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# Constitutional Overview of Post-9/11 Barriers to Free Speech and a Free Press

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I. PANEL: CONSTITUTIONAL OVERVIEW OF POST-9/11 BARRIERS TO  
FREE SPEECH AND A FREE PRESS

A. *Nadine Strossen*\*

I am delighted to chime in on this fascinating conversation about overview principles, and I would like to start by responding to a couple of the ideas that have been presented. First, with respect to the constitutional text, I take a somewhat different approach from the fascinating one that Dean Rodney Smolla set out. I think there is great significance to what the Constitution does say and what it does not say about special emergency powers, war powers, and so forth. Our Constitution's Framers did not include a general emergency provision of the sort that Dean Claudio Grossman talked about, which is characteristic of not only international and regional human rights treaties, but also the constitutions of other modern democracies. Those treaties and constitutions provide very stringent preconditions and strict judicial review for the exercise of emergency power.

In contrast, I think it is striking that our Framers made an apparently deliberate decision to include no general emergency exception whatsoever to the usual constitutional framework for limiting government powers and securing individual rights. I think it is apparent that this was an intentional decision because the Framers did include one very specific emergency exception. That one exception allows Congress, under very narrow circumstances, limited to "Cases of Rebellion or Invasion," to suspend the writ of habeas corpus "when . . . the public Safety may require it."<sup>1</sup> The fact that this "Suspension Clause" imposes such strict constraints upon the specific emergency exception that it authorizes bolsters the inference that there is no textual justification for a general emergency exception.

It is not so interesting that I, the ACLU President, reached that conclusion; that should not be surprising. I think it is far more interesting and surprising that the Supreme Court stressed that conclusion in its first post-9/11 decision, in *Hamdi v. Rumsfeld*.<sup>2</sup> I had been very nervous about what this Supreme Court was going to do post-9/11. In the Vietnam era, the Supreme Court did not decide these kinds of cases. The most recent litigated situation was from

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1. U.S. CONST. art I, § 9, cl. 2.

2. 542 U.S. 507 (2004).

World War II, where the Court pays lip service to applying strict scrutiny, and yet at the same time allows blatant racial discrimination and incarceration without demanding any evidence from the government.<sup>3</sup> This shows that regardless of how strictly the tests are formulated, they can always be manipulated or paid lip service. Moreover, the Bush Administration argued that there should be no judicial review at all of its assertions of seemingly boundless executive power in the name of the “War on Terror.” The Administration maintained that the Court should not hear any of these cases, and its fallback position was that if the Court did hear the cases, it should apply the rubber-stamping-type deference of the sort that we had seen in the past. So, although *Hamdi* was hardly a perfect decision from a civil libertarian’s perspective, it was such an enormous relief given the historical background. I could not agree more with both of my co-panelists that over time there has been an evolution of more judicial protection, for more individual rights, in more circumstances, including emergency circumstances.

What I thought was particularly striking was that, of all the different opinions in the *Hamdi* case, the one that most strongly stood up for individual rights protected by courts, even in times of emergency, was the dissent authored by Justice Antonin Scalia, with the strange bedfellow of Justice John Paul Stevens joining the opinion.<sup>4</sup> This is also very encouraging. That the Court’s most outspoken conservative joined the Court’s most outspoken liberal shows that these issues of individual liberty and checks against government abuses of power do not fall along the usual ideological or partisan political divides. One of the points that the Scalia-Stevens opinion heavily stressed was the point that I noted earlier, that the Constitution itself provides only one exception for only one right in times of war: Congress’s power to suspend the writ of habeas corpus.

Dean Rodney Smolla stopped talking about precedents somewhere around the late-1960s, or perhaps at the beginning of the 1970s, so he did not talk about what I think is the most important precedent for free speech protection in times of war, the *Pentagon Papers* case.<sup>5</sup> That case took place in 1971, while the United States was still engaged in the Vietnam War. The Nixon Administration made very serious claims about how publishing the Pentagon Papers would undermine the war effort and national security. Notably, these claims were accepted by not only the dissenting Justices, but also two Justices

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

4. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

5. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

in the majority. All five of these Justices accepted the Administration's claims that there would be a series of specific harms that would occur through the publication of the Pentagon Papers, including killing of American soldiers overseas and interference with diplomatic efforts to end the war. There is a very short so-called "*per curiam* opinion" for the Court as a whole, followed by nine separate opinions. Although a majority of five Justices actually agreed with the government's assertion that the publication of these papers would lead to enormous harms, including undermining national security, six Justices still voted against restricting freedom of speech in that case.

