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National Security and Civil Liberties: The Legislative Challenge

By Morton H. Halperin

Senator Symington. Last summer when the special prosecutor sent us some papers taken out of the Dean file, in Alexandria, and which had a lot to do with CIA and military matters, they were sent here and also sent to the Ervin committee. Hastily everyone wanted to see us at once, the State Department, the CIA, FBI, DIA. Anybody I left out, Mr. Braswell?

Mr. Braswell. NSA, I think.

Senator Symington. Yes, and they all said these papers from the standpoint of national security must not be utilized by the Watergate Committee. We sat around this table. I said, the best thing to do would be to first read the papers Mr. Dean put in his safe before we consider making a decision to request Senator Ervin not to use them. So we read the papers. They literally had nothing to do, that we could see, with national security. One of the staff members said, after we had read for 10 or 15 minutes, it looks to me as if this is more a case of national embarrassment than national security. In my opinion, he could not have been more right. So having been through that syndrome last summer, that particular aspect, and because of all of the various stories that have been getting out, I would join the Senator from Iowa and hope we make a full report on this situation, one way or the other because I do not see any national security involved. Admiral Moorer said he knew everything being done. So I do not see the national security angle.

The Chairman. I have already told you twice that I have not run across anything yet that is national security but I think, nevertheless, it is the committee's business here and we ought to have it conducted.[1]

From this effort by the bureaucracy to keep secret the Houston Plan for illegal surveillance of domestic groups and from a host of other episodes brought to public view in the wake of Watergate, we have all learned how "national security" has been used to curtail the liberties of Americans.

Some of the clashes have been memorable:

John Erlichman telling the Watergate Committee that the President had the right to authorize a burglary (of Ellsberg's psychiatrist's office) in the interest of national security; and Senator Ervin explaining the Fourth Amend-

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ment's protection against unreasonable searches and seizures.

Egil Krogh claiming immunity from a prosecution for perjury because the national security required him to lie; and District Judge Gerhardt Gesell lecturing him on the court's right to truth from any man.

Richard Nixon's assertion of the right to withhold tapes and other evidence because of "national security" overruled by Judge Sirica and then the D. C. Circuit Court on the grounds that the courts must decide if the privilege is properly invoked.

We have come a long way from the time just a few years back when claims of "national security" from the President or the military or civilian bureaucracies brought public debate and congressional inquiry to a halt.

The question for Congress now is whether it will turn the public concern about the abuse of "national security" rationales into specific legislation. A number of bills are now before the Congress which will test its will to act as well as the administration's proclaimed commitment to privacy and open debate. This article discusses in turn each of these legislative areas, describing what the issues are and what choices are before the Congress.

Freedom of Information

In 1966 after long debate and over the strenuous objections of the Johnson Administration, Congress passed the Freedom of Information Act which, for the first time in the nation's history, established the right of the people to have access to information held by the executive branch. The act provided that information must be released unless it fits within nine relatively narrow "exceptions," and enabled any citizen to go into court to request information denied by the executive.

The act has had some impact despite the obstructionist tactics of much of the bureaucracy. However, in the field of national defense and foreign policy, the act has turned out to be of relatively little value. The first exemption [known as b(1)] excludes from the requirements of public release information "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

Congress' intent in so framing this exemption is unclear. While Congress sought to draft narrow exemptions, it was confronted by a threat of veto from the Johnson Administration which led to substantial compromise, particularly in the House Government Operations Committee Report on the bill. With regard to exemption b(1), that report stated that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." (H. Rep. No. 1497. pp. 9-10).

In the definitive case interpreting the national security exemption to the Freedom of Information Act (*EPA* v. *Mink*, 410 U. S. 73), the Supreme Court held that the act exempted from release any information classified under the provisions of the Executive Order on Classification (then 10501 and now 11652). In the opinion of the Court, Justice White emphasized that the decision was simply interpreting Congress' intent and went on to note that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional order."

In a concurring opinion Justice Stewart noted that the exemption as written "provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." Discussing the specific information sought by Congresswoman Patsy Mink regarding a planned nuclear test in Alaska (the "Cannikin" test at Amchitka Island) Justice Stewart noted:

> One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. *And with the people and their representatives reduced to a state of ignorance the democratic process is paralyzed.* (Italics added).

The Court's opinion by White, Stewart's concurrence, and the dissenting opinions concurred in by Brennan, Marshall and Douglas, leave little doubt that the Court would find constitutional the enactment by Congress of a much narrower national security exemption based on standards legislated by the Congress.

In response to the invitation in the *Mink* opinion, Congress is in the process of taking a

significant step forward. The House in mid-March of 1974 overwhelmingly approved a set of revisions in the Freedom of Information Act (H.R. 12471) which, in regard to exemption b(1), authorized the Court to assess whether information was properly classified under the criteria of Executive Order 11652. Specifically the legislation provides for *in camera* inspection by the Court when the executive invokes exemption b(1) and amends the exemption to read as follows:

> authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy.

