



12-1-2002

# Remarks of Chief Justice William H. Rehnquist - Notre Dame Law School - September 13, 2002

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## Recommended Citation

William H. Rehnquist, *Remarks of Chief Justice William H. Rehnquist - Notre Dame Law School - September 13, 2002*, 78 Notre Dame L. Rev. 1 (2002).

Available at: <http://scholarship.law.nd.edu/ndlr/vol78/iss1/1>

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REMARKS OF  
CHIEF JUSTICE WILLIAM H. REHNQUIST  
NOTRE DAME LAW SCHOOL  
SEPTEMBER 13, 2002

*William H. Rehnquist*

I will speak today on the use of military tribunals in the United States during time of war. I will offer only a historical perspective—what the Supreme Court has said in the past about the use of these tribunals.

The use of military tribunals is certainly conceptually different from the availability of the writ of *habeas corpus*. *Habeas corpus* allows someone detained by a government official to have a court inquire into the basis for the detention, and free someone unlawfully detained. Trial before a military tribunal may result in a sentence to imprisonment for a long period of time. The availability of *habeas corpus* and the use of military tribunals are related because the method by which a civilian tried before a military tribunal may challenge the judgment of that tribunal is by *habeas corpus*.

The use of military tribunals in time of war is but a limited subset of the subject of civil liberty in wartime. This was never a problem in the United States until the outbreak of the Civil War. The United States had been engaged in wars before then—the War of 1812 and the Mexican War. But the federal government at the time of the War of 1812 was too feeble to threaten anyone's civil liberties, and the Mexican War was fought almost entirely in foreign territory.

The Civil War was different. By the time Abraham Lincoln was inaugurated as President on March 4, 1861, the seven states of the Deep South had seceded—South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. The Confederacy demanded that a Union garrison stationed at Fort Sumter, an island in the harbor of Charleston, South Carolina, surrender. Lincoln and his cabinet debated for weeks whether to give up Fort Sumter, to re-provision the garrison there, or to try and reinforce it. Finally, on April 12th, the shore batteries in Charleston Harbor opened fire on Fort Sumter,

and two days later the Union garrison surrendered. Lincoln called for 75,000 volunteers to put down the rebellion.

His action in doing so caused the four states of the upper south, Virginia, North Carolina, Tennessee, and Arkansas, to join the other seven southern states in the Confederacy. This development had dramatic logistical consequences for the city of Washington. The frontier between the Union and the Confederacy was no longer the southern border of North Carolina, but the Potomac River on which Washington was located. The nation's capitol went from being an interior city to a frontier city, subject to attack and even capture by the enemy.

Lincoln was therefore understandably anxious that the troops he had called for should come quickly from New England, the Mid-Atlantic states, and the Midwest to Washington. But all rail lines leading from these areas into Washington went through the city of Baltimore, which was a hotbed of secessionist sympathy. Not only did the rail lines go through Baltimore, but troops coming from the main line from Philadelphia and points north and east had to actually change stations in Baltimore. They could do this either by marching from one station to another, or by boarding horse cars and being drawn through the city in that fashion.

On April 19th, detachments of Union troops moving through Baltimore were stoned by street mobs; the troops fired back, several soldiers were injured, and several civilians were killed. That night, the mayor of Baltimore, who was a closet Confederate sympathizer, and the police chief, who was an open one, gathered together a band of sympathizers and blew up the railroad bridges leading into Baltimore from the north.

This action finally pushed Lincoln, at the urging of his Secretary of State, William H. Seward, to issue a proclamation suspending the writ of *habeas corpus* along the rail line from Philadelphia to Washington. Federal officials then arrested one John Merryman, who was suspected of being one of the principal culprits in the destruction of the bridges, and imprisoned him at Fort McHenry.

He sued out a writ of *habeas corpus*, and the writ was heard almost immediately by Chief Justice Roger B. Taney of the Supreme Court of the United States, sitting as a Circuit Justice in Baltimore. Merryman argued that because the only reference in the Constitution to the writ of *habeas corpus* was in Article I, which dealt with the authority of Congress, the President alone could not suspend the writ of *habeas corpus*. This one provision is found in Section 9, Clause 2 of the Article and says:

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.

Taney issued an opinion saying that Merryman was right, and that the President alone, without Congress, had no authority to suspend the writ. Since the marshal serving papers in the case had been denied admittance to Fort McHenry, Taney simply sent a copy of his opinion to Lincoln in late May, 1861.

