Privacy and the Constitution

Samuel J. Ervin Jr.

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INTRODUCTION

One of the most important guarantees in the Bill of Rights is that of privacy. The Supreme Court of the United States has interpreted this right to be implied in each of several amendments to the Constitution. According to the decision in *Griswold v. Connecticut*, specific guarantees "have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[1]

While the Justices in the *Griswold* case disagreed among themselves about the reach of various amendments as they affected the association of marriage under the Connecticut birth control law, the opinion of the Court was consistent with many others in which it had found that privacy is an aspect of life necessary to the enjoyment and exercise of the freedoms protected by the Bill of Rights, especially the freedoms secured by the first, fourth, and fifth amendments.

As early as 1885, in referring to the principles of the fourth and fifth amendments that had been reflected in the early case of *Entick v. Carrington*,[2] the Court stated:

> [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[3]

In 1928, Mr. Justice Brandeis referred in the following terms to the broad scope of the protections guaranteed by the fourth and fifth amendments:

> The makers of our Constitution undertook to secure conditions favora-

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[1]381 U.S. 479, 484 (1965) (citation omitted).

[2]19 Howell's State Trials 1029 (1765).

[3]Boyd v. United States, 116 U.S. 616, 630 (1885).

> ble to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[4]

Congress has received many complaints of governmental invasions of individual privacy. The variety of practices and policies is limited only by the ingenuity and creativity of the officials responsible for them. Their range suggests that there are fashions in follies as in everything else. They run the gamut from mere aggravations, inconveniences, and offenses to the sensibilities, to more serious threats to freedom. They include, but are not limited to, unwarranted surveillance and investigative programs, unauthorized data banks, intrusive questionnaires unnecessary to the needs of government, letter-opening, lie-detectors, psychological tests, unwarranted police entry to dwellings, coercion of public employees in an effort to promote political programs of the Administration, and requirements to attend psychological sensitivity sessions in order to change the individual's attitudes toward other individuals and toward social problems.

On the basis of the complaints received by the Senate Constitutional Rights Subcommittee, I have concluded that the great majority of the grievances which individuals voice today about invasions of privacy are nothing more nor less than violations of constitutional guarantees, especially those contained in the first, fourth, and fifth amendments to the Constitution.

In a dissenting opinion to the *Griswold* case, Justice Black warned against the danger of challenging unconstitutional acts on the basis of common law concepts of privacy.[5] The average man, he stated, is as concerned about infringements on his liberties whether perpetrated quietly or in public. He agreed that "[t]here are . . . guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities."[6] However, he cautioned that "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the

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[4]Olmstead v. United States, 277 U.S. 438, 478 (1928).

[5]381 U.S. at 508-10 (1965) (dissenting opinion).

[6]*Id.* at 508.

crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."[7]

For these reasons, it is helpful to discuss current privacy issues in the context of freedom of the individual, as it is protected by the Bill of Rights.

FREEDOM OF THE INDIVIDUAL

Freedom for the individual was bought for us long ago by the blood, sweat, tears, and prayers of multitudes of men and women, great and small. The Founding Fathers esteemed it life's supreme value. They so testified by declaring in the preamble to the Constitution that they ordained and established that instrument to preserve the blessings of liberty for themselves and their posterity.

Freedom is hard to win or preserve but easy to lose. The price of its keeping is eternal vigilance, and this vigilance will be exercised only by those stout-hearts who love freedom above all things and are always ready to do battle for it against its enemies, doubt and fear.

Doubt lacks faith in freedom and fear is afraid of freedom. When doubt and fear prevail, government becomes tyrannous, and people become tolerant of tyranny.

THE BILL OF RIGHTS

The Founding Fathers apprehended these truths. Moreover, they were aware that history repeats itself. For these reasons, they knew that the tyrannies of the past would be attempted in the future in the land for which they were creating a government; that the government they were creating would undertake in time of doubt and fear to suppress by sharp measures exercises of freedom displeasing to it; and that freedom itself would thereby be put in peril unless it was protected by irrepealable constitutional law. And so the Founding Fathers added the Bill of Rights to the Constitution to place freedom beyond the reach of any President or any Congress that might doubt the wisdom of America's commitment to freedom or that might fear its exercise by Americans.

The aim of the Bill of Rights is aptly described in these words in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects

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[7] *Id.* at 509.

> from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[8]

A TIME OF DOUBT AND FEAR

Ours is a time of doubt and fear. Certain nations threaten the peace of the world and the security of our country. Violent crime stalks our land. In the recent past, riotous mobs have burned and looted in some of our cities, and disquieting agitators have staged violent, unlawful demonstrations on public streets and college campuses.

