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Case Comments

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CASE COMMENTS

ENVIRONMENTAL LAW—NATIONAL ENVIRONMENTAL POLICY ACT—NATIONAL HISTORIC PRESERVATION ACT—OMNIBUS CRIME CONTROL AND SAFE STREETS ACT—THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION IS REQUIRED TO FULLY CONSIDER THE ENVIRONMENTAL IMPACT OF STATE PROJECTS BEFORE APPROVING "BLOCK" GRANTS UNDER THE SAFE STREETS ACT.—The Green Springs area of Virginia is a unique rural community in that nearly all of its homes were built during the nineteenth century and have been substantially maintained in their original condition. Attesting to the historical and architectural significance of the homes, three have been placed on the National Register for Historic Places[1] as provided in 16 U.S.C. § 470a(a) (1) of the National Historic Preservation Act.[2]

During 1970, the Green Springs area became the proposed site of a reception and medical center for Virginia prisoners. Contrary to the community's setting and architectural design, the facility would consist of four concrete-faced buildings, a thirty-foot guard tower, and a surrounding prison-type fence. In response to that action, suit was brought by area citizens, both as individuals and members of an unincorporated association known as the Green Springs Association, seeking to permanently enjoin the construction of the facility and the allocation of federal funds for the project by the Law Enforcement Assistance Administration (hereinafter referred to as LEAA).[3] Richard W. Velde and Clarence M. Coster, Associate Administrators of the LEAA, and Otis L. Brown, Director of the Department of Welfare and Institutions for the State of Virginia —the agency responsible for the center—were named as defendants.

The Green Springs residents claimed that the administrators of the LEAA and Otis L. Brown violated both the National Historic Preservation Act of 1966[4] (hereinafter referred to as NHPA) and the National Environmental Policy Act of 1969[5] (hereinafter referred to as NEPA). It was further asserted that defendant Brown deprived them of their ninth and fourteenth amendment rights to an environment free from unnecessary environmental degradation. They base these claims upon the fact that in choosing the Green Springs area and allocating $775,000.00 in the form of a "block" grant to the State of Virginia, the responsible officials failed to take into account the project's environmental effect as required by both statutes,[6] and failed to issue a detailed statement regarding

1 Boswell's Tavern was placed on the National Register in 1969. Hawkwood and Westland were placed on the Register in September, 1970. Ely v. Velde, 321 F. Supp. 1088, 1089 n.2 (E.D. Va. 1971).

2 16 U.S.C. § 470 (1970).

3 The Omnibus Crime Control and Safe Streets Act, 42 U.S.C. §§ 3701-37 (1970), provides for the creation of the Law Enforcement Assistance Administration and authorizes the Administration to make "block" grants to states after those states have submitted an approved comprehensive plan for crime control and prevention. The state may then disperse the funds in accordance with its comprehensive plan. *See* detailed analysis *infra*.

4 16 U.S.C. § 470 (1970).

5 42 U.S.C. §§ 4321-47 (1970).

6 Section 470f of the Historic Preservation Act requires:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into

the environmental impact as required by NEPA.[7] The district court rejected the resident's contention and based its conclusion on the premise that NHPA and NEPA were in irreconcilable conflict with the prevailing Omnibus Crime Control and Safe Streets Act[8] (hereinafter referred to as the Safe Streets Act) under which the "block" grant in question was allocated.[9] The United States Court of Appeals for the Fourth Circuit, while refusing to apply NEPA and NHPA to the *state* welfare agency, disagreed with the district court's construction of the applicable statutes and *held*: the LEAA, being a federal agency, must comply with the mandates of both NEPA and NHPA before approving the expenditure of substantial federal funds. *Ely v. Velde*, Civil No. 71-1351 (4th Cir., November 8, 1971).

Congress intended the National Historic Preservation Act (NHPA) to protect sites and properties of statewide and local historical import and to generally promote interest in the preservation of all properties representing the culture and heritage of the nation.[10] Coordination of preservation and improvement efforts on the federal, state, and local levels[11] was accomplished in part by the establishment of a National Advisory Council[12] and furthered by certain procedural mandates applicable to all federal agencies.[13]

Unlike preceding antiquity acts which had no way of controlling the impact of federal projects on historical sites,[14] NHPA inaugurated the following procedure. Section 470f states that heads of federal agencies which directly or indirectly have jurisdiction over proposed federal or federally funded undertakings *shall* before expending any federal funds take the project's historical effect into account and afford the Advisory Council a reasonable opportunity to comment on the effect of such projects on sites included in the National Register for Historic Places. This did not mean the Council could actually halt or prevent federal projects endangering historical sites. Instead, the Council was prescribed to act as nothing more than an advisor with the power to comment favorably or adversely on such federally funded projects. In so limiting their capacity, Congress meant to leave sufficient room for so-called "progress."[15] While attention was to be focused on historic sites and their significance, the

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account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register.

Section 4332 (C) (i) of the National Environmental Policy Act requires all agencies of the Federal Government to:

> . . . [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on—
>
> (i) the environmental impact of the proposed action. . .

7 42 U.S.C. § 4332 (C) (i) (1970).

8 42 U.S.C. §§ 3701-37 (1970). *See* note 3 *supra.*

9 Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971).

10 16 U.S.C. § 470 (1970); H.R. REP. No. 1916, 89th Cong., 2d Sess. (1966); Note, *Public Historic Preservation in Texas,* 49 TEXAS L. REV. 267 (1971).

11 Prior to 1966, historic preservation statutes only extended to properties considered "nationally" significant and took no cognizance of local or statewide sites of historical significance. *See, e.g.,* The Antiquity Act of 1906, 16 U.S.C. § 431; The Historic Sites Act of 1935, 16 U.S.C. § 461.

12 16 U.S.C. § 470 (i) (1970).

13 16 U.S.C. § 470f (1970).

14 *See, e.g.,* The Historic Sites Act of 1935, 16 U.S.C. § 461.

15 H.R. REP. No. 1916, 89th Cong., 2d Sess. 4 (1966); 112 CONG. REC. 25939 (1966) (remarks of Representative Quillen).

most that Congress desired was a balance between American heritage and new construction.[16] Thus, they insisted upon strict procedural compliance by federal agencies,[17] but the required procedural steps were merely designed to elicit consideration and cognizance of historical factors in the decisionmaking stage. In the final analysis, NHPA's general goal was to promote a high degree of cooperation and coordination in federal activities so that historical considerations would not be ignored.[18]

The National Environmental Policy Act (NEPA) has a twofold purpose. First, it broadly describes what the nation's environmental policy will be,[19] and secondly, it imposes procedural duties on federal agencies to force their compliance with and implementation of that policy.[20] Section 4331 of the Act declares that it will be the federal government's continuing policy to "use all practicable means" which are consistent with other national policy considerations to: 1) both protect and restore environmental qualities including "esthetically and culturally pleasing surroundings;" 2) preserve important "historic, cultural, and natural aspects of our national heritage;" and 3) "maintain, wherever possible, an environment which supports diversity and variety of individual choice." The legislation was designed to insure that federal projects and actions would not unnecessarily contribute to the environmental problems faced by the nation. Instead, the various federal agencies were to reorder their priorities and set the pace for a nationwide program of environmental improvement.[21]

In order to coordinate this environmental initiative, the Act authorized the creation of a Council on Environmental Quality.[22] More importantly, NEPA placed upon all federal agencies certain "action-forcing" procedural duties

16 H.R. REP. No. 1916, 89th Cong., 2d Sess. 4 (1966).

17 Few cases have been premised on NHPA and judicial interpretation is nearly nonexistent. However, the few courts that have dealt with the Act have required strict compliance with its procedural mandates. *See, e.g.*, Berkson v. Morton, Civil No. 71-1085B (D.C. Md., October 1, 1971); South Hill Neighborhood Association v. Romney, 421 F.2d 454 (6th Cir. 1969) (dictum), *cert. denied*, 397 U.S. 1025 (1970).

18 The Interior and Insular Affairs Committee's amendments to the original bill, S. 3035, which went on to form part of the Act in its final form, indicate at one point a desire on their part to expand the Advisory Council's purview and potential. The original language of § 470f was amended so as to expand the number of federal agencies required to take historical factors into account. Section 470f was also amended to allow the Council an adequate and reasonable time to comment on proposed federal action rather than the flat 60 days stated in the original bill.

However, further amendments make it clear that the Council's authority was quite limited. One reduced the Advisory Council's duties as outlined in § 470j in order that they conform to its purpose—namely to perform advisory functions. A second omitted provision which would have allowed the Advisory Council to hold hearings under oath; compel attendance, testimony, or production of records; and exercise other powers not commonly granted an advisory council. H.R. REP. No. 1916, 89th Cong., 2d Sess. (1966).

19 42 U.S.C. § 4331 (1970).

20 42 U.S.C. § 4332 (1970).

21 Various acts in force prior to the National Environmental Policy Act declared that environmental factors must be taken into account. *See, e.g.*, Fish and Wildlife Coordination Act, 16 U.S.C. § 662 (a) (1970); Endangered Species Act, 16 U.S.C. § 668aa (b) (1970). However, none have expressed the broad congressional mandate for "action" that NEPA did. *See* Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 643-51 (1970); Note, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 E.L.R. 50035 (1971); Note, *A Panoramic View of the National Environmental Policy Act*, 16 How. L.J. 116 (1970).

22 42 U.S.C. § 4342 (1970).

whose completion was mandatory to the initiation of any major federal action.[23] Section 4332 requires "to the fullest extent possible" that the laws of the United States as well as its policies and regulations "shall be interpreted and administered in accordance with the policies set forth in [the] act." It goes on to state that all federal agencies must use a "systematic, interdisciplinary approach" in their decisionmaking which will guarantee proper environmental planning where a proposed project might have an impact on man's environment.[24] To accomplish this, federal agencies are required to develop methods which will insure consideration of environmental factors.[25] They are additionally required to:

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions[26] significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided . . . ,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[27]

By requiring execution of the above procedural steps, Congress meant to insure full, good faith weighing of environmental factors into an "environmental cost/national benefit" equation, and exploration of alternatives which might alter the equation. Senator Jackson, author of the Act, enunciated this requirement of a balancing judgment. He said on the Senate floor:

> . . . Subsection [4332 (B) is] . . . designed to insure that all relevant en-

23 42 U.S.C. § 4332 (1970). In hearings before the Senate Committee on Interior and Insular Affairs, "action-forcing" measures which would make NEPA "capable of implementation" were urged by Dr. Caldwell. *Hearings on S. 1075 Before the Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. 112-16 (1969). Immediately thereafter Senator Jackson instructed the Interior Committee staff to draft additional provisions to the original bill in order to place a mandatory responsibility "for the management of the human environment" upon *all* federal agencies. Senator Jackson stated that this way "no agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." *Id.* at 206. *See* S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969); 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson); 115 CONG. REC. 39702-04 (1969) (provisions of the Conference Substitute).

24 42 U.S.C. § 4332 (A) (1970).

25 42 U.S.C. § 4332 (B) (1970).

26 Since it would not be possible for federal agencies to prepare detailed statements for all actions affecting the environment, § 4332 only requires statements when "legislative proposals" or "major Federal action[s]" are involved. However, federal officials and agencies are still required to consider the environmental impact of *any* decision and where § 4332 statements are not required, the environmental effects must be made part of a reviewable record upon which the agency based its ultimate decision. *See* Note, *An Analysis of Title I of the National Environmental Policy Act of 1969,* 1 E.L.R. 50035, 50038 (1971).

