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PUBLISH AND PERISH: CONGRESS'S EFFORT TO SNIP *SNEPP* (BEFORE AND *AFSA*)

*Michael J. Glennon**

Over three million present and former federal employees, of the Executive as well as the Congress, are parties to so-called "pre-publication review agreements,"¹ which require that they submit any writings on topics related to their employment for Executive review prior to publication. In Section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988,² Congress attempted to restrict the use of funds to implement or enforce certain of those agreements. On May 27, 1988, however, the United States District Court for the District of Columbia, in *American Foreign Service Association v. Garfinkel* ("*AFSA*"),³ struck that section down, on the theory that the statute trenched upon the President's general foreign affairs powers under the Constitution. The plaintiffs have appealed the ruling directly to the United States Supreme Court, and the Court has noted probable jurisdiction.⁴

The May 27 decision of the District Court was not simply without precedent; the decision was an ill-considered and radical exercise of judicial activism.

The *AFSA* decision was ill-considered in that it is inconsistent with the court's own later, more considered, reasoning. On May 27, 1988, the court struck down Section 630 of the Continuing Resolution as an unconstitutional intrusion by the Congress upon the power of the Executive to conduct the nation's foreign affairs.⁵ Yet in its July 29, 1988 memorandum opinion in a companion case,⁶ the court held that cer-

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1. General Accounting Office Testimony, *HEARING ON CONGRESS AND THE ADMINISTRATION'S SECRECY PLEDGES BEFORE SUBCOMM. ON LEGISLATION & NATIONAL SECURITY OF HOUSE COMM. ON GOV'T OPERATIONS*, 100th Cong. 2d Sess. 3-4 (Aug. 10, 1988).

2. Pub.L. No. 100-202, 101 Stat. 1329-432 (1987).

3. 688 F. Supp. 671 (D.D.C. 1988), *prob. juris. noted*, 109 S.Ct. 302 (1988).

4. 109 S. Ct. 302 (October 31, 1988).

5. 688 F. Supp. 685 (D.D.C. 1988).

6. *National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (1988).

tain of those same agreements proscribed by Section 630 — those using the term “classifiable” — are constitutionally *unenforceable*.⁷ How could First Amendment interests that were accorded no weight on May 27 outweigh all other constitutional interests on July 29? Can Congress not constitutionally deny funds for the enforcement of agreements that are constitutionally unenforceable? If this subject matter is within the exclusive constitutional prerogative of the President, how is it that a federal district court judge in the July 29 opinion can substitute his judgment for that of the President by precluding the use of agreements that the President deems appropriate? One would have supposed that the deference traditionally accorded an act of Congress — long regarded as presumptively constitutional — would have counseled the need for more judicious and deliberate consideration of this delicate issue.

The decision is radical in that it disregards fundamental and time-honored doctrines of Anglo-American jurisprudence. It is the only decision in American case law in which a court has invalidated an act of Congress on the basis of a general presidential foreign affairs power. Moreover, it is the only case in which a court has invalidated an exercise of Congress’s power of the purse as an unconstitutional encroachment on executive power.

The *AFSA* case raises key constitutional issues going deep to the heart of the conduct of foreign affairs. The court resolves those issues in a manner that endangers the most established of the “checks and balances” of our system of government, the power of the purse. Underlying the court’s opinion is a policy choice that discards altogether interests in freedom of expression.

I. THE FOREIGN AFFAIRS POWER

Although it has often been asserted that the President is possessed of plenary foreign affairs powers — powers that do not admit of the possibility of congressional limitation — the truth is that no court has ever so held. Until *AFSA*, every time the courts have reached the merits in a foreign affairs dispute pitting Congress against the Executive, Congress has won. The seminal precedent, overlooked completely by the *AFSA* court, is *Little v. Barreme*,⁸ decided in 1804 by Chief Justice John Marshall and joined by a unanimous United States Supreme Court.⁹

7. 695 F. Supp. at 1202-05.

8. 6 U.S. (2 Cranch) 170, 179 (1804).

9. *Id.* at 179.

