




[Home](#) | [Current Issue](#) | [Editorial Board](#) | [Instructions for Authors](#) | [Contact](#)

Lethbridge Undergraduate Research Journal  
ISSN 1718-8482

## Why the Judiciary Should Protect First Amendment Political Speech During Wartime : The Case for Deliberative Democracy

**Geoffrey J. Derrick**   
Northwestern University  
Chicago Illinois USA

---

### Citation:

Geoffrey J. Derrick: Why the Judiciary Should Protect First Amendment Political Speech During Wartime :The Case for Deliberative Democracy . *Lethbridge Undergraduate Research Journal*. 2007. Volume 2 Number 1.

---

## Table of Contents

[Abstract](#)  
[Introduction](#)  
[The Unclear & Present Danger Test: From  
The Normalization of Expansive—and Expanding—Executive Power](#)  
[Conclusion](#)  
[Endnotes](#)

## Abstract

The intersection of an individual's First Amendment right to political speech and the executive branch's war policy has been the subject of much recent scholarship. The unique challenges of the War on Terror have led Judge Richard Posner of the Seventh Circuit to adopt the view of the late Chief Justice William H. Rehnquist that the judicial branch ought to adopt a deferential posture towards First Amendment rights during wartime. This paper responds by defending the value of open public debate about the war policy for three reasons: to uncover executive branch secrets, to clarify how peacetime First Amendment precedent like *Brandenburg v. Ohio*

applies during wartime, and to guard against the executive branch indefinitely asserting wartime powers during the War on Terror.

---

## Introduction

The legislative branch has not provided an authoritative check on the executive branch during and after national emergencies because hysteria and fear, rather than reasoned debate, have framed Congressional debates about expanding executive power. By truncating discussions about new war powers, legislators have provided little, if any, substantive restraint on the executive branch. In the absence of a good-faith review of the executive branch's war powers by the legislature, the judicial branch becomes the most important institutional restraint by default. Unfortunately, the judiciary has also deferred broadly to the President and unevenly balanced national security and individual liberty during wartime.

Deference, the judicial branch's hands-off approach to the executive branch's power during wartime, has consistently contravened free speech. Wartime courts have rejected the proposition of this paper that the First Amendment guarantees communicative liberty for all citizens even during times of emergency or war. The judicial branch has not gone far enough in protecting a forum for citizens to disagree with the executive branch's war policy. A responsible separation of powers requires the courts to scrutinize the executive's wartime powers in light of Congress' legislation authorizing extraordinary war powers.

The First's Amendment's most important role is to ensure self-governance, the core value from which numerous other constitutional guarantees stem. The exchange of ideas by citizens in the public forum is essential to deliberative democracy. This paper adheres to the formulation of Cass Sunstein who argues that debates about the war policy "provide the key safeguard against senseless cascades" and "open up space for dissent by forbidding government from mandating conformity or insulating itself, and citizens generally, from ... opinions."<sup>1</sup> If the judicial branch is to remain the active guarantor of minority viewpoints that it has been since *United States vs. Carolene Products* (1939),<sup>2</sup> it must more actively insist upon a presumption of unconstitutionality for executive action that abridges the public's right to know and discuss the war. This would require the court to more actively validate First Amendment claims in the face of executive branch secrecy instead of deferring during wartime.

Justice Harlan Stone's fourth footnote in the *Carolene Products* majority opinion introduced a new theory of judicial review in which the court subjected laws to a more demanding scrutiny if they are aimed at "discrete and insular minorities." Citizens who choose to dissent or question the war policy are part of a political minority whose opinions are often under siege by the executive

branch. To ensure that Justice Stone's theory does not disappear in wartime, the modern judicial branch needs to assert review power over legislation, like the USA PATRIOT Act, that expands executive authority at the expense of communicative liberty. The courts must more forcefully protect the dissenting minority during wartime with the artillery of First Amendment precedent.

While *Carolene Products* was not deciding during wartime or with regard to the First Amendment, it has generally allowed for a more profound reading of the Bill of Rights in wartime. This reading, a noteworthy example of when the judicial branch correctly asserted its independence from the executive branch, was adopted in several influential First Amendment opinions such as *Korematsu v. United States* (1942, Justice Jackson and Justice Murphy's dissents), *Dennis v. United States* (1951, Justice Douglas' dissent), *Brandenburg v. Ohio* (1969, Justice Douglas' concurrence), and *New York Times v. United States* (1971, Justice Black's concurrence). As time passed between the "darkest days of World War II"<sup>3</sup> and the waning pressures from the Vietnam War, the judiciary gradually accepted the public's right to information about the war. As the hysteria subsided, the judicial branch chipped-away at the executive's power in the rare circumstances where it went beyond Congress' authorization. However, many of the dissenting and concurring opinions of Justices during this period are not controlling First Amendment precedent. Rarely has a wartime court spoken together to strongly defend the core principles of pluralism and respect for dissenters that are at the heart of the First Amendment.