27 42 U.S.C. § 4332(c) (1970).

> vironmental values and amenities are considered in the calculus of project development and decisionmaking. Subsection [4332 (C)] establishes a procedure designed to insure that . . . any adverse [environmental] effects which cannot be avoided are justified by some other stated considerations of national policy. . . .[28]

The legislative history of NEPA makes it quite clear that despite the phrase "to the fullest extent possible" Congress intended to impose on every federal agency a mandatory duty to manage and protect the environment. The phrase was not to be used as a means of avoiding strict compliance with § 4332, but rather was inserted for the sole purpose of excepting agencies specifically precluded from doing so by statute or whose compliance was virtually impossible.[29] Even these agencies were required to comply with the Act to a feasible degree and submit reasons to the President by July 1, 1971 detailing why they could not entirely conform.[30]

Executive and administrative guidelines for implementation of NEPA have stressed the compulsive nature of the Act and have been strict and explicit in regard to the procedural requirements contained therein.[31] Nevertheless, the early district court decisions were not entirely consistent in their interpretation of the Act and especially in regard to § 4332.[32] It should be noted, however, that the majority of decisions denying relief under NEPA dealt with federal projects initiated long before the Act went into effect on January 1, 1970.[33] Hence, many of the earlier cases are poor tests of the Act's utility.

The most extreme dilution of NEPA mandates was stated in the case of *Bucklein v. Volpe*.[34] There the Act was ruled nothing more than a declaration of congressional policy. In keeping with this philosophy, the court felt that NEPA didn't seem to create any rights or impose any duties "of which a court can take cognizance." The *Bucklein* view was ignored, however, by a clear majority of courts who instead saw NEPA as a creator of judicially enforceable duties to be performed by federal agencies.[35]

28 115 CONG. REC. 29055 (1969) (remarks of Senator Jackson); *accord,* Council on Environmental Quality Guidelines, 36 Fed. Reg. 7724 (1971).

29 115 CONG. REC. 40417-18 (1969) ("Major Changes in S. 1075 as Passed by the Senate"); 115 CONG. REC. 39702 (1969) (Conference Committee Report).

30 The Council on Environmental Quality interprets NEPA as binding upon *all* federal agencies "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." Council on Environmental Quality Guidelines, 36 Fed. Reg. 7724 (1971); *accord,* Exec. Order No. 11,514, 35 Fed. Reg. 4247 (1970).

31 *Id.*

32 Many decisions immediately following the enactment of NEPA failed to premise relief upon the Act. *E.g.,* Bucklein v. Volpe, Civil No. C-70 700 RFP (N.D. Cal., October 29, 1970); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970); Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970); *contra,* Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845 (S.D. Fla. 1970); Sierra Club v. Laird, Civil No. 70-78 TUC (D. Ariz., June 23, 1970); Texas Committee v. United States, Civil No. A-69-CA-119 (W.D. Tex., February 5, 1970); Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

33 *See, e.g.,* Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970), *aff'd on merits,* 329 F. Supp. 118 (W.D. Wash. 1971); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970).

34 Civil No. C-70 700 RFP (N.D. Cal., October 29, 1970).

35 *See, e.g.,* Coastal Petroleum v. Secretary of the Army, 315 F. Supp. 845 (S.D. Fla. 1970); Sierra Club v. Laird, Civil No. 70-78 TUC (D. Ariz., June 23, 1970); Texas Committee v. United States, Civil No. A-69-CA-119 (W.D. Tex., February 5, 1970); Wilderness

Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army,[36] somewhat typified this later interpretation of the Act.[37] In that case, the Corps of Engineers failed to file what the court considered a sufficient impact statement on the environmental effect of an earth embankment dam across the Cossatot River in Arkansas. At the same time the action was brought against the Corps, over two-thirds of the allocations for the project had already been spent, but construction on the dam itself had not yet begun. Despite this fact, the court in making its decision left no doubt that programs must be structured from the outset in accordance with NEPA requirements. In addition, undertakings must be upgraded to meet these requirements. The court cited the Council on Environmental Quality's Interim Guidelines[38] and the legislative history of NEPA[39] in determining that the language "to the fullest extent possible" included in the Act was not at all ambiguous and with few exceptions all federal agencies were required to comply with the directives of § 4332. While the court felt NEPA created no substantive rights so that the dam project could be permanently enjoined, it did envision NEPA as an "environmental full disclosure act" requiring performance of certain procedural steps which allow the ultimate decisionmakers to deliver informed rulings on proposed federal projects.[40]

The Supreme Court has yet to deliver a majority opinion interpreting NEPA specifically,[41] but it has explored the duties of agency administrators in regard to other "environmental" acts.

Justice Marshall, writing the majority opinion in *Citizens to Protect Overton Park v. Volpe,*[42] took notice of the growing national concern with the environment which prompted the enactment of legislation "designed to curb the accelerated destruction of our country's natural beauty." NEPA was cited as an example.[43]

The case centered around § 4 (f) of the Department of Transportation Act of 1966[44] and § 138 of the Federal Aid to Highway Act of 1968[45] which require the Secretary of Transportation to withhold federal funds for highways going through public parks until he has determined that no "feasible and pru-

Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); *contra,* Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D. N.M. 1971).

36 325 F. Supp. 749 (E.D. Ark. 1971).

37 United States v. 247.37 Acres of Land, Civil No. 7769 (S.D. Ohio, September 9, 1971); *accord,* Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 324 F. Supp. 878 (D.D.C. 1971); Gibson v. Ruckelshaus, Civil No. 5255 (E.D. Tex., March 1, 1971). *See also* Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971); Scenic Hudson Preservation Conference v. Federal Power Commission, Civil Nos. 3566-8, 3568-3, 35688-9 (2nd Cir., October 22, 1971).

38 35 Fed. Reg. 7391 (1970).

39 115 CONG. REC. 40416-17 (1969) (remarks of Senator Jackson); 115 CONG. REC. 40417 (1969) ("Major Changes in S. 1075 as Passed by the Senate").

40 325 F. Supp. at 759.

41 Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, *cert. denied,* 400 U.S. 968 (1970) (Black, Brennan & Douglas, J.J., dissenting); The Committee for Nuclear Responsibility, Inc. v. Schlesinger, Civil No. A-483 (U.S., November 6, 1971) (Douglas, J., dissenting).

42 401 U.S. 402 (1971).

43 *Id.* at 404 n.1.

44 49 U.S.C. § 1653 (f) (1970).

45 23 U.S.C. § 138 (1970).

dent" alternative route exists. Furthermore, if no other route is available, the Secretary still cannot approve such funds unless there has been "all possible planning to minimize harm" to the park.

In dealing with these acts, the Court prescribed a procedure to be used by lower courts reviewing challenged discretionary administrative actions. De novo review of such decisions was not desired or allowed, but rather a "substantial inquiry" was required into whether the applicable standards of the Administrative Procedure Act[46] had been met. Discretionary administrative actions were to be vacated if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and this was to be determined by a three-pronged test. First, the action taken had to be within the administrator's authority. Second, it had to be based upon a consideration of relevant factors. Third, it could not be clearly erroneous. The reviewing district courts were instructed to premise their answers to the three questions on a contemplation of all the facts upon which the administrator made his decision. They could even call the administrator as a witness if his formal findings were insufficient.[47]

While *Overton Park* directly relates only to highways and parklands, it seems to apply this procedure to the entire range of suits intended to halt environmentally destructive action by agency administrators.[48] When dealing with NEPA, the Fifth Circuit has interpreted the decision accordingly.[49] After halting a federally funded project, it instructed the responsible administrator to file a § 4332 (C) (i) impact statement and review the environmental effect of the project as a whole. Once this was completed, the district court was to conduct a full review based on the *Overton Park* guidelines.

Like most courts before it, the district court hearing the *Ely* case took notice of the requirements contained in § 470f of NHPA and § 4332 (C) (i) of NEPA and noted that "both . . . are designed to foster . . . improvement and maintenance of areas such as Green Springs."[50] However, it found difficulty in reconciling the tenets of the Safe Streets Act.

The Safe Streets Act is considered the most comprehensive crime control legislation ever enacted.[51] Its purpose is to provide federal financial assistance to state and local law enforcement agencies so that the entire criminal justice system might better cope with the nation's drastic increase in criminal activity.[52] To implement this goal, the Act by design makes the state the focal point of crime control as it has traditionally been.[53] It does so through the creation of the Law Enforcement Assistance Administration (LEAA) which undertakes the authorization of funds mostly in the form of "block" grants to states submitting *approved* comprehensive plans.[54] 42 U.S.C. § 3733 specifies that:

46 5 U.S.C. § 706 (1970).
47 401 U.S. at 415-21.
48 1 E.L.R. 10035 (1971).
49 Conservation Society v. Texas, Civil No. 30915 (5th Cir., August 5, 1971).
50 321 F. Supp. at 1092.
51 *See* Braun, *Federal Government Enters War on Crime,* 54 A.B.A.J. 1163 (1968).
52 H.R. REP. No. 488, 90th Cong., 1st Sess. (1968).
53 *Id.* at 3.
54 The LEAA retains control of 15% of the crime control funds to be allocated under the Safe Streets Act. These funds may then be distributed on a "grant-in-aid" basis. 42 U.S.C. § 3736 (1970).

> The [LEAA] *shall make* ["block"] *grants* . . . to a State planning agency if such agency has on file with the [LEAA] an approved comprehensive state plan . . . which conforms to the purposes and requirements of this chapter. [Emphasis added.]

This unprecedented "block" grant spending replaces traditional "grant-in-aid" funding. The two differ in that under "grant-in-aid" spending, the dispersing federal agency specifically approves each individual project and funds that project only; whereas with "block" grant programs each state (in the case of the Safe Streets Act through a criminal justice agency) presents a general plan of composite projects to be undertaken by its local governmental entities and upon approval the federal agency allots funds to the state in "block" form to disperse as it sees fit based on that comprehensive plan.[55] Thus, the LEAA relinquishes traditional federal dictatorial powers over projects to be undertaken and financed, and must instead allow states to determine their own priorities with relatively no strings attached to federal funds.[56] This according to Senator Dirksen and other backers would prevent the feared establishment of a national police force and would attack the local problem of law enforcement in a more cogent manner.

Where a comprehensive state plan is unsatisfactory or non-existent, the LEAA can take control of all funds so as to guarantee compliance with the Act.[57] A further guarantee is embodied in § 3757 which allows the LEAA to discontinue or withhold future payments or grants where the applying state substantially fails to comply with the Act's provisions, or regulations and guidelines promulgated by the LEAA, or with the comprehensive plan which the state submitted. By these means, Congress insured that funds would be wisely and effectively used to increase state and local crime control.

In the instant case, the funds provided for the Green Springs Reception and Medical Center were acquired through the "block" grant process described

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55 The procedure for obtaining "block" grants under the Safe Streets Act may be summarized as follows:

a) the Governor appoints a state criminal justice agency;
b) local law enforcement agencies propose enforcement and prevention plans to this agency;
c) the agency then formulates a comprehensive plan for the state which it submits to the LEAA for approval;
d) upon approval, the LEAA allocates funds to the state agency based on the state's population;
e) the state agency may then allocate the funds according to its comprehensive plan, with at least 75% of the funds required to go to local enforcement units or combinations thereof.

See 42 U.S.C. §§ 3701-37 (1970); H.R. REP. No. 488, 90th Cong., 1st Sess. (1968); 114 CONG. REC. 14758 (Statement by Senator Thurmond).

