

CIVIL RIGHTS AND CIVIL LIBERTIES IN A CRISIS: A FEW PAGES OF HISTORY

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I welcome the opportunity to participate in this Tribute issue, honoring Judge Procter Hug of the United States Court of Appeals for the Ninth Circuit. I know Judge Hug only slightly but I respect him and his contributions from the bench greatly. If I might be permitted to go off on a professor's tangent, however, I would like to comment on events too recent to be called history and too profound to be understood yet.

Justice Oliver Wendell Holmes, Jr. once observed that "a page of history is worth a volume of logic."¹ Academics like myself are obliged to take the long view, to profess that the ends do not always justify the means, to speak truth to power. We serve the purpose of the canary in a mine: we are supposed to be the first ones to notice the untoward effects of the momentum of events. Just a few pages of constitutional history is enough to caution us to hold dear to our birthright of freedom at a time like this or else, in the phrase *de jour*, "the terrorists win."

In his recent book on the subject,² Chief Justice Rehnquist quotes the Roman legal maxim "*Inter arma silent leges*," or "In time of war the laws are silent," to describe how war powers trump individual civil liberties.³ It is but a truism that the powers of the government are greatest when the Nation is at war. All of our wartime Commanders-in-Chief have conducted themselves based on this belief. For its part, the Supreme Court has acquiesced in draconian measures undertaken by the Executive that would not be permitted during peacetime. The lasting problem is that, when the crisis is over and things get back to normal, we tend to hold onto the crisis constitution instead of returning to the normal constitution. With each such crisis, our basic civil rights and civil liberties shrink.⁴

The Founders and the Framers of the Constitution seemed to have expected emergency crises and appropriate responses. "It is vain to oppose constitutional barriers to the impulse of self-preservation," James Madison

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¹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (unless otherwise particularly cited, the general historical account in this essay is based upon this book).

³ BLACK'S LAW DICTIONARY 728 (5th ed. 1979) ("... It applies as between the state and its external enemies; and also in cases of civil disturbance where extrajudicial force may supersede the ordinary process of law.").

⁴ Robert Higgs, *In the Name of Emergency*, *REASON*, JULY 1987, at 36.

insisted in *Federalist Paper No. 41*, "It is worse than vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."⁵

In *Federalist Paper No. 23*, Alexander Hamilton went even farther than Madison to insist that the textual powers of national defense "ought to exist without limitation" if only to be equal to any and every potential threat or danger.⁶

Thomas Jefferson was generally mistrustful of claims of broad governmental powers and strictly construed textual powers in the Constitution. Nonetheless, Jefferson recognized a higher duty for government and its leaders:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁷

Abraham Lincoln adhered to Jefferson's sense of higher duty with an historic vengeance. In the early days of the Civil War, Chief Justice Taney rebuked Lincoln in ruling that only Congress could suspend the writ of habeas corpus, and further directed that the President be delivered a copy of the order requiring the release of a civilian being held in military custody.⁸ Lincoln responded with a special message to Congress to invoke emergency powers equal to the immediate danger of rebellion: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"⁹ The military authorities basically ignored Taney's order but later saw fit to release the prisoner. Congress, for its constitutional part, promptly passed a law authorizing the President to suspend the Great Writ.

Indeed, civil liberties were among the greatest casualties of the Civil War. Under martial law, Union Generals ordered summary arrests for draft resisters and conducted widescale, warrantless searches and arrests of Southern sympathizers and opponents of the war. They then held military trials – under pain of banishment, indefinite imprisonment, or death – charging the indicted with whatever they deemed to be "disloyal practices," including making political speeches and writing newspaper editorials against the military rule.

Suspending the writ of habeas corpus in the civilian courts made all this possible without any of the protections afforded by the Bill of Rights. What about the rule of law and the law of the Constitution? Justice Holmes, a thrice-

⁵ James Madison, *Federalist Paper No. 41*, in *THE FEDERALIST PAPERS* 257 (Clinton Rossiter ed., 1961).

⁶ Alexander Hamilton, *Federalist Paper No. 23*, in *THE FEDERALIST PAPERS* 153 (Clinton Rossiter ed. 1961) ("These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of the means which may be necessary to satisfy them.")

⁷ Letter from Thomas Jefferson to J.B. Colvin, Sept. 20, 1810, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 606, 606-07 (Adrienne Koch & William Peden eds., 1944).

