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THE PUBLIC RIGHT TO KNOW GOVERNMENT INFORMATION: ITS AFFIRMATION AND ABRIDGEMENT

Claremont Graduate School PH.D. 1984

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THE PUBLIC RIGHT TO KNOW GOVERNMENT INFORMATION: ITS AFFIRMATION AND ABRIDGEMENT

by

Everett E. Mann, Jr.

A Dissertation submitted to the Faculty of Claremont Graduate School in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Government

Claremont

1984

Approved by:

George S. Blair

George S. Blair

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We, the undersigned, certify that we have read this dissertation and approve it as adequate in scope and quality for the degree of Doctor of Philosophy.

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Abstract of the Dissertation

THE PUBLIC'S RIGHT TO KNOW GOVERNMENT INFORMATION:
AFFIRMATIONS AND ABRIDGEMENTS

By

Everett E. Mann, Jr.
Claremont Graduate School: 1984

This study examined the public's access to politically relevant information in the custody of the executive branch of the national government. It's premise was that, in a self-governing society, the people are entitled to know information concerning official actions and intentions, sufficient to express their intelligent consent or dissent to government. Therefore, an examination was made of the controversial idea that there is a political right to know important government information, and that such a right should be afforded constitutional protection.

A broad survey was conducted of relevant statutory and common law, federal regulations, executive orders, Supreme Court opinions, congressional hearings and investigations, constitutional provisions, and the writings of the authors of the Constitution and modern historians. Scholarly commentary on political theory, journalism and the law, particularly on First Amendment issues, was also surveyed. Interviews with selected law scholars were conducted.

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The findings indicate that in certain areas of national security and law enforcement, there is excessive concealment and distortion of official information for political rather than legitimate security purposes. Further, there is evidence that members of the Supreme Court function as part of an extra-constitutional political subsystem to support discretionary executive authority that abridges public access and publishing rights. The Court's apparent cooptation on such matters has led to a limited autocracy that arbitrarily denies politically important to the public.

It was concluded that Congress and the Supreme Court no longer function as an effective check on executive powers, primarily because the executive may operate in secrecy on what should be matters of public debate. In order to restore the balance essential to limited government and representative democracy, the executive branch's assumption of powers must be matched by the recognition of constitutional protection for the public's right to know government actions and intentions.

Deceptive government speech was also examined, and it was concluded that, because it represents an effective censorship of facts, it should only be employed where censorship is justifiable; i.e., in national emergencies that do not permit opportunity for public discussion.

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DEDICATION

This work is dedicated to my parents, without whom it could not have been undertaken.

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ACKNOWLEDGEMENTS

I owe a debt of thanks to Professor George Blair for his patience, encouragement and advice. I also take this opportunity to thank Timothy Ingram and Professors Merrill Goodall, Jack Goldsmith, Jerome Hanus, Gerald Jordan, Leonard Levy, Harold Relyea, Frederick Schauer and Martin Shapiro for their kind assistance. I am grateful to the George Washington School of law and the Marshall Wythe School of Law for the use of their libraries and facilities.

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PREFACE

In early June of 1983, I found in The Washington Post an editorial column by Frank W. Snepp, son of a conservative judge and former CIA employee.[1] It criticizes the apparent lack of fairness, wisdom and practicality of the President's recent order requiring government employees to sign lifetime nondisclosure security agreements. It contains purely political opinion concerning personnel security procedures that may, under present judicial decisions require anyone who now holds, or formerly held "positions of trust" within government to submit writing for pre-publication review and possible prior restraint. More chilling than the article itself is the notice published below it: "This article was cleared for publication in The Washington Post by the CIA."[2] It was the first time I have ever read a state censored political opinion of an American citizen published in an American newspaper. For reasons discussed in Chapter III of this dissertation, Frank Snepp could have been jailed and fined for contempt of court had he failed to have the article cleared.

It is possible that this dissertation manuscript, because of my former assignment to intelligence dutied, may be eligible for pre-publication review by the government even though it is based wholly on open public sources and contains not a single personal experience in intelligence work.[3]

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It is indeed an uncomfortable coincidence at the dawning of 1984, with its reminder of George Orwell's pessimistic prophecy, to see the hand of official government descending to cover the mouth of sources from within the government. Obviously, no one can give more accurate information of the actions of government than a present or former member. They have been the best sources of important political information about government. This is an occasion to examine closely the importance of public access to information of its government.

This dissertation is written out of my concern for the ability of the public to scrutinize and evaluate the actions of our national government with sufficient clarity to keep alive the ideal of self-government. It is based on the conviction that democratic government is not obsolete regardless of the presence in our present political environment of such obstacles as the leviathan bureaucracy of the executive branch and our preoccupation with national security policy.

Because this is a normative study, a statement of its basic premise is appropriate here. If the fundamental political values under which our government was established still obtain, then the public <u>ought</u> to know its government well. The people are sovereign and their consent to actions of government, and such dissent should be knowing. When the people select legislative representation, it should be by an informed vote. When the people pay for their government,

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they should know what they are paying for. The knowledgeable kind of citizenship described here requires more than freely expressed political speech; it requires accurate and truthful information of government itself.

It is the scrutiny of government, not merely the correction of occasional abuses, that is the important product of the public right to know. If the federal government is faithfully administrated, its leaders must inevitably be frustrated from time to time. They are expected to provide substantial services in their official capacity under the continual and often critical scrutiny of other political figures, the press, and the public. They will certainly bump their heads against the constitutional limits of authority on occasion, while acting in good faith. Our open system is designed to detect such trespass and thus assure that public opinion brings steering pressure on government long before constitutional crisis can develop. The preservation of the constitutional limits of government depends on the effectiveness with which government is scrutinized. Although checks and balances between the branches of government will do much to preserve its consitutional structure, it is ultimately as Woodrow Wilson observed," . . . the only truly self-governing people is that people which discusses and interrogates its administration."[5]

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PREFACE

FOOTNOTES

[1]Frank W. Snepp, "This President Wants Silence by Censorship," Washington Post, 12 June 1983, p. B1

[2]Ibid.

[3]If this manuscript is pbulished after March, 1984, it is possible that it will be eligible for official review. This would pose a dilemma for a writer who has taken an oath to "uphold and defend the Constitution of the United States." That Constitution forbids prior censorship.

[4]Alexander Meiklejohn, "Political Freedom: The Constitutional Powers of the People," The Rulers and the Ruled (New York: Oxford University Press, 1965), p. 27.

[5]Woodrow Wilson, Congressional Government, (Houghton, Mifflin & Co., 1900), 14th ed., p. 303.

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CHAPTER I

PERSPECTIVE

> The liberties of the people never were nor ever will be secure when the transactions of their rulers may be concealed from them.
>
> Patrick Henry[1]

The Public Right to Know Government Information

The political, public right to know government information examined in this study is most clearly expressed by this operational form: the right of individuals to have access to records and information generated by government, or otherwise in its custody, from both willing and unwilling sources within government. Such a right is not absolute, and may not obtain in the face of a denial that is both within the constitutional authority of government and in the public interest.

That such a right is today considered controversial, in a society that places free political speech and representative self-government high among its political values, is a matter that requires some perspective. Indeed, the argument that a principle, such as open government, or the related "freedom of information" policy flows from a consitutionally protected right is somewhat recent and novel. The argument has emerged from the quest for a more durable foundation on

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which to demand access to government. A "right" has an immutable quality and grows from fundamental precepts such as justice, equity, reason, tradition, morality, law or nature. Policies are as changeable as the political parties in power.

It is never too late in our history to advance an argument for the existence of an implied constitutional right. Indeed, in the face of the vast and complex growth of our society, all enduring constitutional principles have had to grow and evolve with changing circumstances. It has been observed that a right to know underlies such established principles as freedom of speech, freedom of information, the right to receive information, the right to gather information, and rights of access to government activities such as trials.[2] While at one time a free press and a right to read it may have been adequate to inform the public of its government, under our present leviathan bureaucracy and swings in political mood, the right to know may impose upon government an affirmative duty to inform the public.

The purpose of defining a right to know is to argue that it should receive the same protection of those enumberated in the Bill of Rights. On this the Supreme Court has observed:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcom of no election.[3]

The reason for the recent attention given to arguments

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for a political right of access to government information is that, in spite of the abundance of information and opinion available, politically important information on certain issues may be available only from the government. There are broader arguments; e.g., that government information and documents are ultimately the property of the citizens whose taxes are paid for them, and also that the people are sovereign and therefore own the government with its property. Other theoretical arguments are reviewed in Chapter II. The chief impetus for the exercise of such a right, however, comes from the recent realization of the amount of politically relevant information that has been arbitrarily withheld by the government. For example, to this day information is still coming to light that would have affected public attitudes toward policies of intervention of Southeast Asia and the FBI's political surveillance of prominent figures.

From the slowness with which the truth about certain government policies has seeped into publication, it is evident that any effective exercise of a political right must be timely. That the truth may eventually "out" is not an adequate provision for the politically well informed public. The process of recent history, even retrospective journalism, lacks the essential element of timeliness. If the public is not informed in time to influence policies, it only learns where it has been led.

The Marketplace of Ideas

The broadest and most generally accepted constitu-

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tional protection of the public communication of opinion grew from the Supreme Court's consideration of the First Amendment, and it has been given doctrinal status as the "marketplace of ideas." Its first expression contained an interesting assertion". . . the best test of truth is power of the thought to get itself accepted in the competition of the market. . ."[4]

The consensus theory of truth has remained the key component of the marketplace idea. Writing the opinion of the Court in a 1969 case, Justice Byron White asserted, "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[5]

The consensus theory of truth, on which this primary First Amendment interpretation is based, has allowed the Court to extend almost absolute protection to publication and discussion while curtailing efforts at gathering information such as access to government activities and records. In its modern context, the theory is based on a political truth myth. This myth is that, in the marketplace of ideas, free discussion is a reasonable test for the accuracy of information as well as for the popular will

The Truth Myth

The truth myth is composed of three consecutive assumptions. The first is that if all available ideas and information, including what the government decides to release

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to the public, are guaranteed publication, among them will be something called the truth. The second assumption is that the truth will be recognized by the consensus of a significant number of people because of their shrewdness, some inherent quality of the truth, or a combination of both. And, the third is that the resulting "truth" will be sufficient for the political purposes of the public in its scrutiny and evaluation of government.

This almost mystical faith in the shining quality of truth is not a product of the Supreme Court. We inherited it as gloss along with the more practical political ideas of seventeenth century England. Consider this passage from Milton's Areopagitica which suggests the superstition of trial by combat:

> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in free and open encounter? [6]

This romantic embryo of the First Amendment can be found in Benjamin Franklin's explanation of why printers should cheerfully serve all contending writers, written 51 years before the Bill of Rights: "Printers are educated in the belief, . . . that when Truth and Error have fair play, the former is always an overmatch for the latter."[7]

There is no satisfactory theory of truth that indicates a quality analogous to that of a cork in water, to bob to the surface because of its inherent bouyancy. Those who

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for the past two decades have either observed our national government closely, or served in it, have had ample opportunity to know "truth put to the worse" when the marketplace of ideas has suffered an effective embargo of factual and accurate government informatin relevant to vital political issues.

The truth myth represents a kind of confusion about consensus and democratic government. As a political theory consensus is an admirable and fundamental approach to establishing self-government. It is a measure of public will and opinion. As a test of truth, consensus is the popular opinion of the truth. It is limited by the empirical principle; it can produce nothing more factual or accurate than the information available.

Political Speech and Government Speech

The strength of the marketplace of ideas, guaranteed by the Constitution, is the almost absolute freedom in expression of political speech. Political speech may usefully be considered those utterances and publications intended to affect public attitudes, opinions and beliefs about government. There apparently is no want of material to shape political speech; the various news media, commentators, essayists, political figures, columnists, etc., fairly innundate us with information and opinion. As we have noted, the value, or at least the reliability, of this political speech depends often on its basis in accurate information of government. Fre-

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quently that means information in the custody of government. A first order question concerning political speech is adequate access to government information.

