Vanderbilt Law Review

Volume 28
Issue 5 *Issue 5 - October 1975*

Article 5

10-1975

Recent Cases

Robert L. Teicher

Timothy C. Maguire

RECENT CASES

Constitutional Law—Elections—State Limit on Candidate Expenditures and Campaign Contributions Violates State Free Speech Guarantee

I. FACTS AND HOLDING

Plaintiff,[1] a candidate for state office, sought a declaratory judgment to invalidate the Oregon statutes[2] limiting a candidate's campaign expenditures and prohibiting any expenditures made by

1. Warren Deras was a candidate for Oregon state representative.

2. ORE. REV. STAT. § 260.027 (1) provided as follows:

(1) No political treasurer or combination of political treasurers shall make or authorize any expenditure that will cause the total amount expended in support of or opposition to a candidate to exceed, with respect to any primary, general or other single election:

(a) For congressional and state-wide offices, 15 cents times the number of registered voters eligible to vote for the office on the date of the previous general election;

(b) For all other offices except legislative offices, 25 cents times the number of registered voters eligible to vote for the office on the date of the previous general election or $1,000, whichever is greater; and

(c) For the offices of State Senator and State Representative, 25 cents times the average number of registered voters on the date of the previous general election in all of the senatorial and representative districts, respectively, in the state.

ORE. REV. STAT. § 260.154 provided:

(1) No person or political committee shall make expenditures in support of or in opposition to a candidate except the candidate or an opposing candidate. However, a person or political committee may make expenditures in support of a candidate if the consent of the candidate is previously obtained, or in opposition to a candidate if the consent of one or more other candidates for the same office is previously obtained.

(2) A person or political committee which receives contributions or makes expenditures in support of a single candidate, or in opposition to one or more candidates with the consent of a single candidate, is not subject to ORS 260.035 to 260.162 but such contributions and expenditures are conclusively deemed to be those of the candidate on whose behalf they are made.

(3) Any person or political committee other than a person or political committee described in subsection (2) of this section which receives contributions or makes expenditures in support of or in opposition to a candidate with his consent or the consent of any opposing candidate is subject to ORS 260.035 to 260.162. All expenditures by any such person or candidate shall also be considered to be contributions to and expenditures by the candidate who has consented to them and shall be reported by the candidate as well as by the person or committee making the expenditures.

(4) Expenses incurred by a person or political committee on behalf of more than one candidate shall be allocated between such candidates on a reasonable basis.

(5) Expenses incurred by a political committee, not allocable to any particular candidate or candidates, including expenses incurred in solicitation of funds intended to be contributed to candidates to be designated later, shall not be considered expenditures in support of a candidate for purposes of subsection (1) of this section or ORS 260.027.

others on his behalf without his prior consent.[3] Plaintiff claimed that the statutes violated his freedom of speech as guaranteed by the Oregon[4] and federal[5] constitutions. Defendant,[6] charged with administering the statutes, contended that the laws were valid, since they merely effected an "incidental" restriction on an individual's freedom of speech.[7] He asserted that this restriction was outweighed by the need to protect the electoral process from the abuses engendered by unlimited campaigu expenditures, including the domination of available broadcast air-time by better financed candidates.[8] The trial court upheld the constitutionality of the expenditure limitation, but held the prior-consent provision unconstitutional. On cross-appeal to the Oregon Supreme Court, *held*, reversed in part and affirmed in part.[9] A state statutory scheme limiting a candidate's campaign expenditures and requiring his prior consent to all campaign expenditures made by others on his behalf violates the state constitutional guarantee of freedom of speech. *Deras v. Myers*, 535 P.2d 541 (Ore. 1975).

---

3. The limitations were enforced by requiring that all campaign expenditures be made by a "certified political treasurer," who might be the candidate himself, a person designated by the candidate, or the treasurer of a "political committee." ORE. REV. STAT. § 260.027, 260.035-.037.

4. ORE. CONST. art. I, § 8 provides:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for abuse of this right.

ORE. CONST. art. I, § 26 provides:

> No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances [*sic*].

5. U.S. CONST. amend. I provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first amendment is made applicable to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

6. Clay Myers was the Secretary of State of Oregon.

7. The Secretary of State argued that the restriction was incidental because the expenditure limitation did not foreclose the candidate's ability to convey his message through personal appearances, debates, press releases, and other communications with the public.

8. The Secretary of State also cited the abuses exposed during the investigations of the 1972 Republican presidential campaign, *viz.* burglary, bribery, illegal searches, and defamation.

9. The court also held that plaintiff should not bear the total cost of the litigation since all members of the public benefitted equally from the invalidation of the statutes. *See* Gilbert v. Hoisting Eng'r Local 701, 237 Ore. 130, 384 P.2d 136 (1963). Thus the court remanded the case for the determination of reasonable attorney's fees to be awarded to plaintiff.

II. BACKGROUND

In the 1930 decision of *State ex rel. LaFollette v. Kohler*,[10] the Wisconsin Supreme Court rejected the earliest free speech challenge to a candidate expenditure limitation. The court held that the state's interest in protecting the integrity of its electoral process outweighed the individual's right of communicating with the public without governmental infringement.[11] The court's identification of the communicative effect of campaign spending anticipated the United States Supreme Court's ruling in *Stromberg v. California*[12] that communicative conduct was entitled to protection from government infringement. The Court, however, hampered the effectuation of this protection by failing to define conclusively the point at which an act is sufficiently intertwined with communication to bring it within the reach of *Stromberg*;[13] the first amendment would shield campaign spending only if the conduct were deemed communicative under either of two lines of authority. The older Court authority indicated that conduct intended merely to "facilitate" communication would fall within *Stromberg*. In *Kovacs v. Cooper*[14] and *Saia v. New York*,[15] the Court implicitly recognized that the purpose of speech amplification through the use of a sound truck was the widespread dissemination of a message.[16] Thus the Court conferred first amendment protection on the amplification even though the act of amplifying did not itself incorporate a message. The Court's more recent examinations of communicative conduct have concerned acts specifically intended to incorporate messages. In *United States v. O'Brien*,[17] involving the burning of draft cards, and *Tinker v. Des Moines Independent Community School District*,[18] involving the wearing of symbolic arm-bands, the Court intimated that an act would merit first amendment protection if the actor intended that his act communicate a message[19] and if the

10. 200 Wis. 518, 228 N.W. 895 (1930).

