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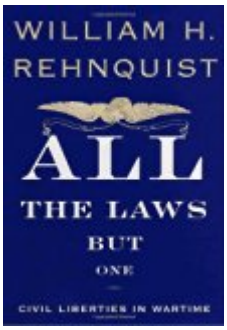

William H. Rehnquist. *All The Laws But One: Civil Liberties In Wartime.* New York: Random House, 1998. xiii + 254 pp. $26.00, cloth, ISBN 978-0-679-44661-3.

Reviewed by Jon Roland

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This is a treatise on the conflict between constitutional compliance and the doctrine of necessity, particularly during wartime. The title is from Lincoln's message of July 4, 1861, to Congress, justifying his proclamation of April 27, 1861, suspending the Habeas Corpus Act adopted by the First Congress, and following his defiance of the order of Chief Justice Taney in Ex Parte Merriman. Lincoln argued that although the qualified prohibition of suspension of habeas corpus in Article I Section 9 Clause 2 was grouped with the powers and prohibitions of Congress, the Constitution was silent concerning which branch could legally exercise the implied authority to suspend it, and he asserted that in an emergency when Congress was not in session the president had that authority. He said that the writ of habeas corpus, which had been fashioned "with such extreme tenderness of the citizens' liberty," if strictly enforced as interpreted by Justice Taney, would allow "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated." The original charges against Merriman were for treason and other offenses for involvement in the burning of bridges north of and leading to Baltimore, Maryland, but Merriman was arrested by federal troops, charged in a military court, and held at Fort McHenry. Due to delays by Taney and others in prosecuting the case against him, Merriman was released on bail in the summer of 1861 and never tried. The remaining members of Congress later adopted an act authorizing the president to suspend habeas corpus under certain circumstances.

From Lincoln's suspension of habeas corpus, the author then goes on to examine other events and issues involving the suspension of civil liberties in the Civil War, in World War I, and in World War II, including the Japanese internments and the establishment of martial law in Hawaii for three years. Besides Ex Parte Merriman, he examines the Prize cases of 1863, the cases of Ex Parte Vallandigham (1 Wallace 243, Feb. 1864), Ex Parte Milligan (4 Wall. 2, 1866), Ex Parte Mudd (17 F. Cas. 954, S.D. Fla, 1968), and prosecution of the alleged Lincoln assassination conspirators, U.S. v. Hudson, Pierce v. U.S., Abrams v. U.S., Schenk, Hirabayashi, Korematsu, and Endo, among others.

The key issue involved here was perhaps best stated by David Dudley Field, a counsel for the defense in the Milligan case, noted for his efforts to codify the common law, quoted by the author and here excerpted:

The source and origin of the power to establish military commissions, if it exists at all, is in the assumed power to declare what is called martial law. I say what is called martial law; for, strictly speaking, 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. And, when we speak of it, let us speak of it as abolishing all law, and substituting the will of the military commander.... There is a maxim of our law which gives the reason and the extent of the power: 'Necessitas quod cogit defendit.' [Necessity justifies what it compels.]

It is always hazardous to read between the lines of a scholarly work, especially if the author is a tenured academic who can be presumed to have the freedom to make explicit all that he has to say. But when, as in this case, the author is Chief Justice of the U.S. Supreme Court, it is unavoidable. The author's readable exposition reads like a suspense novel, leading to the final chapter, the title of which is an ancient legal maxim: "Inter Arma Silent Leges" [In time of war the laws are silent]. The message is an ominous one: in times of crisis, such as a war, the Constitution has been violated, and is likely to be violated in such situations in the future.

The author's final paragraph is worth quoting:

An entirely separate and important philosophical question is whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable. In one sense, this question is very largely academic. 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.

This book confines itself to periods of wartime but does not consider the excesses of the Cold War, and there is a clear implication that a similar book could have been written for periods of economic and other crises. One of the problems this situational compliance brings is that court decisions made under such conditions can establish precedents that continue to impair civil liberties long after the crisis is over. None of the precedents the author cites have been overturned, even if most of them are now disdained by commentators. And most of the precedents established during periods of economic distress are seldom disdained at all, despite our current long-term period of prosperity, but have become part of the catechism of the deification of the state. The Cold War is over, but many of the practices and precedents established thereunder continue unabated.

What Justice Rehnquist seems to be saying to his readers is that when there are strong political forces threatening their civil liberties they can't count on the courts to protect them or to restrain the executive and legislative branches from doing whatever they might want to do. Without a strong public outcry, most such violations will never obtain justice, nor will constitutional compliance be maintained. On the other hand, his final paragraph may signal an intent to begin to move toward a jurisprudence of original understanding, now that the Cold War is over, and that U.S. v Lopez may have been a shot across the bow of the

present New Deal Establishment. What the courts need to proceed further is public support.

This book is written for a general audience, so the author avoids the legal jargon that might repel laypersons. Recognizing that, I still have the criticism that not all of the cases mentioned have complete citations in the endnotes, allowing scholars and laypersons alike to do further research on them. The book would also have been better if the year of events had been stated more often. To provide only the month and date for events spanning several years can be confusing.

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