1986

Curtiss-Wright Comes Home: Executive Power and National Security Secrecy

Harold Edgar
Columbia Law School, hedgar@law.columbia.edu

Benno C. Schmidt Jr.
Columbia Law School

CURTISS-WRIGHT COMES HOME: EXECUTIVE POWER AND NATIONAL SECURITY SECRECY

*Harold Edgar**
*Benno C. Schmidt, Jr.***

Introduction

Collectively we face no greater challenge than maintaining sensible perspectives on national security issues. Central to this task is the need to achieve a tolerable balance between secrecy and openness in public debate on such issues. There are real threats to our nation, and we would be foolish to ignore them; history teaches that no culture is guaranteed survival. Yet, how to respond to such threats must be profoundly controversial. The virtue of liberal society is that it values highly the realization of private preferences; the sacrifice of those desires to attain another's vision of collective security will never be the path chosen by unanimous vote. There will be constant debate. What is worth securing? How real is the threat? How best may the threat be countered? What are the consequences of miscalculation? Each link in the chain is braided with uncertainties, as we venture ultimate stakes at imponderable odds.

The basic structures—communal, political, often even architectural—of every society have been shaped by a concern for collective security. Page through *The Federalist*, our greatest political tract, and note the priority in argument that Hamilton, Madison and Jay gave to claims that only union could reduce the risks of foreign war and influence. The first twenty-nine essays sound mainly that theme in one key or another. War and

---

* Julius Silver Professor of Law, Science, and Technology, Columbia University. A.B. Harvard 1964; LL.B. Columbia 1967.

** Harlan Fiske Stone Professor of Constitutional Law, Columbia University. A.B. Yale 1963; LL.B. Yale 1966. I am grateful to the Markle Foundation for support of my work on problems of freedom of the press.

Thanks to Henry Monaghan, Vince Blasi, Lori Damrosch, and Peter Strauss for valuable comments, and to Nersa Miller and Lisa Peterson for a lot of late night typing.

death come first; only in essay thirty do the authors turn their attention to the other inevitability—taxes.[1]

The concern about security is old; what is new is that we must face it as a democracy of unrivaled complexity, in many ways more committed to notions of popular sovereignty than were the Founding Fathers. Freedom of speech and access to information about security issues are crucial to this democratic governance; they can also be potent forces in promoting or obstructing particular policy initiatives. We act through governmental institutions which are rightly revered for their age and admired for their adaptability, but which are nonetheless unable to escape the bargain struck at their birth: They were chosen precisely because they promised both division and controversy, as well as the opportunity for civic reflection on the uses of power.

Our complicated politics and venerable institutions face security issues in the light of scientific and technological accomplishments that have transformed the premises and requirements of national action, placing the capacity to destroy the world in the hands of a few individuals. The Archimedean principle that the earth can be moved with a lever has become the ultimate threat in a world where techniques for adjustment of discord, let alone abilities to control the deranged, lag far behind appreciation of the forces that hold mere matter together. Moreover, the possibilities for spying have been transformed by satellites, computers, and electronic surveillance techniques of a scope undreamed of a generation ago.

How can those who would shape our institutions respond to the threats and complexity of the modern world, and continue to respect our constitutional traditions of separation of powers and of informed freedom of expression on issues critical to democratic governance? That is one of the most important questions for those committed to constitutional government.

Fifteen years ago, the *Pentagon Papers* litigation[2] prompted the two of us to examine the legal posture of publications that

---

[1] Judicial review, it may be recalled, comes in near the end at number seventy-eight.

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

revealed military or national security secrets.[3] We undertook the inquiry with a strong, perhaps blinding, predisposition to believe that Congress should be the controlling institution in striking a tolerable balance between secrecy needs and the value of public debate about foreign and military policy. We believed congressional primacy to be so obviously right and proper that we hardly considered the need to defend it, and we assumed that the Supreme Court in particular would see the virtues of legislative resolution of secrecy questions. Contrary to our predictions and prescriptions, the years since the *Pentagon Papers* have seen a considerable enhancement of executive power in areas of national security secrecy, an aggrandizement significantly assisted by the Supreme Court, with Congress noticeably absent from the discourse.

We hope in this Commentary to explain our sense of puzzlement and unease about this institutional evolution. In several important decisions, the Supreme Court's choice of techniques for dealing with legal materials, as well as the tone of its opinions, seem to signal the Court's belief that Congress need not participate in the determination of national security secrecy needs. Even though Congress has been quite active in legislating about national security problems generally, the current Supreme Court seems reluctant to abide the slow politics of our separation of powers, and appears to believe that only the Executive and the Judiciary are capable of defending the nation's ultimate interests. We believe this message has been heard by lower courts in national security matters, generating a highly fluid and aggressive approach to secrecy problems and espionage prosecutions.

Our concern about this recent trend toward executive empowerment does not rest on the view that there is, in precedent or in practice, a clear and simple separation of powers model at work with respect to national security and secrecy. On the contrary, the dialectical quality of separation of powers theory, history, polemics and practice that Justice Jackson captured so

---

[3] Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929 (1973).

memorably in his *Steel Seizure* concurrence,[4] is particularly acute in the national security secrecy arena. Justice Black's stringent statement of legislative hegemony over domestic law-making in his opinion for the Court in *Steel Seizure*,[5] and Justice Sutherland's *Curtiss-Wright obiter dictum* concerning the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international affairs,"[6] are the opposing judicial statements confronting those who would make sense of separation of powers analysis. Each of these powerful extremes is as simplistic as it is sweeping, and there is ground for skepticism about any straightforward characterization of what these decisions stand for. However, *Steel Seizure* is generally taken to be the dominant influence on the domestic front, while *Curtiss-Wright* dominates with respect to foreign policy.[7] Categorizing national security secrecy issues is particularly troubling, since they fall at once into both camps: Secrecy is essential to the conduct of foreign relations and

---

[4]

> A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

[5] 343 U.S. at 587–88.

[6] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[7] Confusion about the reach of each case is understandable. Truman's seizure of the steel mills to prevent a work stoppage during the Korean War can easily be regarded as a domestic regulation essential to foreign policy and military concerns, and thereby falling under the Executive's authority. In contrast, *Curtiss-Wright* involved explicit congressional authorization for the Executive to prohibit the sale of arms to countries involved in a specific military conflict; it could thus be viewed as consistent with ultimate congressional control over domestic conduct.

For a recent decision that shows the simultaneous influence of both *Curtiss-Wright* and *Steel Seizure*, *see* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding executive authority to freeze Iranian assets under International Emergency Economic Powers Act); Symposium, 29 UCLA L. Rev. 977 (1982). Nor has the Court extended United States v. Belmont, 301 U.S. 324 (1937) and United States v. Pink, 315 U.S. 203 (1942), which upheld executive power to seize assets within the United States in order to settle the claims of a foreign government, outside the scope of diplomatic recognition under Article II, § 3, of the Constitution.

defense strategy; at the same time, however, it stifles domestic democratic processes and citizens' first amendment rights to debate controversial issues of national policy.

Other dialectical pressures also plague separation of powers principles in the context of national security secrecy. The sense of urgency pressing for an immediate, ad hoc executive response will often be very strong. Passions will rise. Napoleon's adage that "the tools belong to the man who can use them" will tend to govern. A sense of particularity will overwhelm the broader perspective, and expediency will tend to push aside appeal to principle.

But it is equally obvious in thinking about government secrecy that information is power—power for effective congressional oversight, power for fueling enlightened public debate and democratic governance, and power for shaping policy. Thus, offsetting the sense of urgency and particularity will be the sense that issues going to the heart of the separation of powers should be addressed in the language of principle, and cannot safely be left to the self-interested, ad hoc control of only one of the players.

Finally, secrecy problems appear to be especially prone to a judicial dialectic of separation of powers—a dialectic caught between result and rhetoric. Since *Pentagon Papers*, the Supreme Court has consistently upheld executive power as a matter of result, even as it adheres to congressional dominance as a matter of rhetoric. Separation of powers problems almost never involve an explicit collision between executive action and statutory mandate; when such collisions arise, no one doubts that the will of Congress prevails. The interesting issue, then, is not which branch has the ultimate law-creating authority, but where to place the burdens of initiative, inertia, and clear statement. Typically, the question is whether the Executive is empowered to do something that is not remotely within the expectation of Congress, so far as one can judge, but which is nevertheless capable of fitting under some general statutory umbrella. Perhaps the Executive has asked Congress for the specific empowerment, and has been refused. Or perhaps the Executive has taken some action a few times and has not been challenged in court while Congress stands by and does nothing. Obviously, in such cases the distribution of the burdens of clear

statement and legislative inertia will control the outcomes, although the rhetorical theme of congressional dominance can be sung unabated. In the area of national security secrecy, if the Executive can take the initiative in the absence of some clear congressional statement to the contrary, and thus treat legislative inertia as empowering rather than power-limiting, the state of the existing statutory materials is such that the groundwork is laid for a *Curtiss-Wright* conception of executive power, even as the pretense of congressional control is honored.

Without embarking upon the futile effort to build a simple separation of powers model, we believe it safe to say that treatment of secrecy issues in *Curtiss-Wright* terms, with secrecy rules emanating solely from the President, is both out of keeping with our institutional traditions and dangerous to democratic governance. First, Justice Jackson was surely correct in stating that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[8] If executive action is dependent upon what Congress has enacted, what it has refused to enact despite presidential entreaty and how long it has grappled with the general issues, it is surely relevant that Congress has repeatedly confronted the national security problem for over half a century. The more engaged Congress has been, the more the Court should insist on either a clear statutory statement or supporting legislative intent as the predicate for executive power to implement secrecy.

Second, secrecy dilemmas will tend to surface in the context of heated policy disputes. The ad hoc quality of executive lawmaking will be exacerbated when the assessment of secrecy needs is tied to current political sympathies and antipathies. Moreover, the Executive is inherently self-interested in expanding the scope of matters deemed "secret"; the more that is secret, the more that falls under executive control. There is surely room in our separation of powers dialectic, confused as it is, to doubt the wisdom of allowing the fox to define the parameters of—not to mention guard—the chicken coop.

Finally, the fact that first amendment concerns permeate the area of national security secrecy should cause the Supreme

---

[8] 343 U.S. at 635 (Jackson, J., concurring).

Court to insist on a clear statutory statement as the predicate for any exercise of executive power that trenches on constitutionally protected liberties. In other contexts, the Court has refused to consider open-ended statutory language to authorize a constitutionally suspect action without either a clear legislative statement or a surrounding context that in fact indicated congressional acquiescence.[9] This prescript has proven especially useful in dealing with sensitive constitutional areas, where it was very difficult to create principled limits on government power, and where the power could be easily and grossly abused. Sometimes the Court's position was that Congress had not in fact authorized a given action; sometimes it ruled that even if Congress had intended by vague language to authorize something constitutionally suspect, Congress should be required to assume political responsibility by making that authorization explicit. Alexander Bickel best articulated the thrust of these decisions:

> When should the Court recall the legislature to its own policy-making function? Obviously, the answer must lie in the importance of the decision left to the administrator or other official. And this is a judgment that will naturally be affected by the proximity of the area of delegated discretion to a constitutional issue. The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature.[10]

Even if one takes the view, as we do, that courts should be deferential when confronted with a clear congressional determination to protect some category of secrets by restrictions on publication, the presence of vital first amendment interests is nevertheless undeniable. These interests ought to lead courts to insist that secrecy norms reflect the political consent and public participation embodied in legislation, rather than the self-interested bureaucratic discretion that is likely to be the character

---

[9] *See, e.g.*, Schneider v. Smith, 390 U.S. 17, 25–27 (1968).
[10] A. Bickel, The Least Dangerous Branch 161 (1962).

of executive action. This, in turn, suggests that courts should encourage the resolution of problems by statutes in which consideration of principle can be articulated in the language of general lawmaking, rather than by executive action in which overbroad standards applied with extreme selectivity are the normal mode of address.

Several of the secrecy issues recently before the Supreme Court help to explain the Court's penchant for taking *Curtiss-Wright* as its cue, rather than *Steel Seizure*. First, two of the most important cases to reach the Court have involved the imposition of legal sanctions on former Central Intelligence Agency (CIA) agents.[11] No one doubts that the Executive can invoke a wide range of administrative sanctions to enforce secrecy rules on its employees; the more difficult questions concern resort to broader sanctions that must be enforced by the courts. The current Supreme Court appears to regard the Executive's power in the secrecy area as virtually plenary with respect to executive employees, even if they have left the service. At least in cases where criminal sanctions are not involved, the Court has been willing to lend its own enforcement powers. In addition, this Court has made plain its devotion to the CIA, and its readiness to employ broad secrecy rules on its behalf.[12] More generally, it appears to us that several members of the current Court are drawn to the British constitutional tradition of official secrets—airtight legal obligations of confidence imposed on all government employees.[13] In this tradition, freedom of speech about information gleaned in the course of government service is regarded as dangerous, disloyal and naive.

We must also recognize the possibility that the Supreme Court perceives Congress as crippled when it comes to punishing revelations of national security information. The past fifteen years have produced a great deal of legislation to improve the laws bearing upon many aspects of intelligence gathering and

---

[11] Snepp v. United States, 444 U.S. 507 (1980) (per curiam); Haig v. Agee, 450 U.S. 280 (1981).

[12] *See, e.g., Snepp*, 444 U.S. at 511 n.6 (expounding on trust obligation as implicit condition of CIA employment).

