



# FOOTNOTES

*"A nation must think before it acts." - Robert Strausz-Hupé*

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## CIVIL LIBERTIES VS. STATE SECURITY IN HISTORICAL PERSPECTIVE

By Louis Fisher



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How do we reconcile self-government with national security and analyze claims of national security? There should be little doubt that many assertions of "national security" have left the nation less secure. Consider the case of Ellen Knauff, a German woman who married a U.S. soldier and came to New York City to meet his parents in 1948. Instead of being allowed to disembark with other passengers, she was held at Ellis Island for three years and threatened with deportation as a security risk. At no time was Knauff or her attorney told why she was a risk. Her case reached the Supreme Court in *Knauff v. Shaughnessy* (1950). The Court, divided 6 to 3, found no objections to the procedures used by the executive branch. In a dissent, however, Justice Robert Jackson said: "Security is like liberty in that many are the crimes committed in its name." No one has better underscored the danger of automatically bowing down to claims of security.

What do you tell your students about the Supreme Court? Do you say it is the guardian of individual rights and the final word on the meaning of the Constitution? It has never performed in that manner. For much of its history, it protected the rights of government and corporations, not individuals. I will give some examples later in my talk where the elected branches did a much better job in protecting individual rights than the Supreme Court. As for Ellen Knauff, it was fortunate that Congress and the press pushed back against the abusive policy of the Truman administration and she was allowed to remain in the United States.<sup>1</sup>

### Basic Principles of the Framers

I think your students would be interested in some of the positions of the Framers that prepared the way for democracy in America. They were heavily influenced by the Enlightenment and its belief that individuals have the capacity to participate in

<sup>1</sup> For details of her experience, see Ellen Raphael Knauff, *The Ellen Knauff Story* (New York: W. W. Norton, 1952).

self-government. Long before the Declaration of Independence, Americans learned how to run their lives, hold meetings to discuss public issues, and find ways to forge a consensus of what needed to be done in their community. James Madison believed that an individual “has property in his opinions and in the free communication of them.” Property to Madison included religious opinions, personal safety and liberty, and an individual’s free use of one’s faculties and “free choice of the objects on which to employ them.” Of course by faculties he did not mean a teaching staff. He meant powers of the mind and natural aptitude. Conscience, Madison said, “is the most sacred of all property.” Invading someone’s conscience was a greater violation than invading a person’s home.<sup>2</sup> In Federalist No. 10, he spoke of the “diversity in the faculties of men, from which the rights of property originate.” The protection of those faculties, he said, “is the first object of government.”

In a concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), Justice Louis Brandeis reminded us of those values. The Framers believed that “the final end of the State was to make men free to develop their faculties; and that in its government the deliberate forces should prevail over the arbitrary.” The purpose of government was not to crush independent thought but to encourage it. The Framers valued liberty “both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”

### Lessons in the George Washington Administration

Although George Washington was a revered figure, it is interesting that in his two terms of office he learned that the public has a right to put limits on what government may do. In 1793, he issued what has come to be known as the Neutrality Proclamation. It warned Americans to avoid any involvement in taking sides in the war between France and England. He instructed law officers to prosecute all persons who violated his proclamation. However, when these cases were brought into court, jurors balked at a presidential initiative to punish individuals. Insisting that criminal law required congressional action through the regular legislative process, jurors made it clear they would acquit any individual charged with acting contrary to the proclamation. In England, perhaps the king could issue legally binding proclamations, but America was committed to self-government and separation of powers. Jurors asserted their independent right to safeguard constitutional principles.<sup>3</sup>

Unable to cite statutory support to justify actions in court, the administration dropped other prosecutions.<sup>4</sup> Washington then turned to Congress for statutory authority. He presented the matter to lawmakers, stating that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy set forth in his proclamation.<sup>5</sup> Congress passed the Neutrality Act of 1794, providing the administration the legal authority it needed to prosecute and punish individuals who violated national policy.<sup>6</sup>

President Washington ran into another problem with self-government: should citizens be allowed to meet and discuss public policy? It may seem surprising to us today, but Washington had no patience with citizens who engaged in public discussion about national policy, particularly when they raised objections. To understand his reaction, we have to recall that on March 3, 1791, Congress enacted a federal excise tax on spirits distilled within the United States. Excise taxes had a long history of inflaming the public and provoking protests.<sup>7</sup> To American farmers, converting grain into alcohol “was considered to be as clear a national right as to convert grain into flour.”<sup>8</sup> Beginning in September 1791, the resistance to the excise tax grew violent. Excise agents who attempted to collect revenue were seized, tarred and feathered, and stripped of horse and money.<sup>9</sup>

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<sup>2</sup> Madison’s essay on property appeared in *The National Gazette* on March 29, 1792 and is reprinted in 6 *The Writings of James Madison* 101-03 (Gaillard Hunt, ed.).

<sup>3</sup> Francis Wharton, *State Trials of the United States during the Administrations of Washington and Adams* 84-85 (1849); *Henfield’s Case*, 11 F. Cas. 1099 (C.C. Pa. 1793) (No. 6,360).

<sup>4</sup> 2 John Marshall, *The Life of George Washington* 273 (1832).

<sup>5</sup> *Annals of Cong.*, 3d Cong., 1-2 Sess. 11 (1793).

<sup>6</sup> 1 Stat. 381-84 (1794).

<sup>7</sup> Townsend Ward, “The Insurrection of the Year 1794, in the Western Counties of Pennsylvania,” 6 *Pa. Hist. Soc. Memoirs* 119, 119-27 (1858).