56 The Congressional supporters of the "block" grant or "hands-off" provision (including Dirksen, Scott, and others) did so for two main reasons. First, they feared federal control of all law enforcement activities and the possibility of a national police force. Additionally, law enforcement activities were considered a local problem to be controlled locally. Granting funds to states for their distribution was felt to be the only way to guarantee an integrated and comprehensive effort in the area of crime control. 114 CONG. REC. 14753, 14909 (Statement by Senator Dirksen); *see also* 113 CONG. REC. 21,083 (1967) (remarks of Representative Cellar); 113 CONG. REC. 21,188 (1967) (remarks of Representative Hutchinson); 114 CONG. REC. 14757 (1968) (remarks of Senator Thurmond); S. REP. No. 1097, 90th Cong., 2nd Sess. 227 (1968).

57 42 U.S.C. § 3735 (1970).

above.[58] In other words, the State Criminal Justice Agency of Virginia had filed a comprehensive plan which was approved by the LEAA. The result was the Administration's funding of a "block" grant in the amount of $775,000.00 of which $275,000.00 was earmarked for the Green Springs project by the state.[59]

Defendant Brown made the site selection in his official capacity as Director of the Department of Welfare and Institutions for the state of Virginia. While he stated that other sites were available, he considered the Green Springs area best due to its level ground, location, and proximity to major highways.[60] The LEAA in approving the state's comprehensive plan admittedly failed to consider the environmental and historical import of the location and accordingly failed to file a detailed statement on the environmental consequences of locating the reception and medical center in Green Springs. In defense of this failure, the LEAA claimed that under the "block" grant funding system incorporated by the Safe Streets Act, the location of such facilities was entirely a local concern, hence immaterial to the LEAA. Its position centers on certain sections of that Act which it argues prohibit almost all interference with or control of state use of "block" grants, and make the Safe Streets Act, NEPA, and NHPA irreconcilable.[61]

The district court accepted the view taken by the LEAA and determined that the three acts involved were in direct conflict. The court enumerated the inconsistencies which it felt existed between them. It noted that NHPA requires all federal agencies to submit plans to the Advisory Council on Historic Preservation prior to the approval of any federal funds for projects which might affect structures included in the National Register.[62] Similarly, NEPA provides that federal agencies shall "to the fullest extent possible" include in every recommendation or "other major Federal action significantly affecting the environment" a detailed environmental impact statement.[63] On the other hand, the court concluded that the Safe Streets Act requires the LEAA to make "block" grants over which it has no control to state planning agencies if such agencies have an approved comprehensive plan on file with the Administration.[64]

Considering these provisions incompatible, the court reasoned that the Safe Streets Act must prevail for three major reasons.

First, it determined that NEPA language, specifically the words "to the fullest extent possible," made the Act discretionary, while the terms "[t]he Administration shall make grants" contained in the Safe Streets Act were non-discretionary. The court realized that Congress did not intend NEPA language to provide federal agencies with an "escape clause" by which they could avoid implementation of the Act. Nevertheless, it felt the language allowed agencies some leeway in their compliance. Combining this conclusion with the court's intention to enforce only one of the three acts, it concluded that the Safe Streets

58 42 U.S.C. § 3731 (1970) specifically enumerates the construction of buildings and other law enforcement facilities as a purpose for which states might spend the "block" grant.
59 321 F. Supp. at 1090.
60 *Id.* at 1090 n.4.
61 *Id.* at 1093.
62 16 U.S.C. § 470f (1970).
63 42 U.S.C. § 4332(C)(i) (1970).
64 42 U.S.C. § 3733 (1970).

Act must take priority, stating, "[w]hen two statutes of equal efficacy conflict, one non-discretionary and one discretionary, the non-discretionary one must prevail."[65]

Secondly, the court considered NHPA, like the Safe Streets Act, to be *non*-discretionary and as such had to look to a second rule of statutory interpretation in determining that between the two, the Safe Streets Act must prevail because it was passed subsequent to NHPA.[66]

Thirdly, the court relied on language contained in *Udall v. Tallman*[67] in stating the judiciary will show great deference to the interpretation given a statute by the officers or agencies charged with its administration, especially where an act is new or relatively untried. It merely required the agency's decision to be reasonable, not that it be the only decision nor the one that the court itself would have made. The opinion expressed no doubt that the LEAA acted reasonably in approving the "block" grant to Virginia without first considering NEPA and NHPA. In the court's view, the terms of the Safe Streets Act were definitely clear in unequivocably requiring the LEAA to make the grants once an approved comprehensive plan had been filed. Since it deemed the provisions of the Safe Streets Act to be non-discretionary, the court saw no need for LEAA officials to look beyond its terms for provisions of other acts which might contradict those same terms.

The Green Springs residents' final claim as to defendant Brown was also dismissed by the district court. It was their contention that Brown violated not only NEPA and NHPA, but also that he deprived them of their constitutional rights under the ninth and fourteenth amendments. On this point, the United States Court of Appeals for the Fourth Circuit agreed with the district court. While it acknowledged recent opinions as to the claimed right to a constitutionally protected environment, the court determined that the residents were stretching rights in their attempt to reach the action of state officials and refused to accord judicial sanction to the constitutional claim.[68] Further, the court stated that no relief against the state official can be premised on NHPA or NEPA since by their express language they only operate upon federal agencies and officials.[69]

Despite acquiescence on these points, the court of appeals was otherwise at odds with the district court. It centered its reversal as to the LEAA upon a different view of statutory construction and a firmer desire to overcome the balking of administrative officialdom in regard to environmental and cultural improvement. The district court's approach was erroneous in several major respects and it was to these areas that the court of appeals first addressed itself.

To begin with, the district court's line of statutory construction was a last resort measure only to be used where it is impossible to reconcile and effectuate two statutes. The court of appeals recommended a different tact where statutes appear to be in conflict. In such a case, the deciding court should ascertain the underlying purpose of each and based on a "strong presumption" that one does

65 321 F. Supp. at 1093.
66 *Id.*
67 380 U.S. 1 (1965).
68 Ely v. Velde, Civil No. 71-1351 (4th Cir., November 8, 1971) (slipsheet opinion at 23).
69 *Id.*

not repeal or amend the other, attempt to reconcile the two wherever possible.[70]

Applying this construction specifically to the acts involved in *Ely,* it found no real antagonism. Instead, it considered the "hands off" policy of the Safe Streets Act to be overstated and improperly read by both the LEAA and the district court. The court said:

> [I]n the absence of *unmistakable language to the contrary,* we should hesitate to read the congressional solution to one problem . . . so broadly as unnecessarily to undercut solutions adopted by Congress to preserve and protect other societal values, such as the natural and cultural environment. It is not to be assumed lightly that Congress intended to cancel out two highly important statutes without a word to that effect. [Emphasis added.][71]

The district court erroneously viewed NEPA as a statute with which federal agencies could comply at their discretion. Such a view completely ignores the legislative history of the Act which leaves no doubt that performance of NEPA's procedural steps was mandatorily required of agencies with few exceptions,[72] none of which were present here. The LEAA would be excepted only if the Safe Streets Act (as its enabling statute) specifically precluded the Administration from complying, or if compliance was impossible.[73] Since no such language is contained in the statute, the court of appeals correctly concluded there was no congressional intent to forbid LEAA compliance with either NEPA or NHPA, and that in fact there were ways in which the LEAA could integrate both into its functions under the Safe Streets Act. The district court failed to recognize the many areas of discretionary power which the LEAA continues to hold. It retains direct control over 15% of crime control funds,[74] takes direct control of all funds if a state fails to submit a comprehensive plan of which it approves,[75] and has the power to discontinue or withhold funds where a state's actions differ from those contained in the approved comprehensive plan.[76] Most importantly, the Act provides for the submission of comprehensive plans "containing such information as the Administration may reasonably require."[77]

These discretionary powers considered, it was certainly incumbent upon the district court to consider whether NEPA and NHPA could be implemented at the time that the state comprehensive plan came to the LEAA for approval. Assuming the Administration has no choice but to grant funds once a state plan has been approved, this does not mean that they cannot implement NHPA and NEPA at an earlier stage in the grant review process, specifically at the point where they conduct their annual review of the comprehensive plan. This in fact is what the court of appeals suggested.[78] It reasoned that Congress, in enacting the crime control legislation, had no intention of forbidding LEAA

70 *Id.* at 11.
71 *Id.* at 16.
72 Note 23 *supra.*
73 Note 30 *supra.*
74 42 U.S.C. § 3736 (1970).
75 42 U.S.C. § 3735 (1970).
76 42 U.S.C. § 3757 (1970).
77 42 U.S.C. § 3733 (1970).
78 Ely v. Velde, Civil No. 71-1351 (4th Cir., November 8, 1971) (slipsheet opinion at 17).

compliance with environmental and cultural legislation. The court concluded that it would not overburden the LEAA to require as a prerequisite to approval of state plans, state submission of sufficient information to apprise controlling administrators of the cultural and environmental impact of proposed projects or grants, and that this step would in no way initiate a national police force or invite further federal intervention. It seemed anomalous to the court of appeals that the LEAA claimed implementation of NHPA and NEPA was impossible, when according to its "Guide for Comprehensive Law Enforcement"[79] state plans are required to include:

> . . . procedures established to effect coordination with plans under
> (a) the Juvenile Delinquency Prevention and Control Act of 1968
> (b) the Model Cities Program under the Demonstration Cities and Metropolitan Development Act of 1966
> (c) the Highway Safety Act of 196[6].[80]

The guidelines further require states, as well as their subgrantees and contractors, to comply with the Civil Rights Act of 1964.[81] Since none of these acts are explicitly expressed in the Safe Streets Act, the court was hard-pressed to give credence to the LEAA argument that there was no room for NEPA and NHPA.

It, instead, was inclined to follow *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission.*[82] In that landmark litigation, the court extended NEPA duties to their furthest point yet. While refusing to reverse most substantive administration decisions on the merits of proposed projects, it made it clear that all agencies would be required to exercise good faith procedural compliance followed by a balancing of environmental and other factors. If the agency decision that followed was arbitrary or failed to give sufficient weight to environmental factors, it too could be reversed.

