

ALL THE THEMES BUT ONE

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^{*} Associate Professor, University of North Carolina School of Law. I dedicate this essay to the Nisei draft resisters who have reached out a hand of friendship across the years that separate us to help me learn their important story: Gene Akutsu, Frank Emi, Kazuo Hiromoto, Tak Hoshizaki, Mits Koshiyama, Yosh Kuromiya, Jack Tono, Jimi Yamaichi, Frank Yamasaki, and especially George Nozawa. Thanks to Lou Bilionis, Leslie Branden-Muller, Robert Burt, Joe Kennedy, Jim Muller, and John Orth for their helpful comments.

Driving southwest from Powell, Wyoming, with the kernel-shaped summit of Heart Mountain above you and the geysers of Yellowstone ahead, you would not know that you were passing the site of a concentration camp.¹ The rugged beauty of the place is so arresting that it is easy to miss a small metal plaque by the side of the road:

HEART MOUNTAIN RELOCATION CENTER

1942-1945

During the World War II years, Heart Mountain Relocation Center was located on a 740-acre tract of land across the Burlington Railroad right-of-way westward from where you stand facing this monument and Heart Mountain itself

Eleven thousand people of Japanese ancestry from the three west-coast states were loosely confined by the United States government in the Center for about three years. They lived in barracks as singles, or as families, according to their marital status.

The camp was equipped with modern waterworks and sewer system and a modern hospital and dental clinic staffed with people from the ranks of the evacuees. First rate schooling was provided for the children of the evacuees through the high school grades.

This monument was erected, 1969, by the American Legion Posts of Heart Mountain and Powell, Wyoming, and their auxiliaries, in the interest of international peace and understanding, and as a memorial to the men and women who have died in the service of our country.²

What the plaque says is true, in a very limited sense. About eleven thousand people of Japanese descent--some seven thousand of them U.S. citizens--did spend up to three years at the Heart Mountain Relocation Center ("Heart Mountain") during the war. They did have toilets and running water, medical care, and schools.

But the plaque also omits much that is true. "Loose confinement" meant imprisonment behind barbed wire, with search lights and U.S. Army guards authorized to arrest or even shoot anyone leaving without a pass. The camp's barracks were long chains of unfurnished single rooms with common open ceilings that carried unwelcome noises, odors, and rumors from family to family. The barracks offered only slatted wood and tar paper against the raw Wyoming winter. Residents had to brave dust, heat, snow, and wind to enjoy the benefits of the camp's "modern waterworks and sewer system," which often froze during the wintertime. The "modern

¹ I use the term "concentration camp" to describe the World War II internment centers built to house the ethnically Japanese because that is what they were called at the time. See, for example, Ted Nakashima, Concentration Camp: U.S. Style, *New Republic* 822 (June 15, 1942). I also use the term because it is descriptively accurate: these were places where people considered dangerous to the state were "concentrated" for total control. I do not mean to compare the American camps to the Nazi death camps in Europe.

² Historical Marker on Wyo Hwy 14A at Mile 13 (photocopy on file with U Chi L Rev).

hospital and dental clinic" was the site of two employee walkouts over inadequate pay, substandard working conditions, and disrespect from the camp's Caucasian administrators.³ The "first rate schooling," which did not exist at all for the first several months of the internees' time at Heart Mountain, never fully overcame its struggles with high faculty turnover, high student absenteeism, inadequate heating, and insufficient supplies.⁴

Which was the real Heart Mountain: the one that the sign describes, or the one that it conceals? It was probably both of these, and more--a harsh and degrading penitentiary from the perspective of many, an unwelcome but tolerable change of scenery for others, perhaps a safe haven from the pressures of war for a few. In short, there are many stories of Heart Mountain. But only one of them made it onto the American Legion's roadside plaque.

The story on the marker ultimately says more about the organization that placed it than the place it describes. In this way, the plaque neatly illustrates one of the dangers of writing history. In telling a story, the historian must sift the important from the unimportant, the typical from the atypical, and the interesting from the uninteresting. It is often not just the tale but the viewpoint of the person telling it that shakes out in the sifting.

Chief Justice William H. Rehnquist recently published an engaging volume of legal history entitled *All the Laws but One*. His topic is the history of civil liberties during wartime, which calls upon him to address, among other things, the World War II internment of Japanese-Americans at places like Heart Mountain. The Chief Justice is unquestionably a good storyteller, and certainly a more balanced one than the writer of the legend on the roadside plaque at Heart Mountain. Yet his viewpoint shines through. It is instantly recognizable to any student of Rehnquist's judicial philosophy--majoritarian, deferential to claims of social order, and unimaginative in its conception of individual liberty.⁵ War, Rehnquist argues, is hell--not just for soldiers on the battlefield, but for civil liberties at home. It has been so in every declared war in this nation's history, he says, and it will undoubtedly always be so.

Perhaps. The stories that Rehnquist tells certainly do make wartime seem an invariably harrowing time for claims of personal freedom. But as with the plaque at Heart Mountain, the Chief Justice does not tell all of the stories of civil liberty in wartime. Moreover, some of the stories he neglects come from the Civil War and from the Japanese-American internment--the very periods and events that the Chief Justice examines. These stories may not impeach his ultimate conclusion that presidents and judges are least motivated to view civil rights broadly during periods of national military crisis. But they do reveal a rival tradition to the one he describes. A complete history of civil liberties during wartime ought to take this rival tradition into account.

³ See Louis Fiset, *The Heart Mountain Hospital Strike of June 24, 1943*, in Mike Mackey, ed, *Remembering Heart Mountain* 101 (Western History Publications 1998).

⁴ See Mamoru Inouye, *Heart Mountain High School, 1942-1945*, in Mackey, ed, *Remembering Heart Mountain* 75, 80-82 (cited in note 3); Lane Ryo Hirabayashi, *The Impact of Incarceration on the Education of Nisei Schoolchildren*, in Roger Daniels, Sandra C. Taylor and Harry H.L. Kitano, eds, *Japanese Americans: From Relocation to Redress* 44, 44-45 (Utah 1986).

⁵ See Robert E. Riggs and Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 *Akron L Rev* 555, 597-99 (1983) (concluding that Rehnquist reads the Constitution narrowly to avoid derogating the principle of majority rule); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, [90 *Harv L Rev* 293, 294 \(1976\)](#).

I.

"(T)he Constitution has not greatly bothered any wartime President."⁶ So wrote former Attorney General Francis Biddle in 1962, reflecting on the ease with which his former boss, President Franklin Delano Roosevelt, signed the executive order evacuating more than one hundred thousand ethnically Japanese people from the west coast after the Japanese attack on Pearl Harbor. Alone among Roosevelt's top men, Biddle opposed the evacuation. Roosevelt, on the other hand, did not seem "much concerned with the gravity or implications of this step."⁷ The "constitutional difficulty" of the evacuation simply did not "plague() him."⁸

For Chief Justice Rehnquist, Biddle's conclusion that presidents do not lose sleep over the Constitution during wartime is "a remarkably perceptive observation" (p 191). Rehnquist pairs this observation about presidents with one of his own about judges: they are "reluctan(t) . . . to decide a case against the government on an issue of national security during a war" (p 221). By the end of *All the Laws but One*, these two observations mature into something much closer to prescriptions. The nation, Rehnquist concludes, is ultimately more secure when wartime presidents worry about war rather than law and judges accede by avoiding or narrowing their readings of the Bill of Rights until the crisis is over.

The stories that lead the Chief Justice to this conclusion are fascinating, colorful, and generally well told. His book begins with the Civil War, and his first tale is that of newly elected President Abraham Lincoln's suspensions of the writ of habeas corpus. Lincoln emerges from these early chapters as an isolated figure in a vulnerable federal enclave sandwiched between the open rebellion of Virginia to the south and the simmering hostility of Maryland to the north. Efforts to reinforce the capital ran into trouble in Baltimore: a group of Union recruits was trapped by angry anti-Union mobs as the soldiers made a cross-town connection from one train station to another; the ensuing riots left four Union soldiers and twelve civilians dead (pp 20-21). After these riots, the governor of Maryland ordered the railroad bridges north of Baltimore burned in order to prevent more federal troops from reaching the capital (p 21). Lincoln responded to this challenge on April 27, 1861--just seven weeks into his first term in office--by authorizing the commanding general of the U.S. Army to suspend the writ of habeas corpus wherever "necessary . . . for the public safety" along any military line between Philadelphia and Washington (p 25).

The suspension of the writ would soon expand. In October of 1861, it was enlarged to include any place between Bangor, Maine and Washington (p 48). In August of 1862, the suspension became nationwide (p 60). More frightening developments followed. In September of 1862, Lincoln proclaimed that any person obstructing military enlistment or "guilty of any disloyal practice affording aid and comfort to rebels" would be subject to "martial law and liable to trial and punishment by courts-martial or military commissions" (p 60). Thus, not only were suspects unable to seek review in civil court through habeas corpus, but they were subject to trial

⁶ Francis Biddle, *In Brief Authority* 219 (Doubleday 1962).

⁷ *Id.*

⁸ *Id.*

by military procedure for offenses unknown to the civil law. Alongside the civilian justice system now stood an extra-constitutional system of freewheeling military "justice" of Abraham Lincoln's creation.

The lawfulness of this system would be tested in court. Shortly after the first suspension of habeas corpus along the north-south rail lines, a Maryland resident named John Merryman was arrested and detained by Union troops for helping to destroy the railroad bridges. His attorney quickly applied for a writ of habeas corpus from Chief Justice Roger Taney, but federal military officials refused to comply with Taney's order to produce the prisoner. Taney responded by filing an opinion declaring Lincoln's suspension of habeas corpus unconstitutional and holding that military officials lacked power to subject civilians to military arrest or trial. Rehnquist notes that Lincoln ignored Taney's order and refused to release Merryman (p 38). Surely, Lincoln would later argue, a wartime president cannot follow Taney's advice and allow "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated" (p 38).

A better known defendant, former Ohio congressman Clement Vallandigham, met a similar fate. Military authorities arrested him in the middle of the night of May 5, 1863, for violating a military order forbidding the "declar(ation of) sympathies with the enemy" (p 64). His offense was a speech criticizing that very order and urging the unseating of "King Lincoln" (pp 65- 66). The next day he was tried and convicted by a military commission and sentenced to imprisonment for the duration of the war (p 67). Lincoln ultimately changed the sentence to banishment to the Confederacy. But Lincoln defended the government's treatment of Vallandigham--ably, in Rehnquist's estimation--by asking, simply, "Must I shoot a simple-minded soldier boy who deserts while I must not touch a hair on the head of a wily agitator who induces him to desert" (p 73)?⁹

The last and best known of the judicial challenges to the Union's use of martial law against civilians was the military trial that produced the Supreme Court's 1866 decision in *Ex Parte Milligan*.¹⁰ This set of events captures Rehnquist's attention most, as he devotes more than one quarter of his book to the Milligan tale (pp 75-137). In some respects, Lambdin Milligan's story resembled Clement Vallandigham's. Milligan, a well known lawyer and political figure, was one of seven Indiana men who were arrested by military authorities in September of 1864 and charged with military (rather than civilian) offenses. The allegations had the conspirators planning a violent uprising that would free eight thousand Confederate prisoners of war in Union jails, seize Union munitions, abduct and depose the Republican governor of Indiana, and disrupt the 1864 Democratic National Convention in Chicago. Rehnquist notes that the stakes in Milligan were high--much higher than they would have been had the federal government proceeded against these (civilian) conspirators in civilian courts. Not only were the military charges much broader than existing federal statutes would have permitted, but the punishment authorized in the military setting was death rather than the six to ten year terms of imprisonment available under federal statutes (pp 86-88).

