3. The American Experience: Free Speech and National Security*

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INTRODUCTION

My topic—the quest to develop a jurisprudence that, in times of crisis, can preserve civil liberties against the demands of national security—is one that I approach with great trepidation. For my experience of the last 30 years, unlike that of Israel, has concerned the quest to develop a jurisprudence of civil liberties during times when my nation has been under no serious threat to its security. Even during these relatively placid times, my country has not always protected civil liberties as much as I would have liked. Nonetheless, when I think of the progress we have made over the last 30 years, I look upon our system of civil liberties with some satisfaction, and a certain pride. There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security.

For as adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened. This series of failures is particularly frustrating in that it appears to result not from informed and rational decisions that protecting civil liberties would expose the United States to unacceptable security risks, but rather from the episodic nature of our security crises. After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.

Rather, each crisis has manifested the same set of problems. The sudden national fervour causes people to exaggerate the security risks posed by allowing individuals to exercise their civil liberties and to become willing "temporarily" to sacrifice liberties as part of the war effort. The peacetime jurisprudence of civil liberties leaves the nation without a tradition of, or

detailed theoretical basis for, sustaining civil liberties against particularized security concerns. The nation's procedures for vindicating civil liberties prove too slow to resolve any issue before the time of calamity has passed. The inexperience of decision-makers in dealing with wartime security claims makes them reluctant to question the factual bases underlying asserted security threats. Finally, even decision-makers who are suspicious of asserted security claims lack the expertise and familiarity necessary to discern confidently the true security risk from the overstated one. The repeated failure to come to grips with these problems can, I believe, largely be traced to the episodic nature of security crises in the United States.

NATIONAL CRISES IN U.S. HISTORY AND THE APPROVAL OF THE LEGISLATURE AND THE COURTS

(a) The Alien and Sedition Acts

A brief examination of "national crises" in United States history demonstrates this pattern of problems in dealing with security crises. The ink had barely dried on the First Amendment when the United States, on the verge of war with France, enacted the Alien and Sedition Acts in 1798. The Alien Act empowered the President to expel any alien he judged dangerous and to arrest all subjects of warring foreign nations as alien enemies. The Sedition Act made it unlawful to "write, print, utter or publish ... any false, scandalous and malicious writing ... against" the US government, Congress, or the President with the intent "to bring them . . . into contempt or disrepute." [1]

These were the times when the two major parties were the Federalists and the Republicans. The Federalists were conservative. The Republicans, led by Thomas Jefferson, were progressive or liberal. The Federalists were in power when the Alien and Sedition Acts were passed and were under heavy criticism from Republican politicians and Republican newspapers, many of which had editors who were non-citizens. Seizing upon rumours of French espionage and sabotage, the Federalists found it distressingly easy to rationalize the enactment of statutes that effectively permitted them to punish political opposition, prompting James Madison to wonder whether "it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[2] Although no one was ever formally prosecuted under the Alien Act, its mere existence forced many aliens, including many editors of the critical press, to leave the country or go into hiding. The Sedition Act led to at least 25 arrests, 15 indictments, and 10 convictions—all against Republicans. Among the defendants were the four leading Republican newspapers and three Republican officeholders. Indeed, the victim of the very first prosecution was a Republican Congressman named Matthew Lyon, who served four months in prison for publishing an article and a letter severely

criticizing President Adams. Although no legal challenge to the Sedition Act ever made it to the Supreme Court, the Act was upheld by several lower court judges, including three Supreme Court justices sitting on circuit.

It is easy, with hindsight, to see how a nation, newly independent and facing the first foreign threat to its security, was failed by the lack of any civil rights jurisprudence to employ and by an inability or unwillingness to see through the self-serving assertions of the Federalist Congress and Executive. Luckily, the mood of the country changed. While still in prison, Congressman Lyon was reelected in the 1800 elections, which turned Congress over to the Republicans, largely out of a backlash to the Alien and Sedition Acts; Jefferson, elected President in the same election, pardoned all those who had been convicted; and Congress repaid almost all the fines that had been imposed. The courts had no immediate opportunity to redeem themselves, but as the Supreme Court stated 23 years ago in *New York Times v. Sullivan*, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."[3] The sad fact remains, however, that the political and judicial judgments that proved so easy to make during times of repose had eluded the country during the period of hysteria. The test still before the country was whether the judgment obtained in the court of history would be enforced during the next period of national crisis.

