Striking a balance between Fundamental Rights and National Security: The Frailty of First Amendment Protections in the Face of Fear and the “War on Terror”

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Recommended Citation
Rogers, Stephen (2016) "Striking a balance between Fundamental Rights and National Security: The Frailty of First Amendment Protections in the Face of Fear and the “War on Terror”*, Liberated Arts: a journal for undergraduate research: Vol. 2 : Iss. 1 , Article 7. Available at: https://ir.lib.uwo.ca/lajur/vol2/iss1/7
Striking a balance between Fundamental Rights and National Security: The Frailty of First Amendment Protections in the Face of Fear and the “War on Terror”

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Abstract: It is commonly supposed that most, if not all rights and freedoms can be justifiably infringed upon by the state (with proper safeguards against arbitrary infringements). Few would argue against the legitimacy of governments placing limitations on fundamental rights in order to ensure the physical well-being of their citizens and the ultimate safety of the state against internal and external threats. Yet, states must exercise caution when drafting policy and legislation that are rights limiting. They must strike a balance between protecting the safety of the state and their citizens through laws that are rights-limiting, while also safeguarding the rights and freedoms of their citizens. Only by doing so can a state ensure safety and security, while also providing rights and freedoms to its people. Often when situations arise in which the national security of a country is put in jeopardy, state actors, as well as the people, become increasingly willing to have the scale that weighs security against liberty tip in the favour of security. That being said, it is the role of the judiciary in a state to ensure this balance is appropriately and accurately struck, even in the face of hyperbole and a culture of fear. In the context of the United States, the Supreme Court has proven largely ineffective at combatting this fearfulness in the wake of the 9/11 terrorist attacks and the subsequent “war on terror”. Consequently, First Amendment protections have been notably frail in the wake of legislation attempting to mollify the pressures associated with attempting to prevent any future attack as the Supreme Court largely defers to the Executive and intelligence agencies.

Key Words: United States, Supreme Court, First Amendment, National Security, War on Terror, Rights and Freedoms.
The United States has long regarded itself as a bastion and steward of freedom in the world. “Land of the free, and home of the brave” goes the American national anthem, *The Star-Spangled Banner*, and the country takes that to heart. Since its inception, liberty and freedom have been of paramount importance to American socio-political culture. The concepts of fundamental freedoms such as freedom of speech are held as American values, not only liberal values. While a borderline fanatical support of and fascination with freedom is still widespread in the United States today, the protection of freedom in situations regarding national security does not correspond with the resolute defense of liberty in American political culture. Striking the balance between protecting fundamental freedoms and protecting national security is often viewed by many in a society’s populace as a contrast between chaos and order. Therein lies a paradox within the American culture of values and beliefs; despite the country’s passionate affection for freedom, its citizens (for the most part) have a strong affinity for order and security, not to mention an inclination to fearfulness. Six months after the 9/11 attacks on the World Trade Centre, a study revealed that 70 percent of individuals polled were not concerned about sacrificing personal freedoms if they could be guaranteed safety from terrorist threats. In another study, 31 percent of respondents thought that a group should not be allowed to hold a rally for an unpopular cause. This desire for order and fear of conflict (especially in regards to terrorism) results in a notably inadequate protection of First Amendment rights when dealing with some matters of national security as citizens, Congress, and the Supreme Court defer to the assumed wisdom of the Executive and its intelligence agencies to provide security. This deference is pronounced in instances where the perceived threat to national security is anticipated as substantial and the fear deriving from the threat is notably high.
This essay will examine the considerations that have influenced the United States’ judiciary in determining the appropriate balance between First Amendment rights and maintaining national security. It will be clear that the main considerations have been the severity of infringements upon the First Amendment right, and the severity of perceived threats to national security. The phrase, “perceived threat” is important as judgements are made on the appropriateness of the rulings. Furthermore, it will be evident that currently the United States’ judiciary cannot be securely relied upon to comprehensively protect First Amendment rights in the context of the supposed ‘War on Terror’ and its resulting national security pressures on behalf of Congress and the Executive.

Though it may seem obvious, “national security” as a concept will be defined for the specific purposes of this essay. Henceforth, “national security” will convey the interest that a government and its legislatures have in protecting the state and its people from crises that put their well-being in jeopardy. While the idea used to pertain to matters of the military, today the concept largely extends to include other policy areas such as the economy and diplomacy. Of crucial importance in the understanding of national security is the idea of “crises” in the provided definition. Hence, the well-being of the state and its citizens must be in considerable jeopardy for the concept of national security to be applicable. The issue at hand cannot be minor in nature.

