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Wartime Security and Liberty under Law

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To initiate this series of namesake lecturers is an honor and its association with the memory of James McCormick Mitchell imposes a responsibility. Here in Western New York, when I was admitted to its bar Mr. Mitchell already ranked high in its long list of eminent advocates, jurists and intellectual leaders. What Mr. Mitchell was, most of us young men hoped to become. In the courts, his character, scholarship, and industry were highly respected—he was counselor to men of important affairs, his cultural interests were broader than his craft, and he was among the most effective influences that fostered this University and its Law School.

Mr. Mitchell once described the intellectual atmosphere which then permeated higher professional life by borrowing the words of his friend and preceptor, John G. Milburn, another of Buffalo's most gifted advocates:

> It is a noble profession and worthy of a man's deepest devotion. It affords the largest opportunities for the realization of moral ideals, and it never fails in intellectual interest. Its work is in the main stream of the life of the time. It may be establishing a rule of law for the conduct of business, the working out of some adjustment of the existing legal system to new economic or industrial tendencies, the organization of a corporation, the formulation of the terms of an enterprise, or the devolution of an estate. Each day has its problems requiring thought, study and action. The law itself is constantly changing in its adaptation to new conditions, new requirements, new tendencies, new needs. I cannot imagine a more interesting field of labor. Its satisfactions are the satisfactions of a mind actively employed in scientific investigation, in the quest of knowledge and in practical affairs. Its rewards are position, influence, personal distinction and a

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† Associate Justice, Supreme Court of the United States, in an address delivered at Buffalo Law School, May 9, 1951.

reasonable affluence.[1]

The work which they mention as "in the main stream of the life of the time," you will notice, does not include many of today's professional pursuits, such as taxation, labor relations, or practice before various administrative tribunals. Two World Wars and world-wide depression brought new issues. Mr. Milburn omitted any reference to legal struggles over national security or civil liberty, no doubt because that time held no serious threat to security and liberty was taken for granted. The Union had survived, and the North had recovered from the Civil War. The ideas of our Declaration of Independence and our Bill of Rights held the initiative throughout the world and old systems of autocracy were falling before them. The West was still lighted by the afterglow of the American Revolution. Counterrevolution, under the banners of Marxism, had not yet become a world power, nor had its agents in serious numbers infiltrated our country to claim shelter of our Constitution while conspiring to bring about its overthrow.

We can no longer take either security or liberty for granted. The best that we can now hope for seems to be a prolonged period of international tension and rumors of war, with war itself as the ever threatening alternative. For security against foreign attack we must look to the professions which manage our armed forces and to the economy of the country that sustains them. But I see not the slightest probability in the foreseeable future that any conqueror can impose oppression upon us, and the dangers to our liberties which I would discuss with you are those that we create among ourselves.

The essence of liberty is the rule of law. Only when impersonal forces which we know as law are strong enough to restrain both official action and action by private groups is there real personal liberty. Liberty is not mere absence of restraint, it is nor a spontaneous product of majority rule, it is not achieved merely by lifting formerly depressed classes to power, it is not the inevitable byproduct of technological advancement. Freedom is achieved only by a complex but just structure of rules of law, impersonally and dispassionately

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1. James McCormick Mitchell, "John G. Milburn," Address at the Thursday Club (Nov. 1943).

enforced against both rules and the governed. Because liberty cannot exist apart from the impartial rule of law, it is vulnerable to wartime stresses, for then the rule of law breaks down. The same passions and anxieties may result from a long period of tension which may be almost as demoralizing as actual war.

The United States has survived two modern wars without serious or permanent impairment of our system of ordered liberty under law. That may be due more to good fortune than to wisdom. We were not a belligerent in either World War, except for a part of its duration; continental United States was never invaded; our cities were not bombed. While we talked a great deal about "all-out-war," we never began to mobilize men or resources or impaired the civilian standard of living to the extent that Germany or England did and as we would have to do in a long, hard war.

But it is even more important to recall that our Government, during those wars, did not have to combat a really numerous, cohesive, or well-organized internal opposition. The Nazis had no effective or far-reaching underground of their own here. During the time Stalin was a partner of Hitler, it was the extensive and disciplined Communist underground which was at their joint service. That was of sufficient magnitude and efficiency, with propaganda, political strikes, espionage, and sabotage, to retard our preparations and to slow aid to victims of aggression. But before we were attacked, Hitler had turned on the Soviet Union, and the only way the Communists could support Russia's war was to support our war. Had not this change in their course occurred before we became a belligerent, drastic measures to disable them from doing harm would certainly have been undertaken.

