# DANGER FROM WITHOUT, DANGER FROM WITHIN: CLEAR AND PRESENT DANGER AND THE PROTECTION OF FIRST AMENDMENT RIGHTS

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To what extent does the clear and present danger test of Oliver Wendell Holmes allow First Amendment rights to be adequately safeguarded from the machinations of politicians and the federal government during times which challenge national security?

"Congress shall make no law...abridging the freedom of speech, or of the press."

The First Amendment is the first of ten in the Bill of Rights because our Founding Fathers, in their wisdom, placed it so as a reflection of its importance to a free people in a democratic society. President Abraham Lincoln in his Gettysburg Address described the United States as a "Government of the people, by the people, for the people." Free speech and a free press are the basic and necessary vehicles for communicating ideas, thoughts, and beliefs in a society, and so are cornerstones to the establishment and maintenance of a successful democratic government. Nevertheless, barely ten years after the ratification of the Constitution, the concept of seditious libel became a burning political issue that

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allowed the government to abrogate First Amendment rights under the banner of national security. Congress passed such a law and John Adams signed it. Yet, it was not until one hundred and twenty years later that this attack on First Amendment rights by the government was ever challenged in the Supreme Court. Oliver Wendell Holmes, Civil War veteran and Supreme Court Justice from 1902 to 1932, set the standard for First Amendment jurisprudence in the 1919 *Schenck v. United States* decision. He proposed and defined what has come to be known as the clear and present danger test. This test scrutinizes the use of words in terms of proximity and degree, and in turn determines whether those words threaten national security and so justify the suspension or suppression of First Amendment rights. The Alien and Sedition Acts of 1798, the Espionage Act of 1917, and the Pentagon Papers case of 1971 are three historical examples which illustrate First Amendment rights being subjected to executive or legislative degradation during times of national crisis. The clear and present danger test of Oliver Wendell Holmes allows First Amendment rights to be adequately safeguarded from the machinations of politicians and the federal government during times that challenge national security.

The Alien and Sedition Acts of 1798, which suspended First Amendment rights in response to a genuine national crisis with France, were ultimately distorted by political concerns of the time. In 1798: "There was rampant fear of the enemy within. French émigrés in America, according to the French consul in Philadelphia, by now numbered 25,000 or more…The French, it seemed, were everywhere, and who was to measure the threat they posed in the event of war with France."[1] The country was in a state of anxiety and fear because of the possibility of war with France. At the time, America was a new nation having attained its independence from Great Britain only a short fifteen years earlier. France was a world power and there were reports circulating that a pro-French, independent nation had been created in America's west. It was believed that a party of mad Americans would be ready to join a French attack on the United States at any moment. The Alien and Sedition Acts were thus seen as war measures: "The

United States was at war—declared or not—and there were in fact numbers of enemy agents operating in the country."[2] Anti-French feeling, the XYZ Affair, and the undeclared Franco-American naval conflict in the Caribbean were ostensible considerations for the need of war measures to protect the country from mounting dissent and disloyalty. The Sedition Act ultimately made it a crime, punishable by up to two years in prison and a fine of two thousand dollars: "To write, print, utter, or publish..any false, scandalous, and malicious writing or writings against the government of the United States or either house of Congress...or the President...with intent to defame...or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them the hatred of the good people of the United States."[3] 1798 was the first time in the nation's history in which the balance of First Amendment rights and national security issues became a concern. It was decided by Congress and President John Adams that the possibility of war with France necessitated that the security concerns of the nation would outweigh the rights of the individual. Therefore, the Alien and Sedition Acts, whose language and intent made criticism of the federal government a crime, became the first example in American history where First Amendment rights were restricted in the name of national security. According to the most complete modern account, "Fourteen men were charged with violating the act during its brief life. They included the editors and owners of the leading Republican newspapers."[4] During the administration of John Adams, the Federalists controlled both houses of Congress as well as the presidency. As such, the Alien and Sedition Acts' suspension of First Amendment rights could be interpreted as a partisan attempt by the Federalists to stifle the growing power and influence of the rival Republican Party. The political concerns of the Federalists were clearly demonstrated as federal judges and marshals packed juries in Sedition Act cases with Federalists and it is a fact that the few convictions under the act were of leading Republican newspapers and their editors. The Alien and Sedition Acts of 1798, although intended to secure and protect the country in the likely event of war with France, were ultimately corrupted by the political needs of the Federalist-dominated federal government.