This paper rebuts the thesis of modern executive power posited by United States Court of Appeals for the Seventh Circuit Judge Richard Posner<sup>4</sup> and former Supreme Court Chief Justice William H. Rehnquist.<sup>5</sup> Rehnquist argues that "The laws will not be silent in a time of war, but they will speak with a somewhat different voice."<sup>6</sup> Similarly, Posner explains the "The scope of a right must be calibrated ...[as] the point of balance ...shifts continuously [and] threats to liberty and safety wax and wane."<sup>7</sup> The Rehnquist/Posner theory that "Security is the very precondition for freedom"<sup>8</sup> is unfavorable because it denies the possibilities that, during wartime, dissent may improve national security or that judicial deference may endanger deliberative democracy.

Posner is correct that judges should not be in the business of adjudicating national security issues because such an inquiry would require the disclosure of sensitive information. However, the judicial branch has the opportunity to forward a more nuanced First Amendment defense of the public's right to know and discuss the war policy without involving itself in these sticky security questions. This paper concludes that the Rehnquist/Posner theory of executive power is self-sealing because it disavows the need for institutional checks and balances such as public or judicial scrutiny of the war policy. This paper will show that the empirical result of a judiciary that willfully trusts the executive branch during wartime has been a breakdown in public knowledge, discussion

and criticism of the war.

Rehnquist asks, “may it not actually be desirable” for the judicial branch “to avoid decision on [civil liberties] claims during” until “after the war is over”?<sup>9</sup> This question blurs Rehnquist's supposed distinction between his theory and the classic Latin phrase “*inter arma silent leges*”—during war the laws are silent. This paper argues that there is a limited yet important role for the judicial branch during wartime: to ensure self-government via the freedom of information and debates about the war. Posner concludes that this recommendation is unnecessary because “Every time civil liberties have been curtailed in response to a national emergency, whether real or imagined, they have been fully restored when the emergency passed—and in fact before it passed, often long before.”<sup>10</sup> However, section IV takes the opposite position that judicial deference to the executive branch during wartime has resulted in an improper balance of security and liberty even after the end of the war. The need for a more active judicial branch in wartime is manifest in three historical trends: (1). The veil of secrecy imposed by the executive branch on wartime information and debate during the Cold War, the Vietnam War and the War on Terror, (2). The judicial branch's inconsistent application of the “clear and present danger” test during World War I, World War II and the Cold War, and (3). The executive branch's assertion of emergency powers before and after the temporal boundaries of the French-American War, the Civil War and World War I.

## Persecution: Making the War a Secret

Executive branch secrecy prevents citizens from participating in their own governance. Sunstein argues that “Above all, the Constitution attempts to create a deliberative democracy ...that combines accountability to the people with a measure of reflection and reason-giving.”<sup>11</sup> As mentioned above, Posner argues that the executive branch rightly keeps its activities secret during wartime because public discussion of such activities would endanger national security. However, executive branch secrecy in the twentieth century has more directly threatened self-government by controlling what citizens can know about the war policy. The executive branch has employed a variety of repressive tactics including censorship, propaganda, prosecution or persecution. Natan Sharansky writes that “The power of fear” is based on “a regime's ability to control what is read, said, heard, and above all, thought.”<sup>12</sup> These fear-producing tactics have deterred unknowledgeable citizens from questioning national security experts. Simply put, a reasonable understanding of the government's war policy is a necessary precondition for disagreeing with it or having an educated discussion about it.

The executive branch contends that national security information is meant to be discussed in the technical sphere by experts rather than the public sphere by ordinary citizens. During the last half-century, the judicial branch has slowly incorporated substantive First Amendment protections against this brand of

executive secrecy. The Court ought to go further and adopt a heavy presumption against restrictions on information that is vital for the public to think, discuss, and speak in a reasoned and well-informed way about the war, similar to how the court in *New York Times v. United States* rejected prior restraints on political speech. The need for judicial efforts to counteract executive branch secrecy is best understood by examining Congress' persecution of American communists during the Cold War, the Supreme Court's commitment to transparent government in *New York Times v. United States*, and Posner's comments about the role of the judicial branch in the current War on Terror.

The Cold War demonstrates that the legislature cannot be trusted to fairly moderate the marketplace of ideas during wartime. The House Un-American Activities Committee's (HUAC) hearings, inflamed by Senator McCarthy's vitriolic anti-communism, put a spotlight of publicity on dissenters. Geoffrey Stone notes that government-sanctioned persecution in the public forum was a new turn in repression since World War II.<sup>13</sup> Interestingly, Martin Redish has written that "There now appears to be little question that many of the allegations of espionage made during the 1940s that seems wild to many were, in fact, completely accurate."<sup>14</sup> Nonetheless, he concludes that the legislature should not be in the business of justifying viewpoint-based restrictions on expression because "Democracy ...inherently requires that sovereignty ultimately reside in the people."<sup>15</sup> HUAC condemned critical thinking about the Cold War, causing a lack of knowledge about the Soviet Union and the nature of the communist threat. It is thus not difficult to understand how the Comintern and Venona documents—the evidence of American communism during the Cold War—revolutionized a field of historical scholarship that had been based on misinformation because of executive branch secrecy. If the public had been privileged to this information at the time of the HUAC hearings, the case for anti-communism would have been clearer. Instead, the executive branch, under the thumb of FBI Director J. Edgar Hoover, hid its wartime activities and persecuted those who legitimately questioned the war.

