a system-

atic answer.¹⁵ The really neat point is that the achingly dull *Northern Pipeline* problem is the sword-sharp *Milligan-Quirin* problem.

Producing a solution would take at least a twelve-month and a day, and that's too long for a book review.¹⁶

The preceding was about a tightly wound legal knot. *All the Laws But One* and *The Siege* are more concerned with a practical question: in times of crisis, what should be the respective roles of law and force? To what extent should even grave problems be addressed with the same mechanisms of civilian law enforcement and the ordinary judiciary that are used to solve routine problems of compliance with the law, and to what extent should the glove come off the mailed fist, or something like that?

As the Chief Justice documents, Presidents Lincoln, Wilson, and Roosevelt took different approaches to the enemy within, and in particular to the role of the courts in dealing with internal security threats. Lincoln generally went around the courts, suspending habeas corpus to cut off their remedial power and replacing them with military commissions. Wilson did the opposite, encouraging Congress to pass and then strengthen a stiff Espionage Act under which essentially harmless, loud-mouthed buffoons were prosecuted before a judiciary that proved happy to oblige.¹⁷ Roosevelt took some from Column A and some from Column B. Martial law prevailed for a while in Hawaii, and *Quirin* and

15 *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (White, J., dissenting).

16 LOVE'S LABORS LOST, Act V, scene 2, ll. 867-872. The footnote version of the textual point is that I have a wonderful solution to this problem, but it will not fit in this margin.

17 When the Supreme Court says the following about your clients, hope the check has already cleared: These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe.

Abrams v. United States, 250 U.S. 616, 623 (1919).

company hanged. FDR, however, mainly followed his Democratic predecessor, recruiting Congress and the judiciary to help out. Thus *Hirabayashi* and *Korematsu* were criminal prosecutions brought in the ordinary courts, unlike *Milligan*, which was a habeas corpus proceeding brought in the civil courts to challenge executive detention pursuant to military judgment.

Whether and how to rely simply on military power, even if channeled through military courts, is a tricky question indeed. On one side is Bruce Willis' best moment in *The Siege*. Willis' character, General Devereaux, is present when high government officials discuss the wisdom of turning the Brooklyn terrorism problem over to the military, to be commanded by Devereaux. He reminds the policy makers about how armies work, explaining what will happen if he and his comrades are given this assignment: "We will hunt down the enemy and we will kill the enemy." No mention of due process, and when the order is given over his objection General Devereaux does exactly what he suggested any general officer would, seizing Brooklyn and showing just what power looks like.

Maybe the military should be left out as much as possible and internal security matters, even in time of war or terrorist crisis, left to civilian law enforcers (like Denzel Washington) and the ordinary courts. That approach, however, has a downside pointed out by Chief Justice Rehnquist's own former boss, the formidable Justice Robert H. Jackson, dissenting in *Korematsu*. Justice Jackson's position was, characteristically, strange but based on powerful insight. He said that while no court should seek to release *Korematsu* on habeas corpus, neither should any court enter a judgment of conviction against him for failing to comply with an order under which he could not be in his own home. "A military

commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case."¹⁸

One interesting thing about the Chief Justice's book is that it somewhat undercuts Justice Jackson's point, leaving us to look elsewhere for the disadvantages of the mailed fist. Jackson was a lower-case legal realist, someone with a powerful sense of how institutions actually work. He understood that the courts, for all the counter-majoritarian hype, are likely to behave exactly as they behaved in *Abrams* and *Korematsu*, sacrificing both the alien anarchists and innocent citizens to the demands of national security. Judicial precedents set in wartime, he feared, would have mischievous consequences when things had settled down.

The good news is that American courts seem generally to have out-realisted Justice Jackson, no easy thing to do. Once the crisis is over the courts seem to realize that their wartime precedents are good for wartime. Far from having generative power, *Korematsu* and *Hirabayashi* are by-words for bad judging. *Abrams* is not followed and *Milligan* is celebrated. This is not to say that the courts are honest about what they have done; they continue to maintain that we have one law in peace and in war. Nor is it to say that they will not bend with the times again. Of course they will. But what they seem unlikely to do is consistently apply in peacetime principles they announce in wartime. The peacetime *Milligan* decision may seem to have been undercut by the wartime *Quirin* decision, but I am confident that if Congress declared war on drugs and authorized trial of civilians by courts martial, *Milligan* would be back again. Unless,

18 *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

that is, the country were really, really, really up in arms about drugs.

The Chief Justice, a student of Jackson's who has seen subsequent history, sees this point clearly. The book's concluding chapter is titled "Inter Arma Silent Leges" (no question mark). "One would think it likely, of course, that a Roman legal maxim which originated two millennia ago in a legal system with no written constitution, would have only the

most general application to America. But the fact that the phrase *Inter arma silent leges* is quoted by modern writers suggests that it has validity at least in a descriptive way." P. 224. When there's a war on the courts will do what has to be done, but they generally won't let that affect how they behave when we've all gone back to normal.

Reassuring, if maybe a little bit cynical, that's the Chief Justice. 