WHY THE FIRST AMENDMENT IS NOT INCOMPATIBLE WITH NATIONAL SECURITY INTERESTS: MAINTAINING A CONSTITUTIONAL PERSPECTIVE

by The Honorable Martin L. C. Feldman

INTRODUCTION

Bay of Pigs. Pentagon Papers. Watergate. Now the Iran arms affair. Those words no doubt evoke concern in the minds of people whose daily precincts include the highest levels of government service. They perhaps also bring a sense of contentment--indeed, even fulfillment--to those whose agenda is vigilance for the safety of the First Amendment.

It is fitting and current then that, as part of its Bicentennial Constitutional Lecture Program, The Heritage Foundation asks the question: "Why the First Amendment is not incompatible with national security interests." It is a timely question. Present events confirm it as an important one in this era of our Constitution's bicentennial. I have, however, a small but, I believe, important variation to offer: Is national security incompatible with the First Amendment?

Why offer what I hope will not be viewed as an impudent change to the question?

Unlike totalitarian nations, which hold fast to an unyielding primacy for national security, nations in which all other societal values are subordinate to national security concerns, ours is different; free countries are different. You see, all nations have a national security obsession; but it is only free nations that also regard and give succor to the right of expression. Free expression is the anchor of democracies. So we must ask whether national security is somehow incompatible with free expression as we have come to revere it. Every nation strives for security without regard to ideology. But our constitutional republic equally heralds freedom of expression,

---

Martin L. C. Feldman is a United States District Judge for the Eastern District of Louisiana. He spoke at The Heritage Foundation on January 14, 1987.

This lecture is one in a series celebrating the bicentennial of the U.S. Constitution.

ISSN 0272-1155.

embodied in the First Amendment, as a requisite fundamental value. Our society, like all societies, knows well the need for national security, but we also question the value of life in a regime where perceived notions of national security serve as the underlying measuring rod for the monitoring of all civil liberties and the diminishment of individual dignity. Ours is a society that recognizes the tension that exists between national security objectives and free speech, but also states that our national security depends as much on maintaining an intelligent and informed public citizenry as it does on government secrecy.

Thus we reject the classic incompatibility between free speech and national security, which is explicit in autocratic and totalitarian regimes. Ours is a nation which boasts that both principles share a balanced status under the Constitution. We may rightly be proud that ours is not a society where national security interests may be invoked to justify a wholesale suspension of constitutional order.

At the same time, to deny that there is often sharp and precarious competition between the exercise of free speech, on the one hand, and the dogged protection of national security objectives, on the other, is to ignore history's lessons. Recent events have focused increased public attention on the seemingly steadfast clash of these competing constitutional principles. Free speech enthusiasts, championed by the media, find themselves pitted against national security proponents, who urge that a greater sensitivity to the secret needs of government is warranted. How we as a society respect and cultivate that delicate balance, in the wake of new media challenges and assertive public debate, is in large measure a matter of maintaining a firm constitutional perspective. It speaks to what we and our Constitution mean to the underpinnings of Western civilization. And so, the question: Is national security incompatible with the First Amendment?

THE CASE FOR SECRECY: BEYOND POLITICS

Do we need secrecy in government--in a free and open government? Of course we do. But freedom and secrecy pose an unsettling national enigma for those charged with the guardianship of our national ideals. Listen to the words of Sir William Stephenson, former head of the British Secret Service, from his compelling book, A Man Called Intrepid:

> The weapons of secrecy have no place in an ideal world. But we live in a world of undeclared hostilities; in which such weapons are constantly used against us and could, unless countered, leave us unprepared again; this time for an onslaught of magnitude that staggers the imagination.

And while it may seem unnecessary to stress so obvious a point, the weapons of secrecy are rendered ineffective if we remove the secrecy. One of the conditions of democracy is freedom of information. It would be infinitely preferable to know exactly how our intelligence agencies function, and why, and where. But this information, once made public, disarms us.

So there is the conundrum: How can we wield the weapons of secrecy without damage to ourselves? How can we preserve secrecy without endangering constitutional law and individual guarantees of freedom?

