

EXAMINATION OF THE ROLE OF THE JUDICIARY IN NATIONAL SECURITY*

ABSTRACT

National security issues are in the front burner with the contemporary situation that we find ourselves. Several things and organisations or groups are contending with the security of people all over the globe. In Nigeria for example, the issue of bandits, kidnappers, boko haram etc has been a challenge to national security, even though the government has refused and or is not handling the situation to the satisfaction of the majority of the people. The CFRN, 1999 empowers the president to deploy members of the armed forces on a limited combat duty before informing the legislature and one expects this to happen especially in fighting the boko haram attack on innocent citizens of Nigeria but the situation is the reverse. The paper using the doctrinal research method examined the role of the third arm of government, the judiciary on how it can help in curbing insecurity. This work found that some jurisdictions like America had experienced how the judiciary has played a significant role in issues of security but states like Nigeria has not; though it is not something one should covet. We concluded and recommend that in emergency situations the judiciary should weigh the pros and cons of the situation at hand and do the needful in the interest of the safety of the citizens who elected the executive and legislature and by the way who indirectly appointed the judicial officers. We also recommend that all arms of government and indeed all citizens should practice and obey the rule of law.

INTRODUCTION

The judiciary is the third arm of government in a democratic system of government and it is saddled with specific duties and functions to perform just like other arms of government¹. There is always a constitutional provision sharing the powers of the state to the various arms of government² and in this context the judiciary interprets the laws made by the legislation and the executive is expected to implement the outcome or meaning of the law

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¹ Other arms of government are the Executive and the Legislature but in most military governments there are no legislatures.

² See Part II of the Constitution of the Federal Republic of Nigeria, 1999 as amended (ss. 4-7).

interpreted by the judiciary. The responsibility of government broadly is to protect life and property of her citizens or people within her jurisdiction. This responsibility at times can be overreached by the executive arm of government that has the major responsibility. The judiciary is not expected to fold her arm but to act as check and balance in such situations.

This work examines the role of the judiciary in carrying out her function of checking and balancing the activities of the other arms of government especially during emergencies and or war times or during the period of national insecurity. The doctrinal research method was used to discuss the role of the judiciary in emergency situations as seen in some climes. We found that even though the role of the judiciary remains constant the manner in which the judiciary interprets certain provisions of the law during emergencies or crisis situation is such that it favoured the executive and that enhances and guarantee safety or relative security in a given state.

The above notwithstanding some measure of authority need to be asserted by the judiciary as to dissuade the executive from acting as lone rangers without consulting the relevant arms of government before going or exercising any joint powers. The work recommends amongst others, that there should be flexibility between the arms of government especially when it concerns national security. No arm of government should hold the other to ransom at the detriment of the life and properties of her people.

CONCEPT OF JUDICIARY

Black's Law Dictionary defines Judiciary as 'pertaining or relating to courts of justice, to the judicial department of government or to the administration of justice'. Further, it states that it is that branch of government vested with judicial power; the system of courts in a country; the body of judges, the bench³. The judiciary is the system of courts that interprets, defends, and applies the law in the name of the state⁴. The judiciary can also be thought of as the mechanism for the resolution of disputes. Under the doctrine of the separation of powers, the judiciary generally does not make statutory law⁵ or enforce law⁶ but rather interprets, defends, and applies the law to the facts of

³ Black's Law Dictionary, St. Paul Minn West Publishing Co. 1990, p849.

⁴ Wikipedia the free encyclopedia.

⁵ This is the responsibility of the legislature.

⁶ This is the responsibility of the executive.

each case. However, in some countries the judiciary does make common law⁷. The judiciary is the third arm of government and is concerned with the organisation of powers and the working of courts. It also concerns itself with the various personnel, especially the judges and other grades of judicial officers⁸

In many jurisdictions the judicial branch has the power to change laws through the process of judicial review⁹. Courts with judicial review power may annul the laws and rules of the state when it finds them incompatible with a higher norm, such as primary legislation, the provisions of the constitution, treaties or international law. Judges constitute a critical force for interpretation and implementation of a constitution, thus in common law countries they create the body of constitutional law.