These things have frightened many Americans, including some in high offices. These Americans have lost faith in America's commitment to freedom. They demand the abridgment of historic freedoms of our people and attempt to justify their demand by the plea that there is no other way to obtain security for our land.

Let us reject this plea with words uttered by William Pitt, the younger, in the House of Commons in 1783: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."[9] And let us remind ourselves of the admonition given to Americans by Benjamin Franklin in even more troublous times: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[10]

I am not among those who doubt and fear. I hasten to affirm, however, that I do not view the threat from abroad or the crime at home with complacency. They present problems of the gravest nature. There are, however, forthright and rational ways to confront these problems without abridging basic freedoms.

America will remain the land of the free only if it remains the home of the brave. Free men can confront the threat to our national security by keeping their hearts in courage and patience and being prepared to lift up their hands in strength; and a free society can combat crime effectively only by affording speedy and fair trials to those charged with criminal acts and imposing appropriate sentences on the ones who are

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[8]319 U.S. 624, 638 (1943).

[9]BARTLETT'S FAMILIAR QUOTATIONS 496 (14th ed. 1967).

[10]*Id.* at 422.

adjudged guilty. However, Americans of little faith and much fear have recently manifested their purpose to abridge freedoms guaranteed by the first and fourth amendments.

THE FIRST AMENDMENT

The first example of this abridgment of constitutional freedoms can be found in President Nixon's recent Executive Order No. 11605,[11] which undertakes to give the Subversive Activities Control Board new sweeping powers to label various organizations or groups as intellectually or politically dangerous. An appreciation of the true effect of this order requires first an appreciation of the first amendment. This is so because the order obviously is inspired by a lack of faith in the first amendment freedoms and a fear of their exercise by persons whose thoughts and words are understandably offensive to the establishment.

The first amendment outlaws governmental action that abridges freedom of thought, or freedom of speech, or freedom of the press, or freedom of association, or freedom of assembly, or freedom of petition, or freedom of religion. These freedoms embrace and nourish a kindred freedom, the freedom of dissent.

Each of these freedoms, which may be called first amendment freedoms, were created to make Americans politically, intellectually, and spiritually free. The novelist Thomas Wolfe sensed this when he said:

> So, then, to every man his chance—to every man, regardless of his birth, his shining, golden opportunity—to every man the right to live, to work, to be himself, and to become whatever thing his manhood and his vision can combine to make—this, seeker, is the promise of America. I do not believe . . . that the ideas represented by "freedom of thought," "freedom of speech," "freedom of press," and "free assembly" are just rhetorical myths. I believe rather that they are among the most valuable realities that men have gained, and that if they are destroyed men will again fight to have them.[12]

The first amendment grants its freedoms to all persons within the boundaries of our country without regard to whether they are wise or foolish, learned or ignorant, profound or shallow, brave or timid, or devout or ungodly, and without regard to whether they love or hate our

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[11]Exec. Order No. 11,605, 3 C.F.R. 176 (Supp. 1971).

[12]T. WOLFE, YOU CAN'T GO HOME AGAIN 508 (1940).

country and its institutions. Consequently, the amendment protects the expression of all kinds of ideas, no matter how antiquated, novel, or queer they might be. In the final analysis, the first amendment is based upon an abiding faith that our country has nothing to fear from the exercise of its freedoms as long as it leaves truth free to combat error. I share this faith.

To be sure, the exercise of first amendment rights by others may annoy us and subject us at times to tirades of intellectual or political rubbish. This is a small price to pay, however, for the benefits which the exercise of these rights bestows on our country.

The Nature of First Amendment Freedoms

The first amendment protects the expression of ideas, not the commission of acts, and for this reason cannot be invoked to justify criminal or violent deeds. It is explicit in the first amendment that the freedom of the people to assemble to petition for the redress of grievances must be exercised peaceably; and it is implicit in it that the other freedoms it secures must be exercised in like manner.

First amendment freedoms are simply designed to secure to the people a constitutionally protected right to use the means that nature and man's ingenuity afford them to express to others their thoughts, ideas, and desires concerning government, society, religion, and all other things under the sun. Inasmuch as expression has persuasive power, this right must be recognized and exercised if government is to be responsive to the will of the people and if society is to be free.

