

ESSAY

UNDER STRESS: THE CONSTITUTION IN TIMES OF NATIONAL ORDEAL

*Albert M. Rosenblatt**

Given this wonderful occasion, there was no need for any added inducements for me to give the inaugural lecture, but you offered two: first, a dinner with the high officials here. That, of course, was most welcome. Second, that I would be introduced by Dr. Ray Raymond, the living embodiment of Anglo-American scholarship and the cement that binds us to our British cousins. When I think of Dr. Raymond, I am reminded of Arthur Conan Doyle's *The Adventure of the Noble Bachelor*, in which Sherlock Holmes proclaims:

I am one of those who believe that the folly of a monarch and the blundering of a minister in far-gone years will not prevent our children from being some day citizens of the same world-wide country under a flag which shall be a quartering of the Union Jack with the Stars and Stripes.

That has not happened in the literal sense, but symbolically, we owe much of our constitutional heritage to the United Kingdom, its common law, and its historic commitment to human rights, dating as far back as Magna Carta—the ancestor of our Due Process Clause. Conan Doyle spoke of events that took place two centuries ago, but now we are in a very different kind of conflict, fighting not for our independence, but for our political footing in a global struggle.

We were attacked on our own soil in 2001, and since that time have had to examine both our goals and our values, while experiencing waves of emotions. We are enormously powerful, but have not entirely sorted out who our enemies are, so that if and when we un-

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¹ Arthur Conan Doyle, *The Adventure of the Noble Bachelor*, STRAND MAG., Apr. 1892, reprinted in 1 THE COMPLETE SHERLOCK HOLMES 357 (Barnes & Noble Classics 2003) (1992).

leash our might, we may direct it in ways that measure up to our standards of decency and rationality.

Over the course of history, many governments, even responsible ones, have taken up arms. Traditionally, the enemy was a known and visible entity, a national state or something very much like one. The definition of an enemy combatant was clear; in 1942, it was someone wearing a Nazi uniform.

Today our enemies do not typically appear in uniforms but in stealth, and we spend as much time trying to find them as we do confronting them militarily. This has raised questions about our methods. Years ago, we would see the uniform and use our musket, our M1, or our hand grenade. Identifying the enemy through electronic surveillance, detention, and torture would have struck us as almost inconceivable. Things have changed.

I am no statesman or politician or maker of government policy, and as an American judge, I have not functioned in the international arena. Yet I feel the repercussions of our current condition—and the debate that accompanies it—because the American justice system is implicated in these international events. We continually ask ourselves whether American individual rights and civil liberties are being unduly diminished, and whether a country under stress is able to maintain the lofty guarantees of constitutional rights so easily delivered when we are relaxed and unworried. Indeed, one commentator has said that “courts love liberty most when it is under pressure least.”² We read of military tribunals, prolonged detention of suspects, closed proceedings, and other practices that make many Americans uneasy. The last administration tried to assuage us, saying, in effect: “Look, we are at war. When dealing with our enemies—or at least our suspected enemies—we can’t give them the full legal arsenal available in the typical American trial, because if we do, *they* will use that arsenal to destroy us. After all, *they* aim to destroy this country, and make no mistake about it.”

The rub, of course, is deciding who “they” are, given that under our system we cannot begin by adjudging people guilty and *then* providing them with criminal trials that vary with how guilty we think they are.

Responsible critics have asserted, compellingly, that in our zeal to overcome an elusive threat we are compromising our civil liberties.

² JOHN P. FRANK, *Review and Basic Liberties*, in SUPREME COURT AND SUPREME LAW 109, 114 (Edmond Cahn ed., 1954).

These practices, mostly emanating from the Executive Branch, raise troubling questions for Americans.³

There are no easy answers, and I hope you did not come here expecting me to supply any—despite Ray Raymond's generous introduction. If consensus were easy, we would not be divided into red and blue states; we would all be a nice shade of—I would choose—forest green.

I can, however, spend a few minutes reviewing a historical record that goes back to the founding of the Republic. Let me disclose that, having done the research for this talk, I have come away with the impression that the journey has some reassuring turns in the road. It reveals that this is not the first time we have been threatened, that we have contracted our liberties before (in times of war or its equivalent), and have managed to survive with our values generally intact and even renewed. We have given ourselves a few black eyes along the way, but after each crisis, we have grown older and wiser and have learned something. I attribute this to the character of the American people. Over many decades, we have increasingly insisted, at times protestingly, that our public officials obey the rule of law and adhere to constitutional criteria.

