

NATIONAL SECURITY CAPPs INDIVIDUAL CIVIL LIBERTIES IN TIMES OF CRISIS

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INTRODUCTION

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.¹

– Oliver Wendell Holmes, Jr.

After the terrorist attacks of September 11th, 2001, President George W. Bush declared “we will not allow this enemy to win the war by changing our way of life or restricting our freedoms.”² Undoubtedly, the attacks of September 11th were an atrocious and cowardly assault on innocent citizens of the United States, and security measures must be promulgated to ensure the security of the nation against the threat of terrorism. However, under this guise of national security, in Blitzkrieg-like fashion, individual liberties have been attacked and enormously restrained by the enactment of sweeping legislation³ and the issuance of executive orders.⁴ The history of the United States demonstrates that in times of war and national emergencies the first casualties are individual civil liberties. Benjamin Franklin warned, “[t]hey that can give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.”⁵ While an exploration of history will not lead to an ultimate solution, history does reveal the need for

¹ O. W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown, & Co. 1923) (1881).

² *After the Attacks: Bush's Remarks to Cabinet and Advisors*, N.Y. TIMES, Sept. 13, 2001, at A16.

³ See e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴ See e.g., *Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* § 2(A)(1)(i)-(iii), 66 Fed. Reg. 57,833, 57,834 (2001).

⁵ Jim Davis, Note, *A Cautionary Tale: Examining the Use of Military Tribunals by the United States in the Aftermath of the September 11 Attacks in Light of Peru's History of Human Rights Abuses Resulting from Similar Measures*, 31 GA. J. INT'L & COMP. L. 423, 424 (2003) (quoting RICHARD JACKSON, *AN HISTORICAL REVIEW OF PENNSYLVANIA* 290 (E. Olmstead and W. Power 1812) (1787)).

proportionality and the drawing of a delicate balance between ensuring national security and the protection of individual liberties.

Part I of this note describes a post September 11th example of how the government is attempting to use national security to infringe on constitutionally protected individual rights. Part II provides a historical perspective of two eras of national emergency and the Supreme Court's attempt to balance individual liberties against the perceived threat. Part III compares the two eras and provides a method for which the Supreme Court should approach the balancing. Part IV concludes by suggesting that when the legislative and executive branches, based on a perceived threat to national security, infringe on constitutionally protected rights, the Supreme Court must be judicially active to counterbalance the deprivation.

I. POST SEPTEMBER 11TH, 2001 – NOVEL NOTION OF NATIONAL SECURITY?

A. *Computer Assisted Passenger Pre-screening System II: The Regulation*

Early in 2003, the Transportation Security Administration [hereinafter "TSA"]⁶ announced proposals to implement the Computer Assisted Passenger Pre-screening System II [hereinafter "CAPPS II" or "prescreening system"].⁷ The Regulation requires a four step screening process to ensure airline safety.⁸ First, airlines are required to forward a passenger's

⁶ See Francine Kerner & Margot Bester, *The Birth of the Transportation Security Administration: A View From the Chief Counsel*, 17 AIR & SPACE LAW. 1 (2002). On November 19, 2001, President George W. Bush signed the Aviation and Transportation Security Act (ATSA) that created the TSA. Congress enacted the ATSA because it "believed the events of September 11th required a fundamental change" in the way security functions at United States airports. *Id.* "The ATSA established a new federal agency, the TSA, and transferred the responsibility for inspecting persons and property carried aboard passenger aircraft to the TSA on February 17, 2002." *Id.* The TSA's mission is to protect the Nation's transportation systems to ensure freedom of movement for people and commerce. See Transportation Security Administration, *About TSA: TSA's Mission, Vision & Values*, at <http://www.tsa.gov/public/display?theme=7> (last visited Sept. 10, 2004).

⁷ See Notices Department of Homeland Security, 68 Fed. Reg. 2101-03 (Jan. 15, 2003); Notices Department of Homeland Security, 68 Fed. Reg. 45265-01 (Aug. 1, 2003).