Look at the anxiety created by the collision between open expression and national security.

For instance, the Reagan Administration urges the press to refrain from reporting on the delivery of arms to Iran to protect the lives of American hostages held captive in Beirut; the story quickly spreads, however, across the nation after a leak in the obscure Middle East press. The New York Times tells the story of the Pentagon Papers, but withholds talk of the Bay of Pigs invasion until after the ill-fated skirmish. The Washington Post uncovers Watergate.

For instance, United States military authorities exclude the press corps from the invasion of the island of Grenada, and they delay until 48 hours after the invasion transporting members of the press from the neighboring island of Barbados to Grenada so they can report on the military operations in progress. Some members of Congress react by introducing a resolution calling for the impeachment of President Reagan for allegedly abrogating First Amendment freedoms.[1]

For instance, Richard Welch, Central Intelligence Agency Station Chief in Athens, is murdered in December 1975, less than one month after being named in print as a CIA operative by Philip Agee, himself a former CIA agent, triggering congressional clamor for legislation outlawing such knowing disclosure of critical intelligence information.

For instance, the infamous "Walker Spy Ring," said by the intelligence community to be the most damaging spy ring since the end of the Second World War is uncovered and prosecuted. Significant national setbacks are acknowledged. And it is all there to read about over morning coffee.

---

1. Cassell, Restrictions of Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record War," 73 Geo. L.J. 931, 931-932 (1985).

Are these the symptoms of a healthy society, or the signals of a robust national death-wish?

While the history of the relationship between national security and free speech concerns is marked by its share of partisan politics (itself, a sign of the health of the First Amendment), there is overwhelming consensus in our society for the view that certain national security information must be protected from disclosure; that, for the sake of our mutual safety, all must not be told. This pervasive and fundamental recognition of the need for secrecy can be said to transcend politics and rest upon the conviction that to reveal all would be to expose our nation to the hazards and ravages of international hostilities.

Thus the need for secrecy presents itself in a variety of contexts, which implicate national security and, in any open society, quickly pose conflict with ideas of free expression.

Information leaks about military plans, strategies, and the strength and deployment of forces provide invaluable intelligence leads to foreign adversaries and inevitably cause the failure of military objectives or operations. Disclosure of information relating to weapons design and research and to the details of nuclear technology can have shattering consequences by placing such information in the hands of unfriendly adventurers. Leaks of information regarding our advanced technology of lasers, kinetics, and computers can easily erase strategic advantages of inestimable value. Efforts by the government to obstruct dissemination of this type of information with the shield of national security have generated much debate in the scientific community as well as vocal protests from private researchers and developers who seek rewards for their work through the commercial exploitation of such materials.

Obviously, security measures are necessary to ensure the proper functioning of our intelligence apparatus. Disclosure of the identity of agents, or their sources, unqualifiedly impairs their ability to gather information and imperils the lives of those named, and probably others. Public disclosure of systems and methods and of cryptologic information alerts a hostile nation to the need to develop countermeasures and neutralizes our intelligence efforts. Further, and even more fatal, doubts about the government's ability to keep a secret leaves friendly nations reluctant to share their intelligence with us. Why be our partner in matters that require discretion?

Finally, as the recent Reykjavik conference teaches, secrecy plays an indispensable role in the conduct of diplomacy, or as in the case of Dr. Kissinger's first visit to China in the Nixon presidency, secrecy can make possible diplomatic initiatives designed to open useful channels of communications with otherwise hostile parties. Quite patently, confidentiality enables representatives of government

to speak with candor about matters which, if publicized, could cause domestic turmoil or international disillusionment. Secrecy, then, encourages substantive bargaining and helps to prevent public stalemates fueled by a desire to avoid being seen as backing down, losing face, or "blinking" (a term used during the Daniloff affair). Secrecy avoids the dangerous cosmetics of the international political theater.

The need for secrecy at high levels of government is not new. It has been tolerated, appreciated, and understood throughout the history of free discourse. Need I remind this audience, the Constitutional Convention, which resulted in the confection of our magnificent governing document, held its deliberations in secret? It is said that James Madison later expressed the view that publicity would have surely prevented the consensus necessary for adopting the Constitution.[2] Surely none can question that secrecy and confidentiality play a significant role in our society and are a necessary touchstone of effective government. To what extent the interests of national security may serve as a legitimate justification for the control of speech remains, however, a question of constitutional scale.