Lincoln never replied to Taney, but took up the matter in his address to Congress which he had called into special session on July 4, 1861. He asserted that in an emergency when Congress was not in session the President had authority to suspend the writ. He went on to say that the writ, which had been fashioned "with such extreme tenderness of the citizen's liberty" could, as interpreted by Taney, allow "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated."

Lincoln with his usual masterful command of the English language thus phrased the basic issue in all discussions of civil liberty in wartime.

In the following year, Lincoln and Secretary of War Edwin M. Stanton issued executive proclamations suspending the writ of *habeas corpus* and authorizing not only temporary detention, but also trials of those held before military commissions instead of civil courts. Two years later these provisions would be utilized during a time of discontent with the war in the Midwest.

In the summer of 1864, Union authorities in Indiana got wind of a suspected conspiracy on the part of Southern sympathizers to raid a government arsenal at Rock Island, Illinois, to free Confederate prisoners in a camp near Chicago, and to assassinate Governor Morton of Indiana. These plans were thwarted when a cache of arms and incriminating correspondence was found in the Indianapolis home of the state commander of the "Sons of Liberty." At the direction of Secretary Stanton, these defendants were tried, not in the federal court by a jury, but before a military commission composed of senior Army officers. After a trial lasting several weeks, the commission found all of the defendants guilty and sentenced three of them to hang.

By this time—near the end of 1864—Lincoln had won reelection by a substantial margin, Atlanta had fallen to the Union troops, and General Sherman was on his way to Savannah. As the end of the war appeared much closer, public sentiment began to favor leniency, and Lincoln in a personal meeting with the defendants' lawyers gave them reason to think that he would in due time commute the sentences. But then Lincoln was assassinated, and his successor, Andrew John-

son, ordered the sentences to be carried out. The defendants then sought a writ of *habeas corpus* in federal court in Indianapolis, and the case went to the Supreme Court under the name of *Ex Parte Milligan*.

The government's case was badly argued by the Attorney General, James Speed; his principal qualification for the job seems to have been that he was the brother of a close friend of Lincoln's from Kentucky. His primary argument before the Court was that the Constitution applied only in peacetime, not in wartime. This contention was unanimously rejected by the Court, and got the government off on the wrong foot. Justice Samuel Freeman Miller, shortly before the Court was to hear argument in the case, wrote to his brother-in-law:

This session of the Court has developed [Speed's] utter want of ability as a lawyer—he is certainly one of the feeblest men who has addressed the Court this term.

Other attorneys for the government were better, but they did not match the battery of talent on the other side. Jeremiah Black made a superb argument. One of his sallies questioned why soldiers should sit as judges in cases like this:

No law has bestowed the right upon Army officers more than upon other persons. If men are to be hung without that legal trial which the Constitution guarantees to them, why not employ commissioners of clergymen, merchants, manufacturers, horse dealers, butchers, or drovers, to do it? It will not be pretended that military men are better qualified to decide questions of fact of law than other classes of people; where it is known to the contrary, that they are, as a general rule, least of all fitted to perform the duties that belong to a judge.

The opinions of the Court were handed down in December, 1866—nearly a year-and-a-half after the cessation of hostilities—and a majority of the Court held that civilians could not be tried by military commissions outside the theater of war where the civil courts were open for business. The four concurring Justices agreed that the trial of these prisoners by military courts was unauthorized, but criticized the majority for saying that Congress could not have authorized it had it chosen to do so.

Let us now move forward to World War II. There are at least a few people here who, like me, are old enough to remember back to the Japanese attack on Pearl Harbor on December 7, 1941. Since the war began for the United States with Japan's attack on Pearl Harbor, and Hitler's declaration of war, there was strong support for the war effort across the political spectrum in this country. It was "the good war," as Studs Terkel termed it. Fourteen million people were in the

armed services; on the home front there were sacrifices, and slogans such as "Buy Bonds" and "A Slip of the Lip May Sink a Ship." Even restaurants got into the act, with the slogan "Food Will Win the War." On this sign at one restaurant, a dissatisfied customer scrawled "Yes, but how can we get the enemy to eat here"?

