

# SYMPOSIUM: NATIONAL SECURITY AND CIVIL LIBERTIES

## INTRODUCTION

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There are few more crucial constitutional questions before the country today than the reconciliation of national security interests with our system of individual liberties. The issues go to the heart of the democratic process. They involve no less than the application of the rule of law to the various measures being proposed and adopted in the name of national security. Yet the difficulties confronted in seeking a successful accommodation between the demands of national security and the maintenance of individual rights can hardly be overestimated.

In the first place, it is frequently said that national security is the most basic requirement of any society. The argument is that all other interests are dependent on the preservation of the nation itself and hence all such interests must be subordinated to national security. As will be pointed out later, this approach to national security is vastly oversimplified and needs to be seriously qualified. Nevertheless the concept of national security as the paramount interest of a society is at least partially true, carries great weight, and is a force to be reckoned with.

A second factor which adds to the complications is that in today's world the reconciliation of national security and individual rights must be sought against a background of urgent problems and rapid change. We do not have the luxury of operating under stable and favorable economic, political, and social conditions. The state of the economy, the need for protecting the environment, the threat of nuclear war, and other similar problems press for solution. The ensuing conflicts, fears of change, and disruptions of ordinary lives create an atmosphere where a measured approach to the issues may not always be forthcoming.

Moreover, the subject of national security itself arouses an emotional response. Appeals to patriotism and especially expressions of alarm about the intentions of foreign enemies have always been used as techniques for rallying political support. The resulting tides of public opinion are likely to create a diversion from the real issues that must be

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resolved. Even our judicial institutions—the chief guardians of individual rights—may be affected by this influence.

It should be remembered, also, that the scars of previous repressions still remain. The Red Scare of the 1920s and the McCarthyism of the 1950s exploited public fears and shut off public discussion of possible alternative approaches to our problems. That narrowing vision still haunts us.

Again, the reconciliation of national security and democratic rights is set in the context of an advanced bureaucracy. Governmental response to the issues necessarily reflects the common characteristics of that bureaucracy. Thus criticism of government policies and activities is likely to be resented and, if possible, eliminated. There may be a lack of interest in creative or innovative solutions, an unwillingness to take risks, and a prevailing inflexibility in making adjustments to new conditions. Often there is a tendency to utilize claims of national security as a shield against disclosure of mistakes, incompetence, corruption, or other unjustifiable action. In short, preservation of the nation may be confused with preservation of the current bureaucracy.

Another major source of difficulty is that government activities concerned with national security are most often shrouded in secrecy. This blanket of secrecy has tended to expand with the new technologies. Thus, there is an enormous and growing volume of material that is officially classified as secret or is otherwise inaccessible. The ordinary citizen is thereby deprived of the information, ideas, and discussion essential to making informed judgments on matters of public concern. And the watch-dog institutions of the society—the courts, legislative committees, internal mechanisms for supervision—are unable to perform the crucial task of oversight. The result is a crippling of the democratic process.

All of these difficulties are intensified by the unparalleled vagueness of the concept of national security. No clear definition of the term has emerged and few boundaries can be discerned. Thus, President Truman seized the steel mills in the name of national security, claiming that the domestic production of steel was essential to the prosecution of the war in Korea. And the government has claimed that the products of scientific research which may help the economy of a potential foreign foe are affected with a national security interest and subject to control. Similarly, the intelligence agencies have probed widely and deeply into the opinions, associations, and conduct of numerous citizens on the ground that their "subversive activities" endangered our national security. The fact is that virtually anything that happens in the country can be said, in one way or another, to touch on our "national security."

Finally, the competence of the courts to deal with issues of national security has been called into question. It is said that the courts do not

have, and indeed cannot be trusted with, the facts necessary to make a judgment on national security matters, that they do not have the expertise to appraise the impact of events on national security, and that it is not the function of the courts to incur risk of injury to the national security by prohibiting or curtailing action taken by agencies of the executive branch. While these contentions are open to challenge, it remains true that the courts have at times been most reluctant to exercise their powers of judicial review in an effective manner in national security cases. This attitude is reflected in such decisions as *Laird v. Tatum*,<sup>1</sup> in which the Supreme Court ruled that the targets of a widespread program of political surveillance by Army Intelligence had suffered only a "subjective chill" and did not have standing to raise the constitutional validity of the government's action.<sup>2</sup> And the position was recently made explicit in *Haig v. Agee*,<sup>3</sup> where the Court upheld withdrawal of a passport from an American citizen abroad whose speech activities were found by the State Department to be "likely to cause serious damage to the national security or the foreign policy of the United States."<sup>4</sup> "Matters intimately related to foreign policy and national security," said the majority opinion, "are rarely proper subjects for judicial intervention."<sup>5</sup>

The foregoing list of obstacles to a democratic resolution of the conflict between national security and individual rights is a long one. On the other hand certain favorable factors render the task more promising.