⁹ For a complete and insightful telling of the Vallandigham story, see Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 *Wm & Mary Bill of Rts J* 105 (1998).

¹⁰ [71 US \(4 Wall\) 2 \(1866\)](#)

Rehnquist reviews the evidence that military prosecutors offered against Milligan and his codefendants, and concludes that the military had a strong case against only one of Milligan's codefendants (pp 90-101).¹¹ Yet the tribunal convicted all of the defendants on almost all of the charges and sentenced three of them--including Milligan--to death (p 102). Reviewing the cases after Lincoln's assassination, Andrew Johnson commuted the death sentences to life at hard labor (p 104). But Milligan and his colleagues pressed on in their defense, filing habeas petitions contesting the lawfulness of their trial and imprisonment by military authority.

The task of determining the constitutionality of military trials for civilians thus fell to the Supreme Court--specifically, to Abraham Lincoln's old confidant and colleague from their Illinois circuit-riding days, Justice David Davis.¹² The majority opinion in Milligan resoundingly rejected the government's defense of Lincoln's wartime regime of military justice for civilians. Not surprisingly, four of the five votes for this position came from justices appointed by Democrats. But the fifth vote--and the majority opinion itself--came from none other than David Davis. Davis wrote that the government violated a number of constitutional provisions in trying and convicting Milligan and his alleged coconspirators before a military tribunal. First, it violated Article III by permitting judges without life tenure to exercise judicial power in a court not created by Congress. Second, it violated Milligan's Sixth Amendment right to trial by jury. Third, it exceeded whatever power it had to suspend the writ of habeas corpus by trying Milligan on military charges at a time when the civil courts were open. In sweeping language, Davis held that martial law could only be imposed and applied against civilians when an actual invasion or insurrection "effectually closes the courts and deposes the civil administration."¹³ "No doctrine," he wrote, "involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."¹⁴

Chief Justice Rehnquist clearly disapproves of Milligan. The decision, he argues, was recklessly broad, reaching out to decide an important constitutional question about the scope of congressional power that the case did not present (p 134). Although Congress had not attempted to pass a law providing for military trials of civilians while the civil courts were open, Davis so broadly condemned martial law that his opinion seemed to forbid Congress from ever trying to do so.¹⁵

Picking up his pace noticeably, Rehnquist next moves to World War I (pp 170- 83). He

¹¹ The codefendant against whom the case was strongest fled to Canada before trial (pp 83-84).

¹² After managing Lincoln's successful bid for the Presidency in 1860, Davis returned to his Illinois law practice until Lincoln appointed him to the Supreme Court in August of 1862. Davis was Lincoln's third Supreme Court appointment; by the time of the Milligan decision in 1866, two more Lincoln appointees would join those three and the four Justices appointed by Lincoln's Democratic predecessors.

¹³ [71 US \(4 Wall\) at 127.](#)

¹⁴ *Id* at 121.

¹⁵ This precedent, Rehnquist notes, became a problem eighty years later when military authorities captured and tried a group of German soldiers who had landed in Long Island and Florida with the intention of destroying war industries in the United States (pp 136-37). See [United States v Quirin, 317 US 1, 45-46 \(1942\)](#) (distinguishing Milligan by noting that, unlike the defendants in the present case, Milligan was not an enemy belligerent). President Roosevelt ordered that the defendants be tried by a military commission. Naturally, their lawyers relied on Milligan's expansive pronouncements in contesting the proceedings, and the Court had to do some fancy footwork in order to distinguish Milligan and uphold their death sentences.

focuses on the passage of the Espionage Act in June of 1917, a law that broadly criminalized statements tending to hinder the war effort or the draft and that gave Postmaster General Albert Burleson the authority to close the mails to publications or correspondence urging treason, insurrection, or forcible resistance to any law of the United States (p 173). It was, of course, prosecutions under the Espionage Act, and the short-lived amendments to it known as the Sedition Act, that prompted Judge Learned Hand and Justices Oliver Wendell Holmes and Louis Dembitz Brandeis to begin experimenting with a First Amendment theory that would protect subversive speakers. Rehnquist briefly describes these prosecutions, noting that Hand, Holmes, and Brandeis were unsuccessful in their efforts to galvanize judicial resistance to the speech suppression of the political branches (pp 174-82).

Rehnquist notes some important differences between the government's rights-denying strategies during the Civil War and World War I (pp 182-83). Chief among these differences was the involvement of Congress. Whereas the suppression of individual rights was entirely an executive branch affair during the Civil War, Congress took the lead during World War I, giving the executive broad powers to punish and silence subversive speakers. Rehnquist observes that the period saw no trials of civilians before military courts and increased involvement of the civil courts in the adjudication of individual rights claims (p 183). Still, the bottom line for civil liberties was bleak. Rehnquist concludes that "(t)he Wilson administration, during the First World War, proved to have the same instinctive desire to suppress harsh criticism of the war effort as had the Lincoln administration during the Civil War" (p 182).

By the time of World War II, Rehnquist is able to report a "generally ameliorative trend" in government protection of individual liberties during wartime (p 221). "(T)here was no overt effort by the government to suppress public criticism of government war policy," he reports, partly because World War II was a more popular war than was World War I, but also partly because "the First Amendment had come into its own" (p 221).

There was, however, one big blemish on the government's civil liberties record during the Second World War: the forced evacuation from the west coast of about 110,000 people of Japanese descent. Rehnquist devotes two full chapters of his book to this story.¹⁶ According to Rehnquist, the government decided to evacuate and intern the Japanese and Japanese-Americans living on the west coast for essentially military reasons (pp 187-88). West coast communities were in a panic after the bombing of Pearl Harbor, fearing direct attacks on their cities or even a full-scale invasion by Japan. Fanning these fears, from December 1941 through the late spring of 1942, the war in the Pacific went horribly for the United States and its allies. Island nations around the Pacific Rim fell to Japanese control like so many dominoes; two of the Aleutian Islands came under assault and were briefly occupied. And in February of 1942, a Japanese submarine shelled an oil installation near Santa Barbara. In this climate, Rehnquist reports, west coast "(r)esidents became fearful of the ethnic Japanese among them," and their local, state, and federal representatives began demanding evacuation (p 188).

Rehnquist notes in passing that there were "nativists" in California who "disliked (the ethnic Japanese) and wished to remove them as neighbors or as business competitors" (p 206). Indeed, in the three or four decades that the Japanese immigrants (the "Issei") and their

¹⁶ Somewhat confusingly, Rehnquist refers to the evacuation in the plural, as the "Japanese internments" (p 184).

American-born children (the "Nisei") had been in this country, many had become so successful in farming that they had aroused deep economic resentment in their more established Caucasian competitors.¹⁷ Rehnquist, however, downplays the impact of racial hatred and economic jealousy on the relocation decision. He pointedly refuses to attribute the base motives of some segments of the civilian population to the west coast military leaders, arguing that military leaders "did not at first propose relocation." Rather, according to Rehnquist, "those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war" (p 206).¹⁸

The actual decision to evacuate was quick. On February 11, 1942, Secretary of War Henry L. Stimson tried to get an appointment with President Roosevelt to ask him if he would be willing to authorize the removal of both the Issei and the Nisei (collectively the "Nikkei") from the west coast. Roosevelt was too busy for anything but a telephone call, but he enthusiastically told Stimson to "go ahead on the line that (Stimson him)self thought the best" (pp 190-91). Eight days later, Roosevelt signed Executive Order 9066, which authorized General John DeWitt, commanding officer of the Western Defense Command,¹⁹ to remove all ethnic Japanese from any military zone under his command (p 192). Congress promptly passed laws making it a crime to violate any regulation that DeWitt might impose to implement Roosevelt's order.²⁰

The evacuation was promptly underway. The Nikkei of California, Washington, and Oregon were first placed under curfew. Then they were moved to so-called "assembly centers," primarily fairgrounds and racetracks, where they spent the summer of 1942. In the early fall, the government began moving them to camps that had been hurriedly set up (or were still under construction) in the California interior and in Arizona, Arkansas, Colorado, Idaho, Utah, and Wyoming. Rehnquist's description of the internment experience itself is brief: "There was no physical brutality, but there were certainly severe hardships-- physical removal from the place where one lived, often forced sale of houses and businesses, and harsh living conditions in the spartan quarters of the internment centers" (p 192). He also notes that "(a)s the war progressed, some restrictions were relaxed" (p 192). Some Nisei volunteered into the U.S. Army and fought in Europe; other internees applied for and received permission to relocate to the eastern and midwestern United States. Rehnquist reports that all remaining internees were released by the beginning of 1945--three years after their evacuation--when the Supreme Court held that the continued detention of loyal citizens against their will exceeded the scope of Executive Order 9066 and its implementing statutes.²¹

¹⁷ Commission on Wartime Relocation and Internment of Civilians ("Commission on Wartime Relocation"), *Personal Justice Denied* 42-43, 69-70 (Civil Liberties Public Education Fund 1997).

¹⁸ Here Chief Justice Rehnquist parts company with the federal Commission on Wartime Relocation and Internment of Civilians, an agency created by Congress in 1980 to investigate the Japanese-American internment and make recommendations on a possible redress effort. The Commission made clear in its final report to Congress that "(t)he War Department and the President, through the press and politicians with the aid of general DeWitt, (were) sold a bill of goods" by supporters of evacuation who managed to dress up their economic envies and ethnic hatreds in the garb of military necessity. *Id.* at 91. See also *id.* at 6-8. Chief Justice Rehnquist cites the Commission's report in his bibliography (p 238) but was evidently unimpressed by its conclusions.

¹⁹ The Western Defense Command included the states of Washington, Oregon, California, and Arizona (p 188).

²⁰ Pub L No 77-503, 56 Stat 173 (1942).

²¹ Ex Parte [Endo, 323 US 283, 300-02 \(1944\)](#).

Not surprisingly, it is the Supreme Court's response to the Japanese- American internment that most attracts Rehnquist's attention. He describes in detail the three cases in which the Supreme Court dealt with challenges to the legality of the government's actions (pp 192-202). The first of these cases, *United States v Hirabayashi*,²² was a challenge to both the curfew and the subsequent relocation. The case came to the Court in the late spring of 1943, when the war in the Pacific was still far from won. The Court declined to reach Hirabayashi's claim that the relocation was unconstitutional, but it upheld the curfew by an 8-0 vote (p 198). A year later the Court heard *Korematsu v United States*²³ and *Ex Parte Endo*,²⁴ both of which attacked the legality of the relocation. The results were mixed. In *Korematsu*, the Court, although much more divided than it had been in *Hirabayashi*, upheld the relocation against constitutional attack. But the Court agreed with Mitsuye Endo that she was entitled to be released from confinement at the Topaz Relocation Center in Utah: the government stipulated that she was a loyal citizen, and neither Executive Order 9066 nor its implementing statutes in any way authorized the incarceration of the loyal (pp 200- 02).