A similar bill has been approved by a subcommittee of the Senate Judiciary Committee (S. 2543) and is expected to be acted on in late April. Prospects for passage of a revised bill appear to be good, although the Justice Department is opposing the bill including, in particular, the changes in the national security exemption.

This bill will do some good, particularly in cases, to use Justice Stewart's words, of "cynical, myopic or even corrupt" classifications, but it does not get to the heart of the problem.

The revised act would simply assure that the standards of Executive Order 11652 were not applied arbitrarily. What are these standards? The preamble of the order notes that "some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations (labelled collectively as "national security), must be classified. The order establishes three categories of classified information: top secret, secret and confidential. The standard for the lowest category, confidential, is whether "disclosure could reasonably be expected to cause damage to the national security."

Thus, under the revised legislation a court would be required to consider whether it was reasonable to believe that the information fit this criteria. The reasonable expectation is only of "damage," not of serious or substantial damage. More important—although the order begins with the words:

> The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public,

the operational sections of the order require no balancing. Information may be kept classified if its release would do damage no matter how small and no matter how great the public's need for the information.

An act which heeds Justice Stewart's warning of the consequence of the state of "ignorance" in which the American people find themselves on critical matters of national security must provide for a balancing of the public's right to know against the possible damage from disclosure. This need for balancing must appear not only in further revisions of the Freedom of Information Act but also in a legislated classification system, to which we now turn.

Classification

The abdication by the Congress of its responsibility to legislate is nowhere more glaring than in its failure to enact a bill dealing with the procedures for classifying information. Congress is well aware of the fact that successive presidents have issued executive orders on classification. It knows that these orders have been used to keep from public view enormous quantities of new and old documents and information vital to public debate. Yet it has done nothing.

The President has been permitted on his own to legislate to establish criteria and procedures for classifying information. Although the classification system itself has not been challenged in the courts, there is little doubt that, in the absence of legislation, the President has the power to keep information secret. (Any doubts about this were erased by the Freedom of Information Act which, ironically enough—and without shame—was cited by President Nixon in the preamble to this Executive Order on classification as providing Congressional authorization.) Neither is there any question that Congress can legislate in this area and establish criteria and standards which in most, if not all cases, would bind the executive.[2]

Congress has recently begun to stir itself to do something about the problem of the vast and arbitrary over-classification of documents and information. A subcommittee of the House Committee on Government Operations has held a number of hearings on the classification system, culminating in a Report (93-221) advocating that Congress legislate a classification system. On the Senate side, three subcommitees of the Judiciary and Government Operations Committees have held hearings on "Executive Privilege, Secrecy in Government, Freedom of Information."

Congressman Moorehead has introduced a bill (H.R. 12004) establishing a classification system, and Senator Muskie is expected to introduce a bill shortly. Hearings on the bills

are expected in the spring, but neither house is likely to pass the legislation in this session of Congress.

The hearings on classification already held have documented excessive classification of information whose release could in no way have injured national defense and which were kept secret to hide bureaucratic errors or to prevent public debate. The Pentagon Papers are a case in point. Before the *New York Times* began publishing excerpts from the Papers, the Defense Department had refused even to supply a copy to Senator Fulbright, much less to make them public. However, as soon as it went into court seeking an injunction, the government conceded that much of this history could be declassified and promised to complete the process in 90 days.

Perhaps of greater importance was the revelation that the executive branch had kept secret information which, while it might well have fit the criteria for classification under the Executive Order, should have been revealed. Thus not only was the Houston Plan, with which this article began, classified but so was a secret war in Laos under President Johnson and the secret bombing of Cambodia under President Nixon.

The challenge therefore is to devise criteria for classification which in fact reflects the public's right to know. Moorehead's bill is a step in the right direction primarily in establishing Congress' obligation to legislate and in seeking to narrow the area of permissible classification. Basically, however, it would legislate in the pattern of the Executive Order. Despite its good intentions, it could well end giving greater legitimacy to a system which will still deprive the Congress and the public of the information they need to play their constitutional roles.

What is required is a new approach. Congress must proceed from the principle that no information can be kept secret if it is needed by Congress and the public to have an informed judgment on a significant national security issue. This principle can be enforced only by legislating categories of information which cannot be kept secret and permitting the classification of other information only if the public's right to know is weighed against the damage which might result from disclosure. Drafting such legislation will not be easy, particularly since it must operate in the face of strong bureaucratic and presidential interests in controlling the release of information. But anything short of this would simply replace one Congressional fault—the abdication of responsibility—with another—the delegation of excessive power to the executive.[3]

While fighting Congressional initiatives on Freedom of Information and remaining passive thus far on the question of a legislated classification system, the Executive Branch has taken the initiative in a third area—revision of the espionage laws.

Espionage Laws

Drawing on the work of the Brown Commission on reform of the Federal Criminal Code, the Administration has proposed to the Congress a completely redrafted criminal code (S. 1400). In what is reported to be the longest bill ever introduced is buried a new "espionage" law which would substantially expand the meaning of that term.