There is no reason to suppose that we will be so fortunate again. The only probable future enemy is now supported by fanatical partisans within our midst. In strategic places, in communications, government, labor, or industry, they could give valuable aid and comfort to the enemy. Probably much greater than their capacity for actual harm is their capacity to arouse fears and hatreds among us. A secret conspiratorial group, even if not very potent itself, can goad the Government into striking blindly and fiercely at all suspects in a manner inconsistent with our normal ideas of civil liberties.

If we take the first ten Amendments to the Constitution as the legal structure which contains the substance of our liberties, we find that they fall into two general classes. Some are primarily addressed to courts and judges and tell us how we shall manage the judicial process. Others are addressed primarily to Congress or the Executive and place limitations on their powers.

Those admonitions addressed to the judges are designed to keep the judicial process as independent, neutral, and non-partisan as procedural safeguards can, and to make certain that courts will not be used as instruments of oppression or of political policy. These provisions are relatively explicit and concrete and deal with well-defined legal concepts or long-established practices. They are procedural and appeal more to the understanding of lawyers than of the populace. An excited public opinion sometimes discredits them as "technicalities" which irritate by causing delays and permitting escapes from what it regards as justice. But by and large, sober second thought sustains most of them as essential safeguards of fair law enforcement and worth whatever delays or escapes they cost.

These procedural safeguards include the right of the people to be "secure in their persons, houses, papers and effects, against unreasonable searches and seizures" and the requirement of particularity in search warrants;[2] prosecution only by grand jury indictment, prohibition of double jeopardy for the same offense, the right of an accused not to be a witness against himself, and the right not to suffer deprivation of life, liberty, or property without due process of law.[3] They guarantee speedy and public trial by an impartial jury of the people from the locality where the crime was committed, the right to be informed of the nature and cause of the accusation, to be confronted with the accusing witnesses, to have compulsory process for obtaining defense witnesses, and to have assistance of counsel;[4] the guarantee of jury trial;[5] and the proscription of

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2. U.S. CONST. amend. IV.

3. *Id.* amend. V.

4. *Id.* amend. VI.

5. *Id.* amend. VII.

excessive bail, fines, or cruel and unusual punishment.[6] These bear primarily on the conduct of judicial business.

Other provisions embody political policies deemed essential to a free society, and admonish primarily the political branches of government. Time has rendered some of these less important, as, for example, those which permit the people to keep and bear arms[7] and limit the quartering of soldiers in private homes.[8] At least, they are productive of almost no current litigation. Another which our forefathers regarded as of prime importance to the maintenance of liberty was the Tenth Amendment, which reserved to the States or to the people all undelegated and unprohibited powers, and was intended to prevent undue concentration of power and centralization of authority in the Federal Government. Of course, the allocation of power between State and Nation is a fundamentally political question, however it incidentally may be involved in legal controversies. The one really decisive conflict between the central and local government was settled only by civil war. I am not sure that this part of the Bill of Rights is not on its way to obsolescence as a legal doctrine, whatever it may have of political vitality. Contentions based on it have not prospered in the Supreme Court in recent years, although at former times they found considerable hospitality there. The Tenth Amendment may become as impotent juridically as the provision that each State is guaranteed republican form of government which the courts candidly reject as legally enforceable doctrine and regard as presenting only political issues.[9]

Legal controversy has more and more been generated by the Amendments that primarily are restraints upon the Legislative or Executive branches of governments. Chief sources of litigation for many years were the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, applied as limitation on substantive law.[10] Recently,

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6. *Id.* amend. VIII.

7. *Id.* amend. II.

8. *Id.* amend. III.

9. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

10. The Due Process and Equal Protection Clauses are distinguished as to their disabling effect on government in dissent in Railway Express Agency v.

litigation has more often succeeded by invoking the First Amendment, now applied to prohibit abridgment of freedom of speech, press, assembly, and religion and establishment of religion by states, cities, school boards, and local courts, as well as by congress.[11]

Whatever the defects of our constitutional system of legal liberties, however much the generality of their statement permits uncertain applications and varying interpretations, it can hardly be questioned that they have guided the courts in normal times to a protection of the rights of the individual against the mass, and the citizen against the government, that compares favorably with the conditions of any nation. We should not forget, however, that we are not the only people who love and cherish liberty, and we are not the only ones to find that external pressures and threats produce internal reactions which divert their institutions from their usual course.

