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THE FIRST AMENDMENT—AN ABSOLUTE RIGHT?

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I. INTRODUCTION

Under the United States Constitution all branches of government play a role in protecting our most vital national defense information. Balanced against this need is the first amendment and the responsibility to inform the public. In his paper on the access to classified information, Bruce Fein explores the tensions inherent in our system of checks and balances to accomodate these needs. Within this system of checks and balances, each branch of government plays a special role in relation to national security information.

II. THE CONSTITUTIONAL MANDATE TO PROTECT THE NATIONAL SECURITY

Article II, section one of the Constitution provides "[t]he executive power shall be vested in a President of the United States of America."[1] Section two of that Article states "[t]he President shall be Commander-in-Chief of the Army and the Navy of the United States" and "[h]e shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ."[2] As the Commander-in-Chief it is the President's responsibility to maintain our national security and protect the nation from foreign aggression.

The 1875 case of *Totten v. United States*[3] gives historical insight regarding the Supreme Court's early view of the national security authority of the President. In *Totten*, a suit was appealed to the Supreme Court from the Court of Claims for compensation for services performed pursuant to a contract with President Lincoln.

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1. U.S. CONST. art. II, § 1.
2. U.S. CONST. art. II, § 2.
3. 92 U.S. 105 (1875).

Under the contract, Mr. Totten collected intelligence information concerning troops in the South. The Supreme Court had no difficulty recognizing the President's authority to engage in such activities. The Supreme Court stated that "[h]e was undoubtedly authorized during the war, as Commander-in-Chief of the Armies of the United States, to employ secret agents to enter the rebel lines, and obtain information respecting the strength, resources, and movements of the enemy."[4] Executive decisions in the national security area are almost by definition contingent upon executive discretion.[5] Certainly, the flexibility the Constitution affords our public officials in meeting the demands of government in situations of war as well as peace is one of the reasons our Constitution has served us so well.

III. There is no Constitutional Right of Special Access to Government Information

A. Media Access is not a Special Right

As indicated by Mr. Fein, government interests may at times be fostered by secrecy. For example, disclosure of classified information may undermine the fighting capability of our armed forces and may actually risk the lives of the people involved in a military operation. By necessity there can be no absolute constitutional right to access to combat information. A field commander must be in a position of discretion to protect the lives of his troops.

In 1983 this issue arose when armed forces conducted a rescue mission in Grenada. On October 26, 1983, the day after the United States initiated a rescue mission of American civilians in Grenada, a suit was brought by publishers Larry Flynt and LFR Inc., to enjoin the Secretaries of Defense and State from "preventing or otherwise hindering" plaintiffs from sending reporters to Grenada to gather news.[6] For operational security reasons Grenada was closed to private aircraft and ships.[7] The plaintiff's claims were based on the first amendment.[8]

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4. *See id.* at 106.
5. *See* Halkin v. Helms, 690 F.2d 977, 1009 (D.C. Cir. 1982).
6. Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984).
7. *Id.* (declaration of Colonel Charles McClain).
8. *Id.* (paragraphs 5 and 12 of the plaintiffs' complaint).

The commander of the military operation could not guarantee the safety of reporters during the first stages of the operation. Moreover, a critical element of the operation was "surprise."[9] By the morning of the rescue mission, approximately five hundred members of the press had congregated on the Island of Barbados, trying to enter Grenada. Logistically, accomodating five hundred members of the press in any operation would be difficult. Within forty eight hours the press was accomodated.

On October 27 the commander in charge of the operation determined that a pool of reporters could be flown in safely. Appropriate arrangements were made and fifteen members of the news media were transported from Barbados to Grenada.[10] The next day plaintiffs withdrew their motions for a temporary restraining order and a preliminary injunction. By October 30, 1983 any reporter was allowed to go in on military aircraft. Ninety seats on each of the three C-130 aircraft were dedicated to the press.[11]

In response to defendants' motion to dismiss, the court in *Flynt* found that the plaintiffs' claims for relief were moot.[12] Further, the court declined to enter an injunction restraining the government from restricting press access to future United States military operations.[13] Finally, the district court found that the plaintiffs' claims for a declaratory judgment were moot.[14] The court stated that "where the decision being scrutinized is committed to the broad discretion of the commander in the field and is contingent upon a wide range of factors determinable only with reference to the particular military operation being undertaken, a declaratory judgment would be useless."[15]

Although the district court in *Flynt* did not address the merits, no constitutional basis existed for the claim that members of the press have a right of access to military combat zones. A number of

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9. *See supra* note 7.