[13] The notion that only Whitehall need know what the British government is doing in the name of national security was codified by Britain in its Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28, § 2.

national security.[14] However, even though it is common knowledge that the current statutes are hopelessly muddled, Congress has found it impossible to enact more coherent general legislation protecting national defense information against revelation. The effort to clarify would have required firm answers to too many difficult questions.[15] Indeed, since *Pentagon Papers*, the legal community has seen Congress several times poised over major efforts at the comprehensive reform of the entire federal criminal code—surely the least coherent body of substantive criminal law that any major western nation endures—only to have these huge undertakings founder, in part because Congress could not reach a consensus on national security issues. Even the relatively minor controls imposed by the Intelligence Identities Protection Act[16] occasioned a major confrontation between press and government over the possible ambiguities in the statute.[17]

One must ask whether the Supreme Court believes, on the basis of recent experiences, that Congress is unable to fashion acceptable rules in areas where national security confronts first amendment issues. Because Congress must deal with secrecy issues in the language of general lawmaking, under constant challenge by the press, it must set forth statutory principles of restraint, each aspect of which needs to be measured against not only the speech component of the first amendment but its egalitarian aspects as well. In effect, Alexander Bickel's provocative thesis—that the legislature is the forum in which expedience dominates principle, and that courts are by process and title the custodians of decision according to principle[18]—is institutionally transposed in the national security field. In this context, it is Congress that must act with principle across a general range of intense and variegated controversy or be denounced by the press for ignoring its constitutional responsibil-

---

[14] *See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 (1982); Classified Information Procedures Act, 18 U.S.C. § 1 (Supp. 1985); Central Intelligence Information Act, 50 U.S.C. § 431 (Supp. 1985).

[15] *See generally* Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 1977 Duke L.J. 171.

[16] 50 U.S.C. § 421 (Supp. 1985).

[17] *See* N.Y. Times, March 4, 1982, at A22, col. 1; N.Y. Times, March 22, 1982, at A14, col. 1.

[18] A. Bickel, *supra* note 10, at 24–28.

ity. Yet, on the general level at which Congress must shape policy, no completely principled solution to the problem of regulating national security is adequate.[19] Congress, therefore, remains passive on this aspect of national security, and the Court feels the pressure to permit the Executive to fill the gap. On the other hand, by carefully choosing attractive targets without any declaration of principle and under vaguely enunciated legal norms, the Executive can favor security interests over speech concerns.[20]

Since both the context and target of restraint are compelling, the courts feel pressed to uphold these ad hoc initiatives because the idea of *no* effective secrecy constraints seems unthinkable. And if the courts endorse these executive actions, the public and even the legal profession will tend to let the appeal of the particular result quiet any doubts about the scope of executive power that is upheld.

If the premise of the Court's recent decisionmaking is that the Executive is more capable than Congress of responding to issues of national security secrecy, the Court has yet to justify it. The theme we wish to sound most strongly in this Commentary is that the Judiciary is not attending adequately to its re-

---

[19] Congress' difficulty in acting is not attributable simply to the power of the press. See, for example, the effort of mathematicians to balance free publication of cryptography research with security concerns. This group concluded that any attempt at congressional legislation would be too risky, and chose instead to establish a voluntary prior restraint mechanism. *See* Schwartz, *Scientific Freedom and National Security: A Case Study of Cryptography*, in Striking a Balance: National Security and Scientific Freedom (H. Relyea ed. 1985).

[20] Thus, the President's power to license trade with Cuba, under Regan v. Wald, 104 S. Ct. 3026 (1984), permits him to forbid spending money on travel, but then to grant individual licenses to choose who travels as journalists or professional researchers. The Executive determines whether people fall within these categories in response to individuals' requests for permission. For example, is a student writing for a school newspaper a journalist? The Executive thought not. By contrast, the problem of defining terms like "journalist" is one of the reasons Congress has never enacted a press shield law. Thus, reliance on executive discretion permits the law to maintain its symbolic generality and avoid the loss that defining the press in terms of dollars earned or hours spent at it would occasion. The price among others is tolerating all the injustices that insistence on rules is designed to avoid. The problem is the familiar one of rule and discretion.

Is it constitutionally perverse—or simply the logical outcome of individuating the process of choice where conflicts between values is sharpest—that in contexts where speech and national security interests genuinely conflict, the courts accept overbreadth and vagueness without serious question, even though this is the area of central first amendment concern?

sponsibility to explain. There are many occasions in our recent constitutional history where the Supreme Court has altered either the content of legal principle or institutional relationships in response to a perception of political stalemate or institutional paralysis. However, the notion that executive/judicial activism should overcome an unresponsive Congress in the area of national security secrecy is surely flawed. Perhaps an aggressive judicial response is warranted in some cases of political stalemate: those where judicial intervention can vindicate what the Court sees as simple constitutional principles, or contribute to fair and responsive democratic processes.[21] Yet no such conception of principle or process supports the Court's institutional competence to decide national security secrecy issues for itself, or to lend its powers to enforcement of executive initiatives. Nevertheless, to vindicate its own approval of executive visions of security, the Burger Court is rejecting not only its predecessor's tradition of searching for clear legislative authority before limiting individual rights,[22] but also one of the most profound commitments of our free speech tradition—the notion that, unlike the British, we would not empower the Executive to control speech about the government.[23]

Indeed, in the *Pentagon Papers* case, we now believe, although the point escaped us before, the Supreme Court was caught in a state of tension between the precepts of *Steel Seizure* and *Curtiss-Wright*. The Justices in *Pentagon Papers* recognized that, under conventional separation of powers analysis, no legal norm existed to support the Executive's plea for an injunction. At the same time, they registered disturbance about the fact that, outside the context of restricted data under the Atomic Energy Act,[24] Congress had made no provision for injunctions

---

[21] The great decisions on race and reapportionment can be seen in this light. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Education, 347 U.S. 483 (1954); *see also* J. Ely, Democracy and Distrust 121 (1980).

[22] *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Kent v. Dulles, 357 U.S. 116 (1958); Watkins v. United States, 354 U.S. 178 (1957); *see also* A. Bickel, *supra* note 10, at 156–66.

[23] The entire history of Congress' handling of national security secrecy proposals by the President indicates an abiding distrust of executive control. *See* Edgar & Schmidt, *supra* note 3, 952–60, 1051–52. The contrast with the British approach in their Official Secrets Act is stark. *Cf.* New York Times Co. v. United States, 403 U.S. 713 (1971).

[24] 42 U.S.C. § 2014(y) (1982).

to preserve critical national secrets. For this reason, only Justice Marshall embraced *Steel Seizure* without hedge, and regarded Congress, dormant or active, as entirely controlling the field of national security secrecy respecting the regulation of the press. All of the others were prepared to subordinate Congress to their own views of either the first amendment or executive hegemony, or both.

I. *Pentagon Papers* Revisited

When the Nixon Administration sought to enjoin publication of the "Pentagon Papers"[25] fifteen years ago, we were struck by what seemed the bizarre institutional premises of the Administration's main legal position. The government argued that without any statutory authorization, the President, in his role as commander-in-chief and steward of foreign relations, could create a legal norm of secrecy and enlist the injunctive powers of the federal courts to enforce this norm against publications that posed a "grave and irreparable danger" to national security. The government's brief in the Supreme Court did not even mention the statutory situation.[26]

Even if the Executive could sue for injunctive relief without statutory authorization,[27] he cannot create the legal rule that he seeks to enforce in the domestic arena. Since Congress had made no law, what possible basis could there have been even to consider the first amendment?

The absence of legislative authorization was noted in the questions at oral argument and in several of the Justices' opinions, although only Marshall argued that it should be decisive.[28] Of the six Justices who concurred in the judgment against the government, all but Justice Brennan relied to some degree on the absence of statutory authority for injunctive relief. More-

---

[25] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[26] In addition to the inherent executive power argument, the government had sought to rely on the espionage statutes in the district court proceeding against *The New York Times*. *See* United States v. New York Times Co., 328 F. Supp. 324, 328–30 (S.D.N.Y. 1971). Judge Gurfein held the statutes inapplicable to "publication," and the government abandoned the statutes on appeal.

[27] *See, e.g.*, P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1301–09 (2d ed. 1973).

[28] 403 U.S. at 740 (Marshall, J., concurring).

over, considerable interest was expressed on the different issue of criminal sanctions for publication of classified government documents. A number of the Justices volunteered readings of the espionage statutes in relation to hypothetical criminal proceedings against the publishers, reporters and information sources involved,[29] even though such questions had not been briefed, were dreadfully difficult, and were quite unnecessary to a ruling about the injunction.

These speculative dicta addressing the potential capacity of the espionage statutes to criminalize publication of the "Pentagon Papers," when added to our own institutional predispositions, led us fifteen years ago to exaggerate the extent to which the Court accepted the premise of legislative hegemony over national security secrecy issues.[30] With hindsight, we now believe that the central theme of the *Pentagon Papers* opinions, at least in institutional terms, was the suprising willingness of many of the Justices to contemplate scenarios set in a statutory vacuum, where executive power backed by judicial support would govern issues of national security secrecy, at least so long as Congress remained a passive bystander.

In contrast to the opinions of the individual Justices, the terse per curiam opinion of the Court fails to mention the legislative situation at all. It rests solely on the basis that the government failed to overcome the constitutional presumption against prior restraints.[31]

---

[29] Justice White's concurrence was the principal warning to reporters that the statutes might be applied to them. His opinion detailed a construction of § 793 of Title 18 that would impose criminal liability on newspapers for retaining defense secrets, a necessary step in publishing them. 403 U.S. at 735–40 (White, J., concurring). Justice Stewart joined Justice White's opinion, and wrote for himself that the criminal statutes are "of very colorable relevance to the apparent circumstances of these cases." *Id.* at 730 (Stewart, J., concurring). Chief Justice Burger, *id.* at 752 (Burger, C.J., dissenting), and Justice Blackmun, *id.* at 759 (Blackmun, J., dissenting), respectively registered "general agreement" and "substantial accord" about these matters, though they were not raised in a litigation which they complained had otherwise proceeded too hurriedly for careful judgment on the relatively narrow questions briefed and argued. Justice Marshall, though not approving the construction, noted its plausibility. *Id.* at 743–46 (Marshall, J., concurring).

[30] Edgar & Schmidt, *supra* note 3, at 931.

[31] For support, the per curiam cites a strange grabbag of three cases, 403 U.S. at 714: the first, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), rejected a legislatively authorized system of administrative threats of obscenity prosecution; the second, Near v. Minnesota, 283 U.S. 697 (1931), rejected a legislatively authorized system of prior restraints on libelous and scandalous publications; and the third, Organization for a

Justice Black's opinion, joined by Justice Douglas, was a fiery statement of first amendment absolutism. He would deny any governmental power, no matter what the statutory foundation, to censor or punish the press for reporting on military or foreign policy. Although Black referred to the lack of legislative authorization for the government's action,[32] it was plainly an afterthought. Douglas, in his own opinion, gave the legislative posture considerable attention; in the end, however, he seemed to conclude that, at least when no declared war is being waged, the first amendment protects absolutely any speech relating to military policy. Brennan does not even mention the statutory situation or the position of Congress; he rests his opinion entirely on the first amendment.

On the dissenting side, Chief Justice Burger showed little interest in the statutory situation as a guide to the scope of executive and judicial power to enjoin publication. Justice Harlan did note the statutory situation in the course of canvassing various questions which he thought impossible to examine adequately in the "frenzied train of events" resulting from the accelerated judicial proceedings.[33] But when he reluctantly came to the merits, Harlan discounted Congress' role in fashioning secrecy rules. Although he stressed principles of separation of powers as the key to judicial action, as had Marshall, Harlan was pursuing a radically different institutional end. From the premise, drawn from *Curtiss-Wright*, that "[t]he President is the sole organ of the nation in its external relations," Harlan reasoned that the Executive must be empowered to impose secrecy on any matter concerning foreign relations or national security, and must also presumably be able to enlist the courts in enforcing secrecy decisions.[34] For Harlan, the Judiciary's role should be very narrow and passive, merely determining whether a matter was within the general compass of foreign relations and national security.[35] If so, the courts should support the Execu-

---

Better Austin v. Keefe, 402 U.S. 415 (1971), rejected an injunction against leafletting which had no statutory basis. None of the cited cases focused on the presence or absence of legislative authority for the legal controls under review; none dealt with the activities of the federal government; and none had anything to do with national security.

[32] 403 U.S. at 718–19 (Black, J., concurring).

[33] *Id.* at 753 (Harlan, J., dissenting).

[34] *Id.* at 756, citing *Curtiss-Wright*, 299 U.S. at 319–21.

[35] 403 U.S. 713, 759–63 (Blackmun, J., dissenting).

tive. Congress' function was not even mentioned. Like Harlan, Blackmun in his dissent gave no consideration to the role of Congress.[36]

Stewart and White, the two Justices who found themselves between the blocks of three, and whose centrist views of the first amendment thus controlled the outcome, began from strikingly different institutional premises. Most of Stewart's opinion is an eloquent statement of executive supremacy and, like Harlan's opinion, rested on *Curtiss-Wright*.[37] According to Stewart, the Constitution endows the President with "enormous power in the two related areas of national defense and international relations . . . largely unchecked by the Legislative and Judicial branches . . . ."[38] Stewart recognized that informed public opinion is the only effective check on the President's exercise of power, and yet that the successful conduct of foreign and defense policy depends on secrecy. Stewart saw only one answer to this dilemma:

> The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.[39]

Congress and the courts entered Stewart's institutional matrix through the back door. Congress could protect secrecy by enacting criminal statutes that the courts would have to enforce. But the case at hand did not enlist the Court to apply specific laws; the Justices were being "asked . . . to perform a function

---

[36] Harlan added the procedural safeguard that the secrecy determination be made personally by the head of the relevant executive department. 403 U.S. at 757 (Harlan, J., dissenting).

[37] Professor Cox has pointed out that Stewart's puzzling opinion can be read as a startling assertion that the Executive had the "sovereign prerogative" to prevent *The New York Times* from publishing by use of naked force. Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 7 n.15 (1980).

[38] 403 U.S. at 727 (Stewart, J., concurring) (footnotes omitted).

[39] *Id.* at 728–29.

that the Constitution gave to the Executive, not the Judiciary."[40] Stewart seemed to be saying that the Constitution gave the Executive the function of creating a secrecy norm that would bar *The New York Times* from publishing. Then, surprisingly and without any apparent connection to what had come before, Stewart invoked the first amendment and concluded that the injunction must be denied because he cannot say that publication would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[41]

In contrast to Stewart, White seemed to think that Congress bears most of the constitutional responsibility for regulation of press publication of national security secrets.[42] White's opinion stressed the lack of any legislative basis for an injunction and outlined the inadequacies of the judicial process as a means of fashioning sound principles of secrecy.[43] Nevertheless, White did share Stewart's view that because there was no apparent proof of irreparable injury, no injunction could issue. Presumably, it follows that irreparable injury would somehow overcome the absence of congressional action.

