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Can Courts Be 'Trusted' in National Security Crises?

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Executive Summary

- Presidents have always asserted greater powers at the short-term expense of liberty during national security crises, especially in times of war.

- A challenge for any democratic republic is to establish modes of governance that can effectively defeat or mitigate national security threats while also preserving freedoms and public accountability. To many, especially during national security crises, courts are expected to act as guardians of liberty and the boundaries of state power.

- Historically, US courts have played an important but cautious role in checking aggressive executive actions; too assertively for security hawks who see executive flexibility as critical for dealing with security threats, and too passively for civil libertarians who see courts as necessary bulwarks against executive abuses.

- Security-minded unease about such court oversight of executive powers during crises stems in part from concerns regarding competence: whether courts have the necessary expertise and structure to handle national security questions effectively and without unduly constraining critical executive efforts.

- Civil libertarians meanwhile worry that courts are likely to show too much deference to the political branches, at least until the moment of maximum perceived peril passes. Historically, courts have tolerated significant executive liberty infringements during wartime or emergencies, especially when expanded executive powers are sanctioned by Congress. Many argue that courts are fully competent to provide oversight of executive discretion, but are not always willing to do so.

- The Supreme Court's responses to enemy combatant detention practices demonstrate familiar historical patterns of judicial intervention during national security crises. However, an important difference is the likelihood that the current terrorist emergency – from both outside the country and within – is likely to continue for many years and is unlikely to ever have a clear endpoint. Courts therefore cannot assume that validating or not ruling on executive actions will have only temporary effects.

- The experience with enemy combatant detentions also illustrates the strategic importance of legitimacy. Whatever their limitations, courts are uniquely suited to provide decision-making legitimacy because of their relative political independence and their deliberative virtues.

Can Courts Be 'Trusted' in National Security Crises?

Introduction

Since the birth of the United States, presidents have asserted greater powers at the short-term expense of liberty during crises, especially in times of war. Sometimes these expanded powers, such as authority to use military force, to monitor suspected groups, to arrest or deport, have come from Congress, and sometimes they have been asserted unilaterally.

Events since the September 2001 terrorist attacks followed this familiar pattern. Congress passed several statutes, such as the USA PATRIOT Act, expanding and clarifying law enforcement and domestic intelligence powers. The Bush administration asserted as a matter of 'inherent' executive wartime authority additional powers, including the power to monitor domestic communications and to detain and interrogate certain suspected terrorists, beyond court (or public) scrutiny.

A challenge for any democratic republic is to establish modes of governance that can effectively defeat or mitigate national security threats while also preserving freedoms and public accountability. A related challenge is ensuring that responsiveness to national security crises is not used pretextually by any branch of government to alter the power balance among them, especially beyond the crisis period.

To what extent can courts be 'trusted' during national security crises to address these challenges? To many, courts serve as guardians of liberty and the boundaries of state power. This notion goes back to the constitutional founding, but it gained strength in the twentieth century with the increased prominence of independent watchdog groups like the American Civil Liberties Union, new legislatively and judicially created mechanisms for suing the government for its conduct, as well as greater societal emphasis on litigating political disputes, and the collapse of public trust in the government associated with such events as the Vietnam War and the Watergate scandal.

Especially during national security crises, courts are widely expected to act as guardian of rights, and to place limits on state power. Compared to the president and Congress they are politically insulated and independent, and perhaps therefore less susceptible to the type of fervour that endangers rights. Unlike the other two branches, courts have no express national security mandate in the constitution; indeed, the habeas corpus suspension clause states a mechanism for limiting court intervention during rebellions or invasions. Nor does the public look to courts as a major line of defence against national security threats. While civil libertarians generally seek a greater role for courts in serving as a check on executive discretion and secrecy, both security hawks and civil libertarians have expressed concern, for precisely opposite reasons, about judicial responses to aggressive executive actions during national security crises.

Historically, courts have played an important but cautious role in checking aggressive executive actions; too assertively for security hawks who see executive flexibility as critical to dealing with security threats, and too passively for civil libertarians who see courts as necessary bulwarks against executive abuses.

Events since the September 2001 terrorist attacks fit this familiar pattern for courts while also revealing important lessons about the critical role courts can play in prolonged national security crises to serve both security and liberty ends.

