CHAPTER 4

National Security and Freedom of Expression

The Sedition Act of 1798 was the first major government effort to limit free speech on national security grounds, but it would not be the last. The claim that free expression must be sacrificed is typical during times of war and crisis. As you have read in Chapters 2 and 3, the Lincoln administration limited expression during the Civil War, as did the Wilson administration during World War I. Free speech was threatened during the Cold War, the Vietnam War, and most recently in the aftermath of the attacks on September 11, 2001.

Advocates of free expression argue for a robust marketplace of ideas during times of crisis. The First Amendment is premised on the assumption that society can make the best decisions about the actions of our government officials when free expression is unrestrained.[1] In a democratic government, the people decide whether the justifications that their leaders advance for fighting a war are accurate and acceptable. They may debate whether our forces are fighting the war in a manner that is effective and ethical. Citizens who oppose the war should be free to express their viewpoint without being deterred by government surveillance. The people are entitled to have access to government information about the reasons for war and the progress of the war so they can make good decisions about whether the conflict is worthy of their support.

Conversely, the government and its supporters argue that the marketplace of ideas needs to be constricted in times of crisis. They contend that national security must first be guaranteed before "subordinate" values such as free expression can be protected.[2] Advocates of this perspective contend that during war it is the patriotic duty of every American to support the troops, the war effort, and the commander in chief. Criticism of the war effort hurts the morale of our own forces, and a divided nation emboldens the enemy. Government information about the conflict may need to be kept secret to avoid

[1]See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[2]See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951). Chief Justice Vinson's plurality opinion argued, "if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected." Ibid., 509.

giving the enemy an advantage; the government should have maximum flexibility to conduct surveillance on known enemies and their potential supporters.

Free speech and national security conflicts uniquely raise another issue: Who is to be the decider? In most of the cases you study in this book, the process is consistent. The legislative branch passes laws, the executive branch enforces the laws, and the judicial branch decides whether the laws or the enforcement thereof violate the First Amendment. In national security cases, advocates of a strong presidential role in foreign affairs contend that the executive branch should have the primary power to determine U.S. policies. They argue that the president should decide when civil liberties need to be sacrificed in the name of national security, and Congress and the Supreme Court should play a more limited role.

Chapter 4 examines how the Supreme Court has dealt with the tension between the First Amendment and assertions that national security justifies restriction of civil liberties or deference to the executive branch's determination of where the balance should be struck. We will begin by considering the question of whether the Constitution limits individual rights when the nation is at war or when national security is threatened. Following that discussion, we will turn our attention to three specific free speech and national security issues: government efforts to limit free expression in wartime, government practices that keep information secret on national security grounds, and government surveillance of its citizens.

A NATIONAL SECURITY EXCEPTION TO THE CONSTITUTION?

The text of the Constitution does not provide a national security exception to the First Amendment or provide the government with the power to limit free expression during time of crisis. The president's authority as commander in chief covers "nothing more than the supreme command and direction of the military and naval forces."[3] It includes no power to restrict expression. Although the Constitution provides that some of its other guarantees may be restricted during war,[4] there are no similar provisions for suspending First Amendment freedoms.[5]

Despite a lack of constitutional power to deny free expression during wartime, members of the public have demanded that dissenters be imprisoned or deported,[6] Congress has passed laws abridging freedom of expression,[7] and presidents have stretched their power

[3]Alexander Hamilton, The Federalist, No. 69, in *The Federalist*, Jacob Cooke, Ed. (Middletown, CT: Wesleyan University Press, 1961), 465.

[4]For example, Congress may suspend the writ of habeas corpus in cases of rebellion or invasion (Article I, Section 9). Also, although the Third Amendment provides that no soldier may be quartered in a home without the owner's consent in peacetime, soldiers may be quartered as prescribed by law in times of war (U.S. Const. Amend. III).

[5]Jeffrey A. Smith, *War and Press Freedom: The Problem of Prerogative Power* (New York: Oxford University Press, 1999), 16.

[6]Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton, 2004), 4–5.

[7]The Sedition Act of 1798 (Chapter 2 of this text) and the Espionage Act of 1917 (see Chapter 3 of this text) are two examples of such legislation.

as commander in chief to assume a "nearly dictatorial degree of control over the press."[8] However, these efforts cannot be squared with the text or purposes of the First Amendment. When these efforts have been challenged in federal court, the judiciary has refused to recognize a wartime exception to the First Amendment.

The Framers' Intent: Restrict Government Power, Not Public Debate

From the time that Europe was first ruled by monarchs, there was no shortage of European wars. From the campaigns of Charlemagne (768–814), to the Hundred Years War (1337–1453) and the Thirty Years War (1618–48), war "seemed natural" and "the major activity and recreation" for rulers and officers.[9] Wars became more deadly as weaponry improved and became more lethal; extended low-level warfare was devastating to civilian life.[10]

Enlightenment thinking, well known to the American colonists (as noted in Chapter 2), challenged the motivations of monarchs who kept dragging their countries into war. John Jay, an author of the *Federalist Papers*, wrote that monarchs often go to war to achieve personal objectives, even though the wars are "not sanctified by justice" or in the public interest.[11] James Madison believed that wars should only be declared by the will of the people—that is, by those who will bear the cost of war. He believed that through reason and a realistic comparison of the costs and benefits of war, "wars of folly" could be prevented.[12]

To avoid unnecessary war, the founders believed in "limited government and unlimited citizen debate."[13] They viewed the right to critique the performance of their elected leaders to be a key to the nation's security. Their goal, thus, was to preserve a free press that could expose "reckless leadership" that could cost the nation lives and treasure. To that end, they crafted a First Amendment that gave the government no power to control critical speech.[14] The courts have often concurred with this line of argument.

The Courts Weigh In: No Extraordinary Power in Wartime

As far back as 1866, the Supreme Court noted that constitutional rights are not surrendered during a national security crisis. In *Ex parte Milligan*, the Supreme Court held that constitutional protections apply "equally in war and peace." The Court reasoned that the United States cannot always expect "wise and humane rulers." The founders recognized the

[8]Smith, *War and Press Freedom*, 40.

[9]Jeremy Black, *European Warfare 1453–1815* (New York: St. Martin's Press, 1999), 2–3.

[10]John Landers, The Destructiveness of Pre-Industrial Warfare: Political and Technological Determinants, 42 *Journal of Peace Research* (2005): 455, 461–62.

[11]John Jay, The Federalist, No. 4, in The Avalon Project (2008) [online] < http://avalon.law.yale.edu/18th_century/ fed04.asp > .

[12]James Madison, National Gazette, February 2, 1792, in *The Writings of James Madison*, Gaillard Hunt, Ed. (New York: G.P. Putnam's Sons, 1906), 88–91.

[13]Smith, *War and Press Freedom*, 4.

[14]Ibid.

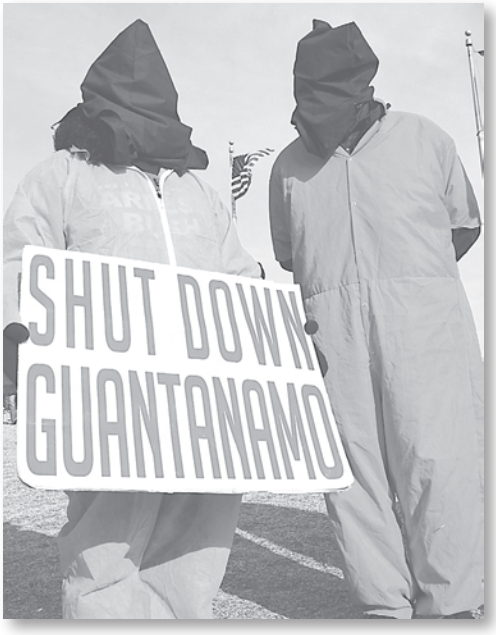

Photo 4.1 Protesters opposed to the U.S. prison at Guantanamo Bay, Cuba. During the Bush administration's War on Terror, secret information concerning the treatment of prisoners, clandestine prisons in Europe, and warrantless surveillance was gradually leaked to the press. These issues led to an intense debate about the proper boundary between the executive branch's power to keep information secret and the public's right to know.

Source: ©iStockphoto.com/mikadx.

dangers of unlimited power, thus they wrote a Constitution with safeguards that cannot be disturbed, even in time of war.[15]

The Supreme Court reiterated this position in a series of cases growing out of the Bush administration's War on Terror, conducted in the aftermath of the attacks of September 11, 2001. The administration had argued that the president has inherent power as the commander in chief to override laws that restrict his or her ability to conduct war.[16] But over the eight years following those attacks, the Supreme Court consistently has rejected the claim that the president possesses extraordinary powers in times of crisis. For example, the Court upheld a challenge to the Detainee Treatment Act, which denied the right of habeas corpus to aliens captured and held at Guantanamo Bay (Photo 4.1). Justice Kennedy's majority opinion noted, "the laws and Constitution are designed to survive, and remain in force, in extraordinary times."[17]

In *Hamdi v. Rumsfeld*,[18] Justice O'Connor's plurality opinion again noted that the Constitution gives the president no power to deny individual rights in wartime:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens [citation omitted]. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[19]

[15]*Ex parte Milligan*, 71 U.S. 2, 120–25 (1866).