First of all, we probably have learned some lessons from history. We should, for example, understand more fully the impact of allowing false national security considerations to lead us into a suppression of individual rights. It is doubtful that the abuses of the Red Scare or the McCarthy period would be repeated. We have also learned to look with some skepticism on claims by the government that national security is imperilled. Thus, despite government assertions that publication of the Pentagon Papers would cause "grave and immediate danger" to the national security, there is no evidence that disclosure of those documents had any adverse affect on national security. Our past experience, then, should point the way to a more balanced appraisal of the contending interests.

Secondly, a substantial body of legal doctrine for reconciling the conflict between national security and individual rights exists, and more could be developed. Thus, it is generally accepted as a starting point that the exercise of governmental power to achieve national security (short of martial law), like the exercise of other governmental powers,

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<sup>1</sup> 408 U.S. 1 (1972).

<sup>2</sup> *Id.* at 13-14.

<sup>3</sup> 453 U.S. 280 (1981).

<sup>4</sup> *Id.* at 286.

<sup>5</sup> *Id.* at 292.

must conform to the constitutional framework. This proposition was reaffirmed by the Supreme Court in *United States v. United States District Court*,<sup>6</sup> where the government's claim that the fourth amendment was not applicable to domestic security investigations was rejected. "We recognize . . .," said Justice Powell for the Court, "the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment."<sup>7</sup>

Beyond this, some areas can be marked out where the constitutional guarantees must be construed to afford full protection and cannot be dispensed with or qualified on grounds of national security. Dissemination of information already in the public domain, the prohibition of which would amount to an official secrets statute, would fall into this category. So also would most kinds of prior restraints.

There are other areas where national security factors might influence the manner in which a constitutional principle is applied, or where the court finds it necessary to balance competing interests. The danger here is that the individual right will be overwhelmed by national security pressures. Yet various ways exist by which the courts can equalize the contest. Thus the courts could place the burden on the government to demonstrate that an immediate, substantial, and identifiable harm to the national security is threatened, that the danger to the national security outweighs the public interest in protecting a constitutional right, and that no alternative less damaging to that right is available. Our constitutional system has achieved some measure of protection for the democratic process and there is no reason why the national security structure cannot follow a similar pattern.

Thirdly, it is possible to develop not only a body of law, but institutions and procedures that will facilitate the accommodation of our national security and liberty interests. So far as the judiciary is concerned, this would call for the Supreme Court to abandon the position taken in *Haig v. Agee*<sup>8</sup> and apply constitutional principles with firmness to national security claims. Lower courts should be encouraged to do this. Oversight by legislative committees, a device which so far has failed to live up to its potential, could also become a valuable mechanism for achieving an appropriate balance. And internal procedures in the executive agencies, such as requirements for making findings of fact, or otherwise leaving a "paper trail," can be used as a basis for more effective controls.

Finally, we need to recognize that, while national security is a basic need, there is more to the story. The attainment of total security, through constrictive or repressive measures, is an illusion. It cannot be

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<sup>6</sup> 407 U.S. 297 (1972).

<sup>7</sup> *Id.* at 320.

<sup>8</sup> 453 U.S. 280 (1981).

achieved in the real world, even at the price of becoming a police state. Nor should national security be the sole goal of a democratic society. We must seek a form of national security that fits within our constitutional structure, not overrides it. This is the only kind of national security worth pursuing.

The articles in this Symposium constitute an important contribution to the solution of these problems. Judith Schenck Koffler and Bennett L. Gershman make us aware of how the primitive concepts behind seditious libel—the urge to silence all criticism of government or its officials, going back to the divine right of kings—still find expression in government measures designed to impose official secrecy and claiming to protect national security. And they rightfully stress the need to sustain the democratic tradition that “celebrates dissent” in its struggle with the “dark tradition” of seditious libel.

John T. Elliff, in an analysis of the Attorney General’s Guidelines for domestic security cases, explains some of the complications and hazards of trying to separate illegitimate political surveillance from legitimate law enforcement investigations. Athan G. Theoharis, dealing with the same subject from a different viewpoint, demonstrates how difficult it is to make sure that the reality conforms to the theory. Both emphasize the need for a statutory charter for the FBI.

Paul G. Chevigny carefully shows how some progress can be made, through courts, legislatures, and executive regulations, in establishing standards and accountability for local police investigations that touch on first amendment rights. Most significantly, he concludes that experience shows the police can live with such constraints.

Mary M. Cheh proposes reforms in the law pertaining to official secrecy. She suggests that greater attention be paid to the right of government employees to freedom of expression and that a constitutional right of access to government information requires more openness in the whole secrecy structure. The student note provides further analysis of one aspect of the secrecy system: polygraph testing of federal employees.

The unspoken assumption of this Symposium is that the problem of conforming national security measures to our system of individual rights is solvable. Whether we move forward to that solution or succumb to the “dark tradition” remains an open question.