

CHAPTER ONE

JUDGING THE JUDGES

Courts are the ultimate arbiters of the rule of law, both when handling routine cases and when reviewing the actions of the executive and legislature.¹ This volume deals with six categories of cases: criminal prosecutions, courts-martial, military commissions, habeas corpus petitions, civil damages actions, and civil liberties. The present chapter draws on two strands of historical scholarship – first focusing on courts and then on wartime distortions of law – to contextualize and frame the questions I will address in the later chapters.

COURTS

Analyzing the predicament of antebellum judges asked to enforce the fugitive slave laws, Robert Cover identified four alternatives – prioritizing law over conscience or conscience over law, manipulating the law, or resigning – and explained judges' choices in terms of their personalities, beliefs about natural law, preferences for liberty and the constraints of the judicial function.² South African legal scholars fiercely debated whether judges should resign rather than administer apartheid laws.³ Methods of selection and retention shape judicial action (as shown by the intense politicization of federal court nominations and the increasing influence of campaign contributions on state judicial elections). Courts of general jurisdiction tend to be more independent than specialized tribunals (which can be captured by the domain they adjudicate, just like regulatory agencies).⁴ Although routine prosecutions generally convict by negotiating a guilty plea (which may tacitly condone procedural irregularities), show trials

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conspicuously respect the rule of law, sometimes acquitting.⁵ It is generally easier to resist government action defensively, using law as a shield, than to challenge it actively, wielding law as a sword, which allows the government to raise questions of standing and invoke state secrets, political question, and act of state doctrines. But a proactive government can forum-shop for the most favorable venue in which to prosecute.

Like the executive and the legislature, the judiciary may subordinate liberty to security in times of apparent crisis.⁶ During the Civil War, courts denied habeas corpus to Clement Vallandigham, even though the writ had not been suspended in the jurisdiction where he was held.⁷ Sentencing International Workers of the World members who opposed World War I, ND Ill Judge Kenesaw M. Landis pronounced: “You have a legal right to oppose, by free speech, preparations for war. But once war is declared, that right ceases.”⁸ In a 1919 opinion Justice Holmes wrote for a unanimous Supreme Court upholding the convictions of Charles Schenck and Elizabeth Baer for denouncing conscription. “[I]n many places and in ordinary times the defendants would have been within their constitutional rights.” But “the character of every act depends upon the circumstances in which it is done.” Announcing his famous test, Holmes said their words created a “clear and present danger.” Justice John H. Clarke wrote the *only* dissent to World War I convictions for speech, denouncing the “flagrant mistrial” of the *Philadelphia Tageblatt*, which was “likely to result in disgrace and great injustice . . . because this Court hesitates to exercise the power, which it undoubtedly possesses, to correct, in this calmer time, errors of law which would not have been committed but for the stress and strain of feeling prevailing in the early months of the late, deplorable war.”⁹

One of the Supreme Court’s most shameful moments was its approval of internment of Japanese Americans during World War II.¹⁰ Unanimously affirming Gordon Hirabayashi’s conviction, Chief Justice Stone revealed his discomfort in a triple negative:¹¹ “[W]e cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety.”

Advancing an analogy that would embarrass even a first-year law student, Stone saw no difference between uprooting more than 100,000 Americans, nearly two-thirds of them citizens, and interning them indefinitely in harsh conditions hundreds or thousands of miles from home, and “the police establishment of fire lines during a fire.” The

great civil libertarian, Justice Douglas, concurred because “we must credit the military with as much good faith in that belief” about necessity “as we would any other public official acting pursuant to his duties.” Affirming the conviction of Fred Korematsu a year later, Justice Black echoed Douglas’s credulous deference in his own double negative: “we cannot reject as unfounded the judgment of the military authorities.”¹² He protested (unconvincingly) that “to cast this case into the outlines of racial prejudice ... confuses the issue.” And he offered government a flimsy veil of false necessity – “it was impossible to bring about an immediate segregation of the loyal from the disloyal” – declaring that “hardships are part of war,” as though they were borne equally by Japanese Americans and all others.