Like the Alien and Sedition Acts of 1798, the Espionage Act of 1917 restricted First Amendment rights and although this legislation was a response to the genuine national crisis of World War I, it was similarly distorted by political concerns. Beginning in 1914: "The growth of competing ideologies abroad in the early years of the twentieth century frightened a good many Americans who saw Socialists, Communists, and Bolsheviks as threats to prosperity, to free enterprise, and to the orderliness of the American way of life…A reign of terror against the Red Menace, fully as ugly as that against things German, ensued."[5] Upon United States entry into World War I in 1917, the mood of the country turned fiercely patriotic and war feelings pervaded the nation. Germans, Socialists, Communists, and Bolsheviks were perceived as serious threats and as such became the main victims of American anger. The ideologies and principles of the Russian Revolution of 1917 rapidly permeated throughout Europe and quickly spread across the Atlantic to America. Americans' concern over these dangerous totalitarian ideas naturally bred intolerance and suppression. Consequently, the concern that the followers of these ideologies would compromise the nation's war effort led Congress to create and pass the Espionage Act in 1917, which made it a crime: "To willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States…and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States…shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."[6] It was decided by Congress and approved by President Woodrow Wilson that the realities of the World War necessitated that the security of the nation and its soldiers would take precedence for a while over the rights of dissenting individuals. Therefore, the Espionage Act, whose language and intent made criticism of the federal government a crime, became yet another example in American history where First Amendment rights were suspended by the federal govern-

ment to protect national security. The Secretary of the Socialist Party, Charles Schenck, was convicted under the Espionage Act: "Of conspiring to cause insubordination in the armed forces and obstruct recruiting and enlistment. Schenck printed and distributed fifteen thousand leaflets opposing the recently passed Selective Service law; many were mailed to draftees."[7] The Supreme Court Case, *Schenck v. United States,* in 1919, resulted when Charles T. Schenck, an antiwar propagandist and official of the Socialist Party in America had indeed published and distributed in 1917 those fifteen thousand leaflets urging opposition to military conscription. The case came at a time when Americans were contemptuous of Socialism and all the other "isms" which were polluting the air of 1917. As such, the Espionage Act's suspension of First Amendment rights was seen as an attempt to protect American political principles from other threatening and malevolent [totalitarian] political ideologies. Although the Espionage Act of 1917 was intended to secure and protect the country during World War I, it was soon used by the federal government to protect the country and its people from exposure to alternative political and economic ideas, ideologies, and politics, such as Marxism.

Unlike the Alien and Sedition Acts of 1798 and the Espionage Act of 1917, the Supreme Court decision in the Pentagon Papers case in 1971 upheld First Amendment rights and the founding ideals of a democratic government during a time that challenged national security and divided the country. The Pentagon Papers issue began when Daniel Ellsberg, a former employee of the U.S. Department of Defense, stole a copy of a study prepared by the Department of Defense entitled, "History of the Decision-Making Process on Vietnam Policy." These studies were a history of American involvement in Vietnam since World War II.[8] Daniel Ellsberg's release of the forty-seven volume, seven-thousand-page history, which became known as the Pentagon Papers came at a time when the Vietnam War was still raging despite the fact that popular opinion was bitterly divided over continued U.S. prosecution of the war. The Pentagon Papers ultimately revealed that the government had long lied to the country, as the documents exposed a policy of concealment and the deception of the Ameri-

can people. Justice Hugo L. Black wrote a concurring Supreme Court opinion in *New York Times Company v. United States* in which he stated: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government…Only a free and unrestrained press can effectively expose deception in government."[9] Supreme Court Justice Black maintained that freedom of the press was absolute and could not be abridged by the government under any circumstances. Black furthermore explained that the Founding Fathers intended the press, protected by the First Amendment, to bare the secrets of the government and so inform the people. Moreover, District Court Judge Murray I. Gurfein explained in his decision: "I am constrained to find as a fact that the…proceedings…did not convince this Court that the publication of these historical documents would seriously breach the national security. It is true, of course, that any breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us…without revealing the content of the testimony suffice it to say, that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would virtually affect the security of the nation."[10] Judge Gurfein found that, contrary to the government's assertions, there were no paramount national security issues involved. No clear and present danger to the country could be identified, so consequently, the *New York Times* and *Washington Post*'s publication of the Pentagon Papers did precisely what the Founding Fathers had hoped and trusted would happen by allowing the press to prevent any part of the government from deceiving the people and destroying the ideals of a democratic political system. The decision in the Pentagon Papers case in 1971 was ultimately significant in that it upheld First Amendment rights and thus the very nature of a democratic government during a time of national crisis.