The United States Court of Appeals for the Fourth Circuit, agreeing with *Calvert Cliffs'*, did not see NEPA as discretionary. Antithetically, it interpreted the "fullest extent possible" language as reinforcement to the NEPA mandates citing *Calvert Cliffs'* as follows:

> . . . [the] language does not provide an escape hatch for footdragging agencies, . . . [nor] make NEPA's procedural requirements somehow "discretionary". . . . Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard which must be rigorously enforced by the reviewing courts.[83]

Following *Calvert Cliffs'*, the court would not make any decision on the merits of the Green Springs project. Rather, the court sees NHPA and NEPA as requiring procedural compliance whereby properly relevant environmental information will be placed before the ultimate decisionmakers on federal projects. After good faith performance of their procedural duties and careful ob-

79 *Id.* at 18. LEAA, GUIDE FOR COMPREHENSIVE LAW ENFORCEMENT, January, 1970.
80 *Id.* at 59.
81 *Id.* at 39.
82 449 F.2d 1109 (D.C. Cir. 1971).
83 449 F.2d at 1114.

servation of environmental and cultural factors administrators will be allowed a final decision. If they feel non-environmental priorities outweigh environmental effects, the project may proceed as originally planned; if the environmental costs are too great the project may be terminated; or, the administrators might be able to modify plans or require their modification so that all priorities might be reached.[84]

By allowing administrative discretion in the final decision, the court did not mean to permit the LEAA or any other federal agency to act arbitrarily. This means that in an *Ely* situation the LEAA would not be allowed to comply with § 4332 (C) (i) by filing a complete environmental impact statement and then act in disregard of its findings by funding a project without proper consideration of environmental and cultural amenities. Such perfunctory compliance will not be allowed, but rather, federal agencies will be required to fully explain their "course of inquiry, . . . analysis and . . . reasoning" so as to insure genuine good faith compliance.[85]

Judge Skelly Wright in *Calvert Cliffs'* stated that the judicial role in the environmental area was to see that the promise of recent statutes which "show the government's commitment to control at . . . last the destructive engine of material 'progress' " was made reality.[86] *Ely v. Velde* has gone farther than any case to date in doing just that, and the decision will have ramifications for nearly every federal project. The opinion makes it clear that "[i]n the absence of *unmistakable* language to the contrary" (emphasis added) all federal agencies will be forced to comply with NHPA and NEPA.[87]

In its broadest sense, the decision provides a new impetus to citizens' suits intended to halt environmentally degrading projects. This is accomplished by the court's insistence upon strict procedural compliance and good faith weighing of environmental exigencies.

It may well be argued that the LEAA has shown bad faith in the past, paying little heed to NHPA, NEPA, or the environment in general.[88] This being true, a conclusion that procedural compliance on the Administration's part would still not produce a proper balancing of environmental factors would not be unwarranted. However, the court made the correct decision by not going into the specific merits of the case. Upon objective analysis, there is no question but that the bureaucratic decisionmaking process has had an adverse effect on the national environment. Nevertheless, it would be a *non sequitur* to assume that this derives from bad faith on the part of individual agency members. Rather, it

84 Ely v. Velde, Civil No. 71-1351 (4th Cir., November 8, 1971) (slipsheet opinion at 21).
85 *Id.* at 23.
86 449 F.2d at 1111.
87 Ely v. Velde, Civil No. 71-1351 (4th Cir., November 8, 1971) (slipsheet opinion at 16).
88 The LEAA appears to be one of the "foot-dragging" agencies to which Judge Skelly Wright referred in *Calvert Cliffs'*. Despite their claimed inability to comply with NEPA, they have yet to file a statement with the President detailing why they could not comply and suggesting means of changing their statutory authority so as to make compliance possible as required by § 4333. 42 U.S.C. § 4333 (1970). Guidelines were finally filed by the LEAA on October 27, 1971, long after the due date, but the Guidelines did not provide for implementation of NEPA in regard to the "block" grant portion of the Safe Streets Act. Department of Justice, LEAA Procedural Guidelines for Implementation of NEPA, 36 Fed. Reg. 20613 (1971).

appears to be the result of project orientation which effectively blinds agencies to other factors.

Requirement of strict and complete procedural compliance solves this problem in two ways. First, the preparation of a well considered impact statement available to virtually anyone has a tendency to bring the environmental factors into the open and put controversial projects into the political arena. Additionally, assuming good faith on the part of individual administrators properly apprised of environmental factors, responsible decisions should follow and be allowed to stand. Nothing is gained by imputing better motives to judges than administrators, nor do judicial decisions on proposed projects warrant better consideration of environmental problems. Quite the reverse may be true. Not only do judges lack the expertise and technical knowledge available to federal agencies, but further, allowing judicial decisions as to the merits of individual undertakings would leave environmental planning and other national priorities to a select few. The blinders previously worn by project oriented agencies would shift to issue oriented judges and nothing could be gained from the transition.

The court embodies a guarantee in its opinion against agencies that don't make their decisions in good faith but instead act capriciously. While *Ely* does not specifically allude to *Overton Park,* it does indicate that arbitrary and clearly erroneous decisions will be reversed, and like *Overton Park,* requires presentation of all facts upon which a decision is centered so that the court will be able to determine the arbitrariness of any agency action brought into dispute. The addition of this guarantee insures that decisions will be put into proper perspective and that all factors will be seriously considered.

In addition to the general value of *Ely,* narrower application of the principles is also of great importance. It makes the mandates of NEPA and NHPA clearly applicable to the LEAA and leaves no doubt that its own guidelines for implementation are insufficient.[89] By doing so, it has forestalled initiation of marijuana eradication programs capable of defoliating up to ten million acres of land in the Midwest[90] and innumerable other crime control programs that might irreparably damage the human habitat. Such programs can no longer be implemented without procedural compliance with NEPA and NHPA and good faith analysis of environmental consequences. More importantly, the case has a prescient effect on all other "block" grant spending and proposed federal revenue sharing,[91] such that future legislation embodying this type of federal financial assistance will be similarly required to meet the *Ely* tenets.

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89 Department of Justice, LEAA Procedural Guidelines for Implementation of NEPA, 36 Fed. Reg. 20613 (1971).

90 *See* New York Times, June 11, 1971, at 37, col. 1; South Bend Tribune, May 24, 1971, at 15, col. 3; Vance, *Marijuana Is for the Birds,* OUTDOOR LIFE, June, 1971, at 53.

91 President Nixon has proposed a bill which would implement a federal revenue sharing program whereby 3% to 5% of Federal Personal Income Tax would be returned to the states in "block" grant form. Similar to the Safe Streets Act, § 701 (a) of the Nixon proposal allows the Secretary of the Treasury to establish reasonable rules and regulations. H.R. 47, 92nd Cong., 1st Sess. (1971).

Secretary Connally, appearing before the House Ways and Means Committee, stressed the "hands-off" nature of the Act, but noted that states would be required to "account for" the spending of federal money. *Hearings on the Subject of General Revenue Sharing Before the Committee on Ways and Means of the House of Representatives,* 92nd Cong., 1st Sess. at 171 (1971).

Ely reiterates the importance of the citizen suit in the environmental area as the most effective check on irresponsible administrative action. However, the decision diminishes its own importance by failing to place any duties upon Otis L. Brown and the state welfare agency. Such a view allows for frustration of both NEPA and NHPA in that it permits states to use "wait and see" tactics. In other words, state administrators may elicit federal funds and planning assistance for projects in the hope that the action will not be challenged on environmental grounds. If it is, they can then use state funds for that project and replace those funds by redistributing the money from federal grants. Congress in enacting environmental legislation certainly did not intend to permit such easy circumvention of the acts. In stating a national policy of environmental control, the legislative purpose was to solve the problem of "federally sponsored or aided construction activities . . . which proceed without reference to the desires and aspirations of local people."[92] Thus, NEPA, if not NHPA, was directed not only at federal administrators and agencies, but to federal projects themselves. Considering this fact, the court does not need to rely on constitutional grounds or consider the ninth and fourteenth amendments at all in fashioning relief as to state officials. They need merely rely on an interpretation stated by the United States Court of Appeals for the Fifth Circuit in *Conservation Society v. Texas*.[93] There the court applied NEPA (and presumably would have applied NHPA were it at issue) to a state agency which claimed it would proceed with a project on its own if federal funds were withheld. The court would not allow such state action because by doing so it would be giving approval to circumvention of the applicable environmental acts. Instead, it deemed the project a federal project such that the state was now bound by federal law.

A similar situation is presented in *Ely*. The State of Virginia has expressed its intention to finance the Green Springs project with state funds should the federal funds be denied.[94] However, the federal agency has provided not only funds but planning assistance.[95] As such, in any future litigation, the court should follow the interpretation of *Conservation Society* and deem the project a federal project in which federal law must be adhered to. In doing so, the court would make *Ely*'s analysis of NEPA and NHPA capable of practical application in all intended circumstances.

Jon R. Pozgay

CONSTITUTIONAL LAW—EXPATRIATION—CONGRESS POSSESSES THE POWER TO DESTROY THE CITIZENSHIP OF A STATUTORY CITIZEN NOT BORN OR NATURALIZED WHILE PHYSICALLY WITHIN THE UNITED STATES WHEN HE FAILS TO SATISFY A REASONABLE RESIDENCY REQUIREMENT.—Aldo Mario Bellei, the expatriated son of an American mother and Italian father, was born in Italy in December, 1939, and became an American citizen at birth by virtue

92 S. REP. No. 296, 91st Cong., 1st Sess. 8 (1969).
93 Civil No. 30915 (5th Cir., August 5, 1971).
94 Ely v. Velde, Civil No. 71-1351 (4th Cir., November 8, 1971) (slipsheet opinion at 17 n. 17).
95 *Id.* at 19 n.22.

of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section provides that a person born outside the United States of parents one of whom is an alien, and the other an American citizen shall become a citizen of the United States at birth provided the American parent, prior to the birth of the child, has been physically present in the United States for not less than ten years, five of which were after reaching the age of fourteen.[1] Since Bellei's mother resided in the United States from the time of her birth until shortly after her 24th birthday, the requirements for his obtaining citizenship had been met.

That citizenship, which apparently had been fully conferred at birth, was nevertheless subject to destruction under section 301(b) of the Act which provides for the loss of citizenship granted under section 301(a)(7) when the child fails to be continuously present in the United States for at least five years between the ages of fourteen and twenty-eight.[2] There is no doubt that Bellei failed to meet the requirements of section 301(b), and it was therefore concluded by the Department of State that he was no longer a citizen of this country.

From birth, Bellei had been treated as an American citizen by the United States and had always traveled under American diplomatic protection. He visited the United States on a number of occasions, never remaining long enough to fulfill the residency requirements of section 301(b). On his first two visits he entered on his mother's United States passport, but on the next two he entered on his own United States passport issued to him in 1952.

On several occasions, Bellei had been warned of the requirements of section 301(b). In 1960, for example, he registered for the draft with the American Consul in Rome and was scheduled for induction in 1963. However, due to his employment in the NATO defense program, his induction was deferred. At that time he was reminded of the possible loss of citizenship if he did not meet the residency requirements. Another warning came in 1961 when his last application for a passport was approved. In July of 1963, Bellei requested and was granted a passport extension until February of 1964. Once again notice of the residency requirements of section 301(b) and of the consequences of a failure to meet them was given. When Bellei failed to return to the United States on or before the expiration date of his passport, the Department of State concluded that he had lost his citizenship since he could no longer satisfy the requirements of section 301(b).

After being informed of his denationalization, Bellei instituted an action

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1 8 U.S.C. § 1401(a)(1970). The following shall be nationals and citizens of the United States at birth:

> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. . . .

2 8 U.S.C. § 1401(b)(1970). Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

against the Secretary of State seeking a declaration that section 301(b) of the Act was unconstitutional. He also moved for an injunction restraining the enforcement of that provision. In a unanimous decision the United States District Court for the District of Columbia declared section 301(b) unconstitutional as violative of both the due process clause of the fifth amendment and the citizenship clause of the fourteenth amendment.[3] On appeal, the United States Supreme Court, by a 5-4 decision reversed the district court holding and *held*: Congress has the power, consistent with the citizenship clause of the fourteenth amendment, to destroy the citizenship granted a person not born or naturalized in the United States and who had not been subject to its jurisdiction when he fails to satisfy a reasonable residency requirement imposed as a condition subsequent to the grant of that citizenship. *Rogers v. Bellei,* 401 U.S. 815 (1971).

