# EXPLORATIONS

# National Security a Decade After

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Not so very long ago the decline and fall of Richard Nixon brought the problems of civil liberties and presidential politics into the living rooms of millions of Americans on an almost daily basis. White House enemies lists, political misuse of the IRS, CIA domestic spying, FBI burglaries, corruption of the judicial process, the waging of secret wars—month after month these and other disclosures poured forth from newspapers, television sets, and congressional hearing rooms until they forced a president out of office, sent some of his subordinates to jail, and confronted the country with a crisis of confidence in its national government.

But it was never entirely clear what the problem was. Was it Richard Nixon? That was how a majority of the House Judiciary Committee saw it, and they were speaking, no doubt, for a majority of the Congress. Was it a problem of the "imperial presidency" taking over powers of the other branches of government until its overreaching finally shook them out of their slumber? That is certainly the way a large body of scholarly opinion has looked at the crisis of the Nixon White House, and no doubt there is much truth to be found here.

But there was another lesson to be learned from the decline and fall of Richard Nixon, and it was all but forgotten as soon as the crisis of August 1974 was over and a new president was installed in the White House. Nixon himself hinted at one of the most difficult problems he had confronted as president when he described his concept of "national security" in a court deposition in Morton Halperin's wiretap lawsuit in 1976. Halperin had been the victim of a twenty-one-month warrantless wiretap installed on his home telephone when he was a deputy to Henry Kissinger on the National Security Council staff in 1969. The Halperin wiretap—along with taps on sixteen other government officials and journalists—was part of a Nixon White House investigation of supposed leaks of

sensitive information. When Nixon was questioned about the wiretap program, he justified it as follows:

> In America, we have the blessing of both security and freedom. What we were trying to do with this [wiretap] program was to maintain security with the least possible infringement upon freedom. It is not always possible to do so.... The use of electronic surveillance to enable the United States to conduct a responsible foreign policy, to get all the options and to get the best possible advice and to get the communication with people abroad that we need to have—I believe that for those fundamental reasons this kind of activity was not only right, but from the standpoint of the security of this country I think it was legally right.

Nixon's view of national security had a profound impact on the inhabitants of the White House. In June 1974, for example, one of the minor dramas of Watergate was played out in a Los Angeles courtroom, when Egil Krogh, chief of the White House plumbers, was sentenced for perjuring himself in connection with the burglary of Daniel Ellsberg's psychiatrist. Before imposing sentence, the judge asked Mr. Krogh whether he wished to make any final statement for the record. He said:

> I see now... the effect that the term "national security" had on my judgment. The very words served to block critical analysis. It seemed at least presumptuous if not unpatriotic to inquire into just what the significance of national security was.... The discrediting of Dr. Ellsberg, which today strikes me as repulsive and an inconceivable national security goal, at the time would have appeared a means to diminish any influence he might have had in mobilizing opposition to the course of ending the Vietnam War that had been set by the President. Freedom of the President to pursue his planned course was the ultimate national security objective.

In the eight years since Egil Krogh was sentenced as a White House plumber, the concept of "national security" has undergone considerable growth. After an initial period of post-Watergate reform, national security policies in recent years have generated steadily increasing pressures on traditional civil liberties. A current example is the Intelligence Identities Protection Act, which was signed into law by President Reagan on June 29, 1982. The Act makes it a crime to publish "any information that identifies an individual as a covert agent" of the CIA or FBI—even if the information is unclassified, is a matter of public record, or is derived entirely from public sources. The impetus for the legislation is the understandable desire to protect the lives of intelligence agents overseas, but as

drafted it almost certainly violates the First Amendment's guarantee of freedom of the press.

It is hoped that no president will use the Intelligence Identities Protection Act to try to curb freedom of the press, but the definitions of national security embodied in the Act are so broad that the First Amendment will be under constant pressure. Sponsors say that the statute is aimed at *Covert Action Information Bulletin*, a journal that has used public record information from newspapers and State Department publications to identify CIA agents. The new law could also silence a *New York Times* reporter who writes an article about agents who participate in the CIA's secret destabilization of Chile, or any other journalist or editor who makes a difficult decision to publish lawfully obtained information about intelligence agencies. Although the legislative history of the Act states that it is not intended to apply to investigative reporting, the express language is very broad. The statute does not require a prosecutor to show that a reporter intended to impair foreign intelligence activities by publishing an expose, but only that he had "reason to believe" that identifying an agent would do so. A warning by the CIA—or even general knowledge of the CIA's sensitivity about the subject of an article—may be enough to constitute the required "reason to believe."