<sup>8</sup> *Id.* at 126.

<sup>9</sup> *Id.* at 130-31.

By September 1792, President Washington learned that citizens in western Pennsylvania had used violence against federal officers attempting to collect duties on distilled spirits.<sup>10</sup> Concerned that the rebellion might spread to other states, he issued a proclamation on September 15, 1792, warning those who resisted the law that it was his duty “to take care that the laws be faithfully executed.” He directed all courts, magistrates, and officers to see that the laws were obeyed and the public peace preserved.<sup>11</sup>

On August 7, 1794, Washington issued another proclamation, itemizing a long list of abuses against federal agents and stating that he had just put into effect the procedures of the Militia Act.<sup>12</sup> He provided Supreme Court Justice James Wilson the evidence needed to verify the rebellion and received from Wilson a certification that ordinary legal means were insufficient to execute national law.<sup>13</sup> Washington called upon the militias of four states to put down the rebellion.<sup>14</sup>

My story now turns from citizens who used violence against federal agents to citizens who merely wanted to discuss public policy in their homes and other places. In his response to the Whiskey Rebellion, President Washington publicly objected to citizens holding “certain irregular meetings” to express their disagreement with government policies. Political clubs had indeed emerged, supported by opposition newspapers that helped sharpen rhetoric and crystallize grievances.<sup>15</sup> In a letter of September 15, 1794, Washington concluded that the Whiskey Rebellion “may be considered as the first *ripe fruit* of the Democratic Societies.”<sup>16</sup> Democratic societies might seem like a compliment to you. Washington did not have that intent at all. The term to him was one of sharp reproach.

Who were the societies? How dangerous were they to public peace? Washington, directing his ire at those who joined these groups and participated in their discussions, expressed no support for citizens who wanted to discuss public affairs. He asked: “can any thing be more absurd, more arrogant, or more pernicious to the peace of Society, than for self created bodies, forming themselves into *permanent* Censors, and under the shade of Night in a conclave?”<sup>17</sup> Meeting during the daytime was bad enough, but gathering after the sun set? To Washington that was intolerable. He said these individuals had no right to offer personal judgments that statutes passed by Congress were mischievous or unconstitutional. To his mind, citizens were not at liberty to disagree with national policy.

Further developing this point, he said the purpose of Democratic Societies was “to destroy all confidence in the Administration, by arraigning all its acts, without knowing on what ground, or with what information it proceeds and this without regard to decency or truth.”<sup>18</sup> Any individual or group that chose to criticize government policy would have to be dealt with harshly. As noted in one study, he sought to “delegitimize them as participants in the political process.”<sup>19</sup> Writing on October 8, 1794, Washington insisted that the “daring and factious” spirit from these meetings had to be subdued. If not, there is “an end of and we may bid adieu to all government in this Country, except Mob and Club govt. from whence nothing but anarchy and confusion can ensue.”<sup>20</sup> He received supporting words from his Cabinet. Secretary of State Edmund Randolph told him that he “never did see an opportunity for destroying these self-constituted bodies, until the fruit of their operations was discharged in the insurrection.” Randolph advised: “They may now, I believe, be crushed. The prospect ought not to be lost.”<sup>21</sup>

### **Congress Responds to Washington’s Annual Address**

In Washington’s Sixth Annual Address to Congress, delivered on November 18, 1794, he reviewed his efforts to suppress the whiskey rebellion in four western counties of Pennsylvania. He said that based on a belief that the government’s excise tax

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<sup>10</sup> Thomas P. Slaughter, *The Whiskey Rebellion 179-81* (1986).

<sup>11</sup> 1 *A Compilation of the Messages and Papers of the Presidents 116-17* (James D. Richardson, ed., 1897-1925).

<sup>12</sup> *Id.* at 150.

<sup>13</sup> *Id.* at 152.

<sup>14</sup> *Id.* at 153.

<sup>15</sup> Slaughter, *The Whiskey Rebellion*, at 163-65, 194-95.

<sup>16</sup> 33 *The Writings of George Washington* 506 (letter to Burges Hall; emphasis in original).

<sup>17</sup> *Id.* (emphasis in original).

<sup>18</sup> *Id.*

<sup>19</sup> Robert M. Chesney, “Democratic-Republican Societies, Subversion, and the Limits of Legitimate Dissent in the Early Republic,” 82 *N.C. L. Rev.* 1525, 1528 (2004).

<sup>20</sup> 33 *The Writings of George Washington* 523 (letter to Maj. Gen. Daniel Morgan).

<sup>21</sup> Letter of Edmund Randolph to George Washington, Oct. 11, 1794, *George Washington Papers*, Series 5, Reel 106, Library of Congress, Manuscript Division.

operation “might be defeated, certain self-created societies assumed the tone of condemnation.”<sup>22</sup> Toward the end of his address he took another slap at Democratic Societies, urging Congress to unite “to turn the machinations of the wicked to the confirming of our constitution: to enable us at all times to root out internal sedition, and put invasion to flight.”<sup>23</sup> Sedition? Invasion? Quite an indictment for citizens deciding to discuss, and possibly disagree with, federal policy.