11. The court concluded that "the law under consideration lies within the police power field and impairs only the right of free speech . . . . [T]he restriction, everything considered, is within the field of reasonableness." *Id.* at 529, 228 N.W. at 914.

12. 283 U.S. 359 (1931) (conviction for display of red flag as symbol of opposition to organized government violated first amendment).

13. Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring).

14. 336 U.S. 77 (1949).

15. 334 U.S. 558 (1948).

16. *Id.* at 561.

17. 391 U.S. 367 (1968).

18. 393 U.S. 503 (1969).

19. One commentator has suggested that since the purpose of the first amendment is to protect communication, it is logical to extend that protection to an act only when the actor intends to convey a message thereby. Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1110-11 (1968).

actor's audience would likely understand the message.[20] The Court clarified the element of audience understanding by noting in *Spence v. Washington*[21] that the message of an act might be understood from the surrounding circumstances.[22] Thus the Court observed that a bizarre manner of displaying the American flag conveyed no message unless perceived against the background of the contemporaneous public furor caused by controversial incidents.[23]

Even if campaign spending were deemed to be communicative conduct, the *Stromberg* Court did not require that conduct be afforded the same degree of protection as pure speech.[24] This was evident in *Kovacs* and *Saia* despite the absence of a specified standard of protection to guide the Court. In *Kovacs* the Court upheld the state's regulation of the loudness of sound amplification as a reasonable exercise of the police power.[25] In *Saia*, however, the Court overturned an ordinance prohibiting sound amplification because the law limited the quantity of communicative conduct.[26] Finally in *O'Brien*[27] the Court enunciated the rule that a substantial state

---

The message of the actor must be more than the mere manifestation of individuality or idiosyncrasy. It must constitute a "contribution to the storehouse of ideas." Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971) (school hair regulation did not violate first amendment); *accord*, New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973).

20. The first amendment does not protect communication in a vacuum. It requires both a speaker and an audience. Pure speech or communicative conduct which is not perceived and understood by an audience will not be protected by the first amendment. Nimmer, *The Meaning Of Symbolic Speech Under The First Amendment*, 21 U.C.L.A.L. REV. 29, 36 (1973).

21. 418 U.S. 405 (1974).

22. *Id.* at 410.

23. *See also* Garner v. Louisiana, 368 U.S. 157, 201-02 (1961) (Harlan, J., concurring) (the act of sitting at a private lunch counter carriers no message unless understood as a demonstration against enforced segregation).

24. *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965). Pure speech—written or spoken communication—is protected from governmental infringement unless the words pose a clear and present danger of creating a substantive evil that the government has a right to prevent. Schenck v. United States, 249 U.S. 47 (1919).

25. 336 U.S. 77, 88-89.

26. 334 U.S. 558, 562.

27. 391 U.S. 367, 377.

The Court had indicated prior to *O'Brien* that it was concerned primarily with the validity rather than the substantiality of the state's interest in regulating the conduct. *See* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950). Indeed, the governmental interest in *O'Brien* — preventing the destruction of draft cards — was arguably less than substantial. Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 17. Recently the Court has evidenced a return to the pre-*O'Brien* concern with validity. *Cf.* Smith v. Goguen, 415 U.S. 566, 586 (1974) (White, J., concurring).

The Court has long acknowledged the governmental interest in safeguarding elections from the improper influence of money. Burroughs v. United States, 290 U.S. 534, 545 (1934); *cf.* Reynolds v. Sims, 377 U.S. 533, 555, 562 (1964); *Ex parte* Yarbrough, 110 U.S. 651, 657, 661 (1884). *See also* Bullock v. Carter, 405 U.S. 134 (1972) (candidates' filing fee); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax). It has been suggested that *Burroughs*

interest in the regulation of the conduct would justify the state's incidental infringement if the regulation was not intended to suppress the message and if the state had no available alternative means that would produce a lesser infringement on freedom of speech.[28] Subsequently, the Court enlarged the *O'Brien* standard of permissible infringement in *Red Lion Broadcasting Co. v. FCC*.[29] Citing the finite number of channels available in the electronic communications media, the Court declared that monopolization of the media's limited "marketplace of ideas" violated the first amendment and thus justified governmental regulation of access to the media.[30] Four years later the Court held in *Columbia Broadcasting System, Inc. v. Democratic National Committee*[31] that there was no constitutional right to purchase air-time on commercial stations for political or public-issue advertising. Further, it has been argued that the government should exercise its regulatory prerogative when

reflects the Court's concern about the misuse of money, not a concern about the amount of money spent. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 450 (1973). Further, it is difficult to define what constitutes improper influences. *Id.* at 464-65. Nevertheless, the Court is likely to respect a legislative judgment that the amount of money spent exerts undue influence on the electoral process. *See* Burroughs v. United States, 290 U.S. 534, 547 (1934); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 387-88 (1972).