This time, however, there were dissents. Justice Murphy (Roosevelt’s former Attorney General) explicitly rebuked Black: relocation goes “over ‘the brink of constitutional power’ and falls into the ugly abyss of racism” (prompting Black’s disavowal, perhaps motivated by unresolved rumors of his earlier KKK membership). And Justice Jackson presciently warned that:

a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself ... the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Justice Rutledge, who joined the majority in both cases, later wrote in extenuation that he had suffered “more anguish” over *Hirabayashi* than any other case. And Douglas claimed he had “always regretted that I bowed to my elders,” conceding that the Court “is not isolated from life ... the state of public opinion will often make the Court cautious when it should be bold.”

During the post-World War II anti-communist hysteria, courts convicted all 11 defendants in the first Smith Act prosecution and 93 of 113 in the second, both of them show trials staged to help Truman win the 1948 election, cheered on by both the *New York Times* and the *Washington Post*.¹³ Dissenting from the affirmation in the first case, Justice Black wrote:

Public opinion being what it is now, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer

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times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

National security prosecutions require courts to decide whether to relax the procedural protections they extend to other accused: admitting illegally obtained or secret evidence, withholding exculpatory evidence, and closing hearings to the public. During the McCarthy era, appellate courts twice reversed Judith Coplon's conviction for espionage and conspiracy because of unlawful FBI surveillance; Learned Hand even publicly rebuked J. Edgar Hoover.¹⁴ In 1972 the government dropped weapons charges against Bill Ayers rather than reveal unlawful wiretaps; but in other Weather Underground prosecutions the Supreme Court invoked national security to uphold the government's refusal to disclose surveillance.¹⁵ CD Cal Judge Byrne dismissed the case against Daniel Ellsberg for leaking the Pentagon Papers because the White House "plumbers" had burgled his psychiatrist's office.

Even during the Civil War, when the US faced a mortal threat, some judges resisted executive pressure to subordinate liberty to security. Chief Justice Taney granted John Merryman's habeas petition, declaring that only Congress could suspend the writ.¹⁶ The Supreme Court reversed Lambdin Milligan's military commission conviction because civilian courts had exclusive jurisdiction whenever they were open. Justice Davis wrote:

[T]he Constitution ... is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

During World War I, D Mont Judge George Bourquin directed the acquittal of a man charged under the Espionage Act because his alleged statements were matters of opinion rather than fact.¹⁷ Bourquin granted habeas to a man facing deportation as a communist, declaring that "he and his kind are less of a danger to America than those who indorse or use the methods that brought him to deportation." (Critics unsuccessfully tried to remove Bourquin from office.) Declaring that the Sedition Act contained "every evil of the old definition of treason," Eighth Circuit Judge Charles Fremont Amidon dismissed more than half the cases brought under the Act

against socialists and agrarian reformers but sustained convictions of German Americans opposed to the war. In Boston, D Mass Judge George W. Anderson secretly arranged to hear the habeas petitions of 20 alleged communists threatened with deportation, asked Harvard law professors Zechariah Chafee and Felix Frankfurter to argue on their behalf, challenged the use of informants, personally questioned government officials, and freed the prisoners, declaring: “this case seems to have been conducted under the modern theory of statesmanship: Hang first and try later.” “The government’s spy system ... destroys trust and confidence and propagates hate. A mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or criminals, loafers and the vicious classes.”¹⁸

SDNY Judge Learned Hand consciously jeopardized his chance of promotion to the Second Circuit by enjoining enforcement of the Espionage Act against *The Masses*.¹⁹ After being reversed, he instructed the jury that “every man has the right to have such economic, philosophic or religious opinions as seem to him best whether they be socialist, anarchistic or atheistic.” (He was passed over for a vacant position on the Court of Appeals that year but appointed to it seven years later.)

Five months after upholding Schenck’s conviction, Justice Holmes qualified that opinion (and his “clear and present danger” test) in language that became even more influential when he dissented from the Court’s affirmation of the Espionage Act convictions of Jacob Abrams and others.²⁰ (Holmes probably was influenced by meeting Zechariah Chafee, who had written a critical article about the *Schenk* opinion, and by corresponding with Learned Hand and Harold Laski.²¹)

[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its operations would hinder the success of the government’s arms ... [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good they desire is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out ... That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment ... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe

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to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²²

Holmes's insistence three times in the final sentence that the danger must be "imminent" or "immediate" was telling, given his earlier requirement that it only had to be "present."

