
VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 95

DECEMBER 7, 2009

PAGES 87-96

RESPONSE

THE CONSTITUTIONAL FOUNDATION FOR FACT DEFERENCE IN NATIONAL SECURITY CASES

*Robert F. Turner**

I have been running the University of Virginia National Security Law Institute each June since 1991 to train professors and government lawyers to teach and work in this emerging field of law. Professor Robert Chesney attended the 2004 Institute and has been a regular instructor in the program since then. I have encountered no young national security law scholar who in my view rivals his considerable talents. I was thus not surprised to find that he has contributed a very thoughtful and insightful article to the *Virginia Law Review*.

Professor Chesney is certainly correct that national security fact deference claims “implicate competing values of great magnitude,”¹ and thus warrant careful attention. He categorizes such claims under four headings, the last of which are claims involving “the concern that the law vests decisionmaking authority in another institution.”² My space is limited, so I will focus on that aspect of the issue.

At least five times in his article Chesney emphasizes “the judicial checking function,”³ quoting the district court’s statement in *United*

* Professor, University of Virginia (General Faculty), and Associate Director of the Center for National Security Law. Former Charles H. Stockton Professor of International Law at the Naval War College and chair of the ABA Standing Committee on National Security 1988–1991.

¹ Robert M. Chesney, National Security Fact Deference, 95 Va. L. Rev. 1361, 1362 (2009).

² *Id.* at 1364.

³ *Id.* at 1376, 1376–77, 1384, 1394.

States v. Lindh that “it is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and indeed sometimes even trump, the actions of the other government branches.”⁴ The key words here are “in appropriate circumstances,” since in many cases involving sensitive matters like foreign relations and intelligence the constitutional Framers did not consider judicial involvement appropriate.

Rather, in their view, much of this business was confided exclusively in the discretion of the President by Article II. Thus, in *Marbury v. Madison*, Chief Justice John Marshall explained:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience

. . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.⁵

Explaining that much of this discretion involved relations with the external world, Marshall held that the Secretary of Foreign Affairs, though his office was created and delimited by Congress, must “conform precisely to the will of the president” in carrying out his lawful duties, and that “[t]he acts of such an officer, as an officer, can never be examinable by the courts.”⁶

The constitutional foundation for this authority is primarily the vesting of the nation’s “executive Power”⁷ in the President. As Thomas Jefferson, then Secretary of Foreign Affairs, explained in 1790, “The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be con-

⁴ Id. at 1375 (citing *Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002)).

⁵ *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 165–66 (1803).

⁶ Id. at 166 (emphasis added).

⁷ U.S. Const., art. II, § 1.

strued strictly.”⁸ Representative James Madison,⁹ Treasury Secretary Alexander Hamilton,¹⁰ President George Washington,¹¹ and Chief Justice John Jay¹² all shared Jefferson’s view.

In the most frequently cited foreign affairs case, *United States v. Curtiss-Wright Export Corp.*, the Supreme Court declared:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.¹³

The Court explained that it was dealing with “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress”¹⁴ This power was largely unchecked by the other branches, although one-third-plus-one of the members of the Senate could exercise a negative over a completed treaty, approval by a majority of the Senate was re-

⁸ Jefferson’s Opinion on the powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in *The Writings of Thomas Jefferson Digital Edition* 378, 379 (Barbara B. Oberg and J. Jefferson Looney ed., University of Virginia Press, Rotunda 2008), available at <http://rotunda.upress.virginia.edu:8080/founders/default.xqy?keys=TSJN-print-01-16-02-0215> (emphasis added).

⁹ See, e.g., Letter from Madison to Edmund Pendleton (June 21, 1789), in *5 Writings of James Madison* 405–06 n. 1 (Gaillard Hunt ed., 1904), available at http://books.google.com/books?id=0G7GAAAAMAAJ&source=gbs_navlinks_s; *The Diary of George Washington, from 1789 to 1791*, 128–29 (Historical Society ed., 1861) (describing Madison’s views), available at http://books.google.com/books?id=TfMtAAAAYAAJ&source=gbs_navlinks_s.

¹⁰ *4 Works of Alexander Hamilton* 443 (Henry Cabot Lodge ed., 1904), available at http://books.google.com/books?id=-ptg7xhedgC&source=gbs_navlinks_s (“[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”).

¹¹ *Diary of George Washington*, supra note 9, at 128–29.

¹² *Id.* (noting Jay’s concurrence with Jefferson).

¹³ 299 U.S. 304, 319 (1936).

¹⁴ *Id.* at 320.

quired for diplomatic, military, and other appointments to government office, and each chamber of the legislature had a negative over a decision to “declare War.” Congress had a variety of other powers of relevance, including control over the existence of military forces and regulation of foreign commerce. But to the extent these extended into the President’s discretion over foreign affairs, they were to be construed strictly.