As other commentators, including Dean Rodney Smolla and Professor Thomas Healy, have suggested, even though the tests for various kinds of free speech restrictions are formulated somewhat differently, they essentially are all variations on the theme of strict scrutiny. Therefore, while the Pentagon Papers case specifically addresses prior restraints, and while *Brandenburg v. Ohio*<sup>6</sup> specifically addresses incitement, they both use versions of strict judicial scrutiny. The details of the Court's analytical framework in each of these particular factual contexts may be different, but the overall concept is the same. Any restriction on freedom of speech is presumptively unconstitutional, and the government must bear a very heavy burden of proof, an appropriately heavy burden of proof, to overcome that presumption of unconstitutionality.

Strict scrutiny is, of course, a two-part test. First, the government must show that there is an interest of compelling importance. Second, the government must show that the restriction is narrowly tailored, indeed necessary, in order to protect or promote that compelling interest, which in the post-9/11 situation is national security. The courts often say that the government has to use the least restrictive alternative. If it could promote national security without such a heavy invasion into First Amendment freedoms, then the government has to use that less restrictive alternative.

One thing that I like about this strict scrutiny test is that it reflects just plain common sense. After all, why should the government get the power to restrict our freedom if it is not necessary, if the government could effectively promote our national security with less of an invasion on our freedom? Why should we sacrifice freedom when that sacrifice is not necessary to promote national security? That would not be a logical tradeoff. Therefore, I especially

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6. 395 U.S. 444 (1969).

appreciate one of the recommendations from the unanimous report of the bipartisan National Commission on Terrorist Attacks upon the United States, commonly known as the Citizens' Commission on 9/11, which essentially said that this form of strict judicial scrutiny should be used as a matter of good common sense, good policy, and good governance.<sup>7</sup>

The first prong of that test is very easy to satisfy. It was easy to satisfy in the Pentagon Papers case, and it is easy to satisfy post-9/11: protecting national security is a compelling interest. Where the rubber hits the road, and where the debate occurs, regards that second prong: is this measure actually necessary? In addressing the second prong, we should consider that many of the measures that are touted as advancing national security have been criticized, including by national security experts, as not even being effective, let alone necessary. Worse yet, too many such measures are even counterproductive to national security, according to national security experts. These concerns specifically apply to many of the post-911 First Amendment restrictions.

These kinds of considerations were cited in a number of the separate opinions in the Pentagon Papers case. As several Justices observed in that case, national security and freedom of speech go hand in hand. When the government denies the public access to information, which is the common theme of so many of the First Amendment violations we are fighting now, it actually undermines national security. Let us consider a few of the statements that the Supreme Court issued in this vein in the Pentagon Papers case, because it is the leading precedent. These statements are completely applicable to the current situation. I hope that when these issues get to the Supreme Court, the Court will be guided by these kinds of statements. Justice Hugo Black wrote: "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."<sup>8</sup> As Congressman Scott noted earlier, even Congress cannot get basic information from the current Administration, and our elected representatives cannot make rational and informed decisions about national security if they do not get this basic information.

Justice William O. Douglas expanded on this core insight by noting that our elected representatives cannot and will not correct their mistakes so long as the mistakes remain hidden under a veil of

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7. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 394-95 (2004).

8. *N.Y. Times*, 403 U.S. at 719.

secrecy imposed for the asserted purpose of promoting national security, but that really had a completely different purpose.<sup>9</sup> Government officials are perennially tempted to use government secrecy to cover-up embarrassing information, which we saw when one of my heroes, Coleen Rowley, blew the whistle on cover-ups of mistakes and misconduct in the FBI. Cautioning against such abuse in his opinion in the Pentagon Papers case, Justice Douglas wrote, "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors."<sup>10</sup> He goes on to say, "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information."<sup>11</sup> In light of history, we have to be alert to the pattern of how and why the government actually uses its powers to impose secrecy. Is the power used to protect "We the People," or is it really a cover-up for mistakes or misconduct by government officials?