The events leading up to *Little* occurred during the administration of President John Adams, when the United States was engaged in an undeclared naval war with France.¹⁰ Although the war was not formally declared, Congress did prohibit American vessels from sailing to French ports.¹¹ The Navy seized a vessel sailing from a French port. Captain Little captured this ship, the *Flying Fish*, and sought to have her condemned.¹² The case turned on whether the Danish owners of the *Flying Fish* should be awarded damages for the injuries they suffered.¹³

The Supreme Court affirmed the circuit court's judgment awarding damages to the owners.¹⁴ The ship captain's act contravened the will of Congress. "[T]he legislature seems to have prescribed that the manner in which this law shall be carried into execution," Marshall wrote, "was to exclude a seizure of any vessel not bound to a French port."¹⁵ Under the law enacted by Congress, therefore, Captain Little "would not have been authorized to detain" *The Flying Fish*.¹⁶ "[T]he instructions [from the Secretary of the Navy]," Marshall concludes, "cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."¹⁷

During the Korean War, Marshall's analysis again became timely in another case also completely overlooked by the district court in *AFSA*. In 1952, *Youngstown Sheet & Tube Co. v. Sawyer*¹⁸ — the famed *Steel Seizure Case* — presented the Supreme Court with a stark choice. A nation-wide strike had broken out in the steel industry. According to the *Youngstown* court:

The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.¹⁹

10. *Id.* at 173, 177. See H. BLUMENTHAL, *FRANCE AND THE UNITED STATES: THEIR DIPLOMATIC RELATIONSHIP 1789-1914*, 13-17 (1970); D. MCKAY, *THE UNITED STATES AND FRANCE*, 81-83 (1951).

11. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799) (expired 1800).

12. *Id.* at 176. Little had some reason to suspect the *Flying Fish's* true nationality: "[D]uring the chase by the American frigates, the [*Flying Fish's*] master threw overboard the log-book, and certain other papers." *Id.* at 173 (emphasis in original).

13. *Id.*

14. *Id.* at 179.

15. *Id.* at 177-78 (emphasis in original).

16. *Id.* at 178.

17. *Id.* at 179.

18. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

19. *Id.* at 583.

President Truman consequently issued an executive order directing the Secretary of Commerce to take possession of most of the mills and keep them running, arguing that the President had "inherent power" to do so. The companies objected, complaining in court that the seizure was not authorized by the Constitution or by any statute.

Congress had not statutorily authorized the seizure, either before or after it occurred. Congress had enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the Administration never claimed that any of those conditions had existed prior to its action. More important, Congress had in fact considered, and rejected, authorization for exactly the sort of seizure Truman actually ordered.

Justice Hugo Black delivered the opinion of the Court. The President, Justice Black wrote, had engaged in law-making, a task assigned by the Constitution to Congress.²⁰ The seizure was therefore unlawful, since the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."²¹ Yet *Youngstown* is remembered mostly for the concurring opinion of Justice Robert Jackson. In reasoning strikingly reminiscent of Marshall's in *Little*, Jackson wrote that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."²² He continued:

We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may

20. *Id.* at 587-89.

21. *Id.* at 585.

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

have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.²³

The opinion is thus notable for its unwillingness to decide the case by reference to "inherent" presidential power, and in the weight it accords Congressional will. It remained for a former Jackson clerk, Justice Rehnquist, to give Jackson's opinion the force of law. The Supreme Court formally adopted this mode of analysis in *Dames & Moore v. Regan*,²⁴ in which Justice Rehnquist applied Jackson's approach to uphold President Carter's Iranian hostage settlement agreement as having been authorized by Congress.²⁵ In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area."²⁶ Rehnquist then quoted from Jackson a passage that the *AFSA* court might profitably have pondered: "[t]he example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."²⁷

23. *Id.* at 635-38.

24. 453 U.S. 654 (1981).

25. *Id.* at 688.

26. *Id.* at 661.

27. *Id.* at 662. Compare Alexander Hamilton, no admirer of legislatures:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of . . . a President of the United States.

THE FEDERALIST NO. 75, at 505-06 (A. Hamilton) (J. Cooke ed. 1961).