Some modern nations have forthrightly recognized that war or external dangers do upset the normal balance between liberty and authority. They have recognized, too, that fear and anxiety create public demands for greater assurance which may not be justified by necessity but which any popular government finds irresistible. They have met this by providing for some emergency powers or temporary crisis government. Their experiments are well worth study, though time today permits only most general reference.[12]

After the First World War, the Weimar Constitution guaranteed freedom of opinion and expression, of assembly and association, and inviolability of the person and of

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New York, 336 U.S. 106, 111 (1949). *See* Charles M. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 228 (1918). The history of due process litigation is set out in ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 24-74 (1941).

11. *See, e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949); Saia v. New York, 334 U.S. 558 (1948); Illinois, *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 103 (1943).

12. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES (1948), is a comprehensive study of crisis in government in Germany, England, and France.

domicile, to the Germans. For its time and place, it constituted a rather advanced bill of rights in the Western tradition. However, the President of the Republic was empowered temporarily to suspend any or all of these individual rights if the public safety and order were seriously disturbed or endangered. This proved a temptation to every government, of whatever shade of opinion, and in thirteen years it was invoked on more than 250 occasions. Upon the burning of the Reichstag, Hitler attributed it to the Communists, although there was substantial evidence at the Nuremberg Trial that the Nazis burned themselves. In the excitement, he persuaded President von Hindenburg to suspend all such rights.[13] They were never restored.

The French, taught by their history, provided for a very different kind of emergency government, known as the "state of siege." Unlike the German emergency dictatorship, it can be invoked, not by action of the Executive, but as a parliamentary measure. And, unlike the German, it is not regarded as a suspension or abrogation of law but, with characteristic French logic, is made a legal institution, governed by legal principles and terminable by parliamentary authority.

Great Britain also has fought both World Wars under a temporary dictatorship of sorts. As there are no written constitutional limitations upon the power of the British Parliament, it simply provides a crisis government by delegating a larger measure than usual of its own absolute power to the Ministers, but always subject to recall at its will and subject to its scrutiny and supervision in administration. In each World War, Parliament, by its Defense of the Realm Act, has delegated to its ministers powers beyond those which Congress could delegate consistently with our Bill of Rights.

It may be significant that the short-lived German system, which resulted in dictatorship, allowed the Executive to enhance its own power by suspending civil

13. The progress of measures for the overthrow of German freedoms is traced in some detail in I Nazi Conspiracy and Aggression (GPO 1947) 184, and in more condensed form in the address opening, on behalf of the American prosecution, the Nurnberg trial of the major Nazi war criminals, *id.*, at 120. Also reported 2 Proceedings, International Military Tribunal 105.

rights. Both France and England retain that power in the Legislative branch, though in England the separation of power is rather nominal. But all three countries invoked emergency government as a political decision with which the Judiciary had nothing to do. Neither in Germany, France, nor England could any court set aside the government's exercises of emergency power or review its fundamental legality.

There is a popular impression, fostered by ignorance of our history, that civil liberties in this country are not so vulnerable, and that courts are always open as the sanctuary from arbitrary government. The historical fact is, however, that several ways have been found to close the courts for any effective enforcement of civil rights and that one sentence of our Constitution has proved sufficient to introduce emergency government with about all the freedom from judicial restraint that any dictator could ask. That is Article I, Section 9, clause 2, which reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." While courts might inquire whether the conditions existed which permit the suspension, "Invasion" might be construed to include an air attack on any part of our territory—an extremely probable incident of any war. There is authority to the effect that only Congress can suspend the privilege,[14] but it was not only suspended by President Lincoln—without authority from Congress—he delegated authority to his generals to suspend it in their discretion. In 1863, Congress authorized and ratified the Presidential suspension and sought to mitigate some of its abuses.[15]

Civil War history teaches that suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty. President Lincoln at the outset of his administration suspended the privilege and resorted to wholesale arrests without warrants, detention without trial, and imprisonment without judicial conviction. Authorities say that there were certainly 13,000 of such

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14. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487); *see Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866).