In June of 1942, six months after Pearl Harbor, Richard Quirin and seven other members of the German armed forces were secretly put ashore in the United States. They had been trained in the use of explosives and secret writing at a sabotage school near Berlin. Four of the saboteurs were transported by German submarine to Amagansett Beach on Long Island, New York. They landed under cover of darkness, carrying a supply of explosive and incendiary devices, including time delay detonators disguised as fountain pens. At the moment of the landing they wore German uniforms, but immediately afterwards they buried their uniforms on the beach and went in civilian dress to New York City. The remaining four who had been trained at the sabotage school were taken by another German submarine to Ponte Vedra Beach, Florida. They went through the same procedures as those who landed on Long Island, and proceeded to Jacksonville in civilian dress; all had been instructed to destroy war industries in the United States. After one of the saboteurs turned himself in, the other seven were ultimately arrested by the FBI in New York or Chicago.

The decision to try the saboteurs before a military commission was not made immediately. When FBI agents interrogated the saboteurs, the agents assumed the prosecutions would take place in civil courts. But as the government's lawyers began to look into criminal prosecution in the civil courts, they realized that the saboteurs might face a maximum sentence of only two years in prison for conspiracy to commit sabotage. Under the law of war they could face the death penalty. A public trial would also expose the apparent ease with which the eight were landed on U.S. beaches. And if it came out that the FBI only caught them so quickly because one of the men turned himself in, the Germans might be encouraged to try again. Without a public trial, the Germans would believe that the FBI managed to discover and arrest the saboteurs almost immediately.

On the advice of Attorney General Francis Biddle and Secretary of War Henry L. Stimson, President Franklin Roosevelt appointed a military commission to try Quirin and his cohorts for offenses against the laws of war and the Articles of War enacted by Congress. The Executive Order establishing the commission also directed that the defendants have no access to civil courts. The trial took place on the fifth floor of the Department of Justice Building. Attorney General Biddle himself prosecuted the case. The lawyers assigned to represent

the saboteurs included Colonel Kenneth Royall, who later served as the last Secretary of War and the first Secretary of the Army, and Major Lauson Stone, son of Chief Justice Harlan Stone.

While they were being tried by the military commission, seven of the saboteurs petitioned the Supreme Court of the United States for review of the procedures under which they were being tried. The Supreme Court convened in a special term on July 29, 1942, to hear arguments in their case.

One of the principal arguments made by counsel for the petitioners was that the civil courts throughout the United States were open at the time, there had been no invasion of any part of the country, and therefore under the *Milligan* case there could be no resort to trial by a military commission. Counsel noted that one of the petitioners, Herbert Haupt, had been born in the United States and was a United States citizen. At the conclusion of the arguments in the case, and after deliberation, the Court on July 31st announced its disposition of the case upholding the government's position, but its full opinion did not come down until October 1942.

On August 3, the military commission convicted all eight and sentenced each of them to death by electrocution. On August 8, President Roosevelt announced that he had granted clemency to two of the saboteurs, commuting their sentences to terms in prison. The other six were executed that day.

The opinion explaining the Court's action in allowing the saboteurs to be tried by a military commission was written by Chief Justice Stone and issued on October 29, 1942. In it, the Court sharply cut back on the dicta in the *Milligan* case, saying that even though the civil courts were open, and even though it was assumed that one of the German soldiers was a United States citizen, these defendants could nonetheless properly be tried and sentenced by a military commission.

We now come to the third case involving the use of military tribunals in the United States. Hawaii was placed under martial law within days after the attack on Pearl Harbor, and remained under that regime until the autumn of 1944. A few hours after the attack on Pearl Harbor, Joseph Poindexter, the Territorial Governor of Hawaii, issued a proclamation placing the territory under martial law and suspending the writ of *habeas corpus*. He then requested Lieutenant General Walter Short, Commanding General of the Military Department of Hawaii, to exercise all powers normally exercised by the Governor and by the territorial judges. On December 8th, Short sent to the Chief Justice of the Territorial Supreme Court an order which the latter duly signed. It said:

Under the direction of the Commanding General, all courts of the territory of Hawaii will be closed until further notice.

And so they were.

It seems that the drafters of this order had read the *Milligan* case quite literally: if military tribunals could not try civilians so long as the civil courts were open, by implication if the civil courts were closed military tribunals *could* try civilians. They did not reason further to say that the basis for closing the civilian courts must have been some threat of military force—a threat which surely obtained in Hawaii immediately after Pearl Harbor, but was almost entirely gone after the Battle of Midway in June, 1942. Yet martial law remained in effect until the autumn of 1944, when it was lifted by Presidential proclamation.