A second order question relates to government speech itself. Government speech may be regarded as utterances and publications of officials acting in their official capacity. It is a component of government information and it carries a special weight. Until recent issues involving intelligence and law enforcement activities, government speech was generally regarded as truth. As discussed in Chapters V and VI, the implications of deceptive government speech for a public right to know are far more drastic than government concealment or denial. If the government lies, then the marketplace is not just barren, it is tainted with poisened fruit, to carry the metaphor past its allowable limit.

The Bureaucracy

The men who framed our Constitution and set down certain of our necessary political rights, did not dream of today's leviathan bureaucracy, its power, and its tendency to deny the public information of its operation. James Madison wrote in the Federalist that "The members of the executive and judiciary are few . . ." and went on to imply that the legislative representatives would be most influential on the lives of citizens."[8] An executive department "few in number" could scarcely generate great concern over concealment of its information. After all, it answered to

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the legislature, and that body was a part of the citizenry itself. It is understandable then that there was more concern over a free press to serve the public right to know, than over access to a small and subordinate branch of government.

The size and habits of the executive bureaucracy probably represent as great an impediment to the public's right to know as the growth of executive branch power. As Max Weber observed a century after the *Federalist* was penned:

> Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of 'secret sessions;' in so far as it can, it hides its knowledge and action from critics.[9]

Max Weber's generalization about bureaucratic seclusiveness has been borne out by later systematic studies in sociology. A good example is Vidich and Bensman's description of bureaucratic behavior in small administrative units.[10] They observed a tendency to preserve a monopoly of power by preventing issues and conflicts from becoming visible through "undiciplined appeals" to outside groups.[11] From their findings, one might conclude that bureaucracy tends to be seclusive because of its attempts to control political situations and to prevent conflict through secrecy. This is quite the anthesis of the participatory public administration mentioned in the Preface. The administrators studied by Vidich and Bensman preferred to avoid public interest, much less public participation, in decision-making. As they paraphrased

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the bureaucratic view, "There is always the danger that, should an issue come into the open, conflicting parties will appeal to outside individuals or groups or to more important figures in the machine. Public sentiment could (then) easily be mobilized around issues."[12]

At the national level reasons for a seclusive bureaucracy also exist. Information concerning public policies often sets off political action on the part of interest groups, and dealing with such action consumes energy as well as threatens political power. Official information may reveal inefficiency, mismanagement or even misconduct on the part of civil servants, and one would hardly expect such to be volunteered. Perhaps the most frequently expressed reason for denying public access to information is that answering requests becomes a considerable inconvenience. However, since the enforcement of freedom of information policies starting in 1974, a sub-bureaucracy of information careerists in government has grown up, and that may assure some life to those policies, the reluctance of colleagues notwithstanding. But generally, it is axiomatic that complex bureaucratic organizations oppose openness, public access and citizen participation because they are sources of conflict and increased administrative burden.

The Congress

The national Congress is in most ways a uniquely open branch of government and open political institution.

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The dual role of its Members has an interesting implication. As Madison observed in the Federalist they not only represent the people in a law-making body they are of the people, subject to the laws they themselves make.[13] Therefore, their representation has a special closeness; they are the presence of the public in government.

In some respects Congress can be seen as a surrogate of all the people vis a vis the executive branch. When Congress consents to an executive policy or action, the people consent, through their representatives. When Congress is informed, the people's representatives are informed. And, in certain cases of national security information, might that be enough? For example, the executive branch, National Security Council, must notify the Senate and House Select Intelligence Committees of covert operations against other countries and certain other intelligence matters. The committee members have security clearances and are sworn to secrecy on such consultations. The question then is this: Is Congress (and in a certain representative sense, the public) adequately informed when a fraction of its membership is informed? Or, does the informing of a select committee represent a form of cooptation that in effect leaves the whole of Congress and the public in the dark?

More relevant to the public's right to know what its government is doing are the inquisitorial power and the informing function of Congress.

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Although the chief justifications for congressional inquiry into executive and judicial branch activities are to draft legislation, to shape governmental policy and to hold the other branches accountable for their execution of the law, there is another important purpose. It is to inform the public and to shape public opinion for political purposes. Writing before statutory rights of access were available to the press and public, Woodrow Wilson placed greater importance on the informing function than on the legislative!

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the dispositions of the administrative agents of the govenrment, the country must be helpless to learn how it is being served; and . . . the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. . . .[14]

Since that time, the Supreme Court has several times considered the informing function of Congress, and has generally affirmed it.[15] While the Court has been badly divided on limitations respecting individual privacy and the purpose of investigative exposure, all the justices have agreed that the legislative function of informing the public concerning matters before Congress, or concerning the administration of the government, is "indispensable" in a representative democracy.[16]

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To what extent does Congress's "right to know" suffice as the public's right to know? Not satisfactorily at all.

While it is more forthcoming to a formal Congressional investigation than to individual requests for information, the executive branch has denied information to Congress on the same national security, law enforcement and executive privilege grounds as used to deny public disclosure otherwise. Moreover, often when the executive branch has provided information it considered sensitive, it has been to closed hearings and under a secrecy caveat. Furthermore, as discussed in Chapter V, when elements of the exeutive leadership have employed deception on the public they have employed it in Congressional hearings as well. It is perhaps a measure of the closeness of Congress and its constituency that all have similar problems obtaining information of the executive branch. In fact, Members of Congress have employed the Freedom of Information Act to obtain information denied them as Members.[17]

While the open and representative nature of Congress and its several information-gathering powers are essential to the general public right to know government information, they are no substitute for it. The Congress and public are both entitled to the same rights of access to information concerning the administration of government.

During the past several decades, the press has seemed much more productive of timely and politically relevant in-

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formation concerning the executive branch than Congress.

The Executive Leadership

Although certain of the executive departments have been responsive to legislative mandates for openness, the executive branch as a whole has not supported public access to its records. Prior to the Freedom of Information Act of 1966, executive agencies by and large denied requests for information they did not care to provide, citing the Administrative Procedures Act provision for official discretion in such matters. When the Freedom of Information Act was passed, executive agencies largely ignored it. After the 1974 Amendments to the act put teeth into its enforcement, the agencies compiled generally. Today this political climate has changed and there is an increasing backlog of bills exempting certain records. This administration has also requested legislation exempting from disclosure whole agencies in the law enforcement and intelligence areas. These are the very agencies whose abuses led to much of the open government legislation in the first place.

The President has sought to increase the control over the political speech of both present and former members of the executive branch. New executive orders require submission of political writings for review and censoring prior to publication. It further subjects executive branch members to polygraph examination in order to fix responsibility for leaks of information to the press.

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The executive branch is not silent to the public however, It is probably the most prolific publisher and speaker in the world. The controversies concerning access by the public and Congress have been in areas claimed to be protected by national security, law enforcement and executive privilege powers.

Although the constitutional underpinnings of the claim of executive privilege are nearly invisible, the Supreme Court has generally upheld the idea.[18] Even when it held, in the case concerning President Nixon's subpoenaed tape recordings, that the privilege must give way before the requirements of justice, the Court's opinion was careful to reinforce earlier findings of confidentiality in executive communications.[19] Executive privilege is supported in several of the exceptions to the statutory disclosure law, and it was struck down by the Court only when it was invoked to prevent relevant evidence from reaching a grand jury considering felony charges against government officials.

The most vocal opponent of the privilege concept is Raoul Berger, who has called it a "constitutional myth."[20] He finds no intent among the framers to authorize the withholding of any information from Congress by the executive.[22] And, he reexamines early disputes between the two branches, (e.g., the St. Claire expedition and the Jay treaty) to show that information compromises between President and Congress reflected a conciliatory attitude on the part of the latter rather than the recognition of a presidential power.[23] This

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scholarship is noteworthy because, if it is correct, the line of executive privilege cases implies an enduring disposition in the Supreme Court to defer to the wishes of the President in most privilege matters.

The Court's support of executive branch secrecy policies affecting government employees has recently taken a wrenching turn. In 1980, nine years after its emphatic affirmation of the freedom to publish in the "Pentagon Papers" case, the Court authorized drastic sanctions against a former CIA employee for failure to submit writings for prepublication review.[24] As noted in the Preface, this man, Frank Snepp, must submit all political writings to the govenment for prepublication censorship or suffer jail or fines. Observers saw an enormous power to gag both former and present government employees in that decision, and at this writing, the administration has invoked it to justify unprecedented gag and censorship regulations.[25]

The Court has likewise departed remarkably from its line of precedents in the enforcement of the <u>Freedom of Information Act</u>, in supporting denial to the public of law enforcement records. In a landmark case, it has effectively rewritten the statute to permit the FBI to withhold clearly political records because they contain some information originating in law enforcement files.[26]

The Attorney General, and dozens of executive agencies independently, have submitted to Congress an array of bills to dilute the statutory access rights granted by the

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Freedom of Information Act. The elements of the administrative bureaucracy have been more successful, getting exemptions here and there, usually riding on annual enabling legislation. Legislation for major curtailments in the law has not been reported out of a Senate committee because it is doubtful it would pass the House at this time.

The picture is clear with regard to the executive branch. The idea of being an unwilling source of information is not a welcome one to the executive officer or administrative bureaucrat. From the President on down, the personnel of that branch prefer to be in control of the flow of government information to the public. The obvious problem is that what is politically unwelcome to the incumbents is quite probably politically important to the Congress and the public.

Conclusion

Information of political importance that is in the custody of the executive branch of government may lie in one of four general categories.

1. Information that is open; i.e., public records, publications, and other forms of information disseminated to the public or available readily on request.

2. Information that may be accessed by administrative or judicial process; e.g., through use of the Freedom of Information Act, or related open government legislation; through appeals; through judicial process; or through Congressional inquiry.

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3. Information known to exist, but withheld from the public through the invocation of national security, law enforcement, executive, or related authorities. Certain of this information may be made public through downgrading action by the executive branch, either at its own initiative or through judicial mandamus.

4. False or misleading information, and information the very existence of which is concealed or denied. This may include wartime ruses de guerre, law enforcement "scam" hoaxes, or secret government aggression through "covert" means against foreign states.

The focus of this dissertation is the struggle for public access to information in the third and fourth categories that is denied for reasons other than legitimate public interest. It is apparent that information has been withheld in both of these categories that would profoundly affect public opinion concerning major executive branch policies in both domestic and foreign matters.

Moreover, recent events also show that such infortion has been often concealed to avoid public displeasure and dissent rather than any significant damage to the state.

This introduction has drawn certain parameters to narrow the questions somewhat and provide a realistic, or at least practical, focus. For example, there appears to be little value in worrying distinctions between access by Congress, the judiciary, the public or the press. They are information channels. The central question is what the

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public is entitled to know.

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CHAPTER I

FOOTNOTES

[1]Patrick Henry, in Wilbur Cohen, "Communication in a Democratic Society," The Voice of Government, (New York: John Wiley & Sons, 1968), p. 13.

[2]David M. Ivester,"The Constutional Right to Know," Hastings Constitutional Law Quarterly 4 (W 1977): 110.

[3]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), 638.

[4]Oliber Wendell Holmes, dissenting, Abrams v. United States, 250 U.S. 616 (1919).

[5]Red Lion Broadcasting v. the FCC, 395 U.S. 367 (1969), 390.

[6]John Milton, Areopagita (1644) (London: A. Murray & Sons, 1868); also in The Works of John Milton, vol. IV (New York: Columbia University Press, 1931), p. 293.

[7]Franklin, Benjamin, Apology for a Printer (Philadelphia: A. Pomerantz & Company, 1953).

[8]James Madison, "Federalist No. 49," The Federalist Papers, Clinton Rossiter, ed. (New York: Mentor Books, 1962), p. 316.

[9]Max Weber, "Bureaucracy," ed. and trans. Hans Gerth and C. Wright Mills, From Max Weber: Essays in Sociology (New York: Oxford University Press, 1958), p.233.

[10]Arthur J. Vidich and Joseph Bensman, Small Town in Mass Society Class, Power, and Religion, rev. ed. (Princeton: Princeton University Press, 1968).

[11]Ibid., p. 128, 133.