Rehnquist acknowledges that modern opinion is highly critical both of the internment and of the Court's response to it (pp 203-11). His own view is that "some of th(e) criticism is well justified, and some not" (p 203). He rejects outright the broad criticism that the entire evacuation and relocation program was born of racist suspicion and economic jealousy. To this claim, he says simply, "The Court's answer . . . seems satisfactory--those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war" (p 206).

Rehnquist is troubled, however, by the narrower objection that the Nisei were treated differently from other American citizens (pp 206-09). He is persuaded that the government presented enough evidence of a risk of subversion by disloyal Nisei to justify limited restrictions on them, but in his estimation the evidence was not sufficient to justify the wholesale exclusion of the Nisei from the west coast. Even here, however, Rehnquist defends the *Korematsu* Court's rejection of the very claim that troubles him. He points out that *Korematsu* came ten years before the Supreme Court discovered an unwritten equal protection component in the Due Process Clause of the Fifth Amendment²⁵ (p 208). "Had this doctrine been the law ten years earlier," Rehnquist offers, "the Supreme Court might have found it easier to reach a different result in *Hirabayashi* and *Korematsu*" (p 208).

What does not trouble Rehnquist, however, is the evacuation and internment of the Issei-- the generation of Japanese immigrants who had come to this country around the turn of the century and who had been forbidden by law from becoming American citizens. The Issei "were both by tradition and by law in a quite different category" from their citizen children, the Nisei (p 209). "Distinctions that might not be permissible between classes of citizens must be viewed otherwise when drawn between classes of aliens" (p 210). Because of the genuine fears of Japanese attack and invasion of the west coast, and because the Issei were so concentrated in that

²² [320 US 81 \(1943\)](#).

²³ [323 US 214 \(1944\)](#).

²⁴ [323 US 283 \(1944\)](#).

²⁵ See [Bolling v Sharpe, 347 US 497, 500 \(1954\)](#) (invalidating federal statute segregating District of Columbia schools).

area, Rehnquist argues the government was justified in removing them.

There was, of course, one place in the United States where the concentration of Nikkei was even greater than in western California, Oregon, and Washington. That place was Hawaii, then a territory of the United States, containing perhaps the most strategically significant American military installation in the entire Pacific theater, the naval base at Pearl Harbor. Rehnquist fails to note the irony that the Nikkei of Hawaii were never evacuated from the island and never interned en masse. He does, however, devote a brief chapter to the imposition of martial law in Hawaii during the war (pp 212-17). Within a few hours of the Japanese attack on Pearl Harbor, the territorial governor signed an order placing the territory under martial law and suspending the writ of habeas corpus. He also asked the commanding general of the Military Department of Hawaii to exercise all governing power-- executive, legislative, and judicial. The general agreed, and Hawaii functioned under martial law for the next three years.

During these years, tensions flared between military and civilian authority over the writ of habeas corpus. In the best known of the conflicts, military authorities arrested and tried two civilians for a 1942 embezzlement and a 1944 assault that had nothing whatsoever to do with the military. A federal district judge granted their habeas corpus petitions, concluding that there was no military necessity for military trials of civilians for nonmilitary offenses. The government appealed, but it did not get the broad authorization of martial law it was seeking. In *Duncan v Kahanamoku*,²⁶ decided after the end of World War II, the Supreme Court held that Congress intended to permit martial law only as militarily necessary. The Court saw no military necessity to try a common brawler and a garden variety embezzler before military tribunals. This ruling, says Rehnquist, was unquestionably correct: *Hirabayashi* and *Korematsu* (both of which were highly deferential to military and executive judgments constraining civil liberty) were not controlling because the Court decided them during wartime, when judicial authority to countermand the orders of military officials is at its nadir (p 217).

That is the last of Chief Justice Rehnquist's tales of civil liberties during wartime. The Korean Conflict and, most importantly, the war in Vietnam go unexamined. Rehnquist is clear about his reasons for limiting his analysis to the Civil War, World War I, and World War II: those were the nation's declared wars (or their equivalent, in the case of the Civil War). "Without question," Rehnquist asserts, "the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war" (p 218). Rehnquist does not seem especially troubled by this conclusion. That, for him, is just the way things are: "(T)here is some truth to the maxim *Inter arma silent leges*, at least in the purely descriptive sense"²⁷ (p 221). But there is also truth to the maxim for Rehnquist in the prescriptive sense. Abraham Lincoln was right to suspend the writ of habeas corpus along the north- south rail line in 1861 without "weigh(ing) the pros and cons as to whether he was authorized by the Constitution to do this before acting" (p 223).

But what of the courts? It is their special duty to see to it that the political branches do not exceed the confines of the Constitution and intrude on individual liberty. Yet time and again Rehnquist sees the courts sitting on the sidelines while the war rages, "reluctan(t) to decide a case against the government on an issue of national security during a war" (p 221). "Is this

²⁶ [327 US 304 \(1946\)](#).

²⁷ The phrase means "when arms speak, the laws are silent."

reluctance a necessary evil," Rehnquist asks, "or is it actually a desirable phenomenon" (p 221)?

For Rehnquist, it is desirable for two reasons. First, he argues, whether we like it or not, courts do hesitate to decide cases against the government during wartime. "If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war" (p 222)? Second, and far more importantly, the scope of our civil liberties contracts during wartime. This is the most striking claim in the entire book. Rehnquist reminds us that "(i)t is not simply 'liberty' but civil liberty of which we speak" (p 222). The word "civil" derives from the Latin word for "citizen"--"a person owing allegiance to some organized government, and not a person in an idealized 'state of nature' free from any governmental restraint" (p 222). Civil liberty, properly understood, is a delicate point of balance between an individual's interest in freedom and the government's interest in order. "In wartime," Rehnquist concludes, "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" (p 222).

To be sure, the Chief Justice assures the reader of his hope and expectation that courts will continue to pay more careful attention to "the basis for the government's claims of necessity as a basis for curtailing civil liberty" (p 225), saying that such scrutiny is both "desirable and likely" (p 225). But it is not clear from Rehnquist's account why this is the case. Debating the desirability of court supervision is, for Rehnquist, "very largely academic" (p 224). He simply sees "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" (p 224).

II.

A. A Book More About Order than Liberty

The subtitle to *All the Laws but One*, "Civil Liberties in Wartime," promises a tale about freedoms--frail and beleaguered freedoms, perhaps, but freedoms. That is not what the book delivers. Chief Justice Rehnquist is not especially interested in freedoms, at least where those are understood as rights enjoyed by individuals "free from any governmental restraint" (p 222). He quotes Learned Hand approvingly: "A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few" (p 222).²⁸ Individual liberties seem to capture the Chief Justice's attention only in relation to, and through the lens of, the government's countervailing claims for social order.

The result is a book in which claims for order, and the government officials asserting and adjudicating them, become the protagonists. In the book's two hundred twenty-five pages, there is exactly one sentence that even attempts to describe what the experience of losing one's freedoms during wartime might be like. It is a sentence summing up the experience of Japanese-American internees: "There was no physical brutality, but there were certainly severe hardships--physical removal from the place where one lived, often forced sale of houses and businesses, and

²⁸ Quoting Learned Hand, *The Spirit of Liberty*, in Irving Dilliard, ed, *The Spirit of Liberty* 189, 190 (Knopf 1953).

harsh living conditions in the spartan quarters of the internment centers" (p 192).

That single sentence reveals its author's perspective on the events and his bias towards order. It is hardly the case that "no physical brutality" was ever directed against internees. No physical brutality was needed to force the west coast Nikkei from their homes, but only because the evacuees were remarkably compliant with General DeWitt's evacuation order. Once the evacuees settled in for indefinite incarceration in desolate camps the situation changed. In the wake of riots late in 1943, internees in the Tule Lake Relocation Center in northeastern California saw weeks of frightening physical brutality; internees were beaten, kicked, dragged from place to place, and had tear gas fired at them.²⁹ Riots at Manzanar Relocation Center resulted in the shootings of at least a dozen Nisei,³⁰ and on another occasion, an army guard shot and injured a Nisei who wandered outside Manzanar's boundaries in search of scrap wood to make shelves for his barracks.³¹ Many Issei who were held at Department of Justice internment camps for enemy aliens were threatened and beaten; some were shot and killed.³² In short, while there was no physical brutality that even remotely resembled the treatment of European Jews and others in Nazi Germany's death camps, the Relocation Centers certainly did see their share of physical brutality of a less systematic sort.

Chief Justice Rehnquist downplays the scope of rights deprivation in other parts of the book as well. For example, in contrasting World War II to earlier wars, he asserts that "(d)uring World War II, there was no overt effort by the government to suppress public criticism of government war policy" (p 221). This assertion would surely come as a surprise to James Omura, the editor of the Denver newspaper Rocky Shampo, who was arrested and tried for conspiring to counsel others to evade the draft after publishing editorials critical of the federal government's January 1944 decision to open the military draft to the Nisei internees.³³ Rehnquist's denial also misses the experiences of the America First Committee, who found themselves under grand jury investigation for opposing American involvement in the war before Pearl Harbor; of David Dellinger and his antiwar organization People's Peace Now, who were harassed and investigated for opposing the war; of the black press, which found itself threatened by J. Edgar Hoover and Attorney General Francis Biddle for publishing articles critical of the war effort; of William Dudley Pelley, leader of the Silver Shirts, who was tried and convicted in 1942 for making anti-government and pro-Nazi statements in the Silver Shirt newspaper;³⁴ and of the thirty defendants charged in *United States v McWilliams* with conspiring to undermine the loyalty and morale of the U.S. armed forces by publishing anti-Roosevelt, antiwar, and pro-Nazi publications.³⁵

²⁹ See Commission on Wartime Relocation, *Personal Justice Denied* at 210-11 (cited in note 17).

³⁰ See Page Smith, *Democracy on Trial* 262-64 (Simon & Schuster 1995).

³¹ See Michi Weglyn, *Years of Infamy* 91 (Morrow 1976).

³² See Tetsuden Kashima, *American Mistreatment of Internees during World War II: Enemy Alien Japanese*, in Daniels, Taylor and Kitano, eds, *Japanese Americans* 52, 53 (cited in note 4).

³³ See [Okamoto v United States, 152 F2d 905, 906 \(10th Cir 1945\)](#). His sole contribution to the alleged conspiracy was the opinions he voiced in his column. A federal jury acquitted him, but his newspaper career was over. For more information on these events, see the fascinating oral history of James Omura in Arthur Hansen, ed, *Japanese American World War II Evacuation Oral History Project, Part IV: Resisters* 131-335 (K G Saur 1995).