Since one of the principal purposes of the first amendment is to make America a politically free society, it assures to every person or group of persons the right to express publicly ideas concerning any problems of government or society without prior restraint or fear of subsequent punishment, even though the ideas are displeasing to government or are believed by a majority of our citizens to be false and fraught with evil consequences.

Why did the Founding Fathers secure this right to every individual and association and assembly within our borders? There are two answers to this question, one philosophical and the other pragmatic. As philosophers, the Founding Fathers believed that free and full debate teaches men the truth and frees them from the worst sort of tyranny, tyranny over the mind; and as pragmatists, the Founding Fathers believed that free and full debate is vital to the civil and political institutions they established.

The Founding Fathers were right on both counts. Freedom of thought and speech are the things that distinguish our country most sharply from totalitarian regimes. They enable our country to enjoy a diversity of ideas and programs and to escape the standardization of ideas and programs that totalitarian tyranny requires.

In addition, a free and full interchange of ideas concerning the problems of government and society makes us aware of conditions and policies that need correction, and induces us to make, in apt time and in a peaceful way, the reforms that changing times demand. As a consequence, violent revolution has no rational or rightful place in our system.

Power of Government to Prohibit or Punish Speech

Like all freedoms, first amendment freedoms may be abused. Society is often disturbed by those who abuse these freedoms to protest, either rightly or wrongly, conditions or policies that they deplore. Nevertheless, society must ordinarily tolerate these abuses by protestors, however much it may hate their thoughts and words. This is true because the power of government to deal with them is limited by the first amendment.

It is well that this is so. If protest is justified, it may lead to reform; and if it is unjustified, protest may relieve at least temporarily the tensions of the protestors. In either event, protest has therapeutic value for both protestors and society.

Freedom of thought is absolute and cannot be limited or punished by government in any way. However, other first amendment freedoms are qualified in the sense that their exercise may be circumscribed by government within narrow limits to protect other overriding social interests.

The general rule is that people may express their ideas freely and associate or assemble freely to make their ideas effective. But this general rule does not prevail in respect to the exercise of speech, association, or assembly that defames others, invades the privacy of others, constitutes obscenity, incites to crime or violence, obstructs the courts in the administration of justice, amounts to sedition, or imperils the national security. Government may punish by law past speech, association, or assembly falling within these narrow limits and under extraordinary circumstances may subject it to prior restraint by obtaining injunctions from courts of equity.

Except when government acts within these narrow limits, it violates the first amendment if it attempts to limit its freedoms by legislation. Moreover, government violates the first amendment if it engages in conduct that is calculated and intended to stifle the willingness of people to exercise their freedom of speech, association, or assembly. It is to be noted in this connection that the first amendment was written for the timid as well as the brave.

Power of Government to Prohibit or Punish Speech Advocating Crime or Sedition

In describing first amendment limitations on the power of Government, the Supreme Court declared in *Terminiello v. Chicago* that "[f]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[13] Thus, strange as it may seem at first blush, the amendment protects advocacy of conduct prohibited by law unless it incites action to bring such conduct about and creates a clear and present danger that it will provoke action to that end. This is so because the amendment protects the expression of ideas, no matter how reprehensible they might be.

Since the doctrine of civil disobedience is invoked with such frequency nowadays, it seems not amiss to emphasize that the Constitution does not countenance civil disobedience that contemplates and produces unlawful acts.

Government has an inherent right to self-protection and may under some conditions prohibit or punish the advocacy or teaching of the desirability of overthrowing government by violent action. Judges have used multitudes of words in many cases to define the conditions under which government may exercise its right to self-protection by limiting speech, association, and assembly. While the words of some of the judges are occasionally somewhat elusive in meaning and for that reason difficult to comprehend, I interpret the cases to lay down these principles:

First, the first amendment protects all utterances, individual or concerted, that advocate constitutional or political changes, however revolutionary they may be, if the utterances contemplate that the

[13] 337 U.S. 1, 4 (1949).

changes are to be achieved by lawful means. Hence, freedom of speech permits an individual or a group to advocate the adoption by means of the ballot box of communism, fascism, or any other system of government.

Secondly, the first amendment also protects all utterances, individual or concerted, that advocate or teach as an abstract doctrine the desirability of the forcible overthrow of the government. This is true even though such advocacy or teaching is engaged in with intent to accomplish violent overthrow and with the hope that it may ultimately do so.

Thirdly, the first amendment affords no protection, however, to utterances, individual or concerted, that advocate or teach action for the forcible overthrow of government.