[12]Ibid., p. 127.

[13]Madison, "Federalist No. 57," Rossiter, p. 352.

[14]Woodrow Wilson, Congressional Government (New York: Houghton, Mifflin & Co., 1900), p. 303.

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[15]E.g., Doe v. McMillan, 412 U.S. 306 (1973); Graval v. United States, 408 U.S. 606 (1972); and Watkins v. United States 345 U.S. 178 (1957).

[16]E.g., 345 U.S. 178, 200.

[17]E.g., see EPA v. Mink 410 U.S. 72 (1973), discussed in Ch. III.

[18]E.g., Totten v. United States, 92 U.S. 95 (1875); Chicago and Southern Airlines v. Waterman Corp., 333 U.S. 103 (1948); United States v. Reynolds, et al. 345 U.S. 1 (1952); and EPA v. Mink, 410 U.S. 72 (1973).

[19]United States v. Nixon, 418 U.S. 683 (1974), 703-70, 714-16.

[20]Raoul Berger, Executive Privilege: A Constitutional Myth (Cambridge: Harvard University Press, 1974).

[21]Ibid., p. 66.

[22]Ibid., p. 67.

[23]Ibid., p. 188, p. 193.

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

[25]Griffin Bell, "Secrecy after the Snepp Case," Washington Post, 9 April 1980, p. A 21; cf. Frank W. Snepp, "This President Wants Silence by Censorship," Washington Post, 12 June 1983, p. B1.

[26]FBI et al v. Abramson, 456 U.S. 633 (1982), 634.

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CHAPTER II

AFFIRMATION OF THE PUBLIC RIGHT TO KNOW

> A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors must arm themselves with the power which knowlege gives.
>
> James Madison, 1822[1]

Introduction

Active debate concerning a public "right" to know government information is less than forty years old. The principle of an informed citizenry, however, predates the republic in our political heritage. In part, the recent introduction of the word "right" has been a mere strengthening of rhetoric by those seeking access to government information and activities. In part, it represents an ideological shift caused by increased government power and secretiveness. For example, historically, a burden of justifying access lay on the shoulders of individuals seeking government records. Proponents of the "right" concept argue that a burden to justify withholding should lie with the government.

While most scholarly and judicial commentors agree on some form of citizen access in principle, there is re-

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sistance among many to the recognition of a political right in this area. Much historical experience mitigates against it.[2] The President has generally exercised a power to refuse inspection and inquisition, and the courts have claimed no general mandamus power over him.[3] The executive department has enjoyed a general immunity from inspection, and documents relating to internal management of executive agencies have been excepted in public disclosure statutes. Internal advisory memoranda have also been held priviledged, and it has been argued that, except for documents intended as public notice, all federal records have a non-public character.[4]

Therefore, it is necessary to survey the evidence affirming a political right in this area, particularly that suggesting constitutional protection. By reviewing affirmations in theory, tradition, law and practice we may draw closer to an informed consideration of whether there should be a clearer recognition of such a right.

Background

The first modern public expression of concern over access to government information was the political outcry at the secretiveness of the expanding New Deal bureaucracy in the 1930s. Jerome Hanus observes that this caused the enactment of the Public Information Section of the Administrative Procedures Act in 1946.[5] That provision encouraged the release of government records to the public, but made it

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purely a matter of administrative discretion. It was virtually ignored by government personnel.

A sharper concern developed from the World War II experience with government censorship and propaganda. With a new appreciation for the power of information, and an eye on the secretiveness of the new bureaucracy, journalists worried about the authority of the government to conceal records. The first scholarly treatment of the public need to know government information was published by Herbert Bruckner of the Cornell University Graduate School of Journalism in 1949.[6] Titled Freedom of Information, it reviewed the importance of government information to a democratic society and the power that manipulation of information afforded government officials. Basically an argument for the importance of a responsible and effective press, it focused more on the ethics and problems of newsgathering than on the public's right to information.

The development of the cold war and then armed conflict in Korea brought new government security regulations, and with them increasing concern on the part of journalists. So prolific was national and international commentary on the role of the press, that in 1949 the Congressional Research Service published a selected survey of writings.[7] It's author explained that the concept of freedom of information began as the traditional idea of freedom of the press, updated to include all other mass media of communication.[8] An examination of the writings surveyed then, and in a 1952 up-

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date, show that the term had acquired a broader meaning, one that suggested an open society as compared with totalitarian societies such as the Soviet Union.[9] It also reveals a preoccupation with the perfection and stewardship of the press as fourth estate to tell the public what it should know about government. A public right was not yet an issue of the controversy

The Term Emerges

The term "right to know" probably first appeared in modern newsprint in a 1945 New York Times account of a talk made by Kent Cooper, then Executive Director of the Associated Press. According to the Times editorialist, Mr. Cooper "used a good new phrase for an old freedom," when he declared: ". . . there cannot be political freedom in one country, or in the world, without respect for the 'right to know.'"[10]

However, neither the term nor the concept was quickly adopted by the journalists then speaking out against the increasing tendency of government officials to deny access to official records. During this period, major statements by journalists concerning government censorship and secrecy considered access to government information in terms of the rights of newspapers and other news media.

Then, in 1950, the American Society of Newspaper Editors (ASNE) appointed James S. Pope chairman of the newly designated Committee on Freedom of Information, and in his accpetance he observed:

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> . . . a sharp and critical disagreement has been found to exist between the country's newspaper editors and the officeholders who contrive much of the news. How much should the people know? . . . (There is) a broad-scale offensive against freedom of information--against the basic principle of the citizen's right to know so that he may govern himself. (Emphasis supplied.)[11]

Thus, the term "public right to know" appears to have emerged as an artifact of journalistic rhetoric; and since that time it has frequently been invoked as a justification for the press's right to make inquiries.[12]

In 1956, Washington Post Executive Editor, J. R. Wiggins, who was then Chairman of the ASNE Committee on Freedom of Information, wrote a law review article to the effect that the press's special obligation is to defend the people's "right to know."[13] It has proved to be an enduring polemic . The newsman's self-appointed stewardship for public access rights was recently revived in Walter Cronkite's lecture at the Washington Journalism Center in December, 1980. The venerable anchor-man spoke of the necessity to "persuade a doubting public that its right to know can only be secured by our freedom to find out."[14]

However self-serving the coining of this term may appear, leaders of the news media were responsible, not only for bringing the concept before the public, but for pursuing its recognition in the courts. A newsperson or news organization has been a litigant in virtually every Supreme Court case decided in the area of access to government information and activities.

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The first uses of the term "right to know" included little discussion of its theoretical basis, but attached it to the more widely known concept, freedom of information.[15] The latter phrase has grown from its beginning as a rallying cry for journalistic freedom during the Second World War to its present, broader meaning, descriptive of policies providing for the free flow of information in society.[16] However, "freedom of information" was an ambiguously broad term and appeared to serve news media interests. Invocation of a "people's right to know," not only seems to have strengthened press arguements against government inormation restrictions, but it characterizes the newsman as a champion of the public in his work.

Harold Cross and the Legal Right

Viewing with alarm the increases in governmental secrecy the American Society of Newpaper Editors commissioned a study of the state of the law regarding access to public records. They selected Harold L. Cross, an attorney who was a specialist in press-law, to make a "comprehensive report of customs, laws and court decisions affecting our free access to public information."[17] In the Fall of 1952, Cross published an exhaustive study of his landmark book, <u>The People's Right to Know</u>. To his dismay, Cross found that:

> . . . in the absence of a general or specific act of Congress--and such acts are not numerous--there is no enforceable legal right in the public or press to inspect any federal non-judicial record.[18]

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He found outdated laws in the states, encumbered by antiquated common-law rules. He also found that federal statutes authorizing public access to records were qualified to permit administrative discretion over virtually any release.[19]

Despite the book's title, and his assertion that "the public business is the public's business," Cross provided no theory or argument for the constitutionality of such a right. Rather, he confined himself to an extensive analysis of its basis in law. Cross intended his book to be a study of the state of the law governing the "right of the people, not of the press as such, to freedom of information," and also to serve as "a manual of arms for my brethern of the bar."[20]

Political Interest Emerges

The skirmishing between journalists and the bureaucracy interested politicans in the matters of access and secrecy. Freedom of information planks appeared in the platforms of both major political parties, the Republican in 1952, and the Democratic in 1956.[21] Both advocated a qualified "free" flow of information from the government, and the Democratic plank attacked the Eisenhower administration's use of executive privileges. Neither endorsed recognition of a right to know, but were concerned with assuring the electorate of the parties' support in principle of governmental openness.

In 1954, the U.S. House of Representatives Govern-

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ment Operations Committee organized a Government Information Sub-Committee under the chairmanship of Congressman John E. Moss. This subcommittee started an Inquiry into the problems of access to government information and secrecy that went on for eleven years before it produced legislation. In 1965, Congress passed the Freedom of Information Act which establishes a national disclosure policy and a strong statutory right of access to executive branch records.[22]

The "right to know" gained some stature, at least as political rhetoric, from President Lyndon B. Johnson when he signed the Freedom of Information Act on July 4th, 1965. He said:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. . . . I sign this measure iwth a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[23] (Emphasis supplied.)

The "most essential principle" of which President Johnson spoke was also endorsed by his successor, Richard M. Nixon, who stated prophetically (and, in retrospect, perhaps a bit wistfully):

> Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withhled by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and--eventually--incapable of determining their own destinies.[24]

Most executive agencies simply ignored the mandate for openness because the Freedom of Information Act was without

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enforcement provisions initially. It was only after the public shock at official mendacity during the Vietnam war, the Watergate scandal, and revelations of law-breaking by government agents that Congress was moved to provide the access policy of the law with that essential ingredient of a right: a legal remedy for its abridgement.[25] At this writing, both federal and state legislatures have created impressive rights of public access to government information and activities.

The Search for a Theory

The most frequent argument for the constitutionality of a public right to know is that it is implicit in the First Amendment guarantees of free speech and free press. James Madison suggested this idea to some extent when discussing the First Amendment shortly after its adoption:

> . . . the *right* of examining public characters and measures and of free communication thereon is the only effectual guardian of every other right.[26]
> (Emphasis supplied)

The first formal argument of a First Amendment right to know apparently was published as an unattributed note in the Fall 1951 *Indiana Law Journal*.[27] Calling access to official information a "neglected constitutional right," the note asserts that it is so important to self-government that it should be "elevated to a position of highest sancity," i.e., be accorded constitutional status.[28] The note finds the right implied by the guarantees of free speech and press

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and necessary to informed self governments. Cutting through the ambiguity of Madison's statement, the note describes the "right to know what the government is doing," as the right, not only to receive, but to acquire information:

> The public should be accorded a legally enforceable right to compel divulgence of information by recalcitrant officials. . . . (the courts) must expressly accord the same constitutional recognition to acquisition as they have to the dissemination of facts.[29]

The justification of a right to know was then taken up by other writers who either provided variations on the First Amendment theory or introduced some broadening of the argument. In 1956, Judge Leon R. Yankwich declared flatly that the right of people to have information of govenment officials "is thoroughly established and cannot be challenged," implicit in the democratic idea of responsibility of those who govern. He felt that elected officials are "duty-bound to communicate to the public."[30]

Parks

In 1957, the first chief counsel of the Government Information Subcommittee, Wallace Parks, began an independent research program into the matter of the constitutionality of the right to know. In his basic study he presented the first truly comprehensive First Amendment theory of "constitutional rights to know and rights of access to federal agency information, attaching to citizenship."[31]

> It is certainly reasonable to conclude that freedom of the press and speech under contemporary conditions includes the right to gather information from government agencies and that

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> it stands as a constitutional prohibition against all forms of withholding information beyond that reasonably required for the exercise of delegated powers or the protection of other rights.[32]

Implying an overarching general right, Parks argued that the freedom of press and speech provisions of the First Amendment were "intended as one of the guarantees of the people's right to know."