⁸ Notices Department of Homeland Security, 68 Fed. Reg. at 45265-01

name, date of birth, address, and phone number to the TSA.⁹ The TSA then sends the information to commercial data services for review and to determine an “authentication score,” which indicates “a confidence level in the passenger’s identity.”¹⁰ The TSA performs a “risk assessment function,” in which the traveler’s information is run through secret law enforcement, intelligence, or other government databases, and the traveler is branded by the software as a “low risk, high risk, or unknown threat.”¹¹ Each traveler’s risk score is forwarded to airport security for appropriate actions.¹² Those passengers with a “high” or “unknown” risk score are subject to heightened security screenings, while travelers with a “low” score pass through normal security measures.¹³

The prescreening system establishes few procedural safeguards to challenge information contained and used in determining a traveler’s risk score.¹⁴ The Department of Homeland Security [hereinafter “DHS”] “is committed to providing access to the information that is contained in the CAPPS II system to the greatest extent feasible consistent with national security concerns.”¹⁵ Although the prescreening system is exempt from the Privacy Act,¹⁶ the DHS

⁹ *Id.* In addition, the airline may send any other information such as travel plans, itinerary, or the passenger’s past travel history. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 45269. The proposal establishes the “CAPPS II passenger advocate,” created to ensure the accuracy of the information retained and used by the system. *Id.* After requesting information from the “CAPPS II passenger advocate,” an individual may “contest” or seek “amendment” of the information contained in the system. *Id.*

¹⁵ *Id.* at 45266-67.

¹⁶ *See* The Privacy Act (1974), Pub. L. 93-579, 5 U.S.C. 552a(k) (1974) (guaranteeing citizens the right to access information about them); *see also* Notices Department of Homeland Security, 68 Fed. Reg. at 45269.

provides that a passenger “may request access to records containing information they provided.”¹⁷ Presumably, the passenger has access only to records containing his or her name, address, date of birth, and phone number, since that is the only information “they provided.”¹⁸ Furthermore, in October 2001, after the September 11th attacks, Attorney General John Ashcroft issued a directive requiring that federal agencies withhold any requested information from the public on any “sound legal basis.”¹⁹ A “sound legal basis” is an illusive and amorphous concept with undeterminable boundaries. However, in the post September 11th climate, certainly the mere mention of national security would be a sufficient basis for nondisclosure of information. It appears that the procedural safeguards against erroneously kept information are nothing more than illusory.

B. The Right to Travel and The Prescreening System

The Supreme Court has long recognized a constitutionally protected right to travel. In *Kent v. Dulles*,²⁰ Justice William Douglas proclaimed,

[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.²¹

The Supreme Court has announced the three different components to the right to travel as follows: (1) the right of citizens to enter and leave states freely; (2) the right of a resident of one

¹⁷ Notices Department of Homeland Security, 68 Fed. Reg. at 45269.

¹⁸ David L. Sobel & Marcia Hofmann, *Comments of The Electronic Privacy Information Center*, Electronic Information Privacy Center, at <http://www.epic.org/privacy/airtravel/capps-comments.pdf> (last visited Sept. 10, 2004).

¹⁹ Jim Oliphant, *War on Terror is Reshaping Legal Landscape*, THE RECORDER, Nov. 19, 2001, at 3.

²⁰ *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958).

²¹ *Id.*

state “to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state;” and (3) the right of travelers to become permanent residents of a state and be treated as equal citizens.²² If the government restricts through regulation any of the three components of the right to travel, the government must assert a compelling interest and establish that the regulation is narrowly tailored and the least restrictive means to achieve the interest.²³

In *Aptheker v. Secretary of State*,²⁴ the Supreme Court invalidated a statute denying passports to members of the communist party and communist front organizations. The government asserted the regulation was reasonable because the communist movement was a serious threat to national security.²⁵ While conceding that national security is a substantial government interest, the Court recognized that the denial of passports is “a severe restriction upon, and in effect a prohibition against, world-wide foreign travel.”²⁶ The denial of passports based on affiliation to a communist organization was not narrowly tailored to the prevention of the spread of communism because it applied to persons branded as communists regardless of “whether or not they were shown to have knowledge that the organizations to which they belonged were attempting ‘to establish a Communist totalitarian dictatorship . . . throughout the world.’”²⁷

²² *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

²³ *Id.*

²⁴ *Aptheker v. Secretary of State*, 378 U.S. 500 (1959).

²⁵ *Id.* at 505.

²⁶ *Id.* at 507. Recently, the Supreme Court has retreated from a constitutional right to international travel. *See Haig v. Agee*, 453 U.S. 280, 306 (1981) (holding that international travel is subject to rational governmental regulations, distinguishable from interstate travel).