In the face of these broad provisions, it is not surprising that many First Amendment scholars have concluded that the Intelligence Identities Protection Act is unconstitutional. For the first time in American history it would penalize the publication of information that is already public, and it would open the way for a new category of censorship. The authors of the new legislation have candidly stated that civil liberties must yield to superior claims of national security. Senator Richard Lugar, Republican of Indiana, put it very bluntly when he said in an interview with the *New York Times,* "I am willing to take risks with regard to all of the [constitutional] protections we have set up. . . . I don't think on a continuum we are going to be able to have both an ongoing intelligence capability and a totality of civil rights protection." Apparently, Senator Lugar was not just speaking for himself, because on March 18, 1982, the Intelligence Identities bill passed the Senate by an overwhelming vote of 90–6. The Senate vote was only slightly more lopsided than the margin in the House of Representatives, which had passed the bill six months earlier, 354–56.

The Intelligence Identities Protection Act is symptomatic of a growing crisis for civil liberties in the area of national security.

The origins of this crisis are both obvious and obscure. They are obvious because it is a clear lesson of our history that international tension often creates a hostile environment for civil liberties. They are obscure because the causes of

tension in the world today can in some measure be found in our own national security policies. The notorious Palmer Raids on tens of thousands of aliens living in the United States after World War I, the internment of Japanese-Americans during World War II, political blacklisting and McCarthyism in the 1950s—these are some of the ugly legacies of earlier periods when the security of the nation was widely perceived to be threatened. Today we live under conditions of international tension and instability unmatched by any other period in our recent history. A relentless series of foreign military and political crises, coupled with the rapidly increasing threat of nuclear war, have combined to create a substantial impetus in the Reagan administration and parts of the Congress in favor of writing a blank check for national security. The result may be the most serious political crisis for civil liberties since the early 1950s.

As we survey the landscape of national security in the Reagan era, the Intelligence Identities bill is only one of the many recent threats to fundamental rights:

- In December 1980 a Washington research institute, the Heritage Foundation, issued a report on U.S. intelligence agencies prepared by several staff members who later became members of the Reagan transition team. The report calls for stepped-up surveillance of dissidents and a revival of federal internal security machinery. The justification: "terrorist cadres" that grow out of "the splinters of dissident or extremist movements" must be tracked "through the cumulative compilation of comprehensive files." A central point of the report is that "clergymen, students, businessmen, entertainers, labor officials, journalists, and government workers all may engage in subversive activities without being fully aware of the extent, purpose, or control of their activities."
- In January 1981, Strom Thurmond, the incoming head of the Senate Judiciary Committee, created a new Subcommittee on Security and Terrorism, to be chaired by Jeremiah Denton, a freshman Alabama Republican, eight-year prisoner of war in North Vietnam and one-time proponent of capital punishment for adultery. In a private comment, a liberal senator paraphrased Roosevelt in 1933, saying, "we have nothing to hope for but fear itself."
- In April 1981, President Reagan conferred pardons on two former FBI officials convicted of planning and supervising warrantless FBI break-ins of private homes during the search for members of the Weather Underground in the 1970s. The president saluted the two convicted FBI burglary supervisors as "men who acted on high principle to bring an end to the terrorism that was threatening our nation. . . . Their actions were necessary to preserve the security interests of our country." In response to criticism, the White House issued a statement saying that the President believes "warrantless searches in the intelligence field should be permitted when interests of national security so require."
- In December 1981, Reagan signed a new executive order on intelligence agencies. It includes new authority for the CIA to mount "covert operations" in-

side the United States so long as they are "not intended" to influence "U.S. political processes," new authority for the CIA to spy on Americans at home and abroad in order to collect "significant foreign intelligence," and new authority for the Attorney General to open mail without a judicial warrant if the targets are suspected of being "foreign agents," a term which is nowhere defined in the order. This new executive order strips away basic civil liberties protections without any public debate.