[16]Adam Liptak, The Court Enters the War, Loudly, *New York Times*, July 2, 2006. See, e.g., John C. Yoo, Authority for Use of Military Force to Combat Terrorist Activities Within the United States, Op. Off. Legal Counsel 24 (October 23, 2001) ("First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully").

[17]*Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

[18]542 U.S. 507 (2004).

[19]Ibid., 536.

In *Hamdan v. Rumsfeld*,[20] Justice Stevens's majority opinion emphasized the *separation of powers* preserved by the Constitution. Although the president is commander in chief, Congress has the power to "make rules for the government and regulation of the land and naval forces." The president "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[21] Professor John Yoo, who helped create the Bush administration's legal strategy for the War on Terror while serving in the Office of Legal Counsel, noted that the *Hamdan* decision "may signal the collapse of the entire enterprise."[22]

In *Bourgeois v. Peters*,[23] Judge Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit crafted an eloquent argument for preserving constitutional rights. That case involved demonstrators who participated in an annual protest at the School of the Americas Watch in Columbus, Georgia. The protesters, who argued that the school teaches repressive techniques to Latin American armies, were compelled to pass through a metal detector before entering the protest site. The city argued that the search policy was justified because the nationwide Homeland Security threat was elevated. The circuit court rejected this contention:

> We also reject the notion that the Department of Homeland Security's threat advisory level somehow justifies these searches. . . . Given that we have been on 'yellow alert' for over two and a half years now, we cannot consider this a particularly exceptional condition that warrants curtailment of constitutional rights. We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.[24]

Thus, during the War on Terror, courts consistently rejected the viewpoint that the president has extraordinary power to limit individual rights. These cases have been consistent with the founders' viewpoint that the American people retain their right to debate and to criticize their elected leaders, even during times of war. We will now turn our attention to three specific contexts where free expression rights and national security have conflicted, beginning with government efforts to restrict communicators' messages in times of crisis.

GOVERNMENT EFFORTS TO LIMIT FREE EXPRESSION IN WARTIME

Few issues raise more impassioned debate than questions of war and peace. The decision to go to war, the quality of the conduct of a war, and the merits of ending a war can all be

[20]548 U.S. 557 (2006).

[21]Ibid., 591, 593 n. 23.

[22]Liptak, The Court Enters the War, Loudly, 4–1.

[23]387 F.3d 1303 (3rd Cir. 2004).

[24]Ibid., 1312.

very controversial. Advocates on all sides of these issues engage in impassioned debate in the marketplace of ideas.

War and Peace: The Debate

Supporters of military action often contend that war is necessary because the nation's very survival is at stake. From the Federalist arguments in 1798 that France would turn its forces against the United States, leading to slaughter and subjection,[25] to the second Bush administration's contention that Islamic terrorists wanted to establish a totalitarian empire and attack the United States with biological or nuclear weapons,[26] advocates have claimed that national self-preservation warrants war.

In response to these claims, other voices have questioned the rationales for war. Challenges to the Bush administration's claim that Iraq had weapons of mass destruction hardly constituted a novel argument strategy. Republicans doubted President Polk's claim that Mexico had attacked the United States in 1846. Instead, they believed that the U.S.-Mexican war was "a conspiracy to acquire territory out of which slave states might be formed."[27] Abraham Lincoln, then a representative from Illinois, earned the nickname "Spotty Lincoln" because he demanded that Polk inform Congress whether the spot where blood was first shed in that conflict "was or was not on American soil."[28] In Chapter 3, you read about speakers such as Eugene V. Debs, who questioned the wisdom of World War I.

Pathological Periods: The Pushback Against Dissent

During times of crisis, the United States may experience what Columbia Law professor Vincent Blasi has called "pathological periods."[29] During these times, toleration of dissent is at a minimum, due to a "felt need for scapegoats, a substantial segment of the political community focuses on the activities of dissenters and on the response of government."[30] Professor Jeffrey Smith referred to this response as a "paranoid style" of American politics during which it is believed that our country is threatened by ruthless enemies, resulting in overreaction in the form of diminished constitutional rights.[31]

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[25]Stone, *Perilous Times*, 27–29. As noted during the discussion in Chapter 2 of the Sedition Act, many Federalists believed that war with France was inevitable.

[26]Vice President Delivers Commencement Address at the U.S. Naval Academy (May 26, 2006). <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060526–4.html> .

[27]Ulysses S. Grant, *Memoirs and Selected Letters* (New York: Library of America, 1990), 41.

[28]Stone, *Perilous Times*, 81.

[29]Vincent Blasi, The Pathological Perspective and the First Amendment, 85 *Columbia Law Review* (April 1985): 449.

[30]Ibid., 468.

[31]Smith, *War and Press Freedom*, 56.

There have been a number of times in our nation's history when freedom of speech and other civil liberties have been particularly threatened, several of which have already been noted in this textbook. They include these:

- The Sedition Act of 1798, criminalizing criticism of the government
- Abraham Lincoln's suspension of habeas corpus and arrests of government critics during the Civil War
- The Wilson administration's prosecution and conviction of World War I opponents under the Espionage Act and Sedition Act of 1918
- The McCarthy Era, when a fear of Communism swept the nation, leading to a search for "disloyal" individuals who were stigmatized for their beliefs and associations
- The Vietnam War era, when opponents of the war were subjected to abusive surveillance and prosecuted under time, place, and manner regulations[32]

In this chapter, you will also read about challenges to free expression rights during the War on Terror, which followed the attacks of September 11, 2001. Historians and legal scholars continue to debate that era's effect on constitutional rights.

Whether the president and Congress are acting on their own volition or responding to fierce political pressure by curtailing freedom of expression, it is the job of the courts to protect constitutional rights. As you read in Chapter 2, an independent judiciary is supposed to protect minority rights from the passions of a political majority. Over time, the courts have taken greater steps to protect critical speech in times of war and crisis.

The Supreme Court and Protection of Antiwar Speech

The Years Before World War I

Early efforts to control critical speech during times of war or crisis did not reach the Supreme Court. The Sedition Act of 1798 resulted in the arrest of twenty-five people. Four of the nation's leading newspaper editors were prosecuted,[33] but the Act expired in 1801 without a ruling on its constitutionality. During the Civil War, critics were arrested for anti-government expression after President Lincoln suspended habeas corpus. The Supreme Court never directly ruled on the First Amendment issues raised by these actions, although after the Civil War the Court did note that no provision of the Constitution can be suspended during times of crisis.[34]

World War I and the McCarthy Era

World War I represented a high-water mark for prosecution of critical speech—there were more than two thousand Espionage Act cases based on antiwar expression, and more than

[32]Stone, *Perilous Times*, 12–13, 312. (This type of restriction will be discussed in Chapter 9.)

[33]See Chapter 2, p. 19.

[34]See *Ex parte Milligan*, 71 U.S. 2, 120–25 (1866).

half resulted in convictions.[35] As you read in Chapter 3, the Supreme Court ruled that such prosecutions did not violate the First Amendment in *Schenck* and subsequent cases. The rationale for these decisions was incitement to illegal conduct, based on the "bad tendency" or "clear and present danger" of such speech to encourage draft resistance and other law breaking. During the Cold War, the Supreme Court again used the "clear and present danger test" to uphold the convictions of Eugene Dennis and fellow leaders of the American Communist Party.[36] Following the *Dennis* decision, 145 Communist Party members and leaders were prosecuted, and 108 were convicted.[37]

Vietnam and the War on Terror

The trend toward successful prosecution of government critics was reversed during the Vietnam War. Although the war was protested by literally millions of people, there were no successful prosecutions based on the *content* of a communicator's message. The reason is that cases such as *Schenck* and *Dennis* were based on the theory that speech is unprotected *if it tends to incite illegal conduct*, rather than on the theory that criticism of the government is unprotected in wartime. In those World War I cases, the communicators' statements were unprotected because they tended to cause illegal draft resistance. But the Supreme Court tightened the standard for incitement in *Yates* and *Brandenburg*.[38] It would have been almost impossible for the government to prove that criticism of the wars in Vietnam or Iraq met that standard.

Thus, when Julian Bond (who had been elected to the Georgia legislature) declared his support for "men who are unwilling to respond to a military draft which would compel them to contribute their lives to U.S. aggression in Vietnam," the Supreme Court noted that his statements were protected by the First Amendment.[39] Fifty years earlier, this type of expression had resulted in prison terms for speakers such as Schenck and Debs. Once the Supreme Court took the bad tendency test off the table, however, the government no longer had a legal theory for punishing critical speakers that would hold up in court.

In the aftermath of the September 11 attacks and during the course of the Iraq War, supporters of the government's policies again took up the cry that critical speech was dangerous to the country. Baruch College professor Alisa Solomon wrote, "From shopping malls to cyberspace, Hollywood to the Ivy League, Americans have taken it upon themselves to stifle and shame those who question the legitimacy of the administration or the war in Iraq."[40] Paul Weyrich, chair of the Free Congress Foundation, argued that for the Dixie Chicks, who had stated during a London concert that they were embarrassed by President Bush, "to give aid and comfort to the enemy when we are on the edge of war is just

[35]Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992), 76.

[36]See Chapter 3, p. 53.

[37]Stone, *Perilous Times*, 411.

[38]See Chapter 3, p. 53.

[39]*Bond v. Floyd*, 385 U.S. 116, 133–34 (1966).