²⁷ Alfred Hill, *Some Realism About Facial Invalidation Of Statutes*, 30 HOFSTRA L. REV. 647, 663 (quoting *Aptheker*, 378 U.S. at 510); *see also Kent v. Dulles*, 357 U.S. 116 (1958) (holding that the Secretary of State may

The prescreening system as proposed violates at the very least the first component to the right to travel by denying those labeled as “high” or “unknown” risk by the TSA the right to travel freely from state to state. Consequently, the prescreening system can survive constitutional scrutiny only if the government asserts a compelling interest. After September 11th, the prevention of terrorism is undoubtedly a compelling government interest; therefore, the question is whether the regulation is narrowly tailored and the least restrictive means to prevent and detect terrorist threats to airline travel.

CAPPS II as anticipated offers little assurances of increasing airline safety from terrorist attacks and therefore, is not narrowly tailored. The system is fraught with potential inaccuracies and loopholes. One cause of the system’s inaccuracies is its reliance on computers to sift through tremendous amounts of information on billions of passengers to determine and identify the few who present a risk to airline safety.²⁸ No matter how successful the prescreening system is at identifying potential threats, the results must be received and interpreted by humans, who are by no means infallible. Furthermore, the information used to generate a traveler’s “risk score” are entered and maintained entirely by humans resulting in an enormous risk for inaccuracies. In fact, a similar smaller scale system was in use prior to September 11th and failed to prevent the attacks although nine of the nineteen hijackers were “flagged.”²⁹

not proscribe that is it unlawful for a citizen to enter and leave the United States without a valid passport based on affiliation to the communist party).

²⁸ American Civil Liberties Union, *ACLU Comments to Department of Homeland Security on the “Passenger and Aviation Security Records,”* at <http://www.aclu.org/news/NewsPrint.cfm?ID=13847&c=206> (last visited Oct. 22, 2003). As one commentator noted, “[s]tudy after study has found that intelligence failures before 9/11 were a result not of insufficient information, but a failure to analyze information that had already been collected. Automated background checks like those envisioned under CAPPS II will only worsen the problem: you don’t find a needle in a haystack by adding more hay – and rotten hay at that.” American Civil Liberties Union, *Problems With No-Fly List Show Problems With CAPPS II Airline Profiling System,* at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12507&c=206> (last visited Sept. 10, 2004).

²⁹ Paul Hudson, *Aviation Heading in Wrong Direction*, 17 AIR & SPACE LAW. 6, 7 (2002).

Another fatal flaw of the system is that the error rate, no matter how small, will bog down the system with false positives, making it extremely difficult to identify and thwart bona fide terrorist threats.³⁰ In 2003, in excess of one-hundred and fifteen million passengers traveled to and from the United States, with over 628 million enplanements, or boarding passengers.³¹ If the prescreening system yields even an unrealistic accuracy rate of ninety nine percent, over 628,000 innocent passengers would be improperly “flagged” and subject to heightened and unjustified security screening, diverting valuable security resources from genuine terrorist threats.

In addition, there are also two major loopholes in the system. The first exists in the “Trusted Traveler” provision of the system which permits those with security clearances and in “positions of trust and confidence” to avoid security procedures.³² The second is the ability of nearly any traveler to obtain another’s identity after paying as little as fifty dollars.³³ Consequently, the prescreening system is not narrowly tailored to the government’s asserted interest in passenger safety because its many deficiencies provide travelers with little reason to believe that suspected terrorists would not simply “slip through the cracks.”

As an alternative to appropriating funds on an unproven technology that collects mass amounts of personal information of all passengers, the government’s interest would be better served by funding and perfecting the security measures currently established. Mass data mining

³⁰ American Civil Liberties Union, *supra* note 28.

³¹ Federal Aviation Administration, *FAA Forecast Fact Sheet Fiscal Years 2004-2015* (Mar. 25, 2004), at http://www.faa.gov/newsroom/factsheets/2004/factsheets_040325.pdf (last visited Sept. 10, 2004). Furthermore, it is estimated that between 2003 and 2015, the total passengers traveling to and from the United States will increase to 212.5 million travelers a year. *Id.*

³² American Civil Liberties Union, *supra* note 28.

³³ *Id.*

is not a substitute for human surveillance and can lead to a false sense of security. Implementing an unproven technology to a security structure already beleaguered with holes does little to plug the gaps. Money needs to be allocated to improve the quantity and quality of current security personnel and more effective metal detectors must be developed. Advancing established measures is imperative and would diminish the threat of future acts of terrorism without infringing on constitutionally protected rights. Thus, the prescreening system is not the least restrictive means of achieving the government's interest in airline safety.

