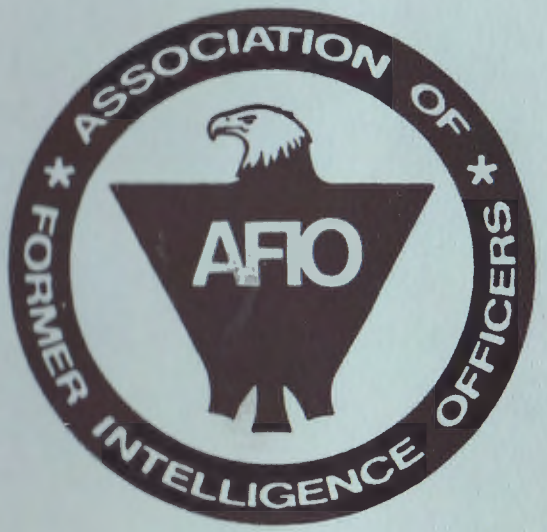
The Intelligence Profession Series

Number TWO



National Security and The First Amendment

By

John S. Warner

6723 Whittier Avenue, Suite 303A
McLean, Virginia 22101
(703) 790-0320

The Association of Former Intelligence Officers (AFIO) was formed in 1975 by former intelligence personnel from the Federal, military and civilian intelligence and security agencies. Its purpose is to promote public understanding of, and support for, a strong and responsible national intelligence establishment.

AFIO believes that effective intelligence is the nation's first line of defense against surprise from abroad and subversion at home and is indispensable for our national leaders in the conduct of foreign and defense policy. AFIO therefore holds that reliable intelligence is essential to the cause of peace.

In its first years, AFIO was active in providing expert testimony to committees of Congress which were investigating various aspects of national intelligence. With a lessening of the amount of effort required to provide Congress with objective, expert testimony, AFIO is embarking upon an education project designed to provide material which will support the teaching of the subject in American universities and colleges. This series of monographs is the first venture into that project.

AFIO is independent and has no affiliation with the United States Government. Publications of the Association, however, which could divulge sensitive information regarding sources, methodology, and techniques, are cleared with the proper element of the intelligence community. Clearance with a government element merely serves to satisfy security requirements and does not constitute substantive approval by that element. In fact, AFIO will not accept substantive direction. Opinions expressed in these monographs are those of the authors, not necessarily those of the Government or of AFIO.

Future editions of this series will address other subjects of current critical interest to the United States intelligence community and the citizenry. These will include secrecy, warning, estimates, the legal and ethical bases for national intelligence, the history of national intelligence in the United States, comparisons with foreign services, collection, policy, and the establishment of requirements.

National Security and the First Amendment

John S. Warner

The Association of Former Intelligence Officers
McLean, Virginia

About the Author

John S. Warner, a retired Major General in the USAFR, was born in Washington, D.C. After receiving his law degree he enlisted in the Air Force and was commissioned in 1944. He served in the European Theater of Operations as a B-17 pilot, was detailed to OSS in 1945 and joined CIA in 1947. In 1956 he attended the National War College and in 1964 obtained his MA in International Affairs from George Washington University. During his CIA career he served as Legislative Counsel, Deputy General Counsel, and later as General Counsel, retiring in 1976. He joined AFIO in 1976, is a member of the Board of Directors and the Executive Committee and was the Legal Advisor until he left the Washington area. He has been active in speaking and writing and has testified before Congressional Committees many times on intelligence matters. He now lives in Tucson, Arizona.

The monograph series, The Intelligence Profession, is published by the Association of Former Intelligence Officers, 6723 Whittier Avenue, Suite 303A, McLean, Virginia 22101. Individual copies are priced at cost and are available for classroom use. Current issues are available at $1.25 per copy. Payment must accompany each order.

Printed at McLean, Virginia.

CONTENTS

ACKNOWLEDGEMENTS

This paper was first presented in the Virgin Islands in January 1982 to a Seminar on The First Amendment and National Security sponsored by the Center for Law and National Security, School of Law, University of Virginia. It is included in the volume of the papers and discussions of that Seminar.* Mr. Warner's presentation is reprinted here with the kind permission of the Center and its Director, Professor John Norton Moore.

Index of Citations prepared by Walter Pforzheimer.

* STEPHEN, Paul, ed. The First Amendment and National Security. Charlottesville, Virginia: University of Virginia Press, 1984.

NATIONAL SECURITY AND THE FIRST AMENDMENT

FOREWORD

The title of this paper is deliberately chosen to place national security first. This is not to say that the First Amendment may be ignored in national security legal matters. Rather, it is to put some perspective on the fact that the U.S. Supreme Court has consistently viewed First Amendment issues when in a national security context in a manner different than such issues in law enforcement or other domestic settings. Also, in other situations, the U.S. Supreme Court has shown considerable deference to powers of the President in the foreign affairs and foreign policy arena, and especially so where the intelligence function is involved.

In order to be precise and avoid confusion in the mind of the reader whenever the term intelligence is used herein, it is referring to foreign intelligence, either the product itself or activities directed at foreigners (or agents of a foreign power) to gain information either of a positive nature or counter-intelligence information. It does not encompass collection of information for law enforcement purposes.

The Center for Law and National Security, University of Virginia, School of Law held its First Annual Seminar on 8-11 January 1982 at St. Thomas, United States Virgin Islands. That seminar was co-sponsored by the Center and The Standing Committee on Law and National Security and the International Law Section of the American Bar Association. The subject of the seminar was "The First Amendment and National Security." Hence this paper, and its title as modified.

Some of the special interest groups represented at the seminar clearly asserted that constitutional rights, i.e., "the law," was absolute and immutable, failing to distinguish or even recognize that "national security" could in any way impact on such rights. Analogies were drawn and precedents cited from case law in many situations where there were no "national security" factors. It is the purpose of this article to demonstrate that the presence of "national security" considerations leads the Judiciary to conclusions in constitutional rights cases which would not be reached absent such "national security" factors. In other words, such considerations have led to judicial views which create a balance between "national security" imperatives and constitutional rights; the latter have been found not be absolute.

There will follow apparently lengthy quotations from judicial cases. This is believed essential so that the reader can develop a reasoned concept of what our courts have been trying to tell us for two centuries, that "national security" is just as much a part of our Constitution as are the privileges and rights afforded our citizens. The Constitution also places heavy responsibilities on the Executive to preserve and protect "national security." While we find no neat or clearly delineated definition of "national security," we do see sharp distinctions drawn between foreign policy activities and domestic security.

I

CONSTITUTIONAL ORIGINS OF NATIONAL SECURITY

It is appropriate to discuss the meaning of "national security" in the framework of law. We first look to the words of the Constitution of the United States. The preamble speaks of insuring "domestic tranquility" and providing for "the common defence."

Article II, Section 1, provides, "The executive power shall be vested in a President of the United States of America." Section 2 of that Article provides, "The President shall be Commander in Chief of the Army and Navy of the United States...." and that, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;...."

Generally overlooked in discussing "national security" is Article I, Section 9, Clause 7 of the Constitution which provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

What does this clause have to do with "national security"? The last four words of Clause 7 were added as an amendment to permit a secret contingent fund for the President to expend for intelligence purposes and for delicate foreign activities.

A. Halperin v. Central Intelligence Agency, 629 F. 2d 144, (DC Cir. 1980).

History is replete with examples of kings, sovereigns, and heads of nations using secret money to hire spies and to conduct delicate foreign relations. The success of these activities depended upon maintenance of secrecy not only in the activities themselves but in accounting for the funds necessarily expended for such activities.