Historically, the cases dealing with the issue of the existence or non-existence of a congressional power to expatriate are indicative of widely divergent opinions and significant shifts in emphasis. The legislation enacted, however, with the exception of several important challenges by the Supreme Court, has had a basically uncontested development. Beginning with the common law doctrine of indefeasible and immutable allegiance, that legislation has reached the point where it is now apparent that, in many instances, Congress feels possessed of the power to determine who shall lose his citizenship. The basic conflict for the courts, however, continues to center on whether Congress has the constitutional authority to destroy the citizenship of *any* person once it has been conferred, absent a voluntary renunciation or concurrence by the citizen.

At first glance, this is a seemingly unimportant point of contention. Yet, the realization of two basic concepts should indicate its significance. First, if unchecked, this power gives the government the prerogative to destroy the citizenship of the citizens to whom it is responsible and from whom it derives its powers. Therefore, if the prerogative was allowed to be exercised to its fullest extent we would no longer have a government whose source of power was the citizenry which created it in the first instance. Second, "[c]itizenship *is* man's basic right for it is nothing less than the right to have rights."[4] In America, it seems apparent that the knowledge of a person existing without the benefit of our constitutional rights and protections would be alarming to many, if not to all citizens.

Constitutionally, Congress has been authorized "[t]o establish a uniform rule of naturalization. . . ."[5] However, that document has not granted Congress the power to determine who shall and shall not lose his citizenship. This power was not only withheld from Congress, but significantly, in our early history, due to the common law doctrine of perpetual allegiance, not even the citizen himself had the unfettered right or power to renounce his citizenship and become an alien.[6] In 1868 that doctrine was abandoned and Congress declared, through a statutory enactment, the right of each citizen to voluntarily expatriate himself from his country.[7] The statute, however, was primarily concerned with declaring

3 Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969).
4 Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).
5 U.S. CONST. art. I, § 8.
6 Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830).
7 Expatriation Act of 1868, ch. 249, 15 Stat. 223.

the right of expatriation and did not specify the acts by which that right could be effectuated. This situation was remedied by the Citizenship Act of March 2, 1907.[8] However, the point of emphasis showed a significant shift. No longer did Congress seem concerned with declaring the right of immigrants to renounce allegiance to their former homelands and acquire citizenship in the United States. The emphasis now was placed on specifying those acts by which an American citizen would be deemed to have expatriated himself from this country. Section 3 of that Act, for example, provided for the divestment of the citizenship of any American woman who married an alien.[9] Under section 2, citizenship could be destroyed by taking an oath of allegiance to or being naturalized in a foreign country, or, for the naturalized American citizen, by living in his former homeland for a period of two years.[10] These provisions were apparently an attempt to avoid conflicting national claims upon United States citizens who had acquired dual nationalities.[11] It is significant to note, however, that the Act of 1907 has generally been considered as creating a rebuttable presumption of intent to denationalize, rather than providing for the automatic divestment of citizenship.[12] Since intent was provided for and the divestment of citizenship apparently was not automatic upon performance of the specified acts, the Act of 1907 appears to be consistent with the doctrine of voluntary renunciation.

In 1915, eight years after its passage, the constitutionality of section 3 of the Citizenship Act of March 2, 1907, providing for the loss of citizenship by marriage to an alien, was determined by the Supreme Court in *Mackenzie v. Hare*.[13] Adhering to the doctrine of voluntary expatriation, the Court declared that "[i]t may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."[14] The Court, nevertheless, sustained the provision and upheld Mrs. Mackenzie's denationalization despite the fact that after her marriage to an alien she remained in the United States and never expressly renounced her citizenship. Basically, the Court reasoned that there had been an implied concurrence since Mrs. Mackenzie entered the marriage voluntarily with knowledge of the consequences.[15]

Once again, in 1939, the Supreme Court recognized and applied the doctrine of voluntary renunciation of nationality in *Perkins v. Elg*[16] where it declared that "[e]xpatriation is the voluntary renunciation or abandonment of nationality and allegiance."[17] Recognition of this principle allowed the Court to

8 Citizenship Act of March 2, 1907, ch. 2534, 34 Stat. 1228. This Act has also been referred to as the Expatriation Act of March 2, 1907.

9 *Id.* § 3.

10 *Id.* § 2.

11 Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 414 (1970).

12 Hurst, *Can Congress Take Away Citizenship?* 29 ROCKY MT. L. REV. 62, 65 (1956); Murphy, *Loss of Nationality Under United States Law and Practice: A Foreign Policy Perspective*, 19 KAN. L. REV. 89, 91 (1970).

13 239 U.S. 299 (1915).

14 *Id.* at 311.

15 As will be discussed, the majority opinion in *Bellei* is totally devoid of any reference to this case or to the reasoning employed. Utilization of this reasoning might have produced the same end to Bellei's citizenship, but would probably have resulted in a great deal less confusion and disruption.

16 307 U.S. 325 (1939).

17 *Id.* at 334.

reverse the loss of citizenship determination of a person who, although born in the United States, had been removed to and naturalized in Sweden during her minority. The Court also concluded that section 2 of the Citizenship Act of March 2, 1907[18] did not destroy the right of a citizen so removed to elect to retain her United States citizenship.[19]

The next major legislative enactment dealing with expatriation was the Nationality Act of 1940[20] which greatly expanded the number of acts which, if performed, would result in the loss of American citizenship for both the native born and naturalized citizen. Included among these were being naturalized in a foreign state, serving in the military of or being employed by a foreign state, declaring allegiance to a foreign state, voting in a foreign political election, formally renouncing American nationality, deserting the United States armed forces during time of war, and committing an act of treason against the United States.[21] Under section 404 of the Act, the naturalized citizen could lose his citizenship by reacquiring citizenship in his former country and living there for two years, or by simply living in his former homeland for three years, or by living in any other country for five years. It should be noted here that no provision was made in the Act "for taking into account a person's intent or loyalty to the United States."[22] This is significant since a number of the acts resulting in the forcible destruction of citizenship do not appear to be indicative of either a dilution of allegiance or of a voluntary renunciation of citizenship. For example, the Supreme Court in *Schneider v. Rusk*[23] declared that living abroad is not an indication of lack of allegiance "and in no way evidences a voluntary renunciation of nationality and allegiance."[24] The failure to provide for taking even implicit intent and concurrence into consideration also signifies the beginning of a trend away from the doctrine of voluntary renunciation as that doctrine was enunciated earlier in *Mackenzie* where the Court noted that citizenship could not be taken away without the concurrence of the citizen.[25]

Yet, what makes the expatriation provisions of the Nationality Act of 1940 even more questionable is that they appear to have been enacted in spite of earlier constitutional principles announced by the Supreme Court. For example, in *United States v. Wong Kim Ark,*[26] the Court declared that "[t]he power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."[27] The Court went on to state that:

> The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon

18 Citizenship Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228, provides that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws.
19 307 U.S. 325, 343 (1939).
20 Nationality Act of 1940, ch. 876, 54 Stat. 1137.
21 Nationality Act of 1940, ch. 876, §§ 401(a)-(h), 54 Stat. 1168, *as amended,* 8 U.S.C. § 1481 (a) (1964).
22 Hurst, *supra* note 12, at 66.
23 377 U.S. 163 (1964).
24 *Id.* at 169.
25 Mackenzie v. Hare, 239 U.S. 299, 311 (1915).
26 169 U.S. 649 (1898).
27 *Id.* at 703.

> Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.[28]

Since the Constitution grants Congress no power to take away citizenship, what had apparently made it constitutionally possible in the past for Congress to declare those acts by which a citizen would be deemed to have lost his citizenship was the doctrine of voluntary renunciation combined with the notion of implicit concurrence. However, the Nationality Act of 1940 effectively eliminated any consideration of these concepts. Therefore, constitutionally, the expatriation provisions of the Act became suspect.

Yet, despite these earlier cases and the conclusion for which they would seem to call, a further blow was dealt the doctrine of voluntary expatriation and the concept of implicit concurrence by the Supreme Court in *Perez v. Brownell.*[29] Perez was born in the United States, but later moved to Mexico with his parents. While in Mexico he voted in a political election. By such an act, it was determined that he had expatriated himself pursuant to section 401(e) of the Nationality Act of 1940.[30] Recognizing that Congress has the power to regulate foreign affairs, the majority concluded that under this power, Congress could also regulate the withdrawal of citizenship.[31] Justice Frankfurter, writing for the majority, went on to state that, "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."[32] The Court also totally ignored the concept of implied intent which it could easily have considered "based on Perez's voluntary performance of an expatriating act, coupled with the general rule that every citizen is presumed to know the law and to understand the legal consequences of his voluntary acts."[33] In a strong dissenting opinion, Chief Justice Warren stated that by virtue of the fourteenth amendment, "United States citizenship is . . . the constitutional birthright of every person born in this country."[34] The citizenship clause of that amendment provides simply that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[35] The Chief Justice continued to dissent by recalling the constitutional principle previously declared by the Court in *Wong Kim Ark* where it was noted that although Congress had the power to regulate naturalization, it had no power to restrict the effect of birth declared by the fourteenth amendment.[36] Addressing himself to the doctrine of voluntary expatriation, Chief Justice Warren stated that, "[i]t has long been recognized that citizenship may not only be voluntarily renounced through exercise of the

28 *Id.*
29 356 U.S. 44 (1958).
30 Nationality Act of 1940, ch. 876, § 401, 55 Stat. 1169. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: (e) Voting in a political election in a foreign state. . . .
31 356 U.S. 44, 59 (1958).
32 *Id.* at 61.
33 Duvall, *supra* note 11, at 422.
34 356 U.S. 44, 66 (1958) (dissenting opinion).
35 U.S. CONST. amend. XIV.
36 356 U.S. 44, 66 (1958) (dissenting opinion).

right of expatriation but also by other actions in derogation of undivided allegiance to this country."[37] He also noted:

> . . . *Mackenzie v. Hare* should not be understood to sanction a power to divest citizenship. Rather this case . . . simply acknowledges that United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country.[38]

The logic of his opinion, nevertheless, was rejected by the majority.