He also outlined three other theoretical supports for his argument. The first was that information is essential for the responsible exercise of the right to vote. Secondly, he asserted that government information is a basis of popular sovereignty and consent of the governed. And finally, since only limited powers to withhold information can be inferred from the Constitution, he concluded that there are correlative rights to know located in individuals.[33]

Following Parks' study, other commentators began to write on the subject, almost all adopting his First Amendment thesis, and some enlarging on the latter three inchoate arguments. Both political figures and journalists picked up his ideas and offered their own contributions to a constitutional foundation for the right.

Senator Thomas C. Hennings, for example, found the popular soveriegnty theory anchored to the Preamble of the Constitution.[34]

J. R. Wiggans suggested that the U.S. COnstitution, as a charter of a self-governing society, implicitly con-

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tradicts theories of an absolute, unreviewable executive power to withhold from Congress, or the public, anything officials choose not to disclose.[35]

Meiklejohn

Further development of a purely political First Amendment theory, after Parks, came from Alexander Meiklejohn's influential proposal that a public right to know information concerning government is virtually the exclusive justification for guarantees of public free speech and free press.[36] According to Meiklejohn, the right to know is the touchstone of First Amendment interpretation. Insofar as a communication adds to the public's information relevant to self-government, it is entitled to the First Amendment's protection. He likens the political functioning of a democratic society to a town meeting in which the right to know is a functional necessity, providing for the presentation of all relevant facts and interests.[37] In Meiklejohn's model, the First Amendment forbids denial of relevant political information and thus protects against "mutilation of the community thinking process" by ill-considered decisions. To him, the First Amendment is a preservation of the people's power of political self-government, and not the guardian of non-political speech or "unregulated talkativeness."[38]

Emerson

Nearly a decade later, a contrasting First Amendment "right to know" theory was advanced by Thomas I.

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Emerson.[39] To Emerson, it is a right of communication, not a right to know, that is the primary object of First Amendment protection. Emerson's thinking in this matter is an extension of his general theory of the First Amendment, which emphasizes the importance of freedom of expression to individual self-fulfillment and social change.[40] Emerson rejects Meiklejohn's theory on three counts: it neglects the function of the First Amendment in protecting the speaker's right to personal self-fulfillment; it is impossible to give the right to obtain information the same, virtually absolute protection as speech under most circumstances; and, the system of free expression is based more on individaul rights of persons wishing to communicate than on pressure from those desiring to listen.[41]

Emerson finds the right to know an emerging and still amorphous right, but one deserving of recognition and constitutional protection as an intergral part of the system of free expression. Although he does not regard it as the "main basis for the system of freedom of expression," he finds it of special importance in three respects.[42] It can serve as a doctrinal challenge to government interference with freedom of expression, it can be a basis for government expansion of the system of freedom of expression (e.g., the freedom of information statutes), and it can be used to make information available. Emerson thus differentiates the listener's right to receive information from that of the communicator to obtain information as the basis for transmitting

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ideas. His theory has an affirmative connotation in terms of a "system of free expression," as well as the "negative right to be free from government interference."[43]

It should be noted that as a legal scholar, Emerson finds a "firm, indeed overwhelming, theoretical base" for recognition by the courts of the right of the public to obtain information from the government.[44] Emerson agrees that the First Amendment's underpinnings include popular sovereignty, attributing to the citizenry a superior right to have all information necessary to "instruct its servant, the government."[45] Thus, he partially incorporates Meiklejohn's "town meeting" model without conceding the primacy of the public right to political information.

Other Viewpoints

Since political interest has emerged in the question, scholars, journalists and politicians have produced a fairly steady succession of studies on aspects of a public right to know, principally in the law journals. Most reflect some form of First Amendment theory--that public access is a derivative of implied right--and many have echoed the call for judicial recognition of its constitutional protection. Some have broadened their arguments, developing the concept suggested by Parks: popular sovereignty, self government and correlative rights.

Jerome J. Hanus and Harold C. Relyea relate a right to know to constitutional theory rather than contsitutional text[46] They note that contract theory, which is the basis

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of government by consent, implies a right to withdraw when government does not fulfill its responsibilities. Consent connotes rational approval and assumes that citizens must have informaton about what their government is doing. A public right to know represents the suspicion of government that is inherent in the theory of limited government. As evidence of this suspicion, they cite the separation of powers, federalism and the Bill of Rights. The freedom of information policy, they find to be a direct outgrowth of "the American philosophy of democratic government that requires an informed citizenry to debate and to guide policy."[47]

Ivester

The most comprehensive and integrated argument in the current literature for a constitutional right to know is David M. Ivester's essay, published in 1977.[48] He presents interrelated political and constitutional arguments for a constitutional right to know that is independent of parallel statutory and common law doctrines.

He points out the necessity of such a right to the American political system, particularly in maintaining the checks and balances necessary for self-regulating government. The growth of the executive department, and its hording of information vital to the people and Congress, produces serious power imbalances in the American constitutional system. In order to fulfill their roles, both the Congress, as a coordinate branch of government, and the people, as sovereign, must have adequate knowledge of the executive.[49]

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He argues that the right to know is inherent in the proper functioning of a system of self-government. Self-government functions well only to the extent that its officials are "responsive and responsible to" the will of the people."[50] The people must have adequate knowledge of what the government is doing to participate effectively.

He also argues that a right to know is implicit in the structure of a self-governing system. A sovereign people, as "the fundamental source of all government power" have an inherent right to know what their government is doing. In the express delegations of powers to the government, the right to know was not forfeited structurally, nor was it forfeited by implication due to its necessity to the proper functioning of such a system.[51]

The public right to know, according to these arguments is one of those unenumerated rights retained by the people and constitutionally protected by the Ninth Amendment.[52]

He finds an additional foundation, and a textual basis, for a constitutional right to know, in the First Amendment. While a strict construction of the First Amendment text would seem to protect only the right to speak, to publish and to inform, he argues that "certain implied rights must logically flow" from the text. "Knowledge and the means of acquiring it are necessary prerequisites to the intelligent and effective exercise of the rights to speak and publish."[53]

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Another foundation Ivester identifies is in the theory of government by compact, which taken with the theory of popular sovereignty, suggests an inherent right to know. It also suggests the idea that there must be a corollary right to offset the government's power to withhold information.

In view of the limited nature of the government's withholding power, Ivester recalls Wallace Park's observation, "There are practical, if not theoretical, weaknesses . . .to power limitations which are not matched by correlative rights located in individuals. . . capable of asserting them when they are infringed."[55] Taking together three things: that the members of Congress and the President are elected by the people, that whatever powers they have are derived solely from the Constitution, and that the people are the source of that power--Park concludes ". . . it would be extraordinary if the powers granted to the President and Congress were to authorize the general withholding of information needed for the exercise of the (people's) franchise."[56]

In other words, because only limited powers to withhold information can be inferred from Articles I and II of the Constitution, then rights must exist to assert this limitation.[57] That such rights must be information rights is clear from Macaulay's popular observation:

> It is quite natural that a government which withholds political privleges from the commonality (sic) should withhold also political information.

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> But nothing can be more irrational than to give power, and not to give the knowledge without which there is the greatest risk that power will be abused.[58]

In summary, David Ivester argues that a right to know is inherent in the theory, structure and functioning of our system of government, as well as implied by the text of the First Amendment It is a right to gather information from willing or neutral sources, and to acquire information from perhaps unwilling government sources."[59]

Checking Value

A unique theoretical argument for a public right to know is Vincent Blasi's proposal of the "checking value" importance of the First Amendment.[60] Blasi does not offer his theory as an alternative to existing interpretations but rather as a supplement to them. His central concern is that abuse of official power is an especially serious evil, and that the threat posed by the totalitarian state represents the overriding problem of twentieth-century politics. The only check on government misconduct "must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective government, and ultimately to make a revolution."[62]

While the government has checking power over private citizens that includes legitimized violence, the only checking power on the government is political and depends on information about government. The right to know government information, under Blasi's rubic, is essential to produce

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"critics capable of acquiring enough information both to pass judgment on the actions of government, and disseminate their information and judgments to the general public."[63]

The checking value theory appears to be a direct outgrowth of Alexander Meiklejohn's self-government theory of the First Amendment. Some twenty years before Blasi's essay, Meiklejohn wrote:

> The particular evil of official misconduct is of a special order. That evil is so antithetical to the entire political arrangement, is so harmful to individual people, and also is so likely to occur, that its prevention and containment is a goal that takes precidence over all other goals of the political system.[64]

Comment

A political theory on which to propose a public right and a public need to know, considers the very purpose of the First Amendment to guarantee the information and ideas citizens must have in order to govern themselves. The narrower and more focused checking value theory can be seen as a special case of the self-government theory, one that sharpens the argument by considering the protection of the public from the potentially most serious threat to self-government --government misconduct.

However strongly one may argue for a narrowly conceived <u>political</u> right to know, its reality, like that of all implied or inherent rights, lies in the hands of the Justices of the Supreme Court. Although Emerson, Meiklejohn, Ivester, and Blasi have all been cited in various opinions by the Court, their ultimate influence on that bench remains

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to be seen.

In its decisions on constitutional issues, the Court often augments its review of theory with attention to the writings and actions of the first officials of our republic, the "framers" of our Constitution. The next section concerns their views on the matter of public access to government information.

The Framers

Although the opinions of those men who influenced our revolutionary declaration and our fundamental law do not have the force of law, their statements are often persuasive in the interpretation of our governing principles.

Historians have concluded that information practices have changed little since the "framers" governed.[65] In those days, controversies focused more on release of information to the Congress than to the citizenry. With regard to what information could reach the Congress, the early Presidents asserted a right to withhold and Congress asserted power to review that right.[66]

An overview of the writings and actions of our earliest officials suggest four general observations regarding public access to government information.

First, Federalist and Republican alike believed in an informed public. There are several opinions among them, however, that certain information might be kept secret, at least for a period, in the public interest.

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Second, there is clearly an assumption that information would be available to the public without special policies to provide it. Particularly, information was expected to flow from Congress to the people, with a few exceptions.[67]

Third, it was believed that protection of the right to communicate would protect the people's right to know adequately. There was controvery only over whether such a protection needed enumeration in the Constitution, or was obviously the property of a sovereign people.[68]

Finally, in the debates of the Constitutional Convention, the inclusion of the requirement to publish congressional journals was accomplished on the unchallenged argument that the people have a right to know what their government is doing.[69]

Jefferson

Thomas Jefferson made several clear statements on the matter. He unknowingly endeared himself to unborn generations of journalists when, while Ambassador in Paris prior to the Constitutional Convention, he wrote to Edward Carrington regarding public behavior in Shays' Rebellion:

> The way to prevent these (errors of opinion) is to give (the people) full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our govenrments being the opinion of the people, the first object should be to keep that <u>right</u>: and were it left to me to decide whether we should have a government without newspapers or newpapers without a government, I should not hesitate to prefer the latter (Emphasis mine.)[90]

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To Jefferson, "full information of their affairs" may not have meant full information of the executive department, considering his actions as cabinet officer and as President. Nevertheless, he endorsed an informed public emphatically in a letter to James Madison two months after the new federal Constitution was completed:

> And, say, finally whether peace is best preserved by giving energy to the government, or information to the people. This last is most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. . . .They are the only sure reliance for the preservation of our liberty.[71]

However sanguine Jefferson was about the ability of the people to preserve their liberty if well informed, his actions under the new Constitution demonstrate some reluctance to provide unlimited information to Congress. While sitting in President George Washington's Cabinet when Congress demanded information concerning General St. Clair's defeat by the Wabash Indians, Jefferson counseled that the President should refuse to provide records which would injure the public and provide those that the public good would permit. He thus articulated a doctrine of executive discretion that Presidents have asserted since.[72]

Washington's reply relied on Jefferson's advice, and Congress revised its request to read, "such papers of a public nature, in the Executive Department, as may be required," for the investigation of Major General St. Clair.[73] Thus, the House of Representatives first accomodated the desire of a President to maintain confidentiality.