10. 588 F. Supp. at 58.

11. *See supra* note 7.

12. *See supra* note 8.

13. 588 F. Supp. at 61.

14. *Id.* The lack of jurisdiction to review moot cases is based on article III of the Constitution. The exercise of judicial power depends upon the existence of a case or controversy. SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 407 (1972); Benton v. Maryland, 395 U.S. 784, 788 (1969).

15. 588 F. Supp. at 61.

Supreme Court cases support the argument that the news media have no right of access under the first amendment superior to other members of the public. *Zemel v. Rusk*[16] is a landmark case in this area. In *Zemel*, the Secretary of State refused to validate a passport for travel to Cuba. The Court stated:

> [W]e cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. . . . The right to speak and publish does not carry with it the unrestrained right to gather information.[17]

The Supreme Court again addressed this issue in *Branzburg v. Hayes*.[18] The question before the Court was whether requiring newsmen to testify before a grand jury would abridge the freedoms of speech and press guaranteed by the first amendment. The Court concluded that the requirement did not.[19] The newsman argued that if a reporter had to reveal his confidences, the source identified and other sources would be deterred from furnishing information. The Court distinguished this case from one involving prior restraint, which would pose significant first amendment considerations.[20] The Court focused on the question of access to information and the constitutional considerations involved in such access:

> It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . .
>
> Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. . . .[21]

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16. 381 U.S. 1 (1965).
17. *Id.* at 16-17.
18. 408 U.S. 665 (1972).
19. *Id.* at 667.
20. *Id.* at 681.
21. *Id.* at 684-85.

In 1978 the press challenged a restriction on access to a county jail, seeking to gain information concerning prison conditions. In *Houchins v. KQED, Inc.*[22] a broadcasting company claimed that denial of access to a jail violated the first amendment. The Supreme Court refused to recognize any special right of access to gather news: "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[23]

A similar case was brought before the Supreme Court in 1974 by four California prison inmates and three professional journalists. In *Pell v. Procunier*,[24] the plaintiffs challenged the constitutionality of a regulation that provided that "[p]ress and other media interviews with specific individual inmates will not be permitted."[25] The media plaintiffs asserted that this limitation on their news-gathering activity unconstitutionally infringed the freedom of the press guaranteed by the first and fourteenth amendments.

The Court balanced the prisoner's first amendment claims against the legitimate policies and goals of the corrections system.[26] In addition, the Court weighed heavily the fact that inmates had an unrestricted opportunity to communicate with the press through visitors and writings.[27]

Members of the press argued that they had a constitutional right to interview and relied on their right to gather news without government interference. Moreover, they argued that no substantial government interest could be shown to justify the denial of access to individual inmates.[28] The Court did not agree, however, that face to face interviews constituted a superior method of news-gathering or that its curtailment amounted to an unconstitutional government interference.[29] In *Pell*, the Court concluded that the Constitution does not impose upon government the affirmative duty to make available to journalists sources of information not

22. 438 U.S. 1 (1978).
23. *Id.* at 15.
24. 417 U.S. 817 (1974).
25. *Id.* at 819.
26. *Id.* at 821.
27. *Id.* at 826.
28. *Id.* at 833.
29. *Id.*

available to the general public.[30]

In a companion case to *Pell*, *Saxbe v. The Washington Post*,[31] the *Post* challenged the Policy Statement of the Federal Bureau of Prisons prohibiting personal interviews between newsmen and inmates. Justice Stewart, writing for the Court, found this case constitutionally indistinguishable from *Pell*,[32] and endorsed the reasoning of the Court in *Pell*.

In sum, Chief Justice Warren's comments in *Zemel v. Rusk*[33] reflect the reasoning consistently adopted by the Supreme Court:

> [t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[34]

B. Due Deference and the State Secrets Privilege

As noted by Mr. Fein, the Government may lodge a formal claim of privilege in a civil action to block access to documents. This privilege basically stops the production of documents instead of blocking the right of access to areas, buildings, and people. The state secrets privilege is rarely used by the government and requires the Secretary of the blocking agency to file a personal affidavit. The affidavit is submitted to the court for the purpose of asserting a formal claim of privilege to protect certain state secrets relating to the national defense and security. While agencies strive to file an affidavit on the public record, the sensitivity of the information may necessitate the filing of an affidavit in camera to disclose specific details to the court. The affidavits filed generally review the nature of the documents and analyze the security considerations that mandate nondisclosure.