(b) The American Civil War

The Civil War of 1861—1865 provided that next test. Shortly after the first shots of the war were fired at Fort Sumter, and before Congress could be convened, President Lincoln took various measures that infringed upon civil liberties in the name of national security—the most egregious of which was suspending the writ of habeas corpus. With habeas corpus suspended, Lincoln caused 20-30,000 persons to be arrested and detained in military custody without charges, simply because those persons were suspected of being disloyal, dangerous, or disaffected. These persons remained in custody as long as the federal government saw fit, some receiving no trial at all, others receiving a military trial which lacked the procedural safeguards that would have been guaranteed by a civilian criminal court.

These deprivations of civil rights enjoyed strong public support. The constitutionality of Lincoln's actions never reached the Supreme Court during the Civil War; it did, however, reach Chief Justice Taney who, sitting as a circuit judge in *Ex parte Merryman*,[4] held that the President's suspension of the Great Writ was unconstitutional. The public reaction to Taney's decision was reflected in this editorial comment from the *New York Tribune*: "The Chief Justice takes sides with traitors, throwing around them the sheltering protection of the ermine. When treason stalks about in arms, let decrepit Judges give place to men capable of detecting and crushing it."[5]

President Lincoln and his military authorities simply ignored Taney's holding, and continued to use military arrests and trials throughout the war, relying on this insidious principle that if military detentions are constitutional in places in rebellion, they are constitutional "as well in places in which they may prevent the rebellion extending."[6]

After the war and the time of crisis had passed, the lofty principles of civil liberties were once again reaffirmed. The Supreme Court, in the 1866 case of *Ex parte Milligan*,[7] held that in any locality where the civil courts were open and functioning it was unconstitutional to suspend the writ of habeas corpus and to establish a system of military detentions and trials. The decision has come to be considered, in the words of Charles Warren, "one of the bulwarks of American liberty",[8] enunciating the principle that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[9] But, as the Civil War experience itself made evident, this principle was as yet more an aspiration than a reality. The unfortunate American tendency to panic in the face of national crisis and to countenance infringements of civil liberties that would appear intolerable during times of repose was more truly revealed elsewhere in *Milligan*, where the Court stated:

> During the late wicked Rebellion the temper of the times did not allow that calmness in deliberation and discussion so necessary to correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.'[10]

A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger. The Court in *Milligan*, however, seemed quite unaware of the irony, and was apparently content to pronounce principles that could presumably be applied by a future Court during the next war. By the time World War I rolled around, though, the nation and the courts had been softened by decades of relative tranquillity, leaving them susceptible once again to overblown claims that the war effort could succeed only if civil liberties were suppressed.

(c) World War I

Indeed, during World War I the Senate considered a bill that would have made the entire United States a military zone within which anyone who published any material that might endanger the success of U.S.

military operations could be tried as a spy by a military tribunal and put to death.[11] Unwilling to go this far, President Wilson instead convinced Congress to enact the Espionage Act of 1917, which made it a crime during a time of war, to make false statements with the intent to interfere with the success of US military forces or military recruiting. This Act provided the predicate for confiscating anti-war films and raiding the offices of anti-war organizations. In 1918 the Act was amended to make it a crime also to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about" the U.S . form of government, Constitution, flag, or its military forces or uniform "or any language intended to bring the [same] into contempt, scorn, contumely, or disrepute..."[12]

All in all, over two thousand individuals were prosecuted under the Espionage Act. Very few individuals were convicted for actually urging men not to enlist or submit to the draft—purportedly the main object of the Act. Rather, the vast majority of the convictions were for stating opinions about the war that the courts treated as false statements of fact because they conflicted with speeches by President Wilson or with the resolution of Congress declaring war. Among the supposed "threats to national security" that were prosecuted under the Act were statements of religious objections to the war, advocacy of heavier taxation instead of the issuance of war bonds, suggestions that the draft was unconstitutional, and criticisms of the Red Cross or the YMCA.[13] Moreover, such "subversive' statements were criminalized even if they were never directly communicated to soldiers or to men about to enlist or be drafted —it was thought enough that the statements might conceivably reach such men and undermine the war effort.