- Three months later a massive expansion of the security classification system was put in place by the Reagan administration that enshrouds the uses of these new intelligence powers in permanent secrecy. The new classification order tells bureaucrats in essence: "When in doubt, keep it secret." Gone is the requirement in the Carter administration's earlier executive order that some "identifiable damage" must be likely to occur if information is not kept secret, as well as the requirement to balance the public's right to know against the need for secrecy.
- At the same time the Reagan administration began pressing Congress to obliterate key sections of the Freedom of Information Act and CIA officials began urging private scientists to submit sensitive research plans to the government for "preclearance" so that the fruits of their research could be classified and kept secret from foreign governments.

These maneuvers by the Reagan administration have helped foster a climate in Congress where the very words "national security" serve to "block critical analysis." The effect on civil liberties can be seen by the fact that there are now 158 members of the House of Representatives cosponsoring a resolution to resurrect the notorious House Un-American Activities Committee. It can also be seen by the fact that an obscure right-wing Virginia congressman, Dan Daniel, was able, in late 1981, to tack a rider on a 1982 appropriations bill that harks back to the McCarthy era by barring "communists, terrorists, and subversives" from participating in Labor Department employment programs. The measure was later struck down as unconstitutional by a federal court.

How did we come to this turn of events? The underlying crisis in the presidency of Richard Nixon was the clash between claims of national security —often cynically invoked by the White House—and traditional values of American liberty. But in the presidency of Ronald Reagan, there is little resistance to claims of national security, despite the fact that similar assertions were routinely questioned and sometimes condemned a decade earlier. What happened? The story begins long before Watergate.

At the end of World War II the United States was jolted out of its traditional isolation from world politics and became an active participant and frequent intervener in international affairs. The Cold War that prompted this fundamen-

tal policy-shift appeared to require a permanent place for many of the temporary institutions and powers of wartime mobilization. Just as the executive powers and agencies that had grown up in response to the Depression became a permanent feature in the political landscape during the New Deal, the security policies and intelligence community that grew out of World War II became a permanent feature of the Cold War. Five years after the end of World War II, President Harry S. Truman, with varying degrees of congressional concurrence, had already issued a series of executive orders creating a secrecy classification system, imposing loyalty and security investigations on government employees, and requiring members of the Communist party and other "subversive organizations" in the United States to register with the government. The cumulative impact of these developments on civil liberties reaffirmed James Madison's comment to Thomas Jefferson in 1798 that "perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."

Deep involvement in foreign political and military affairs became the principal feature of postwar American foreign policy. The consequences for the structure of government in the United States were far reaching. For one thing, an interventionist foreign policy served to diminish the power of Congress and to increase that of the executive branch. During this period, Secretary of State Dean Acheson was fond of quoting Tocqueville's warning that "foreign politics demand scarcely any of those qualities which are peculiar to a democracy. . . . [A democracy] cannot combine its measures with secrecy or await their consequences with patience. These are qualities which more especially belong to an individual or an aristocracy." In the United States this precept translated into a strong executive bureaucracy.

The postwar growth of the executive branch had an increasingly distorting effect on the Constitution. The premise of the founders that Congress makes the laws and the executive branch carries them out was a major obstacle to presidents seeking to shape world events to conform to their view of American security interests. Under the Constitution, of course, it is the Congress, not the president, that has the power to declare war, raise armies, and has the final say in the making of treaties. But these arrangements were increasingly seen as a hindrance to quick presidential responses to the long series of foreign crises over the last four decades—Greece, Iran, Lebanon, Guatemala, the Congo, Cuba, the Dominican Republic, Vietnam, Laos, Cambodia, Chile, Angola, El Salvador, Nicaragua—a list that extends to every corner of the world. Hanging over each of these crises like the sword of Damocles has been the confrontation between the U.S. and the Soviet Union and the nuclear balance of terror that has dominated American defense and foreign policies since 1945.

