

National Security And Civil Liberties

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From the beginning of our nation claims of national security have been advanced as grounds for expanding governmental powers or easing restrictions on those powers. Perhaps at no time, other than during active war, have such claims been urged more insistently or on a broader front than they are now. The reasons for this development lie deep in our present political, economic, and social condition. They include the ever-growing complexities faced in the governance of a modern technological nation, the radical nature of the problems that confront us at home, the changes taking place in the world around us, the position of the United States in global affairs, the specter of nuclear warfare, the vulnerability of modern society to terrorist tactics, and many others. Whatever the causes may be, the tension between national security and traditional liberties plainly poses vital questions for our constitutional structure.

This paper will first undertake to explore some of the basic dynamics in the conflict between national security and constitutional liberties. It will then attempt to set forth the fundamental constitutional principles which govern the conflict. Finally it will examine the record of the Supreme Court in dealing with these problems, particularly in connection with more recent issues relating to the publication of national security information, political surveillance, and the rights of American citizens abroad.¹

I. The Dynamics of the Conflict

Logically, one might start out by attempting to define the term “national security” or “national security interests.” This has never been done, at least successfully, and for good reason. In its broadest scope

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1. Prior material dealing with the subject includes Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972); Civiletti, *Intelligence Gathering and the Law: Conflict or Compatibility?*, 48 FORDHAM L. REV. 883 (1980).

This paper does not deal with problems of martial law, that is, situations where civilian laws and institutions have totally collapsed and are replaced by military authority or its equivalent.

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the concept of “national security” is virtually without limits; it embraces every aspect of the general welfare of the nation. Thus, not only is the strength of our armed forces an issue of national security, but so also is the question of whether school children should be compelled to salute the American flag. If one tries to confine the concept to relations between the United States and other countries, the same dilemma confronts us; almost everything that takes place in the United States has an impact on “foreign relations.” In short the concept of “national security” is so amorphous that it is indistinguishable from the “national welfare” or the welfare of the society viewed as a collective.

It is possible that the concept of “national security” might be limited to matters that threaten the physical security of the nation, such as threats from the large-scale use of force within the United States or from the aggressive actions of a foreign state. This “self-defense” notion of national security probably approaches more closely the core intention of those who utilize the concept. Non-forceful attempts to change the institutions of a nation, or to influence the conduct of other nations, are normally viewed as legitimate by a democratic society and hence should not be regarded as matters of “national security.” Yet this definition also has no firm edges. Economic as well as physical factors play a part in national security and, again, it is hard to draw clear dividing lines between potential and actual use of physical force so far as national security is concerned.²

The dilemma of formulating an acceptable definition of “national security” may not, however, constitute a significant obstacle, depending upon the constitutional effect given to a claim of “national security.” If the showing of a national security interest automatically triggers an expansion of governmental power or constitutes grounds for an exception to restrictions on such power, then a clear-cut definition of “national security” would be essential. But if, as suggested hereinafter, the existence of a national security interest does not in and of itself justify alteration of constitutional principles, but is merely one factor in the application of the constitutional principle, the focus turns not toward a general definition of national security but toward an examination of the specific national security factors involved in the particular situation. In such event the difficulty of definition is not fatal to the construction of legal doctrine. Nevertheless, the potentially unlimited scope of the

2. Efforts to define national security may be found in Note, *supra* note 1, at 1133; Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3) (1976) (repealed 1978); *Alderman v. United States*, 394 U.S. 165, 209 (1969) (Fortas, J., concurring in part and dissenting in part).

term "national security" must be kept in mind as a warning of the length to which some arguments based on "national security" can be carried.

Moving beyond the question of definition, it must be recognized that threats to national security, however defined, generate severe strains upon our system of constitutional liberties. No goal sought by a collective is likely to be considered more imperative than that of self-preservation. Moreover, the facts constituting the alleged threat are likely to be shrouded in secrecy, thereby blocking the normal functioning of the democratic process. Under these circumstances it is not easy to devise a system which would assure that constitutional liberties are not completely subordinated to the demands of national security.

Yet there are inherent limits to a one-sided focus on meeting threats to national security by ignoring or subordinating constitutional liberties. Individual rights are also social rights and an integral part of any democratic society. A democratic society that seeks to protect itself by sacrificing individual rights soon finds that it is no longer the kind of society it purports to be. Moreover, those who framed our structure of constitutional liberties, having just come through the ordeal of the American Revolution, were quite aware of the pressures upon that structure emanating from the demands of national security. The experience of the nation thus far has demonstrated that national security goals can in fact be met without abandoning constitutional liberties. The lesson of these considerations is that the natural tendency to prefer the immediate demands of national security to the long-term requirements of a democratic community needs to be resisted strongly.

The dynamics of reconciling the requirements of national security with the maintenance of constitutional liberties involve a number of other considerations. The first is that claims of national security must always be viewed with a high degree of skepticism. Governments always resent criticism or dissent and are prone to suppress such activity in the name of national security. Governments also frequently employ appeals to national security as a method of distracting public attention from other problems with which the nation must deal. The secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption, or outright violation of law. Subsequent events almost always demonstrate that the asserted dangers to national security have been grossly exaggerated. To put it another way, when national security claims are advanced there may well be a confusion of

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the interests of the administration in power with the interests of the nation.

Numerous examples of these tendencies can be cited. Thus President Nixon and his aides invoked national security considerations as a basis for breaking into the office of Daniel Ellsberg's psychiatrist. The FBI kept Dr. Martin Luther King, Jr., under surveillance and harassed him for several years on the ground that an associate had an affiliation with the Communist Party. The government's claims that publication of the Pentagon Papers would cause "grave and irreparable injury" to the nation turned out to be wholly without foundation when the documents were in fact published. It is not too much to say that the history of constitutional liberty in the United States is in large part the history of the misuse of appeals to national security.³

Second, it is necessary to keep in mind the role of the courts in helping to maintain the appropriate balance between the measures necessary for national security and the preservation of constitutional liberties. Our judicial institutions are, of course, the traditional instrument for protecting individual rights against encroachment by the State. Performance of that function, with independence and courage, would seem even more vital in connection with national security issues. The appeal to public emotions, the temptations to exploit national security claims for illegitimate purposes, the absence of normal political safeguards due to secrecy factors, and the inherent vagueness of the national security concept, all make the supervisory and checking powers of the courts especially relevant in national security cases.

Nevertheless, the executive branch of government and, to some extent, the legislative have consistently endeavored to curtail or eliminate the functions of the judiciary when national security claims are invoked. The grounds for this challenge are mostly based upon customary arguments for limiting judicial review, namely, that the courts are not competent to deal with the special problems of national security,

3. On the break-in of the office of Daniel Ellsberg's psychiatrist, see *United States v. Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974) (ruling on motions for discovery and dismissal; discussion of national security grounds); *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) (affirming jury conviction), *cert. denied*, 429 U.S. 1120 (1977). With respect to Dr. Martin Luther King, Jr., see D. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.* (1981). The government's claims in the Pentagon Papers case are set forth in *N.Y. Times Co. v. United States*, 403 U.S. 713, 717-19 (1971). On the activities of the intelligence agencies, see generally SELECT COMM. TO STUDY GOV'TAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 755, 94th Cong., 2d Sess. (1976) (Church Comm. Report); M. HALPERIN, J. BERMAN, R. BOROSAGE & C. MARWICK, *THE LAWLESS STATE* (1976); D. WISE, *THE AMERICAN POLICE STATE* (1976); F. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL SYSTEM* (1980).

that only the executive branch possesses the necessary expertise, that oversight by the courts entails delay and impairs effective action, that undue administrative burdens are imposed upon the executive, and the like. There seems no reason to accept these assertions as carrying more weight in national security cases than in the numerous other cases with which the courts deal every day. With the possible exception of some issues in the area of foreign relations, the functions of neutral oversight in national security cases does not entail problems that are too complex or administratively awkward for our judicial institutions. The one contention peculiar to national security matters—that the courts cannot be trusted with state secrets—is difficult to take seriously.⁴

Finally, it is important to remember the nature of the search for true national security. It cannot be a search for total security. That is only achievable in a police state, and then only temporarily. National security in a democratic society involves taking some risks and allowing some flexibility. It entails faith that an open community is better prepared to adjust to changing conditions than a closed one. It is based upon the proposition that the creation of economic, political, and social institutions that respond to the needs of the people is a better protection than implacable enforcement of sedition laws, loyalty programs, and regulations classifying information as secret.