Once again, none of these cases actually reached the Supreme Court until the war was over. But against the background of the "Red Scare" years of 1919 to 1920, the Court upheld many such convictions by calling opinions false factual statements and by making assessments of intents and of threats to military recruiting or operations that in retrospect seem outlandish. In 1919, Justice Holmes announced the Supreme Court's opinion in *Schenck v. United States*,[14] which enunciated the famous "clear and present danger" test for protecting speech, but at the same emasculated the test's application during wartime by stating: "When a nation is at war many things that might be said in the time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight ... "[15] Applying this understanding of the "clear and present danger" test, the Court had no apparent difficulty upholding Schenck's conviction for doing nothing more than distributing pamphlets that criticized the draft and denied its constitutionality. Applying the same standard in a subsequent case, *Debs v. United States*, the Supreme Court upheld the conviction of labour organizer Eugene Debs for making a speech in opposition to the war in which his most egregious statement was

"you need to know that you are fit for something better than slavery and cannon fodder." [16]

The only case the Supreme Court considered that involved the far-reaching 1918 Amendment to the 1917 Espionage Act was *Abrams v. United States*,[17] in which the defendants had been convicted of publishing abusive language about President Wilson, the US form of government, and the war effort. The Court relied on the conclusion that the speech was intended, albeit somewhat indirectly, to interfere with military operations, on the theory that the defendants sought "to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe."[18] The dissent of Justices Holmes and Brandeis attempted to distinguish wartime from peacetime speech rights while still limiting the power to punish speech during wartime with the "clear and present danger test," noting: "The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same."[19]

(d) World War II

The trouble in the United States, however, has been not so much the refusal to recognize principles of civil liberties during times of war and national crisis but rather the reluctance and inability to question, during the period of panic, asserted wartime dangers with which the nation and the judiciary is unfamiliar. During the Second World War this problem manifested itself in the cases concerning the military treatment of American citizens of Japanese descent, 120,000 of whom were interned. Without reaching the broader issue of whether the internments were valid, the Supreme Court upheld curfews and evacuation orders that applied only to those of Japanese ancestry. The Court, uncertain about its ability to discern which sorts of threats to security could be considered realistic, announced that it would be satisfied "if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real."[20] Under this deferential standard, the Court concluded that it could not "reject as unfounded the judgment of the military authorities" that many Japanese Americans were disloyal for various cultural reasons, that the disloyal ones posed a significant threat of sabotage and espionage, and that it was difficult to distinguish the disloyal from the loyal.[21] That such racial distinctions were irrelevant, and thus impermissible, during times of peace, the Court asserted, did not mean that they were irrelevant or impermissible "in dealing with the perils of war".[22]

We now have the benefit of knowing what the Supreme Court did not: that the allegation that Japanese Americans were facilitating attacks on

American ships and shore installations by communicating with Japanese warships via radio and light signals (the Army's main justification for the evacuation) was completely unfounded, and that the Army probably knew it. Worse, those who had been evacuated from the coastal states because of this imaginary security threat were held in extended detention by the Army not because they posed a security threat to the interior states but because communities in the interior states did not want an influx of persons of Japanese ancestry. In 1980 Congress established the Commission on Wartime Relocation and Internment of Civilians, which reviewed all the evidence and concluded that the internment was a "grave injustice" that was "not justified by military necessity" but rather was prompted by "race prejudice, war hysteria and a failure of political leadership."