It was the practice at that time for each house of Congress to debate an annual address and provide comments to the President. The Senate generally supported Washington’s objection to private clubs that met to discuss political issues. In its formal response to this annual address, the Senate said that resistance to laws in the western counties of Pennsylvania “has been increased by the proceedings of certain self-created societies relative to the laws and administration of the Government; proceedings, in our apprehension, founded in political error, calculated, if not intended, to disorganize our Government, and which, by inspiring delusive hopes of support, have been influential in misleading our fellow-citizens in the sense of insurrection.”<sup>24</sup>

House debate was more mixed. William Smith warned that if the House failed to endorse Washington’s views about Democratic Societies, the silence of lawmakers “would be an avowed desertion of the Executive.”<sup>25</sup> Quite an extraordinary position. Any attempt by a member of Congress to think independently about a presidential policy would amount to desertion. Other members, however, insisted they had a constitutional right and a personal need to speak their minds. Was it expected, asked John Nicholas, “that I am to abandon my independence for the sake of the President?”<sup>26</sup> Josiah Parker suggested that Washington, “for whose character and services he felt as much respect and gratitude as any man in America, had been misinformed on this point.” Notwithstanding his admiration for the President, “he was not to give up his opinions for the sake of any man.”<sup>27</sup> Parker believed that his constituents in Virginia would be repelled by any form of censorship or repression: “They love your Government much, but they love their independence more.”<sup>28</sup>

William Giles, after noting his respect for Washington, asked what purpose was served by rebuking such abstractions as “self-created societies.” There was not an individual in the country, he said, “who might not come under the charge of being a member of some one or the other self-created society. Associations of this kind, religious, political, and philosophical, were to be found in every quarter of the Continent.”<sup>29</sup> Giles suggested that the Baptists, the Methodists, and the Friends might be called self-created societies. He insisted that members of the House were elected “not for the purpose of passing indiscriminate votes of censure, but to legislate only.” Giles repudiated “all aiming at a restraint on the opinions of private persons.”<sup>30</sup> The public “have a right to censure us,” he said, but “we have *not* a right to censure them.”<sup>31</sup>

James Madison reinforced those points by insisting that Congress had an essential role in protecting individual rights. To him, opinions “are not the objects of legislation.” Any indiscriminate censure that falls on classes or on individuals “will be a severe punishment.” Such conduct was incompatible with constitutional principles: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”<sup>32</sup> Should government, asked Abraham Bedford Venable, “show their imbecility by censoring what we cannot punish? The people have a right to think and a right to speak.”<sup>33</sup> Thus ended a misguided effort by President Washington, some of his Cabinet officials, and certain lawmakers to single out political societies for censure and upbraid them for expressing opinions about public policy.

### **Sedition Act of 1798**

Washington’s suspicion about “disloyal” members of the political community took root a few years later when Congress

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<sup>22</sup> 34 The Writings of George Washington 29.

<sup>23</sup> *Id.* at 37.

<sup>24</sup> 1 Richardson 160. For a fine analysis of political clubs forming in the 1790s, see Eugene Perry Link, *Democratic-Republican Societies, 1790-1800* (1942).

<sup>25</sup> *Annals of Cong.*, 3d Cong., 1-2 Sess. 901 (1794).

<sup>26</sup> *Id.* at 910.

<sup>27</sup> *Id.* at 913.

<sup>28</sup> *Id.* at 914.

<sup>29</sup> *Id.* at 899-900.

<sup>30</sup> *Id.* at 901.

<sup>31</sup> *Id.* at 917 (emphasis in original).

<sup>32</sup> *Id.* at 934.

<sup>33</sup> *Id.* at 910.



passed the Alien and Sedition Acts of 1798 and President John Adams signed it. It is remarkable that the two elected branches could support such a repressive statute seven years after ratification of the Bill of Rights. Pressures had mounted for going to war against France. In that climate, individuals fell into two discrete categories: loyal and disloyal. In 1798, the nation's leading periodical for the Federalist Party, Philadelphia's *Gazette of the United States*, warned: "He that is not for us, is against us."<sup>34</sup> An intolerance of individual opinions and independent thought develops after perceived threats from abroad or from within. Those who faced repression in 1798 were the foreign born: "enemy aliens" and "alien friends."

In Federalist No. 10, Madison opposed efforts to force or enforce a unanimous opinion within the political community. He defined "factions" as a number of citizens, whether a majority or minority of the whole, "who are united and actuated by some common impulse of faction, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." He said there were two ways to remove the cause of faction: "the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interest." He found the first remedy "worse than the disease," while the second "is as impractical as the first would be unwise."

When Congress passed the Alien and Sedition Acts, some of the incentive lay in partisan calculations. The Federalists believed that immigrants were more likely to vote for the Republican-Jeffersonian party. Portions of the legislation extended the waiting period for citizenship from 5 years to 14 years. The Alien Friends Act authorized the President to deport any alien "he shall judge dangerous to the peace and safety of the United States," a standard broad enough to apply to almost anyone. Deportation was also allowed if the President had "reasonable grounds" to believe that an alien was involved "in any treasonable or secret machinations" against the federal government. Individuals targeted by this legislation had no right to a public trial to be heard by a jury, to confront witnesses, or access to other basic procedural safeguards. A separate statute was aimed at "alien enemies," subjecting all noncitizen males 14 years or older to removal from the country. Mere identification with an enemy nation was sufficient to merit removal.