³⁴ See [United States v Pelley, 132 F2d 170 \(7th Cir 1942\)](#)

³⁵ These matters are all described in Margaret A. Blanchard's excellent *Revolutionary Sparks* 189-229 (Oxford 1992).

Even more surprisingly (because the story can be found right in the pages of the U.S. Reports), Rehnquist's denial of government suppression of antiwar rhetoric during World War II ignores the experience of Elmer Hartzel, convicted under the 1917 Espionage Act for anonymously mailing to military leaders his writings "depict(ing) the war as a gross betrayal of America, denounc(ing) our English allies and the Jews and assail(ing) in reckless terms the integrity and patriotism of the President of the United States."³⁶ Even though the Court said that it was aware "of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal,"³⁷ the Court nonetheless reversed Hartzel's conviction for insufficient evidence. Hartzel's story would have made an excellent addition to *All the Laws but One*, both because it demonstrates the official suppression of dissent during World War II that Rehnquist claims was almost entirely absent, and because it shows a court (indeed, his Court) doing what he believes courts rightly shy away from doing-- namely, taking an expansive view of individual liberty during wartime. Yet Hartzel's story, like the stories of so many of those targeted for exercising their freedoms during wartime, is absent from the book.

While the Chief Justice slights the stories of rights deprivation during World War II, he often reports the government's claims for order with an indulgence that strains credulity. He reports that a commission appointed by Roosevelt and headed by Justice Owen Roberts concluded that the attack on Pearl Harbor was facilitated by "Japanese spies on the Island of Oahu,"³⁸ some affiliated with the Japanese consul and some not (p 189). He mentions that as many as ten thousand Nisei had been sent to Japan for some or all of their education, that many of the other Nisei attended after-school Japanese cultural and language programs in this country, and that all Nisei were Japanese citizens under Japanese law (p 207). He also notes that at the time of the decision to evacuate, the Japanese military had been enjoying great success in the Pacific (pp 195-96) and had even managed to shell an oil installation near Santa Barbara, California (p 197).³⁹ Finally, he observes that the west coast of the United States had a high concentration of sensitive military and military supply installations (p 197). For Rehnquist, these facts justified the wholesale evacuation and internment of the Issei, and would have justified narrower prohibitions against the Nisei.⁴⁰ And he rejects the notion that the military, in lobbying for and ordering the evacuation and internment, was motivated by ethnic prejudice or was giving voice to nativist economic jealousies, noting that the military decisionmakers, "after all, did not at first propose relocation" (p 206).

In justifying much of the internment, the Chief Justice fails to note that there was not a

³⁶ [Hartzel v United States, 322 US 680, 683 \(1944\).](#)

³⁷ [Id at 689.](#)

³⁸ Attack upon Pearl Harbor by Japanese Armed Forces, § Doc No 159, 77th Cong, 2d Sess 12 (1942).

³⁹ Several additional shellings of the west coast would occur after the decision to evacuate had been made (p 197).

But those, of course, could not have supported the evacuation, because they had not yet occurred

⁴⁰ While he disapproves of the wholesale evacuation and internment of the Nisei, he believes that the Supreme Court lacked the doctrinal tool it needed to strike down their treatment as unconstitutional--namely, the equal protection component to the Fifth Amendment's Due Process Clause that was still ten years from discovery (pp 207-08). See text accompanying note 25. This defense of the Court is unpersuasive. If the Court could discover an equal protection component to the Due Process Clause in a 1954 case involving black schoolchildren, [Bolling v Sharpe, 347 US 497 \(1954\)](#), it could surely have discovered the same right in a 1944 case involving Japanese prisoners in internment camps.

single documented incident of subversion by any Issei or Nisei on the United States mainland. Even General DeWitt was aware of this awkward fact when, on February 14, 1942, he formally recommended to Secretary of War Henry Stimson that all west coast Nikkei be evacuated. He wrote that "the Japanese race is an enemy race and while many second and third generation Japanese born on American soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."⁴¹ From this, DeWitt argued,

It . . . follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.⁴²

Could DeWitt have made any plainer his reliance on the old stereotype of the sneaky, inscrutable Oriental? The Japanese and Japanese-Americans simply could not win: their loyalty became the proof of their disloyalty. DeWitt was just not interested in the argument that all, most, or even some of the Nikkei posed no security risk; to him (and in his words), "a Jap (was) a Jap."⁴³

It is true, as Chief Justice Rehnquist reports, that the Roberts Commission Report suggested that some Nikkei may have engaged in subversive activity in Hawaii before Pearl Harbor. But Hawaii's residents of Japanese descent were never evacuated or interned.⁴⁴ Rather, the west coast Nikkei, who had done nothing to call their loyalty into question, were. This discrepancy leads to another of the discriminations of the internment: west coast Japanese were interned on suspicion of disloyalty while east coast German and Italian aliens were not. Rehnquist, however, has little sympathy for the claim that the west coast Issei were treated differently from east coast German and Italian aliens (pp 210-11). The Issei, he reasons, were tightly concentrated along the coast where Japanese military activity was feared, whereas east coast Germans and Italians were a bit more dispersed along a coast where the feared danger was the sinking of ships rather than bombings or troop invasions. Yet as Rehnquist himself notes, it was on the east coast, not the west, where two groups of Nazi soldiers actually sneaked onto the territory of the mainland United States with the goal of attempting sabotage, and did so with the assistance of American citizens of German descent (pp 136-37).⁴⁵

With the decisive American victory in the Battle of Midway in June of 1942, any fear of a Japanese attack or invasion of the west coast of the United States became, in Rehnquist's words, "all but groundless" (p 211). Whatever slim excuse of military necessity had justified the evacuation of the Nikkei to assembly centers late in March of 1942 evaporated a little more than

⁴¹ J.L. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942 34, quoted in Commission on Wartime Relocation, Personal Justice Denied at 82 (cited in note 17).

⁴² Id (emphasis added).

⁴³ See Commission on Wartime Relocation, Personal Justice Denied at 66 (cited in note 17).

⁴⁴ See [Joel B. Grossman, The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective, 19 U Hawaii L Rev 649, 653 \(1997\)](#) (stating that less than one percent of those of Japanese ancestry in Hawaii were interned)

⁴⁵ See Paul L. Murphy, *The Constitution in Crisis Times: 1918-1969* 227 (Harper & Row 1972).

two months after the evacuation began.⁴⁶ That fact, too, is of little consequence to the Chief Justice, because "the relocation program was established and put into effect before that decisive encounter" (p 211).

This is not so. When the Battle of Midway ended on June 6, 1942, none of the sixteen assembly centers to which the Nikkei were initially evacuated had been open for more than six weeks, and the evacuation of the Nikkei from their homes to these temporary assembly centers was just concluding.⁴⁷ In other words, at that decisive moment, a few of the 110,000 who would ultimately be interned were still in their homes, and the rest were in assembly centers not far from their homes. As the Battle of Midway raged, only a trickle of evacuees was moving from the assembly centers to the relocation centers in the interior, because most of the interior camps had not yet been built. The overwhelming majority of evacuees did not board trains for the interior until at least six to twelve weeks after the Battle of Midway was won. So while the evacuation had been largely (albeit not entirely) completed by Midway, the internment--which would last three long years--had really not even begun.

Of course, the Supreme Court that upheld the constitutionality of the internment in November of 1944 knew all of this. But, as Chief Justice Rehnquist says, the war was still on. Perhaps it was only natural that the wartime Court would be reluctant to second-guess the government's claims while the battle raged. It is disturbingly unnatural, though, to see the Chief Justice crediting those claims fifty-three years later.

B. A Book that Ends Too Soon

All the Laws but One is not the Chief Justice's first book. He has published two others, one a history of the impeachments of Justice Samuel Chase and President Andrew Johnson,⁴⁸ and the other a history of the Supreme Court.⁴⁹ The Supreme Court history was entitled *The Supreme Court: How It Was, How It Is*, but that title is misleading, because Rehnquist's history of the Supreme Court stops in the early 1950s. *All the Laws but One* stops a few years before

⁴⁶ It is not just hindsight that allows us to see Midway as a turning point in the Pacific theater. That is how the battle was understood at the time. On Monday, June 15, *The New Republic* reported "a great victory": "If (the Japanese) had been successful, the Hawaiian islands and the continent of the United States would have been next on the list. The American victory probably means that the Japanese will be put on the defensive in this whole area for months to come and perhaps permanently, since our naval building program far outstrips their own." *A Great Victory*, *New Republic* 811 (June 15, 1942). See also Donald W. Mitchell, *The Score After Midway*, *The Nation* 732, 733 (June 27, 1942) ("(I)t is safe to say that Japan will find it difficult to undertake large-scale sea offensives for months, possibly years, to come."); War II, Phase II, *Time* 15 (June 22, 1942); William V. Pratt, *The Way Is Open for a U.S. Pacific Punch*, *Newsweek* 26 (June 22, 1942). The devastating impact of Midway on the Japanese was noted even in the west coast press. See Vern Haugland, *Victory Eases Threat to U.S.*, *LA Times* 2 (June 8, 1942); *The Midway Battle*, *San Fran Chron* 12 (June 9, 1942).

⁴⁷ See Commission on Wartime Relocation, *Personal Justice Denied* at 138 (cited in note 17); *Record Alien Evacuation Ends on Schedule: 99,770 Japs Removed from Coast War Zones*, *LA Times* 9 (June 8, 1942) (reporting that the evacuation of the Nikkei from their homes to assembly centers ended "on schedule" on June 7, 1942--the day after the Battle of Midway ended).

⁴⁸ William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (Morrow 1992).

⁴⁹ William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (Morrow 1987).

that, in the mid-1940s. It does not address any post-World War II military episode, including an episode that we refer to, colloquially at least, as a war: Vietnam.

Rehnquist has lawyerly reasons for confining his history to the nation's two most recent declared wars and its one insurrection. "Without question," he argues, "the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war--the Schenck and Hirabayashi opinions make this clear" (p 218). He refers to a passage from *Schenck v United States*⁵⁰ in which Justice Oliver Wendell Holmes wrote that "(w)hen a nation is at war many things which might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight,"⁵¹ and to a passage from *Hirabayashi* in which Chief Justice Stone said that otherwise impermissible ethnic or racial distinctions may be permissible during wartime.⁵² As for the Civil War, Rehnquist admits that it was not a declared war, but points out that in *The Prize Cases*,⁵³ the Supreme Court held that an insurrection was the equivalent of a declared war (p 218). Thus, the Chief Justice fixes the boundaries of his inquiry the way a lawyer would, by citation to authority.⁵⁴

Regrettably, the inquiry in which the Chief Justice actually engages, and the conclusions he draws, do not sit comfortably within those boundaries. In his final chapter, titled *Inter Arma Silent Leges*, Rehnquist generalizes his observations of executive and judicial behavior during the Civil War and the World Wars to make a normative claim about the proper scope of individual freedoms during wartime. That claim is bottomed on Learned Hand's observation (made during, but not directly about, World War II) that "(a) society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."⁵⁵ From this, Rehnquist reasons that wartime shifts the balance of freedom and order "in favor of the government's ability to deal with conditions that threaten the national well-being" (p 222).

