

# Introduction to National Security and the First Amendment

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## NATIONAL SECURITY AND THE FIRST AMENDMENT

### INTRODUCTION

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The Institute of Bill of Rights Law, at the Marshall-Wythe School of Law of the College of William and Mary, has been in operation for two academic years. Established by the trustees of the Alfred Wilson Lee and Mary I.W. Lee Memorial Trust, a trust created under the will of Miss Laura Lee of Washington, D.C., the Institute is the beneficiary of a generous gift to "establish an Institute of Bill of Rights Law with emphasis on the teaching of first amendment principles, the American history of our jurisprudence, Legal English and ethical philosophy." In fulfillment of the testatrix's wishes, the Institute supports scholarly research of constitutional principles embodied in the Bill of Rights, as well as research on the history of the Bill of Rights. As part of a mission to promote understanding between members of the professions of law and journalism, the Institute sponsors programs to discuss subjects of mutual concern to lawyers and journalists. A first symposium was held in April of 1984, sponsored jointly with the *William and Mary Law Review*, entitled "Defamation and the First Amendment: New Perspectives."

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This past March, the Institute, again with joint sponsorship of the *William and Mary Law Review*, organized a second symposium entitled "National Security and the First Amendment." The articles and comments that follow were presented at that symposium. The Institute and the editors of the *Review* were pleased to have papers prepared by Burt Neuborne, Legal Director of the American Civil Liberties Union and Professor of Law at New York University with Steven R. Shapiro, Staff Counsel, New York Civil Liberties Union and Adjunct Professor of Law, Brooklyn Law School; Bruce E. Fein, Vice-President, Gray and Company, Washington, D.C., and Robert D. Kamenshine of Vanderbilt University who this past session served as visiting Lee Professor at the Institute.

Several qualified commentators were invited to discuss the views of the three principal speakers. The reactions of John R. Brock, General Counsel, Defense Intelligence Agency; Frederick Schauer, Professor of Law, University of Michigan; Michael J. Perry, Professor of Law, Northwestern University; Thomas I. Emerson, Lines Professor of Law, Emeritus, Yale Law School; Kathleen A. Buck, Assistant General Counsel, Department of Defense; Martin H. Redish, Professor of Law, Northwestern University; Tom A. Collins, Professor of Law, College of William and Mary; and Elizabeth R. Rindskopf, General Counsel, National Security Agency with Marshall L. Brown, Jr., Attorney, National Security Agency, are published in this volume with the primary papers.

Few questions of public concern involve higher stakes than the conflicts over governmental control of information relating to national security when such control is measured against freedoms of speech and the press. We are rightfully proud of those constitutional assurances of an open society that separate us from totalitarianism. Nevertheless, in a shrinking world with increasingly complex and dangerous technology, the need for secrecy, censorship, and classification often appears greater. Countervailing that view is the fear that greater governmental control of information offers more opportunity for abuse with greater risk of loss of freedoms unique to our society. Often claims of a need for secrecy, based upon national security considerations, have been made to shield unpopular policies from public scrutiny, and the workings of democracy have been thwarted.

Mr. Fein and Professors Kamenshine, Neuborne, and Shapiro have addressed interesting dimensions of a broad topic. Professors Neuborne and Shapiro question present statutory barriers that inhibit the free flow of ideas, and Professor Kamenshine argues for a rational basis scrutiny of the regulation of scientific or technological speech so long as the regulation is not intended to influence public opinion. Mr. Fein, on the other hand, outlines the necessity for classification and protection of government information and defends our present first amendment balance with regard to such. The several commentators enrich, question, and supplement the three principal presentations.

It is the hope of those associated with the Institute of Bill of Rights Law that the articles and comments that follow will cast light upon the question of what limitations may or should be placed upon the guarantees of the first amendment when our national security is involved. The Institute of Bill of Rights Law will continue to present scholarly views on various aspects of the Bill of Rights with emphasis on contemporary public controversy and judicial interpretation of first amendment questions.