II. The Basic Constitutional Structure

The basic constitutional doctrine that governs the reconciliation of national security and constitutional liberties is firmly established. We start with the fundamental proposition that the exercise of governmental power to achieve national security is subject to the same limitations as the exercise of governmental power to secure other social goals. In other words, the existence of national security considerations does not justify the suspension, modification, or abandonment of constitutional rights. This remains true regardless of the source of governmental power, whether it rests on direct legislative mandate, delegation from the legislature to the executive, the inherent powers of the Chief Executive, or any other basis.

The Supreme Court has consistently adhered to this position in a series of cases where the government has contended, directly or in effect, that traditional constitutional limitations were superseded by the

4. Arguments for limiting the scope of judicial review in national security cases were considered in detail and rejected by the courts in *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 944 (1976).

demands of national security. Thus in *Youngstown Sheet & Tube Co. v. Sawyer*⁵ (the *Steel Seizure* case) President Truman, faced with the threat of a strike in the steel industry during the Korean War, took possession of the mills in order to maintain production. "The indispensability of steel as a component of substantially all weapons and other war materials," the Court noted, "led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel."⁶ There was, however, no legislative enactment which authorized the President to take this action. The thrust of the government's argument was that the constitutional principle of separation of powers did not apply where the President acted in the name of national defense. The Court flatly rejected the government's position, saying "we cannot with faithfulness to our constitutional system" uphold the President's action.⁷ "The Founders of this Nation," the Court declared, "entrusted the lawmaking power to the Congress alone in both good and bad times."⁸

In *New York Times Co. v. United States*⁹ (the *Pentagon Papers* case), the government sought to enjoin the New York Times, the Washington Post, and other newspapers from publishing the Pentagon Papers, a classified history of the Viet Nam War obtained from a former government employee. The government asserted that publication would cause "grave and irreparable injury" to the nation and that this justified an exception to the constitutional prohibition against prior restraint. The government contention, if upheld, would have meant abandonment of the doctrine of prior restraint in national security cases. The Court refused to accept the government position. While a majority did not agree upon any one theory of the prior restraint rule, it did squarely hold that, despite substantial injury to national security, the prior restraint doctrine remained in force.¹⁰

*United States v. United States District Court*¹¹ (the *Keith* case) involved a criminal prosecution for conspiracy to dynamite an office of the CIA. The government's case rested in part upon evidence obtained by wiretapping that was admittedly in violation of the Fourth Amendment unless justified on grounds of national security. The government

5. 343 U.S. 579 (1952).

6. *Id.* at 583.

7. *Id.* at 587.

8. *Id.* at 589.

9. 403 U.S. 713 (1971).

10. *See id.*

11. 407 U.S. 297 (1972).

claimed the power "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government"¹² and that its action was "a reasonable exercise of the President's power . . . to protect the national security."¹³ In effect, the government was asserting a broad exemption from Fourth Amendment requirements in national security cases. The Supreme Court, speaking through Justice Powell, unanimously ruled against the government's position. "We recognize," it said, "the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment."¹⁴

Even in the area of foreign affairs, where the exercise of presidential powers is least subject to judicial control, the President is bound to act within constitutional limitations. In *United States v. Curtiss-Wright Export Corp.*,¹⁵ the first and still key case on the powers of the President as the sole organ of the government in international relations, the Supreme Court asserted unequivocally that such power "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹⁶

The position of the Supreme Court is rooted in the fundamental nature of our constitutional order. Abandonment of constitutional principles as the price of achieving national security would sacrifice the very values upon which our society ultimately rests. The Court made this clear in *United States v. Robel*,¹⁷ a case in which the government sought to justify an industrial loyalty program on national security grounds:

[T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—freedom of association—which makes the defense of the Nation worthwhile.¹⁸

What has been said up to this point, however, tells only half the

12. *Id.* at 300.

13. *Id.* at 301.

14. *Id.* at 320.

15. 299 U.S. 304 (1936).

16. *Id.* at 320, *quoted in* *Haig v. Agee*, 453 U.S. 280, 289 (1981).

17. 389 U.S. 258 (1967).

18. *Id.* at 264. The one case in which the Supreme Court might be conceived as turning in the other direction is *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the Japanese detention program during World War II. *Korematsu*, however, is in effect a martial law case.

story. The other half is that in the process of applying constitutional principles in concrete cases the courts retain enormous discretion to determine whether governmental power to achieve national security goals has indeed been exercised in a manner compatible with constitutional limitations. This leeway in the courts derives in part from the fact that national security factors are of course relevant in the decision-making process and may strongly influence the way in which the constitutional principle is given effect. Thus in the *Keith* case the Supreme Court observed: "We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.'"¹⁹ Furthermore, when constitutional doctrine is loosely formulated, as in the balancing test, the courts have free rein to evaluate opposing interests. Thus an open-ended judgment as to the weight to be accorded national security considerations, as opposed to enforcement of constitutional limitations, is reintroduced at the level of concrete application.²⁰

For reasons already stated, this contest between national security and constitutional liberty tends to be an unequal one. The heaviest pressures are usually found on the side of national security and the rights of the individual are readily balanced away. This outcome can be avoided only if the courts exercise firm discipline and adhere to a set of subsidiary equalizing principles. These principles, which are derived from the past experience of the Supreme Court in upholding constitutional liberties against insistent governmental claims to national security, include the following:

1. Constitutional principles protecting individual liberties occupy a preferred position in the hierarchy of democratic values; hence there is a presumption in favor of the constitutional right.
2. Government claims of injury to national security must be viewed with a healthy skepticism.
3. The burden of proof to demonstrate its case rests upon the government.
4. The government must show a direct, immediate, grave, and specific harm to national security, not just a vague or speculative threat.
5. The restriction sought by the government must be confined to the narrowest possible constraint necessary to achieve the goal.
6. Wherever possible, hard and fast rules, rather than loose balancing tests, should be formulated and applied.

19. 407 U.S. at 322.

20. *Id.*

It is in the light of these considerations that the record of the Supreme Court in national security cases should be appraised.

III. The Record of the Supreme Court

The record of the Supreme Court in cases where constitutional liberties are sought to be restricted in the name of national security is a mixed one. The earliest decisions involved prohibition of expression alleged to create insubordination in the armed forces or interference with recruitment for the military; anti-sedition laws, such as the Smith Act, punishing advocacy of overthrow of the government by force or violence; loyalty qualifications for employment in the government or defense industry or for obtaining other government benefits or privileges; investigation of dissenting political speech or association by legislative committees; and similar forms of government control over expression alleged to constitute a threat to national security. After a period of wavering, in which the Court applied the bad tendency test, the clear and present danger test, and various balancing tests, the Court in 1969 came to settle on the *Brandenburg* rule. Under this test, critical or dissenting expression alleged to threaten national security can be suppressed, directly or indirectly, only where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."²¹ While this formulation leaves considerable discretion in courts, prosecutors, and police, and might provide only weak protection in a period of crisis, it has thus far proved to be a livable accommodation.

In more recent years the conflict between constitutional liberties and national security has taken other forms. With the growth of the classification process and other manifestations of governmental secrecy, control over the publication of materials which the government wishes to keep from public knowledge has posed major issues for the system of freedom of expression. Government efforts to gather intelligence information, and to counter dissenting political activities, have also raised the problem of keeping the government's conduct within constitutional boundaries. Finally, the right of American citizens to travel abroad, as

21. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), followed in *Hess v. Indiana*, 414 U.S. 105 (1973); *Church of Scientology of Cal. v. Simon*, 460 F. Supp. 56 (C.D. Cal. 1978), *aff'd sub nom.* *Church of Scientology of Cal. v. Blumenthal*, 441 U.S. 938 (1979). For a discussion of the cases, see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, chs. 4-8 (1970). See also 1 N. DORSEN, P. BENDER, B. NEUBOURNE & T. EMERSON, *HARBER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES*, ch. 2 (Law School Edition) (4th ed. 1976).

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well as their rights when abroad, have come under renewed pressure from national security considerations.