But other situations can "threaten the national well-being" at least as much as declared wars and insurrection. Consider the undeclared war in Vietnam. American involvement in that war was a primary catalyst (along with the civil rights movement) of what was probably the greatest period of domestic turmoil since the Civil War. Antiwar and antidraft movements formed that were at least as vocal as any such movement during World War I. Political demonstrations against the war and racial prejudice were ubiquitous, riots not uncommon. Cities burned.

⁵⁰ [249 US 47 \(1919\)](#)

⁵¹ [Id at 52.](#)

⁵² See [Hirabayashi, 320 US at 100.](#)

⁵³ [67 US \(2 Black\) 635, 666-67 \(1863\)](#) (holding that while civil wars are not formally declared, Confederate declaration of independence, organization of armies, and commencement of hostilities created a state of war nonetheless).

⁵⁴ The lawyering here may not even be especially skilled. While Justice Holmes and Chief Justice Stone wrote during declared wars, nothing in the *Schenck* or *Hirabayashi* opinions suggests that the reasoning was confined to declared wars. These opinions therefore may not support the considerable weight that Rehnquist places on them. Moreover, the text of the Constitution itself appears inconsistent with the line Rehnquist draws, a line that places declared war and rebellion to one side and all other military conflict to the other. Where the Constitution overtly foresees rights restriction through the suspension of habeas corpus, it does so "in Cases of Rebellion or Invasion," not in cases of rebellion or declared war. [US Const, Art I, § 9, cl 2.](#)

⁵⁵ Hand, *The Spirit of Liberty* at 190 (cited in note 28).

The Supreme Court's performance during this period of national crisis neither confirms nor denies Rehnquist's view. On the one hand, the Court upheld the conviction of David Paul O'Brien for burning his draft card on the steps of the South Boston Courthouse, rejecting his First Amendment claim.⁵⁶ The Court had little interest in O'Brien's entirely plausible assertion that the statute forbidding destruction of draft cards was directed at suppressing antidraft and antiwar speech; it was enough for the Court that the statute served the government's important interest in a well-functioning selective service system.⁵⁷ On the other hand, the Court rejected the government's efforts to halt publication in the New York Times and the Washington Post of a stolen, top-secret military report that detailed the history of the (still ongoing) American military involvement in Vietnam.⁵⁸ Here the Court brushed aside the government's assertions that publication of the Pentagon Papers would compromise ongoing military operations and peace negotiations, and very likely endanger the lives of American soldiers in battle or captivity. Justice Harlan, in dissent, insisted (consistently, it seems, with Chief Justice Rehnquist's views) that the scope of judicial authority to override the executive's national security judgments was "exceedingly narrow."⁵⁹ Yet a majority of the Court concluded that the First Amendment rights of the newspapers and their readers trumped the government's military concerns.

This point about Vietnam suggests an even broader shortcoming in *All the Laws but One*. If, as the Chief Justice argues, the scope of "civil liberties" is fluid, determined by the force of the call for "allegiance to . . . organized government" at a given moment (p 222), then a complete account should examine the state of civil liberties at all moments of grave national crisis. The Great Depression, for example, surely posed at least as great a threat to the national well-being as did World War I. It was also a time when the balance between individual freedoms--economic freedoms--and government power shifted dramatically, and probably permanently, in favor of the government's ability to deal with the conditions that threatened the national well-being. Seen in this light, the New Deal's dramatic redefinition of federal-state power and the Supreme Court's repudiation of *Lochner v New York*⁶⁰ in the late 1930s are at least as relevant to Rehnquist's theme as the Court's First Amendment decisions of World War I. They also tend to confirm his thesis that at a time of national crisis, the executive and legislative branches tend to overrun even the freedoms they take to be fundamental in the name of overcoming the crisis, and the courts tend to let them have their way.⁶¹

To write a book about the health of civil liberties in all times of national crisis would be an enormous undertaking.⁶² Chief Justice Rehnquist does have a day job, and it would be unreasonable to expect him to take on such a task. It would not have been unreasonable, however, for the Chief Justice to extend his book to all periods of significant national military crisis, including Vietnam. One can only speculate about his reasons for not doing so. Perhaps the

⁵⁶ See [United States v O'Brien, 391 US 367, 376-77 \(1968\)](#)

⁵⁷ [Id at 377-81.](#)

⁵⁸ See [New York Times Co v United States, 403 US 713 \(1971\)](#) (the "Pentagon Papers" case).

⁵⁹ [Id at 758](#) (Harlan dissenting).

⁶⁰ [198 US 45 \(1905\).](#)

⁶¹ The analogy to the Court's rejection of *Lochner* is admittedly an imperfect one; it took many years of crisis and some rather aggressive anti- Court advocacy by President Roosevelt to bring about the Court's full cooperation.

⁶² Such books do exist, at least for segments of American history. See, for example, Paul L. Murphy's excellent *The Constitution in Crisis Times* (cited in note 45), which covers the period from 1918 to 1969.

Rehnquist Court is still too often called upon to come to grips (or to blows) with the work of the late Warren Court that the Chief Justice does not feel comfortable speaking his mind about it in his extrajudicial capacity as a historian. On the other hand, it may be that the legacy of the Warren Court in times of national crisis so undermines (or at least complicates) the normative claims of his book that he thought it easier to make his point without Vietnam than with it. The former explanation would be an excusable, if perhaps somewhat exaggerated, bow to propriety. The latter explanation would simply be inexcusable. Either way, his omission of the executive, legislative, and judicial response to the war in Vietnam significantly weakens *All the Laws but One*.

III.

Vietnam, however, was not the only American military conflict that produced a mix of executive and judicial responses to civil liberties claims. So too did the Civil War, World War I, and World War II, the rebellion and the declared wars that are Chief Justice Rehnquist's avowed focus. That, of course, is not the impression one gets from *All the Laws but One*: Rehnquist makes the case that these three military conflicts, at least while they were ongoing, were virtually unalloyed disasters for those seeking protection of their civil liberties.

The Chief Justice is unquestionably right that "in time of war the government's authority to restrict civil liberty is greater than in peacetime" (p 224). He is probably also correct that future presidents' and judges' behavior in wartime will more or less follow their predecessors'. But, importantly, the record of how past presidents and judges actually behaved is a good deal less monolithic than the Chief Justice claims. Just as there are many somber stories of rights deprivation and judicial timidity during wartime, there are also (admittedly fewer) stories of rights protection and judicial courage during wartime. Future wartime presidents, generals, and judges will read this Chief Justice's book. If, as the Chief Justice hopes in the book's final page, we are moving toward an era of greater rights protection during wartime (p 225), future readers should be familiar not just with the stories of repression, but also with the stories of liberation.

Some of those stories are in the Chief Justice's book, but they are not emphasized. For example, within days of Abraham Lincoln's decision to suspend the writ of habeas corpus along the train line north of Baltimore, Maryland's governor (who had ordered the burning of the railroad bridges) convened the Maryland legislature to consider secession from the Union (pp 23-24). Maryland's secession would have left the Union capital completely surrounded by hostile territory. Lincoln considered arresting the legislators to prevent them from meeting, but decided against it. He explained to his commanding general that even though the Maryland legislators would "not improbably . . . take action to arm the people of that State against the United States," they should not be arrested or dispersed because, among other things, "(t)hey have clearly legal right to assemble, and we can not know in advance that their action will not be lawful and peaceful"⁶³ (p 24). In other words, a few days after suspending the writ of habeas corpus in part

⁶³ It is unclear whether Lincoln was referring to the assembly rights of state legislators under the First Amendment or under a state constitutional analogue of the right of federal legislators to attend legislative sessions without fear of arrest. See [US Const. Art I, § 6, cl 1](#) ("The Senators and Representatives . . . shall in all Cases, except Treason,

of Maryland, Lincoln acted to protect the constitutional assembly rights of potentially secessionist Maryland legislators.

This story appears in a chapter entitled "Lincoln Suspends Habeas Corpus"--a title that makes plain what the Chief Justice believes to have been the noteworthy development for civil liberties at that point in the Civil War. Rehnquist is undoubtedly right to make the suspension of habeas corpus the headline. What, though, is the reader to make of the counterexample? The Chief Justice does not say, but the answer is important. Later the Chief Justice writes that "(t)here is no reason to think that future wartime presidents will act differently from Lincoln" (p 224). Which Lincoln does he mean? The one who suspended the writ of habeas corpus, or the one who chose to protect the assembly rights of a hostile state legislature?

Similarly, Rehnquist briefly mentions a fascinating story involving a young general Andrew Jackson governing New Orleans by martial law after defeating the British during the War of 1812⁶⁴ (pp 69-70). While awaiting official word on the outcome of peace negotiations in Europe, Jackson kept the city under tight military rule. An editorial by Louis Louailler appeared in the French-language press expressing impatience with Jackson's continued imposition of martial law. Jackson responded by having Louailler arrested and tried by a military tribunal. Rehnquist reports that the military court acquitted Louailler, "quite surprisingly on the basis that he was not in the armed forces and therefore could not be tried before such a body" (p 70). This is indeed surprising; in every other military trial of civilians during wartime that Rehnquist mentions in *All the Laws but One*, the civilians are convicted. It would have been fascinating had the Chief Justice pursued this stunning counterexample.

The same can be said of the book's treatment of World War I. Admittedly, the civil liberties record of that time was abysmal--so bad that one historian of the period labels the wartime Wilson administration "the surveillance state."⁶⁵ Amidst the horrors,⁶⁶ though, were figures and moments of enlightenment. When Wilson asked Congress for a provision that would have subjected a person to up to ten years imprisonment and a \$10,000 fine for publishing anything that the President might declare to be possibly useful to the enemy, Congress refused him (pp 173-74). When an assistant attorney general proposed a bill authorizing military trials and the death penalty for civilians who interfered with the war effort, the President publicly opposed it, and the lawyer resigned (p 183). The 50 percent conviction rate⁶⁷ for defendants charged under the Espionage Act between June 30, 1917, and June 30, 1921--a number the Chief Justice reports (p 183)--was well below the overall conviction rate in the federal courts at the time⁶⁸ -- a fact the Chief Justice omits.

Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same.").

⁶⁴ Actually, unbeknownst to Jackson, his victory at New Orleans came after the War of 1812. A peace treaty ending the war was signed about two weeks before his victory over the British at New Orleans, but word of the treaty had not yet reached New Orleans.

⁶⁵ Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 71 (Norton 1979).

⁶⁶ *Id.* at 128-32 (listing a horrifying array of wartime rights deprivations).

⁶⁷ See Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 63 (Cornell 1960).

⁶⁸ In 1917, the general conviction rate in federal court was 70 percent. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1917* 125 (GPO 1917). In 1918, the rate was 75 percent. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918* 156 (GPO

These are counterexamples to Rehnquist's thesis that actually made it into *All the Laws but One*. There are, however, two very important tales that did not make it into the book at all. One is a story of Lincoln and civil liberties in the Civil War, the other a story of a judge and civil liberties during the Japanese-American internment. Both deserve far more attention than they now receive in the Civil War and World War II literature.