THE CASE FOR OPENNESS: PROTECTING INFORMED SELF-GOVERNMENT

What sort of cohesive partnership between secrecy and free speech can endure in a democracy?

Reflecting upon the successful efforts of his Administration to silence news stories prior to the invasion of the Bay of Pigs, President Kennedy is said to have remarked paradoxically to the managing editor of The New York Times in its aftermath: "Maybe if you had printed more about the operation, you would have saved us from a colossal mistake."[3]

Then we encounter the current Iran arms controversy. Government officials deny knowledge of the covert activities conducted by employees of the National Security Council. Select congressional committees are assembled, and an independent prosecutor is appointed to investigate possible violations of law. The Administration notes that mistakes are made. The story is all out in the open. Congress becomes agitated and the American public seems confused.

---

2. Bruce E. Fein, Access to Classified Information: Constitutional and Statutory Dimensions, 26 Wm. & Mary L. Rev. 805 (1985).

3. F. Friendly and M. Elliot, The Constitution: That Delicate Balance, 61 (1984).

We are witness to a debate that argues the more that is kept secret, the more difficult becomes the intelligent and informed public discussion that is necessary for our broad brand of self-government. An uninformed citizenry is, we hear, an ineffective check on both official misconduct and misguided policy. James Madison observed, "[a] popular [g]overnment, without popular information, or the means of acquiring it, is but a [p]rologue to a [f]arce or a tragedy; or perhaps both. Knowledge will forever govern ignorance: [a]nd people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[4]

Public access to information regarding government practices and policies is essential to enlightened public debate and informed self-government. That concept is enshrined in the First Amendment, which ensures that there shall be an independent means of verifying official accounts of transactions of government. Justice Black once observed, "The press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve."[5] Few would disagree with the spirit of that thought.

Reconciling the maintenance of constitutional liberties with the requirements of national security poses an arduous challenge to democracy. It offers ample proof of the untidiness of a free society as opposed to the antiseptic clarity of dictatorships. Granted that a balance must be struck, where should the line be drawn? That is the puzzle for all who would presume to lead a free people. It implicates perhaps our most cherished contribution to social intercourse: Separation of Powers.

LINE-DRAWING: CONGRESS AND THE COURTS

It is the undisputed responsibility of Congress and the courts to maintain and regulate the right balance between measures necessary for the invulnerability of national security and the preservation of free expression. The legislative boundaries are set by an array of federal statutes whose only common thread is the variety of their subject matter. Decisions by the courts shed some further light on our nation's attempt to accommodate national security objectives with the interests of free expression.

---

4. Letter to W. T. Barry, August 4, 1822, in The Writings of James Madison 103 (G. Hunt ed. 1910).

5. Mills v. Alabama, 384 U.S. 214, 219 (1966).

Statutory Framework

Any summary of the statutory framework pertinent to national security protection must begin with the system of classifying documents pursuant to executive orders and regulations. It is a system that might be abused. But, we must ask, is the risk worth the benefit? I believe so. A vast amount of information about the conduct of the nation's military and foreign affairs, as well as internal security matters, is marked "classified" by the government. The purpose of the classification system is to deny access to information whose unrestricted dissemination might jeopardize the security of the nation.[6] While the classification system has never been expressly authorized by Congress, it has been implicitly approved by the passage of the Freedom of Information Act, which exempts from disclosure properly classified information.[7]

Our current regulatory scheme is complemented by several other federal statutes, and gives us a picture of the congressional attitude over the years. The Espionage Act of 1917 generally forbids the willful disclosure of "information relating to the national defense" to persons not entitled to receive such material, with "reason to believe" such material "could be used to the injury of the United States or to the advantage of any foreign nations."[8] The Act might arguably encompass not only espionage in the classic sense, but also willful disclosure by government employees who leak information,[9] and by others, such as (possibly) news reporters, who disseminate restricted information related to the national defense. The scope of the Act is still unclear.