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30. *Id.* at 834.
31. 417 U.S. 843 (1974).
32. *Id.* at 851.
33. 381 U.S. 1 (1965).
34. *Id.* at 16-17.

The landmark case regarding the state secrets privilege is *United States v. Reynolds*.[35] In *Reynolds*, the Supreme Court found that a formal claim of privilege would prevail if the trial court was satisfied that military secrets were at stake.[36] Arguably, a protective order would provide sufficient security to protect documents that are produced. A protective order might prevent documents from falling into improper hands. A protective order, however, might not carry out its functions. In another important case, *Halkin v. Helms*,[37] the United States Court of Appeals for the District of Columbia noted that protective orders cannot prevent inadvertent disclosure nor reduce the damage which may result from such inadvertent disclosure.[38] In *Halkin*, the plaintiffs alleged that the defendants, specifically the National Security Agency, violated their constitutional rights by conducting warrantless interceptions of their international wire, cable, and telephone communications.[39] The issue before the court was whether the National Security Agency should be ordered to disclose if this had occurred.[40] In particular, the plaintiffs attacked the court's consideration of three in camera affidavits and in camera testimony.[41] The court found that in camera proceedings are an appropriate means to settle disputed issues of privilege.[42]

The court in *Halkin* stressed that the state secrets privilege is absolute, and that the need for well-informed advocacy must give way to the government's privilege against disclosure of its secrets of state.[43] The court added that the standard of review in considering the privilege was a narrow one and that courts should accord the "utmost deference" to executive assertions of the state secrets privilege.[44] As a rule, this tool has been exercised cautiously by the

35. 345 U.S. 1 (1953).
36. *Id.* at 9-10.
37. 598 F.2d 1 (D.C. Cir. 1978).
38. *Id.* at 7.
39. *Id.* at 3.
40. *Id.*
41. *Id.* at 5.
42. *Id.* (citing Kerr v. United States District Court, 426 U.S. 394, 405-06 (1976); United States v. Nixon, 418 U.S. 683, 714-15 (1974); United States v. Reynolds, 345 U.S. 1, 10 (1953)).
43. 598 F.2d at 7.
44. *Id.* at 9.

Executive to protect only the Nation's most sensitive information.

IV. The Freedom of Speech and of the Press is not Absolute

An employee of the government who accepts the privilege of access to classified information also accepts the restraints which accompany this privilege. The Central Intelligence Agency, the State Department, and the Defense Department generally require employees with access to classified information to sign a secrecy agreement. Once the employee leaves the government, challenges to the continuing effect of such an agreement have been presented in terms of first amendment guarantees.

In the case of *United States v. Marchetti*,[45] a former CIA employee wrote a book containing information acquired during the period he was an employee. The CIA brought suit to enjoin the employee from publishing the book without approval by the CIA. The injunction was granted. Mr. Marchetti then sued when the CIA concluded that some items could not be published because they were properly classified. In *Marchetti* the question was whether the first amendment invalidated a secrecy agreement which required prepublication review of any writing. The court found the agreement constitutional, reasonable and lawful.[46]

Although the court found that judicial review of any action by the CIA disapproving publication of material was essential, the court added that the burden of obtaining judicial review did not rest on the government.[47] In most cases no practical reason exists for judicial review because classification is part of the executive function beyond the scope of judicial review.[48] The court stated:

> There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its

45. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).
46. *Id.* at 1318.
47. *Id.* at 1317.
48. *Id.*

proper context.[49]

While the motives of the former employee may be laudable, that employee is not necessarily in a position to assess the damage caused by publication. The court thus rejected first amendment claims and focused on the fact that the employee knowingly entered the employment agreement and accepted the trust imposed on the employee by virtue of his employment.

In a sequel to the *Marchetti* case, *Alfred A. Knopf, Inc. v. Colby*,[50] plaintiffs sought an order permitting the publication of certain items of classified information. In this case, Marchetti had collaborated with John Marks, a former employee of the State Department, who also was bound not to publish classified information.[51] After the government reviewed the manuscript, a number of items were classified and could not be published.[52] The court stated that the deleted items could be withheld only if they were found to be classified and classifiable under the Executive Order.[53] In other words, the court would review whether appropriate procedures had been followed to classify the information and whether the information met the standards of the Executive Order.