A. President Lincoln Protects the Jews of the Tennessee

The first half of the nineteenth century saw a remarkable wave of German immigration into the United States. Fleeing economic chaos in Europe in the wake of the Napoleonic Wars, German immigrants fanned out across the American landscape, settling not just in the major east coast cities but also in inland trade centers. Among these German immigrants were Jews, primarily (although not exclusively) merchants. By 1860, about sixteen thousand Jewish country peddlers were at work in the United States, supported by a network of primarily Jewish retailers, wholesalers, and manufacturers that stretched all the way back to the east coast.⁶⁹ Many of these Jews settled along the major inland trade routes of the time--the Ohio, Missouri, and Mississippi Rivers. Some struggled, many (like the Brandeis family of Louisville, Kentucky) moderately prospered, and a few became business and civic leaders. Some quickly assimilated; others did not.

With the outbreak of the Civil War, the western trade routes, especially the Mississippi, became crucial to both North and South. At first, both North and South left the Mississippi open to trade.⁷⁰ For the South, the river brought much needed coin and supplies southward to support the war effort. The North, for its part, needed southern cotton and was reluctant to wreak havoc on the economies of the western border states by shutting down trade with the South. By the summer of 1861, however, both South and North took steps to stem trade along the Mississippi. President Lincoln took the bolder step, announcing in August that all trade with the Confederacy was prohibited. Individuals wishing to trade could do so only by applying for a permit from the Department of the Treasury.⁷¹

Memphis, Tennessee, was probably the greatest southern commerce center along the Mississippi north of New Orleans. It remained in rebel hands until the Confederate defeat at the Battle of Shiloh in April 1862 forced the Confederacy to abandon western Tennessee to General Ulysses S. Grant's advancing Union forces.⁷² Two months later, Memphis was under federal occupation.

1918). The 1919 rate was 72 percent. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1919* 120 (GPO 1919). In 1920, the rate dropped to 69 percent, where it remained for the year 1921 as well. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1920* 201 (GPO 1920); Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1921* 151 (GPO 1921).

⁶⁹ Howard M. Sachar, *A History of the Jews in America* 42-43 (Knopf 1992).

⁷⁰ See Joseph H. Parks, *A Confederate Trade Center under Federal Occupation: Memphis, 1862 to 1865*, 7 *J § Hist* 289, 289-90 (1941).

⁷¹ See *id* at 290.

⁷² See *id* at 291.

Under Lincoln's order of August 1861, Union traders (and those who would take a loyalty oath to the Union) were free to operate in any federally occupied locale. With the occupation of Memphis, this southern trade center saw a wave of northern merchants, including but not limited to Jews, sweep into town. The situation in Memphis immediately became quite complex. On the one hand, the Lincoln administration wished to entice the local population back into the Union fold by ending their deprivation and allowing them to regain at least a fraction of their lost prosperity. The Union also desperately needed cotton for its own military and economic uses. On the other hand, the markets of Memphis were close to enemy lines; goods bartered for cotton quickly made their way to the Confederate army to support soldiers in the field. Because of these conflicting demands and incentives, the trade policies of the occupying Union forces shifted frequently from prohibition to encouragement and everything in between.⁷³ In such a confused setting, bribery and corruption--even in the ranks of the Union army--soon became rampant.

Union military leaders, charged with the responsibility for administering the military Department of the Tennessee (which included that state and parts of Mississippi and Kentucky), quickly began expressing their frustration with the trade, licit and illicit, that they felt undermined the Union war effort. Grant complained in a letter to his sister that "(w)ith all my other trials I have to condend (sic) against is added that of speculators whos (sic) patriotism is measured by dollars & cents. Country has no value with them compared with money."⁷⁴ Most of the ire, however, focused on the Jews, even though they represented only a fraction of the offending traders. Grant wrote to the Assistant Secretary of War that "in spite of all the vigilance that can be infused into Post Commanders(.) . . . the Specie regulations of the Treasury Dept. have been violated, and that mostly by Jews and other unprincipled traders. . . . (The Jews) come in with their Carpet sacks in spite of all that can be done to prevent it. The Jews seem to be a privileged class that can travel anywhere."⁷⁵

When Grant decided to take action, he set aside his concerns with the "other unprincipled traders" and took aim solely at the Jews. On December 17, 1862, he issued his General Order Number 11:

I. The Jews, as a class, violating every regulation of trade established by the Treasury Department, and also Department orders, are hereby expelled from the Department.

II. Within twenty-four hours from the receipt of this order by Post Commanders, they will see that all of this class of people are furnished with passes and required to leave, and any one returning after such notification, will be arrested and held in confinement until an opportunity occurs of sending them out as prisoners unless furnished with permits from these Head Quarters.

III. No permits will be given these people to visit Head Quarters for the

⁷³ See Bertram Wallace Korn, *American Jewry and the Civil War* 121-22 (Jewish Publication Society 1951).

⁷⁴ Letter from Ulysses S. Grant to Mary Grant (Dec 15, 1862), in John Y. Simon, ed, *7 The Papers of Ulysses S. Grant* 43, 44 (Southern Illinois 1979) ("Grant Papers").

⁷⁵ Letter from Ulysses S. Grant to Christopher P. Wolcott (Dec 17, 1862), in Simon, ed, *Grant Papers* 56, 56 (cited in note 74).

purpose of making personal application for trade permits.⁷⁶

Thus, all Jews in the Department of the Tennessee had twenty-four hours to clear out or be arrested. Grant's order applied indiscriminately to all Jews-- men, women, and children; traders and nontraders; recent arrivals and established members of the community. On its face, it applied even to Jewish soldiers in the Union army. Such a military order would not be seen again until General DeWitt evicted the Nikkei from the west coast eighty years later.

Like the west coast Japanese-Americans, the Jews of the Tennessee complied with the military order. Twenty-five hundred Jews desperately began looking for scarce transport up the Mississippi river and out of the reach of Grant's order.⁷⁷ Their departure was rushed and traumatic. One surviving account tells of "a baby almost left behind in the haste and confusion and tossed bodily into the boat" and of "two dying women permitted to remain behind in neighbors' care."⁷⁸ Another account tells of a group of four Jews in Oxford, Mississippi, whose horse, buggy, and luggage were confiscated shortly before they were sent away by train under guard.⁷⁹ When one of them asked the reason for their detention, he was told, "Because you are Jews, and are neither a benefit to the Union or Confederacy."⁸⁰

Jewish community leaders complained about the order and sought to have it rescinded. A delegation of Jews from Paducah, Kentucky sent a telegram to President Lincoln protesting Grant's "inhuman order, the carrying out of which would be the grossest violation of the Constitution and our rights as citizens under it, (and) which will place us . . . as outlaws before the whole world."⁸¹ The leader of this delegation, Cesar J. Kaskel, also sent letters and telegrams to Jewish community leaders and newspapers around the country, urging them to speak out against Grant's order.

Kaskel then traveled to Washington, D.C., where he, an Ohio congressman, and the leader of a national Jewish organization were granted an appointment with President Lincoln. Kaskel showed the president Grant's order and explained its background and impact. Lincoln, shocked by the order, responded with a biblical metaphor:

Lincoln: And so the children of Israel were driven from the happy land of Canaan?

Kaskel: Yes, and that is why we have come unto Father Abraham's bosom, asking protection.

Lincoln: And this protection they shall have at once.⁸²

⁷⁶ See General Orders No. 11 (Dec 17, 1862), in Simon, ed, Grant Papers 50 (cited in note 74). The order was signed by Grant's assistant, Lieutenant Colonel John A. Rawlins, "(b)y Order of Maj. Genl. U.S. Grant." Id. It is settled, however, that the order was Grant's. Id at 51.

⁷⁷ Sachar, History of the Jews at 79 (cited in note 69).

⁷⁸ Korn, American Jewry at 123 (cited in note 73), quoting an interview with Mrs. William Fineshriber of Philadelphia.

⁷⁹ Korn, American Jewry at 123 (cited in note 73).

⁸⁰ Id.

⁸¹ Id at 124.

⁸² Id at 125.

At that, Lincoln drafted a note to his General-in-Chief of the Army, Henry W. Halleck, instructing him to rescind General Order Number 11.

Halleck later took the opportunity to explain to General Grant why President Lincoln had revoked the order:

It may be proper to give you some explanation of the revocation of your order expelling all Jews from your Dept. The President has no objection to your expelling traders & Jew pedlars (sic), which I suppose was the object of your order, but as it in terms prescribed an entire religious class, some of whom are fighting in our ranks, the President deemed it necessary to revoke it.⁸³

Lincoln himself explained to a group of Jewish leaders that he "d(id) not like to hear a class or nationality condemned on account of a few sinners."⁸⁴

This episode thus marks an early appearance on record of what now seems commonplace: heightened or "strict" scrutiny of a law that singles out a racial, ethnic, or religious group for a unique burden. The order was both underinclusive, in that it did not target non-Jewish traders, and overinclusive, in that it did target nontrading Jews. But heightened scrutiny was not part of legal or constitutional understanding in 1863. Indeed, many decades would pass before courts would develop the doctrine as they struggled to give meaning to the Fourteenth Amendment's Equal Protection Clause.⁸⁵

This important episode in Civil War history does not square with Chief Justice Rehnquist's account of that war or of Abraham Lincoln. The picture of Lincoln that emerges from Rehnquist's lengthy examination of the Civil War is of a chief executive willing to do whatever it took--constitutional or not--to win the war and save the Union. Undoubtedly, he was willing to do a great deal to bring together the "house divided." But he was also willing to protect the rights of a vilified minority by applying a form of rigorous review that was well ahead of its time.⁸⁶ More importantly, he was willing to do so even if it meant publicly overruling his most (and arguably his only) successful general at a time when the Union army's position in the field was far from secure, many months before the tide of the war would finally turn in the North's favor at Gettysburg. This is a very different Abraham Lincoln from the one we read about in *All the Laws but One*. It is, however, the real Abraham Lincoln--a complex figure who could simultaneously authorize and forbid the curtailment of fundamental freedoms.

⁸³ Simon, ed, Grant Papers at 54 (cited in note 74).

⁸⁴ Letter from the Editor, *The Israelite* 218 (Jan 16, 1863).

⁸⁵ See [United States v Carolene Products Co, 304 US 144, 153 n 4 \(1938\)](#) (noting in dicta that laws evidencing prejudice against "discrete and insular minorities" may be subject to heightened judicial scrutiny).

⁸⁶ This is not to say that Lincoln's approach to the problem of Grant's order was entirely unprecedented. Professor Melissa Saunders has recently (and powerfully) argued that the framers of the Fourteenth Amendment's Equal Protection Clause understood that clause "to nationalize a constitutional limitation on state action developed by the state courts in the first half of the nineteenth century: the doctrine against 'partial' or 'special' laws, which forbade the state to single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification." Melissa L. Saunders, [Equal Protection, Class Legislation, and Colorblindness, 96 Mich L Rev 245, 247-48 \(1997\)](#).