Thus, even if Douglas is counted with White and Marshall as seeing Congress as the controlling institution, only three of nine Justices saw the institutional framework in these terms. Only Marshall unqualifiedly anchored his opinion in the basic separation of powers principle that Congress alone can impose national security secrecy obligations on persons outside government.[44]

Those of us who saw the *Pentagon Papers* decision as primarily embodying the *Steel Seizure* theme of congressional authority over national security secrecy were wrong. In fact, the advocates of first amendment absolutism, and the proponents of executive authority à la *Curtiss-Wright*, were equally forceful within the Court. Now, however, the absolutists are gone, and those supporting *Curtiss-Wright*—rather than those supporting *Steel Seizure*—have come to dominate the develop-

---

[40] *Id.* at 729.

[41] *Id.* at 730.

[42] In fact, White saw "no difficulty" in applying the espionage statutes after publication occurred. *Id.* at 737 (White, J., concurring).

[43] *Id.* at 732–33.

[44] *Id.* at 742–47 (Marshall, J., concurring).

ment of constitutional doctrine in this area.[45] Thus, *Curtiss-Wright* has come home.

II. The Supreme Court and the Problem of Process

It is said that when Louis D. Brandeis was a practicing lawyer and he wanted his clients to understand that he really meant "no," he gave them no reasons.

In recent opinions touching upon national security matters,[46] the Supreme Court has upheld executive actions that limit the rights of Americans to speak freely about the government and to travel the world. The Court in each case determined that Congress authorized the presidential action in question, but in none did the Court treat fairly the legislative materials on which it grounded presidential authority. Nor did it weigh carefully the exigency of the executive action against the individual liberties at stake.

Like Brandeis' way of saying "no," the opinions in these cases seem designed, by their summary dismissal of important problems, to send a message to Congress, the legal profession, and the press:[47] Neither conventional first and fifth amendment analysis about the scope of individual rights, nor conventional separation of powers notions, impose much restraint on exec-

---

[45] Indeed, the *Pentagon Papers* decision and the decision the following term in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972), mark the last time that the *Steel Seizure* vision of separation of powers overcame executive claims of authority to act. Since then, with the arguable exception of the Watergate affair, *see* Nixon v. Administrator of General Services, 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974), claims of executive empowerment have been repeatedly upheld by the Supreme Court; no presidential action has been rejected by the Court on grounds that Congress had not authorized it. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court managed to find congressional authorization for the terms of the Iranian hostage settlement. *See also* AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (finding executive authority to set wage and price standards for government contractors). *But see* Chrysler Corp. v. Brown, 441 U.S. 281, 304–06 (1979) (questioning the statutory basis for affirmative action programs). *See generally* Brody, *Congress, the President, and Federal Equal Employment Policymaking*, 60 B.U.L. Rev. 239 (1980).

[46] Regan v. Wald, 104 S. Ct. 3026 (1984); Haig v. Agee, 453 U.S. 280 (1981); Snepp v. United States, 444 U.S. 507 (1980) (per curiam); *see also* United States v. Marchetti, 466 F.2d 1309, *cert. denied*, 409 U.S. 1063 (1972).

[47] These decisions can be seen as similar to the Court's irritated view of first amendment jurisprudence in press cases, where, whether holding for or against the press, the opinions often give vent to anger at the media's estimation of its role in supervising us all.

utive power in the national security secrecy area. This message gives life to the *Curtiss-Wright* strain in *Pentagon Papers*.

To date, the Court has yet to provide an explicit statement of its changing perception of the relationships between executive initiative and residual congressional authority in relation to national security secrecy. All it has offered in the way of analysis of constitutional rights is a series of naked *ipse dixits*. One problem with this injudicious approach is that it is contagious; one can hardly be surprised when lower federal courts adopt this stance on matters of institutional process. At first, the readjustment of the *Curtiss-Wright/Steel Seizure* tension occurred *sotto voce* at the Supreme Court level; now lower courts are beginning to treat novel executive claims about the reach of criminal statutes with a comparably freewheeling approach.

A. CIA Secrecy Contracts

In a letter proffered by the CIA's counsel to the district court in the first of the secrecy agreement cases, CIA Director Colby stated:

> The continued effectiveness of the United States foreign intelligence collection effort is dependent upon the adequate protection of the intelligence sources and methods involved. In recognition of this, Congress, under Section 102(d)(3) of the National Security Act of 1947, made the Director of Central Intelligence responsible for the protection of intelligence sources and methods from unauthorized disclosure. Unfortunately, *there is no statutory authority to implement this responsibility* . . . .
>
> In most cases, existing law is ineffective in preventing disclosures of information relating to intelligence sources and methods. Except in cases involving communications intelligence, no criminal action lies against persons disclosing classified information without authorization . . . *there is no existing statutory authority for injunctive relief.*[48]

[48] Letter from William E. Colby, Director of Central Intelligence, to Roy L. Ash,

One might have thought that this admission would have jeopardized the CIA's chances of securing injunctive relief against a former CIA employee's threatened publication of information about the Agency; at least it might have limited injunctive possibilities to revelations that posed "direct, immediate and irreparable injury to the Nation"—the predicate for injunctions unaided by statute. The case against such relief would be further strengthened by the fact that Congress was asked to provide authority for such a program, and refused to do so.[49]

Nonetheless, the Executive was able to implement and secure Supreme Court validation in *Snepp v. United States*,[50] of a comprehensive program of prior restraints directed at present and former government employees who had signed secrecy agreements promising not to divulge or publish information about the CIA without the express written consent of the Director.

We do not view this system of prior restraints as necessarily unsound as a matter of policy, although we have doubts.[51] Nor do we believe that the courts should invalidate such a program on first amendment grounds if Congress authorized it in reasonably clear terms. Private employment contracts frequently impose secrecy obligations which courts routinely enforce. While government employees have first amendment rights, those rights may be limited by criteria not applicable to citizens in general.

Director, Office of Management and Budget, Jan. 14, 1974 (Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975), unpublished appendix, vol. 1) (emphasis added) [on file with the Harvard Civil Rights-Civil Liberties Law Review].

[49] *See Security Classification Reform: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 363 (1974).

[50] 444 U.S. 507 (1980) (per curiam).

[51] We hasten to add, because we have been misread on this point, that we do not regard this program as misguided or impermissible on the grounds that employees cannot work for the CIA without contracting away their right to speak about it. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 347, is wrong in his reading of Edgar & Schmidt, *supra* note 3, at 1078–79. An adhesion contract is not automatically unenforceable. Our concern, then and now, is the issue of congressional authorization. Curiously, Easterbrook, in discussing insider trading, worries about whether the SEC's approach had been legislatively authorized, and faults the Court for not inquiring. Easterbrook, *supra*, at 318–20. As to the CIA's authority to create this legal regime, however, Easterbrook is content to say that the Court found congressional authorization. The Court did indeed so find. The question is whether Congress actually provided it.

Inasmuch as the government interest in securing many intelligence secrets is clearly compelling, the government, as employer, may make employment contracts calling for preservation of secrets.[52]

On the other hand, one can be sure that a prepublication clearance system within the CIA will be a disaster for core first amendment values. The problems endemic to wholesale administrative censorship will flourish in this context: any doubts will be resolved in favor of suppression; gross overbreadth and vagueness will characterize the standards for censorship; bureaucratic self-interest will result in selective enforcement; delay will be inevitable; and decisions will be made behind a veil of secrecy. The process will be expensive, debilitating and chilling.[53]

1. United States v. Marchetti[54]

The legal saga of CIA secrecy agreements begins with a case that should have reached the Supreme Court, but did not. In April 1972, the government moved *ex parte* against former CIA officer Victor Marchetti to enjoin him from revealing defense information in breach of a secrecy agreement he made when he joined the CIA.[55] The specific issue was whether the United States had a right to insist upon prepublication clearance, on the theory that an enforceable contract had been made. Marchetti wished to publish a book. The Fourth Circuit held the contract lawful insofar as it barred revelation to anyone of classified information not in the public domain; it approved an injunction requiring Marchetti to submit his proposed writings to the CIA for clearance.

---

[52] In fact, in 1983, the Executive attempted with its National Security Decision Directive No. 84 (NSDD 84) (March 11, 1983) to institute across-the-board secrecy contracts for all government employees. NSDD 84 was rejected by Congress. Dep't. of State Authorization Act, Fiscal Year 1984–85. 97 Stat. 1017, 1061.

[53] *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955). On the workings of the CIA program, see S. Turner, Secrecy and Democracy: The CIA in Transition x–xii (1985); R. McGehee, Deadly Deceipts: My Twenty-Five Years in the CIA 196–203 (1983).

[54] 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[55] The courts called these agreements "contracts," although as written they impress upon the signer the possible criminality of intelligence revelations and waive property rights, rather than, as is customary with private sector secrecy agreements, making employment itself the consideration for the promise not to reveal secrets.

On the matter of legislative authority, the *Marchetti* court merely noted that the National Security Act of 1947 imposed on the Director of Central Intelligence the responsibility for "protecting intelligence sources and methods from unauthorized disclosure."[56] Without adverting to the many decisions of the previous two decades limiting executive actions that would affect individual rights by the requirement of explicit statutory authorization,[57] Judge Haynsworth concluded that secrecy agreements are "entirely appropriate to a program in implementation of the congressional direction of secrecy."[58] Indeed, because confidentiality "inheres in the situation,"[59] and because "information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement . . . ."[60]

Judge Haynsworth did not wholly abandon the field to the Executive. He insisted that in accepting employment with the CIA and by signing the secrecy agreement, Marchetti retained his first amendment right to criticize the agency so long as he did not release classified information.[61]

The institutional premises of Haynsworth's opinion were startling. He claimed first that the Supreme Court had been more "flexible" (read: deferential) in applying the first amendment to actions taken by the judicial and executive branches than to actions taken by Congress:

> This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity

---

[56] 50 U.S.C. § 403(d)(3) (1982).

[57] *See* discussion *supra*, text accompanying note 22.

[58] 466 F.2d at 1316.

[59] *Id.*

[60] *Id.*

[61] The Fourth Circuit required the CIA to act within thirty days in reviewing any material submitted by Marchetti, and noted that Marchetti would be entitled to judicial review of any censoring decision. The only questions for review, the court thought, would be whether the information was in fact classified, and whether it had been officially disclosed. There would be no review of the propriety of the classification itself, since "the process of classification is part of the executive function beyond the scope of judicial review." 466 F.2d at 1317.

> to establish a pervasive system of censorship. This case itself illustrates the point that the executive and judicial branches proceed on a case-by-case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures.[62]

This is really a breathtaking concept in the national security secrecy context. The contract rule of *Marchetti* is of course a general rule of submission to censorship by all CIA employees. Perhaps all Haynsworth meant here was that the first amendment must be "flexible" in governing the executive branch's relations with its own employees. That alone would be fine, but his supporting examples are not limited to employees, and his comments seem to go to executive action generally, displaying no concern for extension of executive authority, regardless of congressional action, into the field of domestic activity.

The other related institutional premise of Haynsworth's opinion derives explicitly from *Curtiss-Wright*, which is cited to support the need for secrecy and the broad powers of the President in national security matters. Having established that Marchetti can be enjoined from disclosing classified information obtained in the course of employment, the court continued:

> The CIA is one of the executive agencies whose activities is closely related to the conduct of foreign affairs and to the national defense. Its operations, generally, are an executive function beyond the control of the judicial power. If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review.[63]

Despite the rich array of novel first amendment issues involved in this case, the Supreme Court denied certiorari.[64]

---

[62] *Id.* at 1314.

[63] *Id.* at 1317.

[64] 409 U.S. 1063 (1972). The Fourth Circuit's conclusion about the unreviewability of classification decisions came undone in further proceedings before the district court.

2. Snepp v. United States[65]

When he began work for the CIA, Frank Snepp signed an agreement essentially similar to Marchetti's.[66] After his resignation from the agency, Snepp published a book highly critical of CIA activities in Vietnam. Plainly, the book was full of information that Snepp had obtained during the course of his employment, but Snepp insisted he was careful not to reveal any classified information. His aim in publishing, Snepp claimed, was patriotic. He wanted to expose weakness and incompetence in the Agency and thus contribute to public debate.

Unlike Marchetti, Snepp actually published his book before seeking CIA clearance. The Agency then sued him for failing to submit the manuscript for prepublication review.[67] For purposes

---

Marchetti subsequently sought to publish a book that he co-authored, and submitted it to the CIA in accordance with the injunction previously approved. The CIA initially ordered deletion of 339 items; the number of deletions sought was eventually reduced to 168. Marchetti and his publisher challenged all of these deletions before the district judge who had tried the first *Marchetti* case. What happened at trial was revealing. Perhaps because he had been ordered not to consider the reasonableness of classification, the trial judge insisted on strict proof that each item had in fact been classified by conscious decision of a properly authorized official. The CIA could not satisfy this test for the vast majority of deletions. It was not enough, the trial judge thought, that an item appeared in a classified document, since that document might contain large amounts of unclassified information. Only when a classified document indicated specifically that a particular item should be classified did the trial judge approve the deletion. Twenty-six of the 168 deletions survived this test.

By the time this second ruling was appealed to the Fourth Circuit, the October 1974 amendments to the Freedom of Information Act, 5 U.S.C. § 552 (1982) (FOIA), had taken effect. The amended FOIA made clear that only properly classified information was exempt from disclosure, and provided for de novo judicial review of classification orders. Accordingly, the Fourth Circuit in *Marchetti II* concluded that only if information was both classified *and* properly classifiable could it be subject to deletion under the CIA's secrecy agreement with Marchetti. Knopf v. Colby, 509 F.2d 1362 (1975). However, the Fourth Circuit noted that "any significant intelligence operations" were classifiable, and that under "the prescription of regularity in the performance by a public official of his public duty," courts should presume that information properly classifiable was in fact classified. This relieved the CIA of any need to prove actual classification.

