

# Judicial Review of National Security Decisions: United States and United Kingdom

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# JUDICIAL REVIEW OF NATIONAL SECURITY DECISIONS: UNITED STATES AND UNITED KINGDOM

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## I. INTRODUCTION

Several recent national security cases in the United States bring to mind two cases that the American team observed in the United Kingdom during the course of the Seventh Anglo-American Exchange. At the time, the two English cases appeared unique to the American observers. In light of the abundance of "spy trials" in the United States in 1985, however, the two proceedings in the United Kingdom may have greater relevance in the United States than was initially apparent. Indeed, 1985 produced the greatest number of espionage cases ever recorded in the United States, which prompted a committee of the American Bar Association to label it "the year of the spy."<sup>1</sup>

Both English cases, *Secretary of State v. Guardian Newspapers Ltd.*<sup>2</sup> and *Regina v. Secretary of State, ex parte Council of Civil Service Unions*<sup>3</sup> (*GCHQ*), were tried in the High Court of Justice, appealed to the Court of Appeal, and finally decided by the House of Lords. Notable counterparts in the United States in 1985 included *United States v. Morison*,<sup>4</sup> which involved leaks of classified photographic material to a British publication, and *United States v. Walker*,<sup>5</sup> which concerned alleged sales of classified Navy

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1. American Bar Association, Standing Committee on Law and National Security, *Law and National Security 1985: The Year in Review*, INTELLIGENCE REP., Jan. 1986, at 1.

2. [1983] T.L.R., No. 765 (Ch. Dec. 16, 1983), *aff'd on other grounds*, [1984] Ch. 156 (C.A. 1983), *aff'd*, [1985] A.C. 339 (1984).

3. [1984] T.L.R., No. 459 (Q.B. July 17, 1984), *rev'd*, [1984] T.L.R., No. 518 (C.A. Aug. 7, 1984), *aff'd sub nom.* Council of Civil Serv. Unions v. Minister for the Civil Serv., [1985] A.C. 374 (1984).

4. Crim. No. Y-84-00455 (D. Md. Oct. 17, 1985).

5. Crim. No. H-85-0309 (D. Md. Aug. 9, 1985).

defense intelligence to the Soviet Union.<sup>6</sup> After closely examining the deliberations of the English courts in *Guardian Newspapers* and *GCHQ*, this Article compares these decisions with contemporary national security cases in the United States, noting carefully the lessons that can be derived from the British experience in this area.

## II. THE ENGLISH CASES

### A. *Secretary of State v. Guardian Newspapers Ltd.*

The first of the two English cases, *Guardian Newspapers*, involved a clerk in the Ministry of Defence who had leaked a copy of a secret government memorandum to Guardian Newspapers Ltd.<sup>7</sup> The memorandum, which was signed by the Secretary of Defence and addressed to the Prime Minister, suggested ways to handle public relations when the first United States cruise missiles arrived in Great Britain at RAF Greenham Common. After considering the matter for approximately ten days, Guardian Newspapers had published it. The government had made a written demand for return of the document, and the editor had proposed to return it after cutting off a corner which had certain identifying marks. The government had rejected this offer, however, and had brought suit against Guardian Newspapers.<sup>8</sup>

At trial, the Chancery Division of the High Court of Justice considered the "source protection" law that Parliament had enacted in 1981, which provides in part:

No court may require a person to disclose . . . the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.<sup>9</sup>

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6. The "year of the spy" produced many other cases. See, e.g., *United States v. Chin*, Crim. No. 85-00263A (E.D. Va. filed Nov. 23, 1985); *United States v. Pollard*, Magistrate No. 85-778M-01 (D.D.C. filed Nov. 21, 1985).

7. Guardian Newspapers Ltd. publishes *The Guardian*, a well respected, left-of-center, nationally circulated newspaper generally regarded as being among the top three or four newspapers in Great Britain.