CONCEPT OF NATIONAL SECURITY

National Security has been defined as the capacity of a state to promote the pursuit and the realisation of the fundamental needs and vital interests of man and society and to protect them from threats which may be economic, social, environmental, political, military or epidemiological¹⁰. The philosophy of national security lies in the notion that the safety of the nation is the supreme law (*salus populi est suprema lex*)¹¹. Security is not the absence of threats but the ability to respond to security breaches and threats with expediency and expertise, so to be secured is to be free from danger, harm or anxiety. The uses of multifunctional institutional activities do help to strengthen the security of the state. Information, technology, propaganda, diplomacy and war are all geared towards achieving the security of a nation. These activities tend to minimise the risk and provide a feeling of safety. Talking about national security, we mean that aspect of security which flows from political conscious policy of the state engineered to protect the citizens and defend the nation. Understood in this context, national security is therefore a complex area of

⁷ United Kingdom.

⁸ Joye, M.E and Igweike, K.I. Introduction to the 1979 Nigerian Constitution, the Macmillan Press Ltd. And Babingstoke, London 1982 p.243.

⁹ Nigeria.

¹⁰ Onuoha, F. C., The Transformation of Conflict in the Niger Delta' Taiwo, H.A and others (eds.), Nigeria Beyond 2007: Issues, Perspectives and Challenges, (a publication of faculty of Business and Social Sciences, University of Ilorin,2008) p.265

¹¹ Aduba, J.N. and Oguiche S., Key Issues in Nigeria Constitutional Law, 2014.

politico-military concerns which involve strategies and resources deployed for the purpose of achieving the safety of a state¹².

JUDGES' ROLE IN TIMES OF INSECURITY

The role of judges during times of security like war and or terrorism is essentially not different from during the times of peace. The courts' duty is to interpret the law to the best of her ability, consistent with the constitutionally mandated role and without regard to external pressure. Among the differences in wartime for the judiciary, however, is one that involves a principle that is essential to the proper operation of the courts – judicial independence. The need for judicial independence cannot be overemphasised. This concept is at its most vulnerable imperilled by threats from within and without the judiciary. Externally, there is pressure from the elected branches, and often the public, to afford far more deference than may be desirable to the President, as they wage wars to keep the nation safe. Often this pressure includes threats of retribution, including threats to strip the courts of jurisdiction. Internally, judges may question their own right or ability to make the necessary, potentially perilous judgments at the very time when it is most important that they exercise their full authority. This concern is exacerbated by the fact that the judiciary is essentially a conservative institution and judges are generally conservative individuals who dislike controversy, risk taking, and change.

In Nigeria as we write now, the Judiciary Staff (Judiciary Staff Union of Nigeria (JUSUN)) have been on strike for over five weeks¹³ trying to force the state governments to implement the constitutional provision guaranteeing the judiciary autonomy¹⁴. All judicial activities have been suspended but the other arms of government are yet to be concerned let alone intervene for the judiciary to return work. If there is any threat now that needs the response of the judiciary, it may not be possible as the situation is right now.

¹² Azubuko, J. U, (AIG Zone 2Hqtrs, Lagos) 'Security: Is Nigeria safe?' An International Lecture delivered at the Nigeria-Swedish Chamber of Commerce as a representative of the Inspector General of Police <http://nigeria-swedish.com/pdf/SECURITY2.pdf> accessed on 12th May 2021.

¹³ The strike commenced on 6th April 2021.

¹⁴ Section 6, Constitution of Federal Republic of Nigeria, 1999 as amended (CFRN).

JUDICIARY ACTIONS IN CRISIS SITUATION

The history of judicial responses to threats to our liberties in wartime is mixed at best¹⁵. Now the threat to judicial independence is proving particularly troublesome, especially as we enter the so called “Global War on Terror”. We are faced with a conflict with no projected or foreseeable end, thus the prospect that the war-related challenges to constitutional rights and to judicial independence, will typically subside with the end of a conflict, may continue unabated into the indefinite future. The executive arm of the government is doing nothing to stem the tide of insecurity in the near future. Kidnapping of students is the in thing and a known negotiator that is even recommending that government should direct the Central Bank of Nigeria to pay the ransom being demanded by the kidnappers.

In an era of “war without end,” any inclination of judges to lessen the necessary constitutional vigilance will not only seriously jeopardize basic rights to privacy and liberty, and will make it more difficult to fend off other, non war-related challenges to judicial independence, and as a result cause harm to all of our fundamental rights and liberties. Archibald Cox—who knew a thing or two about the necessity of government actors being independent — emphasized that an essential element of judicial independence is that “there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions”¹⁶. Applying Professor Cox’s precept to current events, we might question whether some recent actions and arguments advanced by the elected branches constitute threats to judicial independence. In the United States of America (USA), Congress, for instance, passed the Detainee Treatment Act¹⁷. The Graham-Levin Amendment, which is part of that legislation, prohibits any court from hearing or considering habeas petitions filed by aliens detained at Guantanamo Bay¹⁸. This has removed the court’s jurisdiction which ordinarily is said to be the last hope of the common man. Any detainee in the mentioned place is now at the mercy of the executive and God.

