JUDICIAL REVIEW AND NATIONAL SECURITY CONCERNS: A CRITICAL COMMENTARY ON *TRUMP* V. *HAWAII* (2018)

Abstract

Electoral promises with religious overtones sometimes lead to victory in elections even in those countries, which have strong traditions of liberal democracy. Often they culminate into controversial policies and conservative laws. In the electoral campaign, Donald J. Trump projected citizens of Islamic countries as security threat to American life. He issued Presidential Proclamation- 9645 to restrict their liberty of entry in the USA which was upheld by the US Supreme Court. This competing claim of security *vis a vis* liberty is the subject matter of this article, which is divided into five parts. Part I provides facts and issues of travel ban orders. Part II deals with majority opinion on statutory and constitutional challenge with special emphasis on the scope of judicial review (deferential standard *vis a vis* reasonable observer review) in cases involving national security and foreign affairs. Part III places a note on minority opinion. Part IV scans hundred years of national security jurisprudence from *Schenck* to *Trump*. Part V proposes concluding remarks with lessons for India.

I Introduction

THE US Supreme Court has upheld the constitutional validity of the controversial Proclamation of the President, in the case of *Trump* v. *Hawaii*.[1] The Proclamation imposed travel restrictions and was condemned by many for the anti-Muslim stand of the President Donald Trump. The conservative judgment of the progressive Supreme Court, therefore, surprised many because the US Supreme Court is famous for the protection of extreme forms of liberty in the USA. However, the trends strongly suggest that peace time Supreme Court is different from war time Supreme Court in the USA. Whenever the US Court found the country is facing a troubled phase (war, cold war or terror war) they have always accorded "security" a priority, over "liberty."

During his electoral campaign for White House, Donald J. Trump convinced the voters that liberal laws and policies of the USA (like visa, refugee resettlement program) facilitate foreign terrorists an easy entry to the country and provide breeding ground for real threat to life, liberty and property of Americans. After being elected as President, Trump gave "political and bureaucratic expression to the restrictionist vision"[2] and

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1 585 U. S. (2018). It was decided on June 26, 2018. The ratio was 5:4. Roberts, C. J., (with Alito, and Gorsuch, JJ.) delivered the majority opinion of the Court. Kennedy, and Thomas, JJ., filed concurring opinions. Breyer, J., (with Kagan, J.) and Sotomayor, J. (with Ginsburg, J.) filed dissenting opinion, *hereinafter* referred as *Trump, available at* : https://www. Supreme court. gov / opinions/17pdf/17-965_h315.pdf, (last visited on July 12, 2018).

2 Cristina M. Rodríguez "*Trump* v. *Hawaii* and the Future of Presidential Power over Immigration," *available at* :https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over immigration, (last visited on Feb 2, 2019). Cristina M. Rodríguez is Leighton Homer Surbeck Professor of Law, Yale Law School.

issued three executive orders, last being the Presidential Proclamation[3] no 9645.[4] He exercised his authority under the Immigration and Nationality Act, 1952 (INA-amended in 1965). INA vests in the President the power to restrict entry of foreign nationals if it "would be detrimental to the interests of the United States."[5] The Presidential order was neutral in text. In application, it prohibited the entry of *all* citizens of seven countries *viz.* Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[6] These countries are Muslim countries. The travel ban led to the immediate cancellation of thousands of visas. There was no doubt that the Executive orders "stranded its residents abroad, split their families, restricted their travel."

The Executive orders and the Proclamation were challenged in the Federal District Courts,[7] Circuit Courts[8] and the Federal Supreme Court of the USA for violation of INA as well as the First Amendment [establishment of religion] *etc.*

US Supreme Court

The Federal District Court issued a Temporary Restraining Order (TRO) on the travel ban followed by approval of the circuit court. The Trump government appealed to the Supreme Court of the USA[9] which stayed the order of the appellate court and allowed the travel restrictions with minor modifications.[10] In this Proclamation, the Trump administration imposed entry restrictions on the nationals of countries on

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3 The President issued three instruments. Executive Order (EO)-1. A federal district court stayed EO1. Therefore, the President issued EO2 replacing EO1, which was also stayed, but the US Supreme Court lifted the stay. EO2 was replaced by the Presidential Proclamation no 9645.