An important recent reaffirmation of this approach is found in *Webster v. Doe*, 108 S. Ct. 2047 (1988), discussed further below. Despite the protestations of the two dissenters, the Court — speaking again through Chief Justice Rehnquist — grounded on congressional will rather than constitutional principle its conclusion that a former CIA employee was not precluded from seeking judicial review of the decision by which he was dismissed. Justice Scalia, dissenting, worried that the majority's opinion

will have ramifications far beyond creation of the world's only secret intelligence agency that must litigate the dismissal of its agents. If constitutional claims can be raised in this

This, then, is the mode of analysis pursued by the United States Supreme Court in assessing the reach of presidential foreign affairs power. Jackson's point bears repeating: "*Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress;*"²⁸ and further, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"²⁹

Section 630 of the 1988 Continuing Resolution placed presidential use of specified pre-publication review agreements in this third category of Justice Jackson's analysis, where his power to use those agreements is at its lowest ebb. Any other case used for precedential purposes must therefore fall within this third category. Cases dealing with presidential acts that fall within Justice Jackson's first or second categories — where Congress has approved, and where Congress is silent — are not on point. The four cases relied upon by the district court in *AFSA* are, for this reason, altogether irrelevant to the constitutionality of Section 630.

The first case, *Department of the Navy v. Eagan*,³⁰ raised the issue whether the statutory structure permitted administrative review of the merits of a security-clearance denial underlying an employee's removal. The "statute's 'express language' along with 'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved' " all militated against such review.³¹ Congress thus *agreed*, rather than disagreed, with the Executive's position. Indeed, in an important passage unnoted by the *AFSA* court, the Supreme Court in this case pointed out that deference to the Executive in military and national security affairs is only appropriate "unless Congress specifically has provided otherwise."³² In Section 630, Congress specifically provided otherwise.

The second case is represented by part of the concurring opinion of Justice Potter Stewart in *The Pentagon Papers Case*.³³ Unfortunately, the *AFSA* court neglected to include the most pertinent portion of Justice Stewart's opinion — his observation that, in that case, the Court was "asked neither to construe specific regulations nor to apply spe-

highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid. *Id.* at 2063.

28. 343 U.S. at 635 (Jackson, J., concurring).

29. *Id.* at 635-38.

30. 108 S.Ct. 818 (1988).

31. *Id.* at 825, quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984).

32. *Id.* at 825.

33. *New York Times v. United States*, 403 U.S. 713 (1971).

cific laws.”³⁴ In other words, the controversy fell within Jackson’s second category — the “zone of twilight.” The case, unlike *AFSA*, presented no disagreement between Congress and the Executive (the *AFSA* court also neglects to note one other minor aspect of *The Pentagon Papers Case*: the Executive lost).

The third case, *United States v. American Telephone and Telegraph Co.*³⁵, seems to be cited by the *AFSA* district court as authority that the role of Congress in this realm is limited to the protection of its own access to classified information, rather than the “intrusion upon the President’s oversight of national security information”³⁶ In fact, the case said nothing of the sort. While it did present “nerve-center constitutional questions,”³⁷ the court expressly declined to resolve those issues,³⁸ urging the parties to pursue an out-of-court settlement. No statute was struck down; no executive act flouting the will of Congress was upheld.

The fourth case is the old war-horse, *United States v. Curtiss-Wright*.³⁹ Those words — *Curtiss-Wright* — often are ritualistically incanted in executive efforts aimed at exorcising the demons of legislative limitation.⁴⁰ But the holding of *Curtiss-Wright* hardly lends itself to such labors, for the circumstances in which the case arose — the facts to which a *holding* is perforce confined — constituted anything but a legislative-executive confrontation. The posture of Congress in that case, unlike *AFSA*, was *support* for the President, not opposition.

34. *Id.* at 730 (Stewart, J. concurring).

35. 551 F.2d 384 (D.C. Cir. 1976).

36. 688 F. Supp. at 685.

37. 551 F.2d at 394. These issues related to the petition of the Justice Department to enjoin a telephone company from complying with a congressional subpoena issued in the course of an investigation into warrantless “national security” wiretaps.

38. *Id.* at 393.

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

40. For example, see the remarks of Lt. Col. Oliver North during the Iran-Contra hearings in 1987:

MR. NORTH. [I]n the 1930s in the *U.S. vs. Curtiss-Wright Export Corporation* . . . the Supreme Court again held that it was within the purview of the President of the United States to conduct secret activities and to conduct secret negotiations to further the foreign policy goals of the United States.

MR. MITCHELL. If I may just say, Colonel, the *Curtiss-Wright* case said no such thing. It involved public matters that were the subject of a law and a prosecution. . . .

I just think the record should reflect that *Curtiss-Wright* was on a completely different factual situation and there is no such statement in the *Curtiss-Wright* case.