¹⁵ Geoffrey R. Stone, *Civil Liberties v. National Security in the Law’s Open Areas*, 86 B.U. L. REV. 1315 (2006).

¹⁶ Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996).

¹⁷ Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified at 10 U.S.C. § 801, 28 U.S.C. § 2241, 42 U.S.C. § 2000dd).

¹⁸ Id. § 1005(e)-(h), 119 Stat. at 2741-44 (to be codified at 10 U.S.C. § 801).

The Supreme Court has been asked to rule on whether the Act applies only prospectively, or whether it applies to pending habeas petitions as well. It is unclear at this time which interpretation will prevail¹⁹. But if the Act is ultimately construed as applying to pending appeals, one must ask whether it constitutes “tampering with the . . . jurisdiction of the courts for the purposes of controlling their decisions,” which Professor Cox identified as a key marker of a violation of judicial independence²⁰. All of this, of course, is wholly aside from the question of whether the legislature and the executive may strip the courts of such jurisdiction prospectively. In the Padilla case²¹, many critics believe that the administration has played fast and loose with the courts’ jurisdiction in order to avoid a substantive decision on a fundamental issue of great importance to all Americans. Another possible threat to judicial independence involves the position taken by the administration regarding the scope of its war powers. In challenging cases brought by individuals charged as enemy combatants or detained at Guantanamo, the administration has argued that the President has “inherent powers” as Commander in Chief under Article II²² and that actions he takes pursuant to those powers are essentially not reviewable by courts or subject to limitation by Congress²³. The administration’s position in the initial round of Guantanamo cases was that no court anywhere had any jurisdiction to consider any claim, be it torture or pending execution, by any individual held on that American base, which is located on territory under American jurisdiction, for an indefinite period²⁴. The executive branch has also relied on sweeping and often startling assertions of executive authority in defending the administration’s domestic surveillance programme, asserting at times as well a congressional resolution for the authorization of the use of military force. To some extent, such assertions carry with them a challenge to judicial independence, as they seem to rely on the proposition that a broad range of cases – those that in the administration’s view relate to the President’s exercise of power as Commander in Chief (and that is a broad range of cases indeed) – are, in effect, beyond the reach of

¹⁹ Following the presentation of these remarks at the symposium, the Supreme Court ruled that the Act did not apply to pending petitions. See *Hamdan v Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006).

²⁰ Archibald Cox (n14).

²¹ *Padilla v Hanft*, 423 F.3d 386 (4th Cir. 2005), cert. denied, 126 S. Ct. 1649 (2006).

²² Constitution of the United States of America (USA)

²³ See, e.g., *Hamdi v Rumsfeld*, 542 U.S. 507, 516 (2004)

²⁴ See, e.g., *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004).

judicial review. The full implications of the President's arguments are open to debate, especially since the scope of the inherent power appears, in the view of some current and former administration lawyers, to be limitless. What is clear, however, is that the administration's stance raises important questions about how the constitutionally imposed system of checks and balances should operate during periods of military conflict, questions that judges should not shirk from resolving.

The fundamental question to ask is whether the role of the judge should change in wartime. The answer is in the negative, but while judge's function does not change, the manner in which they perform the balancing of interests that they so often undertake in constitutional cases does. In times of national emergency, judges must necessarily give greater weight in many instances to the government, more specifically the national security interest than they might at other times. As courts have often recognized, the government's interests in protecting the nation's security are heightened during periods of military conflict. Accordingly, particular searches or detentions that might be unconstitutional during peacetime may well be deemed constitutional during times of war – not because the role of the judge is any different, and not because courts curtail their constitutionally mandated role, but because a government interest that may be insufficient to justify such deprivations in peacetime may be sufficiently substantial to justify that action during times of national emergency. Courts must not, however, at any time allow the balancing to turn into a routine licensing of unbridled and unsupervised governmental power. Because the courts' balancing of the interests of the government and individuals may produce different results during wartime, the question whether the country is indeed “at war,” and if so, the extent to which courts should give the government's interest enhanced weight in wartime, is a critical one. This issue is particularly critical now, when our nation is engaged in a new and unprecedented kind of conflict, one that might very well be a “war without end.”²⁵ In this circumstance, judges must ask whether the considerations that have led courts to give governmental interests greater weight during the traditional wars of the past apply with as much force during the present “war on terror,” and, if so, how long such a circumstance may endure.