[65] 444 U.S. 507 (1980).

[66] Snepp's agreement provided that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval of the Agency." 444 U.S. at 508.

[67] The CIA made no move to enjoin him prior to publication, alleging that Snepp had led it to believe that he would submit the book pursuant to the agreement. In fact, Snepp surreptitiously arranged to have the book published without CIA knowledge. *Id.*

of the litigation, and in order to establish the full scope of its power, the CIA conceded that Snepp had not revealed classified information. It sought damages for breach of contract, an injunction against further publications without clearance, and the imposition of a constructive trust over Snepp's advances and profits from the book.

The district court granted the CIA's relief as requested.[68] The Fourth Circuit affirmed all but the remedy of a constructive trust.[69] That court, while agreeing that Snepp had violated the contract by not submitting his book for clearance, noted that under *Marchetti*, Snepp had a right after submission to publish anything not classified. Thus, the court of appeals thought the CIA's only remedy should be compensatory and punitive damages for any classified information that Snepp actually published.

This difference in relief was significant, and furnished the basis for the Supreme Court's reversal that reinstated the district court's remedy. Under the constructive trust remedy, which avoided putting the question of damages to a jury that might well have been sympathetic to Snepp, he would be liable for all his advances and royalties, amounting to well over $100,000.[70] By contrast, under the court of appeals' approach, the CIA would have to prove to a jury that Snepp had revealed classified information, and then ask it to assess the damages for such revelations.

Snepp petitioned the Supreme Court for certiorari. One might have thought that the case posed a number of critical questions that the Supreme Court would want to approach with caution. Only the Fourth Circuit had dealt with the constitutional and statutory ramifications of CIA secrecy contracts, and its analysis in *Marchetti* seemed open to reconsideration on a number of points. The Fourth Circuit had regarded the Director's statutory mandate to protect intelligence sources and methods from unauthorized disclosure as establishing the requisite

---

[68] United States v. Snepp, 456 F. Supp. 176 (E.D. Va. 1978).

[69] United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[70] *Id.* at 929. This remedy proved ruinous for Snepp, who was liable for all of his advances and royalties, including those he had lived on while writing the book. He was ultimately bankrupted.

legislative authorization for his actions. This conclusion, however, was easy to quarrel with if any degree of statutory explicitness or realistic assessment of legislative intent were thought necessary.[71] Second, with no analysis whatsoever, the Fourth Circuit concluded that Marchetti had no right to publish classified information, and that the risk to the government from disclosure was so great as to warrant a prior restraint system. Yet, if one point stands out in the half-century of pulling and hauling between Congress and the Executive over secrecy issues, it is that Congress has consistently refused to enforce the classification system with criminal sanctions, even when government employees breach it.[72] The *Marchetti* decisions thus manifest judicial approval of both the censorship of more information than Congress has been willing to regulate and the application of more speech-restrictive methods in order to do so.[73]

Beyond *Marchetti*, there remained the question of how to treat a former CIA employee who asserts that he took care not to publish anything classified. Snepp's speech dealt with matter at the heart of the first amendment—information and criticism about the government in relation to the most heated public debate of the 1960's and 1970's. The *Pentagon Papers* opinions converge on the proposition that this kind of information cannot be restrained, at least when in the hands of the press, unless revelation "will surely result in direct, immediate, and irreparable damage to our Nation or its people."[74] What should be the first amendment standard for imposing liability on Snepp? If, absent the contract, he would have substantial first amendment protection in publishing this material, how should the Court resolve the knotty problem of contracting away core first amendment rights in this highly charged arena?

---

[71] Research by Thomas Troy reveals that the "sources and methods" phrase originated with the military services who were concerned with the prospect of revealing communications intelligence to the CIA, and wanted to impose on the CIA the duty not to reveal it. *See* Troy, 4 Foreign Intelligence Literary Scene No. 6, 5–8 (Dec. 1985).

[72] *See* Edgar & Schmidt, *supra* note 3, at 1052.

[73] Congress has refused to make criminal the revelation of "intelligence data" in a manner analogous to the restricted data provisions of the Atomic Energy Act. Instead, it limited criminal penalties under 18 U.S.C. § 798 to the revelation of classified information on communications intelligence activities, an information category far narrower than that embraced by the CIA's prior-restraint-by-contract regime.

[74] 403 U.S. at 730 (Stewart, J., concurring).

The Supreme Court's response to these questions was cavalier—not only substantively, but as a matter of process as well. Although *Snepp* was a case of first impression, the Court did not even go through its normal process of briefing, oral argument and deliberation before it decided against Snepp in every conceivable way. Professor Cox has suggested that judicial indignation at Snepp's "shabby violation of a personal confidence voluntarily accepted" prompted the Court's summary treatment of the case.[75] Plainly, however, indignation ought to cause the judicial pulse to slow, rather than quicken, in terms of the care taken in the decision-making process. But even if indignation intruded where it had no business, the more important question concerns whether one should take seriously the hard-fought lesson of our constitutional tradition—that wholesale administrative censorship of the CIA variety presents the greatest threat to freedom of expression. If one sees in Snepp's book not destructive revelation, but the measured criticism of a disillusioned CIA officer who believed with plausible justification that the Agency callously failed "to protect intelligence sources" in Vietnam; if one accepts Snepp's assertion that he took care to publish nothing that would compromise ongoing intelligence gathering operations, an assertion uncontroverted by the CIA; and above all, if one believes that Congress should govern secrecy issues respecting the CIA, at least as concerns draconian penalties imposed through the judicial process, then indignation against Snepp should be quickly supplanted by a sense of the need for disinterested judgment on the serious questions that call for resolution. To scorn Snepp's actions is to scorn longstanding elements of our constitutional tradition regarding speech about public affairs.

If ever an opinion stands as a lesson against dispensing with the usual deliberative procedures, it is the per curiam opinion

---

[75] Professor Cox obviously shared this indignation, although he makes clear his own view that outrage is not a substitute for a reasoned process of hearing and deliberation. Cox, *supra* note 37, at 8–9. Cox notes the ironic contrast between the precipitate procedure adopted in *Snepp*, and the *Pentagon Papers* dissenters' protest against the "frenetic haste" in that case which they thought rendered deliberation and reflection impossible.

Professor Easterbrook, *see supra* note 51, believes the Court was correct not to waste time when it had the arguments available to it through the briefs below. But obviously, one briefs *Snepp* differently in the Fourth Circuit, with *Marchetti* already on the books, than one does in the Supreme Court dealing with a point of first impression.

in *Snepp*. In a footnote, the majority treated as self-evident the existence of congressional authorization for the secrecy/censorship agreement under the "protecting intelligence sources and methods from unauthorized disclosure" provision of the National Security Act of 1947.[76] There was no discussion about whether the broad language of the 1947 Act should be regarded as an "express and appropriately limited congressional authorization for prior restraints"—the constitutional prerequisite, according to Justice White's *Pentagon Papers* opinion.[77] There was no discussion of the relationship often required between levels of statutory specificity and levels of constitutional suspectness. There was no discussion about whether any of the legislative history suggested a congressional understanding that it was authorizing a system of administrative censorship.

Most importantly, the per curiam opinion mentions nothing about the first amendment; nor does it consider the possibility that Snepp's publication might have value in terms of freedom of expression. The argument that the agreement permitted the CIA to "censor" its employees was handled in a footnote, with the offhand rejoinder that "Snepp's contract . . . requires no more than a clearance procedure subject to judicial review."[78] The Court's opinion gave no sign that a prior restraint mechanism could conceivably pose any problem in terms of traditional first amendment analysis.

Justice Stevens' dissent, joined by Justices Brennan and Marshall, criticized the per curiam opinion on several grounds, but gave no consideration to the question of legislative authority for the prepublication clearance mechanism.[79] Separation of powers considerations were thus entirely absent from both the majority and dissent. This absence seems strange for a dissent which criticizes the "uninhibited character of today's exercise in lawmaking," and which expresses some surprise that "the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a

---

[76] 444 U.S. at 509 n.3, citing 50 U.S.C. § 403(d)(3).

[77] 403 U.S. at 731.

[78] 444 U.S. at 513 n.8.

[79] Justice Stevens' dissent focused on the inappropriateness of imposing a constructive trust. He also criticized the Court's decision "to dispose of this novel issue summarily." 444 U.S. at 517 (Stevens, J., dissenting).

citizen's right to criticize his government."[80] Stevens might have added that *Snepp* was the first case in the history of the United States in which the Supreme Court approved a prior restraint against speech about government.[81] The majority opinion is designed to indicate that nothing of importance has transpired.

B. Travel Restrictions

The same push to executive empowerment marks the Supreme Court's performance in two other cases, *Haig v. Agee*[82] and *Regan v. Wald*,[83] both of which uphold and legitimate discretionary executive action limiting Americans' rights to travel freely in the world.

Unlike government secrecy agreements, the right to travel has a long history.[84] Judicial protection for an American citizen's right to travel abroad, however, came long after the drafting of the Constitution, and it came in a more complicated fashion than did protection of domestic movement.[85] But since the

---

[80] *Id.* at 526.

[81] The injunction issued against Snepp in the district court continued in effect and was affirmed.

[82] 453 U.S. 280 (1981).

[83] 104 S. Ct. 3026, *reh'g denied*, 105 S. Ct. 285 (1984).

[84] Although not mentioned in the Constitution's text, the Supreme Court, even before the adoption of the fourteenth amendment, found constitutional shelter for individuals' rights to freedom of movement within the United States. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). In part, this solicitude for free movement reflected premises of "Our Federalism" and, as such, constituted a legitimate inference from the structures and relationships created by the Constitution. *See* C. Black, Structure and Relationship in Constitutional Law (1968). In part it reflected the status of travel as a basic human right, whose exercise is often the precondition for earning a living, maintaining family ties, and generally engaging in "the pursuit of happiness." The right's significance in the Anglo-American legal tradition traces back to Article 42 of the Magna Carta. *See generally* Z. Chafee, Three Human Rights in the Constitution of 1787 (1956). Its contemporary importance is suggested by inclusion of provisions concerning the right in the Helsinki Accord. *See* Human Rights, International Law and the Helsinki Accord 172–80 (Buergenthal ed. 1977).

[85] For most of our national history—from 1797 until 1952—two different legal traditions coexisted in relative harmony. The Secretary of State, as the holder of the President's delegated authority, claimed and exercised broad power over the issuance of passports. He granted them, denied them, and sought to impose conditions on their use to facilitate the foreign relations of the United States. In the earliest period, the Secretary acted without any statutory authorization, but since 1856, legislation has granted the Secretary broad authority. Act of August 18, 1856, 11 Stat. 52, 60–61. Codified in 1926, the Passport Act reads: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe." Act of

1950's,[86] a series of important judicial cases followed by congressional reactions moved the law quickly to recognize the status of foreign travel as a constitutionally protected right, and to surround it with protection akin to other constitutional rights.

Kent v. Dulles[87] was the seminal case during this period. In 1952, under the open-ended language of the Passport Act of 1926,[88] the Secretary of State issued regulations prohibiting the granting of passports to Communist Party members. *Kent* invalidated these regulations. The Court was clearly influenced by the historical transformation of the legal significance of passports from simple and often unnecessary "letters of introduction" to required exit permits. The Secretary's exercise of discretionary authority over the former was one thing; but that kind of discretion over a document necessary for world travel was quite another, and the Court wanted to make sure that Congress had focused on that issue.

Kent held that the right to travel was part of the "liberty" protected by the fifth amendment's due process clause[89] and rejected any notion that the President has special foreign affairs power to broadly regulate foreign travel. If the "liberty" of travel was to be regulated, Congress must do the job.[90]

July 3, 1926, 22 U.S.C. § 211(a). In 1978, an amendment limited the power to impose area restrictions. Act of Oct. 7, 1978, 22 U.S.C. § 211(a) (1982).

At the same time, with limited wartime exceptions, no statute made it a criminal offense to travel abroad without having a passport, and international practice did not make possession of a passport a practical necessity of travel. Instead, the passport served as a political document acknowledging the bearer's citizenship and requesting foreign sovereigns to permit the bearer's safe passage.

[86] The passage of § 215 of the Internal Security Act changed the situation in 1952. Act of June 27, 1952, 8 U.S.C. § 1185 (1982). That law made it a criminal offense to leave the country without a passport, subject to whatever limitations and exceptions to the prohibition the President might make. The law, in effect, reenacted wartime travel controls that had been in place both in World War I and World War II, and made those controls applicable for the duration of a presidentially declared emergency. Inasmuch as the emergency was not occasioned by or limited to outright warfare, it had no logical stopping point, and thus caused concern for the prolonged deprivation of the right to travel abroad. In 1978, the criminal penalty was repealed.

[87] 357 U.S. 116 (1958).

[88] *See supra* note 85.

[89] 357 U.S. at 125.

[90] The Court said specifically:

> If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen,

Instead of confronting the ultimate constitutional question of how far Congress might limit the liberty to travel, however, *Kent* focused on separation of powers and concluded that it should not infer from open-ended statutory language alone that Congress intended to give the Executive unbridled discretion over an important liberty. The Court in *Kent* did not go so far as to insist on explicit statutory authority as the predicate for executive passport control; it was prepared to ground authorization in open-ended language if that language was bolstered by longtime congressional acquiescence in the face of the actual exercise of passport control by the Executive. Significantly, though, the majority in *Kent* found no such history of previous uses of executive passport control as to give an open-ended statute and Congress' silence the character of authorization.

After *Kent*, concerns about limiting a citizen's right to exit the country determined the outcome of four important cases in the 1960's. In *Aptheker v. Secretary of State*,[91] the Court invalidated as overbroad a criminal statute prohibiting members of registered Communist organizations to apply for or use passports because the statute lumped together all members, including those who posed some danger with those who did not. In reaching this result, the Court characterized the right to travel as "closely related" to the rights of speech and association[92] and applied conventional first amendment tools to determine overbreadth.

In the second case, *Zemel v. Rusk*,[93] the Court upheld the Secretary's refusal to issue a passport validated for travel in Cuba, and found what had been lacking in *Kent*—a consistent administrative practice of imposing area-bans on passports for national security and foreign relations reasons. Congress was thus seen implicitly to have ratified this executive position when it enacted and re-enacted the Passport Act. The Court recog-

---

such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.