[40]Alisa Solomon, The Big Chill: Censoring Those Who Speak Out, 276 *The Nation* (June 2, 2003): 17.

outrageous."[41] In an editorial, the *New York Sun* took the argument to the next level: "[T]here is no reason to doubt that the 'anti-war' protesters—we prefer to call them protesters against freeing Iraq—are giving, at the very least, comfort to Saddam Hussein. . . . So the New York City police could do worse, in the end, than to allow the protest and send two witnesses along for each participant, with an eye toward preserving at least the possibility of an eventual treason prosecution."[42]

Despite the public pressure directed against critics of the Iraq War, there were no successful prosecutions based on a speaker's criticism of the government. As was the case with Vietnam War protesters, the government lacked a viable legal theory to justify the prosecution of Iraq War critics because the bad tendency rule had been repudiated.

This is not to say that all opponents of the Vietnam and Iraq wars escaped prosecution. Based on restrictions of the time, place, or manner of expression (see Chapter 9), or on limits on forms of symbolic expression (see Chapter 10), antiwar advocates have been arrested for burning their draft cards, protesting in the wrong place, or doing what the government deems to be disorderly conduct. However, dissenters who did not violate these rules were not and could not be sanctioned, even if a political majority believed their ideas were offensive or harmful to the war effort.

With the option to prosecute antiwar critics increasingly closed to the government, public officials have found other ways to try to bias the marketplace of ideas in their favor. One such tactic is to manage government information.

GOVERNMENT PRACTICES THAT KEEP INFORMATION SECRET

Under Executive Order 13292, the executive branch can classify information as "top secret," "secret," or "confidential." Such information is not available to the media or general public, and is only available to government officials on a "need to know basis."[43] This information includes military plans, intelligence activities, scientific and technical material, and information about the strengths and weaknesses of programs relating to national security. The question of whether the public should have access to this material can be problematic because sometimes secrecy truly protects national security, and at other times an administration may have an ulterior motive for keeping information secret.

Issues Raised by Government Secrecy

Certain information is clearly related to national security, and the decision to keep it secret is not controversial. For example, during World War II, few would have disagreed with the government keeping its plans for the D-Day invasion a secret. During the Cold War, if a member of the Soviet Politburo had secretly been providing information to the U.S. government, the existence of such a source should not have been revealed.

[41]Paul Weyrich, *Why This Fan Refuses to Listen to the Dixie Chicks from Now On*, Enter Stage Right (March 17, 2003). < http://www.enterstageright.com/archive/articles/0303/0303dixie.htm > .

[42]Comfort and the Protesters, *New York Sun*, February 6, 2003.

[43]Exec. Order No. 13292, 68 Fed. Reg. 15,315 §§ 1.2, 4.1 (2003).

However, the power to keep information secret can also have an adverse effect on the marketplace of ideas. As Yale Law professor Thomas Emerson noted, national security is a concept of "unparalleled vagueness."[44] The amorphous concept of national security can get confused with the electoral security of political leaders who may keep information secret in order to shield their own poor judgments, incompetence, or criminality. Throughout history, this type of information has been kept from the public on national security grounds,[45] yet citizens need this information in order to rationally assess the performance of their elected leaders.

Another problem is that the government can selectively release information to manipulate public debate in the marketplace of ideas. In the mid-1980s, when the government was promoting the wisdom of the Strategic Defense Initiative (a proposal to place antimissile defenses in space), classified information in support of the project was leaked. Scientists who opposed the project did not feel safe in countering with leaks of their own, however,[46] because they could have been jailed for disclosure of classified information.[47] In 2004, Vice President Cheney wanted a portion of a CIA report declassified and released because it supported his argument that the war was helping the campaign against jihadists. However, many of the report's conclusions went in the opposite direction, and Cheney did not want those parts released. Jamie Miscik, the CIA's analytical chief, wrote a memo opposed to releasing only half of the story, and she was forced out within a few weeks.[48]

How have the courts responded to the clash between the public's right to know about its government and claims that some information jeopardizes national security? We will examine some of the leading issues and controversies.

Secrecy of Operational Details

The government is on its strongest grounds when it attempts to keep the details of national security operations secret. Although the primary issue in *Near v. Minnesota*[49] was whether the publication of defamatory[50] material could be banned, the Supreme Court also gave an example of national defense information that could be kept secret: "No one would question but that a government might prevent the . . . publication of the sailing dates of transports or the number and location of its troops."[51] The government is particularly likely to win

[44]Thomas I. Emerson, National Security and Civil Liberties: Introduction, 69 *Cornell Law Review*, (April 1984): 685, 686.

[45]Geoffrey Stone, Classified Information and the Press, University of Chicago Law School Faculty Blog (May 21, 2006). [online] < http://uchicagolaw.typepad.com/faculty/2006/05/classified_info.html > .

[46]David H. Topol, *United States v. Morison*: A Threat to the First Amendment Right to Publish National Security Information, 43 *South Carolina Law Review* (Spring 1992): 581, 601.

[47]Flora Lewis, A "Star Wars" Cover-Up, *New York Times*, A31, December 3, 1985.

[48]Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies Since 9/11* (New York: Simon & Schuster, 2006), 340–41.

[49]283 U.S. 697 (1931).

[50]Defamatory expression, the topic of Chapter 7, is false speech that damages another person's reputation.

[51]283 U.S. 719.

cases involving the disclosure of classified information when a government employee has attempted to reveal it. For example, Frank Snepp III, a former CIA agent, wrote a book about CIA activities in Vietnam without obtaining a clearance from the agency, as was required by his contract. The Supreme Court held that Snepp must give the CIA the opportunity to review his work to determine whether any of its contents would compromise classified information.[52]

United States v. Morison[53] involved a federal employee who sent classified photos of a Soviet aircraft carrier under construction to the British periodical *Jane's Defence Weekly*, which published the pictures. Morison was convicted for unauthorized disclosure of classified information to someone not authorized to receive it,[54] and he appealed the verdict on First Amendment grounds. The Fourth Circuit Court of Appeals upheld the conviction, noting that it was irrelevant that the material was given to a representative of the press rather than to a foreign agent as would occur in a traditional espionage case.[55]

Judge Wilkinson wrote a concurring opinion upholding Morison's conviction but acknowledging that the First Amendment issues raised by the case were "not insignificant." He agreed that governments do attempt to manage the news in their favor and that government security from informed criticism should not be conflated with national security. However, although Morison's disclosure would inform public debate about Soviet sea power, it would also reveal U.S. electronic surveillance capabilities to potential enemies. Judges do not have the aptitude to resolve the trade-off between national security and the public's right to know, and should generally defer to the judgment of Congress.[56]

Thus the government has the power to sanction its employees for transmitting classified information to the press. Does the government also have the power to prevent the press from publishing classified information that they have received? This issue was addressed in one of the Supreme Court's landmark decisions of the Vietnam era, known as the *Pentagon Papers* case.

The *Pentagon Papers* Case

The Context of the Case

The term "Pentagon Papers" refers to a government study requested by then–Secretary of Defense Robert McNamara, of U.S. involvement in Vietnam from World War II to May 1968. The study consisted of about seven thousand pages of information, and was classified top secret. Daniel Ellsberg, who had worked for the Defense Department before becoming an activist against the war, copied the documents and gave them to the *New York Times*, and later to the *Washington Post* and other newspapers.

[52]*Snepp v. United States*, 444 U.S. 507 (1980).

[53]844 F.2d 1057 (4th Cir. 1988).

[54]18 U.S. Code § 793 (d) and (e).

[55]844 F.2d, 1070.

[56]Ibid., 1081–83 (Wilkinson, J., concurring).

The documents contained significant evidence that the government had not been truthful to the public about the rationale for the Vietnam War, or about its conduct in that war. For example, the Gulf of Tonkin Resolution authorizing the war had been forced through Congress under false pretenses.[57] They also indicated that President Johnson was secretly planning to escalate the Vietnam War in 1964 at the same time that he was criticizing his Republican opponent Barry Goldwater for being a "hawk" who wanted to expand the war. The government also had concealed that extensive bombing campaigns against North Vietnam had killed tens of thousands of Vietnamese civilians but done little to harm the North's military capability.[58] Furthermore, although the government kept telling the public that victory was in sight, they knew the opposite to be true.[59]

When Secretary McNamara read the report, he noted, "[Y]ou know, they could hang people for what's in there."[60] By the time the Pentagon Papers were leaked to the press, Richard Nixon had become president. The White House sought an injunction against the publication of the documents, contending that their release would damage national security. A federal appeals court in New York held that the *New York Times* could publish some of the papers' content, but that the newspaper must leave out any material that the government found detrimental to national security. A similar legal battle took place against the *Washington* (DC) *Post*, culminating in an appellate ruling against the government.[61] The cases were appealed to the Supreme Court.

The Supreme Court Rules: This Prior Restraint Is Unconstitutional

The Supreme Court ruled on both cases in a single opinion. By a six-to-three vote, the Court held that the injunctions were unconstitutional. However, the justices in the majority did not agree on the details of the reasoning behind their decision. After a short per curiam opinion ruling that the government had not met their burden of proof to justify the injunction, the justices issued a number of concurring and dissenting opinions. The key First Amendment principle to be learned from this case is that there is a heavy presumption against prior restraints on publication, even when the government attempts to justify the restriction on national security grounds. Beyond that, the justices offered a wide range of opinions on how the freedom of expression–national security dichotomy should be resolved.