Security concerns: authority and competence

The Bush administration and some scholars take the position that courts should generally take an *inactive* role in national security crises. Under this view, executive actions to respond to national security crises should be exempt from judicial review altogether, while others courts should review very deferentially (Posner and Vermeule 2007).

One set of reasons has to do with constitutional structure: under this view, executive powers expand by design during national security emergencies, and judicial intervention to limit exercise of those powers interferes with executive prerogatives and responsibilities. As chief executive and commander-in-chief, the Constitution vests the president with the necessary authorities – authorities that he is empowered and best positioned to judge for himself – to combat national security threats. Judicial intervention risks undermining national protection, or so the argument goes.

During the Korean War, for example, President Truman believed it necessary for the federal government to seize steel production facilities to keep them running and prevent a shutdown due to labour unrest (notably, Truman did acknowledge that Congress could limit this authority, whereas the Bush administration's view goes much further). In one of the most significant wartime powers cases, the Supreme Court, while acknowledging executive emergency powers implied in the Constitution, struck down Truman's actions as overstepping the bounds of those powers (*Youngstown Sheet & Tube Co. v. Sawyer* 1952). Likewise, during the Vietnam War, the Supreme Court refused the executive's request to enjoin publication of the Pentagon Papers, even though the government argued the release of included classified documents would undermine ongoing military operations (*New York Times Co. v. United States* 1971). It also rejected the executive's claim of power to conduct warrantless national security wiretaps to deal with perceived internal threats (*United States v. United States District Court (Keith)* 1972).

Security-minded unease about such court oversight of executive powers during crises stems in part from concerns regarding competence: whether courts have the necessary expertise and structure to handle national security questions effectively and without unduly constraining critical executive efforts. Judges are generalists rather than national security specialists; they are restricted to deciding concrete cases before them, based on the information provided to them by the litigants; the court system is decentralized, allowing conflicting legal decisions to emerge among different courts; and judicial decision making is often slow. These features are generally considered virtues of the judiciary during times of peace or tranquility, but crises often demand speedy, agile, and resolute government decision making.

For many of these reasons the Bush administration urged or engineered a minimal role for courts in regulating its most powerful authorities in combating terrorism. For example, it kept detainees outside US territory in an attempt to avoid habeas jurisdiction, and developed wiretapping programmes outside the normal system of court warrants. In both those areas, it eventually sought and obtained legislation restricting court scrutiny, and to the extent courts have entertained cases concerning them, the administration has argued strenuously for judicial restraint and deference to executive judgements of emergency necessity.

Liberty concerns: deference and independent review

At the same time that the Bush administration and some security-oriented scholars worry about judicial intervention at the expense of effective executive powers, civil libertarians often worry that courts are likely to show too much deference to executive actions during crises and wartimes. Under this view, courts should play a greater role as an independent check on executive discretion.

Scholars such as Bruce Ackerman and Geoffrey Stone have observed that judges, like the other government branches and the public, are susceptible to public panic, and are cautious about taking

decisions that might undermine security. Rather than serving as guardians of liberty during emergencies and wartime, courts are likely to show too much deference to the political branches, at least until the moment of maximum perceived peril passes (Ackerman 2006: 60–63; Stone 2004: 542–57).

As noted above, courts have on occasion rejected emergency executive assertions, but this is more the exception than the norm. Historically, courts have tolerated significant executive liberty infringements during wartime or emergencies, especially when expanded powers are sanctioned by Congress.

During the post-World War I 'Red Scare', the Supreme Court upheld criminal convictions against individuals spreading anti-draft leaflets. '[W]hen a nation is at war', wrote Justice Oliver Wendell Holmes, 'many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right' (*Schenck v. United States* 1919). During World War II, the Supreme Court upheld curfew and internment orders against individuals of Japanese descent *(Hirabayashi v. United States* 1943*; Korematsu v. United States* 1944). It is often only after the moment of perceived danger passes that courts roll back expansive executive powers.

Some of the same structural features of courts that arguably weaken their ability to assess security threats and measures also weaken their ability to enforce limits on emergency powers. Courts' jurisdiction even to consider the merits of such legal issues is generally limited to specific 'cases and controversies' brought by parties who can allege a concrete harm at the time their lawsuit is adjudicated. Decentralized courts operated by generalist judges are slow to acquire the expertise, and therefore confidence, to challenge executive assertions. Lacking their own investigatory powers, they rely heavily on government submissions in evaluating claims of necessity.