There is an excellent historical review of the last four words, "from time to time," of Clause 7, and their intent and purpose to permit continuation of a secret contingent fund for the President. That review is contained in Halperin decided in the United States Court of Appeals for the District of Columbia Circuit on 11 July 1980. Those four words were proposed by James Madison as an amendment to Clause 7 during the final week of the Constitutional Convention. Judge Wilkey in the Halperin opinion quotes Madison at the Virginia ratifying convention on 12 June 1788, "That part which authorized the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the confederation...." and Wilkey then states, "Madison's language strongly indicates that he believed that the Statement and Account Clause,

following his amendment, would allow government authorities ample discretion to withhold some expenditure items which require secrecy."

Judge Wilkey in continuing his review states, "First, it appears that Madison's comment on governmental discretion to maintain the secrecy of some expenditures, far from being an isolated statement, was representative of his fellow proponents of the 'from time to time provision.' Second, as to what items might legitimately require secrecy, the debates contain prominent mention of military operations and foreign negotiations, both areas closely related to the matters over which the CIA today exercises responsibility." Judge Wilkey then summarizes, "Viewed as a whole, the debates in the Constitutional Convention and the Virginia ratifying convention convey a very strong impression that the Framers of the Statement and Account Clause intended it to allow discretion to Congress and the President to preserve secrecy for expenditures related to military operations and foreign negotiations."

The review by Judge Wilkey then finds "yet further confirmation in the historical evidence of government practices with regard to disclosure and secrecy both before and after the enactment of the Constitution." It is then pointed out that "Our nation's earliest intelligence activities were carried out by the Committee of Secret Correspondence of the Continental Congress." That Committee was created by the Continental Congress on 29 November 1775, and the Congress resolved to provide for expenses incurred by the Committee in sending "agents." The Wilkey opinion states, "The Committee exercised broad discretionary power to conduct intelligence activities independent of the Continental Congress and to safeguard the secrecy of matters pertaining to its agents...." The opinion states further, "The importance of total secrecy in intelligence matters was appreciated in this era at the highest levels." The opinion then quotes from the increasingly well-known letter of July 26, 1777 which General Washington wrote to Colonel Elias Dayton issuing orders for an intelligence mission:

> The necessity of procuring good Intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprizes of the kind, and for want of it, they are generally defeated...."

The Wilkey opinion points out that "as commander-in-chief of the colonial armies, Washington made full provision for intelligence activities and for proper funding." Considerable details are then set out in the opinion quoting from a letter to Washington from financier Robert Morris, member of the Committee of Secret Correspondence, dated 21 January 1788. That letter discloses that there was provided a cash account prior to specifying particular needs and a practice of drawing the funds in favor of a member of Washington's family in order to conceal the ultimate recipient of the funds. The Wilkey opinion then states, "Rather than viewing such arrangements as devious or criminal, it is clear that our highest officials in the War for Independence viewed them as entirely proper and moreover essential to the success of their enterprise."

It is then pointed out in the opinion that when the Constitution became effective in 1789, secret funding for foreign intelligence activities was formalized in the form of a "contingent fund" or "secret service fund" for use by the President. In a speech to both Houses of Congress on 8 January 1790, President Washington requested "a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs." By the Act of 1 July 1790 (1 Stat. 128), Congress responded by appropriating funds for "persons to serve the United States in foreign part." By that Act there was required of the President a regular statement and account of the expenditures, but provision was made for "such expenditures as he may think it advisable not to specify." This statute was re-enacted by the Congress on 9 February 1793 (1 Stat. 299) authorizing funds for the financing of secret foreign affairs operations. While the President was required to report expenses of "intercourse or treaty" with foreign powers, the President or the Secretary of State could make secret expenditures without specification upon execution of a certificate for the amount of the expenditure and such certificates to be deemed a "sufficient voucher" for the sums expended.

Such authority has continued to exist in one form or another throughout the existence of our nation. Current law provides such authority to the Director of Central Intelligence, 50 U.S.C.A. 403j; (1949):

> "The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

Similar authority exists with respect to other government officials. Section 107 of Title 31 of the U.S. Code authorizes the Secretary of State to certify expenditures with respect to "intercourse or treaty with foreign nations." (This language is identical with the 1790 and 1793 statute mentioned earlier.) By 28 U.S.C.A. 537, the Attorney General may certify expenditures of the Federal Bureau of Investigation for "expenses of unforeseen emergencies of a confidential character;..." Section 2017(b) of Title 42 of the U.S. Code authorized similar certification of expenditures in the atomic energy area by the Department of Energy. Similar authority is vested in the Secretary of Defense and the Secretaries of the military departments by 10 U.S.C.A. 140.

Halperin involved a Freedom of Information Act (FOIA) request for Central Intelligence Agency (CIA) documents detailing legal bills and fee agreements with private attorneys retained by the Agency. The Agency claimed exemption from disclosure under FOIA pursuant to section 102(d)(3) of the National Security Act (50 U.S.C. 403(d)(3); 1947) which charges the Director of Central Intelligence with responsibility "for protecting intelligence sources and methods from unauthorized disclosure." The plaintiff argued that such statute was violative of the "statement and account" Clause 7, Section 9, Article I of the United States Constitution. Based on the historical review above, Judge Wilkey for the Court con-

cluded, "that the Statement and Account Clause does not create a judicially enforceable standard for the required disclosure of expenditures for intelligence activities." and "...it is a nonjusticiable political question. Courts therefore have no jurisdiction to decide whether, when, and in what detail intelligence expenditures must be disclosed."

B. Totten v. United States, 92 U.S. 105 (1875).

While we need not deal in detail with all manifestations of Presidential responsibilities and powers under the Constitution, it is useful to look at some views as expressed by the United States Supreme Court. Probably, the earliest pertinent case is Totten. Here, recovery was sought as compensation for services rendered under an alleged contract with President Lincoln, made in July 1861, by which the agent was to proceed to the South and ascertain troop and fortifications information. In other words, he was a paid spy.

The Supreme Court said it had no difficulty as to the President's authority and that he was "authorized during the war, as Commander-in-Chief of the armies of the United States, to employ secret agents ... and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control." The Court objected, however, to the filing or maintenance of such a suit in a court of justice. The Court then stated, that the service under the contract was a secret service, with the information sought to be obtained clandestinely, and to be communicated privately. Further, the employment and the service were to be equally concealed and both employer and agent must have understood that the lips of the other were to be forever sealed. "This condition ... was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

Totten continues, "The secrecy which such contracts impose precludes any action for their enforcement." And "... public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."

It is to be noted that no statutes are cited in the opinion. There is reference to the contingent fund which is fully discussed in Halperin above. There is reference to the Constitution by implication by the Court's reference to the role of the President as Commander-in-Chief. Here, then is Supreme Court recognition of the inherent power of the President to act in national security matters, i.e., to hire spies and conduct foreign relations and to do so secretly, and that such acts do not become a justiciable issue.

It appears that Totten in saying "matters which the law itself regards as confidential" is taking judicial notice, aided by the Constitution and

provision of the contingent fund by the Congress, of required secrecy thus denying the traditional rights of contract under the common law to be heard by the judiciary.

C. DeArnaud v. United States, 151 U.S. 483 (1894).

A somewhat similar case came before the U.S. Supreme Court in DeArnaud. This case arose out of Civil War services by DeArnaud for which he was paid by Major General Fremont, signing a receipt, dated 23 October 1861, which stated in part "for account of secret service rendered to the United States." While the Court disposed of the case on the basis of operation of the statute of limitations, nevertheless it alluded to Totten by stating it would be "difficult for us to point out any substantial differences between the services rendered by Lloyd, [in Totten] and those rendered by Arnaud;".