28. In assessing the possibility of less drastic alternatives, the Court generally has refused to fashion legislative schemes for the state or to consider alternatives not already part of the law of the state. Dennis v. United States, 341 U.S. 494, 539-40 (1951); Kovacs v. Cooper, 336 U.S. 77, 96-97 (1949). The Court may believe that it is not competent to undertake this quasi-legislative examination of alternative means. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 472 (1969). The Court, however, has required defendants to prove the absence of less drastic alternatives, thus forcing judicial scrutiny of the proposals considered inadequate hy defendants. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

The Court applies two techniques to assess less drastic alternatives. By one method, the Court identifies the common law and statutory remedies already available to the state to achieve its ends. *See, e.g.*, Martin v. Struthers, 319 U.S. 141, 147 (1943); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940); Schneider v. State, 308 U.S. 147, 164 (1939). Because of society's familiarity with these remedies, the state can assume that their use will provide effective and inoffensive means to the state's ends. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 472 (1969).

By the second method, the Court rules that the state can narrow the reach of its statute so that the allowable state end is effected without burdening free speech. United States v. Robel, 389 U.S. 258, 268 & n.20 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). The Court has held that a statute aimed at communicative conduct will not be overturned unless it is substantially overbroad. Broaderick v. Oklahoma, 413 U.S. 601 (1973); *see* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1012 (1974).

29. 395 U.S. 367 (1969).

30. *Id.* at 387, 390.

31. 412 U.S. 94 (1973); *see* Loper, *Media Access and the First Amendment's Romantic Tradition: A Commentary on Jerome A. Barron, Freedom of the Press for Whom?*, 26 ME. L. REV. 415 (1974).

necessary to protect the electoral process from the undue influence of air-time monopolization.[32]

The first state decision to consider campaign spending limitations within this first amendment framework was *Bare v. Gorton*[33] in 1974. The Washington Supreme Court did not consider whether campaign spending constitutes communicative conduct. Nevertheless, the court struck down the limitations since they effected a prohibition of campaign spending in violation of the first amendment.

Subsequent to the instant decision, however, the District of Columbia Circuit reached the opposite result in *Buckley v. Valeo*.[34] Although failing to discuss the communicative impact of campaign spending, the court nonetheless held that the need to preserve the purity of the electoral process through curbs on expenditures justified the resulting infringement on first amendment freedoms.

III. The Instant Opinion

The court observed at the outset that the statutes would have to be assessed together since the candidate expenditure limits were unenforceable unless coupled with the candidate's control over the spending by others. The court next asserted that the Oregon constitution would govern in the instant case.[35] While refusing to decide the validity of weighing constitutional interests against state interests, the court assumed the propriety of this balancing test for the purpose of applying it to this dispute. Noting that virtually every public communication in a campaign requires financing,[36] the court reasoned that the expenditure limitation produced a more-than-incidental impediment to expression on public issues. The court next cited studies suggesting that the evils of campaign spending sought to be eradicated by the expenditure limitation were indeterminable because of the presence of other influential factors in the electoral process.[37] Pointing to the recognized campaign abuses of

32. National Broadcasting Co., Inc. v. FCC, No. 73-2256 (D.C. Cir., June 2, 1975) (Bazelon, C.J., dissenting).

33. 84 Wash. 2d 380, 526 P.2d 379 (1974).

34. No. 75-1061 (D.C. Cir., Aug. 15, 1975).

35. Although the opinion noted that the federal constitution "is not controlling where this court is of the opinion that our constitution should provide a larger measure of protection to the citizen," 535 P.2d at 549, the court did not suggest that its decision was based upon a view of freedom of speech which was broader than the federal first amendment.

36. *See* note 7 *supra*.

37. Among the other factors noted by the court were the predisposition of voters, the issues in the campaign, incumbency, favorable treatment of a candidate by the press, and the candidate's religion and race. 535 P.2d at 546-47. For a catalogue of the studies cited by the court, see 535 P.2d at 546 n.9, 547 nn.10-12.

burglary, bribery, illegal searches, and defamation,[38] the court declared that these were not the result of excessive expenditures[39] and therefore the statutes could be drawn more narrowly to reach these problems without limiting candidate expenditures.[40] Finally the court observed that the expenditure limitation would favor incumbents, candidates with familiar names, and candidates with leisure time for campaigning. Thus the court concluded that the infringement of free speech and the availability of a less restrictive alternative rendered the statutes violative of the Oregon free speech guarantee.

IV. COMMENT

Although the instant court's analysis was not buttressed by citation to relevant judicial authority, its ultimate conclusion appears correct. The court failed at the outset to consider whether candidate expenditures or campaign contributions constitute communicative conduct protected under *Stromberg*. It would appear that such spending does not satisfy the *O'Brien-Tinker* standard[41] since the conveyance of money is not intended to incorporate a message. It seems clear, however, that the *Kovacs-Saia* "facilitation" standard[42] defines the minimal acceptable connection between conduct and communication, and can be employed to determine the protection afforded the various types of campaign spending. Campaign contributions clearly are intended to subsidize the candidate's access to the means of public communication. Likewise, many of the candidate's expenditures are directed toward the purchase of radio and television time, newspaper space, posters and other literature, sound trucks, and other means of speech dissemination. These forms of spending fulfill the *Kovacs-Saia* criterion because they facilitate the candidate's communication with the public. Other types of campaign spending, such as rental payments and employee salaries, probably are related too tenuously to the candidate's communication to satisfy *Kovacs-Saia*.

The state's interest in regulating spending does not appear to

38. *See* note 8 *supra*.

39. The specially concurring opinion asserted that elections could be tainted by the improper influence of money, noting that the attempted nondisclosure of "Watergate" was made possible by large sums of money. Although the opinion argued that this improper influence justified some limitation on campaign financing, it viewed the prior consent provision of the Oregon scheme as an unconstitutional infringement of free speech.