This, then, is the national security framework within which postwar presi-

dents have sought "the freedom to pursue [their] planned course of action." To make up for their lack of constitutional authority to act so freely, every president since Truman has relied on two doctrines to justify executive initiatives to protect national security: inherent presidential power and post-hoc congressional ratification. Taken together, they provide a new legal system within which presidents have felt justified in acting outside the confines of the Constitution.

In the case of inherent power, repeated presidential acts of warrantless wiretapping or covert manipulation of foreign governments are said to validate claims of presidential authority to perform these acts. The Supreme Court rejected the theory of inherent presidential power in its 1952 decision in the Steel Seizure Case, when President Truman sought to nationalize the steel industry. But Justice Jackson's frequently cited concurring opinion in that case left the door open to future presidents by recognizing a grey area where the president may act in the absence of express constitutional authority, unless and until the Congress tells him to stop.

In the case of post-hoc ratification, military or intelligence initiatives by the executive branch, even if secret, are said to be tacitly ratified by Congress when it votes general appropriations, as in the case of the secret bombing of Cambodia in 1969 or clandestine efforts to overthrow the government of Chile in 1973. Broad language in congressional statutes, such as the provision in the National Security Act of 1947 giving the CIA director power to "protect intelligence sources and methods," is also said to ratify programs of doubtful constitutionality, such as the CIA's requirement that former employees submit manuscripts for prepublication censorship.

These doctrines of expanded presidential authority have become the major building blocks of national security policy. They are also major roadblocks for the Bill of Rights.

The national security powers of the president are powers to act in peacetime as if the country were at war. But since at least 1945 we have lived in a twilight zone in which the distinctions between war and peace are so blurred, and the instability of the world so constant that presidents have lacked any objective guideposts for the exercise of their national security powers. "War is peace," wrote Orwell. This maxim has guided presidents for more than thirty years, all of whom have claimed that in order to keep the peace abroad it has been necessary for them to do things at home that, it was once believed, could be done only in a state of declared war.

Nowhere is this more evident than in the areas of government secrecy and political surveillance. Here, the Nixon administration stands out from other recent presidencies only because of the fate of its principal, not because its policies

presented a unique threat to civil liberties. In fact, the development of a law of secrecy and surveillance, and its steady erosion of the First and Fourth Amendments, has accelerated in the post-Nixon, post-Watergate era.

Until 1971 the national security secrecy system had been created and maintained by the executive branch alone. The only law establishing the system was a series of executive orders issued by Presidents Truman, Eisenhower, Kennedy, and Nixon. There were security clearances and investigations in many government agencies, and millions of pages of classified documents. But there was no systematic enforcement of secrecy and no stamp of approval by the courts or the Congress. All that began to change when the Nixon administration went to court in May 1971 to try to block the *New York Times* from publishing the Pentagon Papers. Although the case is widely regarded as a victory for freedom of the press, the Pentagon Papers litigation actually set in motion the development of a formal law of national security secrecy. The case marked the first time the courts had become involved in defining and enforcing the secrecy system; the first time a president had sought the help of the courts in obtaining a prior restraint of publication of the press; and the first time the Supreme Court had said that both the president and the Congress may have authority to restrain the press in this area, although not in that case.

The Supreme Court's 6–3 decision in the Pentagon Papers case was remarkable for the opportunity it gave the president to curtail First Amendment rights at the very moment that it authorized the *New York Times* to roll its presses. Forty years earlier, in *Near* v. *Minnesota,* another celebrated prior restraint case to come before the Supreme Court, the Court had made it clear that, at least in peacetime, the First Amendment rule against prior restraints is absolute. In times of war, it said, publishing a narrow category of military information might conceivably be restrained if it concerned such details as "the sailing dates of transports or the number and location of troops."

In the Pentagon Papers decision, the Supreme Court abandoned the wartime limitation articulated in *Near.* The pivotal concurring opinions of Justices Stewart and White for the first time generalized the category of information subject to prior restraint and recognized the authority of Congress to legislate in this sensitive constitutional territory. After the dust had settled, the Nixon administration and its successors began to claim that the Pentagon Papers decision had actually established two key principles in a new law of secrecy: first, that the government can block publication of information if its disclosure will "surely result in direct, immediate, and irreparable damage to the nation," as Justice Stewart put it; and second, that if Congress passes a statute authorizing prior restraint, the standard for obtaining an injunction to stop publication can be even lower.