The time spent on Totten (and DeArnaud) is worthwhile since it is the earliest direct expression by the Supreme Court and Totten has been repeatedly cited in cases up to modern times with no deviation in the basic thrust of its doctrine. The Totten case (and DeArnaud) and the historical review in the Halperin case vividly and amply demonstrate that intelligence and foreign affairs activities, and the necessity for maintenance of secrecy were an integral part of the framing of the United States Constitution. Equally demonstrated are the inherent powers of the President to conduct or authorize such activities. With many of the Framers involved, our first Congress acted to provide secret contingent funds by law and succeeding Congresses have provided similar funds. Thus, secret intelligence, secret foreign activities and secret funds are a fundamental and essential part of national security. Any attempt to gauge the application of Constitutional protections and privileges without considering national security factors which may be involved is truly to dismiss what in fact is part of our law.

It is now time to look at two of the leading U.S. Supreme Court cases concerning the President's authority and responsibility in foreign affairs and intelligence matters. These cases are repeatedly cited when "national security" elements are involved in litigation.

D. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

At issue here was the validiy of a Presidential proclamation issued pursuant to a Joint Resolution of Congress authorizing the President to proscribe arms sales and exports to foreign countries, violation of which constituted a criminal offense. It was argued by defendants that this was improper delegation by the Congress of its functions to the Executive. The Court discussed "the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted." The Court indicated that there are "inherent powers of external sovereignty," and in the field of international relations the President is "the sole organ of the federal government."

The Court then stated:

> "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.... As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."

The Court opinion continues:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results...."

The Court then concluded by stating that "the statute was not an unlawful delegation and the discretion vested in the President was warranted."

E. Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp. 333 U.S. 103 (1948).

In this case, the issue was whether judicial review of orders of the Civil Aeronautics Board as authorized by statute also included such orders granting or denying a certificate of convenience and necessity for overseas and foreign air transportation which are subject to approval by the President pursuant to that statute. The Court ruled in the negative saying that such orders "are not mature and are therefore not susceptible of

judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate."

The rationale of the Court follows:

> "The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

This long review of the history of conduct of intelligence efforts and foreign affairs operations clearly establishes the fact of such activities as an inherent responsibility of the President and the need for secrecy and the embodiment of these principles in the Constitution with full awareness of the import of the words used. They were recognized as essential elements of sovereignty and existence as a nation. Then, our First Congress reaffirmed these principles in enacting law to provide the contingent fund for the President as the means to conduct intelligence and maintain secrecy. We see the clearly expressed distinction between the powers of the Executive in respect to foreign affairs and those in respect to domestic affairs. These principles are fundamental and become a part of the concept.

II

FOURTH AMENDMENT -- WARRANTLESS ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH

Consideration of judicial treatment of "national security" factors when faced with assertion of Fourth Amendment protection sheds some light and is relevant to judicial views of First Amendment assertions in "national security" cases. Clear analogies can be drawn from judicial treatment of the national security issue when faced with either Fourth or First Amendment assertions. Distinctions are made between domestic

security issues and actions of foreign powers, i.e., foreign intelligence and counterintelligence. The distinction between domestic and foreign will also show up in the travel/passport cases to be discussed.

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Recognition of the value of electronic surveillance in the national security field coupled with concern for Fourth Amendment implications was found in President Roosevelt's authorization of 3 September 1939 for the Federal Bureau of Investigation to conduct wiretaps and physical trespass either to install microphones or to conduct searches. Succeeding Presidents approved or reissued this authority up until passage of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801, 25 October 1978.

Various Court decisions raised doubts that continued reliance on Presidential authority to conduct electronic surveillance was sufficient in all types of cases. Also, there were continuing developments in case law surrounding application of Section 605 of the Communications Act of 1934 (47 U.S.C. 605) to federal investigations of domestic criminal activities. As a result, in 1968 the Congress passed the Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2510) containing provisions authorizing and requiring prior judicial authorization of any electronic surveillance in connection with law enforcement investigations. That Act took particular note of the long used authority asserted by the President and used by the FBI to conduct electronic surveillance for "national security" purposes. Section 2511(3) provides as follows:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial

> hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

This subsection neither adds to nor subtracts from the President's power to conduct electronic surveillance in the interest of national security. No court decisions have indicated otherwise. (There is here, however, an expression of Congress that explicitly includes foreign intelligence and counterintelligence in the concept of national security.)

A. United States v. United States District Court, (Keith) 407 U.S. 297 (1972).

In referring to Section 2511(3), the Court stated: "...Congress simply left presidential powers where it found them." In this case, the Attorney General by affidavit stated he approved the wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." On the basis of that affidavit, the Government asserted that "the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security." Since there was no evidence of any involvement, directly or indirectly, of a foreign power, the Court concluded that any special circumstances applicable to domestic security surveillances would not warrant an exception to the general Fourth Amendment requirement that a warrant be obtained. The Court made it clear that the President's powers with respect to surveillance of foreign powers were not at issue by saying:

> "Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."

B. United States v. Brown, 484 F. 2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

This issue was, however, squarely addressed in Brown. The Court referred to its earlier decision in United States v. Clay, 430 F. 2d 165 (5th Cir. 1970) in which it "concluded that the President had such authority over and above the Warrant Clause of the Fourth Amendment. We found that authority in the inherent power of the President with respect to conducting foreign affairs. We took our text from Chicago and Southern Air Lines v. Waterman SS Corp., 333 U.S. 103, (1948)." The Brown opinion then utilizes quotations from Chicago and Southern set forth in this paper. Continuing, the Brown opinion states that Keith teaches:

> "...in the area of domestic security, the President may not authorize electronic surveillance without some form of prior judicial approval. However, because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in United States v. Clay, supra, that the President may constitu-

tionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Accord, Zweibon v. Mitchell, D.D.C. 1973, 363 F. Supp. 936; United States v. Butenko, DNJ., 1970, 318 F. Supp. 66, Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."

"Our holding in Clay is buttressed by a thread which runs through the Federalist papers: that the President must take care to safeguard the Nation from possible foreign encroachment, whether in its existence as a Nation or in its intercourse with other nations." See e.g., The Federalist No. 64, at 434-36 (Jay); The Federalist No. 70 at 500 (Hamilton) (J. Cook ed. 1961)."

In a specially concurring opinion in the Brown case, Circuit Judge Goldberg said:

"There can be no quibble or quarrel with the findings and conclusions that the wiretap under consideration here had its origin and complete implementation in the field of foreign intelligence. This Court and the able district judge have conducted inescapably independent reviews of the action of the then Attorney General in authorizing this warrantless electronic surveillance. All agree in the determination that the wiretap was indeed directly related to legitimate foreign intelligence gathering activities for national security purposes; and that it was, therefore, a legal wiretap..."

C. United States v. Butenko, 494 F. 2d 593 (3d Cir. 1974), cert. denied sub nom., Ivanov v. United States, 419 U.S. 881 (1974).

Perhaps the most extensive judicial review of the law on warrantless electronic surveillance for gathering of foreign intelligence is contained in Butenko. After trial and conviction of Butenko and Ivanov in 1964 of conspiring to violate the provisions of 18 U.S.C. 794(a) and (c), there were appeals and voluntary disclosure by the government that it had overheard conversations of Ivanov by means of electronic surveillance.