Six years later Holmes dissented from the affirmation of Benjamin Gitlow's conviction for violating New York's Criminal Anarchy Law by publishing a "Left Wing Manifesto." "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement of its birth."²³

A few years after that, Brandeis (joined by Holmes) wrote in a concurrence upholding Charlotte Whitney's conviction under California's Criminal Syndicalism Act for belonging to the Communist Labor Party:

Those who won our independence ... 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] discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people ... [that] it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government ... Fear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women.²⁴

The Governor of California quoted their opinion when pardoning Whitney a month later.

In a dissent two years later, Holmes offered another memorable formulation: "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."²⁵ Invalidating a California law prohibiting display of a red flag, Chief Justice Hughes wrote in 1931 that "the maintenance of the opportunity for free political discussion to the end that government may be responsible to the will of the people and that changes may be obtained by lawful means is a fundamental principle of our constitutional system."²⁶

Soon after the USA entered World War II, the Supreme Court upheld a Pennsylvania school district's expulsion of Jehovah's Witnesses for refusing to salute the flag. "[W]e live by symbols," Frankfurter explained, and the flag "is the symbol of our national unity, transcending all internal differences." But the Court, in a rare action, reversed itself just three years later (symbolically on July 4). "[I]f there is any fixed star in our constitutional constellation," Justice Jackson wrote, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or other matter of opinion or force citizens to confess by word or act their faith therein." The "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."²⁷

That year the Court overturned the denaturalization of Communist Party president William Schneiderman, declaring: "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder ... and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time."²⁸

After upholding the early Smith Act convictions, the Supreme Court gradually changed course in the wake of Stalin's death, the end of combat in Korea, Senate condemnation of Joseph McCarthy, and the replacement of four Justices.²⁹ The Court declared that "mere doctrinal justification of forcible overthrow" of the government, even "if engaged in with the intent to accomplish overthrow," was not punishable because it was "too remote from concrete actions." In another case the Court held that government could not punish membership in an organization unless the individual knew of its illegal advocacy, was an "active" member, and had a "specific intent" to further its illegal ends. Elsewhere the Court limited the use of paid informants and let the defense see FBI surveillance evidence. It ruled that the Loyalty Review Board lacked authority to conduct post-audit hearings after two other boards had exonerated an individual;³⁰ only civil servants with access to sensitive information could be summarily dismissed;³¹ federal sedition law preempted state laws;³² and New York could not treat invocation of the Fifth Amendment as resignation from employment.³³ But though the government lost all 12 prosecutions involving communists during the 1956 term, the Court upheld the convictions of witnesses who refused to testify before the House Committee on Un-American

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Activities (HUAC), perhaps to deflect efforts to strip courts of jurisdiction in national security matters.³⁴

Although Lyndon Johnson's Attorney General, Ramsey Clark, refused to prosecute organizers of the anti-war demonstrations at the 1968 Democratic National Convention in Chicago, Nixon's Attorney General, John Mitchell, secured indictments of eight, leading to a notorious travesty of justice.³⁵ ND Ill Judge Julius Hoffman displayed blatant hostility to the defendants during the four-and-a-half-month trial, binding and gagging Bobby Seale before declaring a mistrial and sentencing him to four years for contempt of court. The jury acquitted the others of conspiracy but convicted five of crossing state lines with intent to incite a riot.

Judge Hoffman sentenced them to the maximum of five years and both them and their lawyers to another 2.5–4 years for contempt. After the Seventh Circuit reversed all the convictions, the government retried the contempt charges. The new judge convicted three defendants and one lawyer on just 13 of the original 175 contempt charges, but declined to sentence them because they had been goaded by Judge Hoffman's improper, provocative, and "condemnatious" conduct.

When the Department of Justice (DoJ) prosecuted White Panther Party members for bombing the CIA office in Ann Arbor, Attorney General Mitchell declared the FBI could wiretap without a warrant in whatever it "deems a 'national security' case."³⁶ ED Mich Judge Damon Keith ordered the government to disclose its surveillance or drop the case, and the Supreme Court unanimously affirmed. Justice Powell (a Nixon appointee) wrote that the Fourth Amendment "cannot properly be guaranteed if domestic surveillance may be conducted solely within the discretion of the executive branch."