Today we are being tested as never before. When the terrorist planes hit the World Trade Center and the Pentagon, they caused more than a physical explosion. That attack radically affected our national equilibrium. On October 26, 2001—six weeks after 9/11—Congress passed the USA PATRIOT Act, which augmented the power of the Executive Branch to conduct searches and surveillances beyond those that had been generally allowed under the Fourth Amendment of the Constitution.⁴ The Patriot Act also authorized expanded detention of suspects and relaxed standards in connection with wiretap information.⁵ It is worth remembering that in times of war this type of legislation is not new. Over 200 years ago, James

³ See *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 110th Cong. 5 (2008) (statement of Frederick A.O. Schwarz, Jr., Chief Counsel, Brennan Center for Justice at New York University School of Law); David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195 (2008).

⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

⁵ See Nancy Chang, *How Does USA Patriot Act Affect Bill of Rights?*, N.Y.L.J., Dec. 6, 2001, at 1.

Madison observed that the presidency gets stronger when there is danger from abroad.⁶

Some critics have argued that according to the war powers set forth in the Constitution,⁷ presidential orders should not supplant or extend the will of Congress. A system of checks and balances does not comfortably accommodate a presidency or any other branch of our government that trenches upon the other two. The notion of the separation of powers is relatively new in world history. Montesquieu, an eighteenth-century thinker, is generally credited with introducing the concept.⁸ When we drew our Constitution along those lines, we aimed to regulate the power of the newly established presidency. We had just gotten out from under the thumb of the British monarch and did not want our newly drawn presidency to take on the trappings of George III.

I am sure you know that if and when presidential orders, or even congressional enactments, are attacked as unconstitutional, the Judiciary—the third and weakest branch—must be the arbiter.⁹ Alexander Hamilton pointed this out some fifteen years before *Marbury v. Madison*.¹⁰

There has always been tension between war powers and constitutional rights. According to one scholar, our hostilities with France led to the adoption of the Federal Seditious Act of 1798.¹¹ Under this act, people who spoke out against John Adams's presidential policy candidates faced jail. Even though the statute was never tested by the

6 See Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 *HAMLIN J. PUB. L. & POL'Y* 455, 460–61 (2002) (“James Madison admitted that the presidency would naturally get stronger at a time of ‘danger, real or pretended, from abroad.’”).

7 See U.S. CONST. art. I, § 8, cl. 11.

8 See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”).

9 The power of judicial review in the United States contrasts with England's doctrine of Parliamentary Supremacy, see e.g. *Re K*, [2001] 2 All E.R. 719, para. 120 (C.A.); *Miliangos v. George Frank*, [1975] 3 W.L.R. 758; see, generally, Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 *HARV. L. REV.* 30 (1926) (discussing the role of Parliament in seventeenth-century England).

10 5 U.S. (1 Cranch) 137 (1803); see *THE FEDERALIST NO. 78* (Alexander Hamilton).

11 An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801); see also Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 *S. CAL. L. REV.* 1389, 1395 (1993) (“Our first cold war, the ‘phony war’ with France in the 1790s, led to state prosecutions for sedition and the adoption of the Federal Seditious Act of 1798.”).

Supreme Court, it was in existence for two years and has stained the pages of our Constitution.¹²

But that was a long time ago. Today we would be intolerant of any such law. Americans do not like to be muzzled.

In the century that followed (the nineteenth), we stood witness to another presidential action that faced down the Constitution. Abraham Lincoln issued executive orders to wage the Civil War. He resorted to what he called the “laws of necessity” by enlarging the army and navy beyond the authorization of Congress and spending public money without congressional approval.¹³ But Lincoln’s most dramatic action was his executive order commanding General Winfield Scott to suspend the writ of habeas corpus, thus giving the president power to have “disloyal” citizens arrested and held without trial.¹⁴ By suspending the writ, Lincoln prevented arrested individuals from challenging the legality of their detention.¹⁵ Under this edict, Lincoln imprisoned more than 13,000 people, including draft resisters, newspaper editors, judges, lawyers, and legislators.¹⁶

Lincoln’s action was declared unconstitutional by none other than Chief Justice Roger Taney, who had five years earlier authored the infamous *Dred Scott v. Sanford* decision.¹⁷ Sitting in 1861 as a Circuit Justice in Maryland, Taney said:

I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.¹⁸

And then Taney’s rebuke:

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United

12 See Finkelman, *supra* note 11, at 1395; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964) (footnote omitted) (noting that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history”).