4 Proclamation 9645- Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, issued on Sept 24, 2017, *available at* : https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/, (last visited on July 13, 2018).

5 8 U. S. C. s. 1182(f).

6 82 Fed. Reg. 8,977-78 (the Immigration and Nationality Act (INA) s. 217(a)(12), codified at 8 U.S.C. s. 1187(a)(12).

7 Article III of the USA Constitution. Unlike in India, the validity of a federal law in the USA can be challenged in federal district courts.

8 There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals.

9 *Trump* v. *Intern. Refugee Assistance Project*, Decided on June 26, 2017, *available at* https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf, (last visited on July 12, 2018). Also, Nos. 16-1436 (16A1190), 16-1540 (16A1191) : https://www.leagle. com/decision/ insco 2017 0626a87, (last visited on July 12, 2018).

10 News item *available at* : https://www.nytimes.com/2017/06/26/us/politics/supreme-court-trump-travel-ban-case.html, (last visited on July 12, 2018).

either of two grounds; (i) The countries do not share adequate information for an entry determination, or (ii) The country presents a national security risk for America. The Supreme Court focussed on two issues.

i. Whether the President had authority under the Immigration and Nationality Act, 1952 (INA) to issue the Proclamation? and

ii. Whether the entry policy violated the Establishment Clause of the First Amendment?

II Majority Judgment

The judgment was thinly divided and out of nine, five judges upheld the Proclamation. The central point of the argument was that the law, *.i.e.,* proclamation "as it is" is bad in its content as well as its application. The majority, however, held that INA provides broad discretion because section 1182(f) of INA vests the President with "ample power" to impose entry restrictions. Section 1182(f) of INA requires the President to "find" that the entry "would be detrimental to the interests of the United States." To "find" the same, the President engaged in a review process at multiple levels. The delegation under Presidential Proclamation was comprehensive. Was the finding by the President, as well as its sufficiency, subject to judicial review? The majority held that "assuming that some form of review is appropriate, the plaintiffs' attacks on the *sufficiency* of the President's findings cannot be sustained."[11] The Court found greater confidence in Trump's detailed Proclamation *vis a vis* previous executive orders by other presidency on similar matters. Moreover, any "searching inquiry into the persuasiveness of the President's justifications is inconsistent" in this case because of two reasons. (i) The broad statutory text under the INA and (ii) the deference traditionally accorded to the President in the area of national security. The government has lifted the entry ban on various countries once they addressed the security concern and found fit in the vetting process. This indicates that in application also the law is open and not discriminatory.

Admissibility Determinations and Visa Issuance: Difference

It was argued that the Proclamation made discrimination based on nationality which is prohibited under section 1152(a)(1)(A) of the INA. The majority rejected this argument on the ground that visa issuance and admissibility determinations are two different things and they operate in separate fields. Suppose a consular officer issues a visa. This does not guarantee automatic entry into the United States because on arrival the alien may be denied entry. Executive history again favoured Trump because President Reagan suspended the entry of all Cuban nationals as immigrants and President Carter denied and revoked visas to all Iranian nationals. If issue of visa automatically guarantees

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11 Roberts, C. J. in *Trump* at 12.

entry, the President would not be able to suspend the entry of nationals in case of an epidemic, or "a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war."[12] Therefore, the Supreme Court decided that the Proclamation was not inconsistent with the statutory regime of the INA.

Constitutional Challenge

The Proclamation was also challenged on constitutional parameters that it was against the establishment clause of the First Amendment. The relevant part the First Amendment provides that the "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The central argument of the plaintiffs and those of dissenting judges was that the Proclamation was not faith neutral and singled out Muslims for disfavoured treatment because of the *animus* of the President against Islam. They added that the Proclamation was manipulated in such a manner (which the plaintiffs called "*religious gerrymander*"), that in operation, it was prejudicial to Muslims even though the language did not expressly state anything.[13] The supporting evidence was the series of statements made by Trump before and after elections *viz.* total and complete shutdown of Muslims entering the United States until the country's representa-tives can figure out what is going on; Islam hates the USA; Twitter links to three anti-Muslim propaganda videos *etc.* These statements and objectionable expressions of Donald Trump were not considered as a strong argument to favour plaintiffs. The majority held:[14]

> Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. *In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.* [Emphasis added]

In other words, the Court examined whether the statements of the President indicating *animus* against Muslims could be useful in reviewing the Proclamation or not. The majority began with a literal interpretation, stating that the Proclamation was "*neutral on its face.*" The majority, therefore, interpreted the law "as it is" and did not delve into possibility of any hidden agenda behind the law or the operation of the law. It seems this Austinian approach was also necessary to the majority because the Proclamation

12 *Id.* at 23.