Other courts also overturned convictions of government critics. After Benjamin Spock, William Sloane Coffin Jr., Mitchell Goodman, and Michael Ferber were convicted of conspiracy to aid draft violators and sentenced to two years for what D Mass Judge Francis Ford called an act "in the nature of treason," the First Circuit reversed on technical grounds, and the government did not retry them.³⁷ Prosecutions of those protesting the Vietnam War or the draft in Catonsville, Maryland, Kansas City, Missouri, Evanston, Illinois, and Gainesville, Florida collapsed or were dismissed or reversed on appeal because of unlawful surveillance. Mass arrests of demonstrators required courts to deal with evidentiary flaws and due process violations.³⁸

After police arrested 13,400 protesters camped on the Washington Mall in May 1971, courts convicted only 745 for demonstrating without a permit.³⁹ Three years later a federal jury awarded \$12 million to those wrongly arrested on the Capitol grounds. Six months after that a federal judge found massive civil liberties violations during every major Washington demonstration between 1969 and 1975 and ordered all arrest records expunged.

The Supreme Court granted constitutional protections to a variety of 1960s protesters. It extended conscientious objector status to those who did not believe in a Supreme Being⁴⁰ and struck down the Selective Service reclassification and induction of anti-war demonstrators.⁴¹ Affirming the right of a high school student to wear a black arm band to oppose the war, Justice Fortas wrote that students do not “shed their constitutional rights to freedom of speech or expression at the school-house gate.”⁴² Justice Harlan reversed a flag-burning conviction, declaring that the First Amendment protected “excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols.”⁴³ Overturning a conviction for wearing a shirt declaring “Fuck the Draft” in a government building, Justice Harlan echoed Holmes:

The constitutional right of free expression is a powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.⁴⁴

Explicitly limiting Holmes’s “clear and present danger” test, the Court reversed a KKK member’s conviction because the actions he advocated were not imminent.⁴⁵ When lawyers began asking courts to enforce human rights treaties in the 1980s, judges appointed by Democratic presidents were more likely to do so than those appointed by Republicans.⁴⁶

Juries may resist government pressure to convict. A jury acquitted the publisher Andrew Zenger, charged with defaming the royal governor of New York, even though truth was no defense to seditious libel.⁴⁷ John Merryman was accused of treason for allegedly burning bridges during

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the Civil War but never tried because no Maryland jury would convict him.⁴⁸ Juries hung in both prosecutions of *The Masses* under the Espionage Act of 1917. The government indicted 27 Communist Party members for the 1920 bombing of J.P. Morgan and Co. (which killed 38 and injured hundreds, making it one of the worst terrorist attacks in the USA until 9/11), even though it was almost certainly perpetrated by anarchists.⁴⁹ But the jury convicted only the Party's president and could not agree about another defendant after being told it had to find he had "advocated crime, sabotage, violence and terrorism." The government never tried the rest. Juries refused to convict some who protested the draft and the Vietnam War.⁵⁰

Latin American countries have been less protective of the rule of law in times of crisis.⁵¹ Chilean courts rejected almost all the thousands of habeas petitions filed on behalf of those missing or detained by the Pinochet regime.⁵² On the rare occasions when courts granted a petition, the junta ignored them. Even after the restoration of democracy, the Chilean Supreme Court held that international treaties could not retroactively abrogate the amnesty Pinochet had granted his subordinates, and civilian courts could not hear cases against the military. By 1994, however, the Appeals Court circumvented the amnesty by finding that kidnapping was a continuing offense. In 2006 the Supreme Court invoked the Convention against Torture (CAT) to hold there could be no amnesty for crimes against humanity and no statute of limitations for grave human rights violations like torture. The following year the Appeals Court found there had been a systematic pattern of state violence abrogating fundamental human rights and the government had a duty to prosecute. El Salvador courts failed to punish the military for murdering five priests, their housekeeper, and her daughter.⁵³ When Spain tried to prosecute those responsible (because some victims were Spanish), El Salvador rebuffed the extradition request. Guatemalan courts were unable to convict and punish numerous human rights violators.⁵⁴ The Constitutional Court reversed the conviction of Efraín Ríos Montt (a former general, president, and president of Congress) for genocide and crimes against humanity. When Peruvian courts blocked accountability for a military massacre, victims obtained a default judgment in a US court but could not execute it.⁵⁵

Soon after the first intifada began in Israel in 1987 the Landau Commission endorsed "moderate physical" and "non-violent psychological" pressure during interrogations.⁵⁶ Starting in 1994 human rights lawyers brought every case of suspected torture to the Supreme