The real threat of persecution during the Cold War came from private actors, not the government. The legislature chose to expose supposed American communists in the public forum because the HUAC could not authorize legal prosecutions in light of the First Amendment right to free association. Cold War persecution represented a new and more indirect avenue for the government to regulate expression; one that was equally as subversive as sedition legislation because it chilled the willingness of citizens to enter discussions about the war for fear of being seen as un-American or the enemy. HUAC carried the power of a legislative enactment because private business, religious, and political groups sanctioned dissenters with loyalty oaths and blacklists. Redish notes, "Although the constitutional guarantee of free expression restricts what government may do, it is, paradoxically, the very same right that justifies the exclusion of private actors from the scope of the [First] Amendment's restrictions."<sup>16</sup> The executive branch's strategy of

encouraging private non-association through Congressional persecution was, at its core, an effort to create ideological conformity against communism. The government's pursuit of communism was kept secret for thirty years, skewing historical interpretations of the period. The result of executive secrecy was to distort the public forum with misinformation. The enduring lesson of the Cold War is that a democracy is a two-way street: if the government can make the private lives of its citizens into public knowledge, then citizens can also petition the government for information about the war.

Realizing this, dissenters to the Vietnam War relied heavily on the public forum and “the great benefit of vigorous debate ...to educate citizens about the issues.”<sup>17</sup> The public's understanding of the Vietnam War was rarely advanced by congressional investigations of the executive branch. Political pressure restrained legislators from authorizing legitimate inquiries into the executive branch's conduct during and after the war. The executive branch used programs like COINTELPRO and Project MERRIMAC to “disrupt,” “intercept,” “harass,” “sabotage,” and “assault” members of the New Left who opposed the Vietnam War.<sup>18</sup> The secrecy of the Nixon Administration during the Vietnam War presented the Supreme Court with an opportunity to protect the public's First Amendment right to fully understand and discuss the executive branch's war policy.

The Court in *New York Times v. United States* (1971)—the Pentagon Papers case—held that the Nixon Administration could not enjoin the New York Times and Washington Post from publishing the Pentagon Papers and, more importantly, that no information short of that which directly endangers national security could be enjoined from dissemination in the public forum. As a result, the public was exposed to deep and troubled history of the executive branch's inner-workings during the Vietnam War, putting the government under a higher level of public scrutiny than ever before. The press' victory strengthened the notion that it was not only the right but also a central purpose of the free press to scrutinize government. The court's short and quickly issued per curiam opinion in the Pentagon Papers case denouncing prior restraints gave new weight to the First Amendment freedom of the press. Justice Black later wrote that “the Founding Fathers gave the Free Press the protection it must have to fulfill its essential role in our democracy ...to inform the people.”<sup>19</sup> Justice Douglas agreed: “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors.”<sup>20</sup> By releasing the Pentagon Papers for full public assessment in the marketplace of ideas, the court affirmed that the First Amendment fully protects the public's right to monitor the executive branch during wartime.

The public's check is crucial because, as Sunstein argues, “diversity-building practices counteract the human tendency to conform,” especially when “social influences” like the exigencies of war “threaten ...to lead individuals and institutions in the wrong directions.”<sup>21</sup> *New York Times v. United States* “stands as a dramatic symbol of the constitutional protection afforded to disclosure and

dissent.”<sup>22</sup> Steven Shiffrin, quoting Harry Kalven, writes that *New York Times v. United States* “may prove to be the best and most important [decision the Court] has ever produced in the realm of freedom of speech” because it “almost literally incorporated Alexander Meiklejohn’s thesis that in a democracy the citizen as ruler is our most important public official.”<sup>23</sup> Meiklejohn’s self-governance theory asserted absolute protection for political speech because it was at the heart of self-governance. Three separate theories of free speech underpin Meiklejohn’s argument: Justice Oliver Wendell Holmes’ belief that dissent contributes to the realization of truth in the marketplace of ideas, Sunstein’s emphasis on deliberation in the marketplace, and Shiffrin’s theory of questioning accepted conventions. Executive branch secrecy during wartime flies in the face of these three positions because it impedes citizens from participating in their own governance. The executive branch’s reckless persecution of dissent during the Cold and Vietnam Wars demonstrates that the tactics for deterring citizens from speaking about the war had changed from overt sedition legislation to more indirect, extra-legal methods.

In the current War on Terror, for example, state district courts cited the threat of terrorism in allowing the executive branch to use time, place and manner (TPM) restrictions—“free speech zones” or “protest pens”—to limit the communicative liberty of activists at the Democratic and Republican National Conventions.<sup>24</sup> The court’s noninterference with these TPM restrictions has had a chilling effect on political expression under the First Amendment by giving protesters a strong incentive to stay home. Richard Leone has observed that “it is alarming how little public deliberation has occurred” during the “tumultuous post-9/11 period.”<sup>25</sup> TPM restrictions show that the executive branch has been able to silence dissenters during wartime by increasing the deterrent to speech. It is the job of the judicial branch to reign in TPM restrictions when they contravene the First Amendment guarantee of a robust public debate about the War on Terror. Unlike the Cold War, the executive branch did not persecute dissenters through the publicity of congressional hearings; rather, the executive branch has deployed the FBI to watch and disrupt dissenters with more discrete deterrents to dissent such as TPM restrictions.