C. Procedural Due Process & The Prescreening System

The Fifth³⁴ and Fourteenth³⁵ Amendments to the Constitution establish that the government shall not deprive any person of “life, liberty, or property without due process of law.” The Due Process Clause at the very least entitles an individual deprived of their life, liberty, or property the right to be heard “at a meaningful time and in a meaningful manner.”³⁶ In determining what process is due, the Supreme Court announced three distinct factors as follows: (1) the individual interest at stake; (2) the risk that the procedures provided will lead to “erroneous deprivation” and the degree to which any additional procedures would lessen the risk; and (3) any additional burdens that would be placed on the government by implementing the additional procedures.

The prescreening system would violate a citizen's right to travel and offers inadequate procedural mechanisms to persons branded as a “high risk.” The individual interest at stake is the constitutionally protect right to travel from state to state and abroad. Under the current proposal,

³⁴ See U.S. CONST. amend. V.

³⁵ See U.S. CONST. amend. XIV, § 1.

³⁶ Parratt v. Taylor, 451 U.S. 527, 540 (1981).

the procedural protections provided create a substantial likelihood that the right to travel will be erroneously deprived. Travelers singled out by the prescreening system have no knowledge as to why they were targeted. In addition, the system provides inadequate or no means to challenge the information contained in the government's "secret" databases. The right to travel is engrained deeply in the framework of America, such that nothing less than a complete hearing would suffice to cure the system's deficiencies. Admittedly, with the number of individuals who fly each year, a hearing would create a significant burden on the government. However, when the government is prepared to dilute an individual's right to travel by utilizing "secret" information, the government should not be permitted to hide behind national security for nondisclosure. Therefore, the prescreening system does not provide adequate procedural protections.

According to the American Civil Liberties Union [hereinafter "ACLU"], the prescreening system is "a frightening system designed to perform background checks on the 100 million Americans who fly each year to determine their 'risk score' to airline safety."³⁷ Not only does the system infringe on travelers' constitutionally protected right to travel but it also fails to provide adequate procedures for challenging the intrusion to those who are denied this right.

On July 15, 2004, Tom Ridge, Secretary of the Department of Homeland Security, confirmed that the system collectively known as CAPPs II was being discarded by the federal government.³⁸ Undoubtedly, the abandonment of CAPPs II in no way signifies an end of the

³⁷ American Civil Liberties Union, *The Five Problems With CAPPs II: Why the Airline Passenger Profiling Proposal Should be Abandoned*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13356&c=206> (last visited Sept. 10, 2004).

³⁸ Laura Bernardini, *U.S. Rethinks Airline Passenger Screening Plain: CAPPs II Was to Gather Personal Data; Alternative Program a Priority*, CABLE NEWS NETWORK, July 15, 2004, at <http://www.cnn.com/2004/TRAVEL/07/15/passenger.background/index.html> (last visited Sept. 10, 2004). Certain aspects of the former CAPPs II will continue to be developed, while the overall project has been terminated. *Id.*

federal government attempts to develop technology to screen potential threats to airline travel. Predecessors to CAPPS II are already in the early stages of development.³⁹

II. HISTORICAL PERSPECTIVE: NATIONAL SECURITY DURING TIMES OF CRISIS

A. Internment of Japanese Citizens During World War II

When war against Japan erupted after the attack on Pearl Harbor, many military authorities deemed Japanese non-citizens and citizens a serious threat to national security.⁴⁰ On February 19, 1942, President Franklin Roosevelt issued Executive Order 9066 [hereinafter “Order 9066”], which declared “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”⁴¹ In addition, Order 9066 provided discretionary powers to the Secretary of War and other military commanders designated by President Roosevelt to “proscribe military areas” by which the designees have the power to exclude any persons, as well as restrict ingress and egress to the created military zone.⁴² On March 21,

³⁹ *Id.* See also *Aviation Security Program Struggles: Even Coming Up With Name Is Difficult*, CABLE NEWS NETWORK, Aug. 11, 2004, at <http://www.cnn.com/2004/TRAVEL/08/11/passenger.privacy.ap/index.html> (last visited Sept. 10, 2004).

⁴⁰ WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 698 (Foundation Press 11th ed. 2001).