Justice Potter Stewart's opinion in the Pentagon Papers case contained the most subtle, and I think the most intriguing, argument about the negative interrelationship between government secrecy and national security. He explained that a system of excessive secrecy quickly deteriorates into one, seemingly paradoxically, of inadequate secrecy. As he stated:

When everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical . . . and to be manipulated by those intent on self-protection or self-promotion. . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.<sup>12</sup>

These general insights about the positive impact that reducing secrecy has on national security were specifically endorsed by the bipartisan Citizens' Commission on 9/11. The Commission determined that unjustified government secrecy, including over-classification, had undermined national security pre-9/11. It suggested that if more information had been more widely shared, not only among government agencies, but also with the public, the press, and Congress, then there would have been a greater chance of connecting the dots, potentially even averting the terrible tragedy on 9/11. Therefore, moving forward, in the interest of preventing another such catastrophe, the 9/11 Commission expressly

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9. *Id.* at 720–24 (Douglas, J., concurring).

10. *Id.* at 724.

11. *Id.* at 723–24.

12. *Id.* at 729 (Stewart, J., concurring).

recommended more government openness. It said, "Secrecy stifles oversight, accountability, and information sharing. Unfortunately, all the current organizational incentives encourage over-classification. This balance should change . . . ."<sup>13</sup> I have to underscore that this recommendation was made not in the spirit of promoting civil liberties, which is the ACLU's mandate, but rather in the spirit of promoting national security. In short, this is a vivid example of the mutually reinforcing relationship between First Amendment freedoms and national security.

Some of the Justices' individual opinions in the Pentagon Papers case recognize another fundamental constitutional principle at stake. Protecting the free flow of information and countering undue government secrecy are essential underpinnings, not only of individual freedom, but also of our whole government system of checks and balances. A free press that has access to, and the right to publish information about Executive Branch policies, is a critical pillar of both congressional oversight and judicial review. Conversely, when the Executive Branch stifles or withholds information from the other branches of government, as well as from the public, that corrodes our fundamental political system, as well as individual freedom. Unfortunately, this is exactly what the Executive Branch has been doing since 9/11, as Congressman Scott lamented. In fact, this Administration has been so stubborn in refusing to provide basic information to Congress, and so disdainful of Congress's requests for information, that it has earned the criticism of even conservative Republicans, who substantively support the Administration's policies. As they complain, the Administration's withholding of information undermines their ability to perform their essential functions as our elected representatives, including their responsibilities to maintain oversight of the Executive Branch.

In my limited time, I would like to mention two illustrations of this vital interrelationship between the First Amendment freedoms and our government system of checks and balances. I am going to focus on the courts because under the structure of the Constitution, the courts are designed to serve as the ultimate safety net, especially at times of crisis when the branches of government that are politically accountable tend to be timorous and to act based on expediency rather than principle.

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13. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY, [http://www.9-11commission.gov/report/911Report\\_Exec.htm](http://www.9-11commission.gov/report/911Report_Exec.htm) (last visited Apr. 9, 2008).

As I previously mentioned, since the 9/11 terrorist attacks, many federal judges fortunately have ruled in favor of the ACLU's cases that challenge abuses of government power and defend individual liberty, including freedom of speech. The first illustration is one very important victory that we won exactly two weeks ago today, when a federal judge struck down a provision of the Patriot Act under both the First Amendment and a separation of powers principle,<sup>14</sup> specifically the judicial review powers introduced by *Marbury v. Madison*.<sup>15</sup> In *Doe v. Gonzales*,<sup>16</sup> Judge Victor Marrero of the U.S. District Court for the Southern District of New York quoted from *Marbury v. Madison* repeatedly in his opinion invalidating the section of the Patriot Act that authorizes secret surveillance under National Security Letters or "NSL's." This provision imposed gag orders on all Internet Service Providers, librarians and others who receive NSL's seeking information about their patrons' communications. Judge Marrero struck down this provision specifically because of its tight constraints on judicial review. He stressed the vital interrelationship between the judicial review power and the First Amendment freedoms that the NSL provision violated. For example, Judge Marrero wrote:

The Constitution was designed so that the dangers of any given moment would never suffice as justification for discarding fundamental individual liberties or circumscribing the judiciary's unique role under our governmental system in protecting those liberties and upholding the rule of law. It is the judiciary's independent function to uphold the Constitution even if to do so may mean curtailing Congress's efforts to confer greater freedom on the executive to investigate national security threats.<sup>17</sup>

In short, through the power of judicial review, Judge Marrero was able to enforce both First Amendment rights and the judicial review power itself, reinforcing the positive interrelationship between them.