Surprisingly, the story of the Jews of the Tennessee is not well known. Had it been well known in 1944, it might have helped the Supreme Court reach a different outcome on the constitutionality of the Japanese-American internment in *Korematsu*. Not only were the two evacuations strikingly similar, but the *Korematsu* case actually presented a far easier case of unconstitutionality than did the evacuation of the Jews. General Grant based his order on documented involvement of at least some Jews in illegal trade along the Mississippi; General DeWitt could point to nothing more than the absence of any subversive activity by the Nikkei to support their deportation. General Grant ordered the evacuation of the Jews months before the Union Army gained the upper hand at Gettysburg; the long-term internment of the Nikkei did not even begin until weeks after the decisive battle at Midway. While Lincoln struck down General Order Number 11 when the survival of the Union was seriously in doubt, the Supreme Court upheld the Japanese-American internment program against constitutional attack late in 1944, when the far-flung Japanese empire was collapsing and American forces were routing the Japanese in battle after battle. Chief Justice Rehnquist defends the *Korematsu* Court by noting that it did not have an equal protection clause to apply to federal action in 1944 (p 208). Yet there was no Equal Protection Clause at all when Abraham Lincoln overturned the evacuation of the Jews of the Tennessee. In short, if Lincoln's decision to strike down the evacuation of the Jews was right in December of 1862, then it is difficult to see how the military's decision to evacuate and intern the Nikkei in 1942 could have been right, and it is even more difficult to understand the Supreme Court's decision to uphold that decision late in 1944.

Dissenting in *Korematsu*, Justice Jackson described the danger of the Court's opinion upholding the internment:

(O)nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.⁸⁷

This nation may again see a race-based evacuation or internment. But *Korematsu*, although fallen from favor,⁸⁸ has never been overruled--the weapon is still loaded and lying about. For a future court seeking to protect civil liberties in wartime, the story of President Lincoln's protection of the Jews of the Tennessee is a loaded weapon pointing away from *Korematsu* and toward freedom. It is regrettable that this important story was not part of All the Laws but One.

B. Judge Louis Goodman Protects the Nisei Draft Resisters

A common complaint among the interned Nikkei was that they did not understand why the government had placed them behind barbed wire. Several hundred Nisei, however, ended up

⁸⁷ [Korematsu, 323 US at 246](#) (Jackson dissenting).

⁸⁸ See [Adarand Constructors, Inc v Pena, 515 US 200, 236 \(1995\)](#) (describing *Korematsu* as an "error" in which the application of strict scrutiny failed to invalidate "an illegitimate racial classification").

behind barbed wire of a different sort, and they had no confusion about why they were there. These young men were draft resisters. The barbed wire that enclosed them was atop the imposing fences of federal prisons. Early in 1944, the federal government had ordered them out of the relocation centers and into the U.S. Army--the same army that continued to guard their parents and their brothers and sisters. Unlike many of their fellow internees, however, these young men said "no."

People are typically quite surprised to learn that the interned Nisei were drafted. Why, after all, would the government that evacuated them as military risks nonetheless want them in the army? At least some of the impetus to draft the Nisei out of the camps appears to have come (surprisingly) from a segment of the Japanese-American community itself. In June of 1942, the War Department changed the selective service classification of the Nisei--American citizens all--to IV-C, the category for "aliens not acceptable to the armed forces."⁸⁹ Almost immediately, a Nisei organization called the Japanese American Citizens League ("JACL") began lobbying the government to allow Nisei to volunteer and join the military in order to demonstrate their loyalty.⁹⁰ This idea appealed to Dillon Myer, the director of the civilian War Relocation Authority that had been created in November of 1942 to administer the internment camps.⁹¹ He too began pressing for the right of the Nisei to volunteer.⁹²

In January of 1943, the War Department agreed. It did not, however, wish to accept any Nisei volunteer whose loyalty was questionable. The War Department therefore proposed the distribution of a loyalty questionnaire to young men in all ten of the relocation centers. The idea of a questionnaire took hold quickly, and was soon expanded to all evacuees, Issei and Nisei. (The government hoped that the questionnaire would make it easier to determine which internees might be permitted to leave the camps for employment or educational opportunities in the midwest and east.) The four-page questionnaire, entitled "Application for Leave Clearance," included two poorly-worded and ill-fated questions, numbers 27 and 28:

27. Are you willing to serve in the armed forces of the United States on combat duty wherever ordered?

28. Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, to any other foreign government, power or organization?⁹³

Questions 27 and 28 caused confusion, anxiety, and heartache for the internees, Nisei and Issei alike. The Nisei were concerned that a "yes" answer to Question 27 would be tantamount to volunteering to join the armed forces and forsaking their parents and siblings in the camps, and they were incensed that they were being asked in Question 28 to "forswear" an allegiance to the

⁸⁹ 32 CFR § 622.43 (Supp 1943) (defining selective service classification IV-C). The classification of the Nisei as IV-C is reported in Bill Hosokawa, *Thirty-Five Years in the Frying Pan* 52 (McGraw-Hill 1978).

⁹⁰ See Mike Masaoka with Bill Hosokawa, *They Call Me Moses* 115, 120-28 (Morrow 1987); Bill Hosokawa, *JACL in Quest of Justice* 193-212 (Morrow 1982).

⁹¹ For a provocative and intensely critical biography of Dillon Myer, see Richard Drinnon, *Keeper of Concentration Camps: Dillon S. Myer and American Racism* (California 1987).

⁹² See Smith, *Democracy on Trial* at 289 (cited in note 30).

⁹³ See Edward H. Spicer, et al, *Impounded People* 143 (Arizona 1969).

Japanese Emperor when they had never sworn such allegiance in the first place. The Issei, for their part, had not the faintest idea how Question 27 could possibly apply to them, and they were understandably reluctant to respond affirmatively to Question 28 and renounce the only citizenship they had (or were permitted to have), thereby rendering themselves stateless. All were concerned that if members of the same family answered the questions differently, they might be permanently separated from one another.⁹⁴ To varying degrees, all were also tired and bitter from a long year of mistreatment and suffering.

The two questions produced a dizzying variety of responses: many set aside their confusion and answered "yes" to both questions; some answered with a mix of "yes" and "no"; others scribbled qualifications to their responses in the margins of the form; still others left the questions blank. Some, however, answered "no" to both, usually in protest of the way the government had treated them. Most of these internees were promptly bundled off to the Tule Lake Relocation Center in northern California, a relocation center converted by the government to house those of especially dubitable loyalty.⁹⁵

The loyalty questionnaires did serve their original purpose: volunteer Nisei from the relocation centers began serving on the segregated 442d Regimental Combat Team. When stories of their bravery in battle began making their way back to the United States late in 1943, the JACL decided to press further. Its leaders began lobbying the War Department to reopen the draft to the Nisei as well and force into the army the overwhelming majority of Nisei who had not answered, and who had no intention of answering, the army's call for volunteers.⁹⁶ The government agreed in January of 1944. By mid- February, induction notices began appearing in the mail at all ten relocation centers, including Tule Lake.

The opening of the draft to the Nisei was greeted in the camps with widespread concern and disbelief. Issei parents, who had already lost their homes, their livelihoods, their security, and their dignity, were now to lose their sons as well. Nisei of draft age worried about leaving their aging parents and younger siblings behind to fend for themselves in the camps. Residents of all of the camps complained about the unfairness of the government's decision simultaneously to incarcerate and to draft the very same community of people. For the internees, the draft brought the unfairness of the internment into even sharper focus.

Nonetheless, most of the young men who received draft notices complied with their orders and showed up for their physical exams. At each camp, however, some draftees decided that they had had enough and refused to comply. At some of the camps, only a handful of men decided to resist. At two of the camps, Heart Mountain in Wyoming and Poston in Arizona, upwards of one hundred men resisted. Only at these two camps was the resistance in any way vocal or organized; elsewhere the draftees made their decisions furtively and in isolation.⁹⁷ In virtually every instance, however, the resister's position was more or less the same: If I am loyal

⁹⁴ For a good description of the dilemmas caused by the loyalty questionnaires, see *id.* at 169-86.

⁹⁵ For accounts of the conversion of Tule Lake from an ordinary center to a so-called "segregation" center, see Harold Stanley Jacoby, *Tule Lake: From Relocation to Segregation* (Bonanza 1996); Dorothy Swaine Thomas and Richard S. Nishimoto, *The Spoilage: Japanese American Evacuation and Resettlement* (California 1969).

⁹⁶ See Hosokawa, *JACL in Quest of Justice* at 221 (cited in note 90).

⁹⁷ For a description of the activities of the draft resistance movement at Heart Mountain, see [Okamoto v United States, 152 F2d 905, 906 \(10th Cir 1945\)](#).

enough to serve in the army, what have I been doing in a concentration camp for the last year and a half?

Not only did the government decline to answer this question but it punished the resisters brutally for asking it. The resisters were quickly indicted for failing to comply with the draft, arrested by the FBI, and taken to jail to await trial. All of these young men suddenly found themselves charged with felonies and facing the possibility of additional years of incarceration.

Their cases came to trial in federal courtrooms across the western United States in the summer and fall of 1944. Most of the federal district judges hearing these cases behaved as Chief Justice Rehnquist would expect them to behave during wartime. They typically ran perfunctory trials, sometimes processing as many as several resisters per day. And when the inevitable convictions were obtained, the judges sentenced the resisters to terms of as many as five (but more typically two to three) years in federal prison. One judge, T. Blake Kennedy of the District of Wyoming, could not conceal his frustration with the Heart Mountain resisters:

Personally this Court feels that the defendants have made a serious mistake in arriving at their conclusions which brought about these criminal prosecutions. If they are truly loyal American citizens they should, at least when they have become recognized as such, embrace the opportunity to discharge the duties of citizens by offering themselves in the cause of our National defense.⁹⁸

Such a pronouncement is not surprising from a judge who referred to the Nisei resisters as "you Jap boys" in open court.⁹⁹ Judge Kennedy was merely speaking with the voice of a frightened nation consumed by war, which is, as Chief Justice Rehnquist tells us, what wartime judges typically do.

But not all judges do. In July of 1944, Judge Louis H. Goodman of the United States District Court for the Northern District of California was assigned the prosecutions of twenty-seven young men from the Tule Lake Relocation Center who had refused to show up for their physicals. Goodman was fairly new to the bench, having been appointed by Franklin D. Roosevelt in November of 1942.¹⁰⁰ Goodman's first two years on the federal district court bench presented few high profile cases. Perhaps the most difficult matters he encountered before the Tule Lake draft resisters were twelve denaturalization cases that the government brought against naturalized American citizens of German extraction who were members of a pro-Nazi organization called the German-American Bund.¹⁰¹ The government's theory was that the defendants had obtained their U.S. citizenship fraudulently, by claiming attachment to the American government when in fact they felt none. It is ironic, of course, that such a case would

⁹⁸ [United States v Fujii, 55 F Supp 928, 932 \(D Wyo 1944\)](#).