13 *Id.* at 26.

14 *Id.* at 29.

was a core executive responsibility. It was "core" because the President in this case exercised his authority not in a general area of interest but in the specialised area of national security and foreign policy. Therefore, the statements of Trump might be relevant evidence but not admissible in this case because the *authority* of the Presidency in these "core" areas dilutes the significance of his statements made before or after poll. Had this not been the exclusive area of national security or foreign policy, the expressions by Trump might have had a different probative and persuasive force. The Court elaborated on the same while discussing the standard of review applicable in this case. One such observation deserves attention:[15]

> The case before us differs in numerous respects from the conventional Establishment Clause claim. *Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad.* Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. [Emphasis Added]

According to the majority, this challenge before the Supreme Court, based on the fundamental principles of religious neutrality, was not an ordinary case of the violation of fundamental rights under the First Amendment. What made this extraordinary was the deep involvement of national security issues, which indeed mandates the Supreme Court to be conscious and cautious before exercising its armoury of judicial review. The texts of the Proclamation had nothing objectionable to impute *animus* against Muslims. The petitioners argued that there was a hidden agenda behind the Proclamation which was exhibited by the President's "extrinsic statements". Was the Court authorised to make such a judicial inquiry, that too with these evidences, under the Doctrine of Judicial Review?

Judicial Review in Visa Denial: Circumscribed or Comprehensive?

The majority held that entry of foreign nationals is a "fundamental sovereign attribute" of government that always involved a circumscribed judicial review.[16] *Kleindienst* v. *Mandel,*[17] was leading decision to the precedential discussion through which the Court held that only a limited judicial review is available to the extent of determining whether the Executive gave a "facially legitimate and bonafide" reason for its action or

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15 *Id.* at 29.

16 *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952) ; *Fiallo* v. *Bell,* 430 U. S. 787, 792 (1977).

17 408 U. S.(1972), at 756–757. The ratio was 6:3. Ernest Mandel, a Belgian journalist who called himself as "revolutionary Marxist", was invited to speak at Stanford University. The government refused his entry visa in the USA. The Supreme Court upheld that the listeners have constitutional "right to receive information" under first amendment of the US Constitution though the denial of entry of Mandel was upheld.

not.[18] If it is so, the Court "will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of US citizens.[19] This is because of the norm of "deferential treatment"[20] or "respect for the political branches" accorded to the Executive especially in the realm of foreign affairs.[21]

Despite this judicial finding, the Government suggested that an inquiry extending beyond the facial neutrality of the Proclamation should also be made. This argument reflects the confidence of the Government.[22] The Court agreed to look "behind the face of the Proclamation to the extent of applying rational basis review." Rational basis of review in this case considers whether the entry policy is *plausibly* related to the Government's stated objective to protect the country and improve vetting processes.[23] The majority rejected the idea that, instead of the rational basis review, a reasonable observer inquiry ought to be made applicable in "immigration policies, diplomatic sanctions, and military actions." Such a "reasonable observer" inquiry was applicable "to cases involving holiday displays and graduation ceremonies."[24] The Court found

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18 *Id.* at 769.

19 *Id.* at 770.