15. Habeas Corpus Act of Mar. 3, 1863, 12 Stat. 755.

detentions for suspected disloyalty and estimates run the figures as high as 38,000.[16] Since the population of the Northern States in 1860 was only about 22,000,000, the Lincoln arrests without warrant probably would be equivalent to arrest of 100,000 persons out of our present population. This policy was sharply but unavailingly condemned in May of 1861 by the aged Chief Justice Taney. Let him state the case:

> The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.
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> As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. "In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."[17]

Carl Sandburg[18] does not gloss over the abuses committed under cover of suspension of the privilege of the writ. Private mail was opened. Cabinet officers simply sent telegrams ordering named persons to be arrested and held without communication or counsel. General Burnside suppressed the *Chicago Times* and seized its newspaper plant. He also arrested Vallandigham, a rather scurvy

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16. James Parker Hall, *Free Speech in War Times*, 21 COL. L. REV. 526 (1921). It is interesting to note that Dean Hall, on whose researches I rely, was once associated with Mr. Mitchell in the practice of law in this City and was a native of nearby Jamestown, NY.

17. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

18. 2 CARL SANDBURG, ABRAHAM LINCOLN, THE WAR YEARS (1939), at 155-75.

character, who had been in Congress and was the Democratic candidate for Governor of Ohio. He was tried by Military Commission and convicted. His application for a writ of habeas corpus was denied upon the ground that General Burnside had received authority to suspend the writ. Lincoln then ordered Vallandigham to be transported back of the Confederate lines and left there.

President Lincoln, in his famous letter to "Erastus Corning and Others," in defending his conduct said all that ever can be said, and what always is said, in favor of such policies in time of emergency. He drew a distinction between peacetime arrests and jailing men during rebellion.

> In the latter case arrests are made not so much for what has been done as for what probably would be done . . . . Under cover of 'liberty of speech,' 'liberty of the press' and 'habeas corpus' they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways . . . . Nothing is better known to history than that courts of justice are utterly incompetent in such cases. Civil courts are organized for trial of individuals . . . in quiet times . . . . Again, a jury too frequently has at least one member more ready to hang the panel than to hang the traitor.[19]

And he asked, "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"[20]

President Lincoln there voiced the impatience with the process of the civil courts that always develops in wartime and the demand that various conduct or speech, believed harmful to society, be punished summarily by some sort of Military Commission. His suspension of the privilege of the writ of habeas corpus had opened the door to this procedure, and it outlived him. On May 1, 1865, President Johnson ordered a military commission to try those accused of conspiracy to assassinate President Lincoln. The civil courts were open and functioning in the District of Columbia and the acts constituted crimes under its law. The War Department set up this Commission, and two days

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19. Letter from Abraham Lincoln to Erastus Corning and Others (June 13, 1863), *reprinted in* FRANK CROSBY, THE LIFE OF ABRAHAM LINCOLN: SIXTEENTH PRESIDENT OF THE UNITED STATES (1865).

20. *Id.*

later it served its charges. A plea to the jurisdiction, certainly one of substance in the light of later decisions, was overruled on the day it was filed. On May 12, four days after it was created, with the press and public excluded, the Military Commission started the trial. Conviction followed promptly. Application for a writ of habeas corpus was made to the court in the District of Columbia, and the writ issued. General Hancock made return refusing to produce the defendants, by direction of the President, who ceded that, "[t]he writ of habeas corpus has been heretofore suspended in such cases as this, and I do specially suspend this writ and direct you to proceed to execute" the judgment of the Military Commission. Thereupon, the court ruled that it must yield, and the sentences were carried into execution.[21] The performance of this Military Commission was hardly an edifying example of the judicial process and soon the Supreme Court decided Ex parte *Milligan*, by which the supremacy of civil courts was restored.

Another method of closing the courts to aggrieved citizens that is not wholly precluded by our Constitution is the declaration of "martial law," which is nothing less than the taking over by the army of civil authority in an area of military operations where civil government is unable to function. It is a law of necessity and is administered by executive power. It was invoked, and most improvidently used, during the recent war in the Hawaiian Islands, where the conflict between civil and military power was sharp. After hostilities ceased, it was finally curbed by the Supreme Court.[22] While there is some judicial control of the resort to martial law, the courts, as Chief Justice Taney pointed out, have no force equal to the task if military authorities refuse to heed them. The Hawaiian experience is very instructive but too long to detail and is fully exposed in legal literature.[23]

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21. DAVID E. HEROLD & BENN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS (1865).