A. *Dissemination of National Security Information*

Any attempt by the government to control the dissemination of national security information strikes at the heart of the democratic process. Under our Constitution, where “We the People” are sovereign, citizens must have access to all information available in order to instruct and supervise their servants, the government. Therefore, all government business is, generally speaking, the public’s business. Secrecy in government operations, though sometimes justified, must be held to a bare minimum, and that minimum must be carefully and explicitly defined. This presumption in favor of full discussion of public issues is plainly applicable to national security information. Surely preparation for an invasion of Cuba or the conduct of covert operations in Central America should not be concealed from the American people.

Thus far we have had in this country a relatively loose system of controls over the dissemination of national security information. There is no evidence that the national safety has suffered thereby. On the contrary a relaxed policy in this important sector has certainly strengthened our democratic institutions. In recent years, however, there have been demands for broader and more rigid restrictions, and the movement has been in that direction. The issues posed by this development are crucial to our future as an open society.

Analysis of the problem may begin with an area that is clearly subject to governmental control—the area of traditional espionage. A more controversial issue concerns limitations upon the publication of national security information that has escaped government control and entered the public domain. The third current problem relates to the nature of the secrecy measures available to prevent loss of information in the possession of the government.

1. *Traditional Espionage*

Espionage, although it involves conduct that resembles speech, has never been thought to be covered by the First Amendment or to have any degree of First Amendment protection. The underlying reason for this is that espionage is not properly part of our system of freedom of expression. It is not undertaken, within the context of our society, as an aspect of the public discussion, participation in decision-making, or legitimizing process that are crucial elements in the system of free expression. Rather, espionage is characterized by being inseparable from

action. Moreover, its origins lie outside our society; its base and justification are to be found in a society other than our own.

This unique status of traditional espionage, which entitles us to exclude it from our system of constitutional protection for speech, derives from certain special features of the conduct involved. It is crucial, therefore, to isolate those factors, to define them carefully, and to limit the statutory prohibition against espionage to the area thus delineated. The essential features that make up the activity of espionage are (1) the communication (2) of significant national security information (3) to a foreign power (4) with the intent that (a) the information be used by the foreign power (b) to injure the national defense of the United States.

Translated into more concrete terms, this means that espionage deals with a direct communication, not the dissemination of information to the public for purposes of informing and facilitating public discussion. The information must be of substantial importance and relate to defense against violence from external forces. In other words, it must be confined to limited categories of classified information, properly so classified. The information must be conveyed to a foreign power, or its agent, not merely to the public generally. Crucially important, the government must prove that the person making the communication has done so with the primary intent that the information be used by the foreign power to the injury of our national defense. If the communication is intended to serve a general First Amendment purpose, but also happens to benefit a foreign power, it cannot be prohibited as constituting espionage.

Existing statutes, although ambiguous, can be construed to embody this concept of espionage. Recently the government has attempted to extend the scope of the espionage laws to include the communication of information not intended to aid a foreign power or injure the United States. The Supreme Court has not expressly ruled on these issues, nor has Congress amended the statutes. The traditional concept has thus far provided an adequate basis for protection against espionage activities directed at the United States from abroad. There is no reason to extend the reach of the espionage laws.²²

22. The espionage law was upheld in *Gorin v. United States*, 312 U.S. 19 (1941). See also *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946). For a full discussion, see Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973). Governmental attempts to extend the scope of the laws were made in the prosecution of Daniel Ellsberg and Michael Russo for obtaining and disseminating the Pentagon Papers, *United States v. Ellsberg* (S.D. Cal.), dismissed by the trial court because of government misconduct, and in *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

2. *Dissemination of National Security Information that has Come into the Public Domain*

At any moment there is in circulation in the United States a substantial volume of national security information that the government has wished to keep secret, but which has escaped its grasp and has entered the public domain. This information comes from deliberate leaks by government officials, either by those supporting or those opposing government policies or anticipated policies, bureaucratic mistakes, discovery in judicial proceedings, investigative reporting, piecing together various bits of information, purloined material, memoirs of former government employees, and similar sources. The information may be published for the first time, or may be a repeat of information previously published. It may or may not be classified. It ranges from personal gossip to the Pentagon Papers. In total this information represents a high percentage of what the American public knows about important national security issues. Its significance for public participation in decision-making is difficult to overemphasize. One might almost say that the availability of this information represents the difference between an open and a closed society.

The question presented is whether the government should be permitted to prohibit dissemination of this type of information. At the outset, two general considerations need to be stated. First, it is virtually impossible to maintain effective controls over the circulation of such information and still preserve a democratic society. The volume is enormous, and the outlets for dissemination are virtually limitless. An elaborate apparatus of investigators, files, prosecutors, and the like would be needed. In the end enforcement efforts are bound to be discriminatory, directed only against publication by critics and dissenters. In short, the costs of administration would be high, not to say prohibitive.

Second, prohibition of the dissemination of information in the public domain would run counter to one of the basic principles of our constitutional structure. Apart from the traditional areas of libel, obscenity, and incitement to violence, the Supreme Court has never sanctioned a restriction upon the circulation of information in the public domain. On the contrary, the Court has consistently struck down all efforts at government control of such material.²³

In view of these considerations the case against any broad prohibition of the publication of national security information is overwhelm-

23. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

ing. It would mean the adoption of an official secrets act that would foreclose any real public discussion of national security issues, hamstringing the press, and undermine the whole system of free expression. Congress has steadfastly refused to adopt such measures in the past. Any attempt to do so would certainly run afoul of the First Amendment.

The only real issue before us, then, is whether the publication of some specific, narrowly defined types of national security information should be subject to restriction. Both theory and practice suggest that there is no need for such exceptions and that any attempt to enforce them by law would seriously endanger our free institutions.

The question came before the Supreme Court, in the context of a prior restraint, in the *Pentagon Papers* case. As noted above, the Court rejected the government's contention that a showing of injury to the national security, sufficient to overcome the rule against prior restraint, had been made. The result, a major victory for freedom of expression, is attributable to adherence by a majority of the justices to the subsidiary principles that are crucial in resolving a conflict between the government claims of national security and the maintenance of constitutional liberties. Thus the majority of the Court was sensitive to the high value placed upon freedom to discuss public issues. They reacted with skepticism to the government claims of "grave and immediate danger" to the national security. Those who did not adopt an absolute or near-absolute rule against prior restraint put the burden on the government to demonstrate its case by specific, not speculative, facts and to confine constraint to the narrowest possible scope.²⁴

On the other hand, the Court failed to agree upon any one theory of the case and left open substantial doctrinal loopholes. The per curiam opinion subscribed to by the majority of six justices simply said that the government had not met the "heavy burden of showing justification for the imposition of [a prior] restraint."²⁵ There were nine individual opinions. Justices Black and Douglas took an absolute position, asserting that the government had no power under any circumstances to "make laws enjoining publication of current news and abridging freedom of the press in the name of 'national security.'"²⁶ Justice Brennan added one reservation, holding that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a trans-

24. 403 U.S. at 741.

25. *Id.* at 714.

26. *Id.* at 718.

port already at sea”²⁷ could support issuance of a restraining order. Justices Stewart and White thought that a prior restraint was permissible upon a showing of “direct, immediate, and irreparable damage to our Nation or its people.”²⁸ Justice Marshall did not pass on the First Amendment issue, resting his opinion on separation of powers grounds, namely that Congress had never authorized the executive branch to utilize the power of the courts to prevent publication of national security information. Chief Justice Burger and Justices Harlan and Blackmun, dissenting, believed that the judiciary should exercise only minimal review over a finding of the executive that disclosure of information “would irreparably impair the national security.”²⁹

The diversity of opinion, as well as changes in the composition of the Supreme Court, leave it uncertain as to what limiting standard the Court might adopt in future prior restraint cases. A strong argument can be made, however, that any doctrine less rigorous than the Brennan standard would constitute an unsatisfactory resolution of the issues. This conclusion follows from a number of considerations:

1. The Stewart-White formulation, allowing a prior restraint when there is a showing of “direct, immediate, and irreparable damage” to national security, or a similar formula, is totally vague. There is no clear cut-off point. Neither the press nor the ordinary citizen could know in advance whether such a standard would be met. The courts could reach *any* conclusion. In short, the potential for suppression of publication is limitless.