Finally, inasmuch as the capacity of a group to create danger is greater than that of an individual, the law makes a distinction between the power of government to exercise its right of self-protection against individuals and groups. Government may prohibit or punish utterances of an individual that advocate or teach action for the forcible overthrow of government only if his advocacy or teaching creates a clear and present danger that it will provoke action. But it may prohibit or punish utterances of a group that advocate or teach action for the forcible overthrow of government if the advocacy or teaching takes place under circumstances reasonably justifying apprehension that the action will occur either immediately or at a future time selected by the group.

When it enacted the Smith Act of 1940,[14] Congress made it a felony knowingly and willfully to advocate or teach the desirability of overthrowing by violence the Government of the United States or any of its states, territories, districts, or possessions. In construing the Smith Act, the Supreme Court decided that the words "advocate" and "teach" were not used by Congress in their ordinary dictionary meanings, because they had been construed in prior cases that had interpreted similar laws "as terms of art carrying a special and limited connotation."[15] By so doing, the Supreme Court adjudged that the principles which I have outlined were embodied in the Smith Act and in consequence such act is not unconstitutional.

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[14]18 U.S.C. § 2385 (1970).

[15]Yates v. United States, 354 U.S. 298, 319 (1957).

Sedition Laws

The Constitution expressly provides two ways to protect our country against domestic danger by civil means. Congress may make punishable as crimes dangerous acts and, subject to first amendment limitations, dangerous words. Those of us who esteem our system the best yet devised by man may use our freedom amendment freedoms to instruct the ignorant, convert the doubting, and combat the efforts of those who undertake to destroy or injure it. Justice Brandeis must have had these considerations in mind when he made this statement in his eloquent opinion in *Whitney v. California:* "Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."[16]

Since Congress was first organized as the Nation's legislature, it has enacted the following sedition laws: the Sedition Act of 1798,[17] which still lives in infamy; the Espionage and Sedition Acts of 1917[18] and 1918,[19] which Attorney General Palmer grossly abused in his "witch-hunts" after the First World War; and the Smith Act of 1940,[20] the potentiality for abuse of which has been restricted by Supreme Court cases that subject its broad language to first amendment limitations.

Each of these acts was adopted in a time of great national strain. By each of these laws, Congress made utterances that it deemed dangerous to the common weal punishable as crimes and thus secured to all against whom the laws were invoked the right to trial by an impartial jury of the vicinage and the other protections created by the Constitution to prevent the punishment of the innocent.

Fears of Communism

From the time of the Russian Revolution until the day on which Russia became an ally of the United States in the Second World War, multitudes of Americans entertained profound fears in respect to the menace that they believed communism presented to peace abroad and security at home. As a result of Russia's intransigence in Europe and

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[16]274 U.S. 357, 378 (1927).
[17]Act of July 14, 1798, ch. 74, 1 Stat. 596.
[18]Act of June 15, 1917, ch. 30, 40 Stat. 217.
[19]Act of May 16, 1918, ch. 75, 40 Stat. 553.
[20]18 U.S.C. § 2385 (1970).

the communist takeover of mainland China after the end of the war, these fears were revived and intensified, and they rightly remain until this day insofar as they are based on concern over the threat which communism poses to world peace. Inasmuch as they were based on concern for domestic security, the fears of communism persisted with intensity until the mid-1950's, and they still linger on in some quarters.

There is room for dispute as to how substantial the communist threat to our domestic security actually was during the times when it was feared most. There was some tangible evidence and plethoric surmise that communists had strongly infiltrated segments of the labor movement and had even penetrated government and the armed forces to a degree. The extent of the threat was exaggerated by a tendency on the part of the fearful to believe that persons of unorthodox views were tainted with communism.

Anyway, the fear of the threat to domestic security produced two pieces of major congressional legislation—the Smith Act of 1940,[21] which has already been mentioned, and the Internal Security Act of 1950,[22] which Congress passed over President Truman's veto.

The Subversive Activities Control Board

Before the Internal Security Act of 1950 was adopted, our country steadfastly adhered to the principle that government ought not to punish anyone for anything except a crime of which he has been convicted in a constitutionally conducted trial in a court of justice. However, the Internal Security Act injected into our system a novel concept which is alien to this principle. This concept may be summarized in the following way: in order to protect society, our country should maintain a governmental agency to stigmatize publicly organizations that the government considers intellectually or politically dangerous[23] and to visit upon such organizations and their members severe penalties.

The Internal Security Act of 1950 created the Subversive Activities Control Board. By the original act and an amendment of 1954,[24] the Board was given jurisdiction to act on petitions of the Attorney General

[21] *Id.*

[22] 50 U.S.C. §§ 781-826 (1970).