The cat was out of the bag. A succession of post-Watergate cases transformed it into a tiger with a ravenous appetite for the First Amendment. The most spec-

tacular prior restraints to be imposed in the decade since the Pentagon Papers decision involved former employees of the CIA whose writings the government claimed the right to censor. Because former employees are insiders who once had authorized access to classified information, the government argued successfully in these cases that it did not have to satisfy the Pentagon Papers standard in order to obtain a prior restraint. The Victor Marchetti and Frank Snepp decisions established the legal principle that the CIA and presumably other government agencies as well can bar a current or former employee from publishing "any information or material relating to the agency, its activities or intelligence activities generally, either during or after the term of [his or her] employment . . . without specific prior approval of the agency." This new principle is based on the law of contract—if you work for an agency that operates within the national security secrecy system, your employment contract obliges you to waive *permanently* your First Amendment rights to speak and publish without prior restraint.

In Frank Snepp's case this principle was taken to its most Draconian extreme by the Justice Department in the Carter administration. Unlike Marchetti, Snepp was not alleged to have disclosed any classified information in his book, *Decent Interval*, a critical review of the CIA's conduct during the U.S. withdrawal from Vietnam. But the Carter Justice Department sued Snepp to recover the profits he had earned from his book for violating what it called a "fiduciary obligation" to submit the manuscript for CIA clearance, even though Snepp's contract barred him only from disclosing classified information. When the case reached the Supreme Court in February 1980, the Court upheld this new prior restraint theory, 6–3, without even hearing argument, and relegated its discussion of Snepp's First Amendment defense to a footnote of the opinion.

The Snepp litigation was just part of the Carter administration's curtailment of freedom of the press on the grounds of national security. In 1979 the Justice Department moved against a left-wing magazine in an effort to block it from publishing information that was already in the public domain. The *Progressive* case involved an article written about the hydrogen bomb based on information obtained by its author, Howard Morland, from studying government publications. In its effort to obtain an injunction, the government argued that information about atomic weapons is "born classified" and can be restricted under the Atomic Energy Act whether or not its disclosure would meet the Pentagon Papers standard. Although the government eventually abandoned the *Progressive* case when it became increasingly clear that the H-bomb information was not secret, the theory put forward by the Justice Department was that there are whole categories of "dangerous information" that are beyond the reach of the First Amendment.

Three years later, in 1982, the Reagan administration is using this same theory in its well publicized effort to persuade academic scientists to submit their

research plans to the government for clearance. On March 30 the *New York Times* reported that Lawrence J. Brady, Assistant Secretary of Commerce for Trade Administration, condemned what he called "a strong belief in the academic community that they have an inherent right to . . . conduct research free of government review or oversight." So much for the First Amendment.

National security secrecy presents its gravest threat to the First Amendment when it is armed with the criminal law. For this reason it has never been a crime simply to publish information relating to the national defense. Until the enactment of the Intelligence Identities Protection Act in 1982, the espionage laws of the United States applied only to situations in which information was *secretly* passed to a foreign government for the specific purpose of injuring the United States. Even at the height of the Cold War, Congress declined to make it a crime to publish national defense information when it enacted the Internal Security Act of 1950, which expressly provides that "nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship."

In 1971 this consensus began to break down when the Nixon administration, on the eve of oral argument in the Pentagon Papers case, indicted Daniel Ellsberg for releasing the papers to the press. In pursuing the Ellsberg prosecution before it was dismissed because of government misconduct, the Nixon Justice Department argued that there was no need for it to show that Ellsberg intended to damage the United States, and that it did not matter that he had passed the papers to the *New York Times*, rather than to a foreign government. All that mattered, the Justice Department said, was that the papers were the property of the government and that Ellsberg knew they were classified.