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[57]Sanford J. Ungar, *The Papers and the Papers: An Account of the Legal and Political Battle Over the Pentagon Papers* (New York: Dutton, 1972), 33. In August 1964, President Johnson alleged that U.S. naval forces in the Gulf of Tonkin (on the coast of North Vietnam) had been attacked by a North Vietnamese patrol boat and Congress responded by authorizing Johnson to respond with all necessary force.

[58]Ibid.

[59]Nat Hentoff, *The First Freedom* (New York: Delacorte, 1980), 192.

[60]David Halberstam, *The Best and the Brightest* (New York: Random House, 1972), 633.

[61]*United States v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir.1971).

NEW YORK TIMES CO. v. UNITED STATES, 403 U.S. 713 (1971)

Per Curiam.

We granted certiorari in these cases in which the U.S. seeks to enjoin the *New York Times* and *Washington Post* from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" [citation omitted].

Any system of prior restraints on expression comes to this court with a heavy presumption against its constitutional validity [emphasis added] [citation omitted]. The Government thus carries a heavy burden of proof for the imposition of such a restraint. . . .

The District Court for the Southern District Court in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.

Justices Black and Douglas wrote a concurring opinion contending that the government had no power to censor the press. James Madison and the other framers used explicit language that could not be misunderstood: Congress shall make *no law* abridging freedom of the press. The founders' purpose was to ensure the press could forever censure the government, baring its secrets and informing the people. A paramount responsibility of a free press "is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."[62] If the president had the constitutional power to prevent the publication of news by invoking the broad, vague term of national security, it would "wipe out" the First Amendment.[63]

Justice Brennan's opinion did not take Black and Douglas's absolutist stance that a prior restraint could never be granted on national security grounds. However, he argued that only government proof that publication of information would "inevitably, directly, and immediately" cause serious harm could justify censorship. In the case of the Pentagon Papers, the government only showed that publication could, may, or might damage the national interest. The First Amendment allows for no prior restraint based on "surmise or conjecture."[64]

Justices White and Stewart agreed that a prior restraint could only be imposed under exceptional circumstances. However, they would leave the door open for subsequent punishment of the press *after* the material was published. White and Stewart were concerned that publication of the Pentagon Papers would "do substantial damage to public interests."[65] They noted that the government might win a prosecution based on Section 793 of the

[62]403 U.S. 717 (Black, J., concurring).

[63]Ibid., 718–19.

[64]Ibid., 725–27 (Brennan, J., concurring).

[65]Ibid., 731 (White, J., concurring).

Federal Criminal Code, which criminalizes the communication of a national defense document "to any person not entitled to receive it" or to "willfully retain the document and fail to deliver it to an officer of the U.S. entitled to receive it."[66]

Justice Harlan wrote a dissent that was joined by Chief Justice Burger and Justice Blackmun. The dissent contended that the Constitution gives primary control of foreign affairs to the executive branch of government. The judicial branch should generally defer to the executive when it is operating in this field and should not attempt to substitute its own judgment of whether the publication of information would harm national security. Courts are not well qualified to make these complex decisions. Instead, they should be made by the political branches of government who are directly accountable to the people.[67]

The Consequences of the Pentagon Papers *Case*

The publication of the Pentagon Papers and the public's recognition the government had not been truthful when describing and defending its Vietnam War policy changed the way people thought about their government. In the past, the public may have trusted the president to tell the truth; in the future, the public would be more likely to doubt the honesty of their nation's leaders.[68] The term "credibility gap," a reference to the public's skepticism about claims made by the government, was widely employed in public debate.

Did publication of the Pentagon Papers harm national security? Erwin Griswold, the U.S. Solicitor General who represented the government in that case, later admitted that no national security damage was caused.[69] More generally, he stated there was "massive overclassification" by the government and "the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[70]

The War on Terror: Publication of Classified Information

Publication of Secret Information

During the Bush administration's War on Terror, the issues raised by the Pentagon Papers again came to the forefront, as the media received and published secret information that enlightened the public about the conduct of the war. These revelations included these:

- Secret Justice Department memos authorizing the CIA to interrogate terrorism suspects through "a combination of painful interrogation tactics," including waterboarding (simulated drowning). These memos were issued at the same time

[66]Ibid., 737.

[67]Ibid., 756–58 (Harlan, J., dissenting).

[68]Stone, *Perilous Times*, 516.

[69]Tom Blanton, The Lie Behind the Secrets, *Los Angeles Times*, May 21, 2006, [online] < http://articles.latimes.com/2006/may/21/opinion/op-blanton21 > . The National Security Archive, a research institute at The George Washington University, analyzed each of the national security arguments in the government's brief. See [online] < http://www.gwu.edu/ ~ nsarchiv/NSAEBB/NSAEBB48/secretbrief.html > .

[70]Erwin N. Griswold, Secrets Not Worth Keeping; The Courts and Classified Information, *Washington Post*, A25, February 15, 1989.

the administration was publicly claiming to be backing off on the use of the most aggressive tactics.[71]

- A secret report by Maj. Gen. Antonio Taguba detailing abuses by U.S. forces at the Abu Ghraib prison in Iraq, including sexual humiliation and physical abuse of detainees. Photographs of the abuses were also published.[72]
- A disclosure that the CIA had been holding and interrogating captives at secret prisons in Eastern Europe, where prisoners were permitted to use interrogation techniques prohibited by the U.N. Convention Against Torture and by U.S. military law. Other detainees were "rendered" to intelligence services in countries such as Egypt, which have suspect human rights records.[73]
- A revelation that President Bush signed a secret order in 2002 authorizing the National Security Agency (NSA) to "eavesdrop on U.S. citizens," monitoring e-mails, phone calls, and other communications "despite previous legal prohibitions against such domestic spying."[74] (This program will be discussed in detail in the next section of Chapter 4).

The publication of this type of secret material reignited debate on a question that was mentioned in Justice White's concurring opinion in the *Pentagon Papers* case: should the media be prosecuted for publishing classified information?

Calls for Prosecution

The media was criticized in some quarters for publishing classified information that had been leaked to reporters. House Republicans drafted a resolution to condemn such publications, claiming that the *New York Times* and other media outlets "could be placing lives at risk."[75] When asked whether journalists could be prosecuted for publishing classified information, Attorney General Alberto Gonzales responded, "there are some statutes on the book, which if you read the language carefully, would seem to indicate that that is a possibility."[76] *Commentary* senior editor Gabriel Schoenfeld stated that the *Morison* decision[77] provided a possible precedent for an Espionage Act prosecution and argued, "the laws governing what the *Times* has done are perfectly clear; will they be enforced?"[78]

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[71]Greg Miller and Richard B. Schmitt, CIA Doesn't Use Torture, Bush Says; Interrogation Methods are Legal, He Insists, but He Won't Offer Specifics. Leaked Justice Memos Endorsed Harsh Tactics, *Los Angeles Times*, A1, October 6, 2007.

[72]Seymour M. Hersh, The General's Report, 83 *The New Yorker* (June 25, 2007): 58; Unfolding Story of Abu Ghraib, *Congressional Quarterly Weekly* (May 8, 2004): 1064.

[73]Dana Priest, CIA Holds Terror Suspects in Secret Prisons, *Washington Post*, A01, November 2, 2005.

[74]Dan Eggen, Bush Authorized Domestic Spying, *Washington Post*, A01, December 16, 2005.

[75]Linda Feldman, Amid War on Terror, A War with the Press, Bush's Team Pounds the *New York Times* in Particular, Over Reports, *Christian Science Monitor*, 1, June 29, 2006.

[76]Walter Pincus, Prosecution of Journalists Is Possible in NSA Leaks, *Washington Post*, A04, May 22, 2006.

[77]See second and third paragraphs under "Secrecy of Operational Details," this chapter.

[78]Gabriel Schoenfeld, Has the *New York Times* Violated the Espionage Act? 121 *Commentary* (March 2006): 23, 31.

These calls for prosecution were unheeded. Indeed, throughout U.S. history there have been no criminal prosecutions of the media for printing government secrets.[79] Nevertheless, the government attempted to create a chilling effect by invoking the *threat* of prosecution. By attempting to ferret out the person who leaked the classified material and by threatening to prosecute journalists who publish the information, the administration hoped to deter further disclosures of information.[80] However, this type of information plays a key role in the marketplace of ideas, enabling the people to make informed decisions about the performance and policies of their government.

Classified Information, the War on Terror, and the Marketplace of Ideas

The revelation of secret information about the War on Terror provided the American public with knowledge that was highly relevant to democratic decision making. Stories about the NSA domestic surveillance program, torture at Abu Ghraib, and secret prisons in Eastern Europe revealed "serious violations of domestic and international law by our government," and resulted in two Pulitzer Prizes.[81] These disclosures facilitated the checking function of the First Amendment, leading to criticism of the government and advocacy of changes in the conduct of the antiterrorism campaign.[82]

The second Bush administration also denied the public access to information that was highly relevant to the question of whether the United States should go to war in Iraq. At the same time that the government was telling the American public that Iraqis would greet invading U.S. troops as liberators and that Saddam Hussein had ties with Al Qaida, the government failed to inform the public of contrary analysis by the CIA and Defense Intelligence Agency.[83] Furthermore, the state department's Bureau of Intelligence and Research was skeptical about the claim that Iraq possessed weapons of mass destruction, and warned of the "political and ethnic turmoil that was likely in postwar Iraq."[84]

As you read earlier in this chapter, the First Amendment was crafted to give the public the power to debate and decide questions of war and peace. It is not the government's role to make a paternalistic decision about the wisdom of initiating war, and then selectively to present only the information that supports its decision. It is the public's role to evaluate all the relevant information and tell their elective representatives whether war is in the national interest. Whether a fully informed American public would have made the decision

[79]Geoffrey R. Stone, The U.S. Can Keep a Secret, *Los Angeles Times*, B13, June 6, 2006.