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Although he never invoked a power to withhold information, Jefferson sent less material to Congress than either of the Federalist presidents before him.[74] He maintained two files of correspondence: one official and one private which he kept in his personal custody. The confidential file is reputed to have contained candid letters between himself and diplomats abroad.[75] There is evidence that some in Congress disapproved this practice and desired to make formal requests for information from the President. However, friendly Republicans in Congress managed to head off such actions.[76]

It was also during Jefferson's administration that the Supreme Court took its first official notice of executive confidentiality. When Chief Justice Marshall excused Attorney General Levi Lincoln from testifying in Marbury v Madision (1805), concerning matters communicated in confidence, it was the first high court recognition of executive privilege.[77]

Hamilton

In the Federalist Papers, the principle of a public fully informed about the activities of its government is never in doubt. In paper number 84, Alexander Hamilton considered an objection to a national government based on the fear that its seat would be too remote from many of the states to "admit of a proper knowledge on the part of the constitutent of the conduct of the representative body."

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Hamilton observed that the problem was no different than that already faced by citizens in a country remote from the state legislature. He wrote this about citizen access:

> Of personal observation they can have no benefit. This is confined to the citizens on the spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from correspondences with their representatives, and with other persons who reside at the place of their deliberations.[78]

Hamilton assures the reader that not only will the same sources be available for information of a national government, but that problems created by distance will be "overbalanced by the . . .vigilance of the State governments."

> . . .The executive and legislative bodies of each state will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent theirconstituents in the national councils, and can readily communicate the same knowledge to the people.[79]

> And we may conclude with the fullest assurance that the people through that channel, will be better informed of the conduct of their national representatives, than they can be by any means. . . of their State representatives. . . . people at and near the seat of government . . . will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of the intelligence to the most remote inhabitants of the Union.[80]

In addition to its affirmation of the people's right to know of government activities, these passages make three interesting points.

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First, the reliance on freedom of the press and speech as the crux of citizen scrutiny of government had a realistic basis. They were a means of overcoming the remoteness of citizens from government, and protected the only means by which all the people could be informed.

Second, an educated aristocracy was important to information reaching the common people. Above, Hamilton speaks of people depending on the information of "intelligent men, in whom they confide." One vital capacity of such men was their ability to <u>read</u> the public press. Literacy was far from universal.

Jefferson often linked public education with the proper functioning of self-government.[81] His statement of preference for newspapers over government, above, ends with these words: "But I should mean that every man should receive those papers and be capable of reading them."[82] Also, in his letter to James Madison, quoted above, note his exhortation to "<u>educate</u> and inform the whole mass of people. . ."

A third point is Hamilton's assumption of an active interest in the affairs of national government on the part of State governments. It was probably not so much ingenuousness as a bald attempt to pander to the thinking of the anti-federalists. State governments, in their predictable preoccupation with regional politics and their own considerable responsibilities, have hardly become the sentinels over national government that Hamilton tempted his readers to envision.

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Madison

James Madison provides an interesting perspective on republican government where "the legislative authority necessarily predominates."[83] In *Federalist* number 49, this passage emphasizes the connection between the people and their representatives:

> . . . the members of the executive and judiciary are few in number and can be personally known to a small part only of the people. . . .The members of the legsislative department, on the other hand, are numerous. . . . The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.[84]

From this passage we are reminded that from any region the literate aristocracy were few and well-acquainted. Hamilton implies that their very habits of socialization provided an exchange of information, views and values. There is no sharp distinction between the government and the governed here; the people govern. Therefore, they know.

The Constitutional Conventions

The government in the form envisioned by the Framers stimulated far different concerns regarding secrecy. Ivester believes that the debates on the treaty powers, the publication of the journals of each house of Congress and the publication of accounts of public monies reveal more about the attitude toward the people's right to know than the discussions of freedom of the press and speech.[85] He discovered an "overwhelming consensus" in both state conventions and the federal convention to tolerate secrecy but only in the

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necessary matters such as treaty negotiations and military affairs.

Patrick Henry voiced his concern over possible government secrecy at the Virginia convention:

> The liberties of the people never were, nor ever will be secure when the transactions of their rulers may be concealed from them . . . I am not an advocate for divulging indiscriminately all the operations of government, though the practice of our ancestors, in some degree, justifies it. Such transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected. But to cover with the veil of secrecy the common routine of business, is in abomination in the eyes of every intelligent man, and every friend to his country.[86]

John Marshall, speaking on behalf of the Constitution, answered Patrick Henry concisely:

> The British government affords secrecy when necessary and so ought every government. In this plan (the Constitution), secrecy is only used when it would be fatal and pernicious to publish the schemes of government.[87]

This exchange concerned the only provision in the Constitutional text authorizing secrecy, the requirement that each house keep a journal. The requirement to publish the journals is qualified by permission to except such parts as <u>require</u> secrecy.[88]

The debate over this part of the text at the national Constitutional Convention concerned whether to adopt a clause similar to a provision in the Articles of Confederation of 1781. That provision read:

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> Article IX. The Congress of the United States. . . shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the delegates. . . shall be furnished with a transcript of said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.[89]

A first proposal by James Madison that would have allowed the Senate to keep secret all its activities that were not "legislative," was rejected by every state except Virginia. An amended proposal that would give each house discretion to keep secret matters relating to "treaties and military operations," was defeated eight states to two. Because of the controversy, it was suggested to strike out the clause altogether.[90] At this point, James Wilson arose with this comment:

> The expunging of this clause would be very improper The people have a right to know what their agents are doing or have done, and it should not be the option of the legislature to conceal their proceedings. . . .[91]
> (emphasis supplied.)

The clause as it now stands, with one exception, then passed unanimously. The phrase, "except which parts thereof as may in their judgment require secrecy," squeaked by on a six to four vote, New Hampshire being divided.[92] The authors of the Constitution, by these acts, deliberatly recognized a people's right to know limited only by appropriate requirement for secrecy.

Implied Rights

If the people's right to know government was gener-

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ally accepted by the framers, it is reasonable to consider why it was not enumerated in the constitutional text. The most obvious conclusion is that the guarantees which were written reflected abuses suffered under the British Crown and which were therefore fresh in their minds. In Federalist number 83, referring to such rights as trial by jury and habeas corpus, Hamilton equates their merit as a defense against the oppressions of a monarch to "a barrier to the tyranny of popular magistrates in a popular government."[93]

> Here. . . the people surrender nothing; and as they retain everything they have no need of particular reservatrions. 'We the people of the United States, . . .do ordain and establish this Constitution for the United States of America,' Here is a better recognition of popular rights than volumes of those aphorisms. . . in several of our State bills of rights. . .[94]
>
> . . . For why declare that things shall not be done which there is no power to do?[95]

When it became politically necessary to amend the Constitution with a Bill of Rights, it was with the careful reservation in Article IX that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparge others retained by the people."

Historian Leonard Levy has pointed out that, not only did the Ninth Amendment easily answer the question of jeopardizing unenumerated rights, but that there was an even more basic flaw in the argument against a bill of rights.

> why declare that things shall not be done which there is no power to do? might arguably apply to freedom of religion or freedom of speech, but could have no bearing on the rights of the criminally accused or personal liberties of a procedural nature.[96]

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Levy implies here that First Amendment rights might be seen as guaranteed without enumeration in the Constitution. This would suggest that a right to know is more easily inferred than procedural rights protecting an accused individual. Levy also supports the idea that it was the abuses by the Crown that inspired the enumeration of certain rights, not a comprehensive theory of rights.[97]

Excessive government secrecy was apparently not among the oppressions against which the colonists rebelled, and enumeration of the right to know was unnecessary under the new Constitution.

A Self-Government Theory of the Public Right to Know

First Amendment theories of a public right to know are alike in one respect; the freedoms to speak and publish are considered hollow politically if there were no protection of information gathering. The right to know becomes a secondary feature of the broader purpose seen for the First Amendment: Emerson's broad social importance, Meiklejohn's narrower political importance, or Blasi's specific checking function against government misconduct. Historical evidence indicates that the framers had arrived at no clear consensus among themselves as to the meaning of free speech and press; the meaning of no other part of the Bill of Rights is so obscure.[98]

The framers were apparently more concerned with forming a structure of government, through compromise, that would

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preserve liberty and allow self-government, for themselves at least.[99] Perhaps, clearer than the meaning of the First Amendment was the meaning of consent in the charter documents of the republic. Although it is a matter of current debate, if we heuristically accept that the Preamble to the Constitution and the Declaration of Independence have weight as fundamental law, an interesting conclusion is possible.

Consent Theory

Consent, in its traditional legal usage, is somewhat a technical term. Blacks Law Dictionary defines it, in part:

> A concurrance of wills. . . .Consent is an act of reason accompanied by deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to something proposed by another.[100]

Whether consent is expressed or implied, it does not give up the connotation of sufficient mental capacity, which embraces information as well as reason. How else can consent reflect an "intelligent choice?"

A Consent Theory

A consent theory of the public's right to know government information is that, unless the public knows to what it is consenting, there is no legitimate consent. Consent to government requires information of government.

If we assume that we are to be governed through our blind, uncritical consent, then our fundamental political rights are pointless. There is no need for a First Amend-

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ment if there is nothing of real political importance to communicate. The right to vote is hollow if the public knows only what the incumbent wants to tell about his performance in office. How likely is relevant political dissent in a regime where political information is controlled by censorship and shaped by government propaganda?

The "Hobbesian" view of consent, only to the establishment of a governmental leviathan, accomplishes only the theoretical taming of atavistic man by restraining his liberty.[101] An example of a "Hobbesian" state is the Soviet Union today. Having established the Soviet state and the Communist Party, the people are not troubled for further consent of any magnitude. Of what use would a First Amendment be in that state? Here is what Nikolai Lenin has observed on the matter:

> Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal than gusn. Why should any man be allowed to buy a printing press and disseminate pernicious opinion calculated to embarrass the government?[102]

In the modern state, this is where Thomas Hobbes' view of consent leads, and it seems a stronger argument for the alternative view.

A consent theory of a public right to know is based on an idea of consent as conceived by John Locke.[103] If the government must have popular consent for its operations, then the people are entitled to know what the government is

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doing and what it plans to do.

Theoretical Underpinnings

There is no more aptly titled document in our political history than the Declaration of Independence. It is exactly what it says it is, a declaration that the sovereignty of the British Crown over the American colonies is forever-ruptured and the new, autonomous states have emerged. But, is it more than that? Is it "constitutional;" i.e., part of our fundamental law? Does it mandate self-government for the United States of America?

Recent "conservative" and revisionist commentary on the document might lead us to believe that the Declaration was little more than public notice of the revolution.[104] Martin Diamond described the Declaration as a "source of the feelings and sentiments of Americans and of the spirit of liberty in which their institutions were conceived. . . (but) devoid of guidance as to what those institutions should be."[105] He declares that the Declaration is silent with regard to how government must secure to people their "unalienable rights." Is this a legitimate demythification of a benighted attempt to rewrite our philosophy of self-government?

To be considered the authority for self-government through consent, the Declaration must have constitutional force and be more than a public notice. That this is the case is argued in Harry Haffa's How to Think about the American Revolution.[106] He points out that Article VI of the Contitution of 1787 shows that its drafters understood that the

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Union already was in existence; i.e., was constituted. ". . . if the Constitution did not cause the Union," Jaffa concludes "then the Union (that is the Union of the People of the United States) must have caused the Constitution."[107] If the Union was already in existence, what caused it, if not the Declaration of Independence?

> We, therefore, the Representatives of the United States of America, in General Congress Assembled, . . . solemnly publish and declare, that these United Colonies are, and of right ought to be, Free and Independent States . . .they have full Power to. . . do all. . . Acts and Things which Independent States may of right do. (Emphasis supplied.)[108]

Jaffa's logic is then: "If the Declaration gave birth to the Union which gave birth to the Constitution, it must itself have constitutional status."[109]

If we accept the Declaration as a part of our fundamental law, we may consult it for information regarding rights and principles of government.

The Presecriptive Declaration

Although the Declaration was not intended to be a governing document, its purpose makes it our basic statement of political thoery. It was prepared to argue a sound legal case for legitimate revolution. It argues that independence is a justified price for unanswered grievances, which strongly echoes John Locke's Second Treatise.[110] It argues that government without the consent of the governed neither legitimate nor constitutional. In holding that governments derive their just powers from the consent of the governed, the docu-

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ment offers a consent theory of self-government.