1. The Court faced head-on the question of whether Section 605 of the Communications Act of 1934, 47 U.S.C. 605, was to be construed to restrict the President's authority to gather foreign intelligence information and use such information to assist in securing criminal convictions. The Court pointed out that in enacting Section 605, the Congress did not address the statute's possible bearing on the President's constitutional duties as Commander-in-Chief and as adminstrator of the Nation's foreign affairs. Had the Congress explored the question, the Court opines it would have recognized that any action by the Congress that arguably would hamper the President's effective performance of his duties in the foreign affairs field would have raised constitutional questions. In the absence of such legislative consideration, the Court would not ascribe to Congress an intent that Section 605 should reach electronic surveillance conducted by the President in furtherance of his foreign affairs responsibilities, and

therefore concluded that Section 605 does not render them unlawful. Thus, there are no limits placed on the uses to which material so obtained may be put.

2. The Court then turned to an analysis of the applicability of the Fourth Amendment to electronic surveillance conducted pursuant to the President's foreign affairs powers. The Court reviewed Curtiss-Wright and Keith (both cited and discussed earlier) agreeing with its conclusion that the Fourth Amendment is applicable even though unlike Keith the subject of the surveillance is not a domestic political organization. The Court stressed the strong public interest, i.e., "the efficient operation of the Executive's foreign policymaking apparatus depends on a continuous flow of information." The Court then stated, "Also, foreign intelligence gathering is a clandestine and highly unstructured activity."

The Court pointed out that while the "Constitution contains no express provision authorizing the President to conduct surveillance...it would appear that such power is similarly implied from his duty to conduct the Nation's foreign affairs." The Court went on to say that, "To demand that such officers...must interrupt their activities and rush to the nearest magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties. The Court then held in sum that prior judicial authorization was not required since the surveillances were "conducted and maintained solely for the purpose of gathering foreign intelligence."

3. The Court also dealt with the matter of probable cause stating, "the crucial test of legality under the Fourth Amendment, is the probable cause standard," which is subject to post-search judicial review and such "review represents an important safeguard of Fourth Amendment rights..." The Court went on to say of the probable cause standard, that, "Although most often formulated in terms of an officer's probable cause to believe that criminal activity has or will take place, the standard may be modified when the government interest compels an intrusion based on something other than criminal activity...". The Court then states:

"The government interest here -- to acquire the information necessary to exercise an informed judgment in foreign affairs -- is surely weighty. Moreover, officers conceivably undertake certain electronic surveillance with no suspicion that a criminal activity may be discovered. Thus, a demand that they show that before engaging in such surveillance they had a reasonable belief that criminal activity would be unearthed would be to ignore the overriding object of the intrusions. Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental. If the Court, for example, finds that members of a domestic political organization were the subjects of wiretaps or that the agents were looking for evidence of criminal conduct unrelated to the foreign affairs

needs of a President, then he would undoubtedly hold the surveillances to be illegal and take appropriate measures.

"Since,...interceptions of conversations of Ivanov were 'solely for the purpose of gathering foreign intelligence information,' they are reasonable under the Fourth Amendment. Because we have already concluded that a warrant was not required under the circumstances here, we, therefore, hold that Ivanov's Fourth Amendment rights were not violated."

4. The Court concluded:

"Rarely, if ever, do the phrases of the Constitution themselves decide cases without at least some interpretative assistance from the judiciary. The Constitution speaks through the judges, but its phrases are seldom so cabined as to exclude all flexibility. Charged with the assignment to make a choice, a judge must be responsible for the choice he makes.

"The importance of the President's responsibilities in the foreign affairs field requires the judicial branch to act with the utmost care when asked to place limitations on the President's powers in that area. As Commander-in-Chief, the President must guard the country from foreign aggression, sabotage, and espionage. Obligated to conduct this nation's foreign affairs, he must be aware of the posture of foreign nations toward the United States, the intelligence activities of foreign countries aimed at uncovering American secrets, and the policy positions of foreign states on a broad range of international issues... And balanced against this country's self-defense needs, we cannot say that the district court erred in concluding that the electronic surveillance here did not trench upon Ivanov's Fourth Amendment rights.

"To be sure, in the course of such wiretapping conversations of alien officials and agents, and perhaps of American citizens, will be overheard and to that extent, their privacy infringed. But the Fourth Amendment proscribes only 'unreasonable' searches and seizures.

"Accordingly, the judgment of the district court denying Ivanov's request for disclosure and an evidentiary hearing will be affirmed."

D. United States v. Truong Dinh Hung and United States v. Ronald Louis Humphrey, 629 F. 2d 908, (4th Cir. 1980), cert. denied, 102 S. Ct. 1004.

The most recent chapter in the saga of the developing law of warrantless electronic surveillance and searches arises out of the companion cases of Truong and Humphrey who were convicted of espionage in violation of 18 U.S.C. 794(a) and (c) and other statutes. They sought

appeals on grounds which included warrantless electronic surveillance and searches.

1. Truong, a Vietnamese citizen, living in the United States, had his telephone tapped and his apartment bugged by the federal government from May 1977 to January 1978. No court authorization was sought or obtained for this telephone tap. Through the tap, it was learned that Truong procured copies of classified documents from Humphrey, an employee of the United States Information Agency. At Truong's request, Dung Krall received packages containing copies of the classified documents and delivered them to representatives of the Socialist Republic of Vietnam. Unknown to Truong, Krall was a confidential informant employed by the CIA and the FBI. Krall kept these agencies fully informed and gave the packages to the FBI for inspection, copying, and approval. This operation continued from September 1976 until 31 January 1978 when Truong and Humphrey were arrested.

2. The district court accepted the government's argument that there exists a foreign intelligence exception to the warrant requirement of the Fourth Amendment and that approval for the surveillance by the President's delegate, the Attorney General, was constitutionally sufficient. The district court also decided the executive could proceed without a warrant only so long as the investigation was "primarily" a foreign intelligence investigation. Based on an internal memorandum of 20 July 1977 indicating that the government had begun to assemble a criminal prosecution, the district court decided that thereafter the investigation was primarily criminal and excluded all evidence secured through warrantless surveillance after that date.

3. The appeals court agreed with the district court but pointed out that the Supreme Court had never decided the issues. However, they relied on the analysis conducted in the United States v. United States District Court (Keith), 407 U.S. 297 (1972) which is discussed earlier in this paper, where the surveillance was against domestic organizations. The appeals court here said:

"For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following Keith, 'unduly frustrate' the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.

"More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lay

behind foreign intelligence surveillance...The executive branch, containing the State Department, the intelligence agencies, and the military, is constantly aware of the nation's security needs and the magnitude of external threats posed by a panoply of foreign nations and organizations. On the other hand, while the courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized. Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source.

"Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs...The President and his deputies are charged by the Constitution with the conduct of the foreign policy of the United States in times of war and peace. See United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Just as the separation of powers in Keith forced the executive to recognize a judicial role when the President conducts domestic security surveillance, 407 U.S. at 316-18, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

"In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. Accord, United States v. Butekno, 494 F. 2d 593 (3 Cir.), cert. denied sub nom., Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F. 2d 418 (5 Cir. 1973), cert. denied, 415 U.S. 960 (1974); United States v. Clay, 430 F. 2d 165 (5 Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971)."

4. Butenko, Brown and Clay dealt only with overhearing of the defendants during the course of warrantless electronic surveillance for foreign intelligence purposes which was not directed at them as targets. In each case, such surveillance was determined to be legal, and the result was that the defendants were not entitled to review the results, which were not a part of the evidence against them. Here in Truong-Humphrey was the head-on confrontation -- the evidence obtained in warrantless electronic surveillance directed at defendants but conducted "primarily" for foreign intelligence purposes, was admissible evidence in the prosecutor's case against them.