[80]The Media's Role and Responsibilities in Leaks of Classified Information: Hearing Before the House Permanent Select Committee on Intelligence, 109th Cong. 4–5 (May 26, 2006) (statement of Jonathan Turley, professor of law, The George Washington University).

[81]Ibid., 4.

[82]See, e.g., Policy of Abuse; A Senate Committee Shows How Bush Administration Decisions Led to the Mistreatment of Prisoners, *Washington Post*, B06, December 14, 2008; Nat Hentoff, Protecting American Freedom in Wartime; Some Conservatives Stand Against Bush, For Civil Liberties, *Washington Times*, A21, November 26, 2007.

[83]Prewar Revisited; Senate Report Highlights Dangers of Slanting Intelligence to Justify Invasion of Iraq, *Columbus Dispatch* (June 15, 2008): G04.

[84]David Ignatius, Spy World Success Story, *Washington Post*, B07, May 2, 2004.

to go to war in Iraq is beside the point. The more important point is that the government did not disclose highly relevant information that would have assisted the public in making this decision. The people are entitled to an accurate accounting of all the government's assessments on the wisdom of going to war.

The publication of leaked information has resulted in a more informed public, but has there been a cost to national security? Vincent Cannistraro, chief of CIA counterterrorism operations for the first President Bush, indicated "nothing that has been revealed in the past few months has had any substantive effect on the war on terror." He reasoned, "hardened, organized groups have been aware or assumed that voice, e-mail communications, and bank transfers are monitored at least since 9/11." [85] Larry Johnson, a security consultant who has worked for the CIA and the state department, stated that if the secret programs had been all that effective, "we would have heard much more about arrests."[86] Another argument for secrecy is that disclosure of potential human rights abuses by the United States will inflame the terrorists and incite further violence. This rationale was rejected in *ACLU v. Department of Defense*,[87] with Judge Hellerstein's opinion concluding, "the terrorists in Iraq and Afghanistan do not need pretexts for their barbarism."[88]

If the publication of classified information would truly harm national security, the government retains options. At times, the media has acceded to government requests not to publish information. For example, the *Washington Post* did not publish the location of the secret CIA prisons in Europe.[89] The government can also go to court and seek an injunction against publication if they can prove a threat to national security.[90]

Control of information is not the only practice that distorts the marketplace of ideas. Free expression is also threatened by government surveillance.

GOVERNMENT SURVEILLANCE OF ITS CITIZENS

"No holds were barred. We have used [similar] techniques against Soviet agents. [The same methods were] brought home against any organization against which we were targeted. We did not differentiate. This is a rough, tough business."[91] The target of these techniques was Dr. Martin Luther King Jr., and the source of this quotation is William Sullivan, who headed the FBI's surveillance campaign against Dr. King.

[85]Mark Sappenfield and Mark Clayton, How Media Leaks Affect the War on Terror, *Christian Science Monitor* (June 30, 2006) < http://www.csmonitor.com/2006/0630/p02s01-usfp.html > .

[86]Ibid.

[87]389 F. Supp. 2d 547 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2nd Cir. 2008).

[88]Ibid., 576.

[89]Dan Eggen, Bush's Plumbers: The White House Aims to Plug Leaks, Possibly by Prosecuting Sources and Reporters, *Washington Post*, 11, National Weekly Edition March 13–19, 2006.

[90]See, e.g., Justice Brennan's opinion in the *Pentagon Papers* case, p. 97 of this chapter.

[91]Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Dr. Martin Luther King Case Study, S. Rep. No. 94–755, 94th Cong. 81 (April 23, 1976) [hereinafter, Church Committee Report, Book III].

Surveillance refers to efforts to monitor or listen to people, or to find information about people, often without their knowledge. It may be directed at electronic communications such as e-mail and telephone conversations, or it may be conducted by physically monitoring people or infiltrating organizations. The government may also obtain records of phone calls that individuals have made, books that they have bought, or Web sites that they have visited. **Political profiling** refers to surveillance based on the target's exercise of First Amendment rights, rather than on a reasonable suspicion of criminal activity on the part of the target.[92]

Martin Luther King Jr., was a particularly noteworthy victim of government surveillance, but he was hardly the only one. As you will read, executive branch surveillance of its critics has presented a major threat to First Amendment rights at various points in American history.

The Years Before 9/11: Domestic Surveillance Abuses Circumscribed

An Extended Record of Political Profiling

A U.S. Senate Committee headed by Senator Frank Church researched government surveillance practices from 1936 to 1975 and published its findings in fourteen volumes of reports and supporting documentation.[93] The committee found that each president from Franklin Delano Roosevelt to Nixon engaged in improper political surveillance, and concluded, "too many people have been spied upon by too many Government agencies and too much information has been collected."[94] Surveillance has often been misused to "further personal goals, support corruption, and harass opponents."[95]

Surveillance programs included the FBI's COINTELPRO, which was specifically created to "deter citizens from joining groups, 'neutralize' those who were already members, and prevent or inhibit the expression of ideas."[96] Targets included critics of the Vietnam War, politicians, reporters, and authors.[97] The Army conducted a domestic spying operation that assigned undercover officers to collect information on "virtually every group seeking significant change in the United States."[98] Under Operation MINARET, the NSA intercepted international communications of American citizens and groups that participated in antiwar and civil rights activism and created "watch lists" to share with other government

[92]Linda E. Fisher, Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups, 46 *Arizona Law Review* (Winter 2004): 621, 624–25, 627.

[93]Daniel J. Solove, Electronic Surveillance Law, 72 *George Washington Law Review* (August 2004): 1264, 1276.

[94]Senate Select Committee To Study Governmental Operations With Respect To Intelligence Activities, Intelligence Activities and the Rights of Americans, Book II, S. Rep. No. 94–755, 94th Cong. 5, 9–10 (April 26, 1976) [hereinafter, Church Committee Report, Book II].

[95]Susan Freiwald, Online Surveillance: Remembering the Lessons of the Wiretap Act, 56 *Alabama Law Review* (Fall 2004): 9, 12.

[96]Church Committee Report, Book II, 211.

[97]Ibid., 227–31.

[98]Robert Justin Goldstein, Political Repression in Modern America From 1870 to the Present (Cambridge, MA: Schenkman, 1978), 458.

agencies.[99] At the local level, police "Red Squads" conducted surveillance on groups such as the League of Women Voters, National Council of Churches, labor unions, and civil rights organizations.[100]

The information collected was used as a weapon against dissenters. For example, the FBI sent letters to parents, employers, and spouses of activists, alleging that the targets were embezzling, having affairs, or participating in "wild" demonstrations. They tried to make life difficult for members of leftist organizations by causing them to be "evicted from their homes, disabling their cars, and even instigating physical assaults against them." [101] The objective of their campaign against Dr. Martin Luther King Jr., was to "neutralize him as an effective civil rights leader."[102] The military distributed information about "the private political, financial, and sex lives of tens of thousands of individuals" to a variety of government agencies. [103] Red Squads leaked information that was "often replete with inaccuracies," providing it to the media in order to cause the targets to lose their jobs and to destroy their organizations.[104]

The information gathered rarely pertained to criminal activity. Although the FBI conducted more than five hundred thousand investigations to ferret out subversion, not a single person was prosecuted for attempting to overthrow the government. A General Accounting Office study of more than seventeen thousand domestic intelligence investigations found that only 1.3 percent of the cases resulted in conviction. A former member of the Johnson administration admitted that the information gathered about dissident groups was of little use in preventing violence.[105] Little of the evidence gathered in the NSA's MINARET program had any intelligence value.[106] Finally, Red Squads distributed their files to people who had no legitimate law enforcement need for the information.[107]

Surveillance Limits Freedom of Expression

When the government conducts surveillance, it becomes an audience member and, as such, changes communication interactions. The government is generally limited in its ability to control decisions in the communication process, such as the verbal or nonverbal symbols to be used, the channel for expression, and the choice to speak or be silent. The choice of audience is "inextricably intertwined with other choices that currently rest within the constitutional freedom of speech."[108] Surveillance also limits the freedom of receivers

[99]Church Committee Report, Book III, 739.

[100]Fisher, Guilt by Expressive Association, 632–33.

[101]Stone, *Perilous Times*, 490.

[102]Church Committee Report, Book III, 81.

[103]Ibid.

[104]Fisher, Guilt by Expressive Association, 633–34.

[105]Ibid., 19.

[106]Church Committee Report, Book II, 108.

[107]Fisher, Guilt by Expressive Association, 633.

