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National Security v. Civil Liberties

Geoffrey R. Stone†

How should judges approach deciding cases that involve the constitutionality of measures taken by the executive and legislative branches of government to protect the national security? As a matter of first principle, logic suggests that judges addressing sueh cases should start with a healthy dose of deference to military and executive officials.

This seems sensible for several reasons. First, judges have relatively little experience with national security matters. Such cases arise infrequently, and judges are relative novices when it comes to assessing the possible implications of their decisions on national security. This cuts in favor of deference. Second, the stakes in such cases may be quite high. Unlike most legal disputes, in which erroneous judicial decisions have only modest consequences and are usually correctible, the potential consequences to the nation if a judge is wrong in a case involving the national security may be truly catastrophic. Hence, a certain measure of deference seems wise. Third, for institutional reasons, judges should be reluctant to second-guess the judgments of military and executive officials in such conflicts because if they err they may harm not only the national security but also the long-term credibility of the judiciary itself. Again, logic demands deference.

Not surprisingly, in light of these reflections, judges have traditionally followed this "logical" course when addressing conflicts between civil liberties and the national security. They have presumed—seemingly sensibly—that the actions of military and executive officials were constitutional whenever they acted in the name of national security. The three most dramatic twentieth-century clashes between civil liberties and the national security illustrate this approach.

When the United States entered the First World War in April 1917, there was strong opposition to both the war and the draft. President Woodrow Wilson had little patienee for such dissent. Only weeks after the United States entered

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the war, Congress enacted the Espionage Act of 1917.[1] A year later, it enacted the Sedition Act of 1918.[2] These laws effectively made it a crime for any person to criticize the government, the president, the draft, the war, the Constitution, or the United States' military. The Department of Justice prosecuted more than 2,000 individuals for alleged disloyalty, and in an atmosphere of fear, hysteria, and clamor, most judges were quick to mete out severe punishment to those deemed disloyal. The result was the suppression of virtually all criticism of the war.[3]

Rose Pastor Stokes, for example, the editor of the socialist Jewish Daily News, was sentenced to ten years in prison for saying "I am *for* the people, while the government is for the profiteers" during an antiwar statement to the Women's Dining Club of Kansas City.[4] D.T. Blodgett was sentenced to twenty years in prison for circulating a leaflet urging voters in Iowa not to reelect a congressman who had voted for conscription.[5] The Reverend Clarence H. Waldron was sentenced to fifteen years in prison for distributing a pamphlet stating that "if Christians [are] forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in."[6]

In a series of decisions in 1919 and 1920, the Supreme Court consistently upheld the convictions of individuals who had agitated against the war and the draft.[7] Embracing the "logical" presumption for balancing civil liberties and national security concerns in time of war, the Court explained its reasoning: "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 long as men fight and that no Court could regard them as protected by any constitutional right."[8]

In the years after World War I, Americans increasingly came to recognize that these prosecutions had been excessive. Officials who had served in the Wilson administration conceded that the general atmosphere of intolerance had led to serious constitutional violations and criticized some federal judges for

1. 40 Stat. 217 (1917).

2. 40 Stat. 553 (1918).

3. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 180-82 (2004); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 256-57 (1997).

4. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 53 (1941) (emphasis added).

5. *See* WALTER NELLES, ESPIONAGE ACT CASES 48 (1918).

6. CHAFEE, *supra* note 4, at 55.

7. Gilbert v. Minnesota, 254 U.S. 325, 333 (1920); Pierce v. United States, 252 U.S. 239, 252 (1920); Schaefer v. United States, 251 U.S. 466, 482 (1920); Abrams v. United States, 250 U.S. 616, 624 (1919); Debs v. United States, 249 U.S. 211, 216 (1919); Frohwerk v. United States, 249 U.S. 204, 210 (1919); Schenck v. United States, 249 U.S. 47, 53 (1919).

8. *Schenck*, 249 U.S. at 52.