It was not long, however, before the dissent in *Perez* became the rule as the tables were again turned in *Trop v. Dulles*[39] which was argued and decided immediately after *Perez*. This should give some indication of the confusion which existed in the past regarding the issue of a congressional power to expatriate. In *Trop,* petitioner was convicted by a general court-martial of desertion and had received a dishonorable discharge as a result. Under section 401(g) of the Nationality Act of 1940,[40] this was also sufficient to result in the divestment of his nationality. Declaring that provision unconstitutional on eighth amendment grounds, Chief Justice Warren, writing for the majority stated:

> As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone the judgement in this case should be reversed.[41]

He also reiterated the opinion from his dissent in *Perez* that citizenship could not be divested by the exercise of the general powers of the government, but that it could be voluntarily destroyed "by express language or by language and conduct that show a renunciation of citizenship."[42]

This trend back to the doctrine of voluntary expatriation and the concept of implicit concurrence was perpetuated when, six years later, the Supreme Court, in *Schneider v. Rusk,*[43] invalidated section 352 of the Immigration and Nationality Act of 1952.[44] That section provided for the divestment of the citizenship of any naturalized American who, for three years, continuously resided in his former homeland. Recognizing that the statute did not prescribe the same penalty for the native born citizen who lived abroad, the Court held that section 352 involved an unjustifiable discrimination and was therefore violative of fifth amendment due process.[45] The majority also expressed its continued support for the doctrine of voluntary expatriation when it stated that "[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of alle-

37 *Id.* at 68 (dissenting opinion).
38 *Id.* at 73 (dissenting opinion).
39 356 U.S. 86 (1958).
40 Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1169, provides a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: (g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial.
41 356 U.S. 86, 93 (1958).
42 *Id.* at 92.
43 377 U.S. 163 (1964).
44 8 U.S.C. § 1484(a)(1)(1970).
45 377 U.S. 163, 168 (1964).

giance and in no way evidences a voluntary renunciation of nationality and allegiance."[46]

It has been noted that in its decisions subsequent to *Perez,* the Court "portended the rejection of Congressional power to take away an American citizen's citizenship without his consent."[47] However, it was not until its decision in *Afroyim v. Rusk*[48] that the Supreme Court conclusively held that Congress had no general power, express or implied, to divest an American citizen of his citizenship without his assent.[49] The petitioner in *Afroyim* was a naturalized American citizen who had traveled to Israel and, while there, voted in a political election. Upon application for a renewal of his United States passport, the State Department denied issuance and concluded that he had lost his citizenship under section 401(e) of the Nationality Act of 1940.[50] In the *Perez* decision, nine years earlier, section 401(e) was held to be constitutional.[51] Overruling that decision by declaring section 401(e) unconstitutional, the Court in *Afroyim* stated:

> We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a *constitutional right* to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[52]

After reviewing the legislative history of the fourteenth amendment, the Court concluded that its sponsors "wanted to put citizenship beyond the power of any governmental unit to destroy."[53] This would appear to be more consistent with the dictum announced by the Supreme Court in 1824 in *Osborn v. United States Bank.*[54] Noting that once a person becomes a naturalized citizen he possesses all the rights of the native born citizen, the Court stated:

> The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.[55]

In view of the most recent trend culminating in *Afroyim* with the declaration of a constitutional right to remain a citizen until voluntary renunciation and an emphatic denial of the existence of any congressional power to destroy citizenship, it would appear that since Mr. Bellei had apparently been granted complete citizenship at birth, his citizenship would be indestructible except by

46 *Id.* at 169.
47 Comment, *An Expatriation Enigma: Afroyim v. Rusk,* 48 B.U.L. Rev. 295 (1968).
48 387 U.S. 253 (1967).
49 *Id.* at 257.
50 Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1169. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: (e) Voting in a political election in a foreign state. . . .
51 356 U.S. 44 (1958).
52 387 U.S. 253, 268 (1967) (emphasis added).
53 *Id.* at 263.
54 22 U.S. (9 Wheat.) 738 (1824).
55 *Id.* at 827.

a voluntary renunciation or some other dilution of allegiance. However, once again, in what continues to be characteristic of the decisions in this area, the Court in *Bellei* reversed its position. Completely ignoring the doctrine of voluntary expatriation and the concept of implied concurrence, the Court upheld the constitutionality of section 301(b) of the Immigration and Nationality Act of 1952, and therefore the subsequent divestment of Bellei's citizenship. The majority declared that:

> The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen.[56]

It was apparently due to the conclusion that Bellei was not protected by the fourteenth amendment and that his citizenship therefore could be constitutionally destroyed by congressional enactment that the Court saw no need to refer to the doctrine of voluntary expatriation or to the concept of implied concurrence.

For a number of reasons, however, the Court's sustaining Bellei's loss of citizenship on the ground that he was not a first-sentence fourteenth amendment citizen is dubious at best. The Court in *Afroyim* held that the fourteenth amendment protected *every* citizen against the forcible destruction of his citizenship by Congress.[57] Conversely, the Court did not interpret the amendment as protecting only those citizens born or naturalized while *physically* within the borders of the United States. Also, in 1950, the Court in *Savorgnan v. United States*[58] was faced with the question of interpreting the words "naturalized in" as was the Court in *Bellei*. In *Savorgnan*, however, the constitutionality of section 2 of the Citizenship Act of March 2, 1907 was in question. That section provided that "any American citizen shall be deemed to have expatriated himself when he has been *naturalized in* any foreign state in conformity with its laws. . . ."[59] Petitioner there made the argument that since her naturalization did not take place *within the boundaries* of a foreign state her case did not come within the purview of section 2 of the Act. Dismissing her contention as "novel," the Court stated:

> The answer is that the phrase in § 2 which states that "any American citizen shall be deemed to have expatriated himself when he has been naturalized *in* any foreign state in conformity with its laws, . . ." (emphasis supplied) *refers merely to naturalization into the citizenship of any foreign state. It does not refer to the place where the naturalization proceeding occurs.*[60]

56 Rogers v. Bellei, 401 U.S. 815, 827 (1971).
57 387 U.S. 253, 268 (1967).
58 338 U.S. 491 (1950).
59 Citizenship Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228 (emphasis added).
60 Savorgnan v. United States, 338 U.S. 491, 499 (1950) (emphasis added).

This appears to indicate that, when used in the context of the naturalization process, the words "naturalized in" have previously been understood to mean simply becoming a citizen by the laws of a particular country. Justice Black, dissenting in *Bellei,* declared that "[t]he final version of the Citizenship Clause was undoubtedly intended to have this same scope."[61] If the interpretation given the words "naturalized in" in *Savorgnan* was followed by the Court in *Bellei* when interpreting those same words from the fourteenth amendment, Bellei clearly would have been protected by that amendment against the forcible destruction of his citizenship since he had become a citizen in conformity with prescribed laws. Under the Court's decision in *Afroyim,* he would also be entitled to the "constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship."[62]

The fact remains, however, that the majority in *Bellei* chose not to follow precedent. By employing the more literal interpretation of the citizenship clause the majority creates the impression that the determination of who shall lose their American citizenship depends more on the makeup of the Court and what they consider expedient, than on prior decisions interpreting both expatriation statutes and the Constitution. As Justice Black declared: "This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court."[63]

The majority also bases its decision, in part, on the conclusion that the statute in question conferred full citizenship only upon the satisfaction of the condition subsequent of residing in the United States for five years between the ages of fourteen and twenty-eight. Yet, it seems apparent from the language employed in the statute that this conclusion is erroneous. Bellei obtained his citizenship by virtue of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section begins with the statement that "the following *shall be* nationals and *citizens* of the United States *at birth.*"[64] Also, section 301(b) under which Bellei was expatriated speaks in terms of a loss of citizenship. Read together, these sections do not appear to defer the grant of citizenship until the residency requirement is met. If given the same literal interpretation that the Court gave the citizenship clause of the fourteenth amendment, section 301(a)(7) apparently conferred citizenship at birth. Consequently, section 301(b) destroyed that citizenship after it had been granted. Thus, the provision involved the assumption that Congress possessed the power to destroy citizenship once it had been granted without considering the citizen's assent. This is in direct conflict with the statement made in *Wong Kim Ark* where the Supreme Court declared that the naturalization power granted to Congress by the Constitution included only the power to confer citizenship, and not the power to destroy that citizenship once it had been created.[65] Significant also is the Court's deviation from the constitutional principle announced five years earlier in *Afroyim*

61 401 U.S. 815, 843 (1971) (dissenting opinion).
62 387 U.S. 253, 268 (1967).
63 401 U.S. 815, 837 (1971) (dissenting opinion).
64 8 U.S.C. § 1401(a)(7) (emphasis added).
65 169 U.S. 649, 703 (1898).

that Congress did not possess the power to divest a person of his citizenship without his assent.[66]

Assuming Bellei did in fact become a naturalized citizen at birth as the statute clearly indicates, then as noted in *Osborn,* "[h]e becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native."[67] If Bellei possessed *all* the rights of a native citizen and stood, constitutionally speaking, on equal footing, then it is clear that he must also have acquired the constitutional right announced by the Supreme Court in *Afroyim*: to remain a citizen until he chooses to voluntarily relinquish that citizenship.[68] However, the majority was apparently of the opinion that since Belli was not entitled to fourteenth amendment protection, he also had not acquired the constitutional right to remain a citizen until voluntary renunciation of that citizenship. As previously indicated, the majority's reliance on the conclusion that Bellei was not a fourteenth amendment citizen is questionable.

Essentially what the Court did in *Bellei,* therefore, was to sanction the assumption by Congress of the power to destroy citizenship once it had been granted without taking the citizen's assent into consideration. Equally alarming was the stamp of approval given by the Court to an act of Congress which obviously created a second-class citizen. Although the majority rejected the assertion that the statute or its decision had this effect, it seems undeniable in view of the fact that Bellei, although a citizen, had been denied a number of constitutional rights which other citizens possessed. Not only was he denied fourteenth amendment protection and the constitutional right to remain a citizen until voluntary relinquishment, but also he apparently never acquired the constitutional right to due process of law under the fifth amendment. Bellei suffered divestment of citizenship which penalty the statute did not prescribe for the native born citizen who acted in the same manner as the statutory citizen. Under the Court's decision in *Schneider,* this would amount to an unjustifiable discrimination and, therefore, a violation of the due process clause of the fifth amendment.

It seems apparent, therefore, that the more plausible approach would have been for the Court to concede both the fact that Bellei was a complete citizen at birth, and was entitled to fourteenth amendment protection. Although this would have given Bellei the constitutional right announced in *Afroyim* to remain a citizen until he voluntarily relinquished that citizenship,[69] it would not necessarily have dictated a reversal of the Court's determination that he lost his citizenship. Arguably, Bellei also implicitly concurred in his expatriation as did Mrs. Mackenzie since, because of the warnings given, he too acted voluntarily and with knowledge of the consequences. Also, by treating the issue in this manner, it appears that the Court would be acting in conformity with the Constitution as well as its more recent decisions.

Essentially, the result of deciding the case as it did will be confusion and

66 387 U.S. 253, 257 (1967).
67 22 U.S. (9 Wheat.) 737, 827 (1824).
68 387 U.S. 253, 268 (1967).
69 *Id.*

disruption where finally there appeared to be understanding and stability. Unfortunately, this has been the rule rather than the exception arising from many of the cases in the expatriation area. Yet, what remains all too clear is the fact that the same basic issue has continually been decided and redecided differently by the courts; that is, does Congress possess the power to forcibly destroy the citizenship of *any* citizen without his assent? It becomes apparent, therefore, that we do not yet have an "understanding of the nature and extent of the expatriation power."[70] Yet, because of the fact that "[c]itizenship . . . is nothing less than the right to have rights,"[71] the Court, as well as Congress, should be hesitant to act under an assumption of power not granted by the Constitution.

Joseph M. David, Jr.

INVASION OF PRIVACY—UNREASONABLE INTRUSION—A WEAPON AGAINST INTRUSIONS UPON OUR SHRINKING RIGHT OF PRIVACY.—A.A. Dietemann was engaged in the practice of healing through the use of clay, minerals and herbs. This practice was characterized by the district court as "simple quackery."[1] Dietemann made no charges for his services, accepted no contributions and did not advertise. His practice was conducted in his own home behind a locked gate.

On September 20, 1963, pursuant to an agreement with the Los Angeles County District Attorney's office, two of the defendant's employees called on the plaintiff and gained entrance to his house by falsely claiming to have been sent by a mutual friend. Once inside, one of the employees explained that she had a lump in her breast. Plaintiff examined her using various nonmedical gadgets and diagnosed the problem as having arisen from the consumption of rancid butter eleven years, nine months and seven days prior. Without plaintiff's knowledge, pictures were taken of the examination and his conversation was transmitted to a tape recorder located in a car which was occupied by a third employee and representatives from the district attorney's office and the State Department of Public Health.