357 U.S. at 129 (citations omitted).

[91] 378 U.S. 500 (1964).

[92] *Id.* at 517.

[93] 381 U.S. 1 (1965).

nized that refusal to validate a passport would "act as a deterrent to travel to that area,"[94] but regarded the infringement on liberty as legitimate in light of the coordinated effort of other nations in the Western Hemisphere to discourage Cuban travel, as well as the President's obligation to protect Americans unjustly deprived of liberty abroad.[95]

Zemel, however, dealt only with the question of whether the Secretary was prohibited from issuing passports with area-bans; unlike *Aptheker*, it had nothing to do with the right to a passport. Nor did *Zemel* address the question of travel control through passports, that is, whether the Executive could punish or restrict the movement of persons who went to Cuba either with a passport containing an area-ban or without one at all.[96]

That important question was resolved against the government in *United States v. Laub*.[97] There, the Court ruled that it was not a criminal offense to leave the country with a passport and go to a destination where the passport was not valid. The 1967 decision, *Lynd v. Rusk*,[98] struck the final blow to executive enforcement of area restrictions when it held that the Secretary could not refuse to issue a passport to a citizen who planned to travel to both restricted and unrestricted areas, so long as the citizen agreed not to take the passport into the area for which it had not been validated.[99]

The judicially developed right to international travel thus survived the tensions of the Vietnam War; the Executive ultimately abandoned enforcement of passport controls. In 1978, Congress took steps to ratify those developments. It abolished criminal penalties for traveling without a passport, even as it

---

[94] *Id.* at 14.

[95] *Id.* at 15, construing 22 U.S.C. § 1732.

[96] *Id.* at 3. Moreover, the Court treated foreign and domestic travel as involving the same right, noting that since the right of domestic travel does not include unrestricted travel to "areas ravaged by flood, fire or pestilences" where such travels "directly and materially interfere with safety and welfare of the area or the Nation as a whole[, so] is it with international travel." 381 U.S. at 15–16. *Zemel* is obviously ignored by those who regard foreign travel as a secondary right, more easily regulated than domestic travel.

[97] 385 U.S. 475 (1967).

[98] 389 F.2d 940 (D.C. Cir. 1967).

[99] *Id.* at 947. *See* Salans & Frank, *Passports and Area Restrictions*, 20 Stan. L. Rev. 839 (1968).

imposed a general rule requiring a passport to leave the country;[100] and it amended the Passport Act to limit sharply the Executive's authority to impose area restrictions.[101]

1. Haig v. Agee[102]

In *Haig v. Agee*, the Court abandoned this twenty-five year history of legal protection for the right of foreign travel with its sub-theme of limited executive discretion. Although the Court purported to follow the earlier precedents, the language of Chief Justice Burger's opinion cuts so deeply into the rights those decisions accorded it is hard not to be cynical about the Court's enterprise, whatever one thinks about the outcome of the case on its unique facts. We can only hope that the context in which executive power to limit travel was approved—national security fears based upon the particular activities abroad of a renegade CIA agent—will limit the broad reach of the Court's language.[103]

Philip Agee was an ex-CIA agent bent upon doing what he could to destroy the CIA's effectiveness.[104] By traveling abroad and revealing intelligence techniques to expose the CIA, he flagrantly violated his legal obligations to the CIA as determined by the courts, and his behavior was probably criminal. Nonetheless, the government did not indict him; it revoked his pass-

---

[100] Act of June 27, 1952, *as amended*, Act of Oct. 7, 1978, 8 U.S.C. § 1185(b) (1982). The President may by waiver or exception limit the duty to have a passport on leaving the country. Thus, passports are not required for travel to Canada.

[101] Act of Oct. 7, 1978, 22 U.S.C. § 211(a) (1982).

[102] 453 U.S. 280 (1981).

[103] *Haig v. Agee* may demonstrate the impossibility of bringing all security questions under the rule of law. For example, the United States can presumably use whatever means are necessary to stop terrorists who are illegally holding United States citizens abroad. If an American citizen joins the terrorists, the government is not obliged because of her citizenship, we would think, to act towards her in any special way.

[104] Although the *Agee* decision has much in common with *Snepp*, the motivations of the two men should not be confused. Snepp saw himself as a patriotic critic of CIA incompetence who took care to reveal nothing classified, while Agee set out to hamper the CIA by exposing covert CIA agents operating in foreign countries.

For the purpose of litigation, Agee conceded that he was causing or likely to cause serious damage, allowing the Court to make much of this concession. *See, e.g.*, 453 U.S. at 287. By contrast, the government's concession in *Snepp* for litigation purposes that no classified information was divulged by him, fell on deaf ears. 444 U.S. at 511.

port without a prior hearing.[105] After reciting Agee's derelictions, Burger's opinion asserts that the issue is whether Congress has authorized the challenged regulation.[106] Citing *Zemel*, the Court found that in light of the Passport Act's "broad rule-making authority,"[107] administrative constructions of the statute are binding unless obviously wrong, adding that "this is especially so in the areas of foreign power and national security, where congressional silence is not to be equated with congressional disapproval."[108] Moreover, the opinion continued, "[m]atters intimately related to foreign power and national security are rarely proper subjects for judicial intervention."[109]

The unacknowledged manipulation of precedent in these passages is remarkable. First, although the *Zemel* Court found specific congressional approval for area restrictions, it explicitly rejected construing the Passport Act's "broad rule-making authority" to validate discretion secured by "mere congressional inaction."[110] Second, the idea that the government can withhold a passport simply because Congress has not formally *disapproved* stands *Kent* on its head. Because liberty was involved, *Kent* held, the Executive must trace authority to actual congressional approval, either through clear statutory language or through acquiescence after actual executive exercise of power. *Kent* is subtle, but the essence is that *Steel Seizure* controls. Third, and perhaps most importantly, although relied on in *Haig*, *Curtiss-Wright* itself says nothing about national security. Its focus is on foreign relations. The Court hints, we fear, at the expansion of *Curtiss-Wright* to embrace executive authority to act without explicit congressional authorization on domestic national security secrecy problems.

In *Kent*, the Court found the central issue to be whether there was a consistent executive practice of passport refusal,

---

[105] The Secretary acted pursuant to a regulation permitting such action where "the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." 22 C.F.R. § 51.70(b)(4) (1984). The regulation was promulgated in 1966.

[106] In a cautionary footnote, citing *Curtiss-Wright*'s "sole organ" passage, Burger states that the court has no occasion to consider whether the President might have this power independent of Congress. 453 U.S. at 289 n.17. *See supra* note 103.

[107] *Id.* at 291, citing *Zemel*, 381 U.S. at 12.

[108] *Id.* at 291.

[109] *Id.* at 291–92, citing *Curtiss-Wright*, 299 U.S. at 319.

[110] 381 U.S. at 11.

specifically declining to validate executive claims about power when those claims were accompanied only by mere congressional silence. In *Agee*, there were only three instances of executive action in thirty years, and only one that was taken pursuant to the regulation here challenged. Yet the *Agee* Court declared this remarkably infrequent exercise of power sufficient to establish congressional authorization, simply because "there have been few situations involving substantial likelihood of serious damage to the national security or foreign policy of the United States" as a result of a passport holder's activities abroad.[111]

Chief Justice Burger's opinion in *Agee* purported to follow earlier precedents, but it is plain that *Agee* has more in common with the dissents in *Kent* and *Aptheker*, and can draw no credible support from *Zemel*. Burger entirely ignored the fact that after *Kent*, the Eisenhower Administration repeatedly called for a statute to empower the Secretary to revoke passports for security reasons, but Congress refused to enact such a law.[112]

Apart from its treatment of the problem of congressional authorization, *Agee* lays the groundwork for broad regulation of travel, and for judicial refusal to review it. *Kent* and *Aptheker* rested on the constitutional premise that freedom to travel was an aspect of liberty protected by the due process clause of the fifth amendment. *Agee*, however, draws a sharp distinction between the right to travel within and without the United States, and accords significant constitutional dimension only to the former.[113] Stating that "freedom to travel abroad . . . is subordinate

---

[111] 453 U.S. at 302. Is it probable that none of the private visits to and negotiations in Vietnam were thought to create a serious risk to our foreign policy, or is it more likely that the government failed to cancel passports because it felt its claimed power would be rejected by the courts?

[112] We agree with Professor Farber's conclusion in his recent article:

> The *Agee* Court purported to find implicit congressional approval for travel controls based on national security. Instead, the legislative record demonstrates almost complete hostility to travel control for over twenty-five years before *Agee* . . . . To infer congressional approval under these circumstances seems to surpass the bounds of credibility.

Farber, *National Security, the Right to Travel, and the Court*, 1981 Sup. Ct. Rev. 263, 284.

[113] *Kent*, *Aptheker*, and *Zemel* each discussed the right of travel in terms that did

to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation,"[114] the opinion adds that in assessing reasonability, "no governmental interest is more compelling than the security of the Nation."[115]

There is judicial withdrawal on the first amendment front as well, although the Court's message lies more in its dismissive tone than in the result approved. Agee's passport was revoked because of the content of his speech, and therefore his freedom to travel, whatever its independent constitutional dimension, raised a first amendment question directly. The Court categorically rejected Agee's first amendment claims since his statements had "the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel [and, as such, were] clearly not protected by the Constitution."[116] The Court went on to hold that "[t]he mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law."[117] Moreover, Burger held that to revoke Agee's passport "'is an inhibition of action' rather than of speech," citing the area restrictions approved of in *Zemel*.[118] But the point stressed in *Zemel* was precisely that the executive action upheld in that case—refusal to validate passports for Cuban travel—was applied universally, not targeted at particular persons because of their speech or political associations.

Brennan's dissent, joined by Marshall, did not reach the first amendment question, and relied instead on the view that Congress had not authorized this executive revocation. But

---

not distinguish foreign domestic affairs, and suggested that the same broad criteria would be applicable to the freedom to engage in either.

In severing the two, the Court relied on cases such as Califano v. Aznavorian, 439 U.S. 170, 176 (1978), which concern the incidental effect of government benefit programs on travel plans. *Califano* makes clear that durational residency requirements that triggered "right to travel" issues domestically do not have the same effect in a foreign context. They do not, because "[t]he statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases." 439 U.S. at 177.

[114] 453 U.S. at 306.

[115] *Id.* at 306–07.

[116] *Id.* at 309.

[117] *Id.*

[118] *Id.*

Brennan was surely registering the important message of the majority opinion when he referred to "the Court's whirlwind treatment of Agee's constitutional claims."[119]

The Court was probably correct in assessing some of Agee's statements as unprotected under applicable constitutional tests for judging speech that may cause violence or other great harm. But the conclusory, impatient quality of the majority's treatment of Agee's first amendment claims suggests an act of judicial exasperation, not analysis. *Agee* clears the way for the Executive, not only by circumventing precedential requirements of realistic legislative authorization, but also by ejecting the first amendment from the premises.

The result of *Haig v. Agee* is that the Court has authorized the Executive to act without a hearing by withdrawing the passport of any American citizen simply by claiming that his plans represent a risk of serious injury to American foreign relations. Without a passport, the citizen may well not be able to leave the country. After the Executive acts, the administrative process begins, and by the time it ends, who knows whether the circumstances that prompted the desire to travel will still be possible of achievement. In *Agee*, bad facts made bad law.

2. Regan v. Wald[120]

In *Regan v. Wald*, the Court faced a narrow issue of statutory construction. The 5–4 majority held that the President still has the power under the Trading with the Enemy Act of 1917 (TWEA)[121] to impose a near-total ban on transactions in property in which Cuban nationals have an interest, a ban so

---

[119] *Id.* at 320 n.10 (Brennan, J., dissenting).

[120] 104 S. Ct. 3026 (1984).

[121] The Trading with the Enemy Act of 1917 (TWEA) gave the President crisis powers over trade in time of war or presidentially declared "national emergency." Act of Oct. 6, 1917, 50 U.S.C. §§ 1–44 (1982). Once the President declared a "national emergency" under the Act, emergency powers continued to exist until the President declared the emergency terminated. As might be expected, Presidents often hesitated to declare an end to national emergencies upon which their enhanced powers over trade were conditioned. Indeed, the emergency declared in 1950 by President Truman in response to the Korean conflict was still considered to exist in 1977 when Congress sought to put this type of "emergency" power on a reasonable statutory foundation. *See infra* note 123.

broad that it criminalizes spending one's own money to pay for the ordinary expenses of travel.[122]

In reaching this result, the Court refused to heed the clear legislative intent of the 1977 International Emergency Economic Powers Act (IEEPA).[123] This law left intact the wartime powers that the TWEA had conferred on the President but displaced the TWEA with respect to peacetime national-emergency situations, and imposed upon the presidential emergency power a number of new procedural restraints, such as consultation with Congress.

The IEEPA preserved existing trade regulations based upon the President's authority under the TWEA with a grandfather clause in the 1977 Act declaring: "the authorities conferred upon the president by [TWEA] which were being exercised with respect to a country on July 1, 1977 . . . may continue . . . ."[124] The question in *Wald* boiled down to whether the "authority" preserved by the grandfathering statute only included authority actually being exercised in 1977, or also included powers that were not then in use. In other words, the language of the grandfathering statute permitted the view that if the President were exercising "authority" to control trade in some specific respect, he could continue to exercise that authority in other respects as well, adjusting the particular terms of the control as he thought the situation warranted. The legislative history strongly suggests, however, that Congress intended only to grandfather existing restrictions and not to preserve any open-ended authority for wide-ranging executive action.

The majority opinion by Justice Rehnquist simply overrode the intent of Congress in order to permit the Executive to impose general restrictions on travel to Cuba without going through the

---

[122] 104 S. Ct. at 3033–34, construing 50 U.S.C. § 5(b)(1)(B) (statute authorizing the President to "regulate . . . any . . . transactions involving . . . any property in which any foreign country or national thereof has any interest").

[123] Act of Dec. 28, 1977, 50 U.S.C. § 1701 (1982).