Another repressive statute was the Sedition Act of 1798. Unlike the two alien bills, penalties for seditious activity applied to both aliens and citizens. Individuals could be fined and imprisoned if they wrote or said anything about Congress or the President deemed by the government to be "false, scandalous and malicious," intended to "defame" those political institutions or bring them into "contempt or disrepute," "excite" any hatred against them, or "stir up" sedition or act in combination to oppose or resist federal laws or any presidential act to implement those laws. Criticism of the government could result in prosecution. The campaign against self-created societies in 1794, temporarily put to the side, now took the form of federal law. Although people were not permitted to censure government, government was free to censure (and imprison) the people.

The Adams administration prosecuted not only individuals but also newspapers deemed too critical of the Federalist Party and its politics. Most newspapers in the country were Federalist, not Jeffersonian. When Thomas Jefferson was elected President in 1800, he used his pardon power to relieve those punished by the Sedition Act.<sup>35</sup> The statute helped cripple the Federalist Party, which gained a reputation for being hostile to popular government, public debate, free press, dissent, civil liberties, and immigrants. It was a bitter period. Instead of the country mobilized against an enemy abroad, often the enmity pitted one American against another. That pattern would be repeated in subsequent periods.

In 1840, a congressional statute provided funds to reimburse those fined under the sedition statute. A committee report accompanying the legislation denounced the statute as "unconstitutional, null and void."<sup>36</sup> Federal courts during the Adams administration were safely Federalist, with no political interest or independence to check prosecutions by the executive branch. In 1964, the Supreme Court correctly acknowledged that the Sedition Act of 1798 was not struck down by a court of law but by the "court of history."<sup>37</sup>

### **Unilateral Actions by President Lincoln**

At the start of the Civil War, President Lincoln took a number of initiatives that lacked statutory authority or specific constitutional support. To his credit, he never invoked "inherent" authority to justify his actions or claimed exclusive control over national policy. At all times he recognized that his actions could be checked by Congress and the courts.

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<sup>34</sup> James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 15 (1956).

<sup>35</sup> 11 Writings of Thomas Jefferson 43 (Bergh ed., 1904) (letter to Mrs. John Adams, July 22, 1804).

<sup>36</sup> H. Rept. No. 86, 26th Cong., 1st Sess. 2 (1840); 6 Stat. 802, ch. 45 (1840).

<sup>37</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

One of his controversial actions was to suspend the writ of habeas corpus, a power that appears in Article I of the Constitution: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Given its location in Article I, was this power assigned solely to Congress? Lincoln sought advice from his Attorney General, Edward Bates. The opinion by Bates recognized Congress as the superior branch in suspending the writ. However, he reasoned that in times of “a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.”<sup>38</sup> Bates qualified his opinion by saying that if the constitutional language meant “a repeal of all power to issue the writ, then I freely admit that none but Congress can do it.”<sup>39</sup>

Both Lincoln and Bates acknowledged congressional power to pass legislation that limits how a President may suspend the writ of habeas corpus during a rebellion. On March 3, 1863, Congress enacted a bill that directed the Secretary of State and the Secretary of War to furnish federal judges with a list of the names of all persons held as prisoners by order of the President or executive officers. Submitting this list was mandatory. Under the statute, failure to furnish someone’s name to the judiciary could result in discharge of the prisoner.<sup>40</sup>

What of Lincoln’s action in the case of John Merryman, suspected of being the captain of a secessionist group that planned to destroy railroads and bridges between Baltimore and Washington, D.C.? He was arrested by military authorities and held at Fort McHenry in Baltimore. Chief Justice Taney, sitting as circuit judge, issued a writ of habeas corpus to the commandant at the Fort, directing him to bring Merryman to the circuit courtroom in Baltimore on May 27, 1861. The commandant, under Lincoln’s orders, refused to produce Merryman. Taney proceeded to issue an opinion stating that Merryman was “entitled to be set at liberty” but recognized that his order had “been resisted by a force too strong for [him] to overcome.”<sup>41</sup> All that he could do was to publicly advise Lincoln to take care to faithfully execute the laws and “to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”<sup>42</sup>

Some scholars have praised Taney’s defense of constitutional rights. Whatever interpretation we apply to his decision in *Ex parte Merryman*, Taney in May 1861 was not the federal officer responsible for preserving the Union. He had neither the authority nor the capacity. Moreover, his decision in *Dred Scott* had helped propel the country toward civil war. In May 1861, Lincoln faced a hard reality. Having lost Virginia to the South, he could not afford to lose Maryland to the North and have the nation’s capital encircled, unable to bring troops and supplies from northern states. At that moment in time it was Lincoln’s constitutional call, not Taney’s.

Lincoln understood that what he did at the start of the Civil War could not be defended on the basis of his Article II powers. In his July 4, 1861 message to Congress, he explained that his military initiatives, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.” He believed that his actions, such as suspending the writ of habeas corpus, were not “beyond the constitutional competency of Congress.”<sup>43</sup> With that clear language he admitted to using not only his own constitutional powers but those of Congress, and for that reason needed lawmakers to pass statutory language authorizing his actions, which they proceeded to do.<sup>44</sup>

### **World War I and the Sedition Act**

After America’s entry into World War I, Congress passed the Espionage Act in June 1917. It prohibited anyone to “willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.” It also made it a crime for anyone to “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States.” Those found guilty could be fined up to \$10,000 or imprisoned for up to twenty years, or both.<sup>45</sup>

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<sup>38</sup> 10 Op. Att’y Gen. 74, 81 (1861).

<sup>39</sup> Id. at 90.

<sup>40</sup> 12 Stat. 755 (1863).

<sup>41</sup> *Ex parte Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9,487).

<sup>42</sup> Id.