The First Amendment of the United States’ Constitution states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Due to length constraints and in the interest of providing a competent analysis, the examination of First Amendment
protections regarding national security will be confined to the Free Speech Clause and the Freedom of the Press Clause.

The First Amendment serves the fundamental purpose to encourage in society “the free flow of ideas and opinions on matters of public interest and concern… [which are] essential to the common quest for truth and the vitality of society as a whole” ⁴ However, equally imperative to the vitality of society is the security of the state and its citizens. As such, while the United States judiciary may stringently protect First Amendment rights in ordinary circumstances (as will be made evident), the courts also protect the government’s ability to infringe upon First Amendment rights in a restrained manner regarding pressing matters of national security. Such infringements are justified in national security contexts using an argument for the “greater good” nature that posits that the utility of exercising First Amendment rights in some circumstances – especially during times of war – is lesser than the utility offered by infringing those rights in order to protect the national security of the country.

First Amendment controversies and judicial challenges were non-existent prior to the adoption of the Fourteenth Amendment and its Equal Protection Clause, without which the First Amendment arguably did not apply to local and state governments.⁵ Even still, Supreme Court cases dealing with the First Amendment were very rare until Gitlow v. United States (1927), when the Supreme Court declared First Amendment rights were indeed included in the Equal Protection Clause of the Fourteenth Amendment.⁶ With the adoption of the Fourteenth Amendment, there was a further change in the national attitude and political environment that resulted in the contemporary application of the First Amendment in United States jurisprudence.

The first case in which a standard of protection was created for First Amendment rights was that of Schenck v. United States (1919). Schenck was a member of the Socialist Party in
Philadelphia who distributed literature that condemned conscription and encouraged a boycott of the draft. He was convicted under the Espionage Act of 1917 of urging unlawful behaviour, which the Supreme Court unanimously upheld in its decision, declaring that the free speech clause of the First Amendment did not protect him. Justice Holmes famously recognized in the court’s decision that the right to speak freely does not extend to permitting one to shout “Fire!” in a crowded theatre, and states that “the question in every case is whether the words are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Ergo, the Court ruled against Schenck’s First Amendment rights and conceived of Schenck’s actions as creating a clear and present danger. This created the “clear and present danger” test.

Holmes considered himself to be a progressive and a libertarian and was heavily criticized by his respected colleagues for his decision in the aftermath of Schenck v. United States (1919), which he took to heart. He addressed his perceived shortcomings in the previous ruling in Schenck in Abrams v. United States (1919), which was a case similar in nature in which Adams and others were charged and convicted under the Sedition Act of 1918 for inciting resistance to the war effort. The conviction of the Abrams defendants was upheld using a “bad tendency” test, which was a standard where speech was prohibited in cases where it had a tendency to result in illegal activity. In a 7-2 ruling, Holmes along with Justice Brandeis dissented, providing powerful and influential dissenting opinions and using the “clear and present danger” test in the process. Holmes differentiated the facts of Abrams from that of Schenck, arguing that the distributed leaflets were nothing more than hyperbole and that the onus was on the government to prove that the speech was both intentional and would result in creating a clear and imminent danger. The Holmes-Brandeis dissents asserted that such intent and
imminence was absent. Further, Holmes and Brandeis defended this refined “clear and present danger” test from different perspectives. Holmes theorized a “marketplace of ideas” argument, stating, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”12 Diversely, Brandeis advanced an argument for the engagement of the populace in a democracy, stating that “the greatest menace to freedom is an inert people, [and] public discussion is a political duty.”13

The progression of the Holmes-Brandeis perspective on the necessity of free speech and the First Amendment was delayed by the “McCarthy Era” and another wave of fear surrounding communism in the wake of World War Two, reminiscent of the sentiments that prevailed in the Schenck and Abrams cases decades prior. Restrictive new laws were enacted such as the Smith Act 1940, which made it illegal to “knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence…”14 The “bad tendency” approach of Abrams gave way to the “clear and probable danger” standard in the case of Dennis v. United States (1951) in which some communist leaders in the United States were convicted under the Smith Act (and upheld).15 It was unclear whether it was the presence of a greater conspiracy to overthrow the government, or simply the seditious nature of the expressive content.16 In Yates v. United States (1957), Justice Harlan overturned Yates’ conviction and set the precedent that “those to whom the advocacy is addressed must be urged to do something, rather than merely to believe in something.”17 This decision, and the decision of further cases of a similar type, effectively suppressed the Smith Act’s ability to prosecute due to the daunting burden of proof. For a decade and a half after Dennis, the Supreme Court relied on an approach of ad hoc balancing between
private and public interests in cases concerning the First Amendment, portraying a substantial deviation from using a clear, interpretive doctrine.\textsuperscript{18}