²⁵The Boko Haram, IPOB, Kidnappers, Bandits, Herders-Farmers Clashes etc in Nigeria.

Equally important is the question: what is the role of the courts in determining when “the war without end” has ended or reached a state of normalcy such that we should re-evaluate the extent to which we must allow wartime concerns to distort the ordinary balancing process? The judiciary’s practice of according the government’s interest enhanced weight during wartime is premised, at least implicitly, on the notion that because a state of war is temporary, the curtailment of individual liberty that ensues will also exist for only a limited period. Today, we are faced with a conflict with no foreseeable end and thus with the threat that the scale balancing governmental and individual interests may become permanently tipped in favour of the government. Still, the reason that this conflict is a “war without end” is that we face a non-traditional enemy whose threats may continue unabated for the indefinite future. The rationale that the government requires more latitude in order to keep the country safe during wartime is not any less pressing simply because the conflict has no foreseeable end. This poses an interesting conundrum for those who might be willing to sacrifice some rights in the short run but not indefinitely. One might then ask: are judges capable of making such judgments and do they have the knowledge and expertise to do so? Another question is: is it appropriate for judges to decide such issues? The answer to the first question is “yes,” and to the second “maybe”²⁶. As to the first question, let us only refer to the experience of the Israeli Supreme Court. In times of gravest crisis, that court has repeatedly decided critical questions of national security, including some that have directly affected military operations and tactics, as well as questions as essential to Israel’s survival as where the wall protecting Israel against terrorist incursions should be located, hectare by hectare²⁷. The Israeli court’s decisions have not only been forceful and unequivocal, but have been accepted without a whimper, and put into immediate effect, by the government, the military, and the people. Israel, of course, has a different cultural tradition and a different view of the role of the courts. But as to whether judges are capable of making decisions that require balancing the most critical national security interests against basic civil liberties, the Israeli experience clearly demonstrates that the answer is an unqualified “yes.” The task of judging national security issues are, however, more difficult now than in the past as a result of a different factor: the

²⁶ This might take an entire conference session on the second question as to do justice to the subject.

²⁷ See H CJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] 43 I.L.M. 1099.

remarkable recent advances in the field of technology that permit previously unimaginable invasions of our privacy rights in the name of national security.

JUDICIARY POWER AND PRACTICE

It is generally accepted that Constitutions grants war powers to the federal government, and the courts have never seriously questioned this, the source and division of war powers has been much disputed. Reasons for judicial acceptance of federal war powers include: that the power to declare war carries with it the power to conduct war²⁸; that the power to wage war derives from a country's sovereignty and is not dependent on the enumerated powers of the Constitution²⁹; and that the power to wage war comes from the expressed powers as well as the necessary and proper clause. With such acceptance of the federal government's central role in war (and foreign policy generally), the Supreme Court has been reluctant to place any limits on the powers Congress or the president devise to conduct it. The courts have declared some statutes created during wartime unconstitutional, but in nearly every case it has been done on grounds that the law abused a power other than war power, and the decision has been rendered only after combat has ceased³⁰.

THE AMERICAN EXPERIENCE OF JUDICIAL POWER IN CRISIS SITUATION

In America, it is perhaps surprising that Congress has declared war on only five occasions³¹. When U.S. involvement in other international conflicts was challenged in the courts, the judiciary has ruled that declaration is not required. For example, in *Bas v. Tingy*³², the Supreme Court held that Congress need not declare full-scale war and could engage in a limited naval conflict with France. During the latter half of the twentieth century the United States engaged in numerous military conflicts without declaring war, the most controversial being the Vietnam War. Lower courts ruled that the absence of a formal declaration of war in Vietnam raised political questions not resolvable

²⁸ *McCulloch v. Maryland* (citation not supplied), 86 B.U. L. Rev. 1309 (2006).

²⁹ *United States v. Curtiss-Wright Export Corporations*, 1936.

³⁰ Reinhardt, S. Judge, U.S. Court of Appeals for the Ninth Circuit. "The Judicial Role in National Security," *Boston University Law Review*, April, 2006.