Attorney General Alberto Gonzalez, defending warrantless wiretapping, said that the program “does not invade anyone’s privacy, unless you are talking to the enemy in this time of war.”<sup>26</sup> Similarly, Posner’s opinion in *Alliance to End Repression v. City of Chicago* (2004) validated police wiretaps, profiling and infiltration of Muslim groups as a necessary function of the War on Terror. Posner, like the majority in *Dennis* and Attorney General Gonzalez, is willing to obfuscate the First Amendment’s clear distinction between *incitement*—speech that provokes imminent lawless action—and *advocacy*—speech that does not produce such action—if the exigencies of wartime are present. Posner authorized the Chicago Police Department to surveil all potential terrorists because he trusts that they will not unnecessarily infringe upon suspects’ rights. However, it does not follow why citizens should blindly trust the executive branch to conduct the War on Terror given the long history of deception

discussed herein. Without the converse of a public right to information about the war, the executive branch becomes self-sealing. The Pentagon Papers decision set the precedent that the judicial branch would not simply take the executive at its word and defer during wartime; it left more room for judges to balance civil liberties on par with security.

With respect to balancing, Posner argues that “cases involving a clash between liberty and safety cannot yet be governed by rules.”<sup>27</sup> However, it is the lack of a categorical rule against the suppression of wartime dissent that had led judges to decide wartime First Amendment claims in an ad hoc manner. Section III will discuss how the differential application of the clear and present danger test over time has led judges to disregard or misapply First Amendment precedent during wartime. Posner argues that there should be an exception to the *Brandenburg* rule<sup>28</sup> for “speech that preaches holy war against the west.”<sup>29</sup> This case-by-case evaluation of speech acts cuts against the First Amendment’s core value of tolerance. Posner’s language is telling: “the government should not have to stand by helplessly while radical imams convert a multitude to their radical creed.”<sup>30</sup> This idea that any Muslim is inherently dangerous because he or she could be compelled to conduct radical Islamic terrorism assumes that words are triggers to action and that advocacy is equivalent to incitement. The courts ought to clarify this distinction in the War on Terror to ensure that the *Brandenburg* test doesn’t revert back to the “bad tendency”<sup>31</sup> in future wars.

The Supreme Court recently explained how the traditional laws of war will apply to the War on Terror in *Hamdan v. Rumsfeld* (2006), rebuking the executive ability to create military courts without consulting Congress.<sup>32</sup> This ruling speaks to Posner’s argument that “It is much easier for judges to tell the government what not to do than what to do.”<sup>33</sup> As such, the courts need to continue to hear cases that challenge the limits of executive branch authority in the War on Terror. Posner disagrees, arguing that the judiciary would be overburdened if it were charged with “trundling out the heavily artillery of constitutional invalidation” during the War on Terror. This view of judicial authority is profoundly limited. In order for secrets to enter the public forum and for dissenters to receive the appropriate protection from the tactics of executive suppression, the judicial branch must remain far more active in wartime than the Rehnquist/Posner theory advocates.

## **The Unclear & Present Danger Test: From *Schenck* to *Dennis* to *Brandenburg***

While the Supreme Court’s majority consistently applied the bad tendency test to uphold prosecutions for espionage and seditious advocacy during World War I, some of the court’s dissenting opinions began to reveal judicial independence from the executive branch. Dissenting judges, particularly Justice Holmes, introduced a discussion about the role of the First Amendment for the first time in the history of the judicial branch. This was the first time that



any member of the court adjudicated speech prosecutions as a matter of First Amendment rights rather than criminal law. The “clear and present danger test” created by Justice Holmes’ majority in *Schenck* relied heavily on the “marketplace of ideas” metaphor to buttress its claim that the public sphere was an inherent good, rather than a necessary evil, of democratic governance. In his dissent in *Abrams v. United States* (1919), Justice Holmes wrote that “the ultimate good desired is better reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>34</sup> This metaphor for free expression in the public sphere endured in the court’s decision-making for fifty years until *Brandenburg* (1969). David Rabban concludes that “The modern civil liberties movement emerged during and after World War I” because the clear and present danger test “created a broader and more powerful constituency prepared to support freedom of expression.”<sup>35</sup> The vacillation of the clear and present danger test demonstrates, that an active judicial branch can protect communicative liberty in the face of executive branch suppression. This section proceeds by discussing the influences of progressive social thinkers on the clear and present danger test, the test’s distinction—or lack thereof— between advocacy and incitement in *Dennis*, and the broad protection afforded to dissent in *Brandenburg*.

The division before World War I between radical libertarians who favored individual rights and progressives who favored the “common good” led to the first public and judicial debates about the meaning of the First Amendment. These debates embodied the First Amendment’s commitment to pluralism by allowing multiple perspectives to enter the decision-making process. Never before Justice Holmes’ dissent in *Abrams* had any judge discussed speech outside on the strictures of traditional criminal law and the law of “attempt,” i.e. the bad tendency test.<sup>36</sup> Stone and Rabban argue that Justice Holmes’ attitude about the clear and present danger test changed markedly between his *Schenck* majority and his *Abrams* dissent.