The idea behind this allocation was institutional competency—Congress could not be trusted to keep secrets, and large deliberative assemblies lacked the capacity to act with unity of design or speed and dispatch. The Framers learned this in theory from Locke,¹⁵ Montesquieu,¹⁶ and Blackstone¹⁷—each of whom vested control of foreign intercourse exclusively in the executive—and in practice from the failings of the Continental Congress, about which Benjamin Franklin and his colleagues on the Committee of Secret Correspondence wrote in 1776, “We find by fatal experience that Congress consists of too many members to keep secrets.”¹⁸

In *Federalist* No. 64, John Jay reasoned that sharing foreign intelligence secrets with Congress would deprive America of valuable sources of intelligence, and so the Constitution had left the President “able to manage the business of intelligence as prudence may suggest.”¹⁹ Jefferson, in his aforementioned 1790 memorandum to Washington, advised that the Senate was “not supposed by the Constitution to be acquainted with the concerns of the Executive department”²⁰—and the original draft of read “secrets” rather than the broader term “concerns.”²¹ Alexander Hamilton wrote in *Federalist* No. 78 that the executive “holds the sword of the community,” while “[t]he judiciary, on the contrary has no influence over . . . the sword”²²

¹⁵ John Locke, *Two Treatises of Government* § 147 (P. Laslett, rev. ed. 1967).

¹⁶ 1 Montesquieu, *Spirit of the Laws* 151 (Thomas Nugent, trans., rev. ed. 1900), available at http://books.google.com/books?id=_uotAAAAIAAJ&source=gbs_navlinks_s.

¹⁷ 1 William Blackstone, *Commentaries on the Laws of England* *245.

¹⁸ Committee of Secret Correspondence, Verbal statement of Thomas Story to the Committee (October 1, 1776), in 2 Peter Force, *American Archives: A documentary History of the United States*, 5th ser., 818–19 (1837–53).

¹⁹ The *Federalist* No. 64, at 434–35 (John Jay) (Jacob E. Cooke, ed., 1961).

²⁰ Jefferson’s Opinion, *supra* note 8, at 379.

²¹ *Id.* at 379 n. 8.

²² The *Federalist* No. 78, *supra* note 19, at 521, 522, 523 (Alexander Hamilton).

Writing for the Court in *Chicago & Southern Airlines v. Waterman S.S. Corp.*, Justice Robert Jackson explained:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.²³

Five years later, in *United States v. Reynolds*, the Supreme Court again addressed the executive privilege, recognizing an *absolute* privilege for *military* secrets. The Court held:

In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*²⁴

For similar reasons, the Supreme Court has consistently held that alleged employment contracts for espionage services cannot be entertained in American courts. In *Totten v. United States*, the Court unanimously declared in 1875:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which

²³ 333 U.S. 103, 111 (1948).

²⁴ 345 U.S. 1, 11 (1953) (emphasis added).

would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.²⁵

This holding was reaffirmed in 2005 in *Tenet v. Doe*, in which a former East European diplomat who alleged he spied for the Central Intelligence Agency in return for promised sought a judicial remedy for breach—arguing in the process that *Reynolds* had modified *Totten*. A unanimous Supreme Court responded:

We recognized [in *Reynolds*] “the privilege against revealing military secrets, a privilege which is well established in the law of evidence,” and we set out a balancing approach for courts to apply in resolving Government claims of privilege

When invoking the “well established” state secrets privilege, we indeed looked to *Totten* But that in no way signaled our retreat from *Totten*’s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden. Indeed, our opinion in *Reynolds* refutes this very suggestion: Citing *Totten* as a case “where the very subject matter of the action, a contract to perform espionage, was a matter of state secret,” we declared that such a case was to be “dismissed *on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege.”²⁶

There is a popular perception that *United States v. Nixon* substantially narrowed the scope of “executive privilege.” To some extent, that may be true. But the *Nixon* Court repeatedly distinguished that case from one involving “a claim of need to protect military, diplomatic, or sensitive national security secrets,”²⁷ and it reaffirmed the *Reynolds* holding that if “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged,”²⁸ courts “should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”²⁹

²⁵ 92 U.S. 105, 107 (1875).

²⁶ 544 U.S. 1, 9 (2005) (internal citations omitted).

²⁷ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

²⁸ *Id.* at 711.

²⁹ *Id.*

From *Marbury* to *Tenet* we have at play complementary principles: first, that—to recall John Jay in *Federalist* No. 64—“the business of intelligence”³⁰ was vested exclusively in the President, and second, that as a prudential matter of public policy the Executive is better equipped than the judiciary to oversee these highly-sensitive matters. In *Johnson v. Eisentrager*, Justice Jackson eloquently captured the practical implications of permitting enemy nationals or their proxies to engage in what we today refer to as “lawfare”³¹—the use of litigation as war by other means.