20 Among the possible standards of review, the courts may adopt either a *de novo* standard or a *deferential* standard. Deferential standard believes in presumption of constitutionality because it reposes confidence that the lawmakers would not make a law contrary to the constitutional principles and policy. The deference applied to national security and foreign policy is considerably greater than those applied to other cases. Therefore, the Court cannot inquire beyond what is expressly available in the text. *De novo* standard does not believe in the presumption of correctness. It may go beyond the text to examine the sufficiency and correctness of decision. For example in *Kerry* v. *Din*, 576 U.S. (2015) Kerry, the Secretary of State, refused to grant visa to Kanishka Berashk on the ground that he was engaged in "[t]errorist activities," but the officer provided no further information. Kanishka Berashk was a resident citizen of Afghanistan and former civil servant in the Taliban regime, who was married to Fauzia Din. Fauzia Din was a naturalised citizen of the USA. Her husband, therefore, was classified as an "immediate relative" who was entitled to priority immigration status. The majority held that the Court cannot ask detailed report or the ground on which Kanishka Berashk was found to be engaged in terrorist activity. The conclusion was based on *Mandel* case.

21 *Kerry* v. *Din,* 576 US (2015).

22 One may contrast this with *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, 2018 SCC OnLine 2807, also known as ***Rafale*** judgement. In this case, the defence deal of Rafale combat aircraft was in question and the petitioners requested to issue appropriate orders to probe any corruption angle. The government of India was asked to submit pricing details of the defence deal in a sealed cover. The full bench observed that they are making this order only to satisfy their conscience. The Government of India could deny access to these official secret documents but the details were submitted by the government and examined by the full bench.

23 *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980). *See also*, *infra* note 30.

24 Majority opinion of Robert CJ at 32.

that the legitimate purpose was blocking the entry of those nationals who failed in the vetting process and inducing countries to improve their practices. The Court noticed that the Proclamation is silent on religion and therefore, on the face there was no *animus*. Even if some inquiry was conducted (as suggested by the government), the argument of the plaintiffs did not sound strong because of the reasons that (a) The policy covers just 8% of the world's Muslim population; (b) Iraq is one of the largest predominantly Muslim countries in the region and is exempted from Proclamation; (c) The Congress and the prior government have already designated them as a potential risk to national security of the USA and this Proclamation has only limited the restriction to those countries; (d) The Proclamation is the product of a worldwide review process undertaken by multiple agencies (e) Based on criteria and progress made by the countries on vetting process the restrictions were lifted. (e) A report was gathered through the Information Act to ascertain the thoroughness of the review process. These inquiries rebutted the claim of religious *animus* or lack of thoroughness of the review process.

The fundamental flaw, the majority found, in the argument of plaintiffs and the opinion of dissenting judges was that the challenge to the entry suspension under the Proclamation was based not on principles, provisions, precedents, rules of interpretation or limits of judicial review but "on their perception of its effectiveness and wisdom."[25] The government is not obliged to disclose all national security concerns, which "are delicate, complex, and involve large elements of prophecy."[26] Robert, CJ. also observed that the minority opinion only "recycles" the version of plaintiffs which presents statistics selectively, rely on anecdotal evidence and produces only "a piece of the picture".[27] The majority also rejected the comparison of *Korematsu*[28] with *Trump*. The executive order in *Korematsu* was racial on the face of it while the Proclamation of 2017 was neutral. The majority used this opportunity to expressly declare *Korematsu* judgement as "gravely wrong the day it was decided." Indeed minority opinion also supported the unconstitutionality of *Korematsu*.

The brief and concurring opinion of Kennedy, J. reflects that though he agreed with the majority judgement (led by Robert, CJ.), which relied mostly on "is law", he was

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25 Majority opinion of Robert CJ at 35. One may again contrast this with the *Rafale* judgement (2018) where the Supreme Court of India held that the "perception of individuals cannot be the basis of a *fishing and roving enquiry* by this Court, especially in such matters."

26 *Chicago & Southern Air Lines, Inc.* v. *Water-man S. S. Corp.*, 333 U. S. 103, 111 (1948); *see also, Regan* v. *Wald*, 468 U. S. 222, 242–243 (1984). In *Regan* the Court declined to conduct an "independent foreign policy analysis."

27 Majority opinion of Robert CJ at 37.

28 *Korematsu* v. *United States*, 323 U. S. 214 (1944). During war with Japan, the government apprehended espionage and sabotage. The President issued an executive order, which directed the exclusion of all persons of Japanese ancestry from a described West Coast military area.

not comfortable with the expressions of the President against Muslims. Another member of the bench, Thomas, J. also concurred with the majority and addressed in detail the jurisdiction issue of the Federal Court. He also warned, that "*if federal courts continue to issue them, this Court is duty bound to adjudicate their authority to do so*."