As a second illustration of the relationship between the First Amendment and judicial review, let me give you an example of the dark side, the glass half-empty perspective. It shows how the judicial review power can be thwarted through undue Executive Branch secrecy, thus undermining both checks and balances and First Amendment freedoms. I am specifically referring to how judicial review power has been completely frustrated to an alarming extent by

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14. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

15. 5 U.S. 137 (1803).

16. *Gonzales*, 500 F. Supp. 2d 379.

17. *Id.* at 414–15.



the government's abuse of, and many courts' acceptance of, the "state secrets privilege." As a result, the Executive Branch has effectively been immunized from any judicial review of even the most egregious violations of constitutional rights, including First Amendment freedoms. Such abuses are analyzed in the powerful new report put together by James Tucker and his ACLU colleagues, which refers to such acts as "governing in the shadows."<sup>18</sup> While this topic is not as well known as it should be, Louis Fisher has written a book on this subject, *In the Name of National Security*,<sup>19</sup> which I recommend to you.

In its origin, the state secrets privilege was designed to protect particular pieces of evidence that were shown to be dangerous to national security if they came to light. That narrow application has been completely expanded, distorted, and exaggerated, so the privilege is now being used systematically to completely dismiss cases before the introduction of any evidence, even cases claiming enormous abuses of the most fundamental human rights, including rendition to countries that we know engage in torture.

This has become such a serious problem that, after considerable deliberation and risk analysis, the ACLU decided to ask the United States Supreme Court to review this issue in two cases, one of which directly involved the First Amendment.<sup>20</sup> The ACLU reached this decision because we believe that the overblown use of the state secrets privilege is such a serious threat to all freedoms, including First Amendment rights. Further, we believe that there is a likelihood that the Supreme Court, being part of an independent branch of government with an investment in defending checks and balances, will re-examine and cut back on the abuse of this privilege to undermine both individual rights and the judicial review power to enforce individual rights. Let me read just the closing lines in one of the ACLU's briefs seeking Supreme Court review of this issue, to give you a flavor of what is at stake. Under cover of the government's distorted, exaggerated view of the state secrets privilege, our brief writes,

. . . [T]he government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial

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18. JAMES THOMAS TUCKER & SOPHIE ALCORN, AM. CIVIL LIBERTIES UNION, RECLAIMING OUR RIGHTS: DECLARATION OF FIRST AMENDMENT RIGHTS AND GRIEVANCES 2 (2007), [http://www.aclu.org/symposium/reclaiming\\_our\\_rights.pdf](http://www.aclu.org/symposium/reclaiming_our_rights.pdf).

19. LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006).

20. *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert denied*, 128 S. Ct. 373 (2007); *Edmonds v. U.S. Dep't of Justice*, 323 F.Supp.2d 65 (D.D.C.), *aff'd* 161 Fed. App'x. 6 (D.C. Cir.), *cert. denied* 46 U.S. 1031 (2005).

accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.<sup>21</sup>

In conclusion, I would like to return to the Pentagon Papers case, the leading case on press freedom, the First Amendment, and national security. I would like to quote the federal trial judge who issued the first opinion in the case, Judge Murray Gurfein of the U.S. District Court for the Southern District of New York.<sup>22</sup> I think it is very notable that he was a former prosecutor who had a significant background in military intelligence. It is especially noteworthy that, with that background, Judge Gurfein strongly rejected the government's claims that First Amendment principles should yield to national security concerns, rejecting the notion that these are antithetical concepts. As he declared:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. . . . Yet in the last analysis it is not merely the opinion of the editorial writer or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions.<sup>23</sup>

## II. PANEL: RESTRICTIONS ON FREEDOM OF ASSOCIATION THROUGH MATERIAL SUPPORT PROHIBITIONS AND VISA DENIALS

### A. *David Cole*\*

I am delighted to be here at the *Washington College of Law*, one of the nation's leaders in fighting for human rights and educating on the subject of human rights. I am also honored to be on a panel with representatives of the American Civil Liberties Union and PEN American Center. One of my first cases as a young lawyer at the Center for Constitutional Rights was working with PEN American

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21. Petition for Writ of Certiorari, *El-Masri*, 128 S. Ct. 373 (No. 06-1613).

22. *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y.) *rev'd en banc per curiam*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971).

23. *Id.* at 331.

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