³¹ The War of 1812; the Mexican War; the Spanish-American War, World War I, and World War II.

³² (1800) (citation not given) (n28).

in the courts. The Supreme Court refused all appeals to review the lower court rulings, although not all its denials were unanimously agreed³³.

The courts have also rebuffed state challenges to federal government war-related actions. In 1990 the Supreme Court upheld a law in which Congress eliminated the requirement that governors consent before their states' National Guard units are called up for deployment³⁴. Specifically, Minnesota objected to National Guard units being sent to Honduras for joint exercises with that country's military. The issue was between states' control over the National Guard under the Constitution's militia clauses and congressional authority to provide trained forces. The unanimous decision in *Perpich*³⁵ further strengthened the power of the federal government in military affairs.

While there has been little disagreement on the federal government's authority to go to war, the appropriate roles of Congress and the president have sparked considerable debate. Article 2, Section 2 of the Constitution begins: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." This sentence has been the source of controversy between the three branches of government. The concerns are the circumstances under which the president can authorize the use of force abroad and how and whether Congress should be involved in making such decisions. The role of the judiciary in such matters seems crucial, but the courts have been unwilling participants in these debates³⁶.

While such abandonment of judicial review is questionable, there are a series of historical precedents to support the courts' approach. In 1795, Congress authorized the president to call out the militia of any state to quell resistance to the law. The Court sanctioned the president's discretion to determine when an emergency existed and subsequent calling of state militia. Several New England states challenged that law during the War of 1812, but the Supreme Court upheld the delegation of congressional authority as a limited power³⁷. In subsequent decades the Court and Congress regarded the president's war power as primarily military in nature. The Supreme Court has never opposed

³³ See *Mora v. McNamara*, 1967(cited in n28).

³⁴ *Perpich v. Department of Defense*, 1990.

³⁵ *Ibid.*

³⁶ Reinhardt, S (n28)

³⁷ See *Martin v. Mott* (1827)

the president's authority as commander in chief to deploy forces abroad. However, during most of the nineteenth century Congress provided the initiative in foreign policy. When presidents in peacetime sought expansionist policies that threatened war, Congress stopped them.

Supreme Court decisions during the Civil War played a central role in shaping the courts' approach to war powers. Congress was in recess when hostilities broke out, so President Abraham Lincoln declared a blockade of Confederate ports, issued a proclamation increasing the size of the army and navy, ordered new naval ships, and requested funds from the Treasury to cover military expenditures. When Congress returned it adopted a resolution that approved the president's actions. However, owners of vessels seized during the blockade and sold as prizes brought suit, arguing that no war had been declared between the North and the South. The Supreme Court ruled in the Prize Cases³⁸ that President Lincoln's actions in the early weeks of the war were constitutional, because the threat to the nation justified the broadest range of authority in the commander in chief.

Despite a narrow 5–4 ruling, the Prize Cases bolstered the powers of the presidency and shaped the tendency of the judiciary to abstain from rulings that would curb war powers. The Supreme Court's decisions, which interpreted broadly the powers of the president as commander in chief, marked the beginning of expansionary presidential actions during war. The national emergency of civil war required that the executive be able to exercise powers that might not be permitted during peacetime. Thus, Lincoln's decisions to declare the existence of a rebellion, call out state militia to suppress it, blockade southern ports, increase the size of the army and navy, and spend federal money on the war effort were not rebuked by the courts. Even the Emancipation Proclamation was issued under Lincoln's authority as commander in chief. Only Lincoln's suspension of habeas corpus in certain parts of the country earned a censure from the Supreme Court³⁹.

The world wars of the twentieth century provided opportunities for Presidents Woodrow Wilson and Franklin Roosevelt to push the constitutional envelope. As the United States entered World War I in 1917, President Wilson sought

³⁸Youngstown Sheet and Tube Company v. Sawyer (1952), (1863)

³⁹Burt Neuborne, The Role of Courts in Time of War, N.Y.U. Review of Law & Social Change, Volume 29 Issue 3, 2020.

and obtained from Congress broad delegations of power to prepare for war and to mobilize the country. He used these powers to manage the country's economy, creating war management and production boards⁴⁰ to coordinate production and supply. His actions included taking over mines and factories, fixing prices, taking over the transportation and communications networks, and managing the production and distribution of food. Because the president had obtained prior congressional approval for these actions, there were no legal challenges to Wilson's authority during the war⁴¹.