Until the government indicted Daniel Ellsberg for having Anthony Russo help him duplicate a copy of the Pentagon Papers, it had been assumed by citizens and government lawyers alike that "espionage" related to spies. Specifically the espionage laws were believed to be applicable only to individuals who intended to harm the national defense, and every previous espionage indictment had alleged intent to harm.

Having claimed that the law was what it wanted it to be, the Justice Department has now asked Congress to amend the law so that it would in fact cover the Pentagon Papers situation. The proposed new code contains two major provisions. The first is breathtaking in its brevity and sweep:

> a person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it.

Since the Supreme Court has defined national security as:

> a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness (*Gorin* v. *U. S.*, 312 U. S. 19),

and since a person not entitled to receive is defined as one without a clearance or a need to know, this is an offense committed daily by anyone who passes a newspaper to a friend. Even if one excludes information already published, the crime would fit the actions of every government official giving information, not officially released, to a reporter and every reporter passing it on to his editor.

The second crime which would be created by the proposed criminal code is that of a gov-

ernment official communicating "classified information" to anyone not authorized to receive it. The statute would specifically exclude the defense that the information was not properly classified.

The two statutes together would create the equivalent of an official secrets act.

A subcommittee of the Senate Judiciary Committee has held some hearings on the espionage portion of the revised criminal code but no action on the bill is expected in the near future. No Senator or Congressperson has yet introduced a substitute for the espionage section. The House Judiciary Subcommittee is just turning to the criminal code.[4]

There is a desperate need for new legislation on espionage. The current statute literally defies comprehension and, as the Ellsberg indictment shows, can be twisted to mean almost anything. A new law should do two things. First, it should clarify the true espionage crime, specifying the intent which must be proven and the nature of the information covered. Second, the statute should specify a narrow set of circumstances in which one who has had legal access to classified information might be guilty of a crime even if he does not specifically intend to harm the national defense.

National Security Wiretaps

Another major area in which Congress faces the need to balance civil liberties against the requirements of national security is national security wiretapping.

In a landmark decision in 1972 (*U. S.* v. *U. S. District Court*, 407 U. S. 297) known as the *Keith* case, the Supreme Court held that the President had no right to wiretap (without a warrant) even in the name of "national security." It left open the question of surveillance of foreign powers and their "agents," defining the latter as those with a significant connection with foreign powers.

What the policy of the Justice Department now is on warrantless taps is unclear. Certainly taps are being placed on embassies, and foreign officials are put under surveillance. Attorney General Saxbe stated recently that he had just authorized several national security taps. Whether American citizens are now under warrantless surveillance, and if so with what proof of a connection with a foreign power, is not known.

Hearings began in early April before three subcommittees of the Senate Judiciary and Foreign Relations Committees to examine this question as well as to explore the arguments for and against warrantless national security taps. A House Judiciary subcommittee will hold similar hearings.

Senator Nelson has introduced a bill which would limit surveillance of American citizens to situations in which there is probable cause to believe they have committed a crime. Taps on embassies would require a warrant but, under the lesser standard to be gained, there would always be the danger of abuse by a liberal interpretation of whay was permitted. Thus the Nelson bill would appear to be an important step in the right direction.

The issues covered above touch on only the main areas of legislation relating to national security and civil liberties. The issue shows up in an incredible range of different kinds of legislation. To cite just one other example: the administration bill on protecting criminal arrest records from widespread dissemination has an absolute exception for "national security."

It was James Madison who warned in the Federalist Papers that, "Perhaps it is a universal truth that the loss of liberty at home is to be charged to the provisions against dangers, real or pretended, from abroad." Watergate, whatever else it means, should have taught us the truth of this observation. Congress will have ample opportunities in the months ahead to demonstrate if it has learned this lesson and if it has the determination to do something about it.

Footnotes

[1] *Transmittal of Documents from the National Security Council to the Chairman of the Joint Chiefs of Staff*, Hearing before the Committee on Armed Services, United States Senate, 93rd Congress, 2nd Session, Part 2, February 20, 21, 1974, pp. 4-5.

[2] Despite the landmark Supreme Court decision in the Steel seizure case (*Youngstown Sheet and Tube Co., et al.* v. *Sawyer*, 343 U. S. 579), members of Congress seem relatively unaware of this class of situations. To oversimplify somewhat: (1) there are powers which the President has and which Congress cannot take away or limit (e.g., the power to fire subordinates in the Executive Branch); (2) there are powers which the President simply does not have in the absence of legislation (e.g., to indict someone for espionage); and (3) there are areas where the President has the power to act unless Congress preempts that power by legislation (e.g., classification and perhaps national security wiretaps).

[3] The developing of the outlines of such an approach is one of the principal tasks of a project being directed by the author for the Twentieth Century Fund on "Information, National Security and Constitutional Procedures."

[4] It has been preoccupied by another monstrosity, this one a creation of the Judiciary. The Judicial Conference, headed by Chief Justice Burger, had promulgated a new set of federal rules of evidence. Congress vetoed their going into effect and the House has now approved a substitute. Among the critical changes is one that removes the creation of a formal "state secrets" privilege which would have enabled the government to block the introduction of any evidence simply by asserting that its use in court would harm the national security.