⁴¹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

⁴² *Id.* On February 20, President Roosevelt, pursuant to the Order 9066, designated Lt. General J.L. DeWitt Commander of the Western Defense. See *Korematsu v. United States*, 323 U.S. 214, 229 (1944) (Roberts, J., dissenting). General DeWitt promulgated a series of rules applying to persons of Japanese ancestry. See e.g., Public Proclamation No. 1., 7 Fed. Reg. 2320 (Mar. 2, 1942). Proclamation No. 1. states that the entire West Coast is “particularly subject to attack, to attempted invasion . . . and subject to espionage and acts of sabotage. *Id.* Under this perceived threat, General DeWitt created Military Areas Nos. 1 and 2. *Id.*; see also Public Proclamation No. 2, 7 Fed. Reg. 2405 (Mar. 16, 1942); Public Proclamation No. 4, 7 Fed. Reg. 2601 (May 9, 1942); Civilian Restrictive Order No. 1, 8 Fed. Reg. 983 (May 19, 1942). One rule established a curfew applicable to persons of Japanese ancestry between the hours of 8:00 P.M. and 6:00 A.M. COHEN & VARAT, *supra* note 40, at 698. As a result, Gordon Kiyoshi Hirabayashi was convicted under the 1942 Act for violating of the curfew established by General DeWitt. *Id.* In *Hirabayashi v. United States*, 320 U.S. 81 (1943), Justice Stone stated that “distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine equally.” *Id.* at 100. However, the Supreme Court found adequate evidence that persons of

Congress passed legislation⁴³ providing criminal sanctions for any person who violated an order established pursuant to Order 9066.

On March 18, President Roosevelt issued Executive Order 9102, which established the war relocation authority “in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security.”⁴⁴ Under the executive order, a series of Exclusion Orders were promulgated proscribing that “all persons of Japanese ancestry, both alien and non-alien, were to be excluded from” the military zones created under Order 9066.⁴⁵ When the threat finally dissipated, in excess of 120,000 individuals of Japanese ancestry were removed from their homes under the threat of criminal sanctions and relocated to detention camps.⁴⁶

Japanese ancestry presented a special danger to the security and General DeWitt’s establishment of a curfew was adequate means to protect against the dangers presented. *Id.* at 104-05.

⁴³ Act of Congress, 56 Stat. 173, 18 U.S.C. § 97a (1942). The Act provides as follows,

[W]hoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Id.

⁴⁴ Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942). The Order provided that

[t]he Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War to appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

Id.

⁴⁵ Exclusion Order No. 34., 7 Fed. Reg. 3967 (May 3, 1942).

⁴⁶ *See* Korematsu, 323 U.S. at 236 (Roberts, J., dissenting).

In a series of decisions, the Supreme Court, unwilling to second guess the war-making branches' authority, deferred judgment and upheld the exclusion and internment of persons of Japanese ancestry as a valid exercise of constitutional power.⁴⁷ In one of the most infamous of these cases, *Korematsu v. United States*,⁴⁸ the Court held Executive Order 9066 and the corresponding acts of Congress did not exceed the President and Congress's war powers. Toyosaburo Korematsu, an American citizen of Japanese decent, violated a military exclusion order by remaining in his home in San Leandro, California.⁴⁹ Justice Black, writing for the majority, opined that while constitutionally suspect, "compulsory exclusion" may be justified during times of "emergency and peril" based on the "twin dangers of espionage and sabotage."⁵⁰

B. Vietnam, Domestic Security, & The Warren Court

In October of 1962, for fourteen days, the world held its collective breaths as John F. Kennedy and Nikita Krushchev played the highest stakes chess match ever before witnessed. The board was Cuba, and the pieces were intercontinental ballistic missiles, and the possible result was global scale nuclear war. A year after the Cuban Missile Crisis, on November 22, 1963, President Kennedy was shot and killed in Dallas, Texas.⁵¹ Prior to his death, President Kennedy sent United States Military officials to South Vietnam based on a perceived growing communist

⁴⁷ See *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁴⁸ *Korematsu*, 323 U.S. at 224.

⁴⁹ *Id.* at 215.