2. The Stewart-White standard does not give any weight to the social and individual interests in freedom of expression. Consideration is limited to the alleged harm to national security. Of course, a full-fledged balancing test would be equally subject to the criticism of vagueness.

3. Any formulation allowing an exception to the ban against prior restraint is fundamentally inconsistent with the prior restraint doctrine itself. If the Stewart-White formula is adopted, for instance, the government could simply allege that publication would cause “direct, immediate, and irreparable damage,” and thereby obtain a restraining order until the court could hold a hearing and decide the issue. Appeals to a higher court could then be taken. Thus the application of the standard becomes in itself a system of prior restraint. This is exactly what happened in the *Progressive Magazine* case, where government allegations prevented the publication of an article on the manufacture of the hydrogen bomb for seven months until the government, finding

27. *Id.* at 726-27.

28. *Id.* at 730.

29. *Id.* at 757.

the material in the article publicly available, gave up its attempt at restraint.³⁰

4. In most cases the validity of the government's claim can be ascertained, without divulging information that the government wishes to keep secret, only through secret proceedings. This means that the parties and their lawyers cannot know what the case is about without security clearance, a privilege conferred by the government itself, and perhaps not even then. The public, of course, is left completely in the dark. Such a process hardly commends itself to a democratic people.

Any exception to the rule against prior restraint, as it applies to communications within our system of freedom of expression, should therefore be rejected by the courts. One qualification, however, which is suggested in the Brennan formulation, should be noted. The civilian system of freedom of expression does not extend, at least in all its aspects, to the military sector. Military operations are not, and cannot be, conducted according to democratic principles. Therefore, where the information involved is entirely within the military sector the usual rule against prior restraint does not have its customary force.³¹

This is not to say that the civilian sector does not have full control over the military. Obviously civilian supremacy is an integral part of our constitutional structure. But it does mean that the civilian sector may delegate certain tasks to the military. It is contemplated that the military will carry out those assignments by its own methods, which do not necessarily follow the democratic principles by which the civilian sector operates. From this it follows that where the civilian sector has conferred specific functions upon the military, communications relating to such matters are outside the civilian system of freedom of expression.

The kinds of communications thus embraced in the military sector, and hence not governed by the civilian rules against prior restraint, would include such matters as the detail of tactical military operations, such as troop movements, details concerning the design of new weapons, secret codes, and the like. The matters delegated exclusively to the military would be more extensive in time of war, but there would also be such delegations in time of peace. The delegation would not include

30. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *request for mandamus denied sub nom.* *Morland v. Sprecher*, 443 U.S. 709 (1979), *case dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979). Justice Brennan made the same point in the *Pentagon Papers* case, 403 U.S. at 726-27.

31. This and the following three paragraphs are based on the argument originally set forth in an amicus brief filed by the author and Professor Lee Bollinger on behalf of *Scientific American* in the United States Court of Appeals for the Seventh Circuit in the *Progressive Magazine* case.

significant matters of policy or basic decisions, such as the decision to develop a neutron bomb, or whether to invade Cambodia. These matters involve communications about military affairs within the civilian community and clearly fall within the civilian system of freedom of expression.

There is no doubt that the problem of drawing the line between the civilian sector and the military sector for these purposes poses some problems. But the difficulties are no worse than those incurred in many other areas of the law, such as the Supreme Court's task of deciding what material is "obscene" and thereby not protected by the First Amendment. In any event, the proposal made here provides a rational theory by which judgments, troublesome as some of them may be in practice, can be made.

The considerations which rule out issuance of a prior restraint against publication of material in the public domain also preclude the use of subsequent punishment for dissemination of such information. The vagueness of the national security concept, the potential reach of restrictions which undertake to suppress the publication of information that has entered the public domain, the inhibiting costs of enforcing such attempts at censorship, and the impact on the public's right to know all argue against the extension of criminal or other penalties beyond the area of traditional espionage.

The problems raised by the employment of criminal sanctions to prevent publication of material in the public domain are well illustrated by the Intelligence Identities Protection Act,³² enacted by Congress in 1982. That legislation makes it a criminal offense for any person, "in the course of a pattern of activities intended to identify and expose covert agents," who has "reason to believe that such activities would impair or impede the foreign intelligence activities of the United States," to disclose "any information that identifies an individual as a covert agent . . . knowing that . . . the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States."³³ The term "covert agent" is defined to include persons engaged or formerly engaged in foreign intelligence activities, including such activities taking place in the United States.³⁴

The scope and impact of this legislation are far-reaching. The statute applies not only to government officials involved in foreign intelligence, but also to all agents, informants, and other sources. It includes not only information that is classified, but all information, no matter

32. 50 U.S.C.A. §§ 421-26 (West Supp. 1983).

33. *Id.* § 421(c).

34. *Id.* § 426(4).

how readily available or widely circulated. It covers not only disclosure of the names of "covert agents," but of any material that would "identify" them. As a result it would seriously hamper or make impossible the study or reporting of much, or most, of the activities of agencies engaged in foreign intelligence. Thus investigative journalists seeking to ascertain the role of the CIA in the overthrow of the Allende government in Chile, its part in the attempted assassination of Fidel Castro, or even its recruitment efforts on college campuses would be subject to criminal prosecution. Moreover, the statute has other, perhaps unanticipated, effects. It would, for example, make it a criminal offense for members of an organization to expose government informers who have infiltrated their organization.³⁵

The Intelligence Identities Protection Act is, perhaps, an extreme example of the encroachment of criminal legislation upon freedom of speech and of the press. Yet any attempt to impose a criminal penalty upon the publication of material in the public domain would entail similar consequences. The fact is that the employment of criminal sanctions to stop the dissemination of information that is already in circulation—in other words, the enactment of an official secrets act—is incompatible with our system of freedom of expression. Nor, as the *Pentagon Papers* and the *Progressive Magazine* cases demonstrate, can such restrictions actually succeed in preventing the dissemination of information except through the use of methods that border on those of a police state.

3. *Security Measures to Prevent Loss of Information in the Possession of the Government*³⁶

There is dispute over the power of the government, in constitutional terms, to withhold information from the public, and the propriety, in policy terms, of doing so. On either basis it is clear that government secrecy should be held within the narrowest possible bounds. There is no need, however, to consider these issues here. It is generally agreed that the government can keep some information secret, including some national security information. The question, therefore, is what measures are permissible to maintain that security. The problem is not a

35. Although the above provisions were not in issue before the Senate-House Conference Committee, that committee's report sets forth a narrower interpretation than a literal reading of the statute would suggest. H.R. REP. NO. 580, 97th Cong., 2d Sess. (1982). The impact of the Conference Committee report upon the application of the Act by investigators, prosecutors, and courts cannot be predicted. In any event, under any interpretation, the Act creates criminal penalties for the publication of material in the public domain.

36. The discussion in this section is based upon the testimony of the author before the Subcommittee of Legislation of the Permanent Select Committee on Intelligence of the United States House of Representatives, Jan. 31, 1979.

simple one because internal security procedures have a far-reaching effect upon the whole system of freedom of expression.

So far as persons outside the government are concerned, the restrictions plainly should be confined to those which are applicable to any form of newsgathering, either from the government or from other sources, and whether involving national security information or other information. Such measures include prohibition against burglary, wiretapping, use of physical force, bribery, and the like. To limit newsgathering beyond this point, or to punish retention of information, is simply an indirect way of prohibiting publication. If, as we have argued, publication is to be permitted—indeed as a constitutional matter must be permitted—then essential preparations which are part of the process cannot be restricted.