40. The court suggested that public subsidy of campaign costs would be "at least as effective as direct restrictions and . . . less clearly subject to constitutional attack." 535 P.2d at 549 n.18.

41. *See* notes 17-20 *supra* and accompanying text.

42. *See* notes 14-15 *supra* and accompanying text.

rise to the level of substantiality required by *O'Brien*.[43] The court correctly observed that the uncertain influence of money on elections weakens the state's claim that regulation of spending alone will remedy the perceived abuses.[44] The court failed to discern, however, that a candidate's monopolization of available broadcast air-time, which tends to distort the electoral process, is one abuse directly attributable to the candidate's unlimited purchasing of air-time. The state possesses a clear and substantial interest in preventing that monopolization through appropriate remedies. One such remedy is provided by *Red Lion* and *Columbia Broadcasting System*, which sanction the government's limitation of the quantity of air-time made available for purchase by individuals seeking to disseminate political views.[45] Unlike the overbroad general candidate expenditure restriction, this *Red Lion* limit will not infringe upon the candidate's ability to employ other means of communicative conduct in disseminating his ideas.

A federal solution to air-time monopolization, however, does not guide the states in confronting the remaining problems perceived in unlimited campaign spending. Assuming arguendo that the state can show a substantial interest in regulating the spending, the expenditure limitation still would effectively restrict the quantity of that communicative conduct. This would produce an infringement on speech identical to that condemned in *Saia*[46] and clearly exceeding *O'Brien*'s allowance for incidental infringement.[47] Thus any limitation on contributions to candidates or on a candidate's communicative expenditures would violate the spender's first amendment rights.

The expenditure limits also have the practical defect of penalizing a candidate not possessed of incumbency or a name familiar to the public. These restrictions complicate a candidate's efforts to overcome this disadvantage by curbing communicative spending, the single method by which he can close the gap. It is noteworthy that an air-time limit under *Red Lion* would impose nearly the same burden on the unfamiliar candidate since the broadcast of messages likely would be his most effective means of overcoming the handicap.

This decision does not augur well for state regulation of cam-

43. *See* notes 27-28 *supra* and accompanying text.

44. *See Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1256-57 (1975). *But see* Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. PA. L. REV. 1609, 1631-33 (1974).

45. *See* notes 30-32 *supra* and accompanying text.

46. *See* text accompanying note 26 *supra*.

47. *See* text accompanying notes 27-29 *supra*.

paign spending. It is unlikely that a less restrictive alternative can be fashioned to achieve the same end. Proposals such as public funding of campaigns[48] cannot address the perceived abuses of unlimited spending since the first amendment will not permit a funding ceiling. Further, the state's permissible regulation of noncommunicative spending, such as rental payments and employee salaries, seems unlikely to have a noticeable impact on campaign practices. Thus the states' efforts to remedy campaign abuses must be confined to methods that do not limit communicative spending.[49]

ROBERT L. TEICHER

Constitutional Law—Search and Seizure—Warrant Required for Electronic Surveillance of Domestic Groups Having No Direct Relationship with Foreign Powers Even When National Security Is Involved

I. FACTS AND HOLDING

Plaintiffs, sixteen members of the Jewish Defense League (JDL),[1] sued defendant Mitchell, then Attorney General of the United States, and nine special agents of the Federal Bureau of Investigation[2] for damages arising from electronic surveillance of plaintiffs' telephone conversations.[3] Plaintiffs alleged that the surveillance, conducted without a warrant, violated both their fourth amendment rights[4] and Title III of the Omnibus Crime Control and

48. For a general discussion of this subject, see Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C.L. REV. 349 (1973).

49. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 625 (1954) (disclosure of lobbyist activities). For a discussion of other methods of campaign regulation, see Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 417-21 (1972) (*e.g.*, public subsidy of campaign costs, limitiations on advertising rates charged by communications media).

1. The Jewish Defense Leagne is a domestic organization whose activities have included calling world attention to the plight of Soviet Jewry. *See, e.g.*, Schwartz, *Threats and Bombs—A Nasty Phase for the Two Nations*, N.Y. Times, Jan. 10, 1971, § 4 at 3, col. 1.

2. Actions alleging illegal searches and seizures by law enforcement officers now may be brought directly against the federal government. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, *amending* 28 U.S.C. § 2680(h) (1970).

3. Plaintiffs' telephone conversations were monitored by electronic devices over a period of 208 days during October 1970 and from January 5, 1971 to June 30, 1971.

4. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers and effects, against

Safe Streets Act of 1968.[5] Defendants contended that plaintiff's domestic acts of protest affected relations between the United States and the Union of Soviet Socialist Republics.[6] Defendants therefore alleged that since the surveillance was authorized by the President pursuant to his constitutional power to conduct the nation's foreign affairs,[7] neither plaintiffs' constitutional nor their statutory rights were violated.[8] On cross-motions for summary judgment, the trial court rendered judgment for defendants, holding that prior judicial approval of electronic surveillance is not required when the executive branch has ascertained a threat to the nation's security from foreign powers.[9] On appeal to the United States Court of Appeals for the District of Columbia Circuit, *held*, reversed and

---

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Plaintiffs sued under a federal cause of action arising from the fourth amendment. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

5. 18 U.S.C. §§ 2510-20 (1970). Section 2520 relates to the availability of recovery of civil damages:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

6. Defendants' contention was based on the reaction of the Union of Soviet Socialist Republics to JDL activities protesting Soviet emigration policies concerning Jews. Individual members of the JDL conducted lawful demonstrations, as well as unlawful acts that included the bombing of the New York offices of a Soviet trade organization and the Soviet airline. The justification for the surveillance was the vehement protest of the Soviet Union to the United States government, which led the Attorney General to believe that the JDL's continuing activities could lead to international embarrassment or possible reprisals against United States citizens residing in the Soviet Union.