The Court, therefore, found that there was sufficient justification of national security and the Proclamation survived the rational basis review. The majority, however, did not express any view on the soundness of the policy. The plaintiffs failed to demonstrate a likelihood of success on the merits of their constitutional claim. The majority held the preliminary injunction by the courts below as an abuse of discretion.

III Dissenting Opinion

Out of Nine, four judges delivered two dissenting opinions. Breyer, J. filed a dissenting opinion, in which Kagan. J., joined. He held that that the Proclamation was not meant to serve the "sole" interest of national security but was a manifestation of Islamophobia and failed to address the visa issues of those groups of cases, which had no proximity with national security. For example, patients (even child) seeking immediate medical attention, academicians, students, family members, were denied visa. He limited his inquiry into the *application* (the law as it is applied in the society and the perception, a reasonable observer holds) of these exemptions and waivers. He has chosen to interpret the Proclamation "as" it is "applied" and not as it is "written" on the text. The jurisprudential basis for this priority of "enforcement" over "content" was the idea that "lawfulness is strengthened" if the enforcement part of a law is satisfactory.

The second dissenting note[29] is more detailed which was delivered by Sotomayor, J. and joined by Ginsburg, J. They found that the "ostensible and predominant purpose" of the Proclamation was to disfavoure a particular religion, which was against the constitutional command and therefore, it was contrary to the First Amendment. Sotomayor, J. applied "Reasonable Observer" test[30] of judicial review to conclude that

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29 First dissenting note was by Breyer and Kagan JJ.

30 It was propounded in *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor,J., concurring). Initially articulated in the mid-1980s, this approach would find an Establishment Clause violation whenever a reasonable observer would conclude that government "endorses religion," thus sending "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *See,* Jesse H. Choper, "The Endorsement Test: Its Status and Desirability," 18 *J.L. & Pol.* 499 (2002), *available at*: https://scholarship.law. berkeley.edu/cgi/viewcontent.cgi? article = 1295&context=facpubs, (last visited on July 31, 2018) There is another standard *i.e* rational standard of review where the court doesnot inquire the detailed reasons of executive decision. In reasonable observer review the court examines the elaborate reasons of executive decisions so as to satisfy a reasonable person. This is stringent standard of review to evaluate a legal provision.

the *animus* of Trump against Muslims "masquerades behind a facade of national-security concerns." and Proclamation No. 9645 was a repackaging of the same *animus*.[31] She criticised the majority for ignoring the facts, misconstrued legal precedent, and turned a blind eye to the pain and suffering of countless persons.[32] She treated Trump's expressions as part of the same transaction establishing his intention against Islam, from pre poll promises to post poll policy leading to the Proclamation. She also held that the Proclamation cannot stand "even if rational standard review is used", because the officers executing it were openly biased against Muslims. The review document was not made available "even in redacted form." Evan the government's claims of national interest were not correct.[33] Based on above arguments Sotomayor, J. held that, "the Proclamation rests on a rotten foundation"[34]

It seems the dissent has mixed up the political question with legal question. Foreign affairs and national security is a matter of exclusive political judgement and the judicial role is limited to the issue of constitutionality. However, the dissenting note has focused more on the execution part of law to question the desirability of the Proclamation. They ignored that the history of the Supreme Court in the area of national security is tilted more towards a conservative or textual approach rather than a liberal or wide interpretation. The peculiarity of the judgment lies in the fact that it was unanimous on a few less significant issues like stay on TRO, locus and overruling of *Korematsu*.

IV *Schenck* to *Trump*: Hundred Years of National Security Jurisprudence

The majority judgement in *Trump* might have surprised many because the Supreme Court in the USA is very liberal in fundamental rights cases. Many scholars have criticised this judgement. A commentator in *Yale Law Journal* referred this as "very-near-blind deference to the executive branch" and predicts that "one day in the future, *Trump* v. *Hawaii* is eventually overturned." [35] Another commentator in the *Harvard Law Review* writes that "the Court deviated from its usual approach to reviewing claims that a law arises from an unconstitutional motive. What remains unclear is when in the future the Court will take the same approach."[36]

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31 Dissenting opinion of Sotomayor J at 1.

