17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 7: The Wartime Constitution, part III

Discussion of Youngstown vs. Sawyer, 1952
This case is famous for Justice Jackson's concurring opinion.

In April 1952, during the Korean War, steel workers were threatening to conduct a nationwide labor strike. Truman issued an executive order to the Secretary of Commerce mandating the seizing of the nation's steel mills to ensure their continued operations, claiming a stoppage would threaten national security. Congress refused to take any action. This case considers whether President Truman exceeded his constitutionally delegated powers.

Constitutional argument of the court:
Nothing in the Constitution allows the president to seize property, and the power had not been specifically delegated by Congress, therefore it must be unconstitutional.

In his concurring opinion, Justice Jackson sets up a 3 part test for determining when a president's actions are constitutionally permissible:

1. If Congress has legislated and expressly given the President the authority to do something, then his power is at its greatest
2. When Congress has legislated that the president can not do something, then the president's authority is at its lowest point, and courts are obliged to step in and prevent executive action opposed to congressional directive
3. If there is no Congressional authorization or prohibition, the court needs to make a rational judgment based on constitutional structure and precedent

This decision has been relied on by many courts and scholars ever since to evaluate the constitutionality of presidential action in wartime, including the current NSA wiretapping policy controversy. There are 2 arguments currently being debated:

1. The anti-warrantless wiretapping argument: Foreign Intelligence Surveillance Act (1978) sets up a special court that someone must go to in order to get a warrant to authorize a wiretap. Therefore, that procedure must be used to get a warrant before wiretapping is allowed.
2. The president's argument: The Congress' passage of the authorization of force says the president can use any means necessary to apprehend organizations responsible for the 9/11 attacks.

The wiretapping issue is still under review, but most legal experts expect courts to declare warrantless wiretapping unconstitutional. Congress will then be expected to expressly give the president the authority to do international wiretaps without a warrant, which would functionally override the decision the Supreme Court is expected to reach.

Discussion of Schenk vs. US, 1919
These cases form the foundation of First Amendment Constitutional law. Interestingly, most of this body of law has been formed during wartime.

Case circumstances:

- Schenk was a socialist, writing pamphlets saying the draft is unconstitutional and instructing people to assert their rights. He sent them to people who had been

approved for the draft. Schenk's writings claim that military conscription violates the 13th Amendment.
- Schenk was prosecuted for violating the Espionage Act. This act criminalized encouraging resistance to the US government's war efforts, including trying to influence military recruiting efforts.

Why was what Schenk did illegal?
The law *does* distinguish between crimes committed with intent and those committed without intent. Holmes says, *"Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out" (Holmes in Schenk vs. US)*. In order to be convicted for violation of the espionage act, there is a requirement that there must actually be an effort to communicate the offending view.

The court sets up the "clear and present danger" test for freedom of speech. Holmes uses the analogy of shouting "fire" in a crowded theater. Holmes says that expression bringing about a clear and present danger can be prohibited if the resulting clear and present danger is something that could be constitutionally prohibited by Congress. More plainly, does Congress have a right to prevent the substantive evil the expression is trying to incite? If yes, then the context must be evaluated to see if the act caused or could have caused such an evil.

Discussion of Abrams vs. US, 1919
Abrams and his friends were defenders of the Russian revolution. They circulate documents criticizing capitalism and trying to incite a worker revolt against the government.

Court decides that the speech was intended to "provoke and encourage resistance to the United States in the war".

"These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe." (Justice Clark, majority opinion in Abrams v. US, www.findlaw.com)

In a famous dissent, Holmes says the punishment is too extreme and that there was no intent present as there was in the Schenk case. Holmes' says that free speech underwrites a marketplace of ideas which is a necessary implication of the First Amendment.

In the dissent, Holmes expounds upon the meaning of intent, and the limitations on free speech allowable by the clear and present danger test:

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its

opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in Swift & Co. v. United States, 196 U.S. 375, 396 , 25 S. Sup. Ct. 276. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged. (Justice Holmes, dissenting opinion in Abrams v. US)

Holmes then provides the rationale for the determination of legitimate and illegitimate free speech and the clear and present danger test:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when 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 desired 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. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe 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. (Justice Holmes, dissenting opinion in Abrams v. US)

Discussion of West Virginia Board of Education vs. Barnett, 1944
Case facts:
"The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.' 2" (Justice Jackson, Majority opinion in West Virginia State Board of Education v. Barnette)

Barnette, a member of the Jehovah's Witness Church, challenges the law's constitutionality, saying that it prohibits his free exercise of religion. It is uncontested that saluting the flag is against the practices of Barnette's Church.

Barnette's Constitutional Claim: A mandatory salute violates free exercise and free speech as applied to the states under the due process and equal protection clauses of the First Amendment.

Court opinion summary:
The court decides that schools cannot enact compulsory salute because it violates the First Amendment free exercise and freedom of speech provisions.

"The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism [319 U.S. 624, 642] and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But 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.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. 19
We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. " (Justice Jackson, court opinion in West Virginia State Board of Education v. Barnette)

Class Debate of West Virginia Board of Education v. Barnett:
Barnette arguments:

- Should look at the clear and present danger test--infringements upon free speech are only valid when the speech provokes a clear and present danger
- There is no clear and present danger from students not saluting the flag, therefore the requirement is an unconstitutional violation of student's rights to free speech and free expression

West Virginia Board of Education arguments:

- School board has the ability to enforce community values and teach them to the students.
- Compulsory salute is not different from other mandatory enforcements in the school context such as the content taught in classes.
- Deciding what is taught and made compulsory is a community decision of the school board and community members. If they decide that they want their students to salute the flag, then they should be able to enforce that.