On October 15, 1963, Dietemann was arrested and charged with practicing medicine without a license in violation of California law. On November 1, 1963, *Life* magazine published an article entitled "Crackdown on Quackery" which included pictures taken at the plaintiff's home on September 30 and was based, in part, on the information transmitted on that date. Dietemann subsequently brought a diversity action for invasion of privacy in the United States District Court for the Central District of California.[2] The district court found that publication of the pictures taken on September 20, 1963, constituted a tortious invasion of the plaintiff's privacy under California law and was not protected by the first amendment. In addition, the court found that defendant's employees were acting as agents of the law enforcement officials and, as such, had conducted an illegal search and seizure which violated Dietemann's constitutionally

70 Duvall, *supra* note 11, at 410.
71 Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

1 Dietemann v. Time, Incorporated, 284 F. Supp. 925 (C.D. Cal. 1968).
2 *Id.*

protected right of privacy entitling him to relief under the Civil Rights Act.[3] On appeal, the United States Court of Appeals for the Ninth Circuit declined to reach the issue of plaintiff's constitutional right of privacy but affirmed and *held*: a cause of action was established and plaintiff was entitled to relief under California law when defendant's employees gained entrance to plaintiff's house by subterfuge, photographed him and transmitted his conversation to third persons without his consent. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

While prior mention of a right of privacy can be found,[4] it was not recognized as a separate cause of action in any English or American court until the Warren-Brandeis article[5] in 1890.[6] In that article the authors reviewed various cases granting relief for defamation, invasion of property rights, breach of implied contract or confidence and concluded that what was really being protected was a broader right of privacy. Certain aspects, including the development of the right of privacy, are related to actions for defamation but it is important to separate the two. Defamation, whether the offending conduct be classed as libel or slander, affects one's reputation or good name and requires some element of publication or communication to third parties.[7] Privacy, on the other hand, deals with one's peace of mind[8] or right to be let alone.[9]

In 1902, Miss Abigail Roberson brought an action against the Rochester Folding Box Company for using her picture on advertisement circulars without her consent. The New York Court of Appeals refused to recognize the existence of a right of privacy and reversed the decision of the lower court.[10] Public opinion was so adverse to this decision that the New York Legislature enacted a limited right-of-privacy statute covering the commercial use of a person's name or picture,[11] which statute remains the law in New York today. The Supreme Court of Georgia, faced with a similar situation, three years later, rejected the New York court's reasoning by declaring that recognition of the right of privacy would not be an invasion of the legislative province as the concept of a right

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3 42 U.S.C. § 1983 (1970). This section provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4 *E.g.*, T. COOLEY, LAW OF TORTS 29 (2d ed. 1888); De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).

5 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

6 RESTATEMENT (SECOND) OF TORTS § 652A, comment *a* at 101 (Tent. Draft No. 13, 1967).

7 W. PROSSER, LAW OF TORTS §§ 111, 113 (4th ed. 1971).

8 "The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation." Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955).

9 T. COOLEY, LAW OF TORTS 29 (2d ed. 1888).

10 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

11 N.Y. CIV. RIGHTS LAW § 50 (McKinney 1948). This section provides:
> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

of privacy was derived from the natural law.[12] These beginnings became the basis for much of the future development in the area and the right of privacy is now recognized to some degree in all states except Nebraska, Rhode Island, Texas and Wisconsin.[13]

California first recognized the right in *Melvin v. Reid*.[14] The plaintiff had been a prostitute and was involved in a highly publicized murder trial. She was acquitted, abandoned her former occupation, was married and led a relatively quiet life. Eight years after her acquittal the defendant released a film entitled "The Red Kimono." The film was based primarily on facts brought out at the plaintiff's trial and therefore a matter of public record. The California court declared that while the use of information which was a matter of public record was not an invasion of the plaintiff's right of privacy, the use of her true maiden name was. Noting that the rehabilitation of the fallen and the reformation of criminals were major objectives of society, the court said:

> Where a person has by his own efforts rehabilitated himself, we . . . should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.[15]

As Georgia had done in *Pavesich v. New England Life Ins. Co.*,[16] the court based the right of privacy on the constitutional guarantee of life, liberty and happiness.[17]

It should be noted that the activity complained of in the *Melvin* case was publication of private matters of the plaintiff's life while in *Roberson* and *Pavesich* there was not necessarily any embarrassing private matter divulged but rather an economic exploitation of the plaintiffs' pictures. In its present development, the right of privacy can be broken into four separate torts:

> (a) Unreasonable intrusion upon the seclusion of another. . . .
> (b) Appropriation of the other's name or likeness. . . .
> (c) Unreasonable publicity given to the other's private life. . . .
> (d) Publicity which unreasonably places the other in a false light before the public. . . .[18]

The *Melvin* case involved (c) while *Roberson* and *Pavesich* involved (b). The first of these torts focuses on the means by which the objectionable information is obtained and requires no element of publication.[19] Likewise, the actual content of the information acquired is immaterial so long as there has been an

12 "The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guarantied to persons in this state both by the Constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905).
13 W. PROSSER, LAW OF TORTS § 117 at 804 (4th ed. 1971).
14 112 Cal. App. 285, 297 P. 91 (1931).
15 *Id.* at 292, 297 P. at 93.
16 122 Ga. 190, 50 S.E. 68 (1905).
17 112 Cal. App. at 291, 297 P. at 93.
18 RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967).
19 *Id.* at § 652B, comment *a* at 103.

intrusion into another's privacy.[20] The intrusion must, however, be of a nature that is offensive to the reasonable man and the area intruded into must be entitled to privacy.[21] In *Gill v. Hearst Pub. Co.*,[22] there was no invasion of privacy when the defendant took a picture of plaintiffs while they were in an affectionate pose because they were in a public place which was not entitled to privacy. The nature of the intrusion necessary to constitute an actionable invasion of privacy is described by *Pearson v. Dodd*.[23] Several members and former members of Senator Dodd's staff copied papers from his files and turned them over to the defendants, Jack Anderson and Drew Pearson who later published articles containing information from the documents. The Senator sued for invasion of privacy and, on appeal from a decision in favor of the defendants, Judge Skelly Wright noted that because of Dodd's position as a United States Senator and because the published material bore on his qualifications for office, the publication did not constitute an invasion of privacy. The court found, however, that the Senator's employees had committed an improper intrusion by removing confidential files with the intent to show them to unauthorized persons. The defendants, on the other hand, had not participated in the actual intrusion and could not be held liable.

There need not be an actual physical intrusion for an invasion of privacy to take place[24] and the action based on intrusion has been extended to cover eavesdropping[25] and wiretapping.[26] This branch of invasion of privacy closely resembles the fourth amendment protections provided against unreasonable search and seizure. Indeed, the reasonable expectations of privacy test developed in *Katz v. United States*[27] has been applied to this area.[28]

The second branch of invasion of privacy is exemplified by the *Roberson* and *Pavesich* cases. It gives a cause of action for the appropriation of one's name or likeness for the use or benefit of another and usually arises where the plaintiff's name or picture is used to advertise the defendant's business or product. Mere use of the same name, however, may not be enough, rather the defendant must have attempted to pass himself off as the person whose name he is using. There must be an appropriation of some character of the defendant such as prestige or standing in the public eye.[29]

A third type of invasion concerns unreasonable publicity given to one's private life. This branch is not concerned with the truth or falsity of the material published, rather the focus is on the publication of material concerning an individual's private life which is highly offensive to the reasonable man with

20 Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).
21 W. PROSSER, LAW OF TORTS § 117 at 808 (4th ed. 1971).
22 40 Cal. 2d 224, 253 P.2d 441 (1953).
23 410 F.2d 701 (D.C. Cir. 1969).
24 *Id.* at 704.
25 *E.g.*, Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958); McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).
26 *E.g.*, Fowler v. Southern Bell Telephone & Telegraph Co., 343 F.2d 150 (5th Cir. 1965).
27 389 U.S. 347 (1967).
28 410 F.2d 701 (D.C. Cir. 1969).
29 RESTATEMENT (SECOND) OF TORTS § 652C, comment *c* at 109 (Tent. Draft No. 13, 1967).

ordinary sensibilities.[30] The material published must concern some aspect of the plaintiff's life which is entitled to privacy and the publication must be of a general nature and not just to a few isolated persons.[31] In *Gill v. Hearst Pub. Co.*,[32] defendant's employee took a photograph of the plaintiffs while they were seated in an affectionate pose at their confectionary in the Los Angeles Farmers' Market. The picture was subsequently used to illustrate an article about poetic love which appeared in defendant's magazine. Plaintiffs sued for an invasion of their privacy but recovery was denied because the material published was neither offensive to the reasonable man of ordinary sensibilities nor did it concern an aspect of plaintiffs' lives which was entitled to privacy. The plaintiffs had voluntarily exposed themselves to all who may have been near their place of business and therefore waived their right of privacy as to that particular pose.[33]

Lastly, one who is subjected to publicity which places him in a false light in the public eye may have a cause of action for invasion of privacy if such publicity is highly offensive to the reasonable man. There is authority for the proposition that, unlike an action for unreasonable publicity, there need be no disclosure of private affairs but only false statements about the plaintiff which are considered offensive to ordinary sensibilities.[34] California apparently does not follow this approach but requires disclosure of some element of plaintiff's private life.[35]

In 1967, the United States Supreme Court, by its decision in *Time, Inc. v. Hill*,[36] extended the protections given to potentially libelous publications developed in *New York Times Co. v. Sullivan*[37] to cover actions for invasion of privacy. In *Hill*, plaintiffs brought an action under the New York Right of Privacy Statute,[38] which action can best be classified as involving a publication which placed the plaintiffs in a false light. The court ruled that:

> . . . the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[39]

In light of other extensions of the *New York Times* standard developed in *Rosenblatt v. Baer*,[40] *Curtis Publishing Co. v. Butts*,[41] and *Rosenbloom v. Metromedia*,[42] it would appear that the first amendment protection has application to any invasion of privacy except appropriation for personal advantage and unreasonable intrusion. Indeed, it was on the basis of intrusion that the circuit

30 *Id.* § 652D, comment *d* at 115.
31 *Id.* comment *b* and *c* at 113, 114.
32 40 Cal. 2d 224, 253 P.2d 441 (1953).
33 *Id.* at 230, 253 P.2d at 444.
34 RESTATEMENT (SECOND) OF TORTS § 652E, comment *c* at 121 (Tent. Draft No. 13, 1967).
35 Patton v. Royal Industries, Inc., 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968).
36 385 U.S. 374 (1967).
37 376 U.S. 254 (1964).
38 N.Y. CIV. RIGHTS LAW § 50 (McKinney 1948).
39 385 U.S. at 387.
40 383 U.S. 75 (1966).
41 388 U.S. 130 (1967).
42 403 U.S. 29 (1971).

court upheld the judgement in *Dietemann* and not on the publication theory used by the district court. In *Rosenbloom*, the Court abandoned the public figure requirement for the application of the *New York Times* standard stating:

> If a matter is a subject of *public or general interest*, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved.[43] [Emphasis added.]

While *Rosenbloom* did not deal with an action for invasion of privacy, it is probably safe to assume that its extension of the constitutional privilege to matters of legitimate public interest (regardless of the notoriety of the person involved) will be applied to those areas of invasion of privacy that concern publication of false and private information. It is submitted that the constitutional privilege of free press cannot have application to actions for unreasonable intrusion. Intrusion deals not with freedom of expression or of the press to print what it finds but with the methods used in obtaining the information that it prints.[44] If one were to say that the freedom to print necessarily implies a freedom of access, then the press must enjoy some constitutional right not enjoyed by the public at large. It is not maintained that the press should be denied access to material of legitimate public interest, but merely that they should be governed by the same standards of decency and respect for the individual that govern other members of society.