Justice Holmes’ progressivism with respect to speech rights was influenced by Zachariah Chaffee, Ralph Waldo Emerson, John Dewey, and other social thinkers at the turn of the twentieth century. The publication of personal correspondences between Judge Learned Hand and Justice Holmes reveals the large influence that Judge Hand had on Justice Holmes’ commitment to free and open public discussion. Before being exposed to these ideas, Holmes’ published *The Common Law* in 1881 and characterized free speech as an issue of criminal law and nothing else. He counseled judges to ask: what actions will occur as the result of speech and are they punishable? Judge Hand’s opinion in *Masses Publishing Co. v. Patten* (1917) was the immediate precedent for Holmes’ analysis in *Schenck*. In *Masses*, Judge Hand created a specific standard for incitement during wartime: to “counsel or advise violations of law” would be equivalent to the “direct advocacy of resistance to enlistment” of troops.<sup>37</sup> Justice Holmes agreed with this interpretation in *Schenck*, arguing that there the substantive evil of draft obstruction was uniquely heightened

during wartime and that a speaker's intent could be determined based on the "inevitable result" the speech. It retained the substantive aspects of the bad tendency test and simply cast them in new language. However, in *Abrams* after the end of World War I, Justice Holmes changed his position, arguing that the danger produced by advocacy must be "immediate" and "imminent" in order to prosecute speech in wartime. Shiffrin notes, "Emerson may have celebrated a mythical American, but they celebrated an American who was not wedded to the comforts of the present nor tied to the bonds of the past. They celebrated the courage of the nonconformist, the iconoclast, the dissenter ... And, with Mill, they sponsored nonconformity."<sup>38</sup> In this way, Justice Holmes' application of clear and present danger in *Abrams* cut against judicial deference and set the stage for further scrutiny of the executive branch during peacetime.

Because of the uneven application of the test by Justice Holmes in *Schenck* and *Abrams*, future judges were unsure about when and how to apply its "immediate" and "imminent" language. While Justice Holmes' opinions were monumental in breaking the mold of criminal law, they "introduce a long line of cases dealing with the advocacy of illegal action" that are "simply depressing" because "Only rarely did judges transcend the censoring passions of the day."<sup>39</sup> Rabban notes that, "lower court decisions make clear that Holmes' first Espionage Act opinions, resembling his prewar decisions, were in the repressive mainstream, not the libertarian vanguard."<sup>40</sup> This lack of clarity persisted for decades until 1951 when the judicial branch in *Dennis* demonstrated a profound unwillingness to differentiate the clear and present danger from bad tendency and incitement from advocacy.

Justice Fred Vinson's majority opinion, relying on a clear and present danger analysis, validated the persecution of public citizens for their associations with the American Communist Party. *Dennis*, as Rabban argues, "marked both the apex and the turning point of the Supreme Court's reliance on the clear and present danger test" because it had become so differently applied that it was no longer coherent.<sup>41</sup> The majority treated constitutionally-protected advocacy of communism as punishable incitement. Rabban notes, "the Supreme Court reverted to the restrictive interpretation of clear and present danger that marked its original formulation by Holmes in *Schenck*."<sup>42</sup> Instead of moving forward with Justice Holmes' marketplace of ideas metaphor in the mold of his *Abrams* dissent, subsequent courts slowly became more and more deferential to the executive in their application of the clear and present danger test. Judge Hand and Justice Holmes should be honored for their First Amendment foresight and commitment to peacetime speech rights. They were willing to protect communicative liberty generations before such views became the judicial mainstream. Section II concluded that the persecution strategies pursued by the executive branch during the Cold War, affirmed in *Dennis*, were substantive limits on democratic deliberation. The executive branch was so successful in curtailing American communism because the judicial branch affirmed that the executive can, in the interests of the war effort, assert "monopoly control" over the marketplace of ideas.

Luckily, the court in *Brandenburg* affirmed the opposite: that multiple, clashing perspectives in the public forum can guard against the dissemination of widespread propaganda and secrecy by the executive branch. Ed Baker, summarizing Justice William O. Douglas' dissent in *Korematsu*, describes the logic adopted by the *Brandenburg* majority: "without free speech, totally false heretical opinions which could not survive open discussion will not disappear; instead, driven underground, these opinions will smolder, their fallacies protected from exposure and opposition."<sup>43</sup> In *Brandenburg* the judicial branch chose to set a prohibitively high bar for executive branch suppression of dissent during wartime. The ruling rightly clarified the court's various clear and present danger analyses from 1919-1969, ensuring that the rule would not devolve backwards into a bad tendency test as it had in *Dennis*. With such sweeping protection for communicative liberty, the judicial branch encouraged more, not fewer, voices to enter debates about the war policy because the "understandings resulting from [a] robust debate will depend on the ...quantity of inputs."<sup>44</sup> The ebb and flow of the clear and present danger test underscores the unique vulnerability of communicative liberty during wartime and the need for judicial clarity on the issue of political speech.