[23] I use the phrase "intellectually or politically dangerous" to distinguish the stigmatized organizations and their members from organizations and individuals whose illegally dangerous acts or words are punishable as crimes under constitutional safeguards.

[24] 50 U.S.C. §§ 792, 792a (1970).

to identify and require the public registration of communist-action, communist-front, and communist-infiltrated organizations, and members of communist-action organizations.

The act as amended automatically imposed severe penalties upon the organizations and the members of the organizations stigmatized by the Board. For example, a stigmatized organization was denied the use of instrumentalities of communication unless it plainly revealed that they were being used by it and that it was a communist organization; and a member of a stigmatized organization was denied the right to hold office or employment with any labor organization subject to the National Labor Relations Act, the right to obtain or use a passport, and the right to hold any nonelective office or employment under the United States or even to seek such office or employment or employment in any defense facility without revealing his membership in the organization.

In *Communist Party of the United States v. Subversive Activities Control Board*[25] the Supreme Court adjudged, in essence, that Congress had the constitutional power to regulate the registration of communist organizations because of its finding that such organizations advocated or taught action for the forcible overthrow of government. It ruled, however, in other cases that the procedures prescribed by the act to effect the compulsory registration of communist organizations violated the self-incrimination clause of the fifth amendment and that major provisions of the act relating to membership in communist organizations imposed penalties upon individuals on the theory of guilt by association and could not be reconciled with the first amendment.[26] These latter rulings left the Subversive Activities Control Board with virtually nothing it could constitutionally do.

By an amendment of January 2, 1968,[27] Congress undertook to revive the moribund agency by repealing the compulsory-registration provisions of the Internal Security Act and by conferring upon the Board power to issue declaratory orders determining whether organizations that it investigates are communist-action, communist-front, or communist-infiltrated organizations and whether individuals whom it investigates are members of communist-action organizations.

However, the revival was short lived. On December 12, 1969, the

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[25]367 U.S. 1 (1961).

[26]*Id.*

[27]Act of Jan. 2, 1968, Pub. L. No. 90-237, 81 Stat. 765, *amending* 50 U.S.C. §§ 781-84, 786-92a, 794 (1970).

Court of Appeals for the District of Columbia Circuit handed down *Boorda v. Subversive Activities Control Board,*[28] in which the court held that the provisions of the Internal Security Act and its amendments allowing public disclosure of an individual's membership in a communist-action organization without finding that the individual concerned shares in any illegal purposes of the organization to which he belongs violates the first amendment. The Supreme Court refused to review this ruling, and the Board found itself left once again with virtually nothing it could constitutionally do.

Record of the Board

Consider the record of the Board during the twenty-one years of its existence. During these twenty-one years, the Board has found only one communist-action organization in all America, and that was the Communist Party itself. It was not even able, by constitutional methods, to impose registration upon it.

During these twenty-one years, the Attorney General filed petitions which alleged that twenty-two other organizations were communist-front or communist-infiltrated. Eight of these petitions were dismissed by the Board, and the other fourteen came to naught because the organizations had ceased to exist or the Board was unable for other reasons to compel their registration.

During these twenty-one years, the Attorney General filed petitions which alleged that sixty-six individuals—that is, sixty-six persons out of about two hundred million Americans—were members of communist-action organizations. These petitions were frustrated in large measure by the *Boorda* case and other decisions.

As one who loves America and hates communism, I take much comfort from the ineffective record of the Board. It corroborates my conviction that despite its enormous efforts to peddle its shoddy ideas, communism has made few sales in America.

President Nixon's Attempt to Revive the Board

On July 2, 1971, President Nixon issued Executive Order No. 11605,[29] which attempts to confer on the Subversive Activities Control Board vast power to harass and stigmatize Americans. President

[28]421 F.2d 1142 (D.C. Cir. 1969).

[29]3 C.F.R. 176 (Supp. 1971).

Nixon's order purports to amend Executive Order No. 10450,[30] which was issued by President Eisenhower on April 27, 1953, to establish loyalty and security requirements for government employment. Hence, one must understand what power the executive department has in this area.