In a novel interpretation of the economic turmoil of the 1930s, President Roosevelt equated the challenge of the Great Depression to war. He sought wide executive-branch powers to address the economic crisis, but the Supreme Court was reluctant to sanction such authority during peacetime. However, once the United States entered World War II, Roosevelt was on more solid footing. Congress again delegated vast federal powers to the president to help win the war, and Roosevelt created many new administrative agencies to aid in the effort⁴². There were very few objections on constitutional grounds, largely because the three branches assumed that the use of war powers by Lincoln and Wilson applied to the current conflict. The Supreme Court never upheld challenges to the authority of wartime agencies or to the authority of the 101 government corporations created by Roosevelt to engage in production, insurance, transportation, banking, housing, and other lines of business designed to aid the war effort⁴³. The Court also upheld the power of the president to apply sanctions to individuals, labour unions, and industries that refused to comply with wartime guidelines. Even the case of the removal and relocation of Japanese Americans was considered by the Supreme Court, which ruled that, because Congress had ratified Roosevelt's executive order as an emergency war measure, this joint action was permitted⁴⁴.

The assertion of broad emergency powers by Presidents Wilson and Roosevelt obfuscated the constitutional separation between Congress's authority to declare war and the president's power to wage it. As long as Congress delegated authority to the president and appropriated funds⁴⁵ to support such

⁴⁰ Coordinated by the Council of National Defence.

⁴¹ Burt Neuborne (n35).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Through its "power of the purse".

powers, the judiciary would interpret this as congressional sanction of the president's decision. The courts would not challenge this "fusion" of the two branches' war making powers.

The onset of the Cold War did not result in a curb in executive war powers. In 1950, President Harry Truman decided to commit U.S. forces to help South Korea without a declaration of war from Congress. He based the authority for his actions on the United Nations Security Council vote to condemn North Korea's invasion and urge member countries to assist South Korea. However, the Supreme Court ruled that President Truman went too far when he ordered the secretary of commerce to seize and operate most of the country's steel mills to prevent a nationwide strike of steelworkers. The president justified his actions by arguing that the strike would interrupt military production and cripple the war effort in Korea and by claiming authority as commander in chief⁴⁶. In *Youngstown Sheet and Tube Company v. Sawyer* (1952), also known as the Steel Seizure Case, the Court agreed that the president had overstepped constitutional bounds, but it did not rule out the possibility that such seizures might be legal if done with the consent of Congress. Nonetheless, the Steel Seizure Case is significant as the strongest rebuke by the Court of unilateral presidential national security authority. The country was at war when Truman acted, and Congress had not expressly denied him the authority to act. It was extraordinary for the Court to find that the president lacked authority under those circumstances⁴⁷.

Thus, the Cold War environment did little to curb the gradual expansion of presidential authority during war. In 1955, Congress authorized President Dwight D. Eisenhower to use force if necessary to defend Taiwan if China attacked the island. In 1962, President John F. Kennedy obtained a joint congressional resolution authorizing him to use force if necessary to prevent the spread of communism in the Western Hemisphere. Two years later, Congress passed the Gulf of Tonkin Resolution, which empowered President Lyndon B. Johnson to take all necessary steps, including the use of armed force, to assist in the defence of members of the Southeast Asia Collective

⁴⁶ Fabri, Marco. *The challenge of change for judicial systems*, p, 137 (IOS Press 2000): "the judicial system is intended to be apolitical, its symbol being that of blindfolded Lady Justice holding balanced scales."

⁴⁷ Burt Neuborne (n35)

Defence Treaty⁴⁸. President Johnson relied on this resolution to wage the war in Vietnam instead of asking Congress to declare war on North Vietnam. Federal courts were asked repeatedly during the late 1960s and early 1970s to rule on the constitutionality of the war. The Supreme Court declined to hear such cases on the view that war was a political question⁴⁹. Although opponents of the war contended that U.S. involvement was unconstitutional because Congress had never declared war, the legislative body continued to appropriate funds for defence, thus implying support for Johnson's, and then Richard Nixon's, policies in Southeast Asia⁵⁰.