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having "lost their heads."[9] Over the next few years, the federal government acknowledged that injustices had been done in the name of national security and every person who had been convicted of seditious expression during World War I was released from prison and granted amnesty.[10] In later years, the Supreme Court implicitly overruled its World War I era decisions, effectively acknowledging that it had failed in its responsibility to protect constitutional rights during wartime.[11]

The critical civil liberties issue in World War II arose out of the Japanese internment. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, which authorized the Army to designate military areas from which "any or all persons may be excluded."[12] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.[13] Over the next eight months, almost 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these men, women and children were American citizens, representing almost 90% of all Japanese Americans. No charges were brought against these individuals; there were no hearings; and they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. They were told to bring only what they could carry. Many families lost everything. The internees were transported to one of ten permanent internment camps and placed in overcrowded rooms with no furniture other than cots. Surrounded by barbed wire and military police, they remained in these detention camps for some three years.[14]

Why did this happen? Certainly, the days following Pearl Harbor were dark days for the American spirit. Fear of possible Japanese sabotage and espionage was rampant, and an outraged public felt an understandable instinct to lash out at those who had attacked the country. But this act was also very much an extension of more than a century of racial prejudice against the "yellow peril." Racist statements and sentiments permeated the debate from December 1941 to February 1942 about how to deal with individuals of

9. Letter from Alfred Bettman to Zechariah Chafee, Jr., October 27, 1919, excerpted in DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 328 (Cambridge University Press 1997).

10. *See* STONE, *supra* note 3, at 230-32.

11. *See* Brandenburg v. Ohio, 395 U.S. 444, 445-47 (1969) (rejecting the standard applied in the World War I cases for curtailment of First Amendment rights).

12. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

13. *Id.* On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, § 1383, 62 Stat. 683, 765 (repealed 1976).

14. *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 2-3 (1982); STONE, *supra* note 3, at 283-96; GEOFFREY R. STONE, WAR AND LIBERTY: AN AMERICAN DILEMMA 1790 TO THE PRESENT 64-67 (2007).

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Japanese descent.[15] Although the Department of Justice maintained that a mass evacuation of Japanese Americans was both unnecessary and unconstitutional, and although FBI director J. Edgar Hoover reported to Attorney General Biddle that the demand for mass evacuation was based on "public hysteria" rather than fact,[16] FDR nonetheless signed the Executive Order, largely for political reasons. 1942 was an election year, and Roosevelt did not want to alienate voters on the West Coast.[17]

In *Korematsu v. United States*,[18] decided in 1944, the Supreme Court embraced the "logical" presumption for dealing with conflicts between civil liberties and national security. In a six-to-three decision, the Court, in an opinion by Justice Black, upheld the President's action:

> [W]e are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . To cast this case into outlines of racial prejudice . . . confuses the issue. Korematsu was not excluded from the [West Coast] because of hostility to . . . his race. He was excluded because . . . the . . . military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area] . . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.[19]

In the years after World War II, attitudes about the Japanese internment began to shift. On February 19, 1976, as part of the celebration of the Bicentennial of the Constitution, President Gerald Ford issued Presidential Proclamation 4417, in which he acknowledged that, in the spirit of celebrating our Constitution, we must recognize "our national mistakes as well as our national achievements." "February 19th," he noted, "is the anniversary of a sad day in American history," for "[i]t was on that date in 1942 . . . that Executive Order 9066 was issued."[20] President Ford observed that "[w]e now know what we should have known then"—that the evacuation and internment of loyal Japanese Americans was "wrong."[21]

In 1980, Congress established the Commission on Wartime Relocation

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15. *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 14, at 4-6 (discussing the circumstances surrounding the decision to exclude and remove Japanese aliens and Japanese Americans from the West Coast).

16. DON WHITEHEAD, THE FBI STORY: A REPORT TO THE PEOPLE 189 (1956) (quoting Memorandum from J. Edgar Hoover, Dir., FBI, to Francis Biddle, U.S. Attorney General).

17. *See* PETER IRONS, JUSTICE AT WAR 42 (1983); STONE, *supra* note 3, at 286-96; STONE, *supra* note 14, at 73-74.