The problems involved in limiting the dissemination of national security information by persons inside the government—government employees, employees of government contractors, and former employees—are much more complex. Clearly the government is entitled to apply sanctions for violation of legitimate rules and regulations prohibiting the circulation of information the government has a right to keep secret. These sanctions could cover all kinds of conduct necessary to assure that the information is available within the government only to those who need it for legitimate purposes, and to make certain that it does not escape from the confines of the government. Thus restrictions limiting the right to obtain information, to retain it after it has been acquired, and to communicate it to others are all permissible. Clearly, also, the rules can be enforced by administrative sanctions, ranging from reprimand to dismissal. Beyond this point, however, a number of questions emerge.³⁷

The most important issue is whether the government should be empowered to enforce its restrictions through criminal sanctions, where the information has been communicated to outsiders with the intent that it be used for First Amendment purposes. With narrow exceptions the law does not now provide for criminal sanctions in this situation. There are strong arguments of policy, and some of constitutional law,

37. The principal method by which the government seeks to protect national security information from disclosure is the classification system, established by Executive Orders, the most recent of which is Exec. Order No. 12,356, 47 Fed. Reg. 12,874 (1982). On the right of the government to impose restrictions upon speech or other expression by its employees, see *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 552-55 (1976); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

for adhering to that position.³⁸

In the first place, as already noted, the amount of information which slips through the government's fingers is so enormous, the system of leaks so pervasive, and the possibility of stemming the tide so out of reach, that application of criminal sanctions for divulging information would hardly be workable. Prosecutions would be highly selective, thereby unfair, and subject to serious abuse. Limitation of the criminal sanction to classified information would be no solution. The classification system always has and always will be greatly overused and abused.

Second, if criminal sanctions were seriously enforced the amount of information reaching the public about government operations would be drastically curtailed. Government employees would be especially vulnerable to criminal prosecution because the courts have refused to recognize a reporter's privilege and hence the source of information could be readily traced to them. As a result government employees would be afraid to disclose any information, no matter how strong the justification for doing so. Information about critical government policies would be shut off. Incompetence, arbitrariness, and corruption in government would never see the light of day. Antiquated policies and procedures would be perpetuated. "Whistle blowing" would largely cease.³⁹

Third, the application of criminal sanctions to government employees could not fail to have momentous repercussions on the freedom of the press, scholars, and others to discuss national security issues. The press, for example, would inevitably be drawn into criminal investigations, conducted by the FBI, military intelligence, or other intelligence agencies. Newspapers would constantly be called upon or subpoenaed to produce documents or notes of interviews, to answer questions as to their sources of information and methods of operation, to appear before grand juries, and to render account otherwise to investigating officials. As just stated, the reporter's privilege would not protect them, certainly not from investigation and in most instances not from producing confidential material or revealing confidential sources. Furthermore, the impact would not stop there. Under laws of conspiracy, attempt, solicitation, accessory to crime, and the like, news reporters, scholars, and even editors would be subject to prosecution themselves. The constitutional right of publication would hardly amount to much under such conditions.

38. For an examination of the current law pertaining to the application of criminal sanctions for improper disclosure of information by government employees, see Edgar & Schmidt, *supra* note 22.

39. On reporter's privilege, see *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Fourth, there has been no showing that administrative sanctions and other administrative security measures have been inadequate to assure government secrecy to the degree actually needed. The sanction of discipline or dismissal is a potent one for any bureaucrat. Up to now the absence of criminal sanctions has not proved to leave a serious gap in our security system.

If criminal sanctions are permitted, however, they should be extremely limited in scope and surrounded with all possible safeguards. Thus the criminal sanction should be applied only to the disclosure of certain narrow and specific types of classified information. These categories should not extend beyond such matters as cryptographic techniques, technical details of weapons, technical details of military operations, military contingency plans, and the like. The defense that the information was improperly classified at the time of the offense should be allowed. Finally, an overall defense of justification, which would permit the accused to show mitigating circumstances, should be provided.

The other main problem involving measures to prevent the dissemination of government information relates to the use of contracts. At the present time the CIA, the State Department, the Department of Defense, and a growing number of other agencies require employees, as a condition of employment, to enter into a written agreement not to disclose information obtained during the course of employment without prior approval of the agency. This contract arrangement is primarily a device to control the disclosure of information by former employees; during the period of employment other methods of control are available.

The contract device is potentially a far-reaching, suffocating method of blacking out crucial information about the operations of government agencies. Former employees are frequently the only source of important knowledge. Often they are the only persons in a position to reveal information about the inner recesses of a bureaucracy. The contract method could be used to reduce information from this source to a trickle.

In examining this problem it is important to recognize that the issue should not be viewed as a simple matter of private contract law. Just as government information cannot be considered "property" in the normal sense, so these non-disclosure agreements are not really "contracts." They are laws, enacted by government and imposed upon government employees and ex-employees, that deeply affect the whole system of freedom of expression. They must be viewed in First Amendment terms, not private contract terms.

In this light clearly any extensive use or enforcement of the contract

device is contrary to sound public policy, a violation of the right of a citizen to communicate with fellow citizens, and an infringement upon the public's right to know. The only question is what narrow limits should be placed upon the use of such contracts.

The problem is a difficult one. It is true that a person who obtains information from a position inside government should be less free to publish that information than a person who obtains it from a position outside the government. The ex-employee is in a sort of middle position. The obligation of such a person to abide by the rules of the organization still exists, but not to the same degree or intensity as before. And the needs of the public to have access to information otherwise unobtainable are stronger as the interests of the government to maintain control over its employees lessen. The effect on the whole system of freedom of expression remains a factor.

Under these circumstances it would seem that some intermediate position best accommodates the competing interests. First Amendment considerations certainly demand that, as a general proposition, former employees be free to communicate information derived from their service in the government. On the other hand, unlike the right of publication by outsiders, or the application of criminal sanctions to communication by insiders, some exceptions to the general rule appear justified. These would be of the same nature as those suggested as a last resort (but preferably rejected) in the discussion of making government employees subject to criminal sanctions. In other words, contracts not to divulge information after leaving the government might be acceptable if confined to a narrow range of properly classified materials, with a justification defense allowed. In addition, authority to demand such contracts should be limited to a small number of agencies that deal with the most sensitive national security information.⁴⁰

The effort of the Supreme Court to deal with these issues has thus far been a disaster. The question first arose in the *Marchetti* case. Marchetti, a former CIA employee, had signed the standard agreement. When the government learned that Marchetti was writing a book dealing with the CIA, it brought suit to enjoin him from publishing it until he had obtained approval from the CIA. The lower courts granted the injunction and the Supreme Court denied certiorari. Upon submission of the manuscript the CIA ordered 339 deletions, later reduced to 168. Marchetti sought review of the CIA action in the courts, but the Court of Appeals for the Fourth Circuit upheld the government's action, rul-

40. For a discussion of the censorship agreement, see Comment, *National Security and the First Amendment: The CIA in the Marketplace of Ideas*, 14 HARV. C.R.-C.L. L. REV. 655 (1979).

ing that the government could suppress any classified information even though the validity of the classification was not established. Despite issuance of a prior restraint and the suppression of information that might have been improperly classified, the Supreme Court again refused to consider the case.⁴¹

The Supreme Court did, however, reach the issues in *Snepp v. United States*,⁴² decided in 1980. Snepp, also a former CIA employee, was the author of a book, *Decent Interval*, which dealt with the withdrawal of United States forces from Viet Nam in the last days of the war. The book had been published without having been submitted to the CIA in advance. The government brought suit to enjoin Snepp from further publication without obtaining CIA approval and for the imposition of a "constructive trust" which would require Snepp to pay over any profits from *Decent Interval* to the government. Snepp asserted, and the government agreed for the purposes of the case, that the book contained no classified information. The district court granted the injunction and imposed the constructive trust. The Court of Appeals for the Fourth Circuit affirmed the injunction order but refused to approve the constructive trust. The Supreme Court, without waiting for briefs on the merits or hearing oral argument, in a per curiam opinion affirmed the issuance of the injunction and reinstated the constructive trust.⁴³

The Court's opinion dealt, almost exclusively, with the validity and propriety of the constructive trust. It touched on the prior restraint and other First Amendment issues only in a footnote. Declaring that Snepp had "voluntarily signed the agreement," it concluded:

The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest.⁴⁴

This cavalier treatment of constitutional liberty by the Supreme Court in the *Snepp* case violated most of the principles essential to assuring that the safeguarding of national security is accomplished within the limits of our constitutional system. Far from giving presumptive weight to constitutional values, the Court accepted the so-called contract as binding without even considering its impact upon the former employee's right to expression or upon the public's right to know, ap-

41. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); *see also* *Knopf v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

42. 456 F. Supp. 176 (E.D. Va. 1978), *modified*, 595 F.2d 926 (4th Cir. 1979), *modified*, 444 U.S. 507 (1980) (per curiam). Justices Brennan, Marshall, and Stevens dissented.

43. 444 U.S. at 507.