On still another front, the Atomic Energy Act of 1954 makes criminal and enjoins the disclosure by anyone of "Restricted Data," which is defined to include any information related to the design, manufacture, or utilization of atomic weapons, "with reason to believe such data will be utilized to injure the United States or to secure an advantage by any foreign nation."[10]

---

6. Under current Executive Order No. 12,356, 3 C.F.R. 166 (1983), information is properly classifiable if its unauthorized disclosure "reasonably could be expected to cause damage to the national security."

7. 5 U.S.C. Section 522(b)(1)(B)(1982).

8. 18 U.S.C. Sections 793(d)(e)(1982).

9. See, for example, United States v. Morison, 604 F.Supp. 655 (D. Md. 1985), appeal dismissed, 774 F.2d 1156 (4th Cir. 1985).

10. 42 U.S.C. Sections 2011-2296 (1982).

In response to recent history, the Intelligence Identities Protection Act of 1982 criminalizes the disclosure of information regarding the identity of any covert agent of the United States, by anyone, regardless of whether the identity was learned by access to classified information. However, if the identity is learned by one without access to classified information, the disclosure must be shown to have been made "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe such activities would impair or impede the foreign intelligence activities of the United States...."[11]

The Invention Secrecy Act prohibits disclosure, in the name of national security, of privately generated information relating to patent applications adjudged by the government to be "detrimental to the national security."[12] And export control laws, such as the Arms Control Act of 1976[13] and the Export Administration Act of 1979,[14] also represent means by which the government is able to restrict international dissemination of a broad range of scientific and technological data.

Judicial Precedent

From my perspective, what contribution has the Third Branch made?

Judicial decisions that explore the relationship between national security and free expression have been few. While the concept of a national security exception to unrestricted speech has generally been recognized by the courts, its constitutional contours are largely without shape.

The invocation of national security concerns as a basis for restricting speech makes its first appearance in Supreme Court literature in Near v. Minnesota,[15] where Chief Justice Charles Evans Hughes remarked in an oft-quoted dictum dating back to 1931 that "[n]o one would question but that a government might prevent...the

---

11. 50 U.S.C. Sections 421-426 (Supp. 1986).

12. 35 U.S.C. Sections 181-188 (1984).

13. 22 U.S.C. Sections 2751-2796 (Supp. 1986).

14. 50 U.S.C. app. Sections 2401-2420 (1982).

15. 283 U.S. 697 (1931).

publication of sailing dates of transports or the number and location of troops" in times of war.[16]

It was not until some 40 years later, in the Pentagon Papers case,[17] that the Court again had occasion to consider the question. The government sued to enjoin publication by The New York Times and Washington Post of classified material revealing aspects of the decision-making process employed in the Vietnam War. The Court declined to issue an injunction. In his concurring opinion, Justice Potter Stewart, balancing national security dictates against First Amendment concepts, wrote that a prior restraint would not be justified unless the government were able to show that publication would "surely result in direct, immediate, and irreparable damage to our Nation and its people."[18] At the same time, the legitimacy of secrecy in matters of national security was clearly recognized. One senses Justice Stewart's own brooding anxiety; his dilemma was clear. "[I]t is elementary," he also wrote, "that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense, the frequent need for absolute secrecy is, of course, self-evident."[19]

In the celebrated case of Snepp v. United States,[20] the Court faced this conflict in an easier context, sustaining a prepublication review requirement imposed by the CIA, which required, as a condition of employment, that an Agency employee not publish any information relating to the Agency without clearance, affording the Agency an opportunity to delete classified information. The Court concluded that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national

---

16. Id. at 716.

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

18. Id. at 730 (Justice Stewart, concurring).

19. Id. at 728.

20. 444 U.S. 507 (1980) (per curiam).

security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[21] The prepublication requirement, the Court declared, was "a reasonable means for protecting this vital interest."[22]

Finally, in Haig v. Agee,[23] the Court was called upon to decide the propriety of the government's revocation of the passport of former CIA agent Philip Agee, who was engaged in the disclosure of certain Central Intelligence Agency activities. The Court upheld the revocation, declaring quite explicitly, that "no governmental interest is more compelling than the security of the Nation."[24]