This conclusion, however, like those denouncing the Alien and Sedition Acts, Lincoln's suspension of the Great Writ, and the Espionage Act prosecutions of political anti-war statements in World War I, came far too late to prevent civil liberties from being infringed and provides little assurance that hysterical assessments of security risks will not carry the day in a future crisis. So far, the United States has fortunately been able to restore a democratic and constitutional regime after each crisis. But as Justice Davis noted for the Court in *Ex parte Milligan*,

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principle of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to liberty are frightful to contemplate.[23]

For as distressing as the wartime curtailment of civil liberties has been even under leaders like Lincoln, a more pervasive and permanent tyranny could have been established had the country ceded its civil liberties to someone willing to seize upon the opportunity to establish an authoritarian regime.

AN ASSESSMENT OF THE JURISPRUDENCE ON WARTIME CIVIL LIBERTIES

These incidents have provided some valuable lessons. They have helped the United States flesh out its jurisprudence regarding wartime civil liberties and have, I hope, taught us to be suspicious of asserted security claims. But because the United States has had the good fortune of relative tranquillity, the incidents have been episodic, and the lessons learned and the experience garnered have grown faint during the lapses between security crises. Prolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain both the discipline

necessary to examine asserted security risks critically and the expertise necessary to distinguish the bona fide from the bogus.

Indeed, the United States has had some modest success of this sort in adjusting to the post-atomic global struggle with the Soviet Union. Our initial reaction, during those dark years we now call the Cold War, was typically hysterical. Imaginary security risks led the government to start prosecuting communists under the Smith Act, which made it a crime, among other things, to become a member of or "to organize any society . . . advocat[ing] . . . the overthrow or destruction of any government of the United States by force or violence" or "to print . . . any written or printed material advocating . . . the . . . propriety" of such overthrow or destruction with the intent to cause it to come about.[24] Congress, frightened by tales of communist subversion, conducted a witch-hunt for communists through a series of committee investigations, and enacted various laws, including the Internal Security Act of 1950 and the Communist Control Act of 1954, aimed at flushing out those with communist beliefs. Sadly, in 1951 my own Court bowed to the sentiment of the day in *Dennis v. United States*[25] and sustained the conviction of Communist Party members by reinterpreting the "clear and present danger" test in a way that emasculated it and effectively upheld a limitation on speech where the danger was neither clear nor present. The Court proved unable or unwilling to assess independently the factual allegations that the Communist Party stood ready to overthrow the US government.

But over time, sustained exposure to the so-called communist threat enabled the country to work past the fervour that initially clouded its judgment and the lack of experience that disabled it from assessing the facts accurately. The realization grew that the security threat posed by American Communist groups was weak at best, and a more tolerant view came to prevail in the courts, the political branches, and the public mind. The eventual victory on behalf of civil liberties was obviously a modest one, given the modesty of the security risk actually facing the United States during this period. But the ability of the country to learn from sustained experience and to mature in its security views is heartening nonetheless.

The history of American treatment of civil liberties during national security crises thus teaches several important lessons. It teaches that abstract principles announcing the applicability of civil liberties during times of war and crisis are ineffectual when a war or other crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns. It teaches that in order to prevent civil liberties from being shunted aside as a nation girds itself for battle, procedures for swiftly enforcing that jurisprudence during times of calamity must also be designed and implemented, lest the jurisprudence perpetually find itself providing guidance only in retrospect. Finally, it teaches that the perceived threats to national security that have motivated the sacrifice of civil liberties

during times of crisis are often overblown and factually unfounded. The rumours of French intrigue during the late 1790's, the claims that civilian courts were unable to adjudicate the allegedly treasonous actions of Northerners during the Civil War, the hysterical belief that criticism of conscription and the war effort might lead droves of soldiers to desert the Army or resist the draft during World War I, the wild assertions of sabotage and espionage by Japanese Americans during World War II, and the paranoid fear that the American Communist Party stood ready to overthrow the government, were all so baseless that they would be comical were it not for the serious hardship that they caused during the times of crisis. As Walter Gellhorn concluded, "History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows."[26]

