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AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES

*Thomas E. Baker**

In his recent book on the subject, 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.¹ It is a truism that the powers of the government are greatest during war. Certainly, warmaking Presidents have acted upon this belief. The Supreme Court usually has acquiesced to draconian measures by the Executive that it would have not permitted during peacetime.

The founders and the framers of the Constitution seemed to have expected as much. "It is vain to oppose constitutional barriers to the impulse of self-preservation," James Madison insisted, "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." Alexander Hamilton characteristically went 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.

Thomas Jefferson recognized a higher duty of government and 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.

Abraham Lincoln adhered to Jefferson's sense of higher duty with a vengeance. In the early days of the Civil War, Chief Justice Taney rebuked Lincoln to rule 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. 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

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¹ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

violated?" Congress 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 whatever they deemed to be “disloyal practices” including making political speeches and writing newspaper editorials against the military rule.

Fastforward 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 Wilson administration followed the wartime instinct to suppress criticism. In the aftermath, the Attorney General conducted the notorious “Palmer Raids”—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, the Sedition Act 1918 and most of those 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 toward taking such measures: “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.”

Civil libertarians and judge-worshippers alike should be chagrined at how the Justices joined ranks and marched in step. In the infamous but unanimous initial decision upholding the military program to evacuate and relocate Japanese-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 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.”

Thus history tells 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.

Have things changed? Is America different today? Does the Constitution mean something different? Do these same powers attend the newly declared “war on terrorism”? “We the People” must answer these questions for ourselves in our own time and in our own way.

Chief Justice Rehnquist—who may be called upon to provide some answers to these questions—concludes on a somewhat hopeful note:

There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors. But even though this be so, there is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.²

² REHNQUIST, *supra*, at 224-25