The current precedent for First Amendment liberties came with a changed composition of the Supreme Court in the 1960s, forming what would be known as the Warren Court. The Warren Court revolutionized how First Amendment rights were addressed in the United States judiciary and greater American political culture through their ruling in \textit{Brandenburg v. Ohio} (1969). In \textit{Brandenburg v. Ohio}, a Ku Klux Klan leader appealed a conviction under Ohio law that criminalized advocating violence. The Supreme Court overturned this conviction, declaring that, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{19} This “imminent lawless action” standard articulated in \textit{Brandenburg} reinstated the Holmes-Brandeis protections espoused decades earlier, and further strengthened them by making clear that there had to be proof that it was probable the advocacy was to be acted upon; the advocacy of clear and imminent action was not sufficient by itself.\textsuperscript{20} This test of imminent lawless action has provided the foundation for the incredibly rigid protection of the right to free speech that we see today in the United States.

With this progression of First Amendment jurisprudence in the first half of the 20\textsuperscript{th} century, from the tests of “clear and present danger,” to “bad tendency,” to “clear and probable danger”, to an ad hoc balance and finally to “imminent lawless action,” the considerations taken into account by the Supreme Court have primarily been the severity and imminence of the danger posed to national security and the severity of the restriction on the fundamental right/freedom. Up to now, judicial considerations regarding the First Amendment and its
exceptions have been confined to the Free Speech Clause of the First Amendment. However, the relevance of the fundamental rights enshrined in the First Amendment to the issue of national security is not limited to freedom of expression and its suppression. Freedom of the press is also an enshrined right within the First Amendment, press pertinent to the issue of national security, that will be explored from this point forth (notably, free speech and free are not the only two that are relevant: freedom of assembly and of religion are also applicable). The issue of secrecy in government operations and its repercussions will also be examined due to its pertinence to the health of free speech and to free press, before examining the treatment of those rights in respect to the recent “War on Terror.”

Aside from the contradiction between liberty and security, an inherent conflict in any functioning constitutional democracy is the balancing act required between ensuring openness and transparency whilst maintaining a level of secrecy around certain governmental affairs to foster the success of these specific operations and provide for good governance. Simply, secrecy is detrimental and yet also essential to any healthy, constitutional democracy. There are instances when from a utilitarian perspective, the public interest is better served by the government withholding information from the public (the degree of this secrecy and the manner in which it is permitted is not to be debated here). In no instance, from a government’s perspective, is secrecy more essential than in cases of national security. Yet, it is impossible, or nearly so, to protect First Amendment rights and uphold freedom of speech and freedom of the press if actions cannot be held to accountability. Actions cannot be held to accountability if many or most government actions and affairs are undertaken behind a veil of secrecy. Such an approach becomes drastically more concealing when matters of national security are involved. This veil is made possible by the government measure of classifying documents. The United
States Government can declare any information that “could be expected to cause damage to the national security” to be classified. Millions of government officials are allowed to impose this designation, resulting in the billions of documents over the past 25 years that have been declared classified and hidden from view.

The most substantial and effective tool used in the fight against these secrecy pressures on free speech and freedom of the press is the Freedom of Information Act (FOIA). The FOIA grants all citizens the ability to request the disclosure of government files and information. Despite it being created with the purpose of making government records publicly available, the FOIA still has a total of nine exemptions permitting the withholding of information. Principally, there is an exception for denying access to information that is “in the interest of national defense or foreign policy.” Recently in the wake of the “War on Terror” the Executive, chiefly the Bush Administration, has relied on a “state secrets” privilege that they argue is inherent in the Constitution and which was recognized in United States v. Reynolds (1953), to prevent citizens challenging dubious constitutional government actions such as surveillance by intelligence agencies. Though Congress and the courts have the institutional measures in place to theoretically balance out and combat Executive actions that are right-infringing and secretive, they are not assertive enough with those measures to provide a substantial protection of rights and ensure governmental transparency.