⁹⁹ John Tateishi, *And Justice for All 171* (Random House 1984) (oral history of Jack Tono).

¹⁰⁰ Goodman had come far from his humble origins as the son of the proprietor of a small country store in rural Lemoore, California. He distinguished himself as an undergraduate at the University of California, and did only a bit over a year of law school at Hastings before passing the California bar examination. It was not an easy time for talented Jewish lawyers to find good work, but Goodman joined a fledgling San Francisco practice and became a successful and well-known practitioner. See John W. Kelley, *Introducing the Master of U.S. Master Calendar*, 6 *The Brief Case* 6 (1956).

¹⁰¹ See [United States v Holtz, 54 F Supp 63 \(N D Cal 1944\)](#).

wind up in the courtroom of one of the few Jewish judges in the country. But Judge Goodman handled the cases with great care, filing a lengthy opinion that held for the government in seven of the twelve cases and for the defendants in the other five.¹⁰²

In July of 1944, Judge Goodman, following a practice of "riding circuit" that has since been abandoned, drove up the northern California coast to hear cases for a week in the fishing and logging town of Eureka. Waiting for him, in the Humboldt County jail, were the twenty-seven young Japanese-American men from Tule Lake who had refused to comply with their induction notices. Goodman quickly appointed two Eureka lawyers, Arthur W. Hill, Jr. and Chester Monette, to represent them.

The resisters (and their attorneys, Hill and Monette) faced an uphill battle, because public feeling in that war-weary coastal town was strongly against the Tule Lake boys. The local newspaper, revealing its confusion about their nationality, referred to them as "the Japanese,"¹⁰³ and once called them "American born Japs."¹⁰⁴ The day after the Tule Lake defendants arrived, an article appeared on the front page of the paper entitled, "Not Enough Food, Japs Complain in Jail Here."¹⁰⁵ It is worth quoting at some length:

"Not enough ricee."

That wasn't exactly the plaint of the Japanese prisoners in the county jail today; their complaint was "Not enough mealee."

According to the custom of all county jails, only two meals a day are served to prisoners. . . . Some kind of meat, such as stews and often a quarter of beef is served every day, and each meal has plenty of succulence and nutriment, said Sheriff Arthur A. Ross. But this doesn't seem to be enough for those who have been raised on rice in the old country.

They want "three mealees, so solly, please."¹⁰⁶

Adding to the resisters' difficulty, their own court-appointed lawyer, Arthur Hill, publicly mocked them in the same way. At a dinner given by the local bar to honor Judge Goodman, Hill, serving as master of ceremonies, spoke of being appointed to represent "the Japs," and concluded his speech with, "So solly, please."¹⁰⁷ Of course, none of the defendants actually spoke with such an accent; they had all been born and raised in this country, and spoke essentially unaccented American English. But the local community needed to transform them into the enemy.

Attorneys Hill and Monette decided not to wage the uphill battle at all. They advised the defendants to plead guilty as charged, and a group of twelve of them did so at their arraignment

¹⁰² After the war was over, the Court of Appeals for the Ninth Circuit reversed Judge Goodman's orders as to two of the seven defendants whose citizenship Goodman had deemed fraudulently obtained. See *Fix v United States*, 176 F2d 741 (9th Cir 1949); *Bechtel v United States*, 176 F2d 746 (9th Cir 1949).

¹⁰³ 27 Jap Internees Face Trial Here on Draft Count, Humboldt Standard 1 (July 14, 1944).

¹⁰⁴ 6 Japanese Appear in Court Here on Draft Charges, Humboldt Standard 3 (July 17, 1944).

¹⁰⁵ Not Enough Food, Japs Complain in Jail Here, Humboldt Standard 1 (July 17, 1944).

¹⁰⁶ Id.

¹⁰⁷ Federal Court Attaches, Local Bar Members Attend Annual Dinner, Humboldt Standard 3 (July 18, 1944).

on Tuesday, July 18, 1944.¹⁰⁸ Judge Goodman, however, was not happy with this outcome. He turned to a law school classmate, Blaine McGowan, and asked him to join the defense. McGowan agreed, and quickly prepared and filed a motion to quash the indictment as violating Fifth Amendment due process.¹⁰⁹ He also filed a motion to withdraw the guilty pleas that had already been entered.¹¹⁰ At that, defense attorney Chester Monette withdrew from the case, announcing publicly that "his advice to the defendants"--presumably his advice that they all plead guilty-- "had been ignored."¹¹¹

The defendants, however, did well by ignoring Monette's advice. On Saturday morning, July 22, 1944, Judge Goodman held one final hearing to wrap up the Eureka session before returning to San Francisco. The only remaining cases were those of the twenty-seven Tule Lake draft resisters. Assistant U.S. Attorney Emmett Seawell, who had prosecuted the cases, was undoubtedly confident that morning; he knew that every other federal judge who had heard the cases of Nisei draft resisters that summer had ruled for the government.

He was in for a surprise, as was everyone else in attendance that morning. Reading his opinion from the bench, Judge Goodman bluntly dismissed all charges against the defendants.¹¹² He declined to address the defendants' broad attack on the constitutionality of the larger internment, noting that "certain dangers vitally imminent to the security of the West Coast (had) motivated the President . . . in promulgating" [Executive Order 9066](#).¹¹³ The "war powers vested in the executive," he ventured, "may be sufficient constitutional justification" for the internment itself.¹¹⁴ But, he emphasized, "(n)o such dangers . . . are the basis for the prosecution of defendant (sic) for refusing to be inducted."¹¹⁵

Goodman moved quickly to the heart of his argument. "It does not follow," he said, "that because the war power may allow the detention of defendant at Tulelake (sic), the guaranties of the Bill of Rights and other Constitutional provisions are abrogated by the existence of war."¹¹⁶ Applying the basic test of due process, Goodman found it

shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion. . . . The issue raised by this motion . . . must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of "due process." It must not give way to overzealousness in an attempt to reach, via the criminal

¹⁰⁸ See 12 Japanese Admit Draft Evasion Charges in Federal Court Today; 6 Others Arraigned, Humboldt Standard 1 (July 18, 1944).

¹⁰⁹ See, for example, Motion to Quash Indictment and Terminate Proceedings, United States v Paul Kojiro Shiraishi, No 8981 (N D Cal 1944) (on file with U Chi L Rev).

¹¹⁰ See Permission to Withdraw Pleas of Guilty Asked by 12 Japanese, Humboldt Standard 1 (July 19, 1944).

¹¹¹ Indictments of 27 Japanese Attacked in Court Here, Humboldt Standard 1 (July 20, 1944).

¹¹² Judge Goodman's bench opinion was later reported in the Federal Supplement. See [United States v Kuwabara, 56 F Supp 716 \(N D Cal 1944\)](#).

¹¹³ [Id at 718](#).

¹¹⁴ [Id at 719](#).

¹¹⁵ Id.

¹¹⁶ Id.

process, those whom we may regard as undesirable citizens.¹¹⁷

The government did not appeal Goodman's decision.¹¹⁸ The defendants were returned to Tule Lake Relocation Center, where they (rather ironically, in light of their court victory) resumed their lives behind barbed wire.

Chief Justice Rehnquist sees little reason to expect that future judges will decide wartime civil liberties cases differently from their predecessors. That may be so. But the Chief Justice did not have Judge Louis Goodman in mind when he ventured that prediction. Neither, apparently, did he have in mind any of the three dissenting Supreme Court Justices in the Korematsu case--Roberts, Murphy, or even the Justice for whom Rehnquist himself clerked, Jackson. In short, the judicial record on civil liberties in wartime is a good deal more complex than the rather simple case the Chief Justice presents.¹¹⁹ That record includes the several federal district judges across the west who so harshly punished the Nisei draft resisters, just as it includes Justice Black and his colleagues in the Korematsu majority. But it also includes the Korematsu dissenters, and a courageous judge named Louis H. Goodman.

Conclusion

In 1987, the Supreme Court heard a case called *United States v Salerno*.¹²⁰ In that case, the reputed head of a Mafia crime family challenged the constitutionality of a federal preventive detention statute, which permitted the government to incarcerate a defendant awaiting trial not because he might flee, but because he might be dangerous if left to roam the streets. Salerno's claim was that the idea of preventive detention violated the bedrock presumption of innocence.

By a six-to-three vote, the Supreme Court upheld preventive detention. Chief Justice Rehnquist wrote the Court's opinion. He recognized that the case presented an unusually stark choice between the community's interest in its safety and a defendant's interest in his freedom. But he rejected Salerno's contention that under the Due Process Clause, freedom claims invariably trump safety concerns. Rather, he emphasized that "(w)e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."¹²¹ In support of this proposition, the Chief Justice noted that "in times of war or insurrection, when society's interest is at its peak, the Government

¹¹⁷ Id.

¹¹⁸ Had the government appealed, it is likely that Goodman's ruling would have been reversed. The Court of Appeals for the Ninth Circuit later spoke disapprovingly of Judge Goodman's Kuwabara opinion in another Nisei draft resistance case. See [Takeguma v United States, 156 F2d 437, 441 \(9th Cir 1946\)](#) (refusing to distinguish Kuwabara on its facts and noting that to the extent Kuwabara did not accord with the court's own opinion, it was not good law).

¹¹⁹ One might also say, although Chief Justice Rehnquist does not, that the record includes a courageous Chief Justice named Roger Taney. In the Merryman case, Chief Justice Taney did everything in his power to oppose the Lincoln administration's trial of John Merryman by military tribunal for impeding the Union war effort. Chief Justice Taney is therefore another judge who does not conform to Rehnquist's descriptive or prescriptive claims. Of course, the mantle of civil libertarian sits uncomfortably on Taney, the author of the morally outrageous Dred Scott decision. This discomfort, however, only attests to the complexity of the subject that Rehnquist tries to treat.

¹²⁰ [481 US 739 \(1987\)](#).

¹²¹ [Id at 748.](#)

may detain individuals whom the Government believes to be dangerous."¹²² Here Rehnquist cited a case involving aliens¹²³ and a case involving state, rather than federal, power to suppress violent insurrection.¹²⁴ He did not cite the best known and most apposite case, *Korematsu*, perhaps because that is not the sort of case one can cite with approval. But the principle of *Korematsu* nonetheless lurks in the shadows of *Salerno*: however "importan(t) and fundamental" the right to liberty, "this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."¹²⁵

All the Laws but One reads as a historical brief in support of the Chief Justice's *Salerno* opinion, cataloguing the many situations in which wartime executives preferred order to freedom and in which judges let them have their way. It is a good brief, as one would expect from a man who has devoted a long career to writing and reading them. But it is poor history. The story of civil liberties during wartime may ultimately be a sorry one for freedom, but it is a sophisticated sorry story, not the simple one that this book gives us.

¹²² *Id.*

¹²³ [Ludecke v Watkins, 335 US 160 \(1948\).](#)

¹²⁴ [Moyer v Peabody, 212 US 78 \(1909\).](#)

¹²⁵ [Salerno, 481 US at 750-51.](#)