[108]Matthew Lynch, Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure, 5 *First Amendment Law Review* (Spring 2007): 234, 292–94.

because communicative acts "take on a different social meaning" when they are monitored by the government. Visiting a Web site can become a speech act from which the government may draw conclusions.[109]

One consequence of government intrusion into the communication process is a chilling effect. Professor Jerry Kang noted that we have dignity as human beings because we are able to consider and select personal and political projects. However, government monitoring interferes with this autonomy by forcing us to be conscious of how we are perceived by the authorities. "Simply put, surveillance leads to self-censorship."[110] The chilling effect is particularly pronounced on speakers participating in protest and dissent.[111]

When information obtained through surveillance is used against communicators, even when they have committed no illegal acts, self-censorship is exacerbated. For example, people will be inhibited from exercising freedom of speech or association if their activity may get their name into an FBI file.[112] Communicators will also be deterred if their speech or association could get them placed on a watch list or subjected to additional airport screening.[113]

First Amendment scholars who critique government surveillance have used the metaphor of the "panopticon" to describe a surveillance society. Michel Foucault argued that modern society increasingly functions like a panopticon, a model prison in which inmates perceive that they are perpetually observed.[114] The mere knowledge that one's communication may be subjected to warrantless surveillance creates a power dynamic that favors the government and results in self-censorship.[115] Thus the government can influence expression merely by creating ambiguity about who is being monitored and under what conditions.

A second harm from surveillance is forced conformity. Professor Christopher Slobogin noted, "[A] lack of public anonymity produces conformity and an oppressive society."[116] Harvard professor Shoshana Zuboff refers to this phenomenon as "anticipatory conformity" among those who perceive they are under surveillance.[117] Communicators' messages will tend to become more "bland and mainstream"[118] or even tailored toward the observers'

[109]Paul M. Schwartz, Privacy and Democracy in Cyberspace, 52 *Vanderbilt Law Review* (November 1999): 1607, 1651–52.

[110]Jerry Kang, Information Privacy in Cyberspace Transactions, 50 *Stanford Law Review* (April 1998): 1193, 1260.

[111]Solove, Electronic Surveillance Law, 1268.

[112]Fisher, Guilt by Expressive Association, 624–25.

[113]Daniel J. Solove, The First Amendment as Criminal Procedure, 82 *New York University Law Review* (April 2007): 112, 157.

[114]The panopticon was first conceived by philosopher Jeremy Bentham. The cells and walkways would be placed on the perimeter of a circular building with the guards on top of the tower in the middle. A small number of guards can watch a large number of prisoners and the mere knowledge that prisoners can easily be observed makes "every prisoner his or her own warden." Christopher Slobogin, Camera Surveillance of Public Places and the Right to Autonomy, 72 *Mississippi Law Journal* (Fall 2002): 213, 240.

[115]Paul Ham, Warrantless Search and Seizure of E-mail and Methods of Panoptical Prophylaxis, 2008 Boston College Intellectual Property and Technology Forum 90801, *21-*22 (September 2008).

[116]Slobogin, Camera Surveillance of Public Places and the Right to Autonomy, 240.

[117]Ibid., 242–43.

[118]Solove, Electronic Surveillance Law, 1268.

viewpoint.[119] Changes in individuals' thoughts and actions may even occur subconsciously as surveillance becomes pervasive.[120]

The Supreme Court and Congress Respond

In the 1970s, the Supreme Court and Congress responded to the four-decade history of surveillance abuses and placed limitations on presidential power:

United States v. U.S. District Court.[121] This case involved a government prosecution of three defendants for conspiracy to destroy government property. The prosecution acknowledged that evidence against the defendants had been obtained through warrantless wiretaps, but argued that the surveillance was a reasonable exercise of the president's power to protect national security.[122] The Supreme Court ruled that the executive branch did not have the power to conduct surveillance for domestic security purposes without obtaining a judicial warrant.[123]

The Court reasoned that throughout history the government has viewed its critics with suspicion. The danger to dissenters is "acute" when a vague concept such as threat to domestic security could form the justification for government surveillance.[124] Constitutional freedoms cannot be ensured if domestic surveillance searches are conducted at the discretion of the executive branch, because presidential officials are not neutral and disinterested. Their job is to enforce laws and to prosecute *cases against suspects.* The Fourth Amendment resulted from a historical judgment, "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."[125] Individual rights can best be guaranteed through the separation of powers. Therefore, judicial approval is required before domestic surveillance may be conducted.[126]

The government dismissed the conspiracy prosecution rather than continuing the case, which would have resulted in the revelation that there had been illegal wiretaps.[127] The NSA's MINARET program was terminated in 1972, enabling the government to avoid the political consequences that could have resulted if the program had been revealed to the public.[128] The *United States District Court* decision held that a warrant was necessary for

[119]Slobogin, Camera Surveillance of Public Places and the Right to Autonomy, 243. See also Jeffrey Reiman, Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future, 11 *Santa Clara Computer and High Technology Law Journal* (March 1995): 27, 38.

[120]Lynch, Closing the Orwellian Loophole, 271.

[121]407 U.S. 297 (1972).

[122]Ibid., 301.

[123]Ibid., 321.

[124]Ibid., 314.

[125]Ibid., 317.

[126]Ibid., 317–18.

[127]Alton Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978), 124–25.

[128]Ibid., 122.

domestic surveillance. Congress then passed legislation designed to limit abuses of foreign surveillance.

The Foreign Intelligence Surveillance Act. Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978 to regulate electronic surveillance of foreign powers and their agents. A special secret Foreign Intelligence Surveillance Court (FISC) was established to approve surveillance on these entities.[129] To gain FISC authorization, the government needed to prove that there was probable cause that the surveillance target was a foreign power or its agent, and that each location where such surveillance was directed was being used by a foreign power, agent, or lone wolf (a foreign individual who poses a threat).[130]

No warrant was required when a channel of communication was only used by foreign powers, and there was no substantial likelihood that a U.S. person's communication would be obtained. Also, in an emergency situation, surveillance could be conducted without a warrant for seventy-two hours, although the attorney general had to inform the FISC immediately and apply for a warrant within that time frame.[131]

The purpose of FISA was to put a check on unilateral executive branch surveillance so that the abuses uncovered by the Church Committee could not be repeated. A 1978 Senate Report noted, "This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused."[132] The objective was to place an outside check on executive branch spying.[133] This law was to be the "exclusive means by which the executive branch may conduct foreign intelligence in the United States."[134] That provision, along with the legislative history "left no doubt" that Congress intended to terminate the "various warrantless wiretapping and surveillance programs undertaken by the executive branch and to leave no room for the president to undertake warrantless surveillance in the domestic sphere in the future."[135]

From 1978 to September 11, 2001, this policy of requiring judicial authorization before surveillance could be conducted remained largely intact. Government surveillance was subjected to oversight by all three branches of government and allegations of domestic surveillance directed against the exercise of First Amendment rights were relatively few.[136] However, after September 11, there was a surge in warrantless surveillance.

[129]Peter P. Swire, The System of Foreign Surveillance Law, 72 *George Washington Law Review* (August 2004): 1306, 1321–22.

[130]Jon D. Michaels, All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror, 96 *California Law Review* (August 2008): 901, 919 n. 86.

[131]Ibid.

[132]Solove, Electronic Surveillance Law, 1277.

[133]Wartime Executive Power and the NSA's Surveillance Authority II, Before the Senate Committee on the Judiciary, 109th Cong. 2nd session (February 28, 2006) (Statement of Bruce Fein, attorney and former U.S. associate deputy attorney general).

[134]Andrew Adler, The Notice Problem, Unlawful Electronic Surveillance, and Civil Liability Under the Foreign Intelligence Surveillance Act, 61 *Miami Law Review* (January 2007): 393, 394.

[135]In re: National Security Agency Telecommunications Records Litigation, No. 06–1791, 13 (N.D. Cal., filed July 2, 2008).

[136]Swire, The System of Foreign Surveillance Law, 1329.

The Post-9/11 World: Expansion of Domestic Surveillance

The NSA Domestic Surveillance Program Is Revealed

In December 2005, news reports revealed that President Bush had provided secret authority for the NSA to conduct warrantless surveillance on Americans in order to investigate potential terrorist activity.[137] The Bush administration acknowledged the existence of the program and contended that it was limited to monitoring communications of "people in the United States believed to have contact with suspected associates of al Qaeda and other terrorist groups overseas."[138] The administration did not provide the guidelines that are used to determine who is linked to terrorist organizations, but insisted that the decision be closely scrutinized by NSA officials and "must be signed off by a shift supervisor."[139]

Justifications for the NSA Surveillance Program

The Bush administration argued that warrantless surveillance was necessary because the FISA program "does not offer the speed and agility needed to contend with the threat of armed terrorists within U.S. territory."[140] General Michael Hayden, then deputy director of intelligence, contended, "vital information could be lost in the time it took to secure a warrant from a special surveillance court."[141] Although the FISA statute allowed emergency surveillance for seventy-two hours without a court order, Alberto Gonzales argued that this provision was inadequate. The attorney general would still need to certify that the factual basis for surveillance existed, and lawyers would need to prepare legal papers and, ultimately, gain approval of a FISC judge. "This process consumes valuable resources and results in significant delay."[142]

The administration also contended that the Constitution gave the executive branch the power to initiate and carry out the NSA program without oversight. Attorney General Gonzales claimed, "[T]he Constitution charges the president with the primary responsibility for protecting the safety of all Americans," and provides the president with the inherent power to gather foreign intelligence.[143] University of Virginia Law professor Robert Turner argued that the president has the unilateral power to control foreign

[137]See, e.g., James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, *New York Times*, A1, December 16, 2005; Eggen, Bush Authorized Domestic Spying.