18. 323 U.S. 214 (1944); *see also* Hirabayshi v. United States, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); Yasui v. United States, 320 U.S. 115 (1943) (same).

19. 323 U.S. at 219, 223-24.

20. Proclamation No. 4417, An American Promise, 41 Fed. Reg. 7741 (Feb. 19, 1976).

21. *Id.*

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and Internment of Civilians to review the implementation of Executive Order 9066.[22] The Commission, composed of former members of Congress, the Supreme Court and the Cabinet, as well as several distinguished private citizens, unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[23] Several years later, President Ronald Reagan signed the Civil Liberties Restoration Act of 1988, which officially declared that the Japanese internment was a "grave injustice" and offered an official Presidential apology and reparations to each of the Japanese American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the United States government.[24] Over the years, *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result.[25]

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. During this era, the nation demonized members of the Communist Party and the long shadow of the House Committee on Un-American Activities fell across our campuses and our culture. Red-hunters demanded, and got, the blacklisting of thousands of individuals and a fear of ideological contamination swept the nation.[26] The key constitutional decision in this era was *Dennis v. United States*,[27] which involved the prosecution under the Smith Act of the leaders of the American Communist Party. The indictment charged the defendants with conspiring to advocate the violent overthrow of the government. In a six-to-two decision, the Court held that their convictions did not violate the First Amendment. The Court concluded that because the violent overthrow of government is such a grave harm, the danger need be neither clear nor present to justify suppression.[28]

Over the next several years, in a series of decisions premised on *Dennis*, the Court upheld the Subversive Activities Control Act, sustained far-reaching legislative investigations of "subversive" organizations and individuals, and affirmed the exclusion of members of the Communist Party from the bar, the ballot and public employment.[29] In so doing, the Court clearly put its stamp of

22. *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 14, at I.

23. *Id.* at 5, 8.

24. 50 U.S.C. app. §§ 1989-1989a (2000).

25. *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, *in* 2002 SUP. CT. REV. 455, 485 n.99.

26. *See generally* RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958); FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM (1980); STONE, *supra* note 3, at 312-93; STONE, *supra* note 14, at 85-106; ATHAN THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN (1978).

27. 341 U.S. 494 (1951).

28. *Id.* at 509-11.

29. *See, e.g.*, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S.

approval on an array of actions we today look back on as models of McCarthyism. As the historian David Caute has concluded, "the Constitution was concussed in the courts," including the Supreme Court, which too often served as "a compliant instrument of administrative persecution and Congressional inquisition."[30]

As the aforementioned episodes illustrate, the dominant approach of the Supreme Court in the first-half of the twentieth-century to resolving conflicts between civil liberties and the national security was to employ the "logical" presumption that military and executive officials making wartime decisions act fairly and reasonably. For all the reasons that I have identified, the Court embraced a highly deferential stance, presuming that restrictions of civil liberties in wartime were constitutionally justified so long as the government could offer a reasonable explanation for its actions. But this approach proved disastrous. *Schenck*, *Korematsu,* and *Dennis* have all come to be regarded as constitutional failures and black marks on the Court's reputation.

Although a presumption of deference to executive and military officials in wartime may be logical in theory, it fails in practice. With the benefit of hindsight, the reasons for this failure are evident. A policy of deference assumes that those making the critical judgments are properly taking the relevant factors into account in a fair and reasonable manner. If they fail to do so, the underlying rationale for deference is destroyed. As it turns out, the essential predicate for a policy of judicial deference in these circumstances is predictably lacking.

Government officials responsible for the nation's security tend to exaggerate the dangers facing the nation both to protect themselves in the event they fail and to persuade legislators and the public to grant them as much power as possible. Moreover, government officials charged with responsibility for the nations' security tend not to be particularly sensitive to the importance of civil liberties and are therefore too quick to sacrifice those liberties to achieve their primary goal of safeguarding the national security. Finally, opportunistic politicians tend to exploit periods of real or perceived crisis for partisan and personal gain. A time-honored method of gaining or consolidating power is to incite public fear, demonize an internal "enemy," and then "protect" the public by prosecuting, interning, deporting, and spying upon those accused of

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1, 112-15 (1961) (upholding the Subversive Activity Control Board's requirement that Communist and Communist-front organizations register with the government); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (upholding the power of the House Committee on Un-American Activities to require a Vassar College instructor to answer questions about his past and present membership in the Communist Party); Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952) (upholding a New York law providing that no person who knowingly becomes a member of an organization advocating the violent overthrow of government may be appointed to any position in a public school).

30. DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 144 (1978).

"disloyalty."

These three considerations are not exhaustive, but they adequately explain why the "logical" presumption of judicial deference to executive and military officials inevitably leads to decisions like *Schenck*, *Korematsu*, and *Dennis*. It is pointless, indeed dangerous, to defer to those whose judgments are likely to be distorted by such influences. As a practical matter, military and executive officials will invariably overvalue national security concerns at the expense of civil liberties. There may be sound reasons for judges to be cautious when they second-guess military and executive officials, but pragmatism—informed by experience—demands that courts be more rigorous in their exercise of judicial review if we are to avoid more decisions like *Schenck*, *Korematsu*, and *Dennis*.

Of course, the comparative advantage of courts over the executive and legislative branches in interpreting and enforcing individual liberties is familiar. Responsiveness to the electorate may be essential to the day-to-day workings of democracy, but that responsiveness can lead the government too readily to sacrifice the rights of those who are regarded as different, dangerous, or disloyal. Judges with life tenure and a more focused attention on the preservation of civil liberties are more likely to protect our freedoms than the elected branches of government.[31]

Because we know from experience that there is a pattern of excessive restriction of civil liberties in wartime, courts in the twenty-first century must abandon the "logical" presumption of deference to executive and military authority and employ a more rigorous standard of review. In light of experience, we know that the "logical" presumption is counter-productive. The lesson of decisions like *Schenck*, *Korematsu* and *Dennis* is that courts must closely scrutinize invocation of military necessity and national security as justification for limiting civil liberties. In fact, the Court, in part because of the influence of Justice Brennan, has already learned the lessons of history and has increasingly rejected the "logical" presumption. The Justices are acutely aware of the Court's past failures, and no Justice wants his or her legacy to be tainted by the next *Schenck*, *Korematsu*, or *Dennis*.

It is, of course, impossible to mark a precise moment at which the Court's shift towards rejection of the "logical presumption" occurred, but a good candidate would be June 17, 1957, shortly after Justice Brennan joined the Court, when the Court handed down four decisions that reversed the course of

31. The framers were aware of this:

> The independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78 (Alexander Hamilton).

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constitutional history. The most important of those decisions was *Yates v. United States*,[32] which put an end to the government's prosecution of Communists under the Smith Act and effectively ended the era of McCarthyism in the Supreme Court.[33] Since that day, the Court has tended to take a much more aggressive role in scrutinizing government invocations of national security as a justification of limiting civil liberties in wartime.

Over the past half-century, at least five Supreme Court cases have posed significant "civil liberties versus national security" conflicts somewhat analogous to those in *Schenck*, *Korematsu*, and *Dennis*. The first two arose out of the Vietnam War; the latter three involved the war on terrorism. In each of these cases, the Court eschewed the sort of judicial deference that so ill-served the nation in the earlier era.

The two Vietnam War cases implicated the First and Fourth Amendments, respectively. *New York Times Co. v. United States*[34] involved one of the most dramatic confrontations in American constitutional history. The U.S. government attempted to enjoin publication by the *New York Times* and the *Washington Post* of the Pentagon Papers, a "top secret" study of the Vietnam War prepared within the recesses of the Defense Department that had been made available to the newspapers through an unprecedented breach of security. The government maintained that continued publication of the Pentagon Papers would grievously harm the national security.[35] In a six-to-three decision, the Court declined to defer to the executive's national security claim and ruled that the government could not constitutionally enjoin the publication. Justice Stewart insisted that the government could not constitutionally enjoin the publication because it had failed to *prove* that disclosure "will surely result in direct, immediate, and irreparable damage to our Nation."[36]