7. *See* text accompanying notes 29-34 *infra*.

8. Defendants claimed that 18 U.S.C. § 2511(3) denied plaintiffs a statutory cause of action. Section 2511(3) provides:

> Nothing contained in this chapter . . . shall limit the constitutional powers of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

9. Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973).

remanded.[10] A warrant must be obtained prior to instituting electronic surveillance of a domestic organization that is neither an agent of nor a collaborator with a foreign power, even when the surveillance is to be installed under presidential authority to protect the national security in foreign affairs. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

II. BACKGROUND

Constitutional challenges to interceptions of private communications by electronic surveillance devices[11] arose soon after the federal government instituted that practice in criminal investigations.[12] In *Olmstead v. United States*,[13] the Supreme Court found no fourth amendment barriers to the use of a wiretap since no trespass to the victim's "home or curtilege" had occurred.[14] The first significant restriction[15] on wiretapping was statutory—section 605 of the Federal Communications Act of 1934,[16] which imposed criminal sanctions for the interception and divulgence of wire communications without the consent of the sender.[17] Until 1967, however, the constitutionality of electronic eavesdropping remained subject only to the *Olmstead* trespass requirement.[18] In *Berger v. New York*[19] and *Katz v. United States*,[20] the Supreme Court abandoned the *Olmstead*

10. The case was remanded to determine the existence of any defenses available to defendants under either the statutory or federal cause of action. *See* 18 U.S.C. §§ 2510-20 (1970) and note 4 *supra*.

11. Prior to the decision in United States v. Katz, 389 U.S. 347 (1967), electronic eavesdropping was distinguished from wiretapping. Wiretaps involve the interception of communications by attaching a listening device to the line through which the communication is being transmitted, while electronic eavesdropping is the interception of spoken communications through an electronic device that amplifies the sound waves it picks up.

12. N.Y. Times, June 30, 1972, at 17, col. 4.

13. 277 U.S. 438 (1928).

14. *Id.* at 466.

15. Since a wiretap could be instituted without the occurrence of a trespass, *Olmstead* in effect held that there was no constitutional barrier to this type of surveillance. The practice of eavesdropping, however, was hindered by the *Olmstead* holding until technological developments led to devices that could intercept conversations from greater distances away from the speaker.

16. Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended*, 47 U.S.C. § 605 (1970).

17. The Supreme Court subsequently held that § 605 prohibited wiretap evidence accumulated by state or federal officers from being introduced in state or federal courts. Lee v. Florida, 392 U.S. 378 (1968); Benanti v. United States, 355 U.S. 96 (1957); Nardone v. United States, 302 U.S. 379 (1937).

18. *Compare* Goldman v. United States, 316 U.S. 129 (1942) (no fourth amendment violation since no trespass occurred) *with* Silverman v. United States, 365 U.S. 505 (1961) (fourth amendment violated when electronic eavesdropping device penetrated suspect's wall).

19. 388 U.S. 41 (1967).

20. 389 U.S. 347 (1967).

reasoning and held that both wiretapping and electronic eavesdropping were searches and seizures, thus subject to the fourth amendment requirement of reasonableness.[21] In response to *Katz* and *Berger*,[22] Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[23] Title III limits the use of electronic surveillance to delineated police purposes,[24] and provides procedural guidelines to satisfy fourth amendment requirements.[25] In addition, because *Katz* specifically omitted any mention of the national security issue,[26] section 2511(3) of Title III prevents limitation of the President's constitutional power to protect national security by the warrantless use of electronic surveillance devices.[27]

The President's claimed constitutional power to conduct warrantless foreigu security electronic surveillance[28] arises from his in-

21. Included in the standard of reasonableness are the standards of probable cause and prior judicial approval of the search. *Berger* invalidated a New York eavesdropping statute partially because it did not require a prior showing of probable cause that a particular offense was being committed. 388 U.S. 41, 58 (1967). *Katz* required that a warrant be obtained before the commencement of electronic surveillance in criminal cases. 389 U.S. 347, 355-56 (1967). The fourth amendment does not always require prior judicial review of searches. Several exceptions have been enumerated including (1) searches made of an individual and the immediate vicinity incident to his arrest, Chimel v. California, 395 U.S. 752 (1969), (2) searches made in hot pursuit of a fleeing suspect, Warden v. Hayden, 387 U.S. 294 (1967), and (3) searches made with probable cause in which the exigencies of the situation render the procurement of a warrant unreasonable, Brinegar v. United States, 338 U.S. 160 (1949).

22. S. REP. No. 1097, 90th Cong., 2d Sess. (1968).

23. 18 U.S.C. §§ 2510-20 (1970).

24. Except as otherwise provided within the statute, Title III outlaws all electronic surveillance. 18 U.S.C. § 2511(1) (1970). Interception of communications by federal officers is permissible if the investigation concerns the commission of certain crimes, including sabotage, treason, narcotics offenses and interstate travel in aid of racketeering enterprises. *Id.* § 2516.

25. *Id.* § 2518.

26. 389 U.S. 347, 358 n.23 (1967). Justice White, concurring, advocated that in national security cases, the Court should leave the determination of the surveillance's reasonableness to the President or to the Attorney General. *Id.* at 364. Justice Douglas, concurring in a separate opinion, strongly disagreed. He noted that the role of the executive branch as prosecutor or adversary prevents it from acting as a disinterested magistrate. *Id.* at 360.

27. *See* note 7 *supra*. Since the distinction is relevant for purposes of this Comment, "foreign security" will refer to threats to the government arising directly or indirectly from foreign powers. "Domestic security" will refer to threats to the government arising from domestic subversive groups, unconnected to any foreign power. "National security" will be used as a generic term referring to threats to the government, regardless of origin.