[138]Eggen, Bush Authorized Domestic Spying.

[139]James Risen & Eric Lichtblau, Spying Program Snared U.S. Calls, *New York Times*, A1, December 21, 2005.

[140]Jeremy Neff, Does (FISA + NSA) * AUMF—HAMDI = Illegal Domestic Spying?, 75 *University of Cincinnati Law Review* (Winter 2006): 887, 900.

[141]Eggen, Bush Authorized Domestic Spying.

[142]Wartime Executive Power and the NSA's Surveillance Authority II, Before the Senate Committee on the Judiciary, 109th Cong. 2nd session (February 6, 2006) (Statement of Alberto Gonzales, Attorney General).

[143]Charles Babington & Dan Eggen, Gonzales Seeks to Clarify Testimony on Spying, *Washington Post*, A8, March 1, 2006.

intelligence gathering, "accountable only to his country and his political character and to his conscience."[144]

While the Bush administration made no secret of its belief that the program was legal, it kept facts about the program's effects on Americans highly secret.

The Size and Nature of the Program Was Uncertain

Further investigation and documentation will be required before factual conclusions about the program can be established. Bush administration officials stated that the program conducted surveillance on up to five hundred people at any one point in time and that the total number over three years was "perhaps into the thousands."[145] However, the surveillance process can sweep up far more than a few thousand people's communications, even if the original targets are bona fide terrorists. Each person under surveillance is likely to call or e-mail a number of other people in the United States each day. Over time, it is inevitable that the NSA has "eavesdropped on millions of telephone calls and e-mail messages on American soil."[146] The NSA can also access most of the e-mail traffic that passes through the American telecommunications network.[147] According to *Wall Street Journal* reporter Siobhan Gorman, the agency was monitoring "huge volumes" of records of domestic e-mails, Internet searches, bank transfers, and credit card transactions in 2008.[148]

The Bush administration insisted that the program was "carefully targeted at terrorists,"[149] but, other than assertions that proper procedure was followed, little is known about how the government used its surveillance power. Government secrecy has expanded after September 11, and public disclosure of the government's use of its surveillance power is less detailed and useful than in the past.[150] The historical record of executive branch surveillance with limited oversight is a record of abusive monitoring of government critics. The Church Committee concluded that intelligence activities tend to "expand beyond their initial scope," and "once intelligence has been collected, there are strong pressures to use it against the target."[151]

In July 2009, some additional information about post-9/11 government surveillance was released to the public. The inspectors general of the justice department, defense department, CIA, NSA, and the director of national intelligence crafted a report based on their

[144]Wartime Executive Power and the NSA's Surveillance Authority II, Before the Senate Committee on the Judiciary, 109th Cong. 2nd session (February 28, 2006) (Statement of Robert F. Turner, Associate Director, Center for National Security Law, University of Virginia).

[145]Ibid.

[146]James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (New York: Free Press, 2006), 54.

[147]Ibid., 48.

[148]Siobhan Gorman, NSA's Domestic Spying Grows as Agency Sweeps Up Data, *Wall Street Journal*, March 10, 2008. < http://online.wsj.com/article/SB120511973377523845.html > .

[149]Ibid.

[150]Marc Rotenberg, Privacy and Secrecy After September 11, 86 *Minnesota Law Review* (June 2002): 1115, 1125–26.

[151]Swire, The System of Foreign Surveillance Law, 1317–18.

investigation of surveillance programs. Inspectors general are part of the executive branch, but are generally appointed based on their expertise and are designed to be more independent from political forces than typical executive branch employees are. Many of the details from their report remain classified. However, a thirty-eight-page unclassified report was released to the public; it contained a mixed bag of findings. On the one hand, no evidence of "intentional misuse" of the NSA surveillance program was discovered. On the other hand, the report concluded that because the program "involved unprecedented collection activities," there was a need for careful monitoring of "the retention and use" of the information gathered.[152] There were differences of opinion among the intelligence community officials regarding program effectiveness. Agents interviewed about the contribution of the surveillance to the War on Terror and the unclassified version of the report itself did not address the question of whether *warrantless* wiretapping was an essential component of the program.

At the time of this writing, in December 2009, the Obama administration was in the process of reviewing government policies on surveillance and state secrets. Executive branch officials were considering whether to retain or modify previous practices. It will be important to monitor the surveillance policies of the new administration to determine whether they are consistent with freedom of expression and whether there is adequate oversight.

While it can be hoped that subsequent administrations have learned from the mistakes of the past, human nature has not changed in the past forty years. Without effective oversight, "large and sustained expansions of domestic intelligence activity, in the name of national security, can quite possibly recreate the troublesome behaviors of the past."[153] Russell Tice, the former NSA analyst, has recently contended that, under the Bush administration program, the NSA program was not limited to suspected terrorists' communications. In particular, U.S. journalists have been singled out for scrutiny.[154]

Legislative and Judicial Responses to the NSA Surveillance Program

Judicial Challenges to Warrantless Surveillance Blocked

When the existence of the NSA warrantless surveillance program was revealed, the response of the academic and legal communities was predominantly negative.[155] Yale Law School Dean Harold Hongju Koh said the program was "as blatantly illegal a program as I've ever seen."[156] Although it was not disclosed to the public at the time, even some members of the FISC privately expressed concerns about the program's legality.[157]

[152]Offices of Inspectors General, Unclassified Report on the President's Surveillance Program 15, 38 (July 10, 2009).

[153]Ibid., 1315–16.

[154]Scott Horton, Did Bush's Terrorist Surveillance Program Really Focus on American Journalists?, *Harpers* (January 22, 2009) < http://harpers.org/archive/2009/01/hbc-90004257 > .

[155]Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval, 121 *Harvard Law Review* (June 2008): 2200, 2200.

[156]Wartime Executive Power and the NSA's Surveillance Authority II, Before the Senate Committee on the Judiciary, 109th Cong. 2nd session (February 28, 2006) (Statement of Harold Hongju Koh, Dean, Yale Law School).

[157]Dan Eggen, Court Will Oversee Wiretap Program, *Washington Post*, A01, January 18, 2007.

The Supreme Court may never rule on the Bush administration's claim that the Constitution gave the executive branch the power to carry out its warrantless surveillance program without congressional or judicial oversight. Although the Supreme Court rebuked the Bush administration's theory that the Constitution grants the president extraordinary powers during war time,[158] review of the surveillance program has been blocked by the **state secrets doctrine.**

That doctrine terminated a lawsuit after the NSA surveillance program was challenged by the ACLU in a lawsuit filed on behalf of journalists, scholars, lawyers, and nonprofit organizations who regularly communicate with people overseas. The plaintiffs argued that they were the type of people that would raise the suspicions of the NSA and hence be subjected to wiretapping.[159] The Federal District Court for the Eastern District of Michigan held that the program was unconstitutional because no warrants were obtained prior to surveillance.[160]

The government appealed, and the Sixth Circuit Court of Appeals dismissed the plaintiffs' claim without analyzing the constitutional argument. The appeals court held that the plaintiffs lacked **standing**[161] to bring the case to court. They had no evidence that they had *personally* been subjected to warrantless surveillance and they could not produce such evidence because the government invoked the state secrets doctrine.[162] This doctrine gives the government the power to withhold evidence from judicial proceedings when the proper executive branch official attests that the evidence is confidential and should not be disclosed in the interest of national security.[163] The invocation of this privilege precluded the plaintiffs from discovering whether they had been monitored.[164] The Supreme Court declined to review the decision without comment.[165]

The effect of this ruling is a "Catch-22" situation that prevents the courts from determining whether warrantless domestic surveillance is constitutional. The Bush administration successfully used the state secrets privilege to stifle most of the lawsuits directed against the program.[166]

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[158]See second through fifth paragraphs under "The Courts Weigh In: No Extraordinary Power in Wartime," this chapter.

[159]*ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied,* 128 S. Ct. 1334 (2008).

[160]*ACLU v. NSA*, 438 F. Supp. 2d 754, 766 (E.D. Mich. 2006).

[161]493 F.3d, 648. Standing is a legal term for the right of the plaintiff to ask the court to resolve the legal claims in a case.

[162]Ibid., 653.

[163]The landmark Supreme Court decision on the state secrets privilege is *United States v. Reynolds*, 345 U.S. 1 (1953). For a thorough analysis of the justifications of this doctrine and its shortcomings, See Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the Reynolds Case (Lawrence: University Press of Kansas, 2006).

[164]493 F.3d, 650.

[165]128 S. Ct. 1334 (Feb, 19, 2008).

[166]Neil Lewis, Justice Dept. Under Obama is Preparing for Doctrinal Shift in Policies of Bush Years, *New York Times*, A14, February 2, 2009. *Al-Haramain Islamic Foundation, Inc. v. Bush* is still pending. In that case, federal judge Vaughn Walker ruled that the FISA law preempts the state secrets doctrine. *In re. National Security Agency Telecommunication Records Litigation*, No. 06–1791, 18 (N.D. Cal., filed July 2, 2008).