By the slow accumulation of precedents, these lessons are gradually building a jurisprudence that, during crises, can account for, rather than discard, the liberties that give our nation its identity. The ability of the United States to absorb and implement these lessons effectively, however, has been limited by the episodic nature of our security crises. The good fortune of its relatively secure position leaves it unhardened by the experience necessary to apply the historical lesson of scepticism when threats and factual issues crop up that are unfamiliar to a peacetime judiciary and nation. Santayana was certainly right when he noted: "those who cannot remember the past are condemned to repeat it." But merely remembering the past has not proved to be enough. Without prolonged exposure to the claimed threat, it is all too easy for a nation and judiciary that has grown unaccustomed to crisis to get swept away by irrational passion, and to accept gullibly assertions that, in times of repose, would be subjected to the critical examination they deserve. A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat.

In this respect, it may well be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security. For it is Israel that has been facing real and serious threats to its security for the last forty years and seems destined to continue facing such threats in the foreseeable future. The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger—bulwarks to help

guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile. That is why conferences like this one, and vigilant close examination of the demands national security makes on civil liberties in Israel, is so vitally important to the world at large. The nations of the world, faced with sudden threats to their own security, will look to Israel's experience in handling its continuing security crises, and may well find in that experience the expertise to reject the security claims that Israel has exposed as baseless and the courage to preserve the civil liberties that Israel has preserved without detriment to its security.

I have, for example, read with great interest Justice Barak's monumental opinion in the *Kahane* case. In a remarkably sophisticated and comprehensive analysis of free speech interests, Judge Barak articulates a "near certainty" test that, although phrased as a less rigorous test than the clear and present danger test, appears to have somewhat more bite in application than the clear and present danger had when applied in the crisis atmosphere in which *Schenck* and *Debs* were decided. I would not be surprised if this careful and critical review of the interests at stake became a model for other countries facing similar issues in similarly troubled times. Nor would I be surprised if in the future the protections generally afforded civil liberties during times of world danger owed much to the lessons Israel learns in its struggle to preserve simultaneously the liberties of its citizens and the security of its nation. For in this crucible of danger lies the opportunity to forge a world-wide jurisprudence of civil liberties that can withstand the turbulences of war and crisis. In this way, adversity may yet be the handmaiden of liberty.

NOTES

*English translation was made available by Justice Barak to Justice Brennan.

[1] Stat. 570 (1798).

[2] Halpern & Hoffman, *Freedom vs. National Security* ix (1977).

[3] 376 *U.S.* 254, 276 (1964).

[4] Fed. Cas. No. 9.487 (C. C. Md. 1861).
[5] 3 Warren, *The Supreme Court in United States History* 91 (1923).
[6] *Ibid*, 95; *see also* 1 Dorsen, Bender & Neuborne, *Political and Civil Rights in the United States* 32—33 (1976).
[7] 71 *U.S.* (4 Wall.) 2 (1866).
[8] 3 Warren, *supra* note 5, at 149.
[9] 71 *U.S.*, at 120-21.
[10] *Ibid.*, 109 (emphasis added).
[11] Dorsen, *et al. supra* note 6, at 40.
[12] 40 *Stat.* 553 (1918).
[13] Dorsen, *supra* note 6, at 41-42.
[14] 249 U.S. 47 (1919).
[15] *Ibid.*, 52.
[16] 249 *U.S.* 211, 214 (1919).
[17] 250 *U.S.* 616 (1919).
[18] *Ibid.*, 623.
[19] *Ibid.*, 627—28 (Holmes, J., dissenting).
[20] Hirabayshi v. United States, 320 *U.S.* 81, 95 (1943).
[21] *Ibid.*, 99; Korematsu v. United States, 323 *U.S.* 214, 218 (1944).
[22] 320 *U.S.*, at 100.
[23] 71 *U.S.*, at 125.
[24] 54 *Stat.* 671 (1940).
[25] 341 *U.S.* 494 (1951).
[26] Gellhorn, *American Rights* 82-83 (1960).

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Part II

Controlling the Media: The Challenge of Censorship