⁵⁰ *Id.* at 220, 217

⁵¹ See The History Channel, *Kennedy, John Fitzgerald*, at http://www.historychannel.com/perl/print_book.pl?ID=95527 (last visited Sept. 10, 2004).

threat, which eventually lead to the Vietnam War.⁵² On April 4, 1968, James Earl Ray gunned down civil rights leader Martin Luther King, Jr. outside the Lorraine Motel in Memphis, Tennessee.⁵³ While exiting the Ambassador Hotel in Los Angeles, Democratic Presidential hopeful Robert F. Kennedy was shot and killed on June 5, 1968, by Sirhan B. Sirhan.⁵⁴

The Warren Court, during this time of crisis, crippled the federal government's domestic security agenda with a number of decisions.⁵⁵ During the 1964 term, the Court held a section of the Subversive Activities Control Act [hereinafter "SAC Act"], which made it a felony for a member of the Communist Party to apply for, or use a passport, unconstitutional.⁵⁶ The following term, the Court struck down a statute⁵⁷ requiring the postal department to detain and destroy mail received from a foreign county perceived to be "communist political propaganda" unless the addressee notified the post office and requested delivery.⁵⁸ The Court also held a federal statute⁵⁹ making it a crime for a member of the Communist Party to serve as an officer or employee in a labor union unconstitutional. In yet another case, the Court held that orders of the

⁵² *See id.*

⁵³ *See* The History Channel, *King, Martin Luther, Jr.*, at http://www.historychannel.com/perl/print_book.pl?ID=95833 (last visited Sept. 10, 2004).

⁵⁴ *See* The History Channel, *Kennedy, Robert Francis*, at http://www.historychannel.com/perl/print_book.pl?ID=95530 (last visited Sept. 10, 2004).

⁵⁵ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 485, 313 (2000). The focus of this note was on domestic security; therefore, the case law used is an extremely small cross section of the Warren Court. In fact, the largest advancements for civil rights were made by the Warren Court in the area of criminal law. *See id.; see, e.g.,* *Terry v. Ohio*, 392 U.S. 1 (1968), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁶ *See* *Aptheker v. Secretary of State*, 378 U.S. 500 (1959). Discussed by author in greater detail within the text of Part I.

⁵⁷ *Postal Service and Federal Employees Salary Act of 1962*, 76 Stat. 840, 39 U.S.C. § 4008(a) (1962).

⁵⁸ *Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965).

⁵⁹ *Labor Management Reporting and Disclosure Act of 1959*, 73 Stat. 536, 29 U.S.C. § 504 (1958).

SAC Board requiring individuals to register as members of the Communist Party violated the Fifth Amendment privilege against self-incrimination.⁶⁰

In *United States v. Robel*,⁶¹ the Court struck down a section of the SAC Act making it unlawful for Communists to work in the defense field. *Robel* “brought the domestic security apparatus to a halt.”⁶² Chief Justice Earl Warren asserted, “the phrase ‘war power’ “cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. [E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”⁶³ Chief Justice Warren continued,

[the] concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.⁶⁴

After *Robel*, the SAC Act was further rendered meaningless when the Court meticulously struck down section after section.⁶⁵ While the President and Congress decimated individual rights under the pretext of communism as a perceived threat to national security, the Warren Court felt compelled to protect and advance individual liberties.

⁶⁰ *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

⁶¹ *United States v. Robel*, 389 U.S. 258 (1967).

⁶² POWE, *supra* note 55, at 316.

⁶³ *United States v. Robel*, 389 U.S. at 264.

⁶⁴ *Id.*

⁶⁵ POWE, *supra* note 55, at 316.

III. LESSONS LEARNED? NATIONAL SECURITY DURING TIMES OF CRISIS

A comparison of history and post September 11th antiterrorism policy reveals an absolute disregard for lessons derived throughout the history of the United States. Several times in the past, the federal government has been forced to react to what was deemed a threat of national security. Justice William J. Brennan stated that after the supposed threat to national security has dissipated, “the United States has remorsefully realized that the abrogation of civil liberties was unnecessary.”⁶⁶ Furthermore, Justice Brennan notes, the United States continues to repeat the same errors when faced with subsequent threats.⁶⁷

A. *The Revitalization of Korematsu: “The War On Terror”*

Prior to the attacks of September 11th, *Korematsu*, upholding the internment of American citizens and non-citizens of Japanese ancestry, was treated with disgust, disdain, and considered an anomaly in the Supreme Court’s jurisprudence.⁶⁸ After the attacks, *Korematsu* has been resuscitated. The rubberstamping of the war-making branches of the government in *Korematsu* created a dangerous precedent. In Justice Jackson’s dissenting opinion, he warned that such deference creates a “loaded weapon” to be used by the government if it can assert a “plausible claim” of national emergency.⁶⁹

⁶⁶ Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 273-74 (2003) (quoting William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, 18 ISR. Y.B. HUM. RTS. 11, 11 (1988)).