8. See [1984] Ch. at 160-61.

9. Contempt of Court Act, 1981, ch. 49, § 10.

The High Court held that this protection does not apply when an owner is trying to recover misappropriated property. As a result, the court concluded that the government was entitled to the memorandum.<sup>10</sup>

The Court of Appeal, presided over by Sir John Donaldson, Master of the Rolls, upheld the High Court's decision on several grounds. All three judges delivered opinions. Sir John Donaldson, summarizing the reasoning of the court, stated:

Whether or not the editor acted in the public interest in publishing this document is not the issue. The Secretary of State's concern is quite different. It is that a servant of the Crown who handles classified documents has decided for himself whether classified information should be disseminated to the public. If he can do it on this occasion, he may do it on others when the safety of the state will truly be imperiled. The editor will no doubt retort that in such circumstances he would not publish, but the responsibility for deciding what should and should not be published is that of the government of the day and not that of individual civil servants or editors. Furthermore—and this is the Secretary of State's case—friendly foreign states may well be prepared to entrust the government of the day with sensitive information if its security is in the hands of ministers, but will not be prepared to do so if it is in the hands of individual civil servants or editors.<sup>11</sup>

Guardian Newspapers then turned over the document. The government soon discovered the informant's identity—perhaps through the identifying marks, although the source never was admitted officially—and it prosecuted the informant under the Official Secrets Acts.<sup>12</sup> The informant pleaded guilty and the court sentenced her to six months in prison.<sup>13</sup> Despite her plight, however, Guardian Newspapers carried its appeal to the House of Lords.

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10. [1983] T.L.R., No. 765.

11. [1984] Ch. at 162-63.

12. See [1985] A.C. at 351 (citing Official Secrets Acts, 1911, 1 & 2 Geo. 5, ch. 28).

13. See *id.*

In July 1984, Sydney Kentridge argued the case for Guardian Newspapers<sup>14</sup> before the House of Lords Appellate Committee, a group of five Lords of Appeal in Ordinary who are known as "Law Lords." At that point, the whole case arguably was moot because Guardian Newspapers had turned over the document and the informant had been convicted and sentenced, and had served her term.<sup>15</sup> The Law Lords, however, noted that the real issue in the case was not the contents of that particular document, but the threat that such leaks could recur.<sup>16</sup> That issue provided the House of Lords with a sufficient reason to hear the case.

Based on two days of oral argument,<sup>17</sup> the Law Lords handed down their decision in October 1984. They unanimously decided that the full scope of section 10 of the Contempt of Court Act, 1981<sup>18</sup> protects newspapers from legal proceedings designed to compel them to disclose their sources of information,<sup>19</sup> but that its protection must be qualified when it conflicts with various other aspects of the public interest.<sup>20</sup> The Act is consistent with this qualification, according to the Lords, because it conditions compelled disclosure upon a showing that disclosure is necessary to promote justice, national security, or the prevention of disorder or crime.<sup>21</sup> Thus, the House of Lords concluded that the protection of section 10 overrides the lawful owner's right to restoration of a document.<sup>22</sup>

The Law Lords divided three to two, however, as to whether the evidence before the trial judge would have justified the holding that disclosure was necessary in the interest of national security if the judge had decided the issue based on a proper interpretation of the law rather than on the assumption that the Act did not apply

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14. *See id.* at 341-43. Sydney Kentridge is one of the leading civil rights lawyers in South Africa.

15. The informant, in fact, just had been released, and she had attended the oral presentation before the Appellate Committee.

16. [1985] A.C. at 343 (Lord Scarman).

17. This lengthy oral argument contrasted sharply with the written submissions in the case. Each side submitted a brief that was no more than 15 pages long.

18. Ch. 49, § 10; *see supra* note 9 and accompanying text.

19. *See, e.g.*, [1985] A.C. at 349 (Lord Diplock).

20. *See, e.g., id.* at 349-50.

21. *See id.* at 350-51.