But is it a "Lockian" consent required for the continuing operations of government, or a "Hobbesian" consent required only for the creation of a Leviathan? Martin Diamond supports the latter, saying:

> . . . the Declaration does not say that consent is the means by which government is to be operated; rather, consent is necessary only to initiate the government, that is, to establish it.[111]

Is the Declaration really neutral, or does it prescribe self-government?

Harry Jaffa points to the use of consent in three places in the Declaration.[112] While its first use has to do with the establishment of government, the second and third times the term appears it is clearly in connection with the operation of government: "(the King) has kept among us, in times of peace, standing armies without the consent of our legislature," and ". . .imposing taxes on us without our consent."

Jaffa observes:

> The peculiarity emphatic consent required for taxes, is then a peculiarly emphatic requirement for consent for all the operations of government for which taxes are necessary. For all practical purposes, this means all the operations of government.[113]

In Federalist number 84, Hamilton states that the Declaration of Independence was, "no part of a declaration of rights;"[114] but in the same essay affirm that the people are soveriegn from the "ordain and establish" statement in the Preamble to the Constitution, which paragraph he terms

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"a recognition of popular rights."[115] Alexander Meiklejohn sifts the Constitution, and, from the First and Tenth Amendments, the Preamble, the provision for elected representatives, builds the case that representative democracy was the form self-government intended by the drafters.[116]

To pursue, further a "jig-saw puzzle" approach to discovering the "correct" political theory of consent would do little to advance a theory of a public right to know. There was no single Grand Design in the minds of the framers; only an agreed idea that Americans govern themselves and protect their own liberties. Thus, consent of some kind enters into the fundamental law and the intentions behind it. To the degree that the people are allowed to consent, they are entitled by right to the information necessary to make an intelligent consent.

Self-government Theory

Frederick Schauer, believes that consent is probably not fundamental law, but that it is fundamental to law. Although it may be perceived as law, it is an extra-legal concept. Consent is a principle of our form of government, and further it is to the operation, not just the establishment, of government.

Some right to know may attach to consent, but in part it depends on the nature of consent and how it is given. Day to day consent is not only impractical but it jeopardizes the necessary stability of government. But, on the other hand, consent surely must be expressed more often than at

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election time. Consent is reasonably required to a politically balanced extent that will provide both stability and democracy. The element of trust them becomes relevant. The people give up day to day consent for the stability required in government, based on trust in the actions of government. Therefore, the people have a right to know what they need to know to revalidate their trust from time to time.[117] "Time to time," he notes, is a political and not a legal question.

This same public right to know can be supported by a differently expressed arugment from his recent work on the free speech principle.[118] In his "argument from democracy" (for the free speech principle) Schauer affirms that "open debate and public deliberation (are) indispensable features of any society premised on the principle of self-government."

From this premise, he concludes:

> The arguemnt from democracy is composed of two critical elements that support a principle of free speech. The first is the necessity of making all relevant information available to the sovereign electorates so that they, in the exercise of their soveriegn powers, can decide which proposals to accept and which proposals to reject. Because the people are the ones who make the decisions, the people are the ones who need to receive all material information before making any decision.[119]

This paradigm, influenced by the Alexander Meiklejohn town meeting analogy, likewise subsumes some principle by which "material information" is extracted from government custody so that it may be disseminated through the free

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speech principle. The right to know is a right of a listener, and as Schauer points out,"Indeed, the emphasis on the rights of the listener rather than on the rights of the speaker is one of the most important contributions of the argument from democracy."[120]

This review demonstrates that a public right to know, argued from self-government, may be expressed two ways. The argument from consent suggests a more passive role for the public; informed, but yielding to government through representation. Schauer's argument from democracy, suggests an active role for the public in voting, influencing others and dissenting. Thus, it serves to broaden the theory of a right to know springing directly from the public need for government information relevant to the American political processes. The self-government theory of a right to know is attractive for its economy. It requires only a one-step inference.

Legal Affirmations of the Public Right to Know

The Didactic Function of the Law

A central purpose of law is its didactic function; that is, its moral instructiveness regarding the value of society. Legal scholarship suggests that statutory law, based on investigation and deliberation, represents a truly democratic and accurate expression of the general will.[121] The common law, with its step by step development reflects

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the basic customs and usages of the community.[122] Therefore, we turn to the legal rights of access to government information, not so much to learn the status quo of public information policies, but rather for a deeper, non-theoretical measure of the social foundations of a public right to know.

The Federal Freedom of Information Act

The Freedom of Information Act established a disclosure policy for information in the custody of the executive branch of the federal government.[123] It authorized public access to government records and provides for administrative and judicial appeal of decisions to withhold them. The act requires that certain information be made available by publication or through inspection and it also mandates that all otherwise unreleased government records be made available on request to "any person." It permits government withholding of information in nine designated categories, upon justification by the government custodian.

The FOIA was enacted in 1965 after 11 years of congressional hearings and study. It amended and reversed the effect the "Public Information" section of the Administrative Procedures Act of 1946, which had been intended to reduce secrecy by encouraging discretionary release of records to the public.[124] The federal bureaucracy had seized on the discretionary authority as a basis for refusing virtually all requests for federal records. Even after the FOIA went into effect in 1966, the compliance of most executive agen-

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cies fell far short of congressional expectations. After extensive hearings in 1972 and 1937, Congress charged the bureaucracy with "foot-dragging" in the act's implementation. In 1974, Congress enacted amendments to facilitate requests for records and to provide sanctions against official non-compliance.[125]

The 1974 amendments, which were passed over President Ford's veto, are a case study in legislative persistence to overcome bureaucratic intransigence. After an eleven year effort to produce the FOIA and six more years of bureaucratic non-compliance, Congress produced effectuating amendments that blocked most loopholes.

It redefined the term "agency" to bring almost all executive entities under the law; it imposed time limits on agency responses to requests, and limtis on the formerly high reproduction fees for records; it allowed requestors to use non-technical terms in identifying wanted records; it expedited consideration by federal courts of appeals; and finally it awarded fees and court costs to plaintiffs who were even partly successful in litigating official withholding of requested records. The FOIA as it stands today is a monument to the determination of the public, through its Congress, over nearly two decades of efforts, to establish an effective right to know what is in government records.[126]

As keystone of contemporary "open government" legislation, the amended FOIA was the first of several statutes to closely interrelated that the legislative history and

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case law of one affects the interpretation of another. They are mostly further amendments to the FOIA section of the U.S. Code:

The Federal Advisory Committee Act of 1972 opens executive branch advisory committee meetings to the public.[127]

The Privacy Act of 1974 contains special provisions for access to government records pertaining to the requester.[128]

The Government in the Sunshine Act of 1976 provides that every meeting of an agency headed by more than one person who is appointed by the President (with the advice and consent of the Senate) be open to public observation.[129]

The Presidential Records Act of 1978 establishes public ownership of records created by President and their staffs, and it provides for public access to these records at the end of a President's administration.[130]

In a June 1967 policy memorandum, Attorney General Ramsey Clark sent a clear message to the bureaucracy regarding the intent of the original FOIA: ". . . the people must know in detail the activities of government," he declared, "Self-government. . . is meaningful only with an informed public." He went on to lay down five principles for implementing the revitalized FOIA:

That there be a change in government policy and attitudes; That disclosure be the general rule, not the exception; That the burden be on the government to justify withholding; That individuals improperly denied access, have rights to effective appeal and injunctive relief in the

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courts; and, That all individuals have equal rights of access.[131]

However, not until the 1974 amendments was the law successful in changing the behavior of a large protion of the federal bureaucracy with regard to public disclosure. A General Accounting Office report four years later described "more positive" attitudes toward the FOIA and a belief of many officials that the act had actually improved the quality of government because of public scrutiny.[132]

Although news media representatives account for only a small proportion of requests under the act, many government agencies appear to have become more responsive to reporters' inquiries because of the act's existence.[133]

The act has been most energetically opposed by the certain law enforcement, intelligence, investigative and defense elements of the executive branch.[134] Many exceptions to the act have been passed through Congress riding on enabling legislation, some of it not coming before the FOIA oversight committees. For example, after losing its final appeal in the courts, the IRS faced disclosure of its criterion for the selection of tax returns for audit. With the help of friends in Congress, the IRS added to the Tax Incentive Act of 1981 a short provision placing such information under one of the exemptions of the FOIA.[135]

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Common Law and State Law

Common Law

There has always been a generally recognized, but limited, common law right to inspect the records in the custody of state governments.[136] Although today it has almost entirely been codified, and in most cases broadened, by statute, it is still important. Some state open records laws are written so broadly that the courts must turn to common law definitions for guidance. In some states, individuals may still use the common law. The surviving common law inspection rights are all quite narrow, technical, and vary considerably by jurisdiction.[137]

Since colonial times, there has been a primary rule that there is no common law right in all persons to inspect public records, except regarding expenditure of public revenue.[138] Furthermore, there has been no common law right in classes of individuals such as taxpayer, elector, citizen or inhabitant.

Typical rules granting access to public records require such criteria as a "proper" purpose, a "legitimate" interest, and disclosure that is not detrimental to the public interest.[139] For example, any person with an interest in defending or maintaining a legal action has a right to inspect records which contain relevant information.[140]

State Statutes

By 1979, every state had enacted legislation of some kind providing a public right to inspect public records.

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There are mainly "general inspection laws," following the pattern of the federal FOIA, but a few states have enacted a series of laws, each affecting a certain type of record.[141] These statutes generally broaden common law rights of access, but on the other hand limit disclosure with specific exceptions.

The first such state law was Florida's 1915 statute which grants "any citizen" examination of all state,county and municipal records.[142] It also provides for removal or impeachement of officials who do not comply with the law, and their punishment for a misdemeanor.[143]

Most state statutes are considerably less sweeping than Florida's. Certain classes of records may not come under the law and in some states, there is no unquestioned right of access in any individaul. A few states attach the matter of interest to a class of authorized individuals, such as elector, taxpayer, resident, etc.[144] Most state laws now provide for appeal of a decision to withhold access and also provide some form of sanction against an official who improperly denies access. In fifteen states, improper denial is a criminal offense.[146]

A measure of the popular support for public access to government records can be seen in the growth of state legislation. In 1953, only 23 states had open records laws. After the federal FOIA was amended in 1974, most other states rushed to pass them. In 1975, forty-five states had such laws. By 1977, all but two states had them, and today all

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have.[146]

Two Common Law Traditions

In addition to the selective common law rights to inspect public records, there are two traditions representing roots of a right to know. One, sometimes called the "principle of publicity," is the right of public trial and court records. The other is the "principle of notice," which refers to an individual's right to be alerted to activities that affect his interests. Neither right is absolute, however both have been affirmed by judicial decisions and legislative enactments.

The Principle of Publicity

The fundamental idea of open court proceedings originated in the early history of England. To the accused, the presence of the public at a common law trial was insurance against abuse and injustice. Comparing the common law with inquisitorial trials, Leonard Levy observes:

> Torture thrived in dark and secret places, but could not survive a public trial before a jury. Secrecy having infected the entire inquisitorial process, brutilized its judges. They cited, arrested, accused, imprisoned, collected evidence, examined, prosecurted, tortured, convicted, and punished--all in secrecy. Only the final sentence was publicized. By contrast publicity bathed the English common-law procedure, at least through the mid-sixteenth century.[137]

The Supreme Court has consistently affirmed the common law principle of open trial. In 1947, Justice William Douglas wrote: "The trial is a public event. What transpires in the court room is public property."[148] In a more

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recent case the Court traced the historical origins of the principle to pre-Norman England. In that case, the Court not only recognized a Sixth Amendment right of the accused, but First Amendment protection for public access. The Opinion of the Court noted:

> From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years.[149]

The public right of access to trials and court records is not absolute, however, and must yield to such interests as privacy, protection of minors and the preservation of a fair trail on certain occasions.[150] But the presumption is that the public will be present to see that the guilty are punished, the accused are fairly treated, and that high standards of justice are maintained. The people have a right to be present because they have a right to check on what their officials are doing.