32 *Id.* at 3.

33 *Id.* at 22.

34 *Id.* at 18.

35 Neal Kumar Katyal, "*Trump* v. *Hawaii*: How the Supreme Court Simultaneously Overturned and Revived *Korematsu*, , *Yale Law Journal* (2019) *available at* : https://www.yalelawjournal.org/forum/trump-v-hawaii, (last visited on Feb 3, 2018). Neal Kumar Katyal was lead counsel for the State of Hawaii in *Trump* v. *Hawaii*.

36 *Trump* v. *Hawaii* 132 *Harv. L. Rev.* 327 (2018), *available at* : https://harvardlawreview.org/ 2018 /11/ trump-v-hawaii/, (last visited on Jan 25, 2019).

However, a close scrutiny of various precedents suggests that this judgement is not a trend change and any overruling of *Trump* in future might not always mean the judgement was wrong. *Trump* takes a literal route to uphold the travel ban proclamation but, the Supreme Court has only followed the literal trends on difficult days. An archival account of cases decided by the Supreme Court suggests that the judicial decisions of ordinary days are different from those of extraordinary days (when the USA faced challenges to their security and sovereignty). The Court ordinarily behaves as a protector of liberty, but in difficult times, like that of war (be it World War or Cold War or the terror war), they have behaved as a protector of national security laws, changed itself as a conservative court and have made a conscious departure from set liberal trends. In difficult times, they have upheld the laws dealing with national security issues.

The origin of this literal trend may be traced a hundred years ago with the passage of national security enactments (the Espionage Act, 1917) in the USA. During World War I, Schenck was convicted under the Espionage Act, 1917 though he used only leaflets to display his expressions and his disappointments against the participation of USA in the war. The Supreme Court in *Schenck* v. *United States*[37] upheld the law and a unanimous verdict was reached by Holmes, J. who evolved the idea of "clear and present danger" test. His reasoning for a conservative approach was that: [38]

> *when a nation is at war,* many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right." [Emphasis Added]

Similarly, in *Gitlow* v. *New York,*[39] it was observed that:[40]

> [The State] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or *imminent and immediate*

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37 249 US 47(1919), was a unanimous verdict. In several cases the Court upheld the conviction under the Act. *Gilbert* v. *Minnesota*, 254 U.S. 325 (1920); *Pierce* v. *United States*, 252 U.S. 239 (1920); *Schaefer* v. *United States*, 251 U.S. 466 (1920); *Abrams* v. *United States*, 250 U.S. 616 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *See*, Geoffrey R. Stone, "Free Speech and National Security", 84 *Ind. L.J.* 939 (2009) at 946, *available at*:http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2975 &context= journal_articles (last visited on July 02, 2018), *hereinafter* referred at *Geoffrey R. Stone, Free Speech.*

38 *Available at* : https://supreme.justia.com/cases/federal/us/249/47/, (last visited on July 22, 2018).

39 268 US 652 (1925). This case is also known for "incorporation doctrine" *i.e.* Bill of Rights is also applicable to State through fourteenth amendment, *available at* : https:// www.britannica.com/event/ Gitlow-v-New-York (last visited on July 12, 2018).

40 *Ibid.*

> *danger* of its own destruction; but it may, in the exercise of its judgment, *suppress the threatened danger in its incipiency*. [Emphasis Added]

The Supreme Court of the USA upheld convictions under these laws with strong dissenting judges in a few cases. The message of the majority of the judges of the Supreme Court was that "*while the nation is at war, serious, abrasive criticism ... is beyond constitutional protection*." [41] [Emphasis Added]

The trend of upholding national security laws continued post World War II. In *Dennis* v. *United* States[42] while dealing with the Smith Act of 1940[43] the Supreme Court held that "the danger need *neither be clear nor present* to justify suppression."[44] *Dennis* was followed by cases where the Supreme Court upheld[45] the validity of the Subversive Activities Control Act, 1950.[46]

Brandenburg and *Trump*

Dennis was overruled in 1969 in the case of *Brandenburg* v. *Ohio*,[47] where the Court held that "mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action." The criminal statute of Ohio was declared unconstitutional. What is noticeable is the

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41 Observation of the First Amendment scholar Harry Kalven. See, *Geoffrey R. Stone, Free Speech* at 945-946. Brandeis, J., dissented in three cases -*Gilbert*, 254 U.S. at 335; *Pierce*, 252 U.S. at 253 and *Schaefer*, 251 U.S. at 482. Holmes, J., dissented in *Abrams*, 250 U.S. at 624.