⁸ *Ex parte Merryman*, 17 Fed. Cases 144 (Circuit Court 1861).

⁹ *Message to Congress in Special Session of July 4, 1861*, in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 430 (Roy P. Basler ed., 1953).

wounded Civil War veteran, would later sum it up this way: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.”¹⁰ The Civil War experience became “a sort of benchmark for future wartime presidents”¹¹ – it marks the outer limits of the government’s powers in a crisis.

Fast forward several decades to the criminalization of dissident speech during World War I and be reminded that those soaring free speech opinions by Justice Holmes were dissents – the Supreme Court majority consistently ruled for the government. The Wilson administration demonstrated the wartime instinct to suppress criticism and could rely on congressional statutes for support. The federal courts were more prominent by then, of course. There were no trials of civilians in military courts and the writ of *habeas corpus* was not suspended. However, in the aftermath of the War, the Attorney General conducted the notorious “Palmer Raids” – the wholesale arrests, interrogations, and deportations that were in response only to isolated incidents and the perceived threats of anarchists and criminal syndicalists. For its part, the Supreme Court upheld the Espionage Act of 1917 and the Sedition Act of 1918, and most of the Palmer convictions.

During World War II – the last declared war – the government conducted a program of internment of Japanese-Americans on the West Coast. Attorney General Francis Biddle’s observation about FDR is perhaps representative of modern presidential attitudes: “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.”¹²

Thus the pages of history tell this story: in past wars, the Executive Branch has prosecuted the war abroad and has had its way with civil liberties at home, while the Supreme Court has merely stood by, for the most part, perhaps disapproving the most grievous and least justified domestic transgressions, but even then usually only after-the-fact.

At least that is what has happened during constitutionally declared wars.¹³ That has been our experience under the war powers contained in the text and original concept of the framers and available to the government at a time of grave threat and serious emergency.¹⁴ Whether those same powers attend the newly declared “war on terrorism” remains to be seen.

Civil libertarians and judge-worshippers alike may be chagrined at the role of the Justices to join ranks and march in step. In the infamous but unanimous initial decision upholding the military program to evacuate and relocate Japa-

¹⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹¹ REHNQUIST, *supra* note 2, at 171.

¹² *Id.* at 191-92.

¹³ REHNQUIST, *supra* note 2, at 218.

¹⁴ *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425-26 (1934) (“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved While emergency does not create power, emergency may furnish the occasion for the exercise of power.”).

nese-Americans during World War II – joined in by such civil libertarians as Justices Black and Douglas – Chief Justice Stone quoted his predecessor Charles Evans Hughes but sounded more like Alexander Hamilton: “The war power of the national government is ‘the power to wage war successfully’ It extends to every matter and activity so related to war as substantially to affect its conduct and progress.”¹⁵

Have things changed? Is America different today? Does the Constitution mean something different?

I myself have an abiding faith in American Constitutionalism. The consensus is that the *Japanese Internment Cases*¹⁶ have been overruled in the court of history, save for the important principle expressed in those opinions that governmental racial classifications should be reviewed with the highest and strictest judicial scrutiny. The actual convictions in the lead cases have been vacated and set aside in extraordinary judicial proceedings, and Congress has enacted a formal governmental apology and reparations program for survivors. The contemporary historical understanding of the episode is well-established and equally well-accepted – that the government officials gave in to popular ignorance and racist sentiments and affirmatively exaggerated the threats to security to mislead the courts willfully and materially. Moreover, the Supreme Court’s performance during that period has been recorded in the pages of history as one of its most craven moments.¹⁷

President Lincoln had only executive powers to depend upon, but the presidents during the world wars followed congressional authorizations. As a result, the powers of Presidents Wilson and Roosevelt were maximized.¹⁸ The

¹⁵ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (upholding a criminal conviction for violating a military curfew):

The war power of the national government is ‘the power to wage war successfully.’ See Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 239. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgement and discretion in determining the nature and extent of the threatened injury or danger and the selection of the means for resisting it Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Id. See also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a criminal conviction for violating an order of exclusion from a declared military area); *Ex parte Endo*, 323 U.S. 283 (1944) (holding that the statute ratifying the military evacuation and relocation program did not authorize an overly prolonged detention of a citizen whose loyalty was conceded).

¹⁶ See *supra* note 15.

¹⁷ See generally JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (PETER IRONS ED., 1989); PETER IRONS, JUSTICES AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES (1983).

