
THE JUDICIAL ROLE IN NATIONAL SECURITY

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The role of judges during times of war – whether it be a traditional war or a “war on terrorism” – is essentially no different than during times of peace: it is to interpret the law to the best of our ability, consistent with our constitutionally mandated role and without regard to external pressure. Among the differences in wartime for the judiciary, however, is one that involves a principle that is essential to the proper operation of the federal courts – judicial independence. In wartime, the need for judicial independence is at its highest, yet the very concept is at its most vulnerable, imperiled by threats both within and without the judiciary. Externally, there is pressure from the elected branches, and often the public, to afford far more deference than may be desirable to the President and Congress, as they wage wars to keep the nation safe. Often this pressure includes threats of retribution, including threats to strip the courts of jurisdiction. Internally, judges may question their own right or ability to make the necessary, potentially perilous judgments at the very time when it is most important that they exercise their full authority. This concern is exacerbated by the fact that the judiciary is essentially a conservative institution and judges are generally conservative individuals who dislike controversy, risk taking, and change.

As Professor Stone can tell you, the history of judicial responses to threats to our liberties in wartime is mixed at best.¹ Now, in the first years of the twenty-first century, the threat to judicial independence is proving particularly troublesome, and I am not referring just to those demagogues who rush to the steps of the Capitol to call for legislation stripping the federal courts of jurisdiction every time they do not like a decision bolstering the Bill of Rights. Rather, I refer to the chilling reality that, as we enter the fifth year of the so-called “Global War on Terror,” we are faced with a conflict with no projected or foreseeable end, and, thus, with the prospect that the war-related challenges to constitutional rights and to judicial independence, which typically subside with the end of a conflict, will continue unabated into the indefinite future. In an era of “war without end,” any inclination of judges to lessen the necessary constitutional vigilance will not only seriously jeopardize basic rights to

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¹ See generally Geoffrey R. Stone, *Civil Liberties v. National Security in the Law’s Open Areas*, 86 B.U. L. REV. 1315 (2006).

privacy and liberty, but also will make it more difficult to fend off other, non-war-related challenges to judicial independence, and as a result cause harm to all of our fundamental rights and liberties.

Archibald Cox – who knew a thing or two about the necessity of government actors being independent – emphasized that an essential element of judicial independence is that “there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.”² Applying Professor Cox’s precept to current events, we might question whether some recent actions and arguments advanced by the elected branches constitute threats to judicial independence. Congress, for instance, recently passed the Detainee Treatment Act.³ The Graham-Levin Amendment, which is part of that legislation, prohibits any court from hearing or considering habeas petitions filed by aliens detained at Guantanamo Bay.⁴ The Supreme Court has been asked to rule on whether the Act applies only prospectively, or whether it applies to pending habeas petitions as well. It is unclear at this time which interpretation will prevail.⁵ But if the Act is ultimately construed as applying to pending appeals, one must ask whether it constitutes “tampering with the . . . jurisdiction of the courts for the purposes of controlling their decisions,” which Professor Cox identified as a key marker of a violation of judicial independence. All of this, of course, is wholly aside from the question of whether Congress and the President may strip the courts of such jurisdiction prospectively. And it is, of course, also wholly apart from the *Padilla* case,⁶ in which many critics believe that the administration has played fast and loose with the courts’ jurisdiction in order to avoid a substantive decision on a fundamental issue of great importance to all Americans.

Another possible threat to judicial independence involves the position taken by the administration regarding the scope of its war powers. In challenging cases brought by individuals charged as enemy combatants or detained at Guantanamo, the administration has argued that the President has “inherent powers” as Commander in Chief under Article II and that actions he takes pursuant to those powers are essentially not reviewable by courts or subject to limitation by Congress.⁷ The administration’s position in the initial round of Guantanamo cases was that no court anywhere had any jurisdiction to consider

² Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996).

³ Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified at 10 U.S.C. § 801, 28 U.S.C. § 2241, 42 U.S.C. § 2000dd).

⁴ *Id.* § 1005(e)-(h), 119 Stat. at 2741-44 (to be codified at 10 U.S.C. § 801).

⁵ Following the presentation of these remarks at the symposium, the Supreme Court ruled that the Act did not apply to pending petitions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006).

⁶ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

⁷ *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

any claim, be it torture or pending execution, by any individual held on that American base, which is located on territory under American jurisdiction, for an indefinite period.⁸ The executive branch has also relied on sweeping and often startling assertions of executive authority in defending the administration's domestic surveillance program, asserting at times as well a congressional resolution for the authorization of the use of military force. To some extent, such assertions carry with them a challenge to judicial independence, as they seem to rely on the proposition that a broad range of cases – those that in the administration's view relate to the President's exercise of power as Commander in Chief (and that is a broad range of cases indeed) – are, in effect, beyond the reach of judicial review. The full implications of the President's arguments are open to debate, especially since the scope of the inherent power appears, in the view of some current and former administration lawyers, to be limitless. What is clear, however, is that the administration's stance raises important questions about how the constitutionally imposed system of checks and balances should operate during periods of military conflict, questions judges should not shirk from resolving.