Perhaps as a result of these limitations, courts often incline toward enforcing institutional constraints on executive emergency actions, rather than ruling them out altogether (Issacharoff and Pildes 2004). That is, they look to whether Congress has authorized or consented to executive programmes. Such institutional requirements sometimes serve as a brake on arrogation of state powers, but sometimes it merely reinforces them, when politics favour aggressive government crackdown, perhaps against minority or dissident groups, precisely the moments that civil libertarians believe court intervention is most necessary.

Many civil libertarians would argue, however, that there is a greater problem with courts' willingness to act in national security cases, than with their competence to do so. Most national security cases involve reviewing policies and programmes and do not require immediate decision making by the court. Moreover, there are tools available to judges, such as recourse to non-governmental expert witnesses, that can assist them to acquire any necessary expertise in national security issues. Most importantly in this view, courts are needed to provide an independent check on executive discretion. Without such independent review, there is too great a temptation for abuse of executive power.

As explained in the next section, detention is one area where the Supreme Court has pushed back on aggressive assertions of executive power, though it has not pushed back as hard or as definitively as some would like. In some other controversial areas of post-9/11 governmental powers, the courts have largely stepped aside. Courts have so far mostly refused to intervene in controversies over alleged CIA 'renditions' of suspected terrorists or warrantless surveillance, for example, often based on rulings that plaintiffs lack 'standing' to challenge the alleged conduct or that executive branch programmes are protected from litigation as 'state secrets' (*ACLU v. NSA* 2008*; El-Masri v. Tenet* 2007).

Detention cases since 9/11

A survey of the Supreme Court and lower court cases reviewing Bush administration enemy combatant detention practices illustrates familiar historical arguments and patterns of judicial behaviour during national security crises.[1] However, it also highlights unique features of the current terrorist emergency and the Bush administration's peculiarly extreme legal response.

In 2004, nearly three years after the September 2001 attacks and soon after the Abu Ghraib scandal surfaced, the Supreme Court issued two rulings that began to cut back expansive executive detention powers. In *Hamdi v. Rumsfeld,* it held that a Saudi-born US citizen captured in the Afghanistan theatre of war and detained without trial or judicial proceeding in a South Carolina military facility was entitled, as a matter of constitutional due process, to contest his detention before a 'neutral' decision-maker. In *Rasul v. Bush,* the Court held that federal courts had statutory jurisdiction to hear habeas corpus petitions of Guantanamo detainees. The Bush administration responded with new administrative review procedures for Guantanamo and US-held detainees, and the administration and Congress together further responded with the Detainee Treatment Act of 2005, which set minimum statutory treatment and interrogation standards for detainees and seemingly restricted federal court jurisdiction to consider claims of those held as 'enemy combatants' seeking to challenge their detentions.

The following year, the Supreme Court decided *Hamdan v. Rumsfeld,* which, among other things, held that Common Article 3 of the Geneva Conventions applies to war on terror detainees. Again, the Bush administration and Congress responded with legislation, this time the Military Commissions Act, which seemingly further restricted federal court jurisdiction over detainee cases.

In 2008, the Supreme Court decided *Boumediene v. Bush*. It held that constitutional habeas corpus rights apply to Guantanamo detainees (and left open the possibility that they would apply to detainees held elsewhere), and that existing administrative review and limited judicial review procedures inadequately protect detainees from erroneous or illegal imprisonment. Lower courts are now reviewing individual Guantanamo habeas cases, and in the process working through the complex substantive and procedural legal issues involved.

To those who look to courts as guardians of liberty and restraints on power during crises, the detention cases offer some vindication. Even a conservative Supreme Court each time has ruled against the government. This has led dissenting Justices to warn, for example, that the resulting judicial checks would 'sorely hamper the President's ability to confront and defeat a new and deadly enemy' (Justice Thomas in *Hamdan*) and 'almost certainly cause more Americans to be killed' (Justice Scalia in *Boumediene*).