While the First Amendment states, "Congress shall make no law...abridging the freedom of speech, or of the press,"[11] it can be argued in these three cases that Congress in fact never violated the First Amendment as it never made a law directly prohibiting freedom of speech or press. The American system of law is derived from and based upon the British model. The First Amendment was greatly influenced by the British justice, William Blackstone who explained, "The liberty of the press...consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."[12] Blackstone argued that every free man has an undoubted right to say what sentiment he pleases and that the government cannot interfere by censorship or injunction before the words are spoken or printed. However, the government can punish as much as it pleases after publication what is improper, mischievous, or illegal, no matter how harmless or essential to the public welfare the discussion may be. A Republican from Pennsylvania and later Thomas Jefferson's Secretary of Treasury, Albert Gallatin, countered this view. As he explained, it is: "Preposterous to say, that to punish a certain act was not an abridgment of the liberty of doing that act...If 'freedom' meant only freedom from prior restraint how could a government apply prior restraints to men speaking? The free speech clause would have to have been designed to deprive Congress of 'a power to seal the mouths or to cut the tongues of citizens of the Union,' for those 'were the only means by which previous restraints could be laid on the freedom of speech.'"[13] Blackstone further argued: "But to punish (as the law does present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of people and good order, of government and religion, the old solid foundations of civil liberty."[14] Justice Blackstone considered that in order to protect and preserve the peace of the nation there must be some way to punish dangerous or offensive writings. However, the First Amendment reads "Congress shall make no law..."[15] The Amendment does not speak of exceptions such as times of national crisis. Additionally, punishing expression after it has been made can chill or discourage freedom

of speech and press as severely as prior restraint or a gag order. The Blackstonian view is inoperative in this country because, in the words of legal scholars, such as Zechariah Chafee, the theory is, "Contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common sense view of the relations of state and citizen."[16] Abrogation of First Amendment rights in 1798 and 1917 and the attempt by the government in 1971 to suppress publication of the Pentagon Papers were all contrary to the Blackstonian view, clear violations of the Constitution and the very essence and principles of a democratic government.

For more than a century after the First Amendment was adopted, its protections of free speech and freedom of the press scarcely figured in the decisions of the Supreme Court. Yet, U.S. involvement in World War I and the *Schenck v. United States* Supreme Court case in 1919 made it evident that issues of free speech and national security had become profoundly important. Thus Holmes' clear and present danger test was timely and necessary. Holmes wrote in a unanimous Supreme Court decision in *Schenck v. US.:* "In many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstance in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic."[17] The Constitution does not give citizens the right to any and all forms of speech. Time, place, content, and circumstances must be considered. The safety of society must be paramount to freedom of speech. Holmes further explained: "The question in every case is whether the words are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent…When a nation is at war many things that might be said in time of peace are such a hindrance to its effort…that no Court could regard them as protected by any constitutional right."[18] The First Amendment protects two kinds of interests in free speech. There is an individual interest to express vital opinions and a social interest in the attainment of truth, so that in the words of Chafee: "The country

may not only adopt the wisest course of action but carry it out in the wisest way. The social interest is especially important in wartime...so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty."[19] In the Schenck decision, Holmes states, speech should be considered as, "...a question of proximity and degree."[20] Speech consequently should be unrestricted by censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the national security of society. Therefore, as Holmes' clear and present danger test at heart considers both individual and societal interests it is therefore considered to be the best safeguard of First Amendment rights during times which challenge national security.