To grant the [habeas] writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.³²

Even where the Constitution has not entrusted resolution to the exclusive discretion of the President, prudential considerations of relative judicial competence ought to encourage caution. Professor Chesney notes that “judges are generalists who typically have not studied, trained, or obtained practical experience in national security matters.”³³ Neither do they “have the budget, personnel, or technology”³⁴ to independently ac-

³⁰ See *supra*, note 19 and accompanying text.

³¹ For a general discussion, see, e.g. Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 *Yale J. Int'l Aff.*, Winter 2008, at 146.

³² *Johnson v. Eisentrager*, 339 U.S. 763, 778–79 (1950).

³³ Chesney, *supra* note 1, at 1409.

³⁴ *Id.* at 1406.

quire the necessary relevant information in many national security cases. Yet Chesney suggests this might be less problematic than it may first appear, since “the relevant consideration is not an institution’s capacity to acquire information in the first instance, but rather its capacity to access information at the point when factfinding occurs.”³⁵ He reasons: “[t]o the extent that the executive branch is willing to share with the court the information that it has collected, a judge ultimately might stand in the same position as would an executive branch decisionmaker in terms of the quantity and quality of data available to it.”³⁶

This analysis may underestimate the highly complicated nature of many national security decisions, where detailed knowledge of many foreign actors and ongoing sensitive initiatives may be essential and some critical information simply may not be available to share with a judge—even if she were willing to devote weeks or months to absorbing it. For example, when Argentina invaded the Falkland/Malvinas Islands in 1982, many were shocked that the United States did not immediately condemn the violation of Article 2(4) of the U.N. Charter and perhaps offer assistance to its historic ally Great Britain. That was not done for several days, because at the time Argentina was engaged in a very sensitive covert operation designed to counter Nicaraguan aggression against Honduras and other neighboring states. Imagine, for a moment, that Nicaragua, Cuba, or the Soviet Union had by proxy been able to get a case before a U.S. judge who—in all innocence and based upon an evaluation of the available facts—rendered a verdict that so offended the Argentines that they ceased to cooperate and left the United States to deal with the Nicaraguan aggression alone.

Professor Chesney captures this risk well when he says that there may be cases “when a foreign intelligence agency provides information to the executive branch on condition that the information not be used in judicial proceedings or otherwise be made known to the public.”³⁷ It might be added that there are other costs associated with permitting litigation about highly sensitive intelligence or other national security programs—particularly during wartime. At minimum, discovery motions will require the attention of government employees who have sufficient expertise about the program to know what information can be made public

³⁵ *Id.*

³⁶ *Id.*

³⁷ Chesney, *supra* note 1, at 1407.

and what must remain classified. The business of intelligence might be compared to the assembly of a jigsaw puzzle, and—depending upon which pieces are in the public domain or have been compromised by leaks or enemy espionage—it is often difficult to be certain whether the disclosure of a given piece of the overall “puzzle” will do serious harm. Every hour knowledgeable experts must spend reviewing documents in response to a discovery motion is an hour they cannot spend trying to win the war or prevent the next terrorism attack. Every document cleared and disclosed by someone who does not understand the entire picture risks inadvertently releasing information that might do serious harm to our national security. An apparently innocuous piece of information might be the piece that completes the jigsaw puzzle and thereby endangers the lives or freedom of our fellow citizens or of foreign intelligence sources who have risked their lives for our benefit. The more the judiciary involves itself in foreign affairs, intelligence, and other national security matters, the greater the risk of serious, albeit inadvertent, harm to the nation.

In *Marbury*, Chief Justice Marshall noted that the President’s constitutional discretion in this realm pertains to “the nation, not individual rights,”³⁸ but the modern reality is that the line between “national security” and “individual rights” is not always a clear one. Obviously, to the extent fundamental constitutional rights are at issue, the case for judicial deference to the executive weakens. The Constitution binds us in wartime every bit as in peacetime, although the line, for example, between “reasonable” and “unreasonable” searches and seizures may well shift when the government’s interest involves potential catastrophic terrorist attacks or the safety of our military forces at war.

Professor Chesney has written a superb contribution to this important national debate, and I commend the *Virginia Law Review* for publishing it. My comments are not intended as criticism, but rather are designed to emphasize—as he clearly recognizes—that part of the historic deference to the executive in this area is constitutionally based. There is, as Professor Chesney notes,³⁹ legislation pending in Congress to clarify and “reform” judicial conduct in this area. As that legislation moves forward, it is important that everyone involved keep in mind that neither Congress nor the courts may properly usurp the discretion granted the President by

³⁸ See *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 166 (1803).

³⁹ Chesney, *supra* note 1, n. 65 and accompanying text.

the Constitution. As Chief Justice Marshall observed in *Marbury*, “an act of the legislature, repugnant to the constitution, is void.”⁴⁰

⁴⁰ *Marbury*, 5 U.S. [1 Cranch] at 177.