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Why The First
Amendment Is Not
Incompatible With
National Security
Interests

By Hon. Martin L. C. Feldman



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WHY THE FIRST AMENDMENT IS NOT
INCOMPATIBLE WITH NATIONAL SECURITY INTERESTS:
MAINTAINING A CONSTITUTIONAL PERSPECTIVE

by The Honorable Martin L. C. Feldman

INTRODUCTION

Bay of Pigs. Pentagon Papers. Watergate. Now the Iran arms affair. Those words no doubt evoke concern in the minds of people whose daily precincts include the highest levels of government service. They perhaps also bring a sense of contentment--indeed, even fulfillment--to those whose agenda is vigilance for the safety of the First Amendment.

It is fitting and current then that, as part of its Bicentennial Constitutional Lecture Program, The Heritage Foundation asks the question: "Why the First Amendment is not incompatible with national security interests." It is a timely question. Present events confirm it as an important one in this era of our Constitution's bicentennial. I have, however, a small but, I believe, important variation to offer: Is national security incompatible with the First Amendment?

Why offer what I hope will not be viewed as an impudent change to the question?

Unlike totalitarian nations, which hold fast to an unyielding primacy for national security, nations in which all other societal values are subordinate to national security concerns, ours is different; free countries are different. You see, all nations have a national security obsession; but it is only free nations that also regard and give succor to the right of expression. Free expression is the anchor of democracies. So we must ask whether national security is somehow incompatible with free expression as we have come to revere it. Every nation strives for security without regard to ideology. But our constitutional republic equally heralds freedom of expression,

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embodied in the First Amendment, as a requisite fundamental value. Our society, like all societies, knows well the need for national security, but we also question the value of life in a regime where perceived notions of national security serve as the underlying measuring rod for the monitoring of all civil liberties and the diminishment of individual dignity. Ours is a society that recognizes the tension that exists between national security objectives and free speech, but also states that our national security depends as much on maintaining an intelligent and informed public citizenry as it does on government secrecy.

Thus we reject the classic incompatibility between free speech and national security, which is explicit in autocratic and totalitarian regimes. Ours is a nation which boasts that both principles share a balanced status under the Constitution. We may rightly be proud that ours is not a society where national security interests may be invoked to justify a wholesale suspension of constitutional order.

At the same time, to deny that there is often sharp and precarious competition between the exercise of free speech, on the one hand, and the dogged protection of national security objectives, on the other, is to ignore history's lessons. Recent events have focused increased public attention on the seemingly steadfast clash of these competing constitutional principles. Free speech enthusiasts, championed by the media, find themselves pitted against national security proponents, who urge that a greater sensitivity to the secret needs of government is warranted. How we as a society respect and cultivate that delicate balance, in the wake of new media challenges and assertive public debate, is in large measure a matter of maintaining a firm constitutional perspective. It speaks to what we and our Constitution mean to the underpinnings of Western civilization. And so, the question: Is national security incompatible with the First Amendment?

THE CASE FOR SECRECY: BEYOND POLITICS

Do we need secrecy in government--in a free and open government? Of course we do. But freedom and secrecy pose an unsettling national enigma for those charged with the guardianship of our national ideals. Listen to the words of Sir William Stephenson, former head of the British Secret Service, from his compelling book, A Man Called Intrepid:

The weapons of secrecy have no place in an ideal world. But we live in a world of undeclared hostilities; in which such weapons are constantly used against us and could, unless countered, leave us unprepared again; this time for an onslaught of magnitude that staggers the imagination.

And while it may seem unnecessary to stress so obvious a point, the weapons of secrecy are rendered ineffective if we remove the secrecy. One of the conditions of democracy is freedom of information. It would be infinitely preferable to know exactly how our intelligence agencies function, and why, and where. But this information, once made public, disarms us.

So there is the conundrum: How can we wield the weapons of secrecy without damage to ourselves? How can we preserve secrecy without endangering constitutional law and individual guarantees of freedom?

Look at the anxiety created by the collision between open expression and national security.

For instance, the Reagan Administration urges the press to refrain from reporting on the delivery of arms to Iran to protect the lives of American hostages held captive in Beirut; the story quickly spreads, however, across the nation after a leak in the obscure Middle East press. The New York Times tells the story of the Pentagon Papers, but withholds talk of the Bay of Pigs invasion until after the ill-fated skirmish. The Washington Post uncovers Watergate.

