Gene Nichol

US Domestic Legal Constraints on Deception

Thank you very much Peter. I am delighted to be here. I suppose if I was casting my vote as to whether Scott wins or Peter wins on this question of whether or not there is anything much to say about the constraints placed by law on the use of strategic deception, I must say I am sort of with Scott: (I don’t think there is). That puts me on tough grounds. (But I will do what I can to shed some light on the subject.)

I wasn’t sure originally what my charge would be. Once I got here and started reading the definitions which you provided — strategic deception, deception which disguises your real objective; operational deception, tactical deception, and in particular type A. deception which is deception geared towards creating general confusion — I realized that, as Dean of a law school, I have massive experience on all these fronts! However, I am not supposed to talk to you about the strategies of deception or the general infliction of confusion. Rather, I have been asked to talk about legal constraints on the executive branch of the American government. Since I am a constitutional lawyer I have a particularly limited charge in that we are concerned with constraints on the executive branch which are enforceable through the courts.

What I am going to tell you in the brief time allotted me that the constitution places very few constraints upon the actions of the executive branch when it comes to strategic deception. I will try to explain in a little more detail why that is so, why it is likely to remain so, and what this might mean for us as citizens.

1. Enforceable Constitutional Principles – or lack thereof

First of all, there is no constitutional principle that says that the President of the United States or the Executive Branch must tell the truth. I teach constitutional law. If there such a principle existed, then surely the Nixon and Clinton administrations would have filled my case book! Yet they do not. Nor was there any constitutional cause of action when President Eisenhower was caught dissembling about the U2 flights. Constitutional law does little to restrict strategic deception, whether we are talking of deception perpetrated in order to protect the country or deception carried out in order to support a war effort.

Why is this so? Well, first there is the old fashioned, simple, even simplistic, reason: the United States Constitution contains no text which says “Thou shall not lie!” Moreover, we can find in it no text containing a general abuse of power notion. I was speaking to Dick Kohn (Richard) a few moments ago and he said, “Well the framers of
the Constitution were obsessed with the notion of virtue in government.” But even if this is true, they didn’t write that obsession into the text of the United States Constitution. And we can, perhaps, be thankful that they didn’t (though it might be good for lawyers!) I am in the litigation business and I can tell you the litigation we could do if there was a constitutional requirement that our government behaved with virtue would be a massive thing.

Even when there is kind of a formative obligation reflected in the constitution, enforcement is not possible. I like to think about this sometimes. There is a constitutional phrase which requires the President of the United States to go to the Congress or to send a message to the Congress and to report on the State of the Union. I have always been tempted to go to Federal Court after one of the flowery, peppy State of the Union talks and initiate a law suit, saying, “That is not the accurate state of the union. I demand that the President describe what is actually going on in the United States. I think we ought talk a little bit about poverty issues and a little bit about civil rights issues.” Such a law suit would not make it through the federal court system. This is probably just as well. No one, I think you’d agree, is really hurt by this—in any case, no one is hurt by it any more than anybody else! It would also be difficult to determine a standard for accurate reporting of the state of the union. This goes a long way towards explaining why we don’t interfere a lot in this kind of thing.

2. Presidential War Powers

But there are other reasons why the Constitution does little to restrain deception. Those of you who have worked in government circles, no doubt have gained the sense that there is a powerful reluctance to interfere with presidential war powers. In the course of 200 years we have only rarely sought in any meaningful way to impose substantive restrictions on the power of the President to carry out a war or to protect the nation. We have recognized historically a broad power of the President to respond to threat or invasion or threat to security.

That deference is said to flow from the prize cases decided during the American Civil War. On this occasion, the United States Supreme Court said that it was okay for President Lincoln to blockade the southern states without the existence of a congressional declaration of war. The power to do so came through the obligation (which the court described) to repel invasion to protect the nation. The court indicated that it was not only within the President’s power to respond. It was his duty to respond, and (assuming an obligation or an authority to defend) his duty to defend life and property within the United States.

At this point, the further question becomes how much it is necessary to defend. The verdict of the United States Supreme Court in the prize cases suggests that the courts are deeply reluctant to second guess the Executive Branch on this score. Lawyers have turned to the broad ranging power granted in the prize cases to defend the constitutional propriety of things like the attempted rescue of Iranian hostages and (probably less justifiably, though some thought was necessary to protect American citizens) even to
defend the military action in Granada. Some of the prize theory is based on a sort of implicit power to defend the United States. Some of it is based on a perceived presidential ability to respond immediately without waiting for deliberation from the Congress. Some, to be candid, is based on the notion that the President may simply ignore us if we declare that what he or she is doing is a violation of the constitution. What reason is there to think that Lincoln would change the course of action in the Civil War because of a Supreme Court opinion? Especially a Supreme Court which Lincoln thought had helped bring on the Civil War in the first place?