44. *Id.* at 509.

proved almost casually the imposition of a prior restraint, and sanctioned a major restriction upon First Amendment rights subject only to the limitation that it be "reasonable." The Court took at face value, without examination, the government's claim that censorship, even of unclassified material, was essential to the operations of an intelligence agency because necessary to preserve the "appearance of confidentiality." It laid down no requirement for the government to demonstrate a direct and specific harm from the publication. And it made no effort to limit the constraints upon expression to the least drastic necessary to achieve a permissible goal. The *Snepp* decision must be classed as an aberration, not within the mainstream of American constitutional law.⁴⁵

B. *National Security and Surveillance of Political Activities*

The power of the government to engage in surveillance of political activities has now become a major issue in the United States. Recent disclosures of the practices of the FBI, the CIA, Army Intelligence, and other intelligence agencies have shocked the American people into awareness of a problem that has become more and more menacing over the past decades. Not only was it revealed that the intelligence agencies had amassed dossiers on the political beliefs, associations, and activities of hundreds of thousands of American citizens who were not alleged to have engaged in any violation of law but also that they had gone further and, by infiltration, spreading of rumors, intimidation and similar tactics, had proceeded affirmatively to harass individual targets and disrupt organizations. Their methods included illegal break-ins, wiretapping, bugging, mail opening, and even violence. The intelligence agencies, in short, had taken upon themselves the function of monitoring and repressing legitimate efforts for social change.⁴⁶

The legal remedy for this state of affairs must ultimately be found in legislation. Although the executive branch has instituted some reforms, such as the Guidelines issued by Attorney General Edward Levi in 1976, executive action has imposed only modest limitations on the intelligence agencies and, in any event, is subject to change at any time. Unfortunately, efforts to enact legislation, with the exception of the Foreign Intelligence Surveillance Act, have been unsuccessful. Meanwhile, however, it is important that the constitutional principles which

45. For further discussion of the *Snepp* case, see Note, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662 (1981).

46. The literature on the abusive practices of the intelligence agencies is voluminous. See *supra* note 3.

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govern the conduct of the intelligence agencies be examined and clarified.⁴⁷

There are two main constitutional problems. One is the scope of the power of the intelligence agencies to engage in surveillance which is not directly related to law enforcement. The other concerns the methods employed by the intelligence agencies in carrying on their activities.

1. *Scope of Power*

Limitations on the scope of the government's power to engage in political surveillance might come from two sources. It can be argued that the basic affirmative power of the government to collect information or carry on other intelligence activities does not extend to certain types of conduct. This lack of affirmative power might be particularly applicable to the federal government, which possesses only the powers enumerated in the federal Constitution. Similarly, it might be that, under the doctrine of separation of powers, the executive branch is not authorized to engage in data collection without express authorization of the legislature. On the other hand, the need of the government for information is beyond question and it would be difficult to say in many situations that the gathering of data is unrelated to any legitimate function or not implied in some existing legislation. The same might be true, though to a lesser extent, of surveillance activities that go beyond the mere collection of information. On balance it can be said that considerations relating to the absence of affirmative power should not be ignored; they have relevance to the constitutional issues and at times may be decisive. Nevertheless it would seem that effective restriction on the scope of the government's intelligence power must come from the more precise constitutional limitations designed to protect the individual against government abuse of power. The principal constitutional guarantee involved here is the right to freedom of expression embodied in the First Amendment. We deal first with the mere gathering and storing of information and, second, with intelligence activities that constitute more positive attempts to influence political conduct.⁴⁸

47. On Attorney General Levi's guidelines, see J. ELLIFF, *THE REFORM OF FBI INTELLIGENCE OPERATIONS* (1979). The Foreign Intelligence Surveillance Act, regulating the use of electronic devices in foreign intelligence investigations, is Pub. L. No. 95-511 (1978) (codified at 50 U.S.C. §§ 1801-11). Coordination and control of the various intelligence agencies operating in the foreign intelligence field is maintained through Executive Orders, the most recent of which is Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (issued Dec. 4, 1981).

48. On the basic power of the executive branch of the federal government to conduct political surveillance, note should be taken of the Privacy Act of 1974, which provides that no governmental agency may maintain records "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or . . . unless pertinent to and within the scope of an authorized law enforcement activity." 5

The problem of concern is not the government's power to investigate a crime that has been or is about to be committed, or to obtain material necessary for enforcement of a legitimate government regulation. In such cases any impact upon the right of an individual to freedom of expression has never been considered to be of constitutional dimensions. Nor are we concerned here with government collection of economic or similar data that has no impact upon freedom of expression. Rather, the issue arises where the collection of data is not related, or only remotely related, to law enforcement and is principally designed to inform the government about the political beliefs, attitudes, or activities of individuals or organizations in the community. It must be conceded that the distinction involved is often difficult to draw. It is, however, fundamental to the constitutional issue.

The question then becomes, what is the effect of the government's conduct upon free exercise of the right to speak, associate with others in political organizations, and engage in similar activities protected by the First Amendment. At least where the government's gathering of data is directed at unpopular, unorthodox, or dissenting expression, there can be no doubt that, as a factual matter, the impact is severe. Knowledge that the government is collecting and storing information about one's political views and associations is inherently inhibiting. Thus many persons will hesitate to attend a meeting where the police are taking down license numbers, or engage in a demonstration where photographs of the marchers are being made. Rumors that files are being kept by the government evoke memories of the harassments and witch-hunts that have intermittently taken place over the years. Suspicion that government infiltrators are reporting the discussion at meetings, or pressing a hidden agenda, dampen the spontaneity or destroy the harmony of a political gathering. The atmosphere almost inevitably created by a program of political surveillance was well described in a memorandum by the head of a local FBI office urging his agents to engage in more physical interviews. It is important, said this official, in order to "enhance the paranoia endemic in these circles and [to] further serve to get the point across that there is an FBI agent behind every mailbox."⁴⁹

U.S.C. § 552a(e)(7) (1976). Cases where the Supreme Court has held governmental activity which impinges on constitutional rights unauthorized in the absence of express delegation from the legislature include the *Steel Seizure*, 343 U.S. 579, and *Pentagon Papers*, 403 U.S. 713, cases. See also *Greene v. McElroy*, 360 U.S. 474 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958).

49. FBI Memorandum, quoted in *N.Y. Times*, Mar. 25, 1971, at 33, col. 1, and in Note, *supra* note 1, at 1277 n.189. Further, on the impact of political surveillance upon the freedom of expression, see Justice Powell's opinion in the *Keith* case, 407 U.S. at 314; Judge Wright's opinion in *Zweiborn v. Mitchell*, 516 F.2d 594, 633-36 (1975). See Comment, *Pre-*

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There would seem to be no doubt, then, that political surveillance, even when confined to the collection and storage of data, does have a significant adverse effect upon freedom of expression and thereby brings into play the First Amendment. The Supreme Court has found a similar "chilling effect" in many comparable situations. Thus in *Lamont v. Postmaster General*,⁵⁰ the Court held unconstitutional a federal statute which required persons to notify the post office if they wanted to receive mail addressed to them from abroad which the Secretary of the Treasury had labelled "communist political propaganda." This requirement, said the Court, "is almost certain to have a deterrent effect."⁵¹ In *Talley v. California*⁵² the Court struck down a city ordinance which prohibited the distribution of handbills that did not contain the name and address of the authors and disseminators. In *NAACP v. Alabama*⁵³ and *Bates v. City of Little Rock*⁵⁴ regulations that required disclosure of membership in, or financial support of, the NAACP were ruled invalid. Likewise in *Watkins v. United States*⁵⁵ and many subsequent cases the Court has held that the calling of witnesses before a legislative committee to testify about their political beliefs and associations has a constitutional impact upon First Amendment rights. In all these cases the injury to the system of freedom of expression grew out of efforts by the government simply to collect information concerning political activities not directly related to the enforcement of a valid law.⁵⁶

It is true that in the one case where the Supreme Court addressed a specific claim that collection of data on lawful political activities by an intelligence agency violated First Amendment rights it did not grant a remedy. In *Laird v. Tatum*⁵⁷ the plaintiffs brought a class action for declaratory and injunctive relief against the Department of the Army, alleging that Army Intelligence was conducting an extensive program of surveillance of "lawful and peaceful civilian political activity." The government justified its operations on the ground that the "data-gathering system" was established in connection with the development of

ventive Intelligence Systems and the Courts, 58 CALIF. L. REV. 914 (1970); Note, *Governmental Investigations of the Exercise of First Amendment Rights: Citizens' Rights and Remedies*, 60 MINN. L. REV. 1257 (1976); Stickgold, *Yesterday's Paranoia Is Today's Reality: Documentation of Police Surveillance of First Amendment Activity*, 55 U. OF DETROIT J. OF URBAN L. 877, 892-929 (1978).