Intrinsic to analyses of free speech protections is an examination of any prior restraint and of freedom of the press. A free press is indispensable in educating the populace, facilitating discourse, and keeping the government accountable, hence its protection through the First Amendment. The Warren Court established the vital importance of freedom of the press in New York Times v. Sullivan (1964), committing the Court to the “principle that debate on public
issues should be uninhibited, robust, and widespread.”  
From the outset, jurisprudence concerning freedom of the press dealt heavily with the concept of prior restraint. Sir William Blackstone famously stated in 1769 that, “the liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” This aversion to prior restraint was standardized in *Near v. Minnesota* (1931) when a statute banning certain kinds of publications was struck down, with the Supreme Court declaring that censorship of such a sort was unconstitutional. However, in his decision Chief Justice Hughes made a further recognition that censorship generally was indeed justified and the rule against prior restraint was not absolute, saying that the government would not be prevented from prohibiting the publication of “the sailing dates of [military] transports or the number and location of troops.”

The freedom of the press was tested in the midst of the Vietnam War in the case of *New York Times v. United States* (1971). This was a landmark decision in which the federal government worked to prohibit the *New York Times* under the Espionage Act 1917 from publishing the classified “History of U.S. Decision Making Process on Vietnam Policy”, or what were referred to as the “Pentagon Papers,” because of the resulting damage to the security interest of the United States. The Supreme Court declared that this amounted to unconstitutional prior restraint, and that the government did not meet the required burden of proof to justify the restraint. In the decision, Justice Black claimed that “only a free and unrestrained press can effectively expose deception in government,” and Justice Brennan asserted further that the First Amendment does not just entail Free Speech but entails a right to be informed as well, hence the necessity of a free press.
Despite the establishment of freedom of the press, it is not explicit whether the publishing of confidential or classified information by the press is protected under the First Amendment. While the Supreme Court has not directly addressed such a situation, Justice White has stated that “Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed” and that he would not be inclined to overturn convictions of that nature.\textsuperscript{32} Despite this, the press has consistently exposed the government through publishing leaks of classified government information. It was a free press that brought forth the Abu Ghraib abuses to public attention during the Iraq War, and that published the famous “Wikileaks” files recently in a manner the same as the issue with the “Pentagon Papers” from decades prior.\textsuperscript{33}

Following the 9/11 terrorist attacks, with the subsequent “War on Terror” and campaigns in Afghanistan and Iraq, the United States government resorted to what amounted to infringements of fundamental freedoms, with the purpose of providing national security both through the Executive’s direct actions and legislation enacted by Congress. The actions of the military during the “War on Terror” have also amounted to a suppression of First Amendment rights, namely freedom of the press (though that is not to say it is limited to only this right). First, the War on Terror has created an incredibly secretive Executive. During the Bush Administration, an overabundance of non-classified information was withheld due to its alleged relevance to a larger “mosaic” of national security information.\textsuperscript{34} As mentioned above, the Executive has come to rely on a system of secret legal memos and letters to keep many of its operations and actions free from disclosure or scrutiny. This has materialized substantially for the operations of the military and intelligence agencies.
During the Vietnam War, the period of the first major test of new First Amendment concessions and protections in a situation of serious armed conflict, the press was granted an almost unrestricted freedom to report on the war and its reception in America. However, in the war’s aftermath, United States military officials regretted granting the press this access. The press freedom that was allowed resulted in images and stories about the war and its horrors being broadcasted on millions of American family’s televisions every night, and negative sentiments spread across the country. In short, press coverage of the war was blamed partially for its role in fostering the anti-war dissent that plagued the country during the late 1960s and early 1970s, hindering the war effort. Consequently, with the invasion of Iraq in 2003, the military had a comprehensive media strategy. Press access was limited, a 75-mile “exclusion zone” was enforced, reporters were embedded with army units in a gesture of goodwill and transparency (though with the real purpose to foster sympathetic attitudes regarding the war effort among reporters), and there was careful vetting of military experts that were supposed to be “objective” when speaking to the press.35 This deliberate manipulation and restriction of press freedom was a direct infringement of the First Amendment freedom of the press.