<sup>43</sup> 7 A Compilation of the Messages and Papers of the Presidents 3225 (James D. Richardson, ed., 1897-1925).

<sup>44</sup> 12 Stat. 326 (1861).

<sup>45</sup> 40 Stat. 219, sec. 3 (1917).

Between June 1917 and June 1920, over two thousand people were prosecuted under the Espionage Act and one thousand of those were convicted. Most courts, in upholding the Act, did not even refer to the First Amendment in their opinions; the few that did determined that the government's right to self-preservation trumped the individual's right to self-expression. For its part, a unanimous Supreme Court in *Schenck v. United States* (1919) devoted one paragraph to First Amendment concerns when it upheld the Espionage Act. One year later, divided 7 to 2, the Court in *Abrams v. United States* affirmed the conviction of an anarchist who scattered leaflets calling on munition workers to protest U.S. interference in the Russian Revolution.

In this second case, two members of the Court (Oliver Wendell Holmes and Louis Brandeis) invoked the First Amendment to limit governmental power. They were influenced by an article in the Harvard Law Review written by Zechariah Chafee, Jr. He argued powerfully that free speech was important not only in time of peace but particularly in time of war because it is under the conditions of war that government can do the greatest harm to constitutional government. He explained that the First Amendment protects two kinds of interests in free speech. There is an individual interest, allowing people to express their opinions on matters vital to them. There is also a social interest so that the country can adopt not only "the wisest course of action but carry it out in the wisest way." To Chafee, the social interest is particularly important in time of war. Truth can be sifted from falsehood "only if the government is vigorously and constantly cross-examined" so that war is not diverted to improper ends or conducted with an undue sacrifice of life and liberty. Legal proceedings prove that "an opponent makes the best cross-examiner" and therefore "it is a disastrous mistake to limit criticism to those who favor the war."<sup>46</sup>

### **The Sole-Organ Doctrine**

In the *Curtiss-Wright* decision in 1936, the Supreme Court decided whether Congress could delegate to the President authority to impose an arms embargo on a region in South America. At every stage of the litigation, the sole power in question was legislative, not executive. When President Franklin D. Roosevelt issued a proclamation to implement this legislative policy, he did so solely on statutory authority. None of the parties involved in the case ever referred to any independent presidential authority.

In writing for the Court, Justice George Sutherland upheld the delegation. That is the holding.<sup>47</sup> He also proceeded to add pages of extraneous discussion (*dicta*) that referred to the President's "plenary and exclusive" authority in external affairs. Merely reading Articles I and II of the Constitution would reject the position that the President has access to any exclusive authority over public policy, whether domestic or foreign. Many of the external powers vested in the British king are placed in Article I under congressional control, including power over tariffs and duties, foreign commerce, declare war, raise and support armies and navies, and make regulations for the land and naval forces. Sutherland's *dicta* about exclusive presidential authority would eliminate a basic constitutional principle: the system of checks and balances.

Sutherland attempted to strengthen his claim about independent presidential power by citing a speech in 1800 by John Marshall when he served in the House of Representatives. This was a presidential election year, with Thomas Jefferson running against President John Adams. Jeffersonians in the House argued that Adams should be either impeached or censured for turning over to Great Britain an American "Jonathan Robbins" charged with murder. At one point in his speech, Marshall referred to the President as "sole organ" in external affairs. The word "sole" seems clear: plenary and exclusive. But what does "organ" mean? Communicating national policy to other countries after it has been debated and decided by the two elected branches?

The only way to understand what Marshall meant is to read the entire speech. In it, Marshall makes clear that there were no grounds to impeach or censure Adams. The person called Jonathan Robbins was actually a British subject, Thomas Nast. In turning him over to the British, Adams was not making national policy unilaterally. He was carrying out a provision in the Jay Treaty which authorized him to turn over to Great Britain its subjects charged with specified crimes, including murder. Nast was charged with that. Therefore, Adams was not exercising plenary and exclusive authority over external affairs. He was not making national policy. Instead, he was *implementing* it, which was his duty under Article II to "take Care that the Laws be faithfully executed." Under Article VI, treaties are the law of the land. After Marshall finished his speech, the Jeffersonians did not try to rebut him. His floor statement was too closely reasoned.

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<sup>46</sup> Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 Harv. L. Rev. 932, 955, 958 (1919).

<sup>47</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Although Justice Sutherland committed clear error in espousing plenary and exclusive power for the President in external affairs and wholly misrepresented what John Marshall said, and although this material was pure dicta and not the holding, the sole-organ doctrine is referred to on a regular basis to magnify presidential power in foreign affairs and the war power. In the current Jerusalem passport case, *Zivotofsky v. Kerry*, the administration is arguing that a congressional statute enacted in 2002 is unconstitutional because it interferes with the President as sole organ of external affairs.