2. Political Question Doctrine

Secondly, constitutional law signally lacks formal jurisdiction to deal with what we refer to in the jargon as the “political question doctrine.” Indeed, the courts not only are but ought to be reluctant to second guess the Executive Branch in matters which are, in effect political rather than judicial. They should hesitate not only out of deference and on the merits of the question, but also as a matter of jurisdiction. In defining what we mean by the political question doctrine and determining the area where there is no jurisdiction to intervene, we have often used foreign policy as a kind of the marker to distinguish between what constitutes a classic political as opposed to a judiciable question. The court, even at the turn of the nineteenth century, indicated that the conduct of foreign relations is committed by the Constitution to the Executive and occasionally to the Legislative Branches – i.e. the political branches of government. It is, as such, not subject to judicial scrutiny. So our reluctance to intervene is based, in part, on strategic considerations, and in part on constitutional text.

In part our reluctance to second guess the Executive Branch in this arena of foreign affairs stems from a recognition that the Constitution is more or less set up to keep a balance between the Congress and the President. Article I gives the Congress power to declare war and to raise and support an Army and a Navy. The Constitution also gives the President power, of course, as Commander-in-Chief. The Supreme Court has never been anxious to act as a referee and determine the appropriate line of demarcation between these two general authorities. In the past, it has been hesitant to step in when disagreements arose. It is unlikely to do so in the future unless the two branches are totally at loggerheads over an issue, and in time of war, this kind of deadlock is not very likely to happen. It is hard to imagine a situation in which the President is doing all he can to carry out a war effort and the Senate and Congress are trying as hard as they can to undermine it. And so long as the two branches are not at logger heads there is a powerful argument for the court staying out of it.

3. Broad Powers Granted in the Foreign Affairs Arena

Third, when we have described in constitutional law the expanse of foreign affairs we have done so in very generous terms. United States vs. Curtis Wright (1936) is key here. In this case arms makers in the US were charged with conspiring to sell weapons to the belligerents fighting in the Chaco, Central America. The Congress passed a law empowering President Roosevelt to issue proclamations that would make such sales
illegal. At the time, those sorts of broad delegations of power would have been unconstitutional for the president if he had been acting in the domestic sphere. But the same was not true when he was dealing with foreign affairs. There is a broad statement that the government can only exercise power specifically allocated in the constitution. But the Supreme Court ruled that this statement was categorically true only with respect to our internal affairs. Underlying this theory is the notion that foreign policy issues, while they may involve tugging between Congress and the President, do not involve federalism – the appropriate allocation of power between the national government and the states. In the United State vs. Curtis Wright case, the Supreme Court says the state has no unsurrendered powers concerning foreign nations and so sovereignty issues get a different treatment.

It was also in the case of Curtis Wright that the court announced that the president alone has the power to speak in foreign affairs and represent the nation. So how are these sentiments played out in our law? Well, that deference has been reflected in various challenges.

You know, of course, that the internment of Japanese-American citizens in World War II was said to be within the constitutional power of the Federal Government. This was demonstrated in cases like Korematsu vs. United States (1944). The decision in this case was based largely on notions of deference. In other words, the Executive Branch claimed that it was necessary to intern the Japanese because of the military crisis and the courts refused to give judicial scrutiny to this action. They deferred to the judgment of the Executive Branch even though 120,000 Japanese Americans were interned. The lesson is clear: in a military emergency the courts are going to refuse to second guess the actions of the Federal government.

I think that most of us hope that the Korematsu case would turn out differently today were than it did in the early 1940s. However, if a different verdict were returned, it would be thanks to a different theory. We would now argue that Korematsu involves a violation of the constitutional requirement of equal protection of the laws. Even though the broad power of deference holds true in terms of general authority, a question of individual right intrudes. In the case the question is of equal protection under the law – this right now today has much greater salience that it did fifty or sixty years ago. I think – or at least hope that it would be strong enough to lead to a different result.

Challenges to the Vietnam war and to the war in Cambodia as you know were rejected. The Supreme Court and the lower federal courts repeatedly came to the conclusion that the challenges were not appropriately presented to the courts. They said either that they had no jurisdiction or that there was no legal basis to invalidate the war.

A more recent example of this kind of defense was the case of Campbell v. Clinton. This was decided in the year 2000 when Representative Tom Campbell of California sought a declaration that the President violated the War Powers clause of the United States constitution when he engaged in a bombing campaign in Yugoslavia without congressional authorization. In this instance, the D.C. circuit court refused to
intervene. Judge Silverman said first that the plaintiff lacked the standing to file suit. By this he meant that an individual congressman would not have authority to challenge the President’s decision. If anyone could pursue the interest of the legislative branch, he said, it would have to be entire legislative branch, not a single dissenter. But Judge Silberman also said that the D.C. Circuit lacks "judicially discoverable and manageable standards" for addressing the congressmen's case. Now that is a good example of how strong this deference is.