The court recognized that the expertise within the Executive is important in such determinations and the court should presume that a public official who classified the information properly discharged his official duties.[54] The court refused to modify the previous ruling that the first amendment is no bar to an injunction forbidding the disclosure of classified information when:

> (1) the classified information was acquired during the course of his employment, by an employee of the United States agency or department in which such information is handled and (2) its disclosure would violate a solemn agreement by the employee at the commencement of his employment. With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively

49. *Id.* at 1318.
50. 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).
51. *Id.* at 1365.
52. *Id.*
53. *Id.* at 1367.
54. *Id.* at 1368.

relinquished his First Amendment rights.[55]

The court placed great emphasis on this confidential relationship that ought not to be abused. The public trust requires that a "leaker" not be permitted to violate that trust by leaking information to the public, and then claiming that the information is in the public domain and therefore cannot be classified. Further, to permit this to occur would complicate the analysis which may be done of what is or is not actually in the public domain. The publication of information by an official or former official in a position to know may confirm the veracity of information as compared to any writer who may speculate on foreign affairs or defense matters.

Another important case dealing with these issues is *United States v. Snepp*.[56] Snepp, a former CIA employee, published his book without approval or even submission to the CIA.[57] The Supreme Court upheld the imposition of a constructive trust which required Snepp to pay over any profits from the book to the government.[58] The Supreme Court found a compelling government interest in protecting the secrecy of national security information, and that the agreement in question was a reasonable means of protecting the Nation's secrets.[59] The Court carefully examined the vital interests at stake and affirmed the injunction brought to stop Snepp from further publication without approval of the CIA.

In applying the first amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible rather than absolutist approach. All communications, merely because they are spoken or written, are not protected. In the case of *Roth v. United States*,[60] Justice Brennan wrote that the first amendment did not preclude the Court from deciding that libelous utterances were not protected. Threats and bribes are also not protected simply because they are spoken or written.

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55. *Id.* at 1370.

56. 456 F. Supp. 176 (E.D. Va. 1978), *modified*, 595 F.2d 126 (4th Cir. 1979), *modified*, 444 U.S. 507 (1980).

57. Snepp v. United States, 444 U.S. 507, 507 (1980).

58. *Id.* at 515-16.

59. 444 U.S. at 509.

60. 354 U.S. 476, 483 (1957).

V. CONCLUSION

In examining the cases addressing national security and the first amendment, we learn there are no absolutes. The litigation of the legal issues involved in these cases may provide guidance on permissible conduct by both the government and the press but do not necessarily dictate public policy. In the case of media access to Grenada in 1983, the legal issues are clear. This does not, however, preclude the Department of Defense from exploring other methods of working with the press to maximize the press coverage of military operations when feasible. Following the successful completion of the Grenada operation, the Chairman of the Joint Chiefs of Staff established a panel on media-military relations. One of the issues addressed by the panel was access to military operations. The panel's inquiry was not based on any examination of first amendment rights.

The panel recommended that the United States media should cover United States military operations to the maximum degree possible consistent with mission security and the safety of United States forces.[61] The panel recognized that media pooling may be the only feasible way to provide press coverage in certain types of military operations and the Department of Defense should attempt to provide for the largest possible press pool. The panel also concluded that public affairs planning should be conducted concurrently with operational planning.[62]

Following issuance of the panel's report, members of the news media and the Secretary of Defense have held periodic meetings to discuss mutual problems, including media relations during military operations and exercises. It is fundamental that the successful conduct of military operations and the maintenance of effective national defense may require secrecy. Our relationship with other countries depends on mutual trust. Within the Department of Defense, commanders in the field must have the ability to develop plans and communicate with other officials freely and in confidence in combat situations. When the lives of our people in the armed forces are at stake, this freedom should be self-evident.

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61. DEPARTMENT OF DEFENSE, SIDE PANEL REPORT.
62. *Id.*

When security concerns can be met, however, cooperation with the press, including the transportation of reporters on military operations, may be possible.

The United States Constitution historically has served our Nation well because the courts have not interpreted it rigidly. Constitutional questions will continue to present formidable issues as society changes and technology advances. Resolving conflicts between national security and constitutional liberties may continue to be complex because of the compelling nature of the governmental interest in protecting the security of the Nation.