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COMMENT ON "THE NYLON CURTAIN: AMERICA'S NATIONAL BORDER AND THE FREE FLOW OF IDEAS"

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Professor Neuborne treats the first amendment as a monolithic concept, including the right to speak or publish, the right to receive information, and the right to gather information. I must differ. The first of these, the right to speak and publish, is central to the first amendment.[1] The rights to receive information and to gather information are derivative of, or secondary to, the speech or publication right.[2] These distinctions are of substantial importance.

Furthermore, in national security and foreign policy a strong, indeed substantial, discretion exists in the Executive. Congress appropriately can define that discretion, or can give the Executive great latitude. Frequently, Congress *should* permit great latitude in the Executive's discretionary foreign affairs power, partly because of the Executive's competence and expertise, but also because of political factors. The executive policy is endorsed by the elective process, and the Executive should be allowed to carry out that policy.

I am not convinced, however, that the vesting of broad discretion in the Executive precludes judicial review. United States courts are bound to apply the general law, including the Constitution and statutes, to the Executive. Courts also must consider countervailing rights.

The first amendment-national security-foreign policy problem exemplifies this conflict of discretion and constitutional rights, while the application to Cuba of the travel restrictions permitted by the Trading With the Enemy Act[3] particularizes the problem.

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1. *See* Dworkin, *Is the Press Losing the First Amendment*, N.Y. REV. BK., Dec. 4, 1980, at 53-54.

2. *Id.*

3. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. 5(b)(1982)).

The change of administration since 1977, when travel restrictions were removed by congressional act,[4] and the imposition of the present restrictions in 1982, account for a shift in policy.

The new travel restrictions should not surprise us. The new policy reflects changing political and policy choices. In addition, the travel restrictions are simply *too plausible* to be subject to challenge. Hard currency earnings of $8,000,000 are significant, and can buy a lot of terror—consider that $14,000,000 supposedly can fund the countries in and about Nicaragua for five months. The ban on travel also fits perfectly with the Reagan administration's policy toward Cuba: a policy of isolation and rejection at all levels and in all things.

The right to gather information from Cuba, infringed by the recent TWEA applications, is a derivative speech right. That right is protected adequately in practice. Journalists and scholars are protected. They gather and transmit information more effectively than others and the first amendment protects them more extensively than others. And while it might be nice to be able to gather *all* data, the press and others gather sufficient data for our purposes. Indeed, as Alexander Meiklejohn—whom I invoke with some hesitance—asserted in another context, the goal of the first amendment is not that everyone has a chance to speak, but that all that is worth saying be said.[5] Perhaps we face an information overload and not a shortage. On balance, the asserted first amendment right must give way to the Executive's national security prerogative.

The receipt of printed material from Cuba presents a more difficult question. The receipt of material is a broader right than the gathering of material. The Supreme Court has articulated the right more clearly, but in peculiar circumstances. The receipt rationale provided the basis for overturning the exclusion of advertising from first amendment protection.[6] Likewise, the rationale provided an important justification in upholding the fairness doctrine in broadcasting.[7]

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4. The McGovern Amendment is codified at 22 U.S.C. § 2691 (1982).

5. A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1965).

6. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1975).

7. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

The case for the ban on Cuban printed material is hard to justify. Consider the McCarran Act,[8] which restricts the entry of aliens into the United States. When General Pasti and Ms. Allende were barred, the government restricted the flow of information into the American political debate. The government did not base its actions on a specific foreign policy objective toward another state. Instead, the government furthered a vague policy based on somewhat nebulous ideological factors. Even though the Supreme Court has approved these measures, they nevertheless demand substantial judicial scrutiny.

Unlike the exclusion of particular aliens, the ban on Cuban printed materials is a very different matter. The ban constitutes part of a total economic embargo that is integrated with a coherent foreign policy. Further, the ban is part of a policy of total isolation of Cuba for psychological effects, and as such has substantial symbolic importance. Finally, the ban permits enough material to filter back to the United States. Free material, library materials, materials received from third countries, and information brought back by journalists and scholars creates a very large information base.

I conclude with some doubt, therefore, that the ban on purchase of printed material from Cuba should be upheld. The ban's validity results from a total, draconian policy which is politically motivated, created, and endorsed. The accomodation of the need for information and the need for a strong foreign policy has been made in favor of foreign policy. The political process has worked rather well.

Professor Neuborne addresses several further issues about which I am in substantial agreement. He briefly deals with the control of technological speech by preresearch contract or export controls. The target of these controls is core first amendment material. This technological data is pure speech and embodies the search for truth fundamentally. It is vitally important.

In the area of technological "speech," there will be situations where harm will occur if the speech is unrestricted. Specific statutes should deal with these areas, which would include nuclear weapons technology.[9] Other areas of technology, such as lasers and

8. 8 U.S.C. §§ 1101-1525 (1982).

9. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

computer technology, would result in more diffuse harm if unrestricted. That may be difficult to control. Existing first amendment doctrines, however, supply ample protection, although further legal thought is mandated and welcomed.

Finally, let me speak of the certifications of film for export under the Beirut Convention.[10] This certification implicates rather nebulous and peripheral foreign policy interests. The first amendment values affected by these regulations are central to free speech. Films enunciate ideas. Like articles and books, films contain political ideas and deserve and receive full broad first amendment protection.[11] Additionally, the issue of whether the Constitution follows the United States citizen abroad should be resolved in favor of giving the most comprehensive first amendment protection. The constitutional requirement of a jury trial in military dependent cases arising overseas, which implicates foreign policy and national security interests in a different way, argues for this result.[12] Accordingly, content-based regulations here must fall.

The threatened first amendment interests and the foreign policy interests discussed by Professor Neuborne must be considered in context. When they are, an appropriate resolution of the national interests inherently contained in them will occur.

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10. Agreement for Facilitation the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, opened for signature, July 15, 1949, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S. 3 (1949). Entered into force with respect to the United States on January 12, 1967. *See* S. Rep. No. 626, 89th Cong. Ad. News, 3143; Pub. L. 89-634, 80 Stat. 879 (1967)(formal ratification).

11. *See* Joseph Burstan, Inc. v. Wilson, 343 U.S. 495 (1952).

12. *See* Reid v. Covert, 354 U.S. 1 (1957); *see also* Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and At Our Gates*, 27 WM. & MARY L. REV. 11 (1985).