Along with other historians, lawyers, and political scientists, I have published articles demonstrating why Justice Sutherland committed clear error with his dicta.<sup>48</sup> In the *Zivotofsky* case, I filed an amicus brief with the Supreme Court on July 17, 2014, pointing out Sutherland's error and asking the Court to make a public statement that his sole-organ doctrine is an error and should not be relied on by federal courts or the executive branch in defining presidential power.<sup>49</sup> In another effort to argue for plenary and exclusive power for the President in external affairs, Sutherland claimed that the process of treaty negotiation is set aside entirely for the President and Congress may not interfere in any way. That too is in error. Presidents have frequently invited not only Senators but also Representatives to participate in treaty negotiation in order to prepare political support for a treaty and its implementation by subsequent authorization and appropriation bills.<sup>50</sup>

If you find it difficult to believe that the Supreme Court could make an error in 1936 and allow it to remain in place without ever correcting it, you can read Marshall's speech and see if Justice Sutherland misrepresented what is meant by "sole organ." Does anything in Marshall's address argue for plenary and presidential power in external affairs? His speech is available on my personal webpage.<sup>51</sup> As to the capacity of the Supreme Court to commit errors, consider this plain admission by Chief Justice Rehnquist: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."<sup>52</sup> One final observation: Can you think of other professions (such as medicine and engineering) that could make an error in 1936 and leave it uncorrected, perhaps at the cost of unnecessary deaths and bridges falling down?

### Japanese-American Cases

On January 19, 1942, President Roosevelt issued Executive Order 9066, leading to the transfer of more than 110,000 Americans of Japanese descent (about two-thirds of them natural-born U.S. citizens) to what were euphemistically called "relocation centers." In fact, they were forced from their homes and placed in detention camps. Roosevelt said he acted under his authority as President and Commander in Chief.<sup>53</sup> With no evidence of disloyalty or subversive activity and without benefit of any procedural safeguards, these individuals were imprisoned solely on grounds of race. A month later, Congress enacted legislation to ratify the executive order.<sup>54</sup>

A unanimous Supreme Court upheld a curfew order directed against Japanese Americans. In a concurrence, Justice Murphy said the curfew policy "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."<sup>55</sup> The following year, with the Justices divided 6 to 3, the Court supported the exclusion of Japanese Americans and their relocation to detention camps. In one of the dissents, Justice Murphy protested that the exclusion order resulted from an "erroneous assumption of racial guilt" found in the commanding general's report, which referred to all individuals of Japanese descent as "subversives" belonging to "an enemy race" whose "racial strains are undiluted."<sup>56</sup> He dissented from "this legalization of racism."<sup>57</sup>

Why did the Court extend its blessing to this military operation? The majority of Justices (and some of the dissenters) claimed they lacked a capacity to determine whether President Roosevelt and his military advisers possessed sufficient grounds to act as they did. Writing for the Court, Justice Black acquiesced in the advice of military experts: "we are unable to conclude that it

<sup>48</sup> Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139 (2007); <http://www.loufisher.org/docs/pip/439.pdf>.

<sup>49</sup> Louis Fisher, amicus brief in *Zivotofsky v. Kerry*; <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>.

<sup>50</sup> Louis Fisher, "Treaty Negotiation: A Presidential Monopoly?," 38 Pres. Stud. Q. 144 (2008); <http://www.loufisher.org/docs/pip/437.pdf>; Louis Fisher, "Congressional Participation in the Treaty Process," 137 U. Pa. L. Rev. 1511 (1989); <http://www.loufisher.org/docs/pip/442.pdf>.

<sup>51</sup> <http://www.loufisher.org/docs/pip/444.pdf>.

<sup>52</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>53</sup> 7 Fed. Reg. 1407 (1942).

<sup>54</sup> 56 Stat. 173 (1942).

<sup>55</sup> *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943).

<sup>56</sup> *Korematsu v. United States*, 323 U.S. 214, 235-36 (1944).

<sup>57</sup> *Id.* at 242.



was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”<sup>58</sup> The words “we are unable to conclude” are frequently used when courts acquiesce in actions in the field of national security without any grounds for doing so. Although Justice Jackson dissented, he also wrote: “the Court, having no real evidence before it, has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.”<sup>59</sup>

Thus it will always be? It was not always that way before 1944 and certainly not always that way after 1944. Jackson had an opportunity, as a member of an independent branch, to probe the basis for the exclusion order. He claimed the Court had “no choice.” Justices always have a choice. Certainly they had a choice when Jackson admitted the Court had no real evidence before it and when he described DeWitt’s statement as unsworn, self-serving, and untested by any cross-examination. The Justices had a duty under their oath of office to insist: “We decide cases based on evidence. You have provided none, other than crude assertions of racism. Both for the rights of Japanese Americans and our own institutional self-respect, we must hold against the exclusion order.”

In his dissent, Justice Murphy identified an effective and principled way to challenge executive assertions: “Justification for the exclusion order is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment.”<sup>60</sup> The Court was not faced with what might be called a “military judgment.” There was no reason to defer to DeWitt’s purely prejudiced and ignorant beliefs about race and sociology.<sup>61</sup>

In a law review article in 1962, Chief Justice Warren reflected on the Court’s performance in the Japanese-American cases. In times of emergency, he suggested that the judiciary could not function as an independent and coequal branch: “The consequence of the limitations under which the Court must sometimes operate in this area is that other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution.”<sup>62</sup> A fair point. President Roosevelt and members of Congress had a duty to protect individuals from constitutional abuse. But then comes this remarkable sentence from Warren: “To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader, sense, it actually is.”<sup>63</sup>

In so many words: the Court held the government’s actions constitutional when it was not. Warren cautioned against always seeking constitutional answers from the courts. In a democratic society, the legislative and executive branches still have “The primary responsibility for fashioning and executing policy consistent with the Constitution.” He then correctly warned against exclusive reliance on the political branches: “[T]he day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen.”<sup>64</sup>

The Supreme Court has never overruled its decisions in *Hirabayashi* and *Korematsu*. The elected branches, however, have recognized the grave mistreatment of Japanese Americans. On February 20, 1976, President Gerald Ford issued a proclamation publicly apologizing for the “uprooting of loyal Americans.”<sup>65</sup> In 1980, Congress established a commission to gather facts to determine the wrong done by Roosevelt’s order. Released in December 1982, the report stated that the order “was not justified by military necessity” and the policies that followed from it—curfew and detention—“were not driven by analysis of military conditions.” The factors that shaped those decisions were “race prejudice, war hysteria, and a failure of political leadership.”<sup>66</sup> Congress passed legislation in 1988 to establish a trust fund of \$1.25 billion to pay up to \$20,000 to eligible individuals.<sup>67</sup> No financial payment could ever compensate for the lost years, humiliation, and economic sacrifices of having to sell property at reduced values when forced to relocate to detention camps.