22. *See id.* at 349.

in cases involving misappropriated property. The Law Lords agreed that the document was rather innocuous and that it had little value to anyone with evil designs on the national security.<sup>23</sup> They also concluded that the affidavit before the judge on behalf of the Ministry of Defence made only a perfunctory showing of necessity.<sup>24</sup> Three of the five Lords, however, concluded that the evidence in the case was adequate to sustain the finding of necessity, although barely so.<sup>25</sup>

The oral arguments in *Guardian Newspapers* were intriguing, and they raised important issues concerning the ability of the Crown to act in the interest of national security. At the time, however, a second case involving national security issues was receiving greater attention. As *The Times of London* opined in an editorial the day after the Lords decided *Guardian Newspapers*, the oral arguments sounded like "rehearsals"<sup>26</sup> for that second case—*GCHQ*.

*B. Regina v. Secretary of State, ex parte Council of Civil Service Unions (GCHQ)*

The dispute in *GCHQ* concerned the banning of trade unions at the Government Communications Headquarters (GCHQ) at Cheltenham, which is the British equivalent of the National Security Agency at Ft. Meade, Maryland. From 1979 to 1981, GCHQ workers had disrupted operations several times through short strikes and other acts of protest. The most serious disruption came in 1981, when twenty-five percent of the GCHQ labor force participated in a one-day strike, which prompted the government to consider a ban on worker combinations. The government originally had rejected the idea because it never had acknowledged publicly the intelligence functions of the GCHQ, and an acknowledgment of those functions might have been necessary to justify a ban. In 1983, however, a Security Commission report publicly had

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23. See, e.g., *id.* at 357 (Lord Fraser).

24. See, e.g., *id.* at 353-55 (Lord Diplock).

25. *Id.* at 356 (Lord Diplock); *id.* at 371 (Lord Roskill); *id.* at 373 (Lord Bridge). Lord Fraser and Lord Scarman dissented from this holding. *Id.* at 359 (Lord Fraser); *id.* at 367 (Lord Scarman).

26. *The Times of London*, Oct. 26, 1984, at 17, col. 3.

acknowledged the GCHQ's intelligence functions and, shortly thereafter, the Minister for the Civil Service had decided to ban union membership at the GCHQ. After the government had rejected a compromise offered by the unions in the form of a "no disruption" agreement, the ban had become effective in March 1984.<sup>27</sup>

The Council of Civil Service Unions, a confederation of trade unions that included the six unions that had been represented at the GCHQ, sought judicial review of the ban in the Queen's Bench Division of the High Court of Justice. Justice Glidewell, a relatively junior member of the High Court,<sup>28</sup> granted leave to seek review on March 8, 1984 and delivered judgment on July 16. He noted that the Minister for the Civil Service had imposed the ban through power derived from an Order in Council<sup>29</sup> issued under the Royal Prerogative. Justice Glidewell held, however, that exercises of powers granted under the Royal Prerogative are subject to the same scrutiny that applies to exercises of powers granted by statute.<sup>30</sup> Justice Glidewell stated that the Crown had the power under its Royal Prerogative to vary the terms and conditions of service for civil servants, but that it could not exercise that power unilaterally.

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27. See [1985] A.C. at 394-96 (Lord Fraser). The government, in imposing the ban, had offered one thousand pounds to each employee who renounced membership in the union—an approach to labor relations that most Americans probably would find surprising. Approximately ninety-five percent of the GCHQ staff had accepted the offer.

28. Justice Glidewell since has been promoted to the Court of Appeal, an interesting commentary on the independence of judicial selection in Great Britain in view of the general feeling that his decision in favor of the union membership was an embarrassment to the government and to the Prime Minister. The Court of Appeal and the Law Lords apparently were convinced that the national security argument had not been presented properly at the High Court.

29. Order in Council, 1982, art. 4. This order provides, in pertinent part:

As regards Her Majesty's Home Civil Service—(a) the Minister for the Civil Service may from time to time make regulations or give instructions— . . . (ii) for controlling the conduct of the service, and providing for the classification of all persons employed therein and . . . the conditions of service of all such persons. . . .

*Id.*

30. [1984] T.L.R., No. 459.