New Congressional Legislation

The political climate changed in the United States when the Democrats took control of Congress in the 2006 elections, triggering a sequence of events that led to a new surveillance policy. On January 17, 2007, the Bush administration reversed its course and announced that it would terminate its warrantless surveillance program and begin a new program under Foreign Intelligence Surveillance Court supervision.[167] Then, in the spring of 2007, that court ruled that the FISA required a warrant whenever the government wanted to monitor communications that pass through a fixed wire in the United States.[168]

This ruling was problematic for the administration. Due to changes in global communications and technology, calls are not necessarily routed directly from one location to another. If the direct route is congested, computerized systems route digital "packets" of communication in the most efficient way. Thus, the same switches that carry calls from two U.S. cities also may be carrying calls from Pakistan to Afghanistan.[169] Bush administration officials argued that the need to obtain a warrant each time it intended to monitor foreign communications passing through a U.S. wire or fiber had created a backlog of warrants at the FISC, creating an "alarming decline" in U.S. monitoring capability.[170]

The Bush administration advocated amendments to the FISA law, and Congress passed a temporary six-month "Protect America Act,"[171] and subsequently the FISA Amendments, which were signed into law on July 10, 2008.[172] These laws allowed warrantless *foreign* intelligence surveillance and limited the role of the intelligence court in reviewing these activities. The court no longer approves foreign intelligence warrants on a case-by-case basis; rather, it reviews the executive branch's *process* for ensuring, "only persons reasonably believed to be outside the United States" are targeted.[173] During electronic surveillance of foreign persons overseas, the government will necessarily monitor persons in the United States who are communicating with those targets. The law requires minimization of information about U.S. persons gathered during this process, but it does not indicate how much power the intelligence court judges have to review or change those procedures.[174] The FISA Amendments expire at the end of 2012.[175]

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[167]Eggen, Court Will Oversee Wiretap Program, A01.

[168]Joby Warrick & Walter Pincus, How the Fight for Vast New Spying Powers Was Won, *Washington Post*, A01, August 12, 2007.

[169]Risen, *State of War*, 49–50.

[170]Warrick & Pincus, How the Fight for Vast New Spying Powers Was Won, A01.

[171]Ibid.

[172]Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110–261 (July 10, 2008).

[173]50 U.S.C. §1881a(i)(1)(A); In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008, No. MISC 08–01, 3 (Foreign Intel. Surv. Ct., filed August 27, 2008).

[174]Shane Harris, Explaining FISA: The Ins and Outs of the Government's New Surveillance Law, *National Journal Magazine* (July 19, 2008): 28.

[175]Pub. L. No. 110–261, § 403(b)(1).

Courts Affirm Congressional Legislation

Judicial review of challenges to the new FISA legislation has adhered to the principle that presidential authority is at its maximum when the executive acts are based on an act of Congress.[176] When the Protect America Act was challenged by a service provider who had been directed to assist in government surveillance of some customers, the Foreign Intelligence Surveillance Court of Review ruled that the Act was a constitutional means to collect *foreign intelligence.*[177] The court reasoned that a warrant is not required for surveillance conducted to obtain foreign intelligence when it is directed against foreign powers or their agents who are reasonably believed to be located outside the United States.[178] The possibility of executive branch abuse of this process (including the collection of information about people in the United States) was not sufficient to render it unconstitutional.[179] In this case, there was no evidence that the government was keeping a database of information collected from nontargeted U.S. persons.[180]

Although the intelligence court upheld congressional legislation establishing a process for conducting foreign intelligence, the opinion did not hold that the Bush administration's unilateral surveillance program was constitutional. The court noted, "we caution that our decision does not constitute an endorsement of broad-based, indiscriminate executive power."[181]

Future Directions

Government surveillance policy will continue to be debated and refined. The 2008 amendments to the Foreign Intelligence Service Act expire at the end of 2012 and a bill to modify the state secrets privilege has been introduced in the Senate.[182] How can surveillance abuses directed against persons in the United States be limited while allowing the government to effectively conduct surveillance against foreign threats to national security? Two key factors in future debate are the availability of information and the institutionalization of checks and balances.

The debate is hindered by the lack of information about the Bush administration's warrantless surveillance program.[183] Was the program truly limited to foreign terrorists, or were Americans also targeted? What actually happened when information about U.S. persons was obtained, either intentionally or inadvertently? Disclosure of the number of Americans who were subjected to surveillance would help the public and Congress to make a rational decision about the wisdom of the policy.[184] Information about the Obama administration's

[176] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[177] In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08–01, 7, 28 (Foreign Intel. Surv. Ct. of Rev., August 22, 2008).

[178] Ibid., 17.

[179] Ibid., 24–25.

[180] Ibid., 26.

[181] Ibid., 29.

[182] S. 2533, 110th Congress (August 1, 2008).

[183] See "The Size and Nature of the Program Was Uncertain," this chapter.

[184] Patrick Radden Keefe, Big Brother Hasn't Won, *New York Times*, 11, December 14, 2008.

surveillance practices should also be investigated and analyzed.[185] If either administration successfully limited surveillance of persons in the United States who were not complicit in terrorist activities, then its provisions could be a model for future legislation. Conversely, if information gathered was used against Americans who were not complicit in international terrorism, then greater oversight is required.

A second consideration is how to institute checks and balances that enable the president to conduct bona fide foreign intelligence surveillance without allowing the program to morph into the realm of domestic surveillance abuses. If checks on the executive branch are weak (or nonexistent), the risk of warrantless surveillance against Americans increases. Under current legislation, the FISC has noted that its role in reviewing the government's policy is "narrowly circumscribed" and "limited to determining whether the certification contains all the elements required by the statute."[186] As revisions in the law are debated in 2012, proposals to give the intelligence court more authority to access information about the administration's implementation of the program and to make changes if needed can be considered.[187]

CONCLUSION

Chapter 4 focused on challenges to freedom of expression during times of war and other national security controversies. Although the Supreme Court has consistently reaffirmed the fact that the Constitution contains no national security exception to the First Amendment, some members of the public and their elected officials continue to argue that free speech should be scaled back during these times, or that the president should have expanded power to decide when limits are appropriate.

The United States has experienced several pathological periods since the adoption of the Bill of Rights. During such times, dissent is not tolerated and the checks and balances that ordinarily protect free expression are less effective. However, over time, the government's ability to prosecute its critics in wartime has been curtailed. The government could use the bad tendency doctrine to prosecute World War I opponents such as Schenck and Debs. But when that principle was replaced by the more speech-protective test of *Brandenburg v. Ohio*, the government no longer had a legal theory that could be used to sanction dissenters. Thus, critics did not go to jail for speaking out against the wars in Vietnam or Iraq.[188]

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[185]Although candidate Obama criticized Bush administration domestic surveillance policies, it was not clear how much these policies were changed during President Obama's first year in office. See, e.g., Eric Lichtblau and James Risen, Officials Say U.S. Wiretaps Exceeded Law, *New York Times*, 1, April 16, 2009.

[186]50 U.S.C. §1881a(i)(1)(A); In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008, No. MISC 08–01, 3 (Foreign Intel. Surv. Ct., filed August 27, 2008), 3, 9.

[187]FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability: Hearing Before the U.S. Senate Committee on the Judiciary, 110th Cong., 1st Sess. (October 31, 2007) (testimony of Morton H. Halperin, Open Society Institute).

[188]Nevertheless, the government was able to use time, place, and manner rules to limit dissenters' access to the marketplace of ideas and to harass its critics through surveillance.

Another issue is government control of information. Although some information needs to be kept secret in order to save lives or effectively conduct a war, Democratic and Republican administrations have often kept information secret for invalid reasons. The public needs access to such information in order to debate and assess elected officials and their policies in the marketplace of ideas. The *Pentagon Papers* case resulted in a landmark Supreme Court decision on this issue; the Court ruled that the government did not satisfy its heavy burden to justify a prior restraint against publication on national security grounds.

The question of whether members of the press should be prosecuted *after* publishing classified information came to the forefront during the years following 9/11. The media published leaked classified information revealing CIA secret prisons, abuses at Abu Ghraib prison, warrantless surveillance, and collection of Americans' phone call records. These disclosures provided relevant information to the public about the actions of their government and prosecutions did not materialize.

An additional issue is government surveillance. From 1936 to 1975, each administration has conducted surveillance against its political critics, and some of the information gathered was used to harass and silence dissenters. The Supreme Court critiqued and prohibited warrantless executive branch domestic surveillance in *United States v. U.S. District Court*, and Congress passed the FISA, which successfully limited surveillance abuses for more than twenty years. After September 11, the Bush administration authorized a new warrantless surveillance program. The administration insisted that the program only monitored terrorists, but much information about the conduct of the program has been kept secret. In July 2008, the surveillance act was amended, giving the executive branch the power to conduct warrantless *foreign* surveillance. It is not clear whether the law provides sufficient safeguards to ensure that Americans are not subjected to warrantless surveillance. The debate on these issues will be revisited when the amendments expire in 2012.

The issues in this chapter will be revisited in your lifetime, each time a threat to national security is perceived. For more than two hundred years, the Supreme Court has not recognized a national security exception to the First Amendment. Nevertheless, during future crises, the call for limiting free expression is likely to recur. The fate of First Amendment liberties might be resolved by the Supreme Court, or, as the national response to the Sedition Act and McCarthy era excesses demonstrated, it might be the public who will play the decisive role in protecting free speech.