28. The Executive also claims a historical justification for warrantless national security electronic surveillances. President Franklin Roosevelt first justified the use of warrantless wiretaps, although prohibited by the Federal Communications Act of 1934, in a memorandum to then Attorney General Jackson, proposing that surveillance be limited to suspected subversives and spies. The President further directed that the surveillances be confined, when possible, to aliens. Confidential Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, quoted in Zweibon v. Mitchell, 516 F.2d 594, App. A, at 673-74 (D.C. Cir. 1975). President Truman extended the authorization to situations in whicb the domestic security was threatened, or in which human life was endangered. Letter from Attorney General Tom C. Clark to President Harry S. Truman, July 17, 1946, *id.* at 674. President Johnson,

herent powers in the field of foreign affairs[29] and as Commander in Chief of the Armed Forces.[30] The extent of the President's foreign affairs power emanates from the recognition that he must act as the sole representative of the nation when dealing with foreign powers.[31] This role exempts his conduct of foreign relations from limitations on delegation established by the separation of powers in the Constitution.[32] Nevertheless, the foreign affairs power of the President seemingly is constricted by the guarantees of protection from government oppression in the Bill of Rights.[33] In domestic affairs, however, the President must operate under the system of checks and balances, and thus his inherent power is far more circumscribed. In *Youngstown Sheet & Tube Co. v. Sawyer*,[34] the Court assessed the constitutional validity of the President's seizure of domestic steel mills during the Korean War under his power as Chief Executive and as Commander in Chief. The Court held the seizure unconstitutional because the usurpation of the legislative power to take private property for public use without congressional authorization was in excess of the powers delegated to the executive branch,[35] and thus placed strictures on the Executive's power to act in domestic matters even during an emergency.

---

however, significantly limited this policy. Memorandum for the Heads of Executive Departments and Agencies, from President Lyndon B. Johnson, *id.* at 674-75.

29. He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . . U.S. CONST. art. II, § 2.

[He] shall receive Ambassadors and other public Ministers . . . .

Id., art. II, § 3.

30. "The President shall be Commander-in-Chief of the Army and Navy of the United States . . . ." *Id.*, art. II, § 2.

31. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

32. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 253 (1972). In *Curtiss-Wright* the Court stated:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. 299 U.S. 304, 319.

33. *Curtiss-Wright* dealt with the constitutionality of a congressional delegation of power, but the Court noted that the President's power in foreign affairs, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. In Reid v. Covert, 354 U.S. 1, 17-19 (1957), the Court held that constitutional rights could not be denied to civilian dependents of armed forces personnel overseas by treaties negotiated by the executive branch, giving military courts jurisdiction over the criminal acts of the civilian dependents.

34. 343 U.S. 579 (1952).

35. *Id.* at 587-89. Two members of the Court found no inherent legislative powers in the Executive. Under Justice Jackson's test, the extent of presidential power would be dependent upon whether the President acts in an emergency situation and whether Congress had acted previously in the field. No majority opinion emerged from the case.

In the domestic security area, the Supreme Court first encountered the issue of inherent presidential power to protect the national security through warrantless wiretaps in *United States v. United States District Court* (the *Keith* decision).[36] The government contended that Congress, in passing section 2511(3), affirmatively authorized the President to conduct warrantless wiretapping of domestic dissidents who threatened the national security. Rejecting this contention, the Court held that section 2511(3) does not constitute an affirmative grant of power to the President, but indicates instead that Congress did not legislate with respect to this area.[37] The Court, therefore, did not feel compelled to determine whether legislation conferring such power on the President would be within the constitutional authority of Congress. Rather, the Court addressed the issue whether electronic surveillance conducted without a warrant was reasonable under the fourth amendment. Balancing the President's duty to protect domestic security against the potential for infringing on first[38] and fourth amendment rights, the Court found that the requirement of obtaining a warrant prior to instituting electronic surveillance would not hinder the President's performance of his duty. Consequently, the Court held that the reasonableness standard of the fourth amendment demands the traditional safeguard of prior judicial review of electronic surveillance when the national security threat is purely internal.

Keith, however, avoided the issue of warrantless surveillance in situations involving foreigu affairs.[39] Cases that have confronted the issue evidence a trend to allow the executive branch a wide range of discretion. In *United States v. Brown*,[40] the district court declined to review the government's claim that evidence gathered by warrantless wiretapping was a product of foreign intelligence-gathering, holding that the court should not question the Executive's determination that the search was reasonable. Likewise, the Third Circuit, in *United States v. Butenko*,[41] held that warrantless wiretaps employed solely for foreign intelligence-gathering were reasonable under the fourth amendment as a matter of law. Balancing the possibility of abuse of warrantless surveillances against the

36. 407 U.S. 297 (1972). Judge Damon J. Keith presided over the proceedings at the district court level.

37. 407 U.S. at 302-08.

38. The Court feared that public awareness of warrantless surveillance may lead to a restraint on constitutionally protected speech. "[P]rivate dissent, no less than open disclosure, is essential to our free society." *Id.* at 314; *see* 56 CORNELL L. REV. 161 (1970).

39. 407 U.S. at 321-22.

40. 317 F. Supp. 531 (E.D. La. 1970), *aff'd*, 484 F.2d 418 (5th Cir.1973); *see* United States v. Clay, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

41. 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974).

government's need for information, the court stated that executive restraint in authorizing wiretaps, rather than prior judicial review, was the more desirable alternative. Under this analysis, a court would be forced to accept the government's assertion that a warrantless electronic surveillance involving foreign security intelligence-gathering was reasonable under the fourth amendment.