42 341 U.S. 494 (1951). The USA controlled the ideology of communism and the Communist Control Act, 1954 was passed by the Congress (the US Parliament) to tackle with red menace which promoted the ideology of violent overthrow of government. The Act is still a law in 21st century.

43 "Smith Act, formally Alien Registration Act of 1940, U.S. federal law passed in 1940 that made it a criminal offense to advocate the violent overthrow of the government or to organise or be a member of any group or society devoted to such advocacy. The first prosecutions under the Smith Act, of leaders of the Socialist Workers Party (SWP), took place in 1941. After World War II the statute was used against the leadership of the American Communist Party (Communist Party of the United States of America; CPUSA). The convictions of the principal officers of the CPUSA (1949) were sustained—and the constitutionality of the advocacy provision of the Smith Act upheld—by the U.S. Supreme Court in *Dennis* v. *United States* (1951). In a later case, *Yates* v. *United States* (1957), the court offset that ruling somewhat by adopting a strict reading of the advocacy provision, construing "advocacy" to mean only urging that includes incitement to unlawful action," *available at* : https:// www. Britannica .com/ event/Smith-Act (last visited on July 20, 2018).

44 *Geoffrey R. Stone, Free Speech* at 950.

45 In various cases, the Court affirmed the exclusion of members of the Communist Party from the bar, the ballot, and public employment, see *Geoffrey R. Stone, Free Speech, supra* at 950.

46 Also called as McCarran Act or the Internal Security Act of 1950, 64 Stat. 987 (Public Law 81-831).

47 *Clarence Brandenburg* v. *State of Ohio,* 395 US 444 (1969).

fact that *Dennis* was a judgement delivered in difficult days when the communist ideology was posing risk to the national security of the USA. *Brandenburg* was also a judgement which was delivered in difficult times of Vietnam war, and Cold War with the USSR when national security issue was a concern for the USA. Why the Supreme Court interpreted *Trump* conservatively and did not follow liberal interpretation of *Brandenburg*? Even minority judgement does not mention it because *Brandenburg* is not relevant so far as national security laws are concerned. Unlike 1920s or 1940s there was no threat of a full-fledged war. *Secondly*, *Brandenburg* dealt with a problem of criminal law and not those of defence, national security or sovereignty of country, while *Schenck* or *Dennis* dealt not only with law and order issue but also the security of country.

The trend of twentieth century continued in twenty-first century when difficult times of violence risking national security resumed its ugly face in America with the 9/11 terrorist attacks. An issue of fundamental right was raised in *Holder* v. *Humanitarian Law Project*[48] which was relied on by *Trump*. In *Humanitarian Law Project*, a few NGOs desired to become member of foreign terrorist organisation (FTO) with the objective to give training to foreign terrorist organisation on political advocacy.[49] A federal law prohibited and criminalised "material support" to foreign terrorist organisation (FTO).[50] The Court upheld the law prohibiting mere membership because the law was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." The conservative Court not following *Brandenburg* was not a trend change. In all times of risk to country (be it civil war, world war, cold war or terror war) the judiciary has supported the law made to serve national security. A more restricted judicial review in national security issues is a judicial convention and is a command of deferential standard of review. Therefore, *Humanitarian Law Project* was a persuasive precedent of great value, rightly referred in *Trump*. The majority in *Trump* followed the same convention and the command of the constitutional jurisprudence to exercise restraint while dealing with judicial review in national security cases. Therefore, the criticism that the US Supreme Court departed from its previous jurisprudential approach is not convincing.[51]

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48 561 US 1 (2010). The ratio was divided in 6:3.

49 (1) "train members of [the] PKK[Partiya Karkeren Kurdistan (*PKK*), or Kurdistan Workers' Party] on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engage in political advocacy on behalf of Kurds who live in Turkey"; (3) "teach PKK members how to petition various representative bodies such as the United Nations for relief"; and (4) "engage in political advocacy on behalf of Tamils who live in Sri Lanka."