5. The reasoning set out by Truong-Humphrey in support of the lawfulness of such surveillance seems to be a strong argument against the

wisdom and constitutionality of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 (FISA) and its requirement for a judicial warrant by the Executive in order to conduct electronic surveillance for foreign intelligence purposes in the United States.

Certiorari was denied as to Butenko and Brown prior to passage of FISA. The reasoning of Truong-Humphrey accurately reflects Butenko and Brown and agrees, with no other circuit courts substantially in disagreement. That part of FISA requiring a judicial warrant before the Executive is permitted to wiretap a known KGB agent, or for that matter the Soviet Embassy itself, flies directly in the face of these three cases which represent the best judicial law on the subject. Opponents of enactment of this part of FISA commented that the title of the Act should be changed to reflect its intended purpose, i.e. to "An Act to Convey Fourth Amendment Rights on Foreign Embassies and all Foreign Intelligence Agents in the United States." Only the media hysteria and over-reaction of the mid-seventies could bring about such a result under the clarion call of "protecting the Constitutional Rights of Citizens."

E. Physical Search

On the issue of physical search, the United States Foreign Intelligence Surveillance Court (FISC) established by FISA, by order of 4 June 1981, determined it had "no statutory, implied, or inherent authority or jurisdiction to review" an application for the FBI to undertake an intelligence physical search of property under control of a foreign power. However, previously on at least two occasions judges of FISC have issued orders, at the request of the Justice Department, authorizing searches of personal property, (H.R. Rep. No. 1466, 96th Congress, 2d Session, 1980). The Department of Justice in its Memorandum of Law, of 3 June 1981, accompanying its application, changed direction from the Justice Department under the previous administration and urged that FISC reject its application "because of its lack of jurisdiction." That Memorandum went on to say, "The Department of Justice has long held the view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes" and that this power "has also been upheld by the only appellate court that has considered this question in the context of a physical search of the property of an agent of a foreign power" and cites the Truong-Humphrey case. How, in legal logic, can a physical search be distinguished from electronic surveillance in Fourth Amendment terms? The answer is, it cannot.

III

LEGISLATION AFFECTING NATIONAL SECURITY

Much effort is directed herein at the judicial view of "national security" and the role of the Executive as interpreted by the court. Attention should now be turned to action by the Congress in legislating on various aspects of "national security." Not all such legislation can be catalogued here, but we will highlight action relating to those aspects of "national security" which touch on intelligence or foreign activities and the

need for secrecy. We have discussed previously enactment since the first Congress of contingency funds for the Executive to carry out secret intelligence and foreign affairs activities.

A. National Security Act of 1947, 50 U.S.C.A. 402

Until passage of this law, there was no utilization of the word "intelligence" in the United States Code, other than a short reference to detail of Army officers to the fields of intelligence or counterintelligence, [10 U.S.C.A. 3065(b)]. Congress addressed itself fully to the question of intelligence as an integral part of "national security." It established a Central Intelligence Agency with a head thereof, titled the Director of Central Intelligence, under a new National Security Council presided over by the President.

The CIA was given various duties for the purpose of coordinating the intelligence activities of the Federal Government "in the interest of national security." While the Congress, of necessity, decided to formalize "intelligence" and "national security," it could not bring itself to use the word "espionage," but this was a clearly intended duty of CIA as the classified Congressional Committee hearings accurately reflect. At p. 127 of Book I of the Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, 26 April 1976 (Church Committee), it is stated, "The Select Committee's record shows that the legislating committees of the House and Senate intended for the [National Security Act of 1947] to authorize [CIA] to engage in espionage."

The Director of Central Intelligence was furnished little authority by this Act except for the ability to terminate employment of any CIA employee whenever he deemed it "necessary or advisable in the interests of the United States." This he could do notwithstanding the provisions of any other law. On the other hand, a proviso was added that charged him with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." This statutory charge was to play a large role in litigation to be discussed later.

B. Central Intelligence Agency Act of 1949, 50 U.S.C.A. 403a.

In what was originally a part of the National Security Act in early drafts, the CIA Act of 1949 provided the Agency with tools and authority to accomplish its intelligence mission. It was given needed procurement authority, ability to pay appropriate travel, allowances, and related expenses of its employees.

1. To enable secret funding of its yearly appropriation, CIA was authorized to transfer to and receive from other Government agencies funds to perform its functions, and as to funds transferred to CIA such expenditures could be made under CIA authorities. The principal such authority was permanent contingent fund provisions such as previously discussed. From that time up through the present, CIA is the only government agency which expends a major part of its funds under contin-

gent fund provisions which provide for a simple certificate of the Director as to the amount of such expenditures without further detail.

2. Another authority which was essential was the provision (50 U.S.C.A. 403g) that:

> "In the interest of the security of the foreign intelligence activities of the United States and in order further to implement the [sources and methods proviso],...the Agency shall be exempted from the...provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

This provision was to become important in resisting requests for access under the Freedom of Information Act, 5 U.S.C. 552 (FOIA).

C. Criminal Disclosure Statutes.

For purposes of this article, I shall not discuss the espionage statutes, 18 U.S.C. 793 and 794 enacted in 1917, except to indicate they are woefully inadequate to deal with cases of unauthorized disclosure or publication of classified information. In many respects, they are even inadequate to deal with classic cases of espionage. They have, however, withstood the challenge of being unconstitutional as violative of due process because of indefiniteness. See Gorin v. United States, 312 U.S. 19 (1941).

1. 50 U.S.C.A. 783(b), enacted in 1950, makes it unlawful for an employee of the United States to disclose to a person whom such employee knows or has reason to believe to be an agent of a foreign government information of a kind which shall have been classified as affecting the security of the United States. Note here the statutory words "classified" and "security." In Scarbeck v. United States, 317 F. 2d 546, (DC Cir. 1963), cert. denied, 83 S. Ct. 1897 (1963), the statute was tested, and the defendant asserted that evidence should be heard on whether the information was properly classified and that the burden was on the Government so to prove. The Court rejected this argument stating:

> "The factual determination required for purposes of Section 783(b) is whether the information has been classified... Neither the employee nor the jury is permitted to ignore the classification given under Presidential authority."

2. Section 798 of Title 18, also enacted in 1950, was intended to proscribe unauthorized disclosure of classified information pertaining to communications intelligence or cryptographic systems. These terms were then defined in the law which made it a crime for anyone to disclose or communicate to an unauthorized person, or to publish, such information. In a recent case, United States v. Boyce, 594 F. 2d 1246 (9th Cir. 1979), the defendant who had been convicted under Section 798 raised the same objection as in Scarbeck, i.e., that the documents were improperly classified. The Court rejected this contention stating: "Under section 798, the

propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to satisfy the classification element of the offense."

3. The Atomic Energy Act of 1954, 42 U.S.C.A. 2011, establishes a category of atomic energy information known as Restricted Data and defines such information. The Act makes it a crime for anyone to communicate or disclose Restricted Data (i) "with intent to injure the United States or with intent to secure an advantage to any foreign nation" or (ii) "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation," 42 U.S.C.A. 2274. Further, the Act provides at 42 U.S.C.A. 2280 authority for the government to seek an injunction for a threatened violation of these criminal provisions. The recent case of United States v. the Progressive, 467 F. Supp. 990, (7th Cir. 1979) in which the government was granted an injunction under this statute will be discussed later in Part IV.