[124] 50 U.S.C. § 1706(a)(1) (1982). The legislative history of the 1977 grandfather provision indicated that Congress did not wish to undo existing restrictions for various reasons. Some members indicated that the President should not be forced to declare new emergencies in order to maintain existing embargoes or asset freezes, as such declarations might exacerbate international tensions. Others did not want to force the President unilaterally to give up existing restrictions which might be bargaining chips. Still others did not want Congress to get bogged down in partisan disputes about existing restrictions. *See Wald*, 104 S. Ct. at 3035–38.

congressional notice and consultation requirement imposed by the 1977 Act for new peacetime emergencies. As Justice Powell stated in his dissent, the result reached "may well be in the best interest of the United States [but] the legislative history . . . unmistakably demonstrates that Congress intended to bar the President from expanding the exercise of emergency authority . . . ."[125]

Wald, like *Agee*, gives no weight to the value of foreign travel as a right. Instead, *Wald* confirms that foreign travel is a "freedom," not a "right," and then discusses it as if it were merely a privilege. *Zemel* was cited as authority to restrict travel to a particular area, with no discussion of the fact that *Zemel* did not concern criminalizing travel regulations.[126] Most importantly, *Wald* refuses to infer limits on unchecked executive discretion to regulate travel through "trade" controls from the fact that Congress in 1978 amended the Passport Act to limit standardless executive imposition of area restraints on Americans' travel.

The result in *Wald* does not have the far-reaching potential for executive suppression of first amendment freedoms that *Snepp* and *Agee* embody, but it does demonstrate the push to executive empowerment at the expense of congressional control that marks the Supreme Court's recent exposure to national security secrecy and freedom to travel issues.

III. Criminal Revelations: Espionage and Theft of Information in the Shadows of Congressional Intent

A. Covert Espionage

James Stephen observed that "malice aforethought," the criminal state of mind that distinguished murder from manslaughter, had gained its legal content according to judges' views of the propriety of hanging particular defendants.[127] So is it also

---

[125] 104 S. Ct. at 3049 (Powell, J., dissenting).

[126] The *Zemel* Court expressly declined to reach the question. 381 U.S. at 13.

[127] James Stephen, Minutes of Evidence of the Royal Commission on Capital Punishment, 1866, Q.2110, cited in Report of the Royal Commission on Capital Punishment, 1949–53, § 75 (1953).

with the United States law on criminal revelations of national defense information. In response to aggressive executive claims about its scope, the Judiciary is shaping the law to facilitate the prosecution of covert espionage. Whether or not the Supreme Court's summary treatment of legislative materials has influenced the lower federal courts, those courts too, for one reason or another, seem determined that problems of statutory drafting and legislative intent should not stand in the way of effective prosecutions.

The Fourth Circuit's recent en banc decision in *United States v. Smith*[128] provides a striking illustration. Smith, a former employee of the Army Intelligence Security Command (INSCOM) admitted that he sold classified defense information to a Soviet agent in Japan. The information concerned five INSCOM double-agent operations. His sole defense was that he believed he was assisting the United States according to the wishes of the CIA. He claimed that two men persuaded him with their knowledge of operational procedures that they were working for the CIA,[129] and that he could help them set up a new double-agent project by revealing outdated information to the Soviets. One gathers that the true identities and whereabouts of these men are unknown, and the CIA says it had never heard of them.[130] Smith wanted to testify about what these men told him and why in light of his intelligence experiences he believed them. Quite plainly, Smith's credibility improved the more he fully disclosed how CIA espionage operations work, and how these operations are sometimes run by individuals who work under hidden and flexible arrangements with the Agency so that the Agency can "disown" them, if necessary. The government characterized the entire story as a preposterous invention, noting that it was never mentioned during Smith's lengthy preliminary interrogations.[131]

Permitting Smith to tell his full story, whether it was true or not, would have opened the door to wide-ranging disclosures

---

[128] 780 F.2d 1102 (4th Cir. 1985).

[129] United States v. Smith, 592 F. Supp. 424, 428 (E.D. Va. 1984).

[130] *Id.* at 430 n.5.

[131] *Id.* at 434. Whether or not it was false, it persuaded a jury. At the criminal trial following the proceeding here described, Smith was acquitted on April 11, 1986. *See* N.Y. Times, April 12, 1986, § 1, at 6, col. 5.

of classified information.[132] Acting under the recently enacted Classified Information Procedures Act (CIPA),[133] Smith gave notice to the government of his intention to disclose classified information at trial.[134] In response, the government sought pretrial rulings to prevent the admission of some of his testimony. In a well-reasoned opinion, the trial court held that Smith's beliefs, if credited, would be a valid defense to the charges against him.[135] If Smith believed they were authorized CIA agents, then he did not act with the culpability required under the espionage statutes, whether or not the men worked for the CIA, or even for the Soviets. Moreover, the court proposed to admit as relevant evidence his testimony on a variety of classified matters, even where there was only an attenuated link between the evidence and the existence of the two men. The trial court believed it lacked authority, under the law of evidence, to refuse to admit relevant testimony on the sole ground that the testimony would reveal classified secrets.

In particular, the court also could not balance the importance of the information to Smith's defense against the harm public disclosure was likely to cause. That CIPA itself grants no such authority has been clear to each court that has considered the case.[136] The trial court ruled further that it could not, consistent with Smith's right to a jury trial, exclude testimony

---

[132] The belief that conduct was authorized by the CIA has been raised as a defense in other criminal cases, but not with such factual specificity. *See, e.g.*, United States v. Wilson, 732 F.2d 404 (2d Cir. 1984); United States v. Lee, 589 F.2d 980 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979).

[133] 18 U.S.C. §§ 1–16 (Supp. 1985).

[134] Congress patterned this duty to notify the government upon legislation obliging a defendant to reveal in advance of trial an alibi defense. The government can then invoke CIPA's procedures to ascertain in advance of trial the admissibility of a defendant's proposed testimony and seek ways to limit the possible damage to security interests.

[135] 592 F. Supp. 424 (E.D. Va. 1984) (Williams, J.). The opinion is notable for its clear discussion of mistake of law problems.

[136] Congress intended CIPA to provide procedures which would enable the government both to evaluate the substantiality of a defendant's threat to disclose classified information and to seek alternatives to disclosure—such as a government stipulation or the admission of a summary of the evidence rather than the evidence itself. It did not change the substantive law of evidence relating to admissibility or relevance. *See* United States v. Smith, 780 F.2d 1102, 1111–13 (4th Cir. 1985) (Butzner, J., dissenting). The Conference Report on CIPA issued by the House Select Committee on Intelligence states that "nothing . . . is intended to change the existing standards for determining relevance and admissibility." H.R. Rep. No. 1436, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 4307, 4310.

on the alternative ground urged by the government that his story was very likely false.[137]

The government took an interlocutory appeal under § 7 of CIPA, seeking to overturn or limit these rulings. A panel of the Fourth Circuit affirmed[138] in an opinion later vacated by the court of appeals sitting en banc.[139]

The court's en banc opinion is provocative. First, portions of the printed opinion itself are classified[140] in order to preserve the secrecy of the classified information that the government did not want Smith to testify about. Classifying judicial opinions is consistent with CIPA.[141] It makes little sense to go through an elaborate in camera judicial process only to have the published report of the case tell the whole story. Yet, there is a real tension in trying to accomodate the central requisites of the open administration of justice with this kind of secrecy. In particular, it is hard to evaluate the factual premises of secret law. From a legislative perspective, the problem resembles whether a general necessity defense should be enacted in order to ameliorate the law's harshness, when, for example, ordinary rules regulate the actions of men in a lifeboat adrift at sea. Concessions made to necessity in a special, largely unknown context might be later generalized to apply to other contexts. Once loosed, the idea of secrecy in criminal proceedings may prove hard to cabin. Thus, it is genuinely unsettling to open an advance sheet in the Federal Reporter and confront a footnote which reads *in its entirety*: "(Parts of this footnote are classified.)."[142] What happened to the parts that were not classified? Did classification swallow them too?

---

[137] 592 F. Supp. at 434.

[138] United States v. Smith, 750 F.2d 1215 (4th Cir. 1984).

[139] 780 F.2d 1102 (4th Cir. 1985).

[140] *Id.* at 1105–06. Parts of the trial court's opinion are also classified. *See* 592 F. Supp. at 443.

[141] "[T]he Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information." 18 U.S.C. § 9(b) (Supp. 1985).

[142] 780 F.2d at 1105 n.6, 1106 n.9. Did the difficulty of deciding just which parts of the footnote are properly classifed prompt the decision to classify all of it? Are parts of the footnote that clearly do not reveal classified information suppressed now, in order to forestall study of the printed volume to see the contexts in which more information is now available than was initially released, thus revealing the points of concern? Is it a misprint? One can see a world—the inevitable dynamic of a secrecy system, including the paranoia it induces in observers—in this tiny grain of sand.

The en banc opinion is also provocative because the court construes the Federal Rules of Evidence to require the trial court to weigh the importance of an individual's testimony to his defense against the harm that testimony might do to the government by revealing secrets.[143] Smith was permitted to testify that the two men said they were CIA agents, and that he believed them. But he was not permitted to testify about some of his collateral knowledge about the CIA which, he alleged, made him think the two men were credible. Because some of the opinion is classified, one cannot tell just what Smith was able to testify to and what he was not.

In reaching that result, the court of appeals made applicable to the espionage context the *Roviaro*[144] principle, which permits the government to decline to reveal particular facts concerning government informants and operations unless a balance of considerations requires it. There is a world of difference, however, between permitting the government to withhold information which the defendant hopes will either bolster his case or hurt the government's case and prohibiting the defendant from testifying about what he claims to know.

If there is any other context in law where a privilege forces someone to remain silent about what he knows when the holder of the privilege is trying to harm him and the evidence would tend to exculpate, we are ignorant of it. Nonetheless, the Fourth Circuit managed to extract this conclusion not from CIPA, but from the prior law of evidence. In so doing, the court refused to draw any conclusion from the fact that neither the Executive nor the Congress believed that the pre-CIPA rules of evidence authorized the kind of balancing approach that the government here secures. Indeed, the Executive specifically sought authority to balance national security interests against classified defense testimony,[145] and Congress refused to grant it.[146] But, like

---

[143] 780 F.2d at 1107.

[144] Roviaro v. United States, 353 U.S. 53 (1957).

[145] Graymail, S. 1482: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 18 (1980) (prepared statement of Philip B. Heymann, Assistant Attorney General), cited in 780 F.2d at 1111 (Butzner, J., dissenting).

[146] S. Rep. No. 823, 96th Cong., 2d Sess. 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4303, cited in 780 F.2d at 1112 (Butzner, J., dissenting).

the recent Supreme Court cases, *Smith*'s message is that if you can't get it from Congress, the courts are always in session.

The final twist is that the court of appeals rejected Smith's pleas that the trial court be told to make use of the procedures of § 6 of CIPA to require some accommodation by the government, such as abstracting the evidence to preserve classified secrets while still allowing its thrust to be heard. Ironically, the Fourth Circuit said that *that* balancing would ignore congressional intent that CIPA not alter the prior law of evidence.[147] The court did not discuss the fact that the government *itself* had urged this use of CIPA before the panel of the court of appeals, when the issue before the court was Smith's right to testify fully and the government was seeking ways to limit the damage. Thus, relevant evidence which is inadmissible (because, if spread on the record in its entirety, the government would be harmed more than the defendant helped) cannot be made admissible by requiring the government to abstract evidence, even if that abstraction is easily done and will keep the government from being harmed at all.[148]

Other recent case law developments also seem to pass lightly over serious problems of congressional intent. 18 U.S.C. § 798 bars any revelation, including publication, of classified communications intelligence. In *United States v. Boyce*,[149] the Ninth Circuit determined that a defense of improper classification would not be allowed in a prosecution under this statute, citing a prior holding that construed a wholly different statute punishing disclosures of classified information by government employees to foreign agents.[150] The *Boyce* court ignored the fact that the Conference Report, the clearest statement in the legis-

---

[147] 780 F.2d at 1109.

[148] Whether anything could be done on the evidence at issue in *Smith*, we do not know. The court's holding, however, does not make that issue relevant. Nor does the court explain how the trial court will ascertain the dimensions of the national security damage to be feared. The government, presumably, cannot just show up claiming that information is classified and likely to cause damage if revealed. It will have to explain why information is important. CIPA is structured to avoid the necessity of such revelations.

[149] 594 F.2d 1246 (9th Cir. 1979), *cert. denied*, 444 U.S. 855 (1980).

[150] Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1963), construing 50 U.S.C. § 783(b). The major differences between 18 U.S.C. § 798 and 50 U.S.C. § 783(b) are discussed in Edgar & Schmidt, *supra* note 3, 1064–74.

lative history of § 798, states that "the classification must be *in fact* in the interests of national security."[151]

In *United States v. Dedeyan*,[152] the Fourth Circuit upheld the conviction of a civilian under 18 U.S.C. § 793(f)(2), a provision which requires that one report to a "superior officer" the loss or abstraction of a defense-related document. But the defendant had no superior officer—he was a civilian employee. And the court gave no indication of who the "superior officer" might be.

Finally, in *United States v. Zehe*,[153] the district court in Massachusetts recently held that the espionage statutes apply extraterritorially not only to United States citizens but to all foreigners as well, without regard to whether the foreigner has had any contact with persons acting inside the United States. This decision at least claims to implement Congress' intent when in 1961, Congress took action and repealed[154] a law limiting the reach of the espionage statutes to "the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States."[155] According to this construction, however, foreign intelligence officers all over the world are committing offenses under United States law as they sift through whatever "information relating to the national defense"[156] of the United States that their fellow workers have managed to secure for their analysis.[157]

The problem with these espionage cases is not that persons are being convicted frivolously of espionage, or that we are in the midst of some McCarthy-esque spy scare. Rather, the problem is that the same statutory language that is given such expansive effect in order to fashion a tough law of covert espionage

---

[151] S. Rep. No. 111, 81st Cong., 1st Sess. 3 (1949); H.R. Rep. No. 1895, 81st Cong., 2d Sess. 3 (1950) (emphasis added).