III. The Instant Opinion

The instant court initially decided that the Supreme Court's holding in *Keith* was not dispositive because the justification advanced for the surveillance in the instant case involved the exercise of the President's power in the field of foreign affairs. Although the JDL clearly was a domestic organization with no foreign ties, the court found that the JDL's activities, involving a confrontation between the United States and the Soviet Union, affected the foreign security of the nation.[42] Departing from the *Butenko* analysis, the decision focused on whether the extent of the President's authority in the field of foreign affairs included the power to determine the reasonableness of a search and seizure conducted pursuant to his duty of protecting the national security. The court first answered defendants' contention that the weight of historical and judicial precedent indicated that judicial review of executive actions in the field of foreign affairs was inappropriate. While recognizing the President's extensive powers in that field, the court found that the domestic actions of the executive branch are not immune from constitutional limitations, and therefore are subject to judicial review.[43]

The court then considered whether the fourth amendment compelled the executive branch to obtain judicial approval prior to undertaking electronic surveillance in the field of foreign affairs. While recognizing that the fourth amendment reasonableness standard does not always require the prior approval of a magistrate, the court indicated that extreme exigency or probable frustration of the search usually must be demonstrated in such instances.[44] Following

42. 516 F.2d 594, 652.

43. The instant court answered defendants' contention that the practice of instituting warrantless wiretaps hegun during the Roosevelt admininistration constituted an affirmative assertion that national security surveillance was not subject to the warrant procedure by stating that exceptions to fourth amendment requirements cannot be grounded in mere expediency. With regard to the contention that the President's foreign affairs powers justify warrantless surveillance, the instant court noted that in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court struck down the President's attempted usurpation of legislative powers. The instant court analogized the executive branch's attempt to usurp the judiciary's duty to review proposed searches and seizures to *Youngstown*, holding that constitutional review of the President's action was appropriate. 516 F.2d at 620-27.

44. *Id.* at 631.

the *Keith* analysis, the court weighed the possible frustration of the government's legitimate interest in gathering foreign intelligence information against the individual's interest in protecting his first and fourth amendment rights. The central argument advanced by the court[45] militating against the imposition of a warrant requirement was the lack of judicial expertise to make informed decisions regarding complex foreign matters.[46] Nevertheless, the court believed that because of the judiciary's sensitivity to the importance of legitimate information-gathering, government needs would not be frustrated.[47] The court then considered the possibility of security leaks and the attendant delay in judicial review of proposed electronic surveillances, but was not persuaded that the executive branch's interest would be hindered by a warrant requirement.[48] Noting the presumption that a search and seizure is unreasonable unless approved whenever practicable[49] by a judicial officer, and citing *Keith*, the court also observed that warrantless wiretapping has the effect of "chilling" first amendment rights of expression and association by implanting fear of governmental intrusion into private conversations.[50] The court found that the potentially debilitat-

45. Since defendants did not advance any factors indicating that the warrant procedure would unduly frustrate the government's interest in gathering foreign intelligence information, the court presented rationales suggested by other courts and commentators to justify warrantless national security surveillance. *See, e.g.*, United States v. United States District Court, (the *Keith* decision), 407 U.S. 297 (1972); Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976 (1974).

46. 516 F.2d 594, 639.

47. The instant court recognized that in the field of foreign affairs, any uncertainty in a judge's mind almost certainly would be resolved in favor of issuing the warrant to the government. Another contention advanced was that in the case mistakes are made by the judiciary ahout the importance of a surveillance in this field, the possihle societal ramifications are far greater than in a criminal case or a case involving domestic security. The court felt that here, also, any mistakes most likely would be made in favor of the government. *Id.* at 641-47.

48. The instant court felt that a warrant proceeding could he limited to the judge, and all administrative personnel could be supplied by the government to minimize the danger of security leaks. The possibility of delay frustrating the government's interest in a surveillance was seen by the instant court as minimal because in exigent circumstances, warrantless surveillance would be reasonable under the fourth amendment. *See* note 21 *supra*. Furthermore, the instant court noted that most foreign surveillances are of the ongoing intelligence-gathering type, and thus not directed at the prevention of specific crimes. Thus, the court recognized that the time element in these cases would not be crucial. Another contention militating against the instant court's imposing a warrant requirement was that the nonprosecutorial nature of the surveillances offended the fourth amendment less than searches made in a criminal context. The instant court answered by noting that the government did use such surveillances for prosecuting crimes, and recognized that if information is gathered from noncriminals without a warrant in the interest of foreign security, their fourth amendment rights would receive less protection than those of criminals. *Id.* at 647-50.

49. *Id.* at 631.

50. *Id.* at 633-36.

ing effect on individual liberties outweighed the government's interest in engaging in warrantless foreign security surveillances and held that when the subject of surveillance is a domestic organization having no direct relationship to a foreign power, a warrant is required before electronic surveillance is instituted.[51]

IV. COMMENT

The instant decision is significant in that it represents the first judicial limitation of presidential power to conduct warrantless electronic surveillance in any situation involving foreign security.[52] The court, by balancing the government's need to gather information for foreign intelligence purposes against the individual's constitutional freedom from unreasonable government intrusion, correctly defined presidential powers as subject to the fourth amendment. Without such a limitation, the decision to institute foreign security surveillance of a domestic organization would depend entirely upon presidential prerogative, as exercised by the Attorney General. If left unfettered, the Attorney General's power necessarily would deter individuals from exercising their right to associate for the purpose of peaceful dissent against foreign policy. Further, the power to wiretap without judicial restraint might be utilized for politically motivated intelligence-gathering directed at United States citizens. The possibility of these and other abuses of individual freedoms by the government, even under the claim of foreign security, must be carefully tempered by judicial evaluation of the competing policies.[53]

The instant case presents the important question whether the imposition of a warrant requirement actually provides any real protection to the fourth amendment rights of those subjected to electronic surveillance.[54] The instant court noted that the judiciary pos-

51. The instant court admitted that its analysis provided the basis for the contention that all foreign security surveillances should be subject to a warrant requirement, absent exigent circumstances. In cases including investigation of the criminal acts of a domestic group, however, the court did not doubt the competency of the judiciary to determine the reasonableness of the requested warrant. Also, the danger of security leaks was seen as negligible, since the JDL had no contacts with the Soviet Union, and thus could not be expected to impart any strategic information. *Id.* at 654.