First Amendment rights were further suppressed in the aftermath of 9/11 through the extensive security legislation passed by Congress. The most influential and well-known of these statutes is the USA PATRIOT Act 2001, and the PATRIOT Sunsets Extension Act of 2011. The USA PATRIOT Act was enacted in order to grant extended powers to intelligence and law enforcement agencies, however these extended powers have been in direct conflict with many rights enshrined in the Constitution. These include the rights enshrined in the First Amendment. Sections 215 and 505 give the Federal Bureau of Investigation (FBI) the power to implement a “gag order” on citizens such as physicians or bank tellers to prevent them from disclosing to
patrons that they have been in contact with intelligence authorities.\textsuperscript{36} Moreover these Sections authorized the FBI to investigate citizens based on their exercise of the First Amendment.\textsuperscript{37} Section 411 “permits the jailing and expulsion of an [individual] who vocally states his/her support of a terrorist group,” even though Section 802 contains an extremely vague interpretation of what actually constitutes terrorism.\textsuperscript{38} Though the \textit{PATRIOT Act} and its later extensions have expired and been weakened, an amended \textit{USA FREEDOM Act 2015} has been put it in its place to address concerns about rights infringements. However, the damage was already done through the \textit{USA PATRIOT Act}, and the repercussions of the \textit{FREEDOM Act} have yet to be recognized.

Since the beginning of the “War on Terror”, the United States judiciary has yet to uphold a conviction for an individual expressing their dissent. This marks a very substantial improvement from the norm a century ago, when individuals like Schenck were convicted for their dissidence.\textsuperscript{39} However, the Supreme Court has failed to protect free speech and freedom of the press from stifling pressures generated by the actions of Congress and the Executive. The Supreme Court has yet to accept an appeal on issues of surveillance, which indirectly effect First Amendment rights due to the “chilling effect” that spying and surveillance can have on expression.\textsuperscript{40} Moreover, the vast majority of the \textit{PATRIOT Act} has been upheld by the judiciary. Notably, in \textit{Holder v. Humanitarian Law Project} (2010), the Supreme Court upheld in a 6-3 decision the \textit{PATRIOT Act's} prohibition on providing “expert advice”, “training,” and similar types of assistance to terrorist organizations.

In the wake of World War One, President Woodrow Wilson claimed that “If there should be disloyalty, it will be dealt with a firm hand of stern repression” and that inciters lost “their right to civil liberties”\textsuperscript{41} This philosophy gave birth to the \textit{Espionage Act 1917} and the \textit{Sedition Act 1918} that prosecuted Schenck and Abrams. Many in the United States still hold these
sentiments. In the modern era in which we live there is a strong inclination to be fearful, and a temptation to be hyper-vigilant of anticipated national security threats in this increasingly globalized and interconnected world. This temptation is not unwarranted, as globalization has enabled extremist individuals or small groups to cause destruction on an international scale. However, citizens, Congress, and the Judiciary must be cognizant of the fact that under the guise of protecting the security of the country, the government can act to disregard rights and freedoms with the purpose to remove potential criticism and obstacles to government actions. The series of Supreme Court cases regarding national security are part of an ongoing dialogue between the federal government and the judicial branch about measures to restrict fundamental rights and their justification. Unfortunately this dialogue is only active on a case-by-case basis, which limits the capability of the judiciary to provide ongoing protections against security pressures. Moreover, the Supreme Court can be just as susceptible to the fear that plagues the people and the government when national security issues arise. The Supreme Court ruled in favour of restriction in the aftermath of World War One, succumbed to fears during the McCarthy Era in upholding limitations, and despite making progress with the ruling of Brandenburg v. Ohio in upholding the importance of free speech, with the advent of the “War on Terror” the Supreme Court has done a meager job in protecting free speech and free press from national security pressures. The structural limitations of the Supreme Court are such that First Amendment rights cannot be adequately protected in the wake of a legislature that is prone to fear and overreaction in times of conflict, and an Executive that resorts to secrecy in the name of security, as well as neglects the importance of fundamental rights when weighing considerations against rights infringing actions.
In conclusion, limitations upon fundamental rights are warranted in extreme circumstances when the security of the country is at risk. It is the role of the judiciary to determine when and how those limitations are justified. When balancing the First Amendment rights of free speech and freedom of the press against national security pressures for restriction, the Supreme Court of the United States has mainly taken into consideration the severity of the perceived national security threat, and severity of the infringement upon the fundamental freedom(s). Moreover, it is evident that in the “War on Terror”, the Supreme Court has proved itself to be by and large ineffective in protecting free speech and free press from the actions of Congress and the Executive.

About the author: Stephen Rogers is finishing his fourth-year of an Honours Specialization in Political Sciences at Huron University College in London, Ontario. His research interests are focused primarily on the application of political theory to contemporary political and policy issues. These include the hierarchy and limitation of rights and freedoms, especially in the context of law enforcement and national security, as well as examining the prominence of the “offense principle” in contemporary Western society and university campuses.
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