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<sup>58</sup> Id. at 217-18.

<sup>59</sup> Id. at 245.

<sup>60</sup> Id. at 236-37.

<sup>61</sup> Eugene V. Rostow, “The Japanese American Cases—A Disaster,” 54 Yale L.J. 489 (1945); Nanette Dembitz, “Racial Discrimination and the Military Judgment: The Supreme Court’s *Korematsu* and *Endo* Decisions,” 45 Colum. L. Rev. 175 (1945).

<sup>62</sup> Earl Warren, “The Bill of Rights and the Military,” 37 N.Y.U. L. Rev. 181, 192 (1962).

<sup>63</sup> Id. at 192-93.

<sup>64</sup> Id. at 202.

<sup>65</sup> Proclamation 4417, 42 Fed. Reg. 7741 (1976).

<sup>66</sup> Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 18 (1982).

<sup>67</sup> 102 Stat. 903, 905-06, sec. 104-05 (1988).

The price of judicial deference to executive assertions surfaced when Hirabayashi and Korematsu returned to court in the 1980s after newly discovered documents revealed that executive officials had deceived the judiciary by withholding vital evidence. As result, their convictions were vacated.<sup>68</sup> On May 20, 2011, Acting Solicitor General Neal Katyal pointed out that the Solicitor General in *Korematsu* failed to inform the Supreme Court of evidence that undermined the rationale for internment.<sup>69</sup>

## The State Secrets Privilege

Private parties are generally able to take a grievance to court and seek satisfaction through an adversary process that gives each side an opportunity to make its case. In *United States v. Reynolds* (1953), the Supreme Court established what is known as the “state secrets privilege,” greatly reducing access to documents, even by the courts. As a result, the executive branch has been able to prevail in a number of cases where litigants tried to uncover government negligence and illegality. Dependence on the state secrets privilege has been especially heavy after the terrorist actions of 9/11.

The Justice Department and federal judges often claim that the state secrets privilege dates back to the Aaron Burr trial of 1807.<sup>70</sup> That is erroneous. Burr was being tried for treason, which carried the penalty of death by hanging. The Jefferson administration possessed a number of secret letters that General James Wilkinson sent to President Jefferson. Defendants may not be found guilty on the basis of secret evidence. The administration had a choice of giving Burr and his attorneys access to the documents, which it did, or dropping charges. After hearing the case made by the prosecutors, the jury found Burr not guilty.<sup>71</sup>

The principal case establishing the state secrets privilege is *United States v. Reynolds* (1953). On October 6, 1948, a four-engine B-29 exploded over Waycross, Georgia, killing five of the eight crew. Also on board were five civilian engineers who were helping with confidential equipment. Four of the engineers died. Three widows of the engineers sued the government under the Federal Tort Claims Act. Among other documents, they wanted the official accident report to see if the government had been negligent in allowing this particular B-29 to fly.<sup>72</sup>

In defending its action, the executive branch advised the district judge that the accident report contained confidential and secret information that could not be shared with the widows and their attorneys. The judge then ordered that the report be delivered to him to be read in his chambers. When the government refused he held for the three widows. The Third Circuit affirmed his decision as an essential step in maintaining judicial independence and the American system of checks and balances. The Supreme Court, in *United States v. Reynolds*, divided 6 to 3 in supporting the executive branch. Although the Court said that judges should not acquiesce to “executive caprice,” it did essentially that by reaching a decision without looking at the accident report. This marked a major step in increasing executive power, decreasing judicial independence, and severely limiting the rights of private litigants to pursue their interests in court.

In 2000, one of the daughters of a civilian engineer who died on the plane did a computer search, hoping to learn more about the crash of the B-29. She discovered that the accident report was now available, having been declassified in 1995. When she and the other two families, along with their attorneys, read the report, they discovered that it did not contain secret information but revealed numerous acts of negligence by the executive branch in allowing the plane to fly.<sup>73</sup> The three families returned to court, charging that the executive branch had committed fraud on the court by falsely implying that the accident report contained confidential and secret information. This new effort to vindicate their rights failed in district court

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<sup>68</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

<sup>69</sup> Neal Katyal, “Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases,” May 20, 2011; <http://blogs.justice.gov/main/archives/1346>.

<sup>70</sup> Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 10-11, 24; *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977); *In re U.S.*, 872 F.2d 472, 474-75 (D.C. Cir. 1989); *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).

<sup>71</sup> Louis Fisher, “Jefferson and the Burr Conspiracy: Executive Power against the Law,” 45 *Pres. Stud. Q.* 157 (2015); <http://www.loufisher.org/docs/pip/jeffburr.pdf>.

<sup>72</sup> Details on the *Reynolds* case and the state secrets privilege are available at Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006). Also, my personal webpage (<http://loufisher.org>) has a separate category on the state secrets privilege, with links to my articles and congressional testimony.