The federal government has required the states to limit the public common law right of access to judicial records with statutes protecting the individual privacy. A typical law is the Massachusetts Criminal Offender Record Information Act which allows public access only to chronological records and not their alphabetical index. The rationale is that legitimate public interest is highest in recent, easily located cases, but after termination of court

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proceedings the interest in individual privacy weighs more heavily.[151] Although there is still a presumption of public access, other laws typically limit examination of adoption records, obsolete files, probation files, juvenile records, and first offender obsolete files, in that such material might cause unwarranted stigma or impede rehabilitation.

The Principle of Notice

This principle is widely manifest in administrative law and in the administration of justice. It is also an important component of open government laws, and has recently been imposed on private sector institutions where citizen interests are clearly at stake.

This is a matter that touches the public desire for fairness in so fundamental a way that most common law holdings have been legislated into procedural law. Civil litigation may not be initiated except adequate notice is served on the defendants. Property may not be liquidated under civil judgments except after adequate notice to owners. Tax law requires property owners to be notified of increases in their assessments.[152] Laws pertaining to criminal procedures require that the accused be notified of his or her rights, such as those to remain silent and to have legal counsel.[153]

Federal administrative law has built upon the principle. The Administrative Procedures Act of 1949 requires that published notice of proposed federal rule-making appear in the Federal Register allowing opportunity for public com-

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ment.[154] The Supreme Court has affirmed it as an element of due process in administrative law.[155] Notice is one of the modes of disclosure required by the Freedom of Information Act. That law also provides that unless a matter required to be published in the Federal Register is actually published, no person may be adversely affected by it or required to know of it.[157]

The Federal Advisory Committee Act of 1972 requires timely notice of advisory committee meetings be published to insure that all interested parties are alerted.[158] The Government in the Sunshine Act of 1976 required that the time, place and subject matter of certain agency meetings be made public at least a week in advance in the Federal Register.[159] The Privacy Act of 1974 contains extensive public and individual notice requirements.[160] Individuals requested to provide information to executive branch agencies must be informed of its intended use, the authority for its collection and the consequences of not submitting it. The Privacy Act also requires agencies to make public considerable information concerning each of its systems of records including how individuals may determine if they are subjects, how they may see their files and how they may contest information in them.[161]

So fundamental is the tradition of fair notice, that the government also requires private corporations to inform the public concerning such matters as the effects of tobacco, the nutritional content of food, the fuel consumption of auto-

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mobiles, the presence of food additives, the adverse effects of drugs, and the true effective interest rates on loans and credit.

The right to notification of matters that directly affect an individual's interest is a basic form of the right to know in our society.

Summary

The review of tradition, practice and theoretical argument in this chapter strongly suggests that the idea of a right to be informed of matters affecting the public, particularly political matters, is fundamental to our form of society. It seems axiomatic that an open society requires an open government

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CHAPTER I

FOOTNOTES

[1]James Madison, letter to W. T. Barry, August 4, 1822, Gaillard Hunt, ed., The Writings of James Madison, vol. IX (New York: G. P. Putnam's Sons, 1910), p. 103.

[2]E.g., Harold L. Cross, The People's Right to Know, (New York: Columbia University Press, 1953) pp. 199-201.

[3]The only court process ever enforced on a sitting president was Judge John Sirica's subpoena for tape recordings, material to a criminal trial of high government officials, in the custody of the Presdient.

[4]Cross. Right to Know, pp. 198-202.

[5]Interview with Jerome J. Hanus, College of Public Affairs, The American University, August 1977.

[6]Herbert Bruckner, Freedom of Information (New York: MacMillan Co., 1949).

[7]Harry J. Krould, Freedom of Information: A Selective Report of Recent Writing, (Washington, D.C.: Congressional Research Service, 1949).

[8]Helen F. Conover, Freedom of Information: A Revised Supplementary Survey of Recent Writing (Washington, D.C.: Congressional Research Service, 1952), p. 5.

[9]See, Bruckner, Information, chapt. XIX, passim; and pp. 276-77. Bruckner's is perhaps the most idealistic definition of "freedom of information," including "the crusade for free world news. . . freedom from government . . .freedom from any attachment, direct or indirect, to any class, political party, economic group, or other faction of society." p. 276.

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[11]Cross, Right to Know, p. xv.

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[13]J. R. Wiggins, "The Role of the Press in Safeguarding the People's Right to Know Government Business," Marquette Law Review 40 (1956): 74.

[14]Walter Cronkite, The Washington Journalism Center Third Annual Frank E. Gannett Lecture, Washington, D.C., December 9, 1980.

[15]Bruckner, Freedom of Information, p. 49.

[16]Ibid., p. 276.

[17]Cross, Right to Know, p. xv.

[18]Ibid., p. 197.

[19]Ibid., p. 6, pp. 200-01.

[20]Ibid., p. xvi.

[21]Wallace Parks, "The Open Government Principle: Applying the Right to Know under the Constitution," George Washington Law Review 26 (1975): 1, and n. 1.

[22]5 U.S.C. sec. 522.

[23]H. R. Rep. 92-1419, 92d Cong., 2d sess. 1 (1972).

[24]U. S. President, Proclamation, Federal Register 37, No. 48, 10 March 1971, 5209.

[25]Freedom of Information Act, 1974 Amendments (P.L. 93-502), 5 U.S.C. 522. (1974).

[26]Writings of James Madison 6 (1906): 398, cited by Hennings, "The Peoples Right to Know," n. 19.

[27]Note, "Access to Official Information: A Neglected Constitutional Right," Indiana Law Journal 27 (1951-52): 209.

[28]Ibid., 212.

[29]Ibid., 213.

[30]Leon R. Yankwich, "Legal Implications of, and Barriers to, the Right to Know," Marquette Law Review 40 (1956): 3, 6.

[31]Parks, "Applying the Right to Know," pp. 6-9.

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[32]Ibid., p. 12.

[33]Ibid., p. 7.

[34]Thomas J. Hennings, "The People's Right to Know," American Bar Association Journal, 45 (1959): 667-669.

[35]J. R. Wiggans, "Government Operations and the Public's Right to Know," Federal Bar Journal 19 (1959): 71, 72.

[36]Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People, (New York: Oxford University Press, 1965), pp. 24-27.

[37]Meiklejohn, "The First Amendment is an Absolute," The Supreme Court Review (1961): 257.

[38]Ibid., 254.

[39]Thomas I. Emerson, "Legal Foundations of the Right to Know," Washington University Law Quarterly, 1976: 1.

[40]Emerson, Toward a General Theory of the First Amendment (New York: Random House, 1966), pp. 3-12.

[41]Emerson, "Legal Foundations," pp. 4-5.

[42]Ibid., p. 5, and pp. 6-20, passim.

[43]Ibid., p. 16.

[44]Ibid., p. 18.

[45]Ibid.

[46]Jerome J. Hanus and Harold C. Relyea, "A Policy Assessment of the Privacy Act of 1974," American University Law Review 25 (1976): 559-561.

[47]Ibid., 561.

[48]David M. Ivester, "The Constitutional Right to Know," Hastings Constitutional Law Quarterly 4 (W 1977): 109-163.

[49]Ibid., 112-114.

[50]Ibid., 115.

[51]Ibid., 116, 152.

[52]Ibid., 117-18.

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[53]Ibid., 118.

[54]Ibid., n. 4.

[55]Parks, "Applying the Right to Know," p. 7, in Ivester, n. 41.

[56]Ibid., p. 7, Ivester, n. 42.

[57]Ivester, "The Constitutional Right to Know," p. 117.

[58]T. Macaulay, The History of England 347 (1850-1861), cited in Ivester, n. 40.

[59]Ibid., p. 109.

[60]Vincent Blasi, "The Checking Value in First Amendment Theory," American Bar Foundation Research Journal 1977: 3.

[61]Ibid., p. 538.

[62]Ibid., p. 539.

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[64]Alexander Meiklejohn, "What does the First Amendment Mean?" University of Chicago Law Review 20 (1952-3): 538-41.

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[68]Alexander Hamilton, "Federalist No. 84," The Federalist Papers: Hamilton, Madison, Jay, Clinton Rossiter, ed. (New York: The New American Library, 1961), p. 514.

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[71]Letter to James Madison from Paris, December 20, 1787, 11 The Papers of Thomas Jefferson, Julian Boyd, ed., (Princeton, 1950-58), p. .

[72]Sofaer, "Framers," pp. 5-6.

[73]Ibid., p. 6.

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[76]Ibid., p. 15.

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[80]Ibid., p. 517.

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[83]Rossiter, ed., Federalist, p. 322.

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[86]J. Elliot, ed. Debates in the Several State Conventions on the Adoption of the Federal Constitution, vol. 4, (1901), p. 170. cited in Ivester p. 131.

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[112]Jaffa, The American Revolution, p. 123.

[113]Ibid.

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[118]Frederick Schauer, Free Speech: A Philosophical Enquiry (Cambridge/New York: Cambridge University Press, 1982).

[119]Ibid., p. 38.

[120]Ibid., p. 42.

[121]Otto J. Hetzel, Legislative Law and Practice, (New York: The Bobbs-Merril Co., Inc., Publishers, 1980), p. 135.

[122]Ibid., p. 6.

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[129]5 U.S.C. 552b.

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[131]U.S., Attorney General, Memorandum on the Public Information Section of the Administrative Procedure Act, U.S. Department of Justice, June 1967, pp. iii-iv., cited in H.R. Rep. No. 92-1419, pp. 5-6.

[132]U.S. Comptroller General, General Accounting Office Report, Government Field Offices Should Better Implement the FOIA, July 25, 1978, pp. 6-7.

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[134]Center for National Secuirty Studies, "The CIA and the Freedom of Information Act: A Report on the Proposals for an Exemption," Report No. 106, (Washington: Center for National Security Studies, 1980).

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[136]Cross, Right to Know, pp. 55-56.

[137]"Government Information and the Rights of Citizens," Michigan Law Review 73 (1973): 1164.

[138]David S. Cohen, "The Public's Right of Access to Government Information under the First Amendment," Chicago-Kent Law Review 51 (1974): 184.

[139]Cross, p. 55, n. 47.

[140]Ibid., ch. V, n. 53, n. 54.

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[147]Levy, _Origins_, p. 34.

[148]Craif v. Harney, 331 U.S. 367, (1947).

[149]Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555 (1980).

[150]Nixon v. Warner Communications, 435 U.S. 589 (1978), 597-99.

[151]Daniel P. Jaffe, "Media Access to Criminal Justice Records in the Courts: A View from Massachusetts," _Proceedings: News Media Access to Criminal Justice Information_, (Sacramento, California: SEARCH Group Inc., 1980) pp. 27-31.

[152]See Emmette S. Redford, _Democracy in the Administrative State_ (New York: Oxford University Press, 1969), pp. 136-37.

[153]Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966).

[154]60 Stat. 237 (1946) sec. 4(a).

[155]Londoner v. Denver, 210 U.S. 373, (1908).

[156]5 U.S.C. sec. 552(a)(1)(A) through (E).

[157]5 U.S.C., sec 553(a)(2),(3), and (4)(A).

[158]5 U.S.C. App. I, sec. 10(a)(2).

[159]5 U.S.C. sec, 552b(e)(1).

[160]5 U.S.C. 552a.

[161]5 U.S.C. 552a(e)(4).

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CHAPTER III

THE SUPREME COURT AND THE CONSTITUTIONAL RIGHT TO KNOW

> The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act
>
> Associate Justice Potter Stewart 1974[1]

> Neither the First nor the Fournteenth Amendment mandates a right of access to government information or sources of information within the government's control.
>
> Chief Justice Warren Burger, 1978[2]

> Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.
>
> Associate Justice John Stevens, 1980[3]

Introduction

As both a practical and a legal matter, a constitutionality protected, general right to know depends upon its recognition by the Supreme Court. While it has been cautious in their identification, the Court has clearly acknowledged certain unarticulated rights, implicit in the enumerated guarantees and "indespensable to the enjoyment of rights explicitly defined."[4]

The court has found rights of travel and association implied by the First Amendment. Rights to privacy, the pre-

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sumption of innocence, and the "reasonable doubt" test of legal guilt are implied by other explicit guarantees. Other rights derive from the structure of the Constitution and of democratic government. For example, the right of suffrage was held to be implied both by "the very nature of a free and democratic society" and by its role in preserving "other civil and political rights."[5] Thus, there would be nothing precedent-shattering in the recognition by the Supreme Court of a previously unarticulated public right to know based either on a First Amendment or a structural theory.