22. Duncan v. Kahanamoku, 327 U.S. 304 (1946).

23. The story of martial law in Hawaii may be found in many periodicals, including Garner Anthony, *Martial Law in Hawaii*, 30 CAL. L. REV. 371 (1942); Walter P. Armstrong, *Martial Law in Hawaii*, 29 A.B.A. J. 698 (1943); Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); Charles Fairman, *The Supreme Court on Military Jurisdiction-Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV.

Another device which has been used to take the law out of the hands of the Judiciary has been to enact legislation to deprive the Supreme Court of jurisdiction. Under our constitutional structure, the Supreme Court has appellate jurisdiction "with such exceptions and under such regulations as Congress shall make."[24] In 1869, a case involving the validity of certain "reconstruction" measures had been argued and was under consideration by the Supreme Court. Fearing an adverse decision, Congress, over the veto of President Johnson, repealed the Act on which its jurisdiction rested.[25] The Court thereupon dismissed the case for want of jurisdiction.[26] This practice could be carried to almost any extreme that public sentiment would tolerate.

Thus, you see in several ways judicial power can be foreclosed from its ordinary function of standing between the inhabitant and unlawful assertion of power by government. Liberties are not so inflexibly buttressed as most persons suppose and a public sentiment that would sustain closing of the courts could lead to serious consequences.

But if we assume that courts retain public confidence and will not tolerate resort to any of these devices, the judicial handling of wartime cases and controversies still present disappointing departures, not only from the ideal, but from the ordinary.

One of the weakest links in any system of adjudication at any time is fact-finding. Through the jury system, the public participates, indeed almost monopolizes, fact-finding in administration of criminal justice. Ordinarily, an accused feels this to be an assurance of fairness, because lay jurors coming from the masses of the people are not likely to favor

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833 (1946); Archibald King, *The Legality of Martial Law in Hawaii*, 30 Cal. L. Rev. 599 (1942); Claude McColloch, *Now It Can Be Told: Judge Metzger and the Military*, 55 A.B.A. J. 365 (1949).

24. U.S. CONST. art. III, § 2, cl. 2.

25. 15 Stat. 44, Mar. 27, 1868, repealing that part of 14 Stat. 385, Feb. 5, 1867, conferring appellate jurisdiction on the Supreme Court in habeas corpus cases. As a study in political courage, one should read the veto message of President Johnson, then undergoing his impeachment trial before the Senate which passed the Act. *See* LLOYD PAUL STRYKER, ANDREW JOHNSON: A STUDY IN COURAGE (1929).

26. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

harsh, oppressive, farfetched or merely technical prosecutions. But, in wartime, the jury itself may be most susceptible to inflamed opinion and return convictions which judges, if the responsibility were theirs, might deny. No matter how fair the judge tries to be, if the jury, by radio, press and television, are constantly impressed that the public expects and demands convictions, that prosecution witnesses are credible, that defendants have evil backgrounds, the verdict is apt to register this prejudgment.

Judges, too, sometimes give way to passion and partisanship. The judicial process works best in an atmosphere of calmness, patience and deliberation. In times of anxiety, the public demands haste and a show of zeal on the part of judges, whose real duty is neutrality and detachment.

Wartime psychology plays no favorites among rights but tends to break down any right which obstructs its path. And the fall of one weakens others. The Bill of Rights Amendments were all adopted at one time and were designed to present a comprehensive and integrated pattern of a free society. The Constitution established no priority among them. But, of late, one school of judges has adopted as a principle of judicial decision that freedom of speech, press, and assembly are "preferred rights" and are to be given a "preferred position."[27] Large vested interests engaged in communications enterprises welcome this dissatisfaction. So also do the Communists, as these happen to be the rights most frequently invoked to shelter them in their attacks upon our Government. The great difficulty with the preferred-rights doctrine is that it crowds some others into the position of deferred rights. There is some indication, for example, that freedom from unreasonable searches and seizures does not enjoy the preferred rating.[28]

So-called property rights are, of course, among the deferred, and they are especially vulnerable in wartime.

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27. See dissent, Brinegar v. United States, 338 U.S. 160, 180 (1949), and cases there cited. *Cf.* United States v. Rabinowitz 339 U.S. 56 (1950); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947).

28. *See supra* note 27.