Instead, according to Justice Glidewell, the rules of “natural justice”<sup>31</sup> require a Minister who contemplates withdrawal of rights relating to membership in trade unions and to freedom from unfair dismissals to consult with the workers involved, or with their representatives in the various unions. Justice Glidewell concluded that the staff of the GCHQ had a “legitimate expectation” that the Minister would consult them or their unions before making any decision affecting their right to join a union.<sup>32</sup>

Soon after the High Court’s decision, the trade unions mounted a campaign to win back the membership of some 7000 employees in the GCHQ and in certain other stations that had been affected by the ban.<sup>33</sup> The government then considered accepting the ruling of the lower court and entering into the type of negotiations that the High Court had indicated it should have undertaken before it had terminated the workers’ right to join a union. Ultimately, however, the government chose to take the matter to the Court of Appeal. On August 6, 1984, that court reversed the High Court, ruling that the Prime Minister had acted within the law and that the failure to consult the workers prior to imposing the ban had not violated “natural justice.”<sup>34</sup> According to Lord Chief Justice Lane, who chaired the three judge panel of the Court of Appeal, the courts have no power to interfere with governmental decisions grounded on national security considerations. Although a court might be able to inquire into the Royal Prerogative in other areas, it cannot inquire into “any action taken . . . which can truly be said to have been taken in the interests of national security,” such as the ban on unions in *GCHQ*.<sup>35</sup> In essence, the court held that the Crown is the sole judge of what the national security requires,<sup>36</sup> and that once it invokes the national security justification, all

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31. The British courts use the phrase “natural justice” frequently in a manner closely akin to the concept of “due process” in the United States. During the review of *GCHQ* in the House of Lords, however, Lord Roskill suggested that the phrase should be discarded and that the concept of a “duty to act fairly” should replace it. [1985] A.C. at 414.

32. [1984] T.L.R., No. 459 (Q.B. July 17, 1984).

33. *The Times of London*, July 17, 1984, at 1, col. 2.

34. [1984] T.L.R., No. 518 (C.A. Aug. 7, 1984).

35. *Id.*

36. *Id.* (citing *The Zamora*, [1916] 2 A.C. 77, 107 (P.C.)) (“Those who are responsible for the national security must be the sole judges of what the national security requires.”).

other considerations, such as the prior consultation argument in *GCHQ*, become moot.<sup>37</sup>

The unions appealed this decision to the House of Lords and, in October, a five member panel of the Law Lords heard oral arguments. After six days of oral arguments, the Law Lords took the case under consideration and, on November 22, 1984, they delivered their opinion orally to the House of Lords.<sup>38</sup> With national security again the critical issue, the Lords unanimously upheld the ruling of the Court of Appeal in favor of the government. According to the Lords, the *GCHQ* employees normally would have had a legitimate expectation that they would be consulted before the ban was imposed,<sup>39</sup> but these fairness considerations can be outweighed by the requirements of national security.<sup>40</sup> These requirements were solely for the executive to decide, and not the courts, the Lords stated, and the evidence showed in this case that the government had considered all the proper factors before it made its determination.<sup>41</sup>

Although the decision to dismiss the appeal ultimately rested on national security grounds, all five Law Lords also discussed whether judicial review laid for Orders in Council derived from the Royal Prerogative. Their conclusions concerning this issue indicate that the courts may review such cases much more closely when

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37. Both the Court of Appeal and the High Court criticized the Prime Minister for issuing the critical instruction to ban trade unions merely by informing the cabinet secretaries orally, terming this oral notification a "surprising" way to take such an action. *Id.*; see [1984] T.L.R., No. 459. The *Economist* commented: "[I]f government decisions are intended to have legal effect, they should surely be both written and public." *ECONOMIST*, Aug. 11, 1984, at 50. The *Economist* also subjected the decision of the Court of Appeal to more general criticism, noting the opinion of Neil Kinnock, leader of the opposition Labor party, that the decision gave the "government an unlimited license which is open to abuse and which contradicts all the values of our democracy." *Id.*

38. This oral presentation in the chambers of the House of Lords was rather unusual, and it illustrates the degree of attention that the case received. Opinions of the Law Lords, although cast as speeches in the House of Lords, usually are written opinions; they rarely are delivered orally.