⁶⁷ *Id.*

⁶⁸ Elbert Lin, *Korematsu Continued . . .*, 112 YALE L.J. 1911, 1912 (2003). In 1971, Congress repealed (*see* 18 U.S.C. § 4001(a) (1971)) the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.*, which provided the President with the authority to detain persons when faced with “internal security emergencies,” similar to the internment of Japanese citizens and non-citizens. *See Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2639 (2004).

⁶⁹ *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The attacks of September 11th, 2001, armed the United States government with the “plausible claim,” for which the Bush administration did not hesitate to unleash the “loaded weapon” established in *Korematsu*. Congress passed a Joint Resolution [hereinafter “AUMF”], which authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States. . . .”⁷⁰ Pursuant to the AUMF, President Bush issued Executive Order 57833, which proclaimed that in order “[t]o protect the United States . . . , and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . be detained, and . . . tried for violations of the laws of war and other applicable laws by military tribunals.”⁷¹ Individuals subject to this order are allegedly non United States citizens who are or were a member of Al Qaeda, or have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism,” or finally, anyone who provides safe haven to either of the former.⁷² Unmistakably, the “war on terror,” as well as the siege on civil rights, was underway.

B. The Rehnquist Court & “The War On Terror” Trilogy

By the year 2003, the “war on terror” has spawned several cases that have slowly begun to work their way up through the federal court system towards the United Supreme Court. The

⁷⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁷¹ Military Order, Detention, Treatment, and Trial of Certain Non- Citizens in the War Against Terrorism § 2(A)(1)(i)-(iii), 66 Fed. Reg. 57,833, 57,834 (2001).

⁷² *Id.*

Supreme Court recently granted *certiorari* in three pivotal cases; *Hamdi v. Rumsfeld*,⁷³ *Rasul v. Bush*,⁷⁴ and *Rumsfeld v. Padilla*⁷⁵ [collectively hereinafter “war on terror trilogy” or “trilogy”].

In *Hamdi*, the Supreme Court was asked to decide whether the detention of American citizens was valid, and what process is due, if any, to those were apprehended and detained pursuant to the “war on terror.”⁷⁶ Justice Sandra Day O’Connor, writing the plurality opinion, announced that the AUMF authorized the classification and detention of those labeled “enemy combatants” by the Executive branch and consequently, the President did not exceed his constitutional powers.⁷⁷ The Court then turned its attention to the question of what process, if any, is due to an American citizen who is labeled as an “enemy combatant” by the government to challenge that classification.⁷⁸ The plurality concluded that a citizen-detainee has a right to challenge his classification as an “enemy combatant” and detention before a neutral decision-maker, denial of which would amount to an abrogation of due process.⁷⁹

⁷³ *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633 (2004).

⁷⁴ *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004).

⁷⁵ *Rumsfeld v. Padilla*, ___ U.S. ___, 124 S. Ct. 2711 (2004).

⁷⁶ *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633 (2004). Yaser Esam Hamdi, a citizen of Louisiana, was accused of “[taking] up arms with the Taliban during” the conflict in Afghanistan. *Id.* at 2635. Hamdi was classified by the government as an “enemy combatant;” detained indefinitely, denied the right to legal counsel, and was without notice of any “charges pending, or against him.” *Id.* at 2635.

⁷⁷ *Id.* at 2643.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2648.

In so holding, Justice O'Connor discussed the necessity of balancing the government's national security interest against individual civil rights during a time of continuing hostilities.⁸⁰

Furthermore, Justice O'Connor proclaimed,

it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.⁸¹

While conceding that the government's interest in detaining threats is "critical," Justice O'Connor warned that "history and common sense teach us that an unchecked system of detention carries the potential to become the means for oppression and abuse of others who so not present that sort of threat."⁸²

The Supreme Court connected with another swift blow to the Bush administration's call for extreme deference in the guise of federalism, when it handed down its decision in *Rasul*. In *Rasul*, the Supreme Court determined that federal district courts have jurisdiction to hear habeas

⁸⁰ *Id.*

⁸¹ *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 2648 (2004).