To those who view courts as too deferential to executive power and assertions of security need during crises, however, the detention cases display familiar judicial caution. While incrementally imposing stricter and stricter requirements on executive detention for instance, at the time of writing federal courts have yet to order released a single detainee whom the government insists is a dangerous enemy combatant. And, with the notable exception of *Boumediene*, the Supreme Court has in most cases refused to rule out the executive's actions, instead insisting that it seek legislative approval. In siding with the majority against the government in *Hamdan*, for example, Justice Breyer went out of his way to note that '[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.'

One reason why even a conservative-leaning Supreme Court has ruled mostly against the Bush administration in each case is the sheer extent of the administration's assertions of implicit executive constitutional powers and the depth of its overt

1. The detention cases cited here are: *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

hostility to regulation of national security powers by either courts or Congress. Even measured against controversial wartime assertions of legal powers during World War II and the Korean War, for example, the Bush administration's stance is extreme in pressing them as unilateral powers, beyond regulation by the other branches. It is not so surprising that courts would bristle at this view, and the familiar wartime pendulum swing from judicial deference to push-back has therefore been relatively swift.

Lessons for the future

Another difference between the Supreme Court's combatant detention cases and many of its prior interventions in national security crises is the likelihood that the current terrorist emergency will continue for many years and have no clear endpoint. To be sure, the country has faced long-term national security threats before, including the founding period, when the new nation was surrounded by strong imperial powers, and the Cold War, during which the threat of nuclear annihilation loomed for decades. But the September 2001 attacks exposed the country to a new awareness of direct danger, from both outside the country and within, that will continue indefinitely.

The long-term nature of the current terrorist threat and both its domestic and foreign features have several implications for the role of courts in fashioning responses.

Given the continuing nature of this national security crisis, courts cannot assume that validating executive actions will have only temporary effects. Recalibrations of security and liberty may be needed, but wherever they are set may become the norm rather than a temporary response to exceptional circumstances.

So far the Supreme Court has taken a sensible approach to that recalibration process. It has been cautious and incremental in articulating or enforcing outer bounds of government powers. That is prudent, given that the nature of the terrorist threat is still evolving, as are such contextual factors as the technological capacity of both the government and terrorist organizations. It has been more forceful in urging Congress to legislate the boundaries of coercive state powers.

While courts can urge Congress to act, they cannot force it to do so. Congress has been reluctant to take on some of the biggest national security issues, such as whom can be detained and interrogated outside the criminal justice system and according to exactly what rules, instead leaving it to courts to fill in those important details. Whereas arguably Congress is best situated and constitutionally charged with setting long-term policy for defending the nation and its liberties, it has thus far played a secondary role to the executive and even courts on some key issues.

As to the continuing relationship between the executive and the courts, those favouring a strong executive minimally checked by deferential courts are correct that the government needs speed, flexibility, and secrecy to combat terrorism effectively. But it is equally true that speed, flexibility, and secrecy may come at high cost, not just to liberty but to the accuracy with which coercive state powers are applied and the level of public trust in their careful use. Those latter objectives play to courts' strengths.

Furthermore, the experience with enemy combatant detentions also illuminates the strategic importance of legitimacy; that is, that to be effective in furthering long-term national security goals, government programmes must be widely seen at home and abroad as reflecting constitutional values and deriving from constitutional processes. As the United States moves forward in its efforts to combat terrorism, it would do well to observe that its British, Israeli, and other democratic allies that have faced long-term terrorism threats have eventually come to similar conclusions. Whatever their limitations, courts are uniquely well-suited to provide decision-making legitimacy because of their relative political independence and their deliberative virtues.

References

Ackerman, B. (2006) *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale, pp. 60–63.

Goldsmith, J. (2007) *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: Norton.

Issacharoff, S. and R. H. Pildes (2004) 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime,' *Theoretical Inquiries in Law*, 5.

Posner, E. and Vermeule, A. (2007) *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford.

Stone, G. (2004) *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: Norton, pp. 542–57.

Cases cited

ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008).

Boumediene v. Bush, 128 S. Ct. 2229 (2008).

El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007).

Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

Hirabayashi v. United States, 320 U.S. 81 (1943).

Korematsu v. United States, 323 U.S. 214 (1944).

New York Times Co. v. United States, 403 U.S. 713 (1971).

Rasul v. Bush, 542 U.S. 466 (2004).

Schenck v. United States, 249 U.S. 47 (1919).

United States v. United States District Court (*Keith*), 407 U.S. 297 (1972)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

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