We all agree that the president has the power to defend the United States. And, if he has the power to defend, then he has the power and authority to decide what it is necessary to defend. The President says it is necessary to carry out air strikes in Yugoslavia in order to protect our European interests and in order to preserve our credibility abroad. The majority of the circuit court in Campbell v. Clinton agreed that we must then defer to his individual determination. Now may I suggest to you how broad a deference that is. Judge Tatel who dissented in this case said, wait a minute! We do have judicially manageable standards to decide whether or not this conflict in Yugoslavia is a war. Surely, 800 U.S aircraft flying 20,000 sorties provides us with enough information to decide whether or not this is a war. So that the strong deference that judge Silverman decided to employ would probably be enough to read out the war declaration clause of the United States Constitution and to suggest whatever the president wants to do is up to the President.

This broad ranging deference was probably the basis for the Hamdi decision. The Fourth Circuit Court of Appeals (Hamdi v. Rumsfeld) in 2003 dismissed the habeas corpus petition of Yaser Hamdi, an apparent American citizen who had been captured among Taliban forces by members of the Northern Alliance and was being detained. At issue was whether or not Hamdi could appropriately be held as an enemy combatant, and be removed, therefore, from the demands of due process of law and treated according to the desires of the commanders in the theater. The ruling given – that there was no constitutional problem with doing this – was again based on powerful notions of deference.

I would just add that, even if true, this will not justify the case the Jose Padilla case. American-born Padilla who was arrested at O’Hare International Airport in May 2002 on a flight from Pakistan is accused (but not charged) with plotting to detonate a dirty bomb in the United States. The argument is that he is an enemy combat and that, therefore, the demands of due process and the bill of rights do not apply. So we will put him in a military brig and hold him there until we are no longer concerned about a war on terrorism. This is a decision very difficult to square with the text of the United States constitution.

Finally, I would say that if you looked at the theories of absence of jurisdiction they ring true in this circumstance and likely will continue to ring true. When we say that something is a political question rather than a judiciable one we are typically talking about three things.
• First, we are speaking of a textually demonstrable commitment to another branch of government – that is fancy language to describe the notion that the constitution seems to say this is someone else’s job rather than the courts’ job. Now we can argue whether conducting foreign affairs is a congressional matter or a presidential matter but the courts seem to have few doubts that it is not a judicial matter.

• Second, we tend to say that the absence of judicially manageable standards means that law should not be implicated. If there are no rules to figure out what would be comprehensible, or understandable, or justifiable deception in constitutional terms, would we not then refrain from judicial intervention?

• Third, we tend to say that, if and when it is essential for the government to speak with one voice rather than be subject to multiple pronouncements, then it is important for the Judicial branch to defer to the actions of the Executive branch. This was a very powerful notion in upholding the Iran Contra (Excuse me, the Iran Hostage) agreements which were would have been questionable as a matter of domestic law.

So putting all this together, it is seems to be the case that we have little constitutional law to intervene and ongoing reasons not to change this. We have decided, as a judicial matter, that these issues are for the political branches to decide. This is our happy valley. Our methods of control over wrong doing in this area are political, not judicial. In the worst case scenario, one might resort to impeachment. But controls of this sort are rooted in electoral politics. It seems quite clear that we will keep things this way.

I will add only two caveats. First, if there is anything which every constitutional lawyer in the United States would have told you before the year 2000 and the decision in Bush against Gore, it was that the United States Supreme Court would never interfere with the selection of the president and the path laid out in the constitution through the Electoral College. So you can take everything I say with that appropriate grain of salt. Second, if the answer is meant to be political engagement if that is the way in which we are to control excesses of government in this country, then I think one thing that we might begin to question in the years ahead is the extent of which a regime of secrecy can grow and become all the more pervasive in American government. This is because it will be very difficult to control political excess through the electoral process if we come to know less and less about what our government is actually doing.

So thank you very much.

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us to identify the position of a legal entity in the system of subjects of law. In particular, we propose to define a legal entity as a subject of law in the following way: it is a subject of legal relations, which has a corresponding property for participation in the legal relationship, may be the plaintiff and defendant before the court. 3. General provisions on a legal entity as a subject of administrative law. Within this section, it is essential to consolidate and. Constraints on the foreign policy of the US administration do exist and are most frequently faced by a President by domestic sources. Of these, the most significant constraints are those of the Congress and public opinion. Yet the source of those constraints has always been a topic of discussion. Some would insist that the primary constraints on a President come from international factors, including the preferences and actions of other countries and organized bodies beyond our borders. Yet others would vouch for the realist model, according to which constraints are based solely on the current and true national interest, and would not fluctuate as a function of public opinion or changes in leadership. Please help us improve our site! — No thank you. Skip to main content. Cornell Law School Search Cornell. Toggle navigation. Please help us improve our site! Support Us! Search. 20 of the most curious and stupid US laws with commentary. The reasons for the prohibitions and penalties for violations in different US states and cities. History of the emergence of laws. We invite you to familiarize yourself with the 20 most ridiculous laws of the United States, so as not to be trapped! Top 20 most strange laws of the United States. Close the doors in Wyoming.