Noteworthy district court cases that are specific to this issue include United States v. Progressive, Inc.,[25] Flynt v. Weinberger,[26] and United States v. Morison.[27]

In United States v. Progressive, Inc., the government sought to enjoin publication of a magazine article entitled, "The H-Bomb Secret: How We Got It, Why We're Telling It." The article detailed the design and operation of thermonuclear weapons. The district court enjoined publication. Most interesting about the decision is that the article involved the literary efforts of a private researcher who had relied upon nonclassified information in generating the piece. Nevertheless, the court concluded that the article revealed "Restricted Data" as defined by the Atomic Energy Act.

Flynt v. Weinberger concerned publisher Larry Flynt's efforts to enjoin the temporary press ban enforced by the government in the wake of the invasion of Grenada. While noting that the suit had become moot since the press ban had been lifted, the court sensibly indicated that, in any event, it would decline entering an injunction because to do so "would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military

---

21. Id. at 509, n. 3.

22. Id.

23. 453 U.S. 280 (1981).

24. Id. at 307.

25. 467 F.Supp. 990 (W.D. Wis. 1979).

26. 588 F.Supp. 57 (D.D.C. 1984).

27. 604 F.Supp. 655 (D. Md. 1985), appeal dismissed, 774 F.2d 1156 (4th Cir. 1985).

operations and the lives of military personnel and thereby gravely damaging the national interest."[28]

Finally, in the recent case of United States v. Morison, a civilian analyst employed by the Department of Defense was found to have violated the provisions of the Espionage Act of 1917 by selling classified photographs of Soviet naval vessels to a British magazine for publication. Mr. Morison had been associated with the British magazine prior to the photographs being released, and was paid as an American "editor." The court rejected the defendant's argument that the espionage statutes were intended to "punish only 'espionage' in the classic sense of divulging information to agents of a hostile foreign government and not to punish the 'leaking' of classified information to the press," noting with perception that "the danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government."[29] In either instance, foreign governments are provided with critical national security information. This important decision, which marks the first time the espionage statutes have been successfully used to convict one not engaged in traditional espionage activities, has generated its share of academic commentary.[30] To what extent the espionage statutes may be employed to prosecute those not engaged in traditional espionage activities, such as "leakers" who trade in national security information as well as those who knowingly publish such information, remains an open question of serious constitutional moment.

In the broader sense, the Morison decision typifies the increasing complexity of maintaining the appropriate constitutional balance between national security needs and the institutional role of the press in an environment of unprecedented technology and information delivery. It frames the question: Is national security incompatible with the First Amendment?

MAINTAINING A CONSTITUTIONAL PERSPECTIVE

We live in a world in which nuclear annihilation is only minutes away; being an American exposes one to terrorist attacks both domestically and abroad; and hostile nations employ increasingly sophisticated mechanisms to pry at our national secrets. The majesty

---

28. Flynt, supra at 60.

29. Morison, supra at 657-660.

30. See especially, Comment, A Nation Less Secure: Diminished Public Access to Information, 21 Harv. C.R.-C.L. L. Rev. 409 (1986).

of our nation is that, instead of responding to these sobering truths by suppressing the means of communication, we live in a society in which there is more openness and less secrecy than ever in this, the age of the electronic media.

We pay a dear price for our fidelity to the aspirations of democracy. As stated by Yale Law Professor Thomas I. Emerson, "[n]ational security in a democratic society involves taking some risks and allowing some flexibility. It entails faith that an open community is better prepared to adjust to changing conditions than a closed one."[31]

In the final analysis, we must appreciate that in our society, given the premium placed upon open debate and a free and uninhibited press, an effective national security depends not on establishing police-state controls, but on maintaining a consensus both within and without government that certain kinds of information require secrecy and must be restricted so long as fact-specific exigencies exist to justify suppression. Our remarkable Constitution teaches us the value and the hazards of balancing. It involves an acceptance of the idea that the acquisition and wide dissemination of information is not always a good thing; and it may be highly destructive. Moreover, it admits that the process of reconciling free speech with the demands of national security is a shared responsibility, involving the courts, the Executive Branch, Congress, and what Justice Stewart has referred to as "the Fourth Estate,"[32] the press.