D. National Security Agency Act of 1959, 50 U.S.C.A. 402 Note. (See Sec. 6, P.L. 86-36).

Despite the fact that the National Security Agency was not created by statute, but rather by a Top Secret directive issued by President Truman, 24 October 1952, the Congress acted in 1959 to grant its activities additional protection from public disclosure by the NSA Act of 1959 which provides:

> "...nothing in this Act or any other law...shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such Agency."

(This closely parallels the CIA provision referred to earlier, 50 U.S.C.A. 403g.) This provision would be helpful to NSA in later litigation under FOIA.

E. Intelligence Identities Protection Act of 1982, P.L. 97-200.

The continuing development of "national security" law is reflected in most recent legislative action, i.e., the Congress approving in 1982 the "Intelligence Identities Protection" legislation. Similar proposed legislation had been introduced as early as 1975, and Committees of three different Congresses have considered this issue. The purpose of these bills was to prohibit unauthorized disclosure of information identifying United States personnel, including agents, informants, and sources and to protect the secrecy of these intelligence relationships. That section of the bills relating to disclosures by persons not having had access to classified information was the subject of intense debate over four years.

Many assertions were made by special interest groups and others that this latter section was flatly and facially unconstitutional, but support for this assertion by directly relevant case law was conspicuously absent. Among those who urged this view were included those who also assert the First Amendment is an absolute. Some of these interest groups made

similar assertions in Zemel v. Rusk, Cole v. Richardson, Laird v. Tatum, Marchetti I and II, Snepp, Truong-Humphrey, Haig v. Agee, (all cited and discussed herein) and had their assertions rejected by the Supreme Court which balanced "national security" against constitutional rights. Having lost their First Amendment arguments at the bar of the Supreme Court, they attempted to win that argument in Congressional Committee rooms, but finally lost that battle on the floor of the House and the Senate.

The Intelligence and Judiciary Committees of both Houses, over more than a three year period, carefully crafted well designed provisions to meet the objective of improving the effectiveness of U.S. intelligence and protecting the safety of intelligence personnel. At the same time, the provisions were deemed adequate and sufficient to pass Constitutional muster. In a last minute effort to weaken the effectiveness of the proposed bills, those interests which had objected to such legislation on constitutional grounds were instrumental in having amendments made to H.R. 4 and S. 391 as they were reported out by the Committees. In rousing and prolonged debate, particularly in the Senate, the amendments added by the Committees were rejected in roll-call votes, and the provisions of S. 391 as introduced by Senator Chafee and supported by the Administration were approved and signed into law on 23 June 1982 by President Reagan before assembled officers and employees of CIA at the headquarters building at Langley, Virginia.

The interest groups opposed to any measures to improve the effectiveness of intelligence won temporary victories in the Congressional Committee arena. Such groups include within their ranks exponents of the absolutist view of the First Amendment. But it is interesting and significant that those forces lost on the floor of the House and the Senate on roll-call votes. Those votes for the bills as amended on the floor were, in the House 354 to 56 and in the Senate 90 to 6. Thus, resounding majorities in both Houses voted their belief that this law is constitutional in the framework of protecting "national security" despite the shrill protests of the media and First Amendment absolutists.

IV

FIRST AMENDMENT NATIONAL SECURITY CASES

We now begin to come face to face with judicial expressions of resolution of the apparent dilemma of the protective words of the First Amendment and the necessities of the survival of the nation through the exercise of Presidential powers under Article II of the Constitution.

A. Near v. Minnesota, 283 U.S. 697 (1931).

Most treatises on the First Amendment include Near v. Minnesota, and so shall I. While that case dealt with a state law proscribing publication of defamatory newspapers (which was struck down on First Amendment grounds), the Court took great care to make it clear that the First Amendment was not absolute. The example they chose to illustrate an exception lay in the "national security" area, i.e., military matters:

"...the protection even as to previous restraint is not absolutely unlimited." and

"No one would question but that a government might prevent actual obstruction to its recruiting efforts or the publication of the sailing dates of transports or the number and location of troops."

B. Kent v. Dulles, 357 U.S. 116 (1958).

Many point to Kent v. Dulles as judicial vindication of an asserted First Amendment right to travel. This it is not. Factually, the issue concerned refusal of the Secretary of State to issue a passport based on the applicant's failure to file affidavits concerning membership in the Communist Party as required by law. The Court held for the applicant concluding that the statutes did not give the Secretary of State the kind of authority exercised to deny travel, "solely because of their refusal to be subjected to inquiry into their beliefs and associations." The Court stated it did not reach the question of the constitutionality of the statutes concerned. It did state:

"The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."

The Court then added:

"If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case."

In other words, if appropriate "national security" considerations were involved, such as the President's responsibilities for foreign affairs, the result might be different -- and so it was as we shall see in the next case and in the later case of Haig v. Agee.

C. Zemel v. Rusk, 381 U.S. 1 (1965).

First Amendment rights were again asserted in a passport case where the Secretary of State refused to validate a passport for travel to Cuba in Zemel v. Rusk. The Court stated:

"...we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unreasonable to assume that it does not), it is an inhibition of action...The right to speak and publish does not carry with it the unrestrained right to gather information."

The Court, picking up on the "right to travel" as a liberty of a citizen referred to in Kent v. Dulles, discussed above, went on to say, "the fact that a citizen cannot be inhibited without due process of law does not mean

that it can under no circumstances be inhibited." The Court in referring to the restriction on travel to Cuba then said, "the restriction is supported by the weightiest considerations of national security."

D. New York Times Co. v. United States, 403 U.S. 713 (1971).

Due to the haste with which this case was brought to the Supreme Court, there were many complaints in the opinions about such haste. It is difficult to draw clear lessons, abetted by the fact of six separate concurring opinions, all but two shared by more than one Justice and three separate dissenting opinions (two of them individual dissents). There were disparate views ranging from the absolute views of the First Amendment of a minority to the view of some Justices that they were "not prepared to reach the merits,..." The final result, of course, was that injunctions against the New York Times and the Washington Post were not sustained.

One can draw a lesson that the Government did not carry its burden of proving grave, immediate, and irreparable harm to the national security of the United States. Others would assert that this case stands for the principle that there can be no prior restraint of the media. However, as Justice White put it, with concurrence of Justice Stewart, "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans and operations." He also noted that in this case, "a substantial part of the threatened damage has already occurred." Justice Marshall, in concurring with the result, conceded that "in some situations it may be that under whatever inherent powers the Government may have as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander-in-Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security" however that term may be defined."

E. Cole v. Richardson, 405 U.S. 676 (1972).

In Cole v. Richardson, First Amendment rights were again asserted. In this case, an employee of the State of Massachusetts refused to subscribe to a required oath of employment which provided in part that the subscriber will oppose the overthrow of the Government of the United States by force, violence, illegal, or unconstitutional method. Other parts of the oath of office provided for upholding the Constitution of the United States. The Court held that such an oath was not inconsistent with the constitutionally required oath of office "to uphold the Constitution."

F. Laird v. Tatum, 408 U.S. 1 (1972).

Just a few months later, the U.S. Supreme Court dealt with assertions of First Amendment rights in a case more directly related to "national security," i.e., collection of intelligence by the U.S. Army in Laird v. Tatum.