Holmes' marketplace metaphor did not provide that clarity; however, it did begin a debate within the judicial branch about the meaning of the First Amendment and the relationship between speech and crime. By casting the public sphere in an understandable economic language, Holmes was able to articulate the social value to pluralism and debate in the clearest possible terms. Sunstein explains: "Well-designed market mechanisms can be helpful in ensuring that information is disclosed. Free societies depend on a high degree of receptivity, in which many perspectives are heard and in which dissent and disagreement are not unwelcome."<sup>45</sup> However, the inequities of the economic marketplace have also limited the communication of ideas. Baker argues, "the market is doubly determined to appeal successful ...those groups who most frequently participate in the marketplace find that it 'correctly' advances their interests or views; and ...the marketplace validates those views that generally appear to be correct; that is, it reinforces currently dominant views."<sup>46</sup> Because of such inequities in the public forum, the judicial branch must intercede and moderate the discussion during wartime. It must fight for the rights of the minority groups to valuably contribute in the marketplace. Without a judicial ruling that explains how the *Brandenburg* test will apply during wartime, it is possible that bad tendency could test could once again reappear and suppress legitimate dissent in the War on Terror.

## The Normalization of Expansive—and Expanding—Executive Power

Stone explains that "wartime" connotes a period of "armed conflict," "emergency" and a situation that requires "immediate executive action, often without time for deliberation."<sup>47</sup> Wartime is by definition distinct from peacetime and the everyday operation of government. A primary tenet of First Amendment

jurisprudence is its dichotomy between times of peace and times of war, with the former constituting the norm and the latter the exception to the norm. However, the commonsense distinction between war and peace has become blurred by the political climate and social pressure of wartime. Considering the first wars which affected constitutional interpretation in the United States, the executive branch assumed wartime powers before and after the temporal boundaries of the French-American War, the Civil War and World War I. Understanding executive branch activity during these historical conflicts will help inform the more complex issue of executive authority in the War on Terror. In order to properly restrain the executive from elongating its emergency powers in the War on Terror, the judicial branch must closely monitor the length of the war. If the War on Terror continues without end, the judicial branch will be charged with curtailing executive branch authority when there exigency from terrorism becomes less severe.

During the United States' first wars, the executive branch propagated the notion that any citizen who disagreed with the war policy was disloyal to the nation. The judicial and legislative branches established the executive's inherent wartime power to prosecute dissent as a necessary means of preserving national unity. Such restrictions on speech had a lasting, not temporary, effect on First Amendment expression because they extended and normalized the executive's wartime powers to apply even in the absence of armed conflict. This effort to bridge wartime and peacetime, to assume extraordinary authority before and after the war, can be understood by examining three historical episodes: (1). President Adams original support for silencing his Anti-Federalist opponents for the sake of national unity, (2). President Lincoln's indirection regulation of speech by persuading citizens to accept broad executive power during the Civil War, and (3). President Wilson's propaganda control over what speech could enter the public forum during World War I.

Although no consensus about free speech emerged from the French-American War, if there actually was a War, a certain conclusion is that the judiciary tends qualify peacetime rights by erring too much on the side of security and the need for immediate executive action during wartime. President Adams and the Federalists institutionalized a broad theory of wartime executive power later employed during the Civil War and World War I.<sup>48</sup> During debates over the Sedition Act of 1798 Federalists such as Congressman Allen from Connecticut ostracized Anti-Federalists to secure political advantage, accusing them of "acting under the influence of French diplomatic skill."<sup>49</sup> The result was a prohibition on public debate about the war, confusing loyalty to Adams' war policy with loyalty to the nation at a critical time when the first Congressional discussions about the meaning of the First Amendment were occurring. Stone argues that the enduring lesson of the war is that "when we act in the heat of war fever, we may overact ... Fear, anger and an aroused patriotism can undermine sound judgment."<sup>50</sup> The Federalists' strong-armed political opponents and truncated debates in Congress and in the judiciary about the

enforcement of the Sedition Act. The Act set a precedent that, regardless of whether or not the national interest is served by suppressing dissent, the executive has the inherent power to eliminate public criticism as legitimate function of waging war. As such, the judiciary should be culpable for allowing the prosecutions under the Sedition Act and expanding wartime executive power at the expense of the First Amendment.

To be clear, it was during the war—not before or after—when Adams overreacted to the French threat and unnecessarily prosecuted his Anti-Federalist critics. The Sedition Act expired on the final day of Adams' term in office and newly elected President Jefferson “pardoned all those who had been convicted under the [Act] and freed all those still in jail.”<sup>51</sup> While the Act had only a temporary effect on expressive freedoms, it ensured that the executive branch possessed the capacity under law to treat individual rights like free speech as subservient to the war policy. The expansive deference to the executive in the French-American War heightened the risk that future Presidents might try to artificially exercise wartime powers in half-wars, or times of conflict that might more closely resemble peacetime.