13 See Mathews, *supra* note 6, at 465 (“With the threat of the secession of the southern states and the possible breakup of the American Union, Lincoln resorted to the ‘laws of necessity.’”).

14 See *id.* (“In 1861, Lincoln issued an order to Commanding General Winfield Scott authorizing him to suspend the writ of habeas corpus.”).

15 See Wendy Kaminer, *An Imperial Presidency*, AM. PROSPECT, Dec. 17, 2001, at 34.

16 See Mathews, *supra* note 6, at 465 (citing ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* 58–60 (1973)).

17 60 U.S. (19 How.) 393 (1856).

18 *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C. Md. 1861) (No. 9487).

States, and has not the slightest reference to the executive department. . . .

. . . .

It is true, that . . . congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.¹⁹

Taney then went on to quote Justice Joseph Story:

A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.²⁰

Taney continued by reminding us that under the Constitution's Fifth Amendment, "no person shall be deprived of life, liberty, or property without due process of law." You can hardly tell the players without a scorecard.²¹ In *Ex parte Merryman*, Roger Taney, author of the most disgraceful pro-slavery decision in our history, gave Abraham Lincoln a lecture in civil liberties.

After the Civil War, the constitutional/military scene was relatively quiet for about fifty years until World War I. In 1917, Congress passed the Espionage Act, giving the government the power to jail people for publicly expressing anti-war *commentary* and *opinions*.²² The law prohibited saying anything scurrilous about the government, or bringing the armed forces into disrepute.

The government conducted a number of prosecutions under this Act. No one was convicted of spying, but according to one researcher:

- D.T. Blodgett was sentenced to twenty years in jail for urging the people of Iowa not to re-elect members of Congress who voted for conscription.
- Rose Pastor Stokes was sentenced to ten years in prison for saying "I am for the people, and the government is for the profiteers."

19 *Id.*

20 *Id.* at 151–52.

21 *Id.* at 152.

22 See MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 43 (1990).

- John White was sentenced to twenty-one months in prison for stating that U.S. soldiers were “dying off like flies” and that the “murder of innocent women and children by German soldiers was not worse than what United States’ soldiers did in the Philippines.”
- Kate Richards O’Hare was sentenced to five years in the Missouri State Penitentiary for stating that “the women of the United States are nothing more or less than brood-sows, to raise children to get in to the army and be turned into fertilizer.”
- Twenty-seven South Dakota farmers were convicted for sending a petition to the government calling the war a ‘capitalist war’ and objecting to the draft quota for their county.²³

And if that were not enough, thirty-four-year-old Professor Zechariah Chafee, Jr. found himself in the middle of the controversy when he wrote an article in the Harvard Law Review criticizing the Espionage Act.²⁴ In an academic inquisition, he was brought up on charges by the University Board of Overseers to see if he was fit to continue teaching. The Board acquitted him . . . by a vote of 6-5.²⁵ This is reminiscent of comic get-well cards that people in the office send to a colleague who is out with a broken leg. “We heard of your injury and we wish you a speedy recovery . . . by a vote of 6-5.”

During World War I, the country was experiencing strong governmental reaction to anti-war speech,²⁶ and it was not long before Espionage Act cases reached the Supreme Court, which then developed the “clear and present danger” test. In one of the most famous of these cases, Justice Oliver Wendell Holmes said that:

“[I]n many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.”²⁷

Speaking for the Court, Justice Holmes found a clear and present danger justifying the prohibition:

[T]he character of every act depends on the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theatre and causing a panic. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so

²³ *Id.* at 44–45 (footnotes omitted).

²⁴ See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); see also Peter H. Irons, “Fighting Fair”: Zechariah Chafee, Jr., *The Department of Justice, and the “Trial at the Harvard Club,”* 94 HARV. L. REV. 1205 (1981).