As Justice Frankfurter declared in his concurring opinion in *Garner v. Los Angeles Board*:

> The Constitution does not guarantee government employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor.[31]

President Eisenhower's executive order applies only to persons who are presently enjoying or presently seeking employment in federal executive departments and agencies and requires the Civil Service Commission, the employing department or agency, or the FBI to investigate matters relating to them as individuals, including their individual memberships in subversive organizations, which are relevant to the determination of whether the employment or retention in employment of each of them is clearly consistent with the interests of national security. Hence, the Eisenhower order establishes forthright and circumscribed procedures for insuring the loyalty of federal civil servants. Moreover, it merely implements powers vested in the President by the Constitution and Acts of Congress relating to government employment.

President Nixon's executive order is a different kettle of fish. To be sure, it professes to be a mere amendment to the Eisenhower order, and it does alter that order in one or more insignificant respects. Yet, the major provisions of President Nixon's executive order represent, in reality, an attempt on his part to amend the Internal Security Act of 1950 by bestowing upon the Subversive Activities Control Board new, sweeping powers far in excess of those that Congress sought to give it.

To this end, the Nixon order declares in express terms that the

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[30] 3 C.F.R. 936 (1953).

[31] 341 U.S. 716, 724-25 (1951) (concurring opinion).

Board shall henceforth possess and exercise the power to conduct, on petition of the Attorney General, hearings to determine whether any of the innumerable organizations that claim the membership of millions of Americans who do not enjoy or seek federal employment are totalitarian, fascist, communist, or subversive organizations; organizations which have the policy "of unlawfully advocating the commission of acts of force or violence to deny others their rights under the Constitution or laws of the United States or of any State;"[32] or organizations "which seek to overthrow the Government of the United States or any State or subdivision thereof by unlawful means."[33]

The Nixon order further declares that in making its determinations the Board shall have power to investigate the activities and objectives of every group in America which commits acts of force or violence; or unlawfully damages or destroys property or injures persons; or violates laws "pertaining to treason, rebellion or insurrection, riots or civil disorders, seditious conspiracy, sabotage, trading with the enemy, obstruction of the recruiting and enlistment service of the United States, impeding officers of the United States, or related crimes or offenses."[34]

Finally, the Nixon order provides that the Attorney General will transmit to each federal executive department or agency the names of all organizations condemned by the Subversive Activities Control Board for the use of the department or agency in determining whether persons enjoying or seeking employment by it should be employed or retained in employment.[35]

It is manifest, however, that the real objective of the order is to empower the Board to brand the specified organizations and groups as intellectually or politically dangerous to the established government. It is equally as manifest that such branding of these organizations and groups will place a political or social stigma on their members and tend to minimize their exercise of freedom of speech, association, and assembly.

I submit that the provisions of the Nixon order that purport to confer new powers on the Board have no legal force for the following reasons: (1) their promulgation is beyond the constitutional power of the President and is a direct violation of the doctrine of separation of pow-

[32] 3 C.F.R. 176 (Supp. 1971).
[33] *Id.*
[34] *Id.* at 177.
[35] *Id.*

ers; (2) they are void for overbreadth; and (3) they violate the first amendment and due process rights of all the members of the organizations or groups designated except those who share the illegal aims of the organizations or groups.

What was said by the Supreme Court in respect to President Truman's executive order in the steel-seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*,[36] makes it plain that in attempting to expand the power of the Board President Nixon undertook to make law: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[37] It necessarily follows that the major provisions of the Nixon order are void under sections one and eight of article I of the Constitution, which give Congress all of the lawmaking power of the Federal Government and deny any of it to the President.

I do not question the power of the President under the Constitution and acts of Congress governing federal employment to establish by executive order procedures to assure the loyalty of federal civil servants. But I do assert with confidence that even if the Nixon order were a bona fide effort to accommplish that objective, it would be void for overbreadth. This is because the order brings within its coverage the organizational memberships of millions of Americans who neither enjoy nor seek employment in the federal establishment. Moreover, it applies to the activities and objectives of groups past numbering which have no relationship whatever to the loyalty of federal civil servants. The President has no power to subject the organizational memberships, activities, or objectives of all Americans to the scrutiny of the Subversive Activities Control Board because some of them may be employed by the Federal Government or some of them may hereafter seek employment by it.

The Nixon order also violates the first amendment and the due process clause of the fifth amendment by applying the theory of guilt by association and by stigmatizing politically and socially all of the members of all the organizations or groups branded by the Subversive Activities Control Board, including those who may be passive or inactive members of such organizations or groups, those who may be una-

[36]343 U.S. 579 (1952).

[37]*Id.* at 588.

ware of the unlawful aims of such organizations or groups, or those who may disagree with the unlawful aims.