When the Alien and Sedition Acts of 1798 and the Pentagon Papers case of 1971 are subjected to Oliver Wendell Holmes' clear and present danger test, it is reasonable to conclude that First Amendment rights would have been, in the case of the former, and were in the case of the latter, protected from the efforts of the federal government during times of national security concern. Edward Livingston of New York, opposed to the Alien and Sedition Acts, argued, "Here again, gentlemen were at fault; they could not show even a suspicion why aliens ought to be suspected."[21] As Livingston explained in June of 1798, prior to the passage of the Alien and Sedition Acts, there was no evidence or facts produced. Therefore, these important rights, of freedom of speech and of the press, in a democratic government, were resticted on the grounds of "individual suspicions, private fears, and overheated imaginations."[22] According to Livingston, there was no definitive national security concern. Consequently, had Holmes' clear and present danger test been applied to the Alien and Sedition Acts of 1798 it can be assumed that a prudent Supreme Court would have declared the Acts unconstitutional and thus protected First Amendment rights. Furthermore, in 1798: "The Federalists controlled both Houses of Congress as well as the presidency, but they saw the Republicans gaining politically. They believed they could arrest that trend by silencing critics of the government, especially in the

Republican press, and they made the suppression of criticism a partisan cause."[23] There were clear political concerns at stake for the Federalist Party at this time in history, as they feared the growing power of the Democratic-Republican Party. These issues ultimately mutated the goals of the Alien and Sedition Acts from ones of national security concern to ones of political concern. Thus, Holmes' clear and present danger test, hypothetically applied, would have safeguarded our First Amendment rights from the political maneuvering of the Federalist-dominated national government. Politics were also an accepted or recognized motive for the government's actions in the Pentagon Papers case. Daniel Ellsberg wrote of the government during the Vietnam War, "Their determination not to suffer the political consequences of losing a war outweighed, for them, the human costs of continuing."[24] Political concerns and consequences were more important to the President and Congress than the national concern of the human costs involved in the war in Vietnam. For years, in order to avoid the embarrassment of losing a war, the government lied to the people and made Vietnam a prolonged war, an escalating war, and finally, a hopeless war. Therefore, when the Pentagon Papers case came to the Supreme Court, First Amendment rights of freedom of the press were upheld because publication of the documents posed no definitive clear and present danger to the security of the nation. Supreme Court Justice William J. Brennan, Jr. wrote: "The First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result…Only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient."[25] As Justice Brennan explained and as Holmes' clear and present danger test strives to ensure, only with governmental proof that an action will "inevitably, directly, and immediately" harm the nation or its security can First Amendment rights be abrogated. As the government failed to show clear and present danger to the security of the country by the publication of the

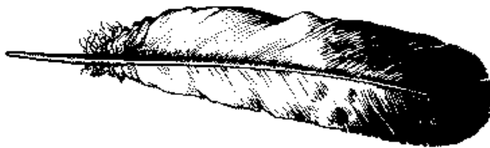
Pentagon Papers, the Court correctly allowed publication. Thus, the clear and present danger test successfully protected First Amendment rights from the political machinations of politicians and the federal government. The effect of Oliver Wendell Holmes' clear and present danger test hypothetically applied to the Alien and Sedition Acts, and in the Pentagon Papers case, demonstrates that it can function as a balance and so protect First Amendment rights from executive and legislative degradation during times which challenge national security.

While Oliver Wendell Holmes' clear and present danger test would have safeguarded First Amendment rights in 1798 and did protect these rights in 1971, it can be argued that the test did not protect First Amendment rights from the political workings of the federal government during and immediately after World War I. In the *Schenck v. US* case, "No evidence was presented to prove that he had corrupted even one draftee."[26] Consequently, as the case lacked any definitive proof that Schenck had corrupted anyone there seems to be no physical evidence of a clear or present danger to uphold the decision of the government and the Supreme Court. Furthermore, it is known that, "As general secretary of the Socialist party, Charles T. Schenck was in charge of the Philadelphia headquarters from which the leaflets were sent."[27] The *Schenck v. United States* case came at a time when Americans were fearful of the effects of the Russian Revolution of 1917 and were contemptuous of Socialism, which was viewed as the direct cause of violent labor strikes within America. In March of 1919, Eugene V. Debs, the leader of the Socialist party, was sentenced to prison, ultimately serving three years of a ten-year sentence, for delivering a speech detailing Socialism, its growth, and a prophecy of ultimate success. Like the Federalists of 1798, it seemed as though throughout World War I, and even immediately afterwards, the government was attempting to use the law to reduce First Amendment rights, thinking to protect American political democracy rather than securing the country's national security interests. However, as Holmes wrote in the Court's unanimous decision, "If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we

perceive no ground for saying that success alone warrants making the act a crime."[28] Holmes explained that intent matters and if there is intent to corrupt draftees then that intent outweighs the fact that there is no definitive proof of corruption of a single draftee. By analogy, a failed attempt to rob a bank is still a crime despite the fact that not a single dollar was stolen. Holmes explained in his decision his notion of intent, "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 out of it."[29] The issue of intent in this case being a criminal offense is a debatable issue. Nevertheless, the justices agreed that the actions of Schenck did demonstrate a clear and present danger to the security of the country and so the clear and present danger test did in fact strike an appropriate balance between First Amendment rights and national security.