It is the responsibility of the courts under our Constitution to ensure that governmental claims of national security as a basis for restricting speech are subject to rigorous scrutiny, in order to separate the authentic from the contrived. "National security" ought not be permitted to become some talismanic phrase invoked by government for purely self-centered introverted reasons to hide political embarrassment, bureaucratic mistakes, or government wrongdoing. At the same time, courts must be tempered by the recognition that it is difficult for the judiciary to gauge a potential hazard to national security with any exactitude or expertness. We do not have the information or insights to do so. We were not created to do so. Diplomatic and foreign policy developments result from a confluence of diverse forces and events, defying easy categorization, at least for judges. The disclosure of critical national security information could subtly and unintentionally contribute to a chain of events that later reveals itself as severely damaging to our national security. One of the shortcomings of

---

31. Emerson, National Security and Civil Liberties, 9 Yale J. World Pub. Order 78,82 (1982).

32. Stewart, Or of the Press, 26 Hastings L.J. 631,634 (1975).

depending upon judicial resolution of the conflict is that, whether it be a prepublication restraining order which is sought by the government or a post-publication prosecution which is at issue, the effective result is most frequently that it is too late to undo the harm done.

The press must accept its responsibility too. Protecting our national security equally depends upon an ever-alert recognition by the press that it too has a role to play. As a major force in our society, the institutional press is a public trustee, obliged to act responsibly with respect to publishing information that might adversely affect the nation's security. Self-regulation and cooperation by the press with government could provide the surest guarantee against undesired national security disclosures. Some might observe that the attentiveness of the press to self-restraint should improve.

At the same time, the good faith of the press must be matched by a similar appreciation by government that the guarantee of a free press is, as the Supreme Court stated in Time, Inc. v. Hill,[33] "not for the benefit of the press so much as for the benefit of us all." In the end, the disposition of the would-be censors must be moderated by history's teachings that unreasoned, unchecked secrecy can harm our country in a variety of ways. Not only might it promote public cynicism and foment civil distrust, but it permits flawed judgments about national objectives to persist without the disinfectant of public debate.

CONCLUSION

Professor Emerson's words bring us back to the beginning: "[t]he effort to resolve the tensions between national security and constitutional rights should not be looked upon as a zero-sum game. It is not true that the greater the degree of constitutional liberty maintained, the lesser the degree of national security achieved, or that the lesser the degree of constitutional liberty, the greater the degree of national security. Rather, there must be an accommodation between the two systems in which each supplements and supports the other."[34] Protecting our national security without deprecating our commitment to the First Amendment depends in large part upon the resolve with which we embrace our shared constitutional mission.

---

33. 385 U.S. 374,389 (1966).

34. Emerson, National Security and Civil Liberties, supra note 31, at 111.

The Founding Fathers embarked us upon a difficult, exciting, sometimes rowdy voyage, but one which in 200 years has been gleeful and successful. The secret of that success is rooted to the endless quest for the correct balance between secrecy and freedom of information. And that, quite simply, is the key. The Founding Fathers institutionalized for Western civilization the primacy of doctrine of balance in our written Constitution. We must never overlook that central lesson. Still, we must also never relax our fidelity to a resolute national security because our obligation is not just to ourselves...it is to the entire free world.

Let me close by returning to the wisdom of Intrepid:

> "Perhaps a day will dawn," he said, "where tyrants can no longer threaten the liberty of any people, when the function of all nations, however varied their ideologies, will be to enhance life, not to control it. If such a condition is possible, it is in a future far too distant to foresee. Until that safer, better day, the democracies will avoid disaster, and possibly total destruction, only by maintaining their defenses."

And so, you see, national security must come first. But the wonderful mystery of our system is, so must the First Amendment.

Author's Note: I wish to recognize and express my gratitude to my law clerk, Ronald J. Friedman, for his efforts and assistance in the preparation of this paper.