While I do not care to belabor the points, a pretty good case can also be made for the proposition that some of the powers that the order attempts to allot to the Board trespass upon areas that the Constitution reserves to the states, and others offend the first amendment principle that government cannot touch the mere advocacy of ideas, no matter how reprehensible they may be.

Apart from its constitutional infirmities, President Nixon's executive order is to be deplored because it has no rightful place in our land. It is not the function of government in a free society to protect its citizens against thoughts or associations that it deems dangerous or to stigmatize its citizens for thoughts or associations that it thinks hazardous. Yet that is exactly what the executive order undertakes to empower the Subversive Activities Control Board to do.

If America is to be free, her Government must permit her people to think their own thoughts and determine their own associations without official instruction or intimidation; and if America is to be secure, her Government must punish her people for the crimes they commit not for the thoughts they think or the associations they choose.

THE FOURTH AMENDMENT: EVERY MAN'S HOME IS HIS CASTLE

The deepest hunger of the human heart is for a home in which one may have privacy, exercise personal liberty, and enjoy safety free from unjustifiable intrusions by government or law-breakers. Ages ago the Prophet Micah pictured this hunger with eloquence by describing the mountain of the Lord as a place where "they shall sit every man under his vine and under his fig tree, and none shall make them afraid . . . ."[38]

When the common law of England was emerging from the mists of history, it undertook to satisfy this hunger by declaring that every man's home is his castle and that every man may resist to the utmost unidentified persons who undertake to enter his home against his will. This principle of the common law was judicially recognized and applied in *Semayne's Case,* which was decided in 1604 and which declares: "The house of everyone is to him as his castle and fortress, as well as for his

[38]Micah 4:4.

defense against injury and violence as for his repose . . . ."[39]

This principle of law is not absolute as against government. It must yield on rare occasions if an overriding public purpose demands that government make an entry into a home. But even on those rare occasions, government may enter only if it uses means which insure that its power to enter is not abused.

In recognition of this principle, the court further declared in *Semayne's Case:*

> In all cases where the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make requests to open doors.[40]

In opposing a proposal to collect an excise on cider by methods which abridged the concept embodied in the maxim that every man's home is his castle, William Pitt, the elder, expressed the veneration of Englishmen for the principle of law embodied in such a concept by this statement in the House of Commons:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![41]

When the colonists migrated from England to America, they brought with them a proud attachment to this principle of the common law. Hence, it is not surprising that the people of Boston rebelled when officers of the British Crown entered and ransacked their homes and places of business under general warrants to collect taxes imposed upon them by Parliament. This outrage was one of the tyrannies that provoked the American Revolution.

After Independence was won, the Founding Fathers incorporated this principle of the common law in the fourth amendment, which reads as follows:

> The right of the people to be secure in their persons, houses, papers,

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[39]77 Eng. Rep. 194, 195 (K.B. 1604).

[40]*Id.*

[41]Speech by William Pitt the Elder, *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 426 (14th ed. 1967).

> and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[42]

The fourth amendment protects the occupant of a house from an unannounced entry by an officer of the law. Even though he has a legal right to enter a house to make a lawful arrest or to execute a lawful search warrant, an officer is prohibited by the amendment from attempting to do so unless he first announces his identity and purpose to the occupant and is refused admittance by him. This requirement has this two-fold objective: (1) to protect the privacy, personal liberty, and safety of the occupant; and (2) to protect the officer from the danger of violent injury or death at the hands of the occupant, who might otherwise mistake him for a burglar.

The requirement of prior announcement of identity and purpose is subject to limited exceptions, which are stated in Justice Brennan's dissenting opinion in *Ker v. California*.[43] The opinion rightly asserts that the fourth amendment is violated by an unannounced entry of officers into a house:

> except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door) are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[44]

Manifestly, the facts that call any of these exceptions into play cannot be known to an officer until he arrives at the house in which the arrest or search is to be made.

Crime and dangerous drugs present hard problems. Yet, hard problems are the quicksands of sound legislation.

In 1970, Congress enacted two "no-knock" laws. One of them is embodied in the District of Columbia Court Reform Act[45] and regulates arrests and search warrants for all purposes in the District of Columbia;

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[42]U.S. CONST. amend. IV.

[43]374 U.S. 23, 48 (1962) (dissenting opinion).

[44]*Id.* at 47.

[45]District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE §§ 23-1 to -1705 (Supp. IV, 1971).

the other is incorporated in the Drug Control Act[46] and regulates search warrants for discovery of dangerous drugs or controlled substances as defined in the Act throughout the country.