Seven years later, in 1978, this same theory was successfully used by the Carter administration when it obtained convictions of Ronald Humphrey and David Truong in a celebrated espionage prosecution. Humphrey and Truong had been charged under the espionage statute with passing national defense information to persons not entitled to receive it, without any allegation that they had done so with an intent to injure the United States or even that they had passed the information to agents of a foreign government. Soon after the Truong and Humphrey convictions, the Carter administration sent to Congress the first version of the Intelligence Identities Protection Act, reflecting all the elements of the new crime of disclosing official secrets. Although it took the Reagan administration to secure the bill's enactment, the new crime had been planted and carefully nurtured by three presidents.

Like the law of secrecy, the law of national security surveillance has evolved from bold presidential assertions of power to an extensive authority ratified by judicial decisions and congressional enactment. Every president since

Franklin Roosevelt has claimed the power to conduct warrantless wiretapping of foreign governments. But once again, it was Richard Nixon who put forward the most sweeping claims in this area, and sought to have them approved by the courts.

In a series of cases beginning in 1969, the Nixon administration argued that it had an inherent power to disregard the Fourth Amendment warrant requirement whenever it conducted wiretaps or physical searches of persons or groups believed to be a threat to the national security. In the first such case to reach the appellate level, this argument was rejected by the Sixth Circuit Court of Appeals, which wrote a scathing opinion in 1971 comparing the Nixon claims to the royal prerogatives of King George III to search the houses of colonists—prerogatives whose exercise triggered the American Revolution and were foremost in the minds of the Founding Fathers when they wrote the Fourth Amendment to the Constitution prohibiting unreasonable searches and seizures. The Sixth Circuit decision was affirmed by a unanimous Supreme Court in 1972. Like the Pentagon Papers decision, however, the Court's ruling in the national security wiretap case was most significant for what it did *not* decide. Since the wiretap at issue had been installed on a domestic organization with no connections to any foreign power, the Court left open the possibility that warrantless surveillance of a person or group with "foreign ties" would be legal. For the next few years, however, the erosion of the Fourth Amendment appeared to have been contained.

By the end of the Nixon administration, the courts and the Congress were viewing presidential claims of national security with skepticism. In a 1973 Freedom of Information Act case, for example, when a group of congressmen sued the Environmental Protection Agency to obtain information about the environmental impact of underground nuclear testing in Alaska, several Supreme Court Justices observed in a concurring opinion that blanket national security claims can be "cynical, myopic, or even corrupt." A year later, the Watergate tapes case provided a dramatic example of such a claim.

But the political corruption of the Nixon White House obscured the steady development of a new law of national security surveillance. Taking its cue from the Supreme Court's 1972 wiretap decision, the law began to focus on the elusive concept of "foreign agency." Since the Court had held that the Fourth Amendment only barred warrantless national security surveillance of domestic targets, suspected agents of a foreign power were presumed to be beyond its reach. Ironically, this distinction established a legal rational for much of the surveillance that had been condemned in the Nixon era. One example was the CIA's program of spying on the anti-Vietnam War movement, jauntily dubbed "Operation CHAOS." This was a surveillance effort to ferret out links between the leaders of the peace movement and foreign governments. Although no such links were ever established, the program resulted in the creation of CIA files on more than

300,000 domestic activists participating in activities that had been under suspicion for having a foreign stimulus.

The Ford, Carter, and Reagan administrations have all claimed, in a series of executive orders, that undefined foreign agent surveillance is beyond the reach of the Fourth Amendment. The confusing world of these executive decrees is best captured by a section of the Carter order entitled "Restrictions on Certain Collection Techniques." It reads as follows:

> Activities . . . for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes, shall not be undertaken without a judicial warrant, unless the president has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is the agent of a foreign power.

What does this mean? It means that whenever the government has "probable cause to believe" that a person in the United States is an "agent of a foreign power" (a term not defined in the executive order), that person can be targeted for unlimited, warrantless wiretapping, television monitoring, physical searches, and mail opening. A White House document further explaining and implementing this claim of presidential power is classified "because of the sensitivity of the information and its relation to national security."