MR. SULLIVAN. I disagree with you. I think it is a little unfair . . . to have a debate with Colonel North. . . .

Iran-Contra Investigation: Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions With Iran, 100th Cong., 1st Sess. (part II) 38 (1987)(Testimony of Oliver North).

The case falls in Jackson's *first* category, not his third.⁴¹

The *AFSA* court thus relies upon precedential props that collapse under examination. No case that the court cites supports the notion that the President can use appropriated funds to enforce pre-publication review agreements when Congress has expressly denied funds for that purpose. In an effort to shore up its shaky conclusion, the *AFSA* court thus turns to a student law review note for the proposition that "[n]ever has the President's authority in this area been dependent upon express legislative authorization."⁴² Unfortunately, the note observes on the very page cited by the court that "authority for the practice is said to be implicit in a number of statutes."⁴³ To the extent that such authority is conferred statutorily, of course, it can be limited or repealed statutorily. The court elsewhere seems not to have appreciated the note's full import. The court, for example, cites the note as authority for the proposition that Presidents "have been protecting national security information since World War I." Yet woven throughout the note's discussion are repeated references to relevant authorizing legislation, and the note nowhere suggests that Congress would lack power to prohibit the use of funds to limit the *means* by which national security information is protected.⁴⁴ Indeed, at no point in the note does any reference appear to pre-publication review agreements, for the apparent reason that, whatever Presidents may have been doing "since World War I," none before Ronald Reagan widely and routinely employed such agreements.

II. THE POWER OF THE PURSE

Section 630 represents a classic, textbook exercise of Congress's power of the purse: it prohibits the expenditure of certain appropriated funds for a specified purpose.

The text of the Constitution prohibits statutorily unauthorized expenditures by the President. Article I, section 9, clause 7 confers on Congress exclusive power of the purse. It provides that "no money shall be drawn from the treasury, but in consequence of appropriations

41. *Little v. Barreme*, *Youngstown Sheet & Tube Co. v. Sawyer*, and *United States v. Curtiss-Wright* are examined in greater depth in Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *YALE J. INT'L L.* 5 (1988).

42. The piece cited is *Developments in the Law — The National Security Interest and Civil Liberties*, 85 *HARV. L. REV.* 1130 (1972).

43. *Id.* at 1198 (emphasis added).

44. The court apparently accepts without criticism the Administration's argument "that Congress [can] be excluded from restricting the means by which the Executive protects national security." It is difficult to take seriously the suggestion that *any* means elected by the Executive to protect the national security is constitutionally permissible and immune from congressional restriction as well as judicial review — yet that clearly seems to be the implication of the court.

made by law." The only textual prohibitions against the use of the appropriations power to curtail the activities of another branch are the requirements that the Justices of the Supreme Court and the President receive a compensation that may not be diminished.⁴⁵ Had the Framers intended further limitations on the appropriations power they seemingly would have included them. Indeed, in the case of "national security" matters they placed even greater checks in the hands of Congress. In addition to the power to appropriate funds — and to refuse to do so — they gave Congress the power to "raise and support Armies"⁴⁶ and to "provide and maintain a Navy"⁴⁷ — and to refuse to do so.

The historical background of the appropriations power reveals why the Framers conferred such broad power upon Congress.⁴⁸ The provision was framed against the backdrop of 150 years of struggle between the King and Parliament for control over the purse, often centering on military matters. In 1624 the House of Commons conditioned a grant of funds to the King for the first time when the Subsidy Act of that year prohibited the use of any military monies except for financing the navy, aiding the Dutch, and defending England and Ireland.⁴⁹ Two years later Charles I attempted to wage war without popular support, but Parliament promptly denied him funds to conduct it.⁵⁰

By the 1670s Parliamentary control over the purse was firmly established. Charles II insisted that the stationing of troops in Flanders was a prerogative of the Crown. Parliament, however, saw it differently: it enacted the Supply Act of 1678,⁵¹ requiring that funds granted be used to disband the Flanders forces.⁵²

Meeting in Philadelphia in 1787, the Framers were well aware of the tradition of parliamentary power of the purse and its use to check unwanted "national security" activities. "The purse and the sword must not be in the same hands," George Mason said.⁵³ Madison considered it "particularly dangerous to give the keys of the treasury, and

45. U.S. CONST. art. II, § 1, cl. 6; art. III, § 1.

46. *Id.* at art. I, § 8, cl. 12.