The District of Columbia Act contains two unprecedented provisions. One of them empowers a judicial officer to confer upon a law enforcement officer express authority to break and enter any dwelling house or other building in the District in order to execute an arrest warrant without giving the occupants notice of his identity and purpose if the judicial officer finds that "such notice is likely to enable the party to be arrested to escape."[47] The second provision empowers a judicial officer to confer upon a law enforcement officer express authority to break and enter any dwelling house or other building in the District in order to execute an arrest warrant without giving the occupants notice of his identity and purpose if the judicial officer finds that "such notice is likely to enable the party to be arrested to escape."[47] The second provision empowers a judicial officer to confer upon a law enforcement officer express authority to break and enter any dwelling house or other building in the District to execute a search warrant without giving the occupants notice of his identity and purpose if the judicial officer finds (a) that "such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of,"[48] or (b) that "such notice is likely to endanger the life or safety of the officer or another person,"[49] or (c) that "such notice would be a useless gesture."[50]

The Drug Control Act empowers a federal judicial officer to confer upon a law enforcement officer express authority to break and enter any building to execute a search warrant for the discovery of dangerous drugs or controlled substances without giving the occupants notice of his authority and purpose if the judicial officer finds (a) that "the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of,"[51] or (b) that "the giving of such notice will immediately endanger the life or safety of the executing officer or another person. . . ."[52]

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[46]Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-966 (1970).

[47]D.C. CODE § 23-591(c)(2)(C) (Supp. IV, 1971), referred to at *id.* § 23-561(b)(1) (Supp. IV, 1971).

[48]*Id.* § 23-591(c)(2)(A) (Supp. IV, 1971), referred to at *id.* § 23-521(f)(6) (Supp. IV, 1971).

[49]*Id.* § 23-591(c)(2)(B) (Supp. IV, 1971), referred to at *id.* § 23-521(f)(6) (Supp. IV, 1971).

[50]*Id.* § 23-591(c)(2)(D) (Supp. IV, 1971), referred to at *id.* § 23-521(f)(6) (Supp. IV, 1971).

[51]Comprehensive Drug Abuse Prevention and Control Act § 509(b)(1)(A), 21 U.S.C. § 879(b)(1)(A) (1970).

[52]*Id.* § 509(b)(1)(B), 21 U.S.C. § 879(b)(1)(B) (1970).

In attempting thus to abrogate the constitutional obligation of an officer to give notice of his identity and purpose before he undertakes to break and enter a house to make an arrest or search, these no-knock statutes offend the letter, the spirit, and the purpose of the fourth amendment. Neither Congress nor any official acting under its authority can nullify a constitutional requirement on the ground that obedience to it "would be a useless gesture.[11] The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures cannot be made to hang on such an arbitrary and brittle thread. Moreover, these no-knock laws do not bring the unprecedented powers they attempt to create within any of the exceptions to the fourth amendment requirement of prior notice of identity and purpose. To be sure, they pay lip service to the fourth amendment by stating that the extraordinary warrants cannot be issued except upon probable cause. However, probable cause can be established only by facts that exist and are made known to a judicial officer at the time he acts on an application for an arrest or search warrant. It cannot be predicated upon prophesies or suspicions or fears as to what the conduct of the occupants of a distant house may be at some future time when an officer of the law reaches the premises to make an arrest or search. Hence, there can really be no probable cause for the issuance of the extraordinary warrants that the no-knock laws undertake to sanction.

Even apart from constitutional considerations, no-knock laws are bad. If a nation's people are to have respect for law, the nation must have respectable laws, and no law is respectable if it authorizes officers to act like burglars and robs the people of the only means they have for determining whether those who seek to invade their habitations violently or by stealth are officers or burglars.

When the Drug Control Act was under Senate consideration, I moved to strike the no-knock provision from it. I predicted at that time that its implementation would result in the deaths of both law enforcement officers and householders. Unfortunately, this unhappy prediction has materialized on a number of occasions.

I do not condemn no-knock laws in ignorance of the terrible toll which crime and dangerous drugs exact from society. Dangerous drugs doom those who become addicted to them, shatter the happiness of the families of the addicts, and provoke much of the crime that haunts our land. The evil and selfish men who traffic in dangerous drugs for filthy lucre and bring these tragedies to pass deserve the harshest punishment the law sanctions.

Despite these things, I cling to an abiding conviction that it is better for lawmakers to permit some wrongdoers to escape than it is for them to sacrifice upon the altar of fear and doubt the age-old boast of Anglo-American law that every man's home is his castle. A freedom sacrificed is seldom resurrected.