For instance, United States military authorities exclude the press corps from the invasion of the island of Grenada, and they delay until 48 hours after the invasion transporting members of the press from the neighboring island of Barbados to Grenada so they can report on the military operations in progress. Some members of Congress react by introducing a resolution calling for the impeachment of President Reagan for allegedly abrogating First Amendment freedoms.¹

For instance, Richard Welch, Central Intelligence Agency Station Chief in Athens, is murdered in December 1975, less than one month after being named in print as a CIA operative by Philip Agee, himself a former CIA agent, triggering congressional clamor for legislation outlawing such knowing disclosure of critical intelligence information.

For instance, the infamous "Walker Spy Ring," said by the intelligence community to be the most damaging spy ring since the end of the Second World War is uncovered and prosecuted. Significant national setbacks are acknowledged. And it is all there to read about over morning coffee.

1. Cassell, Restrictions of Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record War," 73 Geo. L.J. 931, 931-932 (1985).

Are these the symptoms of a healthy society, or the signals of a robust national death-wish?

While the history of the relationship between national security and free speech concerns is marked by its share of partisan politics (itself, a sign of the health of the First Amendment), there is overwhelming consensus in our society for the view that certain national security information must be protected from disclosure; that, for the sake of our mutual safety, all must not be told. This pervasive and fundamental recognition of the need for secrecy can be said to transcend politics and rest upon the conviction that to reveal all would be to expose our nation to the hazards and ravages of international hostilities.

Thus the need for secrecy presents itself in a variety of contexts, which implicate national security and, in any open society, quickly pose conflict with ideas of free expression.

Information leaks about military plans, strategies, and the strength and deployment of forces provide invaluable intelligence leads to foreign adversaries and inevitably cause the failure of military objectives or operations. Disclosure of information relating to weapons design and research and to the details of nuclear technology can have shattering consequences by placing such information in the hands of unfriendly adventurers. Leaks of information regarding our advanced technology of lasers, kinetics, and computers can easily erase strategic advantages of inestimable value. Efforts by the government to obstruct dissemination of this type of information with the shield of national security have generated much debate in the scientific community as well as vocal protests from private researchers and developers who seek rewards for their work through the commercial exploitation of such materials.

Obviously, security measures are necessary to ensure the proper functioning of our intelligence apparatus. Disclosure of the identity of agents, or their sources, unqualifiedly impairs their ability to gather information and imperils the lives of those named, and probably others. Public disclosure of systems and methods and of cryptologic information alerts a hostile nation to the need to develop countermeasures and neutralizes our intelligence efforts. Further, and even more fatal, doubts about the government's ability to keep a secret leaves friendly nations reluctant to share their intelligence with us. Why be our partner in matters that require discretion?

Finally, as the recent Reykjavik conference teaches, secrecy plays an indispensable role in the conduct of diplomacy, or as in the case of Dr. Kissinger's first visit to China in the Nixon presidency, secrecy can make possible diplomatic initiatives designed to open useful channels of communications with otherwise hostile parties. Quite patently, confidentiality enables representatives of government

to speak with candor about matters which, if publicized, could cause domestic turmoil or international disillusionment. Secrecy, then, encourages substantive bargaining and helps to prevent public stalemates fueled by a desire to avoid being seen as backing down, losing face, or "blinking" (a term used during the Daniloff affair). Secrecy avoids the dangerous cosmetics of the international political theater.

The need for secrecy at high levels of government is not new. It has been tolerated, appreciated, and understood throughout the history of free discourse. Need I remind this audience, the Constitutional Convention, which resulted in the confection of our magnificent governing document, held its deliberations in secret? It is said that James Madison later expressed the view that publicity would have surely prevented the consensus necessary for adopting the Constitution.² Surely none can question that secrecy and confidentiality play a significant role in our society and are a necessary touchstone of effective government. To what extent the interests of national security may serve as a legitimate justification for the control of speech remains, however, a question of constitutional scale.

THE CASE FOR OPENNESS: PROTECTING INFORMED SELF-GOVERNMENT

What sort of cohesive partnership between secrecy and free speech can endure in a democracy?

Reflecting upon the successful efforts of his Administration to silence news stories prior to the invasion of the Bay of Pigs, President Kennedy is said to have remarked paradoxically to the managing editor of The New York Times in its aftermath: "Maybe if you had printed more about the operation, you would have saved us from a colossal mistake."³

Then we encounter the current Iran arms controversy. Government officials deny knowledge of the covert activities conducted by employees of the National Security Council. Select congressional committees are assembled, and an independent prosecutor is appointed to investigate possible violations of law. The Administration notes that mistakes are made. The story is all out in the open. Congress becomes agitated and the American public seems confused.

2. Bruce E. Fein, Access to Classified Information: Constitutional and Statutory Dimensions, 26 Wm. & Mary L. Rev. 805 (1985).

3. F. Friendly and M. Elliot, The Constitution: That Delicate Balance, 61 (1984).