39. See, e.g., [1985] A.C. at 401 (Lord Fraser). This exception, however, did not rise to the level of a legal right to consultation. See *id.*

40. See *id.*

41. See *id.* at 401-03.

issues of national security are not involved.<sup>42</sup> Like the High Court,<sup>43</sup> the Lords rejected the proposition that judicial review of Orders in Council issued under the Royal Prerogative should be more limited than review of Orders issued under the authority of statutes enacted by the Parliament.<sup>44</sup> Because the Government had invoked the national security justification, however, the Lords held that they could not invoke these general rules of review to challenge the discretion of the Prime Minister in this area.<sup>45</sup>

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42. See, e.g., *id.* at 399 (indicating that courts should not construe an Order in Council differently merely because it was made under the authority of the Royal Prerogative rather than under the authority of a statute).

43. See *supra* note 30 and accompanying text.

44. See [1985] A.C. at 399 (Lord Fraser).

45. See *id.* at 401-03.

Besides the two cases witnessed during the Exchange, a dispute now being contested in the courts of the United Kingdom and Australia is reminiscent of parallel national security cases in the United States. The dispute revolves around the attempt of Peter Wright, a former official of MI5, the British intelligence service, to publish his memoirs, which, among other things, contain an accusation that Sir Roger Hollis, the former head of MI5, was a Soviet agent. The British Government has responded by filing an action against Wright and his publisher in the Supreme Court of New South Wales, Australia, where the book was to be published, to enjoin publication. The Australian court is expected to rule later this year. See *The Times of London*, Sept. 17, 1985, at 9, col. 4 (action filed); *id.*, Mar. 25, 1986, at 7, col. 1 (describing the issues); *id.*, June 3, 1986, at 9, col. 4 (describing oral argument); *id.*, July 18, 1986, at 5, col. 8 (describing additional evidence to be given later in 1986). The British Government also has succeeded in obtaining an injunction in its courts against publication of excerpts of Wright's book by two English newspapers, including *The Guardian*. *Attorney-General v. The Observer Ltd.*, T.L.R., No. 434 (C.A. July 26, 1986).

This dispute is reminiscent of *Snepp v. United States*, 444 U.S. 507 (1980), in which the United States Supreme Court found that a former CIA employee had violated his employment contract by publishing a book without prior clearance by the agency. The Court found that the publication had irreparably harmed the United States Government, *id.* at 513, and it imposed a constructive trust on the proceeds of the book for the benefit of the United States. *Id.* at 515-16. The proceedings concerning Wright's book are distinguishable from *Snepp*, however, because no contractual provisions are involved and the British Government is resting its claim purely on national security considerations.

The injunction against *The Observer Ltd.* and *Guardian Newspapers Ltd.*, like the earlier *Guardian Newspapers* case, also provides an interesting contrast to the less deferential view of government claims of national security considerations taken by the United States Supreme Court in the *Pentagon Papers Case*. See *infra* notes 46-47 and accompanying text. In fact, unlike *Guardian Newspapers*, the recent *Observer* case cannot be distinguished on the grounds that it does not involve a prior restraint on speech. See *infra* note 48 and accompanying text. If the injunction is upheld by the House of Lords, it will demonstrate even more clearly the great difference between the approaches of the two countries to government claims that restrictions on the press are necessary to protect national security interests. See *infra* text following note 62.