The two provisions of the Constitution most often invoked in behalf of them are the Due Process Clauses of the Fifth and Fourteenth Amendments and the provision of the Fifth Amendment that private property shall not be taken for public use except upon just compensation. There has been a sharp and desirable reaction from that period when a court could say, "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty and property, the chief of these is property . . . ."[29]

Property is particularly vulnerable in modern war. Communism and Socialism have no more effective allies and promoters than total war. Control of prices, allocation of raw materials, priorities in transportation, requisitions, compulsory orders, and renegotiations, leave little of the system of private enterprise. Military socialization comes wrapped in patriotism, while political socialization is deemed alien and un-American. Wartime business and property controls usually outlast the wars. It is no accident that the European peoples who have had total war and most complete militarization find it so easy to adopt socialization. No one who follows the trend of decision mould expect the courts to be a bulwark against it in wartime, if indeed they are at any time.

But our forefathers deemed the personal right to acquire, own, and manage property as one of those liberties essential to a free society. A large degree of freedom from government control in these matters was as much a part of their philosophy as was freedom from interference in speech, press, or religion. It may be open to question whether we can completely abandon laissez faire as to property and retain it as to person. When acceptance of a war order is compulsory on an employer, it is more easy to argue that labor to perform it should be compulsory. When scarce materials are allocated the argument is strengthened for allocation of labor. Each liberty found in our Bill of Rights furnishes a sort of lateral support for every other, and when one is withdrawn or deferred the foundations of all are weakened.

Property and enterprise, of course, require more

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29. Children's Hosp. v. Adkins, 284 F. 613, 622 (D.C. Cir. 1922) (setting aside the Minimum Wage Law of the District of Columbia).

regulation than persons, but hostility to property as an institution was no part of our constitutional scheme and should find no place in its interpretation. Wisely or not, our forefathers regarded the personal right to acquire, accumulate, and enjoy property as the great incentive to individual effort. If not controlled in the interests of society, it can be abused, especially where exploitation of natural resources or the labor of others is involved. But those countries which, under Communist domination, have largely abolished the property incentive have felt obliged to substitute a far more harsh and oppressive system of labor compulsion, enforced by penalties upon the person. Bad as the evils of out system may be painted, they do not equal those of the only alternative yet brought forth—mass transfers from the country to the factories, forced labor, work camps, heavy penalties for absenteeism and for failure to meet standards of quantity or quality in production. The most callous and brutal of all inducements to labor are those applied by the dictator state. In fact, there is reason to believe that even they are returning to the incentive system, because they find compulsion has passed the point of diminishing returns.

Moreover, we must not forget that enjoyment of personal rights often will depend upon enjoyment of some property right. For example, what is modern freedom of the press worth without the right to occupy a costly plant, hire competent labor, and obtain adequate paper and supplies? A high-handed government could do much to get rid of an objectionable newspaper without passing any law abridging freedom of the press. The government might, for example, condemn the newspaper building and even the physical presses and equipment for its own use. Courts will not inquire into the justification for an exercise of eminent domain. But, under recently approved practice, it need not even put the owner in funds to replace the building, for it need not take the title. Instead, the government may take only the use—and that for an unstated time—and pay only the rental as it accrues.[30] Even if the owner has other resources to build a new plant, he may find himself blocked in getting scarce materials or transportation priorities, or subject to discrimination in rationing of paper. When in

30. See United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261 (1950), and cases there cited.

these matters he turns to the courts, he has little relief from these administrative decisions, and that little long-delayed. Meanwhile, he is out of business, his advertising customers gone, his subscribers vanished, his goodwill destroyed. Certainly if an evil government desired to destroy freedom of a hostile press, it would approach it, not through direct suppression, but through unfair administration of property regulations. That is why any doctrine of deferred rights is dangerous and especially if we defer those rights that are an essential to fair administration of the laws.

I suppose the American people, on whose eternal vigilance liberty ultimately depends, are well agreed that what they want of the courts is that they both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it.

The issue that usually comes to the courts, however, is not a clear and simple one between security and liberty. The issue as we get it is more nearly this: measures violative of constitutional rights are claimed to be necessary to security, in the judgment of officials who are best in a position to know, but the necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself. What does it do then? The best study of the impact of such claims upon the judicial process during wartime is *Korematsu v. United States*,[31] the precedent that I fear will long be most useful to justify wartime invasions of civil liberty. It was not a case where the Court was asked by a citizen to obstruct execution by military authorities of a military order. It was a case where the Government asked the Court to become, itself, the agency to enforce against the citizen, by criminal process, a military policy of dubious constitutionality. That policy was to remove all persons of Japanese ancestry, including native-born American citizens, from the west coast and herd them into camps in the interior. When enforcement of that measure came squarely before the Supreme Court, three judicial policies were advocated, none of which can be said to be wholly satisfying.