52. The modern interdependence among nations entails the involvement of many levels of society in international affairs, from athletic teams to trade unions. To allow the Attorney General the discretion to employ warrantless electronic surveillance against these groups because their activities affect the nation's foreign relations provides too great a potentiality for abuse of individual rights.

53. The issue whether the warrant requirement should be extended into other areas of foreign security surveillance, including wiretaps to prevent security leaks and surveillance of foreign agents and collaborators, is not considered by this Comment.

54. In 1971, over 800 cases of electronic surveillance were reviewed by the judiciary without a single denial of a warrant application. N.Y. Times, June 30, 1972, at 17, col. 4.

sessed only limited expertise in foreign affairs matters and that deference to executive competency may be necessary;[55] such deference arguably would limit a judge's scrutiny of the government's justification for the proposed surveillance. Furthermore, since much of foreign security surveillance is ongoing intelligence-gathering, not directed toward criminal prosecutions, knowledge of the surveillance may never become public; in such cases the government could ignore the warrant requirement without discovery. Nevertheless, an examination of the practical effects of a warrant requirement, possible standards for issuance of warrants, and procedural safeguards that could accompany a wiretap order suggests that infringements upon individual rights can be limited.

A practical effect of the warrant requirement would be to reduce the number of warrantless searches that otherwise would remain secret. A law-abiding executive official could be expected to apply for warrants for all proposed surveillances, even one not likely to be discovered. Thus the rights of the individual subjected to surveillance would be protected by substantive and procedural safeguards imposed by the reviewing judge. To deter government officials who would act expeditiously rather than lawfully, criminal penalties should be greater for defying a denial of a warrant application, or for bypassing the warrant procedure completely, than for a post hoc judicial determination that a warrantless wiretap was an unreasonable exercise of presidential power. Furthermore, adverse public opinion could be expected if warrantless wiretapping of citizens was exposed, especially since the executive branch would be deprived of an honest-mistake excuse concerning the extent of presidential power.[56]

The establishment of meaningful standards by which courts could examine warrant applications would further insure the protection of individual rights. The instant court noted that the standards of probable cause set forth in Title III often would not be applicable to foreign security surveillances, since many interceptions are not directed at specific criminal activity.[57] In *Keith*, the Supreme Court recognized that this also would be true in domestic security cases, and suggested that Congress could tailor standards to meet the needs of national security.[58] For such congressional action to be effective, the standards enacted must be sufficiently flexible to apply to both information-gathering and prosecution-oriented

55. 516 F.2d 594, 645.

56. Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976 (1974).

57. 516 F.2d at 655-57.

58. 407 U.S. at 322-24.

surveillances, and a court would have to consider each situation individually to accommodate the governmental interest while protecting individual rights from unreasonable infringement. Factors to be utilized in the court's determination of the reasonableness of a proposed search should include the utility of the information sought in light of the government's goal of preserving national security, the probability of such information being obtained from the proposed surveillance, the extent of invasion of the subject's privacy, and the availability of the same information by means other than electronic surveillance.[59] By considering these factors, a court could prohibit searches of domestic groups instituted for political reasons, while allowing the executive branch to continue surveillance of groups whose subversive activities threaten national security.

Even if the judiciary fails to fulfill its proper role as a disinterested arbiter by deferring to the government's interest in obtaining information, procedural safeguards accompanying the issuance of a warrant can insure accountability of the executive branch and prevent abuses of individual rights.[60] Title III provides a number of protections that would limit infringement of individual rights if made applicable to national security wiretaps. The statute imposes a time limit on the duration of the surveillance,[61] with provisions for renewal by the judge. Recordings of the interception are to be made,[62] and all records of the warrant procedure are preserved.[63] Additionally, the subject must be notified of the surveillance after it is discontinued.[64] Such features, in conjunction with criminal[65] and civil[66] penalties provided by Title III, would have the beneficial effect of limiting unjustifiable intrusions into the privacy of citizens.

The requirement of judicial review, along with the imposition of meaningful standards for issuing warrants and procedural safeguards to minimize intrusions into the privacy of individuals, would limit the potentiality for abuse inherent in the use of electronic surveillance. Requiring the government to submit to prior judicial review of proposed electronic surveillances, at least where the sub-

59. 516 F.2d at 657-59.

60. Nesson, *Aspects of the Executive's Power over National Security Matters: Security Classifications and Foreign Intelligence Wiretaps*, 49 IND. L.J. 399, 415 (1974).

61. 18 U.S.C. § 2518(5) (1970). (The time allotted is limited to no longer than necessary to achieve the objective of the surveillance, and in no case longer than 30 days).

62. *Id.* § 2518(8)(a).

63. *Id.* § 2518(8)(b).

64. *Id.* § 2518(8)(d).

65. *Id.* § 2511(1). (The penalties include fines up to $10,000 or imprisonment up to 5 years, or both.).

66. *Id.* § 2520; *see* note 5 *supra*.

jects have no direct relationship with a foreign power, lessens the threat to individual rights that unchecked foreign security power otherwise would pose.

TIMOTHY COLLINS MAGUIRE