<sup>73</sup> Fisher, *In the Name of National Security*, at 165-69.

and the Third Circuit. The Supreme Court refused to hear their appeal.<sup>74</sup>

After the terrorist attacks of 9/11, the Bush administration regularly cited the state secrets privilege to prevent litigants from seeking assistance from the judiciary in cases involving warrantless surveillance, torture, and other matters. Individuals who brought lawsuits against the Central Intelligence Agency and the Justice Department, including Khaled El-Masri and Maher Arar, had their cases dismissed because of the state secrets privilege. Nevertheless, on December 13, 2012, a unanimous opinion from the European Court of Human Rights ruled that El-Masri was an innocent victim of torture and abuse. As for Arar, on January 16, 2007, Canada released a three volume, 822-page report that detailed how Canadian intelligence officials had passed false warnings and unreliable information about Arar to the United States. Canada publicly apologized to Arar and his family and provided \$9.75 million in compensation. Arar's appeal to the second Circuit was unsuccessful, and on June 14, 2010, the Supreme Court denied his petition for certiorari. No one in the Bush or Obama administrations expressed any apology or statement of regret for the U.S. role in his mistreatment.

The unwillingness of federal judges to independently examine charges of executive branch illegality is illustrated by the Ninth's Circuit decision in *Mohamed v. Jeppesen Dataplan*, decided on September 8, 2010. The case was directed against a private contractor who helped the CIA send suspects abroad for interrogation and torture. The litigation began under Bush and continued under Obama, with each administration invoking the state secrets privilege. The Ninth Circuit offered what appeared to be a position of coequal power by citing an earlier case: "[W]e must make an independent determination whether the information is privileged."<sup>75</sup> From that same case it expressed its understanding that federal courts "take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical eye."<sup>76</sup> Shortly after those encouraging words the court abandoned any pretense of judicial independence: "[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second-guessing the Executive in this arena."<sup>77</sup>

In a speech on May 21, 2009 at National Archives, President Obama raised objections to the state secrets privilege, saying it "has been over-used" and should not be invoked "merely because it reveals the violation of a law or embarrassment to the government." Yet his administration continued the reliance on the state secrets privilege by the Bush administration, concluding that no change was warranted in the cases El-Masri, Arar, and Jeppesen Dataplan. The Obama administration asserted the privilege in new cases involving NSA surveillance (*Shubert v. Obama*) and the use of drones to kill U.S. citizens abroad (*Al-Aulaki v. Obama*).

One more example will underscore the continuity of the state secrets privilege used by the Bush and Obama administrations. On January 2, 2005, Rahinah Ibrahim, a Malaysian Muslim pursuing her graduate studies at Stanford University, arrived at the San Francisco airport to fly to Malaysia. She discovered she could not board her plane because her name was on the federal government's No Fly List. The belief that she was a security risk was an apparent mistake because she was allowed to board a plane the next day to return to Malaysia. Yet her situation remained unclear, forcing her to file a complaint in federal court in January 2006 to challenge the government's action and seek damages.

As the litigation continued, Attorney General Eric Holder on April 23, 2013, signed a declaration that claimed the state secrets privilege over certain documents. In court, it was discovered that an FBI agent admitted he had improperly filled out a form on Ibrahim, doing it "exactly the opposite way" from the instructions given him, thereby wrongly placing her on the No Fly List. Instead of apologizing to Ibrahim and compensating her for the government's error, the Obama administration insisted on invoking the state secrets privilege.<sup>78</sup> Eventually, District Judge William Alsup ordered the government to remove all references to the mistaken designations by the FBI agent and make other corrections.

## Conclusion

The preamble to the Constitution identifies a number of fundamental values: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." In times of emergencies and national threats, the values of justice, welfare and liberty

<sup>74</sup> Id. at 176-211.

<sup>75</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010), citing *Al-Haramain*, 507 F.3d 1190, 1202 (9th Cir. 2007).

<sup>76</sup> 614 F.3d at 1082.

<sup>77</sup> Id. at 1081-82.

<sup>78</sup> Louis Fisher, "Government Errors Are Shrouded in Secrecy," *National Law Journal*, March 10, 2014;

<http://www.loufisher.org/docs/ssp/nofly.pdf>.

have been subordinated to national defense, often at substantial cost to constitutional government. The cost grows higher when lawmakers, courts, and the public swallow their misgivings about presidential claims and assertions.

The United States has traveled down that path many times: attacks on “self-created” societies, the Alien and Sedition Acts of 1798, the Espionage Act of 1917, the Red Scare after World War I, the treatment of Japanese Americans during World War II, initiatives by Congress and the Truman administration against “disloyal” Americans, and executive branch abuses after 9/11. Patriotism should not mean mechanical deference to public statements by Presidents and executive officials. The pattern of errors and misconceptions is too evident. Democracies survive because of the power of reason, open debate, and the courage to speak out when the reigning guidelines are “no politics beyond the water’s edge” and “my country, right or wrong.” A healthier principle was offered by Senator Carl Schurz in 1872. Born in Germany, he listened to Senators characterize his opposition to a pending amendment as unpatriotic. He first explained the basis for his opposition but then closed with: “My country, right or wrong; if right, to be kept right and if wrong, to be set right.”<sup>79</sup>

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<sup>79</sup> Cong. Globe, 42d Cong., 2d Sess. 1287 (February 29, 1872).