The Ford, Carter, and Reagan executive orders on intelligence agencies have been issued with much public fanfare proclaiming the "rule of law" over the "intelligence abuses" of the Watergate era. At the same time, however, the orders have been broadly drafted to fit the needs of the national security apparatus, regardless of their impact on civil liberties. The Reagan order represents the culmination of this process. It goes beyond the "foreign agent" approach of the Carter administration and authorizes the CIA to conduct general surveillance of anyone inside the United States who may be in possession of "significant foreign intelligence," such as journalists or academics or businessmen returning from trips overseas. It also authorizes the CIA to conduct undefined covert operations inside the United States so long as they are not "intended" to influence "the political process, public opinion, policies or the media." No secret abuses can occur now. Everything is out in the open. All in black and white. All within the claim of a general foreign security loophole to the Constitution.

During the last decade there has been only one successful effort in the Congress to narrow this presidential claim, and that success has been mixed. In 1978 Congress enacted the Foreign Intelligence Surveillance Act, requiring judicial warrants based on evidence of criminal conduct for most national security wiretapping in the United States. On paper, this statute is a significant improvement

over the chaotic state of the law before its enactment. It puts Congress on record against presidential claims of inherent power to conduct unrestricted surveillance, and it all but closes the "foreign security" loophole to the warrant requirement left open by the Supreme Court in its 1972 decision. On the other hand, the statute authorizes the executive branch to keep all its foreign security wiretaps permanently secret, and it lowers the standard for the issuance of warrants so that full-fledged probable cause of a crime does not have to be shown.

The real significance of the Foreign Intelligence Surveillance Act, however, will ultimately depend how it is applied. The early signs are not encouraging. The statute sets up a special "Foreign Intelligence Surveillance Court" to receive applications for wiretap orders. The court operates under extraordinary security procedures for the handling of materials submitted to it—procedures that inevitably compromise its independence from the executive branch. So compelling is the lure of legitimacy surrounding this special court that the Carter administration could not resist turning to it on at least three occasions in 1979 and 1980 for approval of physical searches as well as wiretaps, paving the way for routine cooperation between the executive branch, the courts, and the Congress in pruning back the Constitution in the name of national security. In essence, the Carter Justice Department was saying that since Congress has created a special national security court, that court should be used as an all-purpose source of authority for particular executive actions curtailing constitutional rights. If the court can authorize wiretaps, why not physical searches, mail opening, covert action, prior restraint, and censorship?

Apparently the Reagan administration prefers to leave these delicate matters to executive discretion, so the Foreign Intelligence Surveillance Court is once again limited to performing its statutory function of serving up wiretap warrants that their targets will never see. But the new court is a permanent feature of our legal system and it stands for the stark proposition that the conflict between constitutional rights and national security must be adjudicated under different procedures than those which apply to other areas of constitutional law.

The development of a formal law expanding the concept of national security is a largely unnoticed legacy of the Watergate era. Out of the national trauma that accompanied the impeachment proceedings against Richard Nixon there emerged a consensus that abuses of presidential power must be contained by the rule of law. This consensus was best articulated by Chief Justice Warren Burger, speaking for a unanimous Supreme Court in the White House tapes decision, which served as Nixon's writ of execution in July 1974:

> The President . . . reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many de-

> cisions of this Court, however, have unequivocally reaffirmed . . . that it is the province and duty of the judicial branch to say what the law is. . . . We conclude that . . . the [President's] generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

But the rule of law has little force if the law can always be bent by claims of necessity. Another passage from Burger's opinion in the tapes case is a reminder that the consensus about Nixon's abuses of power never touched his claims about the necessities of national security. How much deference should be accorded to presidential definitions of national security? The view of the Court is that few questions should be asked of a president when he claims to be acting in this area.

> The President does not place his claim of privilege on the ground that [the tapes] are military or diplomatic secrets. As to these areas . . . the courts have traditionally shown the utmost deference to presidential responsibilities.

National security is a ubiquitous concept that presidents have frequently invoked over the last three decades to insulate their actions from review. The law has not only been inadequate as a safeguard against overreaching claims of national security; it has become, especially since the Nixon presidency, a source of legitimacy for the view that definitions of national security should be left to the discretion of the executive branch. Over the last eight years the courts and the Congress have increasingly been drawn into the conflict between security and liberty, but instead of defining and narrowing security claims by the executive branch, they have often ratified executive practices and insured them against legal challenge.