Provost courts, composed of officers appointed by the military governor, tried criminal cases. Lloyd Duncan, a civilian shipfitter, was charged with assaulting two military guards at the Pearl Harbor Navy yard, where he worked. He was tried by a provost court and sentenced to six months in jail. Harry White, a stockbroker, was charged with having embezzled funds from a client—surely an offense as far removed from considerations of public order or security as one can imagine. He was tried by a provost court and sentenced to four years in prison. Both of the defendants challenged their convictions by *habeas corpus* in the federal courts.

When their cases finally reached the Supreme Court, a majority of the Court in the case of *Duncan v. Kahanamoku* held that extension of martial law so long after the threat of invasion had ceased was illegal. Chief Justice Stone commented in a concurring opinion that if the bars and restaurants could be reopened within two months after Pearl Harbor, it was hard to see why the courts should not have been able to reopen a full year later. The good news for the defendants, and perhaps for the people of Hawaii, was that martial law was illegal there at the time these defendants were tried—in 1943. The bad news was that they did not find out about it until February, 1946—half a year after the end of the war with Japan, and nearly two years after martial law had been terminated by Presidential proclamation.

*In re Yamashita* also involved a *habeas* petition—in this case filed by Commanding General Yamashita of the Imperial Japanese Army in the Philippine Islands. General Yamashita had surrendered to the United States Army in the Philippines on September 3, 1945, and on September 25 was charged with violating the law of war by failing to prevent his troops from committing atrocities against civilians and prisoners of war.

Less than two weeks later, on October 8, Yamashita was served with a bill of particulars specifying sixty-four crimes committed by his troops. A supplemental bill, alleging fifty-nine additional charges, was filed on October 29, the day Yamashita's trial before a U.S. military tribunal in the Philippines began. The tribunal denied a defense request for a continuance to prepare to defend against the new charges. The trial lasted until December 5. On December 7, Yamashita was convicted and sentenced to death by hanging.

After the Supreme Court of the Philippine Islands denied his *habeas* application, Yamashita filed a *habeas* petition and a petition for certiorari in the Supreme Court of the United States. At that time, the Philippine Islands were under the authority of the United States—the independent Republic of the Philippines was not established until July 4, 1946—and the Supreme Court of the United States had jurisdiction to hear certain appeals from the Supreme Court of the Philippines.

Yamashita argued on various grounds that the military tribunal lacked jurisdiction to try him, but his main contentions were that he could not be tried by a military tribunal after hostilities had ceased and that the tribunal's procedures for conducting the trial, particularly in admitting evidence, denied him due process.

Many have criticized the proceedings of the tribunal, arguing that the tribunal merely went through the motions in order to produce a predetermined outcome. The defense was given virtually no time to prepare and General Yamashita was seen as a scapegoat who had no chance to receive a fair trial. The trial seemed to be tailored for maximum media coverage—including the timing of the announcement of the verdict on the fourth anniversary of the Japanese attack on Pearl Harbor.

The Court, however, found against Yamashita on all of his claims. In an opinion that relied heavily on *Ex Parte Quirin*, Chief Justice Stone emphasized the narrow scope of the Court's review, to "consider . . . only the lawful power of the commission to try the petitioner for the offense charged." Justice Murphy, who had served as governor-general and then high commissioner of the Philippine Islands prior to his appointment to the Court, and Justice Rutledge dissented, concluding that Yamashita had been denied "the fair trial our Constitution and laws command."

Looking at these four examples of the Supreme Court's treatment of military tribunals, one is reminded of the Latin maxim *inter arma silent leges*—in time of war the laws are silent. The first of them, *Ex Parte Milligan*, rejecting the use of military tribunals, was decided a year-and-a-half after the end of the Civil War. The second of them,

upholding the use of military tribunals, was decided in the dark days of the summer of 1942, when the fortunes of war of the United States were just beginning to recover from their lowest ebb. The United States Navy had suffered serious damage to its fleet at Pearl Harbor, and Japanese troops invading the Philippines had pushed the United States troops back onto the Bataan Peninsula, resulting in the grisly Bataan death march. In North Africa, German forces had recaptured Tobruk and were within striking distance of Cairo, threatening the entire Mid-East. In the Battle of Midway, which occurred about this time, the United States Navy decisively defeated the Japanese Navy, but this fact was not then known to the general public. *Yamashita* was decided just after the war had ended, and involved the military's authority to punish a Japanese general accused of allowing gruesome atrocities to be committed against civilians by those in his command. In *Duncan*, the decision, as I have said, came down not only after the war had ended but also after martial law had ended.

These cases suggest that while the laws are surely not silent in time of war, courts may interpret them differently then than in time of peace.