[152] 584 F.2d 36, 40 (4th Cir. 1978).

[153] 601 F. Supp. 196 (D. Mass. 1985).

[154] Act of Oct. 4, 1961, *repealing* 18 U.S.C. § 791.

[155] Formerly 18 U.S.C. § 791.

[156] 18 U.S.C. §§ 794(a), (c).

[157] Inasmuch as United States v. Heimlich, 704 F.2d 547 (11th Cir. 1984), holds that no statute of limitations applies to violations of 18 U.S.C. § 794(a), these foreigners do well to keep out of the United States' jurisdiction.

See also United States v. Harper, 729 F.2d 1216 (9th Cir. 1984), where the court issued mandamus to keep a district judge from conducting an espionage trial as a capital case over the objection of the United States.

is also applicable to government employees participating in the traditional practice of leaking national security information in order to shape policy. The statutory prohibitions might also apply to reporters and newspapers—newspaper employees, for example, could be prosecuted as aiders and abettors of a government employee's press leak. Yet making criminal this kind of behavior would be a marked change in the tradition of United States information controls, and it would be entirely inconsistent with congressional intent over the years.

B. Criminality of Public Revelations

1. The Legislation

Shortly after the *Pentagon Papers* decision, we undertook an analysis of the application of the espionage statutes to publication of information bearing on national defense and national security.[158] We assumed that a generally coherent picture would emerge from study of the statutory texts, legislative history, judicial glosses on the texts and their histories, and the repeated efforts of Congress and the Executive to deal with the problems of leaks and press disclosures. We were wrong. The espionage statutes are incomprehensible if read according to the conventions of legal analysis of text, while paying fair attention to legislative history. This is especially true of the sections relating to publication of defense information and the preliminary acts of information-gathering and communication.[159] Although we

---

[158] *See* Edgar & Schmidt, *supra* note 3.

[159] In order to explain how they may be applied to government employees and newspapers, it is important to briefly describe the espionage statutes. Broad and amorphous espionage laws have been on the books since 1917, and are found in §§ 793 and 794 of Title 18 of the U.S. Code. Subsections 794(a) and 793(a) and (b) collectively criminalize gathering for and communicating to foreigners "information respecting the national defense" if done with "intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of a foreign nation." These provisions do not explicitly cover "publishing," although gathering and communicating information are obvious prerequisites to publication. Subsection 794(b), on the other hand, does explicitly apply to publication. It prohibits, among other things, publishing national defense information in time of war with intent to communicate it to the enemy. Subsections 793(d) and (e), by far the most confusing provisions, prohibit "willful" communication of national defense information to persons "not entitled to receive it." They also prohibit unlawful retention of such information.

These statutes were enacted after a series of legislative debates and amendments

continue to believe that it was not mistaken in its essentials, our 1973 effort to rationalize the espionage statutes was both interminable and almost absurd in the confusion it depicted. We have no wish to reiterate that effort, particularly since the Comment which follows sets out the general analysis. However, we do wish to highlight the basic problems because it is important to understand that the Executive's recent efforts to apply the murky espionage statutes to government employees—possibly leading to prosecution for press publications—has been aided by a Judiciary equally unwilling to construe the statutes more narrowly. The implications of this executive-judicial partnership are especially disturbing in cases such as *United States v. Morison*,[160] which raise genuine civil liberties concerns.

Although the espionage statutes present a fantastic array of interpretation problems, there are four key issues. First, § 794(b) punishes wartime publication of defense information with "intent" to communicate to the enemy. May such an intent be inferred from general publication in a newspaper that its reporters know will be read by the enemy? After examining the legislative history in 1973, we thought not. The Wilson Administration in 1917 proposed a comprehensive set of statutes designed to protect defense information during World War I, resting on essential and sweeping provisions for executive information control. One such provision would have given the President power either to censor prior to, or punish after the fact—exactly which was never entirely clear—publication of any information relating to the military that was generally covered by presidential directives. Congress firmly rejected this provision after much debate about the dangers of a president's manipulating public opinion and the value of publication of military

---

which are fairly read as rejecting criminal sanctions for publication of information designed to inform the public. This was so no matter what damage to national security might ensue, and regardless of whether a well-meaning publisher knew that a by-product of disclosure would be damage to the national interest. In the 1917 debates, Congress repeatedly assured both itself and the press that the statutes under consideration would not bar press revelations. Revisions in 1950 were undertaken with similarly explicit and uncontradicted statements of immunity for the press. The trouble is that, notwithstanding Congress' intentions, one has to strain to read the language of §§ 793 and 794 in such a way as to immunize publication of defense-related information; similarly, only a tortured reading of the statutes would save from criminal prosecution the collection and retention of information preliminary to such publication.

[160] 604 F. Supp. 655 (D. Md. 1985).

information to informed policy choices in a democracy. Enacted in its place was the prohibition now codified in 18 U.S.C. § 794(b). To give effect to Congress' rejection of what was then known as "the censorship proposal," we concluded that the intent formulation of § 794(b) must be read to require a purpose to communicate to the enemy—the sort of mental state that a spy would have. Yet the surprising result of this reading is that § 794(b)'s explicit prohibition on publication is so limited as to be, in practical effect, a nullity.

Second, § 794(a) prohibits communication of defense information to foreigners, and §§ 793(a) and (b) prohibit gathering information if done "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." A reporter who gathers defense information for publication would seem to violate these provisions, and yet leaders in the congressional debates repeatedly insisted that it was not their aim to punish newspapers for publishing defense information in the interests of informed national debate. A baffling question of interpretation is therefore raised by these provisions, particularly those pertaining to newsgathering. One argument is that these statutes do not reach publication because the word "publishes," used in § 794(b), is absent here. This argument is fraught with difficulties, however, because immunity would have to extend not merely to publication but also to those who act in contemplation thereof, such as employees who seek to publish damaging security information. Moreover, what is a publication? Does it include a conversation with a friend? Does it include a government employee who leaks information to the press?

Third, the meaning of §§ 793(d) and (e) is especially troublesome. The subject of much dicta in the opinions of several Justices in the *Pentagon Papers* decision, § 793(e) prohibits anyone in unauthorized possession of any document relating to the national defense from delivering or communicating it to someone not entitled to receive it. The same subsection also prohibits the willful retention of any tangible defense information and the failure to deliver it to a United States officer entitled to receive it. Section 793(d) is similar, but applies to lawful possessors. The legislative history of these provisions indicates that Congress did not understand them to criminalize conduct

engaged in for publication purposes. But how they can be narrowed to effectuate this understanding is a mystery. Unlike the other espionage provisions, they do not expressly require that the actor be motivated by a desire to injure the United States or advantage foreign nations.

Fourth, 18 U.S.C. §§ 793(d) and (e), and several other parts of the espionage laws, make behavior criminal only if national defense information is transferred to "any person not entitled to receive it." The question is, what body of law determines this entitlement? An obvious answer is the classification system, but that answer must overcome the objection that Congress, at the time of enacting the espionage statutes, rejected the Wilson administration's proposal to grant the President authority to designate what was to be defined as "defense information," and who was "entitled to receive it." To permit classification to determine entitlement in effect gives back to the Executive what was earlier denied. Moreover, to this date, Congress has never explicitly authorized the classification system, although it has implicitly recognized its legitimacy by enacting numerous statutes that assume its existence.[161] But Congress has not been prepared to make simple transfer of classified information a criminal offense.

2. *The* Morison *Case*

In *United States v. Morison*, a government employee was convicted of violating 18 U.S.C. § 793(d) by having "willfully" communicated to a British military journal, *Jane's Defense Weekly*, copies of photographs taken by reconnaissance satellite. He was also convicted of violating 18 U.S.C. § 793(e) for having kept intelligence documents at home. Relying on the Fourth Circuit's earlier opinion in *United States v. Dedeyan*,[162] the trial court explicitly stated that the question of who is "not entitled to receive" defense information could be resolved by reference to the classification system.[163] Moreover, in construing the statutory prohibition against communicating a photograph

---

[161] *See, e.g.*, 18 U.S.C. § 798; 18 U.S.C. § 1 (1982).
[162] 584 F.2d 36 (4th Cir. 1978).
[163] *See supra* text accompanying note 161.

relating to the national defense, the court in effect transformed the elements of the crime, substituting "which is properly classified" for "relating to the national defense." The court held that the government need not show that the defendant knew that a classified document was in fact defense-related rather than improperly classified. Knowledge of the fact of classification was itself sufficient. In response to the defense's argument that the legislative history of § 793 demonstrates that Congress intended to punish spies and not leakers, the *Morison* court stated blithely that Congress could have considered someone a spy who took information gained in government employment and "released it to the world."[164]

The *Morison* court also relied heavily on the *Dedeyan* decision to define the scienter requirements in the statute. *Dedeyan* construed 18 U.S.C. § 793(f)(2) to require "knowledge of illegal abstraction," and therefore rejected the claim that the description of "information" covered by this statute was too vague.[165] What the *Dedeyan* court meant by this "knowledge" is uncertain. If the court meant that the government must prove that a defendant knew of the document's *illegal* abstraction, the government must show that the defendant knew that the document "related to the national defense". Such a reading, however, puts the government in a difficult position because the defendant can claim that he knew that the *government* considered a document to be defense-related, but that *he* did not similarly view the document. The government would then have the heavy burden of proving that a defendant is lying about his beliefs.[166]

---

[164] 604 F. Supp. at 659.

[165] The Court in *Dedeyan* upheld a conviction under 18 U.S.C. § 793(f)(2) for failing to report that a classified document had been, with the defendant's knowledge, photographed by a Soviet representative to the United States. Dedeyan had himself prepared the document and stamped it secret. He mounted vagueness and overbreadth attacks against the critical statutory term "information related to the national defense"—the language which the espionage laws use to define information that cannot be transferred. In theory, this language does not refer to classified information, inasmuch as the phrase was on the books and interpreted by case law before the classification system was ever developed. Instead it means information broadly related to military affairs. The *Dedeyan* court rejected the defendant's claim that 18 U.S.C. § 793(f)(2) was unconstitutionally vague, despite the law's failure to require a subversive intent. The court noted "[s]ubsection (f)(2) does contain a scienter requirement: knowledge of the document's illegal abstraction." 584 F.2d at 39. *See* discussion in Edgar & Schmidt, *supra* note 3, 974–91.

[166] There also is the possibility of a mistake of law defense, that is, an assertion by

The *Morison* court read *Dedeyan* as requiring only knowledge of the fact of abstraction, and not its illegal character, and tried to fashion a similar rule for § 793(e). The jury was asked whether the materials Morison transferred related to the national defense, and whether he had "willfully" communicated them, in breach of his duty to maintain security.[167] The jury was not asked to decide whether Morison had knowledge of their defense-related status, above and beyond the fact of their classification. Moreover, the court's analysis was internally contradictory. In a published opinion holding inadmissible any evidence of Morison's patriotism, the court first stated that "[n]ational defense is not a subjective test; it does not matter whether the defendant himself believed that the photographs and/or documents did indeed relate to the national defense."[168] But the court went on to say that "a showing of willfulness [the statutory standard] only requires that he knew he was doing something prohibited by law."[169] Inasmuch as the crime is one of transferring *defense* information, not classified information, he could not "know" he was violating the law if he held the belief that the court had described as immaterial—i.e., if he believed that the classified information was not in fact defense-related. In effect, the court makes the transfer of classified information a material element of the crime, providing only that misclassification *in fact* will serve as a defense.

The remaining policy question is where to draw limits around what classified information is encompassed by the statutes. In *Dedeyan*, for example, the court had charged the jury that the law required the government to show how the information's disclosure might be "potentially damaging" to the national defense or "might be useful" to an enemy.[170] It seems that

---

the defendant that he does not understand the criteria to be used in determining what information "relates to the national defense." Presumably that defense would be invalid on the conventional ground that ignorance of the law is not a defense. *But see* Liparota v. United States, 105 S. Ct. 2084 (1985), where the majority accepts a mistake of law defense and suggests that failure to do so would convert an ordinary crime into one of strict liability!

[167] *See* United States v. Truong Dinh Hung, 629 F.2d 908, 919 (4th Cir. 1980).

[168] United States v. Morison, 622 F. Supp. 1009, 1010 (D. Md. 1985).

[169] *Id.*

[170] The *Dedeyan* court characterized as a "limiting [jury] instruction" one that focused attention on whether information had been made public by Congress or the Department of Defense and is found in sources "lawfully" available to the general

the government will always be able to prove this if information is both classified and secret. Indeed, the "might be useful" standard is no limit whatever if the "use" a foreign nation may make of information is simply to confirm information they already know, including their suspicions about how well they have penetrated our security system. Interestingly, the difficulty of judicial or jury evaluation of whether a particular revelation of classified information indeed worked damage to the national interest presents the same problems of proof that have led, in general first amendment theory, to reject tests that try to ascertain whether particular speech will cause harm.

In rejecting the overbreadth defense, the trial judge in *Morison* implemented the holding of the court of appeals in *Dedeyan*. In effect, military relatedness and proof of the government's attempt to keep the information secret, are all the government need show. Indeed, under *Morison*, it is ironic that persons who reveal information publicly have a harder time defending themselves than spies because, unlike spies, their conduct makes the information available to *everyone*; they may provide Tobago with knowledge about United States defense matters that the Soviet Union has long possessed. Thus, for government employees at least, the *Morison* court creates a general crime of willful revelation of classified information, which Congress has consistently refused to enact when asked to do so by the Executive.

Whether or not the United States should have a military secrets act applicable to government employees, or to everyone else as well, is obviously a complex proposition that cannot simply be rejected out of hand. Too many thoughtful and experienced people support the idea for it to be one without any merit. Moreover, the idea that government employees can rightly claim a privilege to choose for themselves when to make secrets public is, we think, preposterous. Any such privilege, if regularly exercised, will lead inevitably to a concentration of

---

public, or alternatively, where the sources of information are lawfully available to the public, and the United States and the Department of Defense have made no effort to guard the information. On this instruction, the fact that information is widely available despite government effort to suppress it is of no consequence, so long as the information could provide advantage to some foreign country.

power in the hands of those few people whose unquestioned personal loyalty to their superiors makes them a safe security risk. No one can believe that will result in either better government or heightened security. There is also the ever present possibility that an employee may not realize why certain seemingly insignificant information is important for security purposes. The number of opportunities to slip up, and the cracks in the system no matter how well it is managed, must understandably make intelligence officers charged with securing sensitive information extremely nervous people.