50 Title 18, United States Code, §§2339B(a)(1), (g)(4); §2339A(b)(1).

51 Two articles have criticised the judgement. *Trump* v. *Hawaii* 132 *Harv. L. Rev.* 327, (2018) ; *available at* : https://harvardlawreview.org/ 2018 /11/ trump-v-hawaii/, (last visited on Feb 3, 2019) and Cristina M. Rodríguez "*Trump* v. *Hawaii* and the Future of Presidential Power over Immigration," *available at* : https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over immigration, (last visited on Feb 2, 2019).

V Concluding Remarks

Judicial review has remained a contentious issue in all democracies. As the judiciary lacks democratic legitimacy unlike legislatures, the power to declare a law as unconstitutional has generated various controversies. These controversies have led to different standards of judicial review. The obligation of the Supreme Court is to protect, preserve and promote fundamental rights in a modern democracy. This is possible only when the provisions of fundamental rights are interpreted liberally and not literally. This time-honoured principle has a few limited but established exceptions.[52] National security and foreign policy constitute those exceptions when the Supreme Court transforms into a conservative court. It sticks more to the doctrine of separation of powers, accords greater weight to the principle of constitutionality and applies the doctrine of deferential standard of review with greatest force. National security and foreign policy are a regular affair, be it war or peace but at the difficult times of civil war, war, cold war, proxy war or terror war, this finds a unique significance. Fitzgerald also states that "*the fundamental requirement of any society is the ability to protect itself against annihilation or subjection; and the chief duty of any government is to safeguard the State and its institutions against external and internal attack*."[53] In difficult times, the judiciary has to trust the executive and the Parliament because they are well acquainted with the real risks to the security of State. Therefore, it has to furl its wings of judicial review in these cases.

The US Supreme Court judgement on *Trump* is a reflection of this appreciation. The Supreme Court has never hesitated to jettison its liberal image in times when the US felt a threat, be it external or internal. This State oriented interpretation of the Supreme Court (called as deferential standard of review) has been criticised by many scholars, who argue that if the Constitution remains the same in war and peace, why not the Supreme Court? They miss the point that the Supreme Court is authorised to interpret laws not based on the "text" of the Constitution but have to consider the "purpose" of the Constitution. Liberty, rights and freedom are safe only in a strong as well as secured State with an independent judiciary. The new millennium, led by revolutionary changes in technology, has opened new doors for "free trade of ideas." It is also witnessing the ugly and deadly face of global terrorism, which is an enemy *sui generis*. A stronger enemy needs stronger power. The majority opinion in the US Supreme Court

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52 Grahame Aldous and John Alder, *Applications for Judicial Review, Law and Practice*, writes that "certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited," as quoted in *Rafale* judgement.

53 P.J. Fitzgerald, *Criminal Law and Punishment* 83 (Oxford, 1962).

in *Trump* has established that advocating a "rights based" broad standard of judicial review in the difficult times of war on terror is a deeply flawed concept. Supreme Court of wartime is distinct from the Supreme Court of peacetime. This is a "distinction with difference." They inaugurated national security jurisprudence hundred years ago in *Schenck*, developed it further in the 1950s, applied it in *Humanitarian Law Project* and brought about its culmination in *Trump*. The Indian judiciary should learn this lesson while deciding the issues in *Arup Bhuyan* case[54], Rohingya Refugee, Citizenship Amendment Bill, National Register of Citizens and other cases with national security and foreign policy overtones.

Anurag Deep*

54 *Arup Bhuyan* v. *State of Assam* (2011)3 SCC 377. A division bench decided that membership of a terrorist organisation cannot be penal unless the accused resorts to violence or incites violence. The review of the case is pending before a larger bench, which should overrule this judgement.

* Associate Professor, Indian Law Institute, New Delhi. The author is grateful to Prof. S. N. Singh, Former Dean, Faculty of Law, University of Delhi, for his review comments. He also acknowledges Ms. Charvi Kumar, Ph.D. Research Scholar at the Indian Law Institute for proof read and comments.