Sixty years later, President Lincoln revived the debate over executive power and free speech by suspending the writ of habeas corpus during the Civil War. By putting executive power at the center of debates about wartime free speech rights, Lincoln persuasively advocated for a more broad interpretation of wartime power than even the Federalists had supported. While Lincoln was not concerned with regulating speech and Congress did not legislate against sedition, the President's generals independently prosecuted citizens in military courts without regard for the full guarantees of the First Amendment. In denying Clement Vallandigham's petition for a writ of habeas corpus, civilian court Judge Leavitt warned against “the dangerous consequences of these disloyal” speeches and charged General Burnside to “suppress them.”<sup>52</sup> Such a show of deference to military courts was indicative of the judiciary's hands-off approach to the First Amendment during the Civil War; an approach very different from the more active subversion by Federalists like Justice Samuel Chase. The judicial branch during the Civil War affirmed the executive's inherent authority to make individual rights subservient to preserving the union. Luckily, many of those convicted were let free at Lincoln's demand. Still, the legislative branch, which ratified Lincoln's suspension of the writ, and the judicial branch, which further normalizing Federalist notions of deference to the executive during wartime, must take responsibility for allowing the military to suppress speech despite Lincoln's good intentions.

Lincoln should be applauded for refocusing debates about free speech during wartime to address the larger issue of executive power. Lincoln's appreciation for criticism and political debate is most clear in his letter to Erastus Corning: “these safe-guards of the rights of the citizen against the pretensions of arbitrary power, were intended more *especially* for his protection in times of civil commotion ...I too am devotedly for them *after* civil war, and

*before* civil war, and at all times 'except when, in cases of Rebellion or Invasion, the public Safety may require' their suspension."<sup>53</sup> This nuanced and speech-protective interpretation of the First Amendment is admirable in light of "the extraordinary complexities of a civil war, the well-founded anxieties about sabotage, desertion, and draft evasion."<sup>54</sup> Unlike Adams and the Federalists, Lincoln invited dissent from political opponents and was not concerned with regulating seditious speech for partisan reasons.

However, because Lincoln so successfully argued that habeas rights were subordinate to wartime exigencies, President Wilson used similar arguments to justify curtailing free speech in World War I. Wilson's stated desire to eliminate disloyalty—i.e. critical debates about American involvement in World War I—*prior* to a Congressional declaration of war was an unprecedented widening of wartime executive power beyond the temporal boundaries of the war. Unlike Lincoln, Wilson "was a man with little tolerance for criticism" who remarked even before the war began that "disloyalty 'was not a subject on which there was room for ...debate'" because "Disloyal individuals ...had sacrificed their right to civil liberties."<sup>55</sup> Wilson sought a Congressional declaration of war in 1917 despite the lack of an armed conflict involving United States (US) forces. The intense debate over the war resolution focused on whether Wilson had correctly justifiably sought a full grant wartime executive powers and whether the country was, indeed, at war. After ignoring dissenters in Congress and obtaining a full grant of wartime power, Wilson quickly created the Committee on Public Information (CPI) to mobilize public opinion in favor of war. Further, he compelled passage of the Espionage Act and its amendments to provide law enforcement with the "necessary tools for ensuring loyalty" to the administration's war policy. The Federalists' claim that eliminating dissent to the war policy was essential for its success was central to Wilson's defense of the Act. Wilson's treatment of dissent before World War I brings the normalization of wartime executive power into a more clear light.

The norm of executive wartime power established across these three conflicts created a more than temporary limitation on First Amendment rights because it emboldened future Presidents like Wilson to assert wartime powers in half-wars. By World War I, the act of labeling those who disagreed with the war plan as disloyal to the nation had become part of the normal political debate. Wilson's Espionage Act, like Adams' Sedition Act, was a partisan attempt to legislate wartime political conformity. It effectively turned back the clock on the advancements Lincoln had made by articulating free speech as just a piece of a larger theory of balancing. Understanding how the executive's power to suppress dissent during wartime became normal governmental practice in early United States history can shed light on modern wartime complexities. As time passes and new cases arise, the courts will be charged with answering two key questions: is the War on Terror a half-war and is domestic counter-terrorism an exertion of wartime executive power?

## Conclusion

The three historical episodes discussed herein demonstrate that the executive branch has consistently opposed public discussion of the war policy. The quick reauthorization of the USA PATRIOT Act in 2006 raises questions about whether or not the executive branch can make its temporary counter-terrorism powers permanent. Leone astutely observes that, in the War on Terror, “The struggle ...could continue for generations, and we run the risk of finding ourselves on a slippery slope, making decisions in which freedoms that are set aside for the ‘emergency’ become permanently lost to us.”<sup>56</sup> In a war that is potentially unending, it is all the more incumbent upon the judicial branch to solidify First Amendment rights. The Supreme Court's holding in *West Virginia State Board of Education v. Barnette* (1943) during the height of World War II offered such clarity: “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics.”<sup>57</sup> Here, as Shiffrin says, the court finally recognized that “democracy and dissent ran together.”<sup>58</sup> In order to “petition the Government for a redress of grievances”<sup>59</sup> pursuant to the First Amendment, citizens must have an understanding of the war policy and of the executive's wartime conduct. Without the guarantee of communicative liberty in the public forum, the public's only avenue for petition is through the legislative branch. This paper argues that citizens cannot trust the legislature during wartime to respect dissent and must rely on legal strategies to forge effective political communication about the war.