On the other hand, the courts' approach to this problem, both on the civil side in *Snepp* and *Marchetti*, as well as in criminal cases like *Morison*, is inadequate. Constitutional difficulties aside, the courts' rush to give the espionage statutes the broadest possible application overlooks the relationship of employee revelations to the system of information management. There exists a complex relationship between the national media, the executive branch and its allies, and those who oppose the administration in power. The ability of the press to shape the national agenda by the manner in which it selects, pursues, and treats stories is well-known. An effort to manage the press' perception of the problems is thus an indispensible aspect of effective executive leadership, since the President wants the press to tell the story "in the right way." On the other hand, the system mandates that those with a competing agenda make it their responsibility to see that the Executive does not tell the story its way, particularly not by hiding any skeletons. In the United States, we have no mechanism of parliamentary inquiry obliging the Executive to reveal its bad news. Thus, leak and counterleak by government employees have become an integral part of the way people with power talk to one another. It is this problem, as well as first amendment concerns, that make Congress so reluctant to enact any thoroughgoing secrecy program.

Moreover, it is not clear that the press publishes everything it learns. After all, we are assured that the secrets that most concerned the government in the *Pentagon Papers* case were never published.[171] Similarly, it is a gross exaggeration to say,

---

[171] Griswold, *Teaching Alone is not Enough*, 25 J. Legal Educ. 251 (1973).

as in *Morison*, that the damage done to the national security by public release of military secrets is equivalent, or even worse than, damage through transfer of information by spies. For some kinds of secrets that might be true, but for the vast majority of them, knowledge that the secret is out sharply limits the damage done. The greatest damage occurs when the government believes that "secrets are secret"—particularly communications intelligence systems—when in fact they are not. In that situation, the government is easy prey to tactics that take advantage of its predispositions and biases. Indeed, one lesson we should draw from the recent spate of espionage prosecutions is that if the dark figure of criminology—the relation of the true offense rate to the reported crime rate—is as true for espionage as for other crimes, there are many more spies out there than we have been able to apprehend.

Finally, why do we assume that foreign intelligence officers can rely on the truth of what appears in the press? If we cannot tell whether or not a defecting KGB officer was acting out a Soviet disinformation scheme, why should we suppose that the Soviets regard as fully credible the reports that appear in the media, whether they concern weaponry, covert action, or our success or failure in breaking their codes?

Given the clarity of the legislative history indicating that Congress never intended that the espionage statutes should reach publication, and given Congress' repeated refusal to put criminal penalties behind the classification system, one would think that courts would exercise caution in applying the statutes to employee press leaks.

C. Theft of Information

It is our judgment that the Supreme Court would, and should, uphold some military secrets law if Congress enacted one applicable to government employees. On the other hand, an "Official Secrets Act" criminalizing all publication of secret facts about the government, whether or not related to national security matters, must be held unconstitutional unless we are willing to abandon large portions of our first amendment jurisprudence. Nonetheless, lower courts, interpreting 18 U.S.C.

§ 641,[172] which prohibits theft, conversion, or unauthorized disposition of government property, are laying the groundwork for transforming that act into its British counterpart. This not only raises the gravest constitutional problems, but also flatly contravenes congressional intent. Indeed, there is no more important question about the extent to which the courts will fashion secrecy policy with Congress in the wings than whether or not § 641 will be construed to reach an employee's unauthorized transfer of government information, or copies of government documents. The statute parallels ordinary larceny prohibitions by punishing the person who deprives another of the economic value of his property by wrongfully taking it away, as well as the person who steals for his own use.

Presumably the statute reaches without question the actual taking of a document, when the government loses possession of papers prepared for its use and in which it has a property interest. That was the situation in *United States v. Kampiles*,[173] which resulted in the defendant's conviction under § 641, as well as for espionage, because he transferred a technical manual concerning satellite photography systems. Kampiles did not copy the manual—he simply took it from his place of employment at the CIA's office in Virginia. While affirming his conviction on multiple counts, the Seventh Circuit failed to discuss § 641.

---

[172] Public money, property or records, 18 U.S.C. § 641 (1985):

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exeed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale, or retail, whichever is greater.

Act of June 25, 1948, ch. 645, 62 Stat. 725.

[173] 609 F.2d 1233 (7th Cir. 1979).

Three critical issues concerning § 641's application to unauthorized transfer of documents, and information contained in documents, must be considered. The first is to determine the liability attaching to duplicating and transferring government documents in a manner contrary to the government's instructions—whether those instructions are set out by statute, regulation or simply as part of an employment contract. Where copies were made of FBI records by persons using government equipment and paper, and acting on government time, the Third Circuit has upheld a § 641 conviction on the theory that the government owns the copies as well as the original.[174] The question is then whether the papers should be valued at the cost of the paper the government lost or, alternatively, at the amount someone might pay for the document. Conventional larceny analysis suggests the latter; market value controls.

The virtue of this theory is that prosecution does not turn on the government's right to exclusive control over information. Taking the government's *blank* paper would also be a crime. However, the virtue of the approach is also its vice: Is it proper to link information controls to the private use of a copying machine—an offense committed daily by hundreds of thousands of employees? Punishing conduct in which everyone engages, and leaving it to officials to choose those whom it wishes to penalize, is inconsistent with fundamental principles of criminal law. Such a wide-open statutory construction is simply an invitation to unconstitutionally motivated selective prosecution.

The second critical issue regarding § 641 is whether the government can claim that one who copies and then transfers the copy to another has sold or disposed of a "thing of value" belonging to the United States.[175] Under this hypothesis, the government has lost no document, since all of its original papers remain in its possession. However, it may be claimed that the transferred item contained, and therefore the government has lost, an intangible "thing of value"—namely the information whose secrecy the government sought to maintain. The term

---

[174] United States v. Digilio, 538 F.2d 972 (3d Cir. 1976).
[175] *See supra* note 172.

"thing of value" is commonly used in legislation to cast a broad net of liability, and is frequently construed to include intangibles.[176] In the related setting of *United States v. Bottone*,[177] Judge Friendly construed 18 U.S.C. § 2314, which prohibits transporting "goods stolen or taken by fraud," to cover photocopies of documents that remained with their owners. In general, as the protection of information becomes a key part of the legal regime in an information economy, its protection under general legislation will become even more commonplace.

The question then becomes whether it makes any difference that it is *government* information at stake when determining whether information is a "thing of value." Congress has rejected any notion of copyright in government expression.[178] Does that imply that government "information," no matter how expressed, ought not be considered a "thing of value," even though as a practical matter government information is something that people will pay for? At least two cases, neither of which deals with espionage problems, treat government information as a thing of value. The first case permitting a conviction on this theory was *United States v. Friedman*,[179] where the revelation of grand jury testimony was held a violation of § 641. In the second case, *United States v. Girard*,[180] the court construed § 641 to criminalize the sale of agency files by a Drug Enforcement Agency official.

The third critical issue involving § 641 is how to determine who acts "without authority" within the meaning of its prohibition on sale or disposition. In *Girard*, the court permitted the Drug Enforcement Agency's (DEA) rules and regulations to delimit and clarify the concept of "authority." If "without authority" can mean simply that a defendant did not obey DEA rules, there is no reason why the same theory cannot make criminal the transfer of a copy of a document which the government, under its ordinary housekeeping authority, has directed

---

[176] *See, e.g.*, the cases cited in United States v. Girard, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

[177] 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966).

[178] 17 U.S.C. § 105.

[179] 445 F.2d 1076 (9th Cir.), *cert. denied sub nom.* Jacobs v. United States, 404 U.S. 958 (1971).

[180] 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

not be disclosed—at least if the duty not to transfer is clearly spelled out.

If these critical issues are all resolved in favor of the government, or even if only the last two are, the combination of ordinary executive housekeeping regulations and § 641 creates a de facto official secrets act. An employee's unauthorized revelation, at least if it is embodied in tangible form, of *any* fact constitutes a disposition of the government's intangible property; the person who participates by receiving the information is guilty as well if she knows the circumstances surrounding the transfer. The inquiry must then turn to the question of whether a first amendment defense exists for this type of behavior.

This problem has been perceived as a serious one in recent espionage cases. In *United States v. Boyce*[181] and *United States v. Truong Dinh Hung*,[182] circuit courts permitted § 641 convictions to stand. However, since the defendants were simultaneously convicted of other, more serious espionage offenses, both courts relied on the principle of concurrent sentences to obviate the need to consider the issue at length.[183] In *United States v. Lee*,[184] and *United States v. Kampiles*,[185] the § 641 convictions for transfer of documents were apparently upheld without discussion. While in *Kampiles*, the government lost actual possession of a document, *Lee* involved the same copies as those at issue in *Boyce*. The *Morison* indictment for transfer of a copy of a government document was upheld under § 641 as well.[186]

The courts should not create an "Official Secrets Act" through relentless expansion of general legislation that was obviously not enacted for speech restricting purposes. Judges have only the plain-meaning rule and the facts of a particular case before them; they have no basis for confidence that when their interpretations are applied in other contexts, a first amendment

---

[181] 594 F.2d 1246 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979).

[182] 629 F.2d 908 (4th Cir. 1980).

[183] Judge Winter wrote a thoughtful protest in *Truong Dinh Hung* against dodging the issue by the concurrent sentence doctrine. He would not have construed § 641 to reach conduct covered by more explicit law.

[184] 589 F.2d 980 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979).

[185] 609 F.2d 1233 (7th Cir. 1979).

[186] *Morison*, 604 F. Supp. 655, 663–65 (1985).

defense can be employed. For example, what can courts do with the employee who reveals a confidential EPA report with which he disagrees as a matter of public policy, but who is motivated in part by a desire to advance his own career? Furthermore, who is a member of the "press" and therefore entitled to raise a first amendment defense to a charge of receiving stolen goods? Perhaps it is tolerable to permit the Executive to shape the conditions of government employment without clear guidance, but for the courts to use the criminal law this way ignores the prohibition on common law crimes. In effect § 641, so read, becomes yet another instrument by which the Executive is empowered to pick and choose its targets for suppressing speech.

D. Lessons from the Confusion

The espionage statutes, particularly §§ 793(d) and 793(e), embody the serious tension between the executive and the legislative branches as to the proper scope of laws forbidding disclosure of national defense information. Congress has refused to adopt sweeping secrecy proposals, no doubt in part because it relies on general publications for much of its information about foreign and military affairs—information that facilitates congressional oversight of an increasingly secretive Executive. The espionage statutes were originally formulated within the executive branch; Congress has never attempted to formulate such legislation of its own. Congress has instead simply modified certain executive proposals and enacted others almost unaltered; in some cases, Congress has approved only part of an integrated package of legislation which is virtually meaningless when severed from the whole.

The incredible confusion among the existing espionage statutes points to several lessons. First, the statutes reveal the anomalies likely to result from selective congressional adoption of discrete components of sweeping executive initiatives. Protection of defense secrets is too complex to be handled by ad hoc amendment of executive branch proposals. The subject is one of inherent tension between the legislative and executive branches. Congress must actively undertake to formulate its own legislation.

The second lesson to be extracted from the confusion of existing law is the difficulty of dealing with all forms of information disclosure at once. The 1917 debates are a morass in large part because of the continued conflation of the problems of spying, government employee leaks and newspaper publication. Sections 793 and 794 cover all people and all defense information, making distinctions between spying and well-meaning publication only through cumbersome and opaque descriptions of mental states. It is essential to recognize that spying, breaches of secrecy by government employees and public discussion of defense matters by the press and the citizenry at large are distinct issues. While these activities pose somewhat similar dangers to national security, the hazards of prohibition and zealous enforcement are very different. Above all, the legitimate social values underlying many leaks and publications require separate treatment. Lumping them together can only produce unnecessary difficulties in prosecuting true spies, conflicting interpretations of the legal status of government employees, and utter confusion in the rules applicable to both publishers and audience. As a result, all-or-nothing prohibitions either permit publication without significant restraint, or subject it to sweeping restrictions that are appropriate to spying but not to concerned debate about national policy. Publication and espionage should not be encompassed within a single prohibition, except in those rare instances where the type of information at issue is extremely sensitive and of little value to informed political debate.

We fear that the Executive and the Supreme Court have learned a third lesson from the confusion of existing law, one we believe to be unwarranted—namely that Congress is not capable of, or at least is ineffective in, dealing with the problems of secrecy and speech in any general framework.

V. Conclusion

Our legal tradition insists that reasonably clear statutory statements that reflect actual legislative intent precede the imposition of criminal sanctions or other government actions which trench on constitutionally-protected individual rights. With respect to national security secrecy issues, however, and

related problems of the right to travel, the Supreme Court has since *Pentagon Papers* committed itself to a different model of institutional legitimacy—one of executive empowerment.

While Congress retains its primacy as a matter of rhetoric, the burdens of initiative and clear statement have been shifted, thereby shaking the foundations of our institutional controls. The long-term effects of this development on the structure of American government are even more important than their immediate impact on civil liberties. Executive decisions in the national security area frequently rest on less secure political foundations than do legislative determinations. Plagued by overbroad standards and selective enforcement, executive judgments fail to incorporate sufficiently considerations of principle and generality. Too often, shortsighted concerns of self-interest and expediency exert undue influence.

Perhaps the quality of true security in the modern world is such that these characteristics of executive action, usually conceived of as incompatible with our consitutional traditions, are actually essential to their survival. We doubt that. Yet our principal concern is that the questions are not being appraised in terms of institutional responsibility. The legal profession and the press have generally taken their cue from the Supreme Court; they have focused on the results in national security cases, and not on the separation of powers issues implicit in them. The Court has offered no coherent rationale for its rejection of congressional control, and neither scholars nor practitioners have taken up the challenge of justifying or criticizing the radical shift in institutional authority that seems to be in process.