50. 381 U.S. 301 (1965).

51. *Id.* at 307.

52. 362 U.S. 60 (1960).

53. 357 U.S. 449 (1958).

54. 361 U.S. 516 (1960).

55. 354 U.S. 178 (1957).

56. See also *Gibson v. Florida Leg. Investigative Comm.*, 372 U.S. 539 (1963).

57. 408 U.S. 1 (1972).

contingency plans, if called upon by the President, to assist local authorities in putting down public disorders. By a six to three vote the Court upheld a motion to dismiss for the reason that plaintiffs "have not presented a case for resolution by the courts."⁵⁸ The plaintiffs had alleged only a "subjective" chill, the majority stated, not a claim of "specific present objective harm or a threat of specific future harm."⁵⁹

The Supreme Court's decision technically went only to the question of standing to raise the constitutional issue, not to the merits of the constitutional claim. Thus a further factual showing on the part of the persons affected would presumably produce a different result. However that may be, the opinion of the majority in *Laird v. Tatum* cannot be squared with the principles that should control efforts by the judiciary to reconcile protection of national security with the maintenance of constitutional liberties:

1. The Court gave little weight to the values promoted by the system of freedom of expression. Its preference for supporting the military was abrupt and arbitrary.

2. The Court, far from reacting with skepticism to the government's claim that massive surveillance of legitimate political activities was necessary in order to prepare for the Army's possible role in civil disturbances, accepted the government's explanation with complaisance, not to say eagerness. It wholly neglected to consider the remoteness of the information collected to the Army's function in protecting national security.

3. The Court utterly failed to appreciate, or was not interested in, the dynamics of the system of freedom of expression. In finding no constitutional impact arising from the surveillance program the Court ignored the breadth and depth of the Army's operations. As the minority pointed out, the allegations were that (a) "the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country, including groups such as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, The American Civil Liberties Union, Women's Strike for Peace, and the National Association for the Advancement of Colored People"; (b) that the Army "uses undercover agents to infiltrate these civilian groups and to reach into confidential files of students and other groups"; (c) that the Army "moves as a secret group among civilian audiences, using cameras and electronic ears for surveillance"; (d) that the data collected "are distributed to civilian officials in state, federal, and local governments"; and (e) that "these data

58. *Id.* at 15.

59. *Id.* at 13-14.

are stored in one or more data banks.”⁶⁰

4. The Court made no effort to limit the Army’s surveillance activities to the narrowest possible area of constraint.⁶¹

If it be accepted, despite *Laird v. Tatum*, that a government program to collect and store information on legitimate political activities does have a severe inhibiting effect upon freedom of expression the question becomes whether such infringement constitutes a violation of the First Amendment. If rights under the First Amendment are given full protection, the answer is not open to doubt: in any situation where a substantial adverse impact is shown, First Amendment rights prevail; the government must seek its objective in some other way. This has been the approach of the Supreme Court in some cases, such as *Lamont* and *Talley*, mentioned above. In other cases, however, the Court has applied a balancing test, and here the result cannot be so clearly anticipated. Nevertheless, in any weighing process, the First Amendment rights should normally be found paramount.

The impact upon freedom of expression from political surveillance is drastic; if conducted on any substantial scale it creates the atmosphere of a police state. As to countervailing interests, insofar as the goals sought by the government are to influence and constrain dissenting opinion, they are illegitimate and entitled to no weight. To the extent that the government’s objectives are to obtain information concerning the enforcement of existing laws, the surveillance of lawful political activities is of remote and dubious value. Where the government is seeking information for use in developing new law, it can and must do so without infringing on First Amendment rights. In short, justification for inhibiting freedom of expression in order to obtain data pertaining to legitimate political activities can rarely be demonstrated. This would be particularly true if the Court adhered to the subsidiary principles applicable in national security balancing cases, namely, by starting with a presumption in favor of the First Amendment, placing the burden of proof on the government to show compelling reasons, viewing the government’s claims with skepticism, and insisting on use of the least drastic means.

If one moves from the mere collection and storage of data to other features of political surveillance the constitutional issues are hardly open to debate. Any program of political surveillance tends to expand

60. *Id.* at 24-25.

61. *Laird v. Tatum* has not always been rigorously followed by the lower courts. *See, e.g.,* *Paton v. LaPrade*, 382 F. Supp. 1118 (D.N.J. 1974), *aff’d*, 524 F.2d 862 (3d Cir. 1975). For a collection of the lower court decisions see N. DORSEN, P. BENDER, B. NEUBORNE & T. EMERSON, *supra* note 21, at 196-98. *See also* *Socialist Workers Party v. Attorney General*, 419 U.S. 1314 (1974).

beyond the simple gathering of information. Thus an infiltrator placed in an organization under surveillance must begin to play a significant part in the affairs of that organization in order to obtain information and maintain credibility. Officials and agents of the intelligence agency start with, or soon acquire, intense hostility to the ideas and activities of the groups under investigation. Inevitably the intelligence agencies develop a sense of mission which leads to affirmative programs to harass, disrupt, and ultimately destroy the targets of their surveillance. The tactics employed have included forging documents, spreading false rumors, promoting mistrust, making it difficult to obtain a meeting place, disrupting meetings, provoking violence between organizations, and similar conduct. The most notorious example of these practices was the FBI Cointelpro program. But the same methods were used by the CIA, other federal intelligence agencies, and many state and local "red squads." Plainly, operations of this sort—aggressive governmental conduct designed to interfere with legitimate political activities—cannot be justified under any theory of the First Amendment or any concept of national security. Although a number of cases which raise these issues are pending in the lower federal courts, the Supreme Court has not yet had occasion to deal with them.⁶²

2. *Methods of Surveillance*

A series of constitutional provisions imposes limits on the methods used by intelligence agencies in conducting political surveillance. Thus wiretapping, bugging, opening mail, break-ins, and other forms of search and seizure are subject to the restrictions of the Fourth Amendment. The imposition of semi-official sanctions through Cointelpro tactics is foreclosed by the due process clause. In some circumstances the use of intrusive techniques would also violate the First Amendment or the constitutional right of privacy. A major gap in the protective coverage of these constitutional guarantees occurs in the use of informers and infiltrators; the Supreme Court has held that the obtaining of information through these methods is not limited by the Fourth Amendment. In general, however, the intelligence agencies, like all government agencies, must adhere to a strict set of standards in carrying on their operations. The question is whether those standards are to be relaxed or abandoned when the subject of an investigation involves matters pertaining to national security.⁶³

62. For a discussion of the remedies available, see Note, *supra* note 49, at 1270-87.

63. On the exclusion of the use of informers and infiltrators from the coverage of the Fourth Amendment, see *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1965); Comment, *Domestic Intelligence Informants, the First Amendment and the Need for Prior Judicial Review*, 26 BUFFALO L. REV. 173 (1976).

The key decision of the Supreme Court is the *Keith* case. As previously noted, the Court there squarely rejected the government's contention that surveillance directed at the protection of national security need not be conducted within the limits of the Fourth Amendment. The basic rationale of the Court was that the functions served by the Fourth Amendment were fully as necessary in national security cases as in other areas of investigation:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive branch. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.⁶⁴

The Court went on to discuss and dismiss the specific reasons put forward by the government for making an exception in national security cases:

1. To the argument that "special circumstances applicable to domestic security surveillances" justified an exception it answered: "Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."⁶⁵

2. To the proposition that national security cases involved "a large number of complex and subtle factors" beyond the competence of the judiciary, the Court replied: "Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases."⁶⁶

3. To the contention that "prior judicial approval will fracture the secrecy essential to official intelligence gathering," the Court declared: "The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases."⁶⁷

The reasoning of the Supreme Court in the *Keith* case applies to all intrusive methods employed by the intelligence agencies in the conduct of their operations. The essence of the decision is that the intelligence agencies must adhere to the traditional principle that surveillance for

64. 407 U.S. at 316-17.