The three historical trends discussed herein—secrecy, the ebb and flow of precedent, and the length of wartime—raise necessary questions about the commitment of individuals and their government to the values of trust and tolerance during wartime. Can we trust the present-day executive branch to effectively execute the War on Terror given past deceptions? More importantly, can the executive branch trust individual human reason to prevail in the marketplace of ideas? Will the courts hold, as Posner has already suggested, that radical Islamic rhetoric is a certain trigger to terrorist action? The answers to these questions will likely determine the direction of First Amendment rights during wartime in the United States' War on Terror.

## About the Author

Geoffrey Derrick is a senior at Northwestern University, majoring in Communication Studies and Legal Studies with a minor in Political Science. After graduation, he will be working in the United States Senate in Washington DC before applying to law school where he hopes to obtain a joint J.D/Ph.D degree. This article is adapted from an essay he wrote during his senior year for a class in First Amendment law.

## Endnotes

1. Sunstein, C. R. (2003). Why Societies Need Dissent, pg. 96.
2. United States v. Carolene Products, 304 U.S. 144 (1938).

3. Stone, G. R. (2004). *Perilous Times: From the Sedition Act of 1798 to the War on Terrorism*.
4. Posner, R. A. (2006). *Not a Suicide Pact: The constitution in a Time of National Emergency*.
5. Rehnquist, W. H. (1998). *All the Laws But One: Civil Liberties vs. National Security*.
6. *Id.*, pg. 30.
7. Posner, *supra* note 4, pg. 31.
8. Rehnquist, *supra* note 5, pg. 106.
9. *Id.*, *supra* note 5, pg. 27.
10. Posner, *supra* note 4, pg. 44.
11. Sunstein, *supra* note 1, pg. 150, 102.
12. Sharansky, N. (2004). *The Case for Democracy: The Power of Freedom to overcome Tryanny and Terror*, pg. 56.
13. Stone, *supra* note 3, pg. 421.
14. Redish, M. H. (2005). *The Logic of Persecution: Free Expression and the McCarthy Era*, pg. 5.
15. *Id.*, *supra* note 14, pg. 9
16. *Id.*, pg. 223.
17. Leone, R. C. (2006). *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11. The War on Our Freedoms: Civil Liberties in an Age of Terrorism*. G. Anrig., pg. 22.
18. Stone, *supra* note 3, pg. 490.
19. *New York Times v. United States*, 403 U.S. 713 (1971), Justice Black's concurring opinion.
20. *Id.*, Justice Douglas' concurring opinion.
21. Sunstein, *supra* note 1, pg 8, 12.
22. *Id.*, pg. 99.
23. Shiffrin, S. H. (1990). *The First Amendment, Democracy, and Romance*, pg. 50.
24. Nanes, S. R. (2005). "'The Constitutional Infringement Zone': Protest Pens and Demonstration Zones at the 2004 National Political Conventions." *Louisiana Law Review* 66.



25. Leone, *supra* note 17, pg. 2.
26. Attorney General Alberto Gonzalez, 11-20-2006.
27. Posner, *supra* note 4, pg. 34.
28. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
29. Posner, *supra* note 4, pg. 123.
30. *Id.*, pg. 124.
31. Under the "bad tendency" test, speech was punishable if it contained a tendency that the government determined to be unfavorable.
32. *Hamdan v. Rumsfeld*, 548 U.S. \_\_\_\_ (2006).
33. Posner, *supra* note 4, pg. 43.
34. *Abrams v. United States*, 250 U.S. 616 (1919).
35. Rabban, D. M. (1997). *Free Speech in its Forgotten Years*, pg. 299.
36. Stone, *supra* note 3.
37. *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y 1917).
38. Shiffrin, *supra* note 23, pg. 78
39. *Id.*, *supra* note 23, pg. 73.
40. Rabban, *supra* note 35, pg. 257.
41. *Id.*, pg. 377.
42. *Id.*, pg. 376.
43. Baker, C. E. (1978). "Scope of the First Amendment: Freedom of Speech." *University of California Los Angeles Law Review* 25, pg. 965.
44. *Id.*, pg. 977.
45. Sunstein, *supra* note 1, pg. 109.
46. Baker, *supra* note 43, pg. 980.
47. Stone, *supra* note 3, pg. 9.
48. Stone, *supra* note 3, pg. 74.
49. "The Debates and Proceedings in the Congress of the United States," *History of Congress*, 1798, pg. 1497.
50. Stone, *supra* note 3, pg. 74.

51. *Id.*, supra note 3, pg. 73.

52. *Id.*, pg. 103.

53. Abraham Lincoln, "Letter to Erastus Corning and Others," pg. 1.

54. Stone, supra note 3, pg. 133.

55. *Id.*, supra note 3, pg. 137.

56. Leone, supra note 17, pg. 6.

57. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

58. Shiffrin, supra note 23, pg. 85.

59. United States Constitution, First Amendment,  
[[caselaw.lp.findlaw.com/data/cons ...](http://caselaw.lp.findlaw.com/data/cons...) ]

## References

---

Lethbridge Undergraduate Research Journal  
ISSN 1718-8482