⁸² *Id.* at 2647. Justice O'Connor stated "history and common sense teach us that an unchecked system of detention carries the potential to become the means for oppression and abuse of others who so not present that sort of threat." *Id.* conversely, Justice Antonin Scalia observed, in his dissenting opinion, that

[m]any think it not only inevitable but entirely proper that liberty give way to security in times of national crisis--that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

Id. at 2674 (Scalia, J., dissenting).

corpus challenges brought by foreign nationals incarcerated at the Guantanamo Bay, Cuba; challenging the validity of their detention.⁸³

The Executive branch reeling from the Supreme Court's recent onslaught, finally obtained a slight reprieve when the Court refused to decide *Padilla v. Bush* on the merits, since the majority determined that Petitioner's habeas corpus request was filed in the wrong district court and, in addition, named the wrong defendant.⁸⁴ However, the probable outcome will indubitably mirror that of the recent decision of *Hamdi*.

The "war on terror" trilogy demonstrates that the Supreme Court early on seems to be mindful of lessons learned by this Nation through times of national peril leading to the egregious deprivation of individual rights. The Court emphatically reinforced the notion that the constitution and the judiciary, however inconvenient in the President's fight against terrorism, are not silenced nor suspended during times of hostilities. It appears the Rehnquist Court is pursuing the delicate balancing approach established by the Warren Court, rather than the dangerous rubberstamping deference of *Korematsu*.

IV. CONCLUSION

After the terrorist attacks of September 11th, President Bush and his administration have urged patience in the "war on terror," while hastily enacting some of the most progressive antiterrorism legislation. Such myopic legislation and directives on the surface may seem appropriate; however, history demonstrates a need for proportionality. Justice Brennan asserted,

⁸³ *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686, 2698 (2004). Justice John Paul Stevens, writing for the majority, concluded that 28 U.S.C. § 2241, conferred jurisdiction to the federal courts to hear habeas corpus challenges to the "Executive's potentially indefinite detention of individuals." *Id.* at 2699.

⁸⁴ *Rumsfeld v. Padilla*, ___ U.S. ___, 124 S. Ct. 2711 (2004). The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is "the person who has custody over [the petitioner]." *Id.* at 2717 (citing 28 U.S.C. § 2422).

“[a] jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger.”⁸⁵

The prescreening system is just one of many examples of recent nearsighted directives, which effects will not be truly recognized until the threat to national security has diminished. The system would create a colossal infrastructure to delve into the private lives of every individual who chooses to travel, and there is no telling in what other ways the system could be utilized. While the Department of Homeland Security has recently announced the abandonment of the major components of the CAPPs II project,⁸⁶ the government appears to be determined in the development and use of electronic technologies in the “war on terror.” During times of national crisis, the Supreme Court must be judicially active to safeguard civil liberties by not providing the type of deference history reveals as perilous.

The 1960s was arguably one of the most volatile decades in recent United States history. With the immense political turmoil, a decade long war, narrowly averted nuclear war, assassinations of predominate political figures, riots, protests, and the civil rights movement, one would assume the United States Supreme Court would defer to Congress and the President in a time of great peril and national crisis. However, the Warren Court was one of the most judicially active Supreme Courts since its inception and has been described as “revolutionary.”⁸⁷ The judicial activism of the Warren Court did not deteriorate the fabric of society or increase the

⁸⁵ Lori Sachs, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1720 (2002) (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986)).

⁸⁶ Bernardini, *supra* note 38.

⁸⁷ POWE, *supra* note 55, at 316 (noting that between 1963 and 1969, the Warren Court overruled thirty-three prior decisions, and altogether the Court overruled 88 prior decisions).

likelihood of a communist takeover. Nuclear war was narrowly averted with the former Soviet Union; yet, the Court took the initiative to strike down the anti-communist legislation enacted by Congress that ran contrary to individual liberties, which in fact, created a stronger Nation.

For a Nation that prides itself as a melting pot consisting of diverse citizenship, racially motivated decisions reminiscent of *Korematsu* under the guise of national security fly in the face of this very notion. National emergencies, perceived or realized, should not dictate the constitutional rights guaranteed. A “state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”⁸⁸ The Warren Court demonstrates that judicial activism can be used as a strategic instrument to strike that delicate balance between individual rights and national security. The “war on terror” trilogy decided by the Rehnquist Court in 2004, was a step in the right direction. However, the decisions were only the initial step in what should be a continuous struggle of national security and preservation of individual rights. In the post September 11th climate, where the legislature and the President are eroding individual liberties, the Supreme Court must be judicially active and mindful of lessons learned.

⁸⁸ Hamdi v. Rumsfeld, ___ U.S. ___, 124 S. Ct. 2633, 2650 (2004).