Preservation of fundamental constitutional rights is the most important responsibility of the federal judiciary. The structural protections enjoyed by Article III⁵¹ judges—life tenure; no diminution of salary; two-thirds Senate vote for impeachment—are designed to insulate the judicial branch from political pressures in order to make it possible for it to act as an institutional safety-net in settings where a risk of majoritarian overreaction exists. It is a truism that the risk of government overreaching peaks during periods of national crisis, especially wartime⁵². It is also a truism that risks associated with the full-fledged enjoyment of certain constitutional rights increase during wartime. Thus, in time of war or national crisis, federal judges have the daunting responsibility of balancing a heightened risk of government overreaching against a heightened risk created by enforcing certain constitutional rights against the government⁵³. How should a federal judge react in such a setting when the political branches assert that enforcement of an individual constitutional right poses an unacceptably high risk?

One extreme would be for the Article III judiciary to take the government's assessment of risk at face value, effectively leaving the scope of constitutional rights during wartime in the hands of the political branches. Given the difficulty of second-guessing the government's initial risk assessment, such a passive approach is institutionally seductive. But both history and human nature tell us that government estimates of the risks associated with unpopular or frightening behaviour are often overstated, especially in times of great

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Burt Neuborne (n35).

⁵¹ Constitution of the United States of America.

⁵² Fabri, Marco (n42).

⁵³ *Ibid.*

national stress. We have only to remember the Alien and Sedition Acts, Lincoln's suspension of the writ of habeas corpus, the Palmer raids after World War I, anti-union activity during the Depression, the Japanese internment camps, the McCarthy era, and the jailing of draft card burners during the Vietnam War⁵⁴.

The other extreme would be to insist that the judicial role should not change during wartime. Under such a view, the classic "checking" function of a federal judge as a brake on majoritarian overreaching should continue unabated during periods of crisis, with the government required to satisfy an extremely high burden of justification before it can act in derogation of traditional constitutional values. Although the examples are less well-known, federal judges have occasionally played precisely such an aggressively protective role during periods of military insecurity⁵⁵.

If forced to choose, I would opt for the latter approach. Abdication of the judiciary's checking function during time of war or national crisis is virtually certain to result in serious misbehaviour by overzealous government officials who will, in good faith, abuse their powers in the name of national security. The tragic misbehaviour at Abu Ghraib merely illustrates the certainty that power will be abused in the name of national security unless its exercise is subject to effective outside scrutiny⁵⁶.

But we should not be forced to choose between the extremes of no effective judicial protection, or full-scale peacetime judicial review. Abdication of effective judicial oversight in time of war virtually guarantees the kind of oppressive behaviour that has far too often marred our constitutional heritage. Ask a Japanese-American who was forced from her home and confined in a concentration camp during World War II what she thinks of a system with no judicial effective protection. On the other hand, insistence on a "business as usual" approach to judicial risk assessment in wartime may pose unacceptable levels of danger to society. Ask someone getting on a plane today whether a fairly administered prophylactic search of her baggage and the baggage of fellow passengers violates the Law⁵⁷. Instead of being forced into an either/or

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

choice between extremes, one wonder if it is possible to distil from Americas wartime experiences an intermediate position that would permit the Article III judiciary to continue to play an important checking function during wartime, while taking account of the changed reality that war brings?

CONCLUSION AND RECOMMENDATION

The issue of national security is the front burner especially with the contemporary situation that we find ourselves. Several things and organisations or groups are contending with the security of people all over the globe. In Nigeria for example, the issue of bandits, kidnappers, boko haram etc has been a challenge to national security, even though the government has refused and or is not handling the situation to the satisfaction of the majority of the people. The CFRN, 1999⁵⁸ empowers the president to deploy members of the armed forces on a limited combat duty before informing the legislature. One expects this to happen especially in fighting the boko haram attack on innocent citizens of Nigeria, since it was established that the members of the sect are mostly from outside Nigeria.

The America system has been very interesting as the judiciary has been tested severally on the interpretations of the actions of not just one president but several. Nigeria judiciary is yet to have such an experience, even though it is not a good thing to covet. One wonder if our judges will be bold enough to make pronouncements against the executive arm especially the president if he goes wrong in the use of the armed forces.

We recommend that in emergency situations the judiciary should weigh the pros and cons of the situation at hand and do the needful in the interest of the safety of the lives and properties of the citizens who elected the executive and legislature and by the way who indirectly appointed the judicial officers. We also recommend the all arms of government and indeed all citizens should practice and obey the rule of law. If constitutional democracy is practice and equality of citizens is enshrined we will not have any cause to find ourselves in any security mess.

⁵⁸S.5 (5) CFRN, 1999 as amended.