In *Griswold v. Connecticut*,[45] a divided Supreme Court ruled that a Connecticut statute banning the use of contraceptives was unconstitutional as an invasion of the right of privacy of married persons. Justice Douglas, writing for the plurality, stated:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[46]

Even with this broad authority, the Court has refused to recognize a general constitutional right of privacy[47] but has taken a case by case approach singling

43 *Id.* at 43.
44 Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3rd Cir. 1958).
45 381 U.S. 479 (1965).
46 *Id.* at 484.
47 *E.g.*, Katz v. United States, 389 U.S. 347 (1967).

out certain rights or zones protected under the constitutional right of privacy and others which are not. Among those rights deemed to be within the constitutional protection are many which are equally recognized as falling within the tort of intrusion. Probably because *Griswold* dealt with the marital relationship and generally with sexual relations, subsequent cases have established that the Constitution protects an individual from intrusions into his private sexual habits.[48] Likewise, the methods used and the conduct of those obtaining information must meet constitutional standards. The stomach-pump tactics of *Rochin v. California*[49] and the shocking conduct of the police in *York v. Story*[50] will not be permitted either by constitutional or common law standards of justice and decency. The right most closely approaching the tort of intrusion is the fourth amendment prohibition against unreasonable search and seizure. Since *Mapp v. Ohio*,[51] the fruits of an illegal search and seizure are excluded from evidence in subsequent criminal prosecutions. In the *Katz* case, the Court discarded the physical invasion test and recognized that verbal as well as tangible evidence could be the subject of an unlawful search and seizure, thereby extending fourth amendment protections to eavesdropping. If one views closely the reasonable-expectations-of-privacy test developed in *Katz*, it cannot be denied that what is being protected is the defendant's right of privacy.

Although the interest protected by an action for invasion of privacy and the constitutional right of privacy is the same, the scope of the interest and conduct necessary to violate that interest differ greatly. In *United States v. White*,[52] the Supreme Court narrowed the protection against eavesdropping afforded by the fourth amendment by allowing a bugged agent to obtain evidence by subterfuge so long as his conduct, had he not been bugged, did not violate the defendant's fourth amendment rights.[53] The Court relied on *Hoffa v. United States*[54] and *Lewis v. United States*[55] as authority for the proposition that defendant's misplaced confidence could not constitutionally invalidate the evidence obtained through an informer. This misplaced confidence, however, was brought about by deceit. Even prior to the formal recognition of the right of privacy, this concept of misplaced confidence through deceit was recognized as constituting tortious conduct. In *De May v. Roberts*,[56] when a doctor attending a pregnant woman failed to inform either the woman or her husband that the young, unmarried man accompanying and assisting him was not a doctor or medical man, the Michigan court allowed recovery stating:

> The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to

48 "[O]fficial inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy." In Re Labady, 326 F. Supp. 824, 827 (S.D.N.Y. 1971).
49 342 U.S. 165 (1952).
50 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).
51 367 U.S. 643 (1961).
52 401 U.S. 745 (1971).
53 *See* Comment, 47 NOTRE DAME LAWYER 172 (1971).
54 385 U.S. 293 (1966).
55 385 U.S. 206 (1966).
56 46 Mich. 160, 9 N.W. 146 (1881).

> the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character.[57]

In addition, Dean Prosser states that consent will be ineffective if given under a mistake as to the nature of the act consented to if the defendant is aware of the mistake and takes advantage of it.[58]

For a better view of what interests are considered to be within the constitutional right of privacy, it is helpful to look at some of the actions brought under the Civil Rights Act.[59] In *Monroe v. Pape,*[60] the Court held that an illegal search by Chicago police was a violation of plaintiff's constitutional rights and therefore within the coverage of 42 U.S.C. § 1983. In that case thirteen police officers, with no warrant, broke into plaintiffs' home, rousted them from bed, forced them to stand naked in the living room and ransacked the entire house.[61] In *York v. Story,*[62] police officers coerced the plaintiff, who came to the police station to lodge a complaint, to be photographed in various indecent poses and subsequently circulated the pictures among other police personnel. The court ruled that plaintiff's constitutional right of privacy had been invaded and that the police conduct was actionable under 42 U.S.C. § 1983. In *Travers v. Paton,*[63] the court refused to find that secret filming and recording of plaintiff's parole hearing was a violation of his constitutional right of privacy. The court distinguished *York* on the grounds that the invasion there was of a nature that enraged the community's sense of dignity. The court noted, however, that the elements of privacy found in *Mapp* and *Rochin* were examples of interests that were clearly protected by the Constitution.[64] Similarly, in *Mattheis v. Hoyt,*[65] a prisoner who sought damages against a police chief and magazine publisher for publishing a story of his criminal activities was not allowed to bring his action under 42 U.S.C. § 1983 because the court found that the publication did not violate a federally protected right. The court in *Davis v. Firment*[66] refused to classify the right of free choice in grooming as a constitutionally protected right of privacy and interpreted the *Griswold* case as granting protection only to those rights that are so sacred as to be fundamental. While the courts have refused to expand the constitutional right of privacy beyond those rights that are considered "fundamental"[67] or "traditionally regarded as private in nature,"[68] it is clear that an individual's right to be free from unreasonable search and seizure is a right which is considered to exemplify one's fundamental right of privacy.[69]

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57 *Id.* at 165-66, 9 N.W. at 149.
58 W. PROSSER, LAW OF TORTS § 18, at 105 (4th ed. 1971).
59 42 U.S.C. § 1983 (1970).
60 365 U.S. 167 (1961).
61 *Id.* at 169.
62 324 F.2d 450 (9th Cir. 1963).
63 261 F. Supp. 110 (D. Conn. 1966).
64 *Id.* at 113.
65 136 F. Supp. 119 (W.D. Mich. 1955).
66 269 F. Supp. 524 (E.D. La. 1967).
67 Griswold v. Connecticut, 381 U.S. 479 (1965).
68 United States v. Laub Baking Co., 283 F.Supp. 217, 228 (N.D. Ohio 1968).
69 *E.g.,* Felber v. Foote, 321 F. Supp. 85 (D. Conn. 1970); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966); Wolf v. Colorado, 338 U.S. 25 (1949).

In *Dietemann,* the circuit court properly shifted the emphasis from the publication theory relied on by the lower court to a theory of intrusion.[70] In light of the *Hill* and *Rosenbloom* decisions by the United States Supreme Court, it is doubtful that the judgement of the district court could have been upheld solely on the basis of publication. It cannot be denied that the quackery which *Life* magazine sought to expose was a matter of "public or general interest"[71] within the meaning of the *Rosenbloom* decision and therefore protected by the first amendment. The district court's reliance on *Gill v. Curtis Pub. Co.* [72] for the proposition that the right of privacy may limit the freedom of press is also misplaced as the court there was dealing with publication. There had been no actionable intrusion. For a publication to be protected, it need only concern an item of legitimate public interest and, if false, not be printed with knowledge of the falsity or in reckless disregard for the truth. As was noted by the circuit court, however:

> Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication.[73]

The manner in which the material is obtained is the subject of intrusion and must be examined in the light of cases dealing with that cause of action and not those dealing with publication.

Prior to the *Dietemann* case, California had apparently not accepted the validity of an action based solely on intrusion,[74] but some conduct amounting to intrusion had been recognized as a violation of the constitutional right of privacy. In *Britt v. Superior Court,*[75] a police officer secreted himself in a ceiling over some toilet stalls and filmed certain homosexual acts through an opening in the ceiling. In a subsequent suppression proceeding, the Supreme Court of California ruled that such activity on the part of the police officer constituted an unreasonable invasion of the defendant's privacy and rendered the film inadmissible in his prosecution. Other jurisdictions that have dealt with the subject have allowed recovery for unauthorized eavesdropping on an intrusion theory,[76] but they have dealt with situations where the defendant had bugged a room and left to overhear the conversation from another location. They were not faced with the false friend or misplaced trust situation where the defendant has express or implied consent to see or hear what is going on and surreptitiously photographs, transmits or records the incidents. In *Dietemann,* the district court, having found that defendant's employees were acting as agents of the law enforcement officials, used a constitutional standard and found that an illegal search and

70 449 F.2d at 249.
71 Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971).
72 38 Cal. 2d 273, 239 P.2d 630 (1952).
73 449 F.2d at 249-50.
74 Dietemann v. Time, Inc., 284 F. Supp. 925 at 929 (C.D. Cal. 1968); Dietemann v. Time, Inc., 449 F.2d at 249.
75 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962).
76 *E.g.,* Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958); McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

seizure had taken place entitling plaintiff to recovery in tort or under 42 U.S.C. § 1983. The subsequent decision in *United States v. White*[77] does not allow this conclusion. If White had no "justifiable and constitutionally protected expectation that"[78] Jackson would not relate their conversation to the police, then neither did Dietemann. Similarly, White's constitutional right of privacy was not violated when, instead of telling the police, Jackson transmitted the conversation,[79] and neither was Dietemann's constitutional privacy invaded when the defendant's employees transmitted his conversation.

This is not to say that there cannot be a different, stricter standard of conduct set by the state for the protection of privacy than is required by the Constitution. As the Supreme Court noted in *Katz*:

> [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.[80]

As was mentioned above, the type of consent given by Dietemann, involving deceit and subterfuge, is not accepted as effective in tort law. The offensive conduct in *Dietemann* was not only the eavesdropping and photography but the invasion of the privacy of the defendant's home by means of a subterfuge. As in the *De May* case, the plaintiff would never have consented to this intrusion had he known the true identity of the intruders. Following this reasoning, the circuit court ruled that Dietemann had not taken the risk that what was heard and seen would be transmitted and photographed.[81]

However, the opinion of the circuit court fails to delineate a workable standard. In the district court, the defendant, supposing that a legal search and seizure had been conducted, claimed that its employees were acting as law enforcement agents. On appeal, after the district court had ruled the search illegal, the circuit court made no new findings of fact but accepted the disclaimer on the grounds that it would be unnecessary to reach the issue of Dietemann's constitutional right of privacy. But it was necessary to decide liability as agents of the police even though the constitutional issue was not reached. With no factual basis for denying the agency, one might assume from the opinion of the circuit court that, while defendant's employees could not act independently, they could if they first made an agreement with the police.

While the constitutional protection afforded one's right of privacy is applied to prevent intrusions by the state or by individuals acting under color of law and not against private actions, this distinction need not and should not be made when dealing with an action for tortious invasion of privacy. Nor should the scope of one's right of privacy be defined differently depending on the identity of the intruder. The limitations on the constitutional right of privacy both as to its scope and those whose conduct it controls should have no effect on the ap-

77 401 U.S. 745 (1971).
78 *Id.* at 749.
79 *Id.* at 751.
80 389 U.S. 347, 350 (1967).
81 449 F.2d at 249.

plication of the state law for tortious invasions of privacy. In a time when technological advancements are stripping man's privacy from him, population and industrial expansions are destroying his seclusion, his misplaced trust can lead to the transmission of his private conversations, and the press can make a public figure of the recluse, the tort of unreasonable intrusion may be the last effective weapon in his fight for privacy. Were its effectiveness to be diluted by using a different standard for police officers than for private citizens, this weapon might be rendered useless.

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