Here the Army had established a system for collecting intelligence, principally through monitoring the media, concerning civilians possibly involved in potential or actual civil disturbances. No legally proscribed

collection means were utilized. The Court reviewed the various statutes which authorized the President to utilize the armed forces to quell insurrection. The plaintiffs asserted that the chilling effects of the mere existence of this collection activity on their First Amendment rights were constitutionally impermissible. The Court held:

> "No logical argument can be made for compelling the military to use blind force. When force is employed it should be intelligently directed, and this depends upon having reliable information -- in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information...'."

Here again, the Court refused to spread the umbrella of First Amendment rights to exclude "national security" needs for intelligence.

G. United States v. Marchetti, 466 F. 2d 1309 (4th Cir. 1972), cert. denied 409 U.S. 1063 (1972), hereinafter Marchetti I.

The competing demands of "national security" need for secrecy in intelligence matters, First Amendment rights, free speech, and prior restraint were thoroughly analyzed and dealt with in United States v. Marchetti. The Central Intelligence Agency (CIA) sought an injunction requiring its former employee, Marchetti, to submit to the Agency any proposed writing relating to the CIA prior to release to anyone else, the purpose being to assure that such writing did not include any classified information. CIA relied upon a secrecy agreement signed by Marchetti when he became a CIA employee wherein he agreed he would never divulge any classified information unless authorized by the Director of Central Intelligence. It was claimed that the First Amendment barred any such prior restraint, and the New York Times case was cited in support of this claim.

The Court in its opinion pointed out that free speech is not an absolute concept and referred to the type of exception for "national security" set out in Near v. Minnesota. The Court then commented on the Government's right to secrecy in foreign affairs matters and intelligence, citing Curtiss-Wright Export and Chicago and Southern Air Lines. The Court pointed out that the Director of Central Intelligence is charged by law with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3). The Court stated such secrecy agreements as signed by Marchetti "are entirely appropriate" to implement the Congressional charge of responsibility. The Court upheld the injunction saying, "Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights."

Thus, a valuable legal tool had been established, enforceable in a Court, based on a simple contract concept. This tool could prevent serious damage to the "national security" interests of the United States or threats

to the personal safety of individuals, by acting in advance of a threatened disclosure -- with no abridgement of First Amendment rights.

H. Environmental Protection Agency et al v. Mink et al, 410 U.S. 73 (1973).

EPA v. Mink is discussed briefly here because of the reaction of Congress. The Freedom of Information Act, 5 U.S.C. 552 (FOIA) provided for exemption from forced disclosure matters "specifically required by an Executive Order to be kept secret in the interest of national defense or foreign policy." After discussing the legislative history of that Act, the Court held: "...but the legislative history of that Act disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them."

The Congress promptly amended the existing FOIA concerning the exemption relating to matters to be kept secret pursuant to an Executive Order to provide additionally, "and (B) are in fact properly classified pursuant to such Executive Order;", Public Law 93-502, 21 November 1974. That law also provided that any documents withheld under any of the exemptions may be examined by the Court in camera and such "court shall determine the matter de novo."

The President's veto message of 17 October 1974 stated, "...the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise." He stated this provision "would violate constitutional principles..." and "It is...my conviction that the bill as enrolled is unconstitutional and unworkable..." There are many who agreed then and agree now on the basis of the spectacle that has been visited upon our judicial system by this revision.

Consider the case of Philip Agee v. Central Intelligence Agency decided in the District Court for the District of Columbia on 17 July 1981, 524 F. Supp. 1290. The Court conducted a random in camera review of the 8,699 CIA documents responsive to the Agee request. This review was done mainly at CIA headquarters "because of the volume and sensitivity of the material." In granting the CIA's motion for summary judgment, Judge Gerhard A. Gesell said:

> "As far as can be determined this is the first FOIA case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his Government's legitimate efforts to ascertain and counteract his effort to subvert the country's foreign intelligence program. It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."

In a footnote, Judge Gesell notes that as of January 1981 CIA had expended 25,000 man hours on the request involving salaries of $327,715 and

computer costs of $74,750 with present total costs far exceeding such sum, none of which can be charged to Agee under the statute.

Here again, the hysteria and media over-reaction of the mid-seventies led to passage of a law vetoed as being unconstitutional and flying into the face of well-established case law that the determination of what is secret and must be protected in the interest of "national security" is a matter to be left to the Executive Branch.

In testimony before the Senate Select Committee on Intelligence on 21 July 1981, the Deputy Director of Central Intelligence, Admiral B.R. Inman, pointed out that prior to the 1974 amendments, CIA had received virtually no FOIA requests and since then has been deluged with such requests and with resulting litigation with 1,212 new FOIA requests logged in 1980. Admiral Inman concluded, "I believe it is absolutely clear that the FOIA is impairing our nation's intelligence efforts." Many of the same interests asserting First Amendment privilege in the passport cases, Marchetti I and II, Snepp, and in the vanguard of resisting passage of the Intelligence Identities Protection Act of 1982 are also leaders in the multiplicity of FOIA lawsuits filed against all of the national security agencies.

I. Knopf v. Colby, 509 F. 2d 1362 (4th Cir. 1975), cert. denied, 421 U.S. 992 (1975), to be known as Marchetti II.

We now come to Marchetti II where the author is requesting judicial review of deletions of classified information requested by CIA upon its review of the manuscript submitted pursuant to the injunction granted in Marchetti I. The Court noted that in its consideration of the earlier case it had been "influenced in substantial part by the principle that executive decisions respecting the classifying of information are not subject to judicial review," and then cited EPA v. Mink. It also noted the revisions to FOIA of 1974, indicating the new standard of review should be applicable. Even under this standard, after review of some of the deleted items, the Court referred to the "presumption of regularity in the performance by a public official of his public duty." and "That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the 'Top Secret' legend on the document." The effect of the Court's ruling was to approve all of the deletions of classified information requested by CIA.

The Court also declined to modify its previous holding (in Marchetti I) that the First Amendment is no bar against an injunction forbidding disclosure of classified information when such disclosure would violate a solemn agreement made by the employee at the commencement of his employment. The Court concluded:

> "With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights."

J. United States v. The Progressive, 467 F. Supp. 990 and 486 F. Supp. 5 (1979).

Here in The Progressive case a temporary restraining order, and later a preliminary injunction, was granted by a federal district court to prevent publication by a magazine of an article purported to contain the basic theory of why the hydrogen bomb works, and how it is constructed. The statements of the Secretary of Defense and the Secretary of State that publication would irreparably harm the national security of the United States were balanced by the Court against First Amendment assertions. In granting the injunction, the Court stated:

> "A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to publish is moot." and "...one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live."

The Court denied reconsideration, and we can only surmise what appellate rulings would have been in the Circuit Court and the Supreme Court, since substantially the same information was published by another author in another publication, and the case became moot. However, the Court's opinion is worthy of noting in its attempt to balance "national security" and survival against First Amendment considerations.

K. Snepp v. United States, 444 U.S. 507 (1980).

The enforceability of a secrecy agreement was again raised in Snepp v. United States. Plaintiff makes the assertion that such agreement is unenforceable as a prior restraint on protected speech and thus violative of the First Amendment. Snepp was employed by CIA and signed a secrecy agreement similar to that in the two Marchetti cases. After terminating his employment with CIA, Snepp published a book based on his experiences in CIA about certain CIA activities without submitting it to CIA for review for classified information. The government sought an injunction as in Marchetti I but additionally requested that all profits, attributable to the breach of contract by failure to submit his manuscript, be impressed with a constructive trust. The Court found that Snepp's employment with CIA involved an extremely high degree of trust and that he "deliberately and surreptitiously violated his obligation..." The Court found undisputed evidence that a CIA agent's violation of his obligation to submit writings impairs the CIA's ability to perform its statutory duties. The Court referred to the finding of the District Court that publication of the book had "caused the United States irreparable harm and loss." The Court found it immaterial whether the book actually contains classified information -- for the purposes of trying this case, the CIA did not contend that Snepp's book contained classified material. However, upon being questioned on this point at a hearing before the House Permanent Select Committee on Intelligence on 6 March 1980, a CIA witness made it very clear that the Snepp book did in fact contain a number of matters that were classified.