65. *Id.* at 320.

66. *Id.*

67. *Id.* at 320-21. *See also* *Zweibon v. Mitchell*, 516 F.2d 594, 636-55 (D.C. Cir. 1975).

national security purposes must take place within the structure of our constitutional system.

The Court in the *Keith* case, however, made one important reservation. It pointed out that the case dealt only with "the domestic aspects of national security" and that it was expressing no opinion as to "the issues which may be involved with respect to activities of foreign powers or their agents."⁶⁸ On the basis of this distinction the government, while apparently accepting the guarantees of the Constitution in "domestic security" surveillance, has argued that they do not apply to "foreign intelligence" activities. The Court has thus far not clarified its position.⁶⁹

The term "foreign intelligence" is open to a variety of interpretations. Regardless of the exact definition, however, the distinction between domestic and foreign intelligence activities is unwarranted and dangerous. So long as intelligence operations are carried on in the United States or are directed at American citizens abroad, they should be conducted within the confines of our constitutional guarantees. Surveillance taking place within the United States almost invariably involves American citizens and residents; surveillance of Americans abroad necessarily does so. The protection afforded to American citizens and residents by the Constitution are just as important and just as necessary whether the subject matter of the investigation relates to domestic or foreign matters. Nor, for the reasons stated in the *Keith* case, are the arguments for allowing unreviewed discretion in the executive branch any stronger in foreign than in domestic security cases. Furthermore, it is not possible to make any clear distinction between the two areas. For example, many domestic organizations have some foreign ties, and many American citizens possess information of interest to foreign countries. An exception for "foreign intelligence" would thus open the way to political surveillance on a virtually unlimited scale and would have a devastating effect upon our system of individual liberties. The only safe course is to insist upon adherence to constitutional re-

68. 407 U.S. at 321-22.

69. A number of lower federal courts have dealt with the issue. In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), the Court of Appeals for the District of Columbia held that Fourth Amendment rights must be recognized where the target of the surveillance (there, the Jewish Defense League) was neither an agent of a foreign power nor acting in collaboration therewith, even though the information sought pertained to foreign affairs. In *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit held that Fourth Amendment protections did not extend to an alleged foreign agent charged with espionage. The Supreme Court denied certiorari in both cases. *Zweibon v. Mitchell*, 425 U.S. 944 (1976); *United States v. Truong*, 454 U.S. 1144 (1982).

quirements across the board.⁷⁰

C. *Travel Abroad*

Considerations of national security have also had an impact on the constitutional rights of American citizens travelling abroad. Until recently the basic principles appeared to be well established. As a result of *Reid v. Covert*,⁷¹ holding that an American civilian residing on a military base abroad was entitled to a civilian trial with its accompanying constitutional guarantees, it seemed clear that American citizens overseas, in their dealings with American officials, were entitled to all the constitutional rights of citizens at home.⁷² As to the right of American citizens to obtain a passport, *Kent v. Dulles*⁷³ held that the State Department lacked power to deny a passport because of an applicant's political beliefs or associations. The *Kent* case rested on a lack of express authority from Congress, but the constitutional implications were clear. In any event, numerous other cases have held that a government benefit or privilege cannot be conditioned upon refraining from the exercise of constitutional rights.⁷⁴ In 1981, however, the Supreme Court's decision in *Haig v. Agee*⁷⁵ cast doubt upon this whole structure.

In the *Agee* case the Secretary of State revoked the passport of Philip Agee, a former CIA employee, under a departmental regulation authorizing that action where the activities of an American citizen abroad "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." The Secretary of State alleged that Agee was engaged in a campaign "to disrupt the intelligence operations of the United States" by exposing the names of undercover CIA officers or agents.⁷⁶ In a motion for summary judgment Agee admitted the factual allegations. The Supreme Court, by a vote of seven to two, upheld the revocation of Agee's passport. Most of the majority opinion was devoted to establishing that, despite the ruling in *Kent v. Dulles*, the Secretary of State had authorization from Congress

70. For further discussion, see Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976 (1974).

71. 354 U.S. 1 (1957).

72. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 231 (1978).

73. 357 U.S. 116 (1958). Cf. *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding area restrictions).

74. *Perry v. Sindermann*, 408 U.S. 598 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958) (rule against conditioning a governmental benefit or privilege upon abandonment of constitutional rights).

75. 453 U.S. 280 (1981).

76. *Id.* at 286.

to withhold or revoke passports for reasons of national security or foreign policy. Discussion of the constitutional issues was brief.

The constitutional right to travel abroad, the majority held, was "subordinate to national security and foreign policy considerations," and as such was "subject to reasonable governmental regulation;" and, since "no governmental interest is more compelling than the security of the Nation," the regulation involved was justified.⁷⁷ As to the First Amendment claim, the majority began by "[a]ssuming, *arguendo*, that First Amendment protections reach beyond our national boundaries." It went on to hold that, although "revocation of Agee's passport rests in part on the content of his speech," obstructing intelligence operations and the recruiting of intelligence personnel "are clearly not protected by the Constitution."⁷⁸ The majority added that, "[t]o the extent the revocation of his passport operates to inhibit Agee 'it is an inhibition of *action*' rather than of speech."⁷⁹ The underlying approach of the majority was made explicit in an opening comment: "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."⁸⁰

The opinion of the majority in *Haig v. Agee* constitutes a repudiation of virtually every precept that should guide the Supreme Court in resolving a conflict between national security and constitutional liberties:

1. The Supreme Court virtually abandoned any role in the process of maintaining constitutional liberties where national security is involved. Far from giving priority to constitutional rights, and viewing government claims with skepticism, it came close to bowing out altogether.

2. Without discussion, the Court concluded that the right to travel abroad was automatically "subordinate" to national security and foreign policy considerations. Thus the constitutional right can be abrogated by any "reasonable" regulation in the name of national security.

3. By "assuming *arguendo*" that First Amendment rights extended to citizens abroad, but not accepting that proposition, the Court cast doubt upon the previously established principle that American citizens overseas could claim the protection of the Constitution against acts of American officials.

4. The Court gave no weight to First Amendment considerations.

77. *Id.* at 307.

78. *Id.* at 308.

79. *Id.* at 309 (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)).

80. *Id.* at 292.

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It simply held, again without discussion, that speech or other expression which "obstructed" intelligence operations was "clearly not protected by the Constitution." It did not even adopt a balancing process.

5. In holding that "inhibition of action" by conditioning a government benefit or privilege upon refraining from speech was permissible, the Court repudiated the long established doctrine that such benefits or privileges could not be withheld because of the exercise of constitutional rights.

6. The Court made no effort to confine the restriction upon the right to travel abroad to the narrowest possible constraint.

If the courts react to national security claims in the manner of the *Agee* case, their usefulness in supporting constitutional liberties virtually disappears.

Conclusion

In the long run national security is not achieved at the expense of constitutional liberties. A tightly closed security system, seeking to avoid all risks, is not compatible with a democratic society. Nor is it, ultimately, attainable. The effort to resolve the tensions between national security and constitutional rights should not be looked upon as a zero-sum game. It is not true that the greater the degree of constitutional liberty maintained, the lesser the degree of national security achieved, or that the lesser degree of constitutional liberty the greater the degree of national security. Rather, there must be an accommodation between the two systems in which each supplements and supports the other.

In this process the role of the courts is crucial. They start from the traditional position that measures to assure national security must conform to our system of constitutional rights. Yet national security factors inevitably affect the way constitutional limitations are applied and hence the issues come before them in a fluid state. Because of the pressures exerted by appeals to national security, the tendency of the government to overstate the dangers, and the likelihood of invoking national security for improper purposes, the courts must be constantly alert not to be stampeded. To perform an effective role they must approach claims of the executive and legislative branches with skepticism and firmness, and must insist upon principles which force the government to meet exacting standards. The Supreme Court has done this at times, as in the *Steel Seizure*, the *Pentagon Papers*, and the *Keith* cases. But at other times it has wavered and retreated. The extent to which our constitutional structure will be preserved, in the face of mounting

tensions, depends in large measure upon the leadership exerted by the judicial system.