The ultimate effect of much law in this area has been to authorize discretion and flexibility in the management of security practices. The result is that today we have greater secrecy, more censorship, a CIA with more domestic authority, an FBI with fewer restraints, and a National Security Agency with broader power than we have ever had in our history. And all of these developments have taken place under a new system of law that has grown up in the shadow of the Nixon presidency, after we thought we had struck down the abuses that produced Watergate. Ten years later, most Americans are not aware of this continued erosion of their individual liberties in the name of a dangerously expanding concept of national security.

What is most remarkable about all this is that we have drifted into a state of permanent emergency that has no immediate contest. We do not know what the emergency is or how long it will last. We do not even have a clear understanding of its impact on our system of liberty, since we have been conditioned to accept

the view that the rule of law often requires individual liberty to yield to claims of security under certain limited circumstances. In fact, we do not even think of ourselves as living in a state of emergency. On the contrary, we believe that a general suspension of liberty happens only in other countries and could never happen here.

Take a typical example close to home. On October 16, 1970, Prime Minister Pierre Elliott Trudeau went on Canadian national television and declared a "state of insurrection" throughout Canada, based on the kidnapping of a Canadian minister and a British consul by Quebec separatists. Trudeau invoked the Canadian War Measures Act and authorized the national police to conduct predawn roundups of French Canadians suspected of associating with the separatists. Trudeau's emergency decree had the effect of temporarily suspending the Canadian Bill of Rights.

Could it happen here? Probably not the way it happened in Canada. We are not likely to experience such a dramatic announcement and clear suspension of the Constitution in a time of similar crisis. Why not? Because our law of national security is flexible enough to accommodate almost any necessity. A decade ago, the Nixon administration was already able to devise methods of coping with similar emergencies without formally suspending the Constitution. In 1971 Nixon's second attorney general, Richard Kleindienst, commented on Trudeau's declaration of emergency by stating:

> It could not happen here under any circumstances. We wouldn't suspend the Bill of Rights even if the whole Cabinet, the Chief Justice and the Speaker of the House were kidnapped. . . . We wouldn't have to because our existing laws—together with our surveillance and intelligence apparatus, which is the best in the world—are sufficient to cope with any situation. . . . There is enough play at the joints of our . . . law, enough flexibility, so that if we really felt that we had to pick up leaders of a violent uprising, we could. We would find something to charge them with and we would hold them that way for a while.

That, of course, is exactly what the Nixon Justice Department did when it unceremoniously rounded up 12,000 people in the streets of Washington, D.C., during the May Day antiwar demonstrations in 1971. Although these mass arrests were later condemned by federal courts as unconstitutional, they were an awesome display of informal executive power to define and declare emergencies and suspend the Constitution. Comparing the Canadian and American approaches to national security, the Canadian Attorney General, John Turner, made a wry comment after Trudeau lifted his emergency decree:

> In a certain sense, it is a credit to the civil liberties of a country that it has to invoke extraordinary powers to cope with a real emergency. Some

countries have these powers at their disposal all the time.

Is the United States becoming such a country? Without clearly defining what we mean by national security, we have turned it into a talisman to ward off any evil that might befall us as a nation. It is disturbing, but not surprising, therefore, that the current administration has turned the CIA loose to spy on Americans and conduct "covert actions" inside the U.S.; created a presumption that all government information about foreign or military affairs can be withheld from the public; pardoned FBI officials who supervised criminal burglaries as heroes in a war against terrorism; mounted a campaign for official censorship of scientific research; and accused the critics of its foreign policy of promoting Soviet propaganda.

There is a simple question that we must ask ourselves as we look at these recent developments and the long history of national security maneuvers that preceded them: where does the Constitution fit in? National security is what protects us from our adversaries, but the Constitution and the Bill of Rights are what distinguish us from them. The question, of course, is not just one of law. We must decide what we mean by national security and whether its protection should be allowed to blur our principal distinguishing features as a nation. "Liberty lies in the hearts of men," Judge Learned Hand said in a famous speech delivered during a time of grave national danger, in 1943. "When it dies there, no constitution, no law, no court can save it." Judge Hand's speech echoed the warnings of the drafters of the Bill of Rights that, in the words of Thomas Paine, "those who expect to reap the blessings of freedom must always undergo the fatigue of supporting it."