The Court approved the injunction as to all future writings relating to intelligence matters, thus putting its stamp of approval on the Marchetti

cases. It also approved the constructive trust as an appropriate remedy for both the Government and the former agent. The Court said:

> "If the agent publishes unreviewed material in violation of his fiduciary and contractual obligations, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would put sensitive information at risk."

To deny this remedy "would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security." The majority opinion in a footnote rejects a dissent which analogizes Snepp's obligation to a private employee's convenant not to compete by saying:

> "A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to 'protect intelligence sources and methods from unauthorized disclosure.' "

L. Haig v. Agee, 453 U.S. 280 (1981).

First Amendment rights are again asserted in connection with the revocation of Philip Agee's passport by the Secretary of State pursuant to departmental regulations in Haig v. Agee. The notice to Agee of revocation of his passport stated his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." It was stated such action was based on Agee's declared intention to conduct a continuous campaign to disrupt the intelligence operations of the United States and evidence of facts and actions in carrying out that campaign. The Court held that beliefs and speech are only a part of Agee's campaign, contrasting it with Kent v. Dulles. The Court also found that "Agee's conduct in foreign countries presents a serious danger to American officials abroad and serious danger to the national security."

The Court stated that the freedom to travel abroad in the form of a passport "is subordinate to national security and foreign policy considerations." Further, it pointed out "that the freedom to travel outside the United States must be distinguished from the right to travel within the United States." The former, i.e. the freedom to travel outside, can be regulated within the bounds of due process. The Court went on to say that "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation," and "Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot be neatly compartmentalized."

The Court cites in this portion cases already cited herein, Chicago and Southern, Curtiss-Wright Export, Zemel v. Rusk, Snepp, and then jumps back to Near v. Minnesota. The Court in finding that Agee's First Amendment claim has no foundation stated:

> "Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law. To the extent the revocation of his passport operates to inhibit Agee, 'it is an inhibition of action,' rather than of speech."

CONCLUSION

While the term "national security" is of relatively modern origin, nevertheless its substance is fully embedded in our law beginning with the Constitution. Article II provides for a President who shall be Commander in Chief of the Army and the Navy and that he shall have power to make treaties with other nations. These powers and responsibilities were granted as concomitant with other aspects of sovereignty in a world of contesting and often hostile nations. The duty was clearly and explicitly placed on the President to preserve and protect this nation by foreign activities and by force of arms if necessary, i.e., to protect the "national security."

In the very molding of the Constitution, it has been demonstrated that the Framers were mindful of the necessity for the conduct of intelligence activities and equally mindful of the necessity for secrecy of those activities. The history set forth above relating to the amendment of the Statement and Account Clause of Article I dramatically emphasizes that secret intelligence as an element of national security is an integral part of our Constitution. Whenever other provisions of the Constitution are asserted as conveying privileges or rights, such assertions must be considered against the Constitution as a whole. Where Presidential duties involving national defense, foreign activities and intelligence are present in situations where First Amendment (or Fourth Amendment) rights are asserted, it is the role of the Judiciary to balance what may seem to be conflicting Constitutional principles.

From Totten on, the Supreme Court has trod most carefully where these national security issues are involved. It has shown great respect for the powers and responsibilities vested in the President by the Constitution and by the fundamental concepts of sovereignty which enable a nation to exist and preserve its national security. In the landmark cases, Curtiss-Wright Export and Chicago and Southern, it laid the judicial groundwork for the later First Amendment, electronic surveillance and passport cases. Here were made the distinctions between foreign affairs and internal affairs. Also discussed was the relationship between intelligence concerning foreign matters and the exercise of Presidential powers.

Similar distinctions were made by the Judiciary in electronic surveillance cases. In various Circuit Courts of Appeal (Keith, Brown and Butenko), it was determined that inherent Presidential power to authorize wiretaps and bugging in the interests of national security could not overcome the restraints of the Fourth Amendment in purely domestic security matters. As to collection of foreign intelligence and counterintelligence from agents of foreign powers, the courts uniformly held that Presidential

powers were paramount. In considering whether the general statute prohibiting disclosure of wire communications (Communications Act of 1934) was applicable, Butenko held that it could not ascribe to Congress an intent to intrude on such activities conducted by the President in his constitutional role as Commander-in-Chief and as administrator of the Nation's foreign affairs. These courts drew reinforcement in reaching their judgments from Curtiss-Wright Export and Chicago and Southern as did the Court in the 1980 decision in the Truong-Humphrey case which reaffirmed Keith, Brown and Butenko.

Congress clearly approved the concept of secret intelligence and related foreign activities by authorizing in the First Congress a secret contingency fund for the President for these purposes and thereafter providing similar funds throughout our existence as a nation. Intelligence was formally recognized by Congress in establishing the Central Intelligence Agency in 1947 and giving it necessary authority to conduct intelligence and related activities and also the necessary authority to keep such matters secret. Some of these authorities to keep matters secret were granted to the National Security Agency in 1959. Criminal statutes were enacted with respect to disclosure of communications intelligence (18 U.S.C.A 798), classified information by government employees (50 U.S.C.A. 783(b) and Restricted Data relating to atomic energy (42 U.S.C.A. 2274). Most recently, the Congress in 1982 (P.L. 97-200) made it a criminal offense to disclose the identity of intelligence personnel under cover. By an overwhelming majority in roll-call votes in both Houses, the argument was rejected that this legislation was violative of the First Amendment.

It is against this total background that "national security" and the First Amendment must be considered. Certainly Near v. Minnesota is the precursor of the cases to come. In the passport cases, Kent v. Dulles, Zemel v. Rusk, and finally in Haig v. Agee where First Amendment rights were asserted, the Supreme Court balanced those rights against "national security." Similarly, the Courts relied on such total background in reaching its decisions in the Marchetti I and II and Snepp cases.

The array of decisions discussed must lead to a heightened awareness that secret foreign policy activities, intelligence, strategic military plans and operations were all of a part of the powers vested in the President by the Framers of the Constitution. The Congress, from its inception, implemented those powers with necessary funds and the laws to maintain essential secrecy. The Judiciary has consistently paid due deference to these powers vested in the Executive recognizing the weighty responsibility placed on the Executive on which the existence of our nation depends. Sharp distinctions have been drawn between purely domestic security and law enforcement as against the foreign policy activities, including intelligence operations. The Supreme Court has weighed and balanced most carefully the seeming dilemma of the privileges afforded citizens by the Constitution and the exercise by the Executive of its constitutional responsibilities for "national security."

For those who wish to explore seriously the subject of "Law and National Security," there is a wealth of judicial expression of philosophy on the subject. But, the subject cannot be thoroughly examined by sole

reference to law unless that law has been considered in the context of "national security." As aptly said in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) and quoted in Haig v. Agee:

> "While the Constitution protects against invasion of individual rights, it is not a suicide pact."

First Amendment absolutists should constantly be reminded with this quotation that the Judiciary performs the function of weighing the apparently competing demands of First Amendment rights and "national security" imperatives, as demonstrated by the cases dealt with herein.

INDEX

CITATIONS

CONSTITUTION