47. *Id.* at art. I, § 8, cl. 13.

48. See generally R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH, 125-27 (1974).

49. J.P. KENYON, THE STUART CONSTITUTION, 1603-1688, at 58 (1966).

50. F. DIETZ, ENGLISH PUBLIC FINANCE 1558-1641 (2d ed. 1964).

51. 30 Car. II. c. 1 (1678).

52. See generally Abbot, *The Long Parliament of Charles II*, 21 ENG. HIST. REV. 254 (1906).

53. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (M. Farrand ed. 1937).

the command of the army, into the same hands."⁵⁴ He regarded the power of the purse as "the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people. . . ."⁵⁵ Accordingly, the Framers chose, in the words of Jefferson, to transfer the war power "from the Executive to the Legislative body, from those who are to spend to those who are to pay."⁵⁶

Early practice comported with a broad reading of the appropriations clause in national security matters. Presidents Jefferson and Jackson, for example, when requesting Congressional instructions as to the proper course to pursue in the face of threatened aggression by Spain and marauding by South American pirates, respectively, recognized that control of the "means" necessary to carry out any military effort lies exclusively with Congress. The Nixon Administration recognized the supremacy of Congress's power of the purse even as it asserted broad power under the Commander-in-Chief clause to prosecute the war in Vietnam. Indeed, it conceded that Congress could use the power of the purse to control troop *deployment* decisions.⁵⁷

The Supreme Court, accordingly, has never held unconstitutional any use of the appropriations power to limit the exercise of power by the executive branch.⁵⁸ The only limitation on an appropriation act that the Court has invalidated⁵⁹ exceeded a constitutional limitation on the power of Congress — the prohibition against bills of attainder.⁶⁰ "Congress alone controls the raising of revenues and their appropriations," Justice Jackson wrote in the *Steel Seizure Case*.⁶¹ Only it "may determine in what manner and by what means they shall be

54. THE FEDERALIST NO. 26 (J. Madison).

55. M. FARRAND, *supra* note 53, at 81.

56. 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1958).

57. Secretary of State Rogers testified:

THE CHAIRMAN [Fulbright]: Do you question the constitutionality of the right of Congress to bring back the troops from Europe? Do you think that is going beyond our constitutional power?

Secretary [of State William] ROGERS: Well, no. As I understand Senator Mansfield's resolution, it refers to appropriation of funds, and that is, of course, within the constitutional powers of the Congress.

THE CHAIRMAN: It is clearly within our powers.

War Powers Legislation: Hearings Before the Comm. on Foreign Relations, U.S. Senate, 92d Cong., 1st Sess. 504 (1971).

58. CONGRESSIONAL RESEARCH SERVICES, U.S. LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 1597-1619 (1973) (setting forth a summary of all acts of Congress held unconstitutional in whole or in part).

59. *United States v. Lovett*, 328 U.S. 303 (1946).

60. U.S. CONST. art I, § 9, cl. 3.

61. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 643 (Jackson, J., concurring).

spent for military and naval procurement.”⁶²

Congress thus relied upon its sole power of the purse to end the Vietnam War. Beginning in 1973, seven statutory funding limitations — such as the Boland Amendment⁶³ — prohibited the use of any appropriated funds for military or paramilitary operations in, over, or off the shores of North Vietnam, South Vietnam, Cambodia and Laos.⁶⁴ Though strongly objecting on policy grounds, the Nixon Administration never challenged the constitutional power of Congress to cut off funds for the war. Similarly, in 1975, when President Ford sent in the Marines to rescue the container ship *Mayaguez* from the Cambodian military, his administration never argued that those funding limitations were unconstitutional — only that they were inapplicable. If Congress can use its power of the purse in time of war to control the use of the armed forces, *a fortiori* Congress can employ that power in time of peace to control the use of pre-publication review agreements.

Nowhere does the *AFSA* court explain how the President can expend funds for enforcing specified pre-publication review agreements when no money has been appropriated for that purpose.

III. PRE-PUBLICATION REVIEW AGREEMENTS

Over the last decade, something terribly significant has happened in this country, mostly unnoticed “beyond the Beltway” and often unheeded within it. The pall of government censorship has descended upon vast numbers of persons who are among the most expert on key matters of public concern. A regime of licensing has been imposed upon a vitally important class of informed public discussants. These individuals must seek the permission of a government censor before publishing written work within their areas of expertise. If a work is not submitted for government censorship, the author may be penalized — even though it contains no classified information. The *AFSA* deci-

62. *Id.*

63. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105, 99 Stat. 1002, 1003 (1985).