²⁵ See LINFIELD, *supra* note 22, at 45.

²⁶ See David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 100 (1992).

²⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

long as men fight and that no Court could regard them as protected by any constitutional right.²⁸

In 1920, the Supreme Court decided *Gilbert v. Minnesota*,²⁹ a prosecution against an anti-war protestor. Under the law, speaking out against enlistment was a crime. Joseph Gilbert was arrested for saying what he thought about going to war:

We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy. I tell you what is the matter with it: Have you had anything to say as to who should be president? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a great democracy, for Heaven's sake why should we not vote on conscription of men. We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours.³⁰

Tried and convicted, Gilbert was ordered to pay a fine of \$500 and was locked up in the Goodhue County jail for one year.³¹

In upholding Gilbert's conviction, the Supreme Court said:

Gilbert's speech had the purpose they denounce. The Nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that—its purpose was necessarily the discouragement of that. It was not an advocacy of policies or a censure of actions that a citizen had the right to make. The war was flagrant; it had been declared by the power constituted by the Constitution to declare it, and in the manner provided for by the Constitution. It was not declared in aggression, but in defense, in defense of our national honor, in vindication of the "most sacred rights of our Nation and our people."

This was known to Gilbert for he was informed in affairs and the operations of the Government, and every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It would be a travesty on the constitutional privilege he invokes to assign him its protection.³²

The episode caused one historian of the period to characterize Woodrow Wilson's wartime administration as "the surveillance state."³³

28 *Id.* (citation omitted).

29 254 U.S. 325 (1920).

30 *Id.* at 327.

31 *Id.*

32 *Id.* at 333 (footnote omitted).

33 PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 71 (1979).

I find it interesting for historians to now assert that these World War I cases resulted in the origin of the civil rights movements in the United States.³⁴ That is not only remarkable; it is utterly American. Here is the great American pendulum at work. It is also fascinating to note that some of the most severe constrictions on civil liberties took place during the administrations of our most prominent presidents: Adams, Lincoln, Wilson, and, perhaps most dramatic of all, Franklin Delano Roosevelt.

In 1942, after the attack on Pearl Harbor, President Roosevelt issued Executive Order No. 9066, authorizing the internment of 120,000 people of Japanese descent. In the Order, which was challenged in *Korematsu v. United States*,³⁵ Roosevelt argued that it was necessary for the “protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”³⁶ In addition, the Order provided that Military Commanders could “‘prescribe military areas’ and define their extent, ‘from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions’ the ‘Military Commander may impose in his discretion.’”³⁷ Not one of the citizens sequestered had been accused of a crime, let alone found guilty. They were released four years later in 1946.³⁸

The U.S. Supreme Court upheld the relocation and internment of the Japanese Americans, based on their purported threat to our nation in 1942.³⁹ One commentator later asserted that there was “not a single ‘documented act[] of espionage, sabotage or fifth column activity . . . committed by any identifiable American citizen of Japanese ancestry or resident Japanese alien on the West Coast.’”⁴⁰ Today, when we hear the name, we remember *Korematsu* and we become more keenly aware of the outer limits of what we can do in the name of national security.

34 See, e.g., *id.*

35 323 U.S. 214 (1944).

36 *Id.* at 217 (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

37 *Id.* at 227 (Roberts, J., dissenting) (quoting Exec. Order No. 9066, 3 C.F.R. 1092 (1942)).

38 See Mathews, *supra* note 6, at 468.

39 See *Korematsu*, 323 U.S. at 217–20.

40 JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES, at ix (Peter Irons ed., 1989) (quoting COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1983)); see also Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2837 n.99 (2001).