### III. NATIONAL SECURITY CASES IN THE UNITED STATES: COMPARISON AND CONTRAST

In both British cases, the courts had to consider whether the government had demonstrated sufficiently that the action in question was necessary in the interest of national security. This issue was reminiscent of the decision of the United States Supreme Court in *New York Times Co. v. United States*<sup>46</sup> (*Pentagon Papers Case*), in which the United States government sought to prevent publication of Department of Defense documents on the grounds that such a prohibition was necessary in the interest of national security. In the *Pentagon Papers Case*, unlike the English cases, the Court held that the government had not made the requisite showing of necessity.<sup>47</sup> The *Pentagon Papers Case*, however, is distinguishable from the two English cases because it involved an attempt to impose a prior restraint on speech rather than an attempt to require a newspaper to hand over a document to the government or an attempt to regulate union membership. Because of the involvement of a prior restraint on speech, the government in the *Pentagon Papers Case* had to shoulder a much heavier burden in demonstrating necessity than the Crown had to shoulder in *Guardian Newspapers* or *GCHQ*.<sup>48</sup>

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46. 403 U.S. 713 (1971) (per curiam).

47. *Id.* at 714.

48. *Id.* In the oral arguments in *Guardian Newspapers*, counsel for the newspaper cited three other United States cases to support the contention that journalists should not be compelled to disclose their sources unless all other means of obtaining the desired information had been exhausted. See [1985] A.C. at 342 (citing *In re Petroleum Prods. Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); and *Cary v. Hume*, 492 F.2d 631 (D.C. Cir. 1974)). The Law Lords ruled that these three cases also were inapposite because, even if the United Kingdom did recognize a right for journalists analogous to the one granted in the United States through the first amendment, no evidence indicated that the Crown in fact had not made other attempts to obtain the information and had found those attempts fruitless. See *id.* at 367 (Lord Scarman).

Floyd Abrams, who represented the New York Times Company in an of counsel capacity in the *Pentagon Papers Case*, stated in a recent seminar, in response to a question about the decision of the British courts in *GCHQ*, that he would advise clients in the United States that they had no obligation to return a secret document that came into their hands and that no United States court would force them to do so. *THE MEDIA AND GOVERNMENT LEAKS 8* (P. Cathcart & D. Fletcher eds. 1984) (report of a conference cosponsored by the Standing Committee on Law and National Security, American Bar Association, and the Media Institute).

Several of the issues in the United States "spy trials" in 1985, however, are not as easily distinguishable. In fact, one of these cases, *United States v. Morison*,<sup>49</sup> presented national security issues that were quite similar to the issue presented in *Guardian Newspapers*. In *Morison*, as in *Guardian Newspapers*, the controversy centered around an individual's decision to leak certain material to the press, and the press' decision to publish it. Specifically, the defendant in *Morison* was charged with sending three secret photographs and some other classified information to *Jane's Defense Weekly*, a British magazine.<sup>50</sup> Morison's apparent motive was to provide information that in his opinion deserved public exposure, and possibly to secure employment with the publication.<sup>51</sup> He was not involved, however, in a scheme to spy for a foreign power for cash, as was involved in other recent cases such as *United States v. Walker*.<sup>52</sup>

*Morison*, like *Guardian Newspapers*, turned chiefly on the issue of government document protection, this time in the context of the United States laws dealing with espionage<sup>53</sup> and theft of government property.<sup>54</sup> In moving to dismiss the charges, Morison contended that a theft of "information" does not constitute a theft of government "property" under the applicable statute.<sup>55</sup> Morison also maintained, with the support of amicus briefs submitted by members of the United States press, that the legislative history of the law concerning espionage indicated that Congress was concerned with the release of information to spies and saboteurs, but not with leaks to the press.<sup>56</sup> The district court denied Morison's motion to dismiss, stating that the law concerning theft of

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49. Crim. No. Y-84-00455 (D. Md. Oct. 17, 1985).

50. See *United States v. Morison*, 604 F. Supp. 655, 657 (D. Md. 1985) (memorandum and order denying defendant's motion to dismiss), *appeal dismissed without opinion*, 774 F.2d 1156 (4th Cir. 1985).

51. See *id.* at 659 (noting Morison's argument that he was not a "spy" in the classic sense of the word); see also *United States v. Morison*, 622 F. Supp. 1009 (D. Md. 1985) (further proceedings) (granting government's motion to exclude testimony relating to the patriotism of the defendant over defendant's objection that it showed the absence of an improper motive).