64. Section 30 of the Foreign Assistance Act of 1973 was typical except in referring to “military or paramilitary operations” rather than to “combat activities” or “involvement . . . in hostilities.” Section 30 provides: “No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operation by the United States in or over Vietnam, Laos, or Cambodia.” Foreign Assistance Act of 1973, Pub. L. No. 93-189, 87 Stat. 732 (1973). The other provisions were: Department of Defense Appropriation Act of 1975 Pub. L. No. 93-437, § 839, 1974 U.S. CODE CONG. & ADMIN. NEWS (88 Stat.) 1400; Department of Defense Appropriations Act, 1974, § 741, 87 Stat. 1045 (1974); Department of Defense Appropriation Authorization Act, 1974, § 806, 87 Stat. 615 (1973); Department of State Appropriations Authorization Act of 1973, § 123, 87 Stat. 454 (1973); Joint Resolution of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 134; Second Supplemental Appropriations Act, 1973, § 307, 87 Stat. 129 (1973).

sion invalidates Congress's primary means to check this executive abuse.

This system of censorship has been put in place following one of the most unfortunate Supreme Court decisions in decades — *Snepp v. United States*.⁶⁵ The Court there upheld the validity of a pre-publication review agreement as applied to information that the government conceded was not classified and, indeed, was available entirely on the public record. *Snepp* had breached no duty to protect classified information. The Court rested on interpretation of contract law, while disposing of the First Amendment issue in a footnote, without even hearing oral argument. It did not consider “whether national security is harmed by such disclosures, or, if so, whether the adverse effects are resolved effectively by the [Central Intelligence] Agency’s scheme of secrecy agreements.”⁶⁶ Most important, the Court declined to consider the countervailing interests undercut by secrecy agreements.

Those interests are weighty. Indeed, they lie at the core of our structure of government. Since the time of Blackstone, Anglo-American law has taken a dim view of prior restraints on speech and the press. In *Near v. Minnesota*,⁶⁷ the Supreme Court found prior restraints to be presumptively unconstitutional. The reason is known to every student of American constitutionalism: our First Amendment, as Justice Brennan wisely put it in *Richmond Newspapers, Inc. v. Virginia*,

has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ . . . but the antecedent assumption that valuable public debate — as well as other civic behavior — must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive. . . .⁶⁸

The censorship agreements at which Section 630 was directed undercut “uninhibited, robust, and wide-open” public debate. They undercut the “process of communication necessary for a democracy to survive.” Who can begin to assess the chilling effect these agreements have had upon free expression? How many articles have never been written, and how many speeches never given about the “disinformation” campaign against Libya; about the illegal mining of the harbors

65. 444 U.S. 507 (1980).

66. Franck & Eisen, *Balancing National Security and Free Speech*, 14 N.Y.U. J. INT'L L. & POL. 339, 343 (1982).

67. 283 U.S. 697 (1931).

68. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (emphasis in original, citations omitted).

of Nicaragua; about the sale of Hawk missiles to Iran and the diversion of funds to the contras; and about the most massive Pentagon procurement scandal in the nation's history, because a would-be author or speaker was unwilling to submit to the heavy hand of the government's censor? Can we ever begin to measure the damage inflicted upon the marketplace of ideas in this country by excluding from it information and ideas vitally important to petitioning Congress for a redress of grievances or to casting an informed vote?

I do not suggest that government has no interest in keeping secrets. Nor do I suggest that secrecy agreements are always necessarily to be avoided. Narrow and precisely drafted agreements might, for example, be justified in circumstances involving individuals, employed by intelligence agencies, who have direct access to extraordinarily sensitive information that is legitimately classified because it relates to bona fide intelligence sources or methods.

The point is, however, that policymakers ought not be deluded into accepting a false choice, one that suggests that our nation must choose between massive censorship or national annihilation. It does not. The art of statesmanship, in Congress or on the bench, lies in devising a solution that strikes a balance between the competing interests of free expression and national security, not a solution of the sort imposed by the federal district court in *AFSA* that affirms one interest while discarding altogether another set of vital interests.