None of us is old enough to have lived through the Alien and Sedition Acts of John Adams or of the Abraham Lincoln era. As for *Korematsu*, if we were around at the time, most of us were not old enough to understand the case. But by the 1950s, some of us were around, and we remember Senator Joseph McCarthy and the red scare. At school, we were told to duck and cover, and some people built bomb shelters. Under those circumstances, our judicial response was more measured than in *Korematsu*, but still not one that we can look back on with any great pride. We recall prosecutions under the Smith Act and the McCarran Act of the Korean War era. In 1951, in *Dennis v. United States*,⁴¹ the U.S. Supreme Court upheld the convictions of individuals in the context of fears of an international communist conspiracy.⁴²

Throughout the red scare and the cold war, the threat—real or imagined—posed by subversive speech continued to worry public officials and the population at large. In *Barenblatt v. United States*,⁴³ a Vassar College professor refused to answer questions posed by the House Committee on Un-American Activities regarding his associations with the Communist Party. The Supreme Court held that Congress had the power to investigate subversive organizations (that is, the Communist Party), and accordingly could compel persons to answer questions in the course of such an investigation.⁴⁴ It further held that the First Amendment did not bar questions into an individual's associations; instead, it was for the courts to decide whether Congress's interest in investigation outweighed the individual's freedom of association.⁴⁵ Upholding the conviction, the Court concluded that the interest in investigating groups committed to the overthrow of the United States outweighed Barenblatt's interest in associational privacy.⁴⁶

Today we are experiencing our most pressing constitutional struggles in waging a war on terror, particularly in the context of dealing with detainees. Not surprisingly, these cases involve the writ of habeas corpus. When our Constitution was drafted in Philadelphia in 1787, the document contained no declaration of rights. The Bill

41 341 U.S. 494 (1951).

42 *Id.* at 516–17. *See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 995–96 (3d. ed. 2006).

43 360 U.S. 109 (1959).

44 *Id.* at 116–22.

45 *Id.* at 125–34.

46 *Id.* at 134.

of Rights was promulgated four years later, to include what we recognize as our core liberties (due process, freedom of speech, freedom of religion, and other rights comprising the first ten amendments). There was, however, a notable exception to the absence of rights in the original Constitution: under Article One, Section Nine, Clause Two, “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.” This writ—to produce the person held and explain why—is said to be older than even the Magna Carta (1215).⁴⁷ One scholar has traced the concept back to Roman antiquity.⁴⁸

In a series of recent cases the Supreme Court has subjected the Bush administration detention policies to habeas corpus scrutiny and, for the most part, has found the policies deficient. In *Hamdi v. Rumsfeld*, the Court ruled that the government may not hold an American citizen indefinitely on American soil without trial or counsel, even though he was captured in Afghanistan and classified as an “enemy combatant.”⁴⁹ On the same day, in *Rasul v. Bush*, the Court held that aliens held in Guantanamo Bay are entitled to habeas corpus challenges to test their detention.⁵⁰ And most recently, the Supreme Court in *Boumediene v. Bush* determined that foreign detainees at Guantanamo have the constitutional privilege of habeas corpus and that the review procedures in the Detainee Treatment Act of 2005 were not an adequate substitute for the writ.⁵¹

I will conclude with two observations: First, that over the years we have grown wiser and have become more sensitive to civil liberties. The very notion of civil liberties scarcely existed in this country until part-way into the twentieth century. Second, the chorus of disapproval at the thought of governmental repression has grown louder with every generation.

As Americans we are more watchful than ever and infinitely more willing to criticize the government. We know our history and we do not want to repeat our mistakes. But we also expect government to protect us from danger and are ready to trust our leaders, to a point, insofar as they have more facts than we, and have the job of assessing the facts intelligently. We need to insist on our commitment to the

47 See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 44 (2001).

48 See David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405 (2008).

49 542 U.S. 507, 533 (2004).

50 542 U.S. 466, 484 (2004).

51 128 S. Ct. 2229, 2240 (2008).

rule of law. We cannot take constitutional rights for granted or sacrifice them merely because it might be expedient. It means keeping our eyes open and remembering that the government exists to do our will, and not vice versa.

I am much encouraged by the stance of the Supreme Court in the detainee cases. The Court has not sought to interpose itself as commander of the armed forces or to dictate military or political policy. It has, however, been fulfilling its fundamental function as guardian of the Constitution and the rights that must be accorded under that charter, even to people whom we suspect and may not like. But suspicion or dislike is no basis for indefinite detention, let alone torture. In a free society, for which we have been the world's model, our actions must measure up to our basic standards of decency and withstand the light of day.

I am at once watchful and hopeful: watchful that we protect both our security and our liberty, and hopeful that we have acquired the wisdom to go forward in ways worthy of our country's greatness.