Several years later, President Richard Nixon maintained that the executive was constitutionally exempt from the ordinary requirements of the Fourth Amendment when it undertook *national security* investigations. Specifically, the government argued that to protect the nation from violent acts of subversion, the President must be free to engage in national security wiretaps without complying with the warrant and probable cause requirements. In *United States v. United States District Court (Keith)*,[37] the Court unanimously rejected this contention, holding that even in national security investigations the

32. 354 U.S. 298 (1957). The other three decisions were *Watkins v. United States*, 354 U.S. 178 (1957) (limiting HUAC's investigative activities); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (limiting state investigative activities); *Service v. Dulles*, 354 U.S. 363 (1957) (limiting loyalty-security dismissals).

33. *See* STONE, *supra* note 3, at 411-16.

34. 403 U.S. 713 (1971).

35. *See* SANFORD J. UNGAR, THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS 14 (1972).

36. *N. Y. Times*, 403 U.S. at 730 (Stewart, J., concurring).

37. 407 U.S. 297 (1972).

President has no constitutional authority to wiretap American citizens on American soil without a judicially-issued search warrant based upon probable cause.[38]

More recently, the Supreme Court has addressed and sternly rejected the Bush administration's claims of executive authority in the war on terrorism. In three decisions, the Court has refused to grant deference of the sort that led to the results in *Schenck*, *Korematsu*, and *Dennis*. In *Rasul v. Bush*,[39] the Court held that federal courts have habeas corpus jurisdiction to review the legality of the confinement of the Guantanamo Bay detainees.

In *Hamdi v. Rumsfeld*,[40] decided on the same day as *Rasul* in 2004, the Court went even further in its refusal to grant undue deference to the military and executive officials in the war on terrorism. Yaser Hamdi, an American citizen, was seized in Afghanistan by the Northern Alliance (an American ally) and turned over to the U.S. military.[41] In April 2002, Hamdi was covertly shipped to a naval brig in Virginia. The Bush administration maintained that Hamdi was an "enemy combatant" and that it could therefore detain him indefinitely, without access to counsel, and without any formal charge or proceeding.[42] In an eight-to-one decision, the Court held that this violated Hamdi's right to due process of law. In her plurality opinion, Justice O'Connor declared that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker."[43] O'Connor explained that it "is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[44] In rejecting the government's contention that the Court should play "a heavily circumscribed role" in reviewing the actions of the executive in wartime, O'Connor pointedly observed that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[45]

In *Hamdan v. Rumsfeld*,[46] as in *Pentagon Papers*, *Keith*, *Rasul* and *Hamdi*, the Court declined to grant broad deference to the executive, instead making its own independent determination of the legality of the President's action. In this case, decided in June 2006, the Court held that the procedures adopted by President Bush for military commissions violated the basic tenets of

38. *See id.* at 324.
39. 542 U.S. 466 (2004).
40. 542 U.S. 507 (2004).
41. *Id.* at 510.
42. *Id.* at 510-11.
43. *Id.* at 533.
44. *Id.* at 532.
45. *Id.* at 536.
46. 126 S. Ct. 2749 (2006).

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military and international law. In a five-to-three decision, the Court held the military commissions established by President Bush's executive order violated both the Uniform Code of Military Justice and the 1949 Geneva Conventions. The Court emphatically rejected the President's assertion that, as commander-in-chief of the Army and Navy, he could constitutionally impose procedures that were incompatible with traditional practice even though they violated both federal and international law.

In terms of judicial review of conflicts between civil liberties and the national security, the twenty-first century has gotten off to a rather good start. Having learned from the mistakes of the past, the Court—or at least majority of the Justices—has jettisoned the "logical" presumption evidenced in *Schenck*, *Korematsu*, and *Dennis* and replaced it with the "pragmatic" presumption of close judicial scrutiny evidenced in *Rasul*, *Hamdi*, and *Hamdan*. This is a fundamental step forward in American constitutional history. Justice Brennan would be pleased.

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