One view, certainly the popular view at the time, was sponsored in the opinion of Mr. Justice Black, with support

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31. 323 U.S. 214 (1944).

of Chief Justice Stone, Justices Reed, Douglas, and Rutledge, and a concurring opinion by Justice Frankfurter. It held exclusion and detention of citizens of Japanese ancestry constitutionally valid. Korematsu, it reasoned, was detained because military authorities feared an invasion and felt constrained to take proper security measures. "The need for action was great, and time was short." The Court refused to say that the "actions were unjustified" and held them constitutional. Another course was proposed by Mr. Justice Roberts and, for different reasons, by Mr. Justice Murphy. Both refused to yield to the doctrine of military necessity and declared the measure "a clear violation of constitutional rights," let the chips fall where they would. It seemed to me then, and does now, that the measure was an unconstitutional one which the Court should not bring within the Constitution by any doctrine of necessity, a doctrine too useful as a precedent. I thought the courts should not lend themselves to its enforcement and we should discharge the prisoner from custody under judicial commitment. But had the military authorities attempted to enforce the measure by their own force and authority, the Court should not attempt active interference, since the West Coast was then a proper theatre for military operations. I can add nothing to my dissent in the case, though I have to admit that my view, if followed, would come close to a suspension of the writ of habeas corpus or recognition of a state of martial law at the time and place found proper for military control.

Temperate and thoughtful people had difficulties in such conflicts which only partisans had no trouble in deciding wholly one way or the other. It is easy, by giving way to the passion, intolerance, and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security. Also, it is easy, by contemptuously ignoring the reasonable anxieties of wartime as mere "hysteria," to set the stage for by-passing courts which the public thinks have become too naive, too dilatory and too sympathetic with their enemies and betrayers. Lax law enforcement is the enemy of civil rights under law, for it creates the demand for the military trial and for extralegal vigilante organizations, such as the ill-famed American Protective League of the First World War. And if the people come deeply to feel that civil rights are being successfully turned against their institutions by their

enemies, they will react by becoming enemies of civil rights. Such was the case in the Lincoln era—there is no doubt where popular feeling stood in the contest between Lincoln and Taney. After all, we have to acknowledge the historical fact that international hostility has resulted in surprise attacks and conquests, in unanticipated disasters and overthrows, and in catastrophic treachery and betrayals.

The Communist coup d'etat in Czechoslovakia, followed by their destruction of all civil rights of those who had shown them tolerance, poses the dilemma of all free people. There the Benes-Masaryk government was completely tolerant of Communist opposition. They were allowed generous liberties of press and speech and assembly. They were even taken into high posts in government, because they claimed to represent a substantial minority of the citizenship. That liberty was used to overthrow liberty and to set up a murderous regime which tolerated not the slightest deviation in thought, speech, or action from the Communist dogma. Perhaps they could not have succeeded but for their geographic location and the proximity of a Red army. But the example of Communist abuse of Czechoslovakian liberty will long make difficult the path of those who would give complete liberty of action to internal enemies.

The American dilemma is perhaps best illustrated by that scene in Masonic Hall at Baltimore, when Chief Justice Taney heard the return to his writ of habeas corpus to military authorities who were holding Merryman without charges, warrant, trial, or conviction. Taney, the constitutionalist, was outraged by this flagrant invasion of Merryman's constitutional rights. These he would protect, even if in doing so he gave free rein to those who sought overthrow of the Union. In the White House was a man who would preserve the Union, even by disregarding constitutional rights of those fomenting rebellion. It may be that his extreme measures were not necessary, that the war would have been won without them. But I suppose a poll to name the greatest benefactor of freedom this country ever had would result in a heavy majority for Abraham Lincoln. The issue between authority and liberty is not between a right and a wrong—that never presents a dilemma. The dilemma is because the conflict is between two rights, each in its own way important. Taney in the light of his duties was right, and Lincoln in the light of his duty was right.

And if logic supports Taney, history vindicates Lincoln.

It is customary to tell students how urgently these great issues challenge them, and how soon they will have to face the greatest challenge of history. I forbear such extravagances. The problem of liberty and authority ahead are slight in comparison with those of the 1770s or the 1860s. We shall blunder and dispute, and decide and overrule decisions. And the common sense of the American people will preserve us from all extremes which would destroy our heritage.