The fundamental question, I suppose, is whether the role of the judge should change in wartime. The answer is that while our function does not change, the manner in which we perform the balancing of interests that we so often undertake in constitutional cases does. In times of national emergency, we must necessarily give greater weight in many instances to the governmental, more specifically the national security, interest than we might at other times. As courts have often recognized, the government's interests in protecting the nation's security are heightened during periods of military conflict. Accordingly, particular searches or detentions that might be unconstitutional during peacetime may well be deemed constitutional during times of war – not because the role of the judge is any different, and not because courts curtail their constitutionally mandated role, but because a governmental interest that may be insufficient to justify such deprivations in peacetime may be sufficiently substantial to justify that action during times of national emergency. Courts must not, however, at any time allow the balancing to turn into a routine licensing of unbridled and unsupervised governmental power.

Because the courts' balancing of the interests of the government and individuals may produce different results during wartime, the question whether the country is indeed "at war," and if so, the extent to which courts should give the government's interest enhanced weight in wartime, is a critical one. This issue is particularly critical now, when our nation is engaged in a new and wholly unprecedented kind of conflict, one that might very well be a "war without end." In this circumstance, we must ask whether the considerations that have led courts to give governmental interests greater weight during the traditional wars of the past apply with as much force during the present "war on terror," and, if so, how long such a circumstance may endure. Equally

⁸ See, e.g., *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004).

important is the question: what is the role of the courts in determining when “the war without end” has ended or reached a state of normalcy such that we should reevaluate the extent to which we must allow wartime concerns to distort the ordinary balancing process?

The judiciary’s practice of according the government’s interest enhanced weight during wartime is premised, at least implicitly, on the notion that because a state of war is temporary, the curtailment of individual liberty that ensues will also exist for only a limited period. Today, we are faced with a conflict with no foreseeable end and thus with the threat that the scale balancing governmental and individual interests may become permanently tipped in favor of the government. Still, the reason that this conflict is a “war without end” is that we face a nontraditional enemy whose threats may continue unabated for the indefinite future. The rationale that the government requires more latitude in order to keep the country safe during wartime is not any less pressing simply because the conflict has no foreseeable end. This poses an interesting conundrum for those who might be willing to sacrifice some rights in the short run but not indefinitely. During the first years of the twenty-first century, judges will undoubtedly have to consider these and similar novel questions resulting from the radically different world situation we now confront.

One might then ask: are judges capable of making such judgments and do they have the knowledge and expertise to do so? Separate this from the different question: is it appropriate for judges to decide such issues? The answer to the first question is “yes,” and to the second “maybe” (as it would take an entire conference on the second question to do the subject justice). As to the first question, I need only refer to the experience of the Israeli Supreme Court. In times of gravest crisis, that court has repeatedly decided critical questions of national security, including some that have directly affected military operations and tactics, as well as questions as essential to Israel’s survival as where the wall protecting Israel against terrorist incursions should be located, hectare by hectare.⁹ The Israeli court’s decisions have not only been forceful and unequivocal, but have been accepted without a whimper, and put into immediate effect, by the government, the military, and the people. Israel, of course, has a different cultural tradition and a different view of the role of the courts. But as to whether judges are capable of making decisions that require balancing the most critical national security interests against basic civil liberties, the Israeli experience clearly demonstrates that the answer is an unqualified “yes.”

The task of judging national security issues is, however, more difficult now than in the past as a result of a different factor: the remarkable recent advances in the field of technology that permit previously unimaginable invasions of our privacy rights in the name of national security. For various reasons, I will not discuss the controversies regarding the administration’s domestic wiretapping

⁹ See H CJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] 43 I.L.M. 1099.

programs. The point I want to stress here is simply that the issues raised by recent breathtaking technological advances pose totally new and different questions, questions with which most judges may have no particular familiarity and which may well require them to master new subjects and develop new skills. Technological knowledge beyond that possessed by the ordinary highly educated citizen may become a necessity for future members of the judiciary.

Let me end where I began. There is nothing fundamentally different about the role of the judge in the twenty-first century, in general or with regard to national security issues. Our job is essentially no different than the role of the judge in the twentieth century – or the nineteenth. And our role with respect to national security cases is essentially no different from our role with regard to any other important or controversial matter – maybe a little more difficult, maybe a little more daunting, maybe a little more perilous, but in the end it is simply a matter of what good jurists regularly do – weighing, balancing, exercising independent judgment, and safeguarding the Constitution. As in earlier times and as with other issues, our role is to interpret the law to the best of our ability without regard to personal bias or outside pressure. It is to review the actions of the government, particularly as they affect individuals' liberties. Perhaps most important in an era in which civil liberties are inevitably in the greatest jeopardy, we must view with considerable skepticism any attempt to limit the role of the federal courts or undermine their jurisdiction. As dedicated jurists have repeatedly recognized during previous wars, and as some have recognized during the current crisis, the constitutionally mandated function of the judiciary is at least as important, and, in my view even more important, in times of national emergency than in ordinary times – and that may unfortunately be the case for most, if not all, of the twenty-first century.