¹⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-37 (1952) (Jackson, J., concurring).

current Congress seems eager to grant President Bush any power he deems appropriate for the war on terrorism.¹⁹ However, the role of the federal courts – especially that of the Supreme Court – has greatly expanded in jurisdiction, prestige, and influence since World War II.²⁰ This has coincided with developments in the theory and precedents of civil rights and civil liberties, such that there is more tolerance for dissent and for dissenters in the courts and in the popular culture today. The contemporary Supreme Court certainly has demonstrated an institutional hubris when it comes to judicial review.²¹

Civil rights and civil liberties do not exist in the abstract or in a political vacuum. Chief Justice Rehnquist – who might be called on to evaluate the constitutionality of the government's response to the threat of terrorism – has taken a pragmatic view when writing as historian:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order – in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.²²

The worry and concern of a civil libertarian is that the pendulum is not allowed to swing too far or become permanently misaligned against individual freedom and liberty. In a poll taken by the Pew Charitable Trust just after September 11th,²³ a majority of Americans (55%) said the average person will have to give up some freedoms to prevent further attacks. And slightly more Americans (39%) worry that the government will not go far enough than the number (34%) who worry that the government might go too far to restrict civil liberties and civil rights. In a follow-up poll one year after the September 11th attacks, public support for some anti-terrorism measures depended in part whether the respondent was asked if the government should monitor telephone calls and e-mails of unspecified individuals (33% said yes) or if they were asked if they wanted their own calls and e-mails monitored (22% said yes). At the same time, enthusiasm for a national identity card system declined from 70% to 59%. Solid majorities support airline pilots to carry guns (68%) and airport personnel to do extra checks on passengers who fit a Middle Eastern profile (59%).

The worry from history is that government power gets ratcheted up under a "crisis Constitution" and we never seem to manage to return to the normal Constitution.²⁴ Some of our freedom is lost forever. The traditional answer among constitutionalists is to depend on the courts to perform their role as

¹⁹ P.L. 107-40, 2001 S. J. Res. 23 (Sept. 18, 2001) (Authorization for the Use of Military Force).

²⁰ *But see Military Order: Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism* (White House Nov. 13, 2001).

²¹ *See Bush v. Gore*, 531 U.S. 98 (2000).

²² REHNQUIST, *supra* note 2, at 222-23.

²³ Pew Charitable Trust, available at <http://www.pewtrusts.com>.

²⁴ Robert Higgs, *Does the Constitution Protect Rights in Times of National Crisis?*, REASON, July 1987, at 36.

counter-majoritarian institutions. The Article III judiciary is supposed to stand athwart the *zeitgeist*, to protect and preserve our fundamental liberties from the passions of the majority. We celebrate the great tradition of the Third Branch by singling out Judge Procter Hug for deserved honor in this Tribute. Indeed, Judge Hug's singular commitment to civil rights and civil liberties has admirably exemplified that tradition. Again, I appreciate the opportunity to participate in this *festschrift* honoring a judges' judge.

But if we understand our constitutional past to be our constitutional prologue, there is reason to be apprehensive about our civil rights and civil liberties at a time like the present. In the past, the Constitution has been merely a parchment barrier. Justice Cardozo wisely reminded us, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."²⁵ My hope, our hope, must ultimately be in ourselves.

Like Judge Hug, Judge Learned Hand before him understood this essential reality – that individual freedom is yoked with individual responsibility. Judge Hand, who was the Nestor of his day, delivered an inspired speech in the critical World War II year 1944 on what it means to be an American. His words bring home the challenge facing us at this our hour of crisis:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²⁶

September 11th has changed us to be sure. As the one-year anniversary of those horrific events comes to bear, all America reflects on the changes that have taken place and will yet take place in the nation's psyche. But in the midst of such political evolution and angst, we must strive to be true to our constitutional faith. "We the People" must "provide for the common defence" while at the same time remaining vigilant to "secure the Blessings of Liberty to ourselves and our posterity." Thomas Jefferson warned: "A society that will trade a little liberty for a little order will deserve neither and will lose both."²⁷ I hope and pray he was not talking of my generation.

²⁵ BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

²⁶ Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY – PAPERS AND ADDRESSES OF LEARNED HAND 189-90* (Irving Dilliard ed., 3d ed. 1974).

²⁷ See *Williams v. Garrett*, 722 F. Supp. 254, 256 (W.D. Va. 1989).