52. Crim. No. H-85-0309 (D. Md. Aug. 9, 1985); see *supra* text accompanying note 6.

53. 18 U.S.C. § 793(d) (1982).

54. 18 U.S.C. § 641 (1982).

55. See 604 F. Supp. at 658.

56. See *id.* at 658, 659.

property had been applied in at least two other cases involving the disclosure of classified information,<sup>57</sup> and that the law concerning espionage should apply to anyone who uses a security clearance to obtain classified information to release it to the world.<sup>58</sup>

More importantly for the purposes of this Article, the defendant in *Morison* argued that the United States law governing espionage is constitutionally overbroad because it uniformly restricts the first amendment right freely to disseminate the information contained in certain documents whether or not those documents contain information so sensitive to the national security that the government would have a compelling interest in preventing its disclosure sufficient to outweigh first amendment concerns.<sup>59</sup> The court also dismissed this argument, but not without demonstrating some sympathy to first amendment considerations. According to the court, any possible overbreadth problem could be cured by giving a jury instruction requiring a finding that the government had proved each document sufficiently "relate[d] to the national defense" as to come within the language of this statute.<sup>60</sup> The court, therefore, refused to grant the defendant's motion to dismiss.

By reading this requirement of proof into the statute, the court effectively imposed a significant burden on the government to demonstrate that its classification of a document was necessary for the national security and that the information contained was not merely "harmless material."<sup>61</sup> This judicial second-guessing of government national security decisions contrasts starkly with the deferential attitude of the British courts in cases such as *Guardian Newspapers* and *GCHQ*, in which the courts held that decisions

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57. *Id.* at 663 (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980), and *United States v. Boyce*, 594 F.2d 1246, 1252 (9th Cir. 1979)). The court also noted that the government had attempted to apply the section to the theft of classified information in its widely publicized prosecution of Daniel Ellsberg, but that that attempt had been aborted because of prosecutorial misconduct. *See id.* (citing *United States v. Ellsberg*, 687 F.2d 1316 (10th Cir. 1982)). The court did note, however, that Judge Winter of the United States Court of Appeals for the Fourth Circuit, which is the court that will review any appeal in *Morison*, has contended that the law concerning theft of government property does not apply to theft of classified government information. *See id.* (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 922-28 (1980) (Winter, J., concurring)).

58. *Id.* at 659.

59. *Id.* at 660.

60. *Id.* at 660-61.

61. *See id.* at 661.

involving national security are the sole prerogative of the Crown and that the courts can look only into whether those decisions were made in good faith and not into the merits of the Crown's determinations.<sup>62</sup> Recent United States cases such as *Morison*, which indicate on facts at least analogous to recent English cases that the United States courts are willing to examine the merits of the government's national security decisions even though the facts involve less compelling first amendment considerations than those involved in the *Pentagon Papers Case*, show that the difference between the approaches of the two countries' judiciaries in national security cases is real and not merely fact-based. The English courts are significantly more deferential.

#### IV. CONCLUSION

Although comparisons between the United States and the United Kingdom often are strained, especially in the areas of constitutional law and relations between the executive and the judiciary, one can say without much fear of contradiction, in light of recent cases in both countries, that the English courts are much more deferential than their American counterparts to executive decisions involving national security. One could posit many complicated theories involving differences in the two countries' systems and structures of government in an attempt to explain this difference. The real distinction, however, may lie in the fact that the British traditionally place much greater faith in their executive branch than Americans do, as evidenced by the statement of Lord Denning, Master of the Rolls, in a 1977 case involving the deportation of an American reporter who allegedly was prepared to publish information concerning GCHQ:

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security

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62. See *supra* notes 36-37 & 45 and accompanying text.

has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.<sup>63</sup>

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63. *R. v. Secretary of State, ex parte Hosenball*, [1977] 1 W.L.R. 766, 783 (C.A.), *petition for leave to appeal dismissed*, [1977] 1 W.L.R. 789 (H.L.).