Finding and striking an appropriate balance between the rights of the individual and the legitimate security needs of the community is a historical theme or pattern which has been played and replayed in America since the ratification of the Constitution in 1789. The Alien and Sedition Acts of 1798, the Espionage Act of 1917, and the Pentagon Papers case in 1971 are examples in which freedoms of expression guaranteed by the First Amendment to the Bill of Rights have been either suspended or challenged in order to defend and protect national security. Yet, in each case, hidden within genuine security concerns was a political ambush on the First Amendment. The pattern continues in America today. The tragic September 11, 2001 terrorist attack might easily result in new measures to limit speech or the press as related to men of Middle Eastern descent or the ideology of radical Islam. The U.S. Congress, through the Campaign Finance Reform Bill, attempts to ban advocacy speech sixty days prior to a general election. If passed, the bill will be the latest attempt to restrict speech and the press, a direct frontal attack on First Amendment rights. Campaign Finance reform at heart concerns purely political issues, as it is an attempt by the legislature to

protect the political process from the influence of big corporations and big money. By limiting the First Amendment rights of citizens, the legislation strives to protect us from ourselves. Unlike 1798, 1917, and 1971, the danger to the First Amendment today—the danger from within—overtly involves politics. Should the legislation become law and be constitutionally challenged, the clear and present danger test, applied by a prudent Supreme Court would be the best test and safeguard to protect First Amendment rights from the whims, pleasures, and caprices of the Congress. The Campaign Finance Reform Bill, an attempt by this generation of politicians to move the country forward, when placed in the river of history, would, in this author's opinion, carry us back to a past of First Amendment rights challenged and threatened by political concerns. As F. Scott Fitzgerald wrote in the very last lines of *The Great Gatsby*, "[S]o we beat on, boats against the current, borne back ceaselessly into the past."



Notes

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[4] Anthony Lewis, Make No Law (New York: Random House, 1991) p. 63

[5] Liva Baker, The Justice from Beacon Hill (New York: Harper Collins Publishers, 1991) p. 512

[6] Leonard F. James, The Supreme Court in American Life, Second Edition (Glenview, Illinois: Scott, Foresman and Company, 1964) p. 99

[7] Joan Biskupic, The Supreme Court and Individual Rights, Third Edition (Washington, D.C.: Congressional Quarterly, Inc., 1997) p. 25

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[9] William W. Van Alstyne, First Amendment Cases and Materials, Second Edition (Westbury, New York: The Foundation Press, Inc., 1995) p. 119

[10] Edward W. Knappman, Great American Trials (Detroit: Gale Research, 1994) p. 608

[11] Van Alstyne, p. 7

[12] Zechariah Chafee, "Freedom of Speech in War Time," Harvard Law Review 32 (June 1919) p. 938

[13] Lewis, p. 60

[14] Van Alstyne, p. 15

[15] Ibid., p. 7

[16] Chafee, p. 939

[17] Lewis, p. 71

[18] James, p. 100

[19] Chafee, p. 958

[20] Van Alstyne, p. 37

[21] Edward Livingston, "Against the Alien Act," The Annals of American Domestic Expansion and Foreign Entanglements 4 (Chicago: Encyclopedia Britannica Inc., 1976) p. 50

[22] Ibid., p. 50

[23] Lewis, p. 58

[24] Daniel Ellsberg, "Lying About Vietnam," The New York Times 29 June 2001, sec. A

[25] Van Alstyne, p. 123
[26] Mark Mikula, Great American Court Cases, Volume I Individual Liberties (Detroit: The Gale Group, 1999) p. 170
[27] James, p. 99
[28] Van Alstyne, p. 37
[29] Ibid., pp. 36-37

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