It is likely, however, that the question of a right to access government information will remain hypothetical for a long time. It is improbable that the present Court would accept or consider so broad and controversial a question in a single case. Furthermore, it is hard to conceive of a justiciable question that would evoke a nominal ruling on such a comprehensive right. The Court prefers to address narrow questions and to expand constitutional rights piecemeal. On the other hand, on rare occasions the Court has declared a summary change in constitutional interpretation, giving birth to a general political or civil right "whose time had come." It is unlikely, however, that the present Court is near such an understanding.

In Chapter II, the public right to know was discussed as a unitary concept; a right of access to government information and records. The consideration of Supreme Court decisions is clearer in terms of the components of such a

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right. A right to information encompasses rights to gather information (such as access to government records), rights to disseminate information (such as speech and press), and further rights to receive information (such as reading, viewing and listening).

As the focus has shifted in recent years to the question of acquiring information, and particularly of access to government information, the Supreme Court has proven reluctant to provide anything like the protection it has formerly bestowed on the right to publish.

In recent cases involving press attempts to access government facilities and activities, the Court has gone from an adamantly negative stance to a qualified recognition of constitutional protection. One reason for the Courts lack of enthusiasm for public "right to know" cases is undoubtedly the complex access questions that arise. Furthermore, a present way out of the public interest issue is the statutory access right, discussed in the following chapter. The decisions affirming a partial right of access under First Amendment protection are inchoate partly because no more than three justices have concurred in any one clear opinion.[6]

The Right to Receive Information

The right to receive information and opinion is probably the best protected component of the public right to know. Few restrictions exist in current case law, particularly for a willing reader, viewer or listener.

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In 1965, the Supreme Court unanimously declared in Lamont v. Post-Master General that members of the public have a right to receive foreign political material, even if it is "communist propaganda," without the obligation to inform the government that they are receiving it.[7]

In 1969, a unanimous Court held that "it is now well established that the Constitution protects the right to receive information and ideas," in Stanley v. Georgia.[8] And, later that year, in Red Lion Broadcasting Co. v. FCC, the Court further declared that "it is the rights of viewers and listeners, not the right of broadcasters, which is paramount."[9]

The only times the Court has not deferred to the claim of a right to receive information has been when it was raised as a peripheral issue, as in Kleindienst v. Mandel in 1972.[10] In that case the authority of the United States to deny a visa to a foreign citizen it deemed "undesirable" was upheld. The Court disagreed that if a foreigner were denied entrance to the United States, it would interfere with the First Amendment rights of citizens to hear what he had to say.[11]

Although the focus of this discussion is political speech, a comment on recent developments in commercial speech doctrine is appropriate. Since 1977, in cases upoholding the rights of lawyers and pharmacists to advertise service and price information, the Court for the first time has held that "commercial speech" is not without First Amendment

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protection, attaching its reasoning to the public's right to receive information.[12]

The Right to Publish

The means of disseminating information has changed considerably since James Madison penned freedoms of speech and of the press into the First Amendment. For example, the Court has had to consider whether media such as radio and television are included in the concept of publication.[13] It is instructive that in a case limiting the right of broadcasters to present obscene material, FCC v. Pacifica Foundation (1978), the Court's opinion warned, "If there were any reason to believe the Commission's characterization of . . . the (material) as offensive could be traced to its political content. . .First Amendment protection might be required."[14] This illustrates a hallmark of Supreme Court publishing decisions, the firm protection it has afforded the expression of political material and opinions.

Until recently, the Court has generally followed the reasoning of Alexander Meiklejohn that the central purpose of the First Amendment is to guarantee a sovereign citizenry the information it needs to govern.[15] When the case has involved political matters, it has come very close to affording absolute protection to publishing and distributing, and it has drawn a much firmer line against prior restraint than against subsequent penalty. It has also afforded political material much greater protection than commercial speech, advertising and pornography. Justice Potter Stewart char-

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acterized the political purpose of the First Amendment in his observation that, "The publishing business. . . is the only organized private business given explicit constitutional protection (in order to create) a fourth institution outside the Government as an additional check on the three official branches."[16]

The following cases will illustrate both the affirmation and the abridgement of this doctrine by the Court.

Prior Restraint

Near v. Minnesota (1931)[17]

Prior restraint upon publication has traditionally been an anathama to Americans. The doctrine protecting unfettered publication was clearly expressed in Near v. Minnesota, in which the Supreme Court overturned a state law authorizing injunctive action against publishing "scandalous, malicious, defamatory or obscene material."[18] The Court condemned that law as censorship, declaring that freedom of the press means "principally, although not exclusively, immunity from previous restraint or censorship."[19]

Neither this, nor any other Court decision has ruled out prior restraint absolutely; however the conditions hypothesized by Chief Justice Hughes in Near would hardly constitute a threat to free political communication in peacetime. Hughes suggested that vital military information, obscene publication and incitement to violence might in some cases be forbidden.[20]

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This case illustrated the impartiality of the Constitution. The Saturday Press, a newsheet published by Near and enjoined under the Minnesota law, was by any standard a sensationalistic, bigotted, and reckless scandal sheet.[21] Nevertheless, Near was afforded the protection of the Court, if not much in the way of its sympathy. The Court in effect ruled that matters such as libel and nuisance are of inferior importance to free political expression, however benighted it may seem. As the Court stated in a more recent case, ". . . a free society prefers to punish the few who abuse the rights of free speech after they break the law than to throttle them and all others beforehand."[22]

Organization for a Better Austin v. Keefe (1971)[23]

In this case, the Court overturned the restraint of a leaflet which had been characterized an "intimidatory" and invasive of privacy. In its opinion the Court reaffirmed its docrine that there is a heavy constitutional presumption against prior restraint, and declared that justifying such restraint required a "heavy burden" of proof.

The Pentagon Papers Case

The definitive Supreme Court condemnation of prior restraint involving politically important information comes from the Pentagon Papers case; i.e., The New York Times v. United States, and United States v. The Washington Post Company (1971).[24] It not only evoked the strongest statement to date concerning the presumption against prior re-

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straint, but the circumstances of the case were important to the preferred status of political information. The case involved the publication of classified national security information. The case involved the publication of classified national security information, a commodity previously held to be most protected from publication, and further, it demonstrated a clear connection between the publication and the public's right to know the political truth about its government.

Daniel Ellsburg, a former employee of the Defense Department, gave the newspapers a collection of documents, stamped "top secret," which candidly reviewed this country's progressive involvement in the Vietnam war. The government sought injunctions to prevent publication, and the Supreme Court granted certiorari to appeals from both sides.

In a succinct six to three per curium decision, the Court declined to restrain publication of the Pentagon Papers. It said:

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government 'thus carries a heavy burden of showing justification for the enforcement of such a restraint.' The District Court(s). . .held that the Government had not met that burden. We agree.[25]

The judgement is followed by nine separate opinions. Among the six concurring opinions of Justices Black, Douglas, Brennan, Stewart, White and Marshall were generally two common elements. One was an objection to an attempt to exercise prevsious restraint by the executive branch, with no

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no supporting legislative authorization by Congress. The other was that the harm of publication alleged by the Government was too vague to fit into the "exceptional" category posited in Near v. Minnesota.[26] It must be note that the accord among the concurring justices was on the matter of unrestrained publishing. Several reserved their judgment as to whether the newspapers might not be found guilty of an offense after having published the documents, and two of them actually seemed to encourage criminal prosecution.

The strongest statement of a constitutional theory behind the doctrine was Justice Black's, joined by Justice Douglas:

> In the First Amendment the Founding Fathers gave the free press teh protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in Government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.[27]

This theory was expressed with some color and feeling by Judge Murry Gurfein in earlier Federal District Court opinion on the New York Times case:

> A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authroity in order to preserve the even greater values of freedom of expression and the right of the people to know (Emphasis supplied.)[28]

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In the mid-1967, Secretary of Defense Robert McNamara directed that a major study be conducted that would illuminate how and why the United States had become so deeply involved in Vietnam.[29] Titled, History of U.S. Decision-Making Process on Vietnam Policy, it consisted of 47 volumes. In effect, it is an archive that presented "the first good look since the end of World War II at the inner workings of the machinery of the Executive Branch.[30]

The papers showed that our intelligence agencies had repeatedly warned decision makers that their goals were unattainable. The military had early and often warned against involvement in the defense of South Vietnam. Presidents had adopted recommended programs in ineffective piecemeal form. Perhaps the worst revelation was that deception had become an official policy; high officials had not only concealed their real intentions from the press and Congress, but also from the concerned executive branch agencies. Moreover, it was revealed that this country had covertly violated the Geneva Accords of 1954 and made secret commitments to other nations outside the constitutional treaty making process.

There can be no doubt that the Pentagon Papers' effect on public opinion and Congress acclerated government measures to withdraw from Vietnam and to end the national division over the issue. In this respect it clearly illustrates the importance of the public's right to know.

The only verification of political facts about our foreign policy, for example, is access to the records of

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government, not to government speech. If there is a greater significance to this case it is the underlying need for access.

Daniel Ellsberg risked his career and his personal liberty to set before the press and public facts to which only he and certain government officials had access. But, the appearance of an Ellsberg is not a reliable expectation of our political system. The current executive branch security program poses a greater threat to a "whistle-blower" than the penalties faced by him.

Subsequent Penalty

Although it could not frustrate the public right to know as much as official censorship, the threat of punishments and civil penalties subsequent to publication can certainly inhibit the flow of public information. However, the Supreme Court has been mindful of the chilling effect the threat of subsequent penalty could have on the purpose of the First Amendment, and has provided protection in the area of political speech.

New York Times v. Sullivan (1964)[31]

In this important case the Court provided further protection of the right to publish by significantly curtailing the basis on which a public official may win a libel suit against a newspaper. Sullivan, an elected official in the state of Alabama, sued the Times over a full page ad and won $500,000 under an Alabama law. On appeal, the Supreme

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Court of the United States reversed the Alabama courts, holding:

> . . . that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action.[32]

The Court ruled generally that criticism of official conduct is protected by the First Amendment, and in the opinion of the Court:

> . . . (libel must be considered) against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[33]

<u>Landmark Communications Inc., v. Virginia (1978)</u>[34]

In this case the Court unanimously refused to uphold the conviction of a Norfolk, Virginia newspaper publisher for accurately reporting on the investigation of a local judge by the Virginia Judicial Inquiry and Review Commission. The publisher had been fined $500 for violating a statute which prohibited divulging such information to anyone except the commission.[35] The Court refused to find sufficient the legislative assertion that "a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission." It held that a court must probe for itself the validity that a particular publication presents such a clear and present danger.

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> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . .Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.[36]

The Court cited cases that established as a working principle that the evil "must be extremely serious" and imminent before "utterances can be punished." "The danger must not be remote or even probable: it must immediately imperil."[37]

In summary the publication of politically relevant information in the print press seemed to be almost as protected from subsequent punishment as it is from prior restraint. However, the Court has never closed the door completely on a First Amendment limitation under extreme circumstances where publication might jeopardize a vital public interest in national security.

Political Heresy

A discussion of subsequent penalty must include a reveiw of cases concerned with political heresy because they contributed to the political interpretation of the First Amendment and they had a clearly negative implication with regard to the right of the listener. In many of these cases, not only was no consideration given to the public's right to know what the speaker had in mind, but the public was regarded as susceptible to the development of "bad tendencies" through listening to subversive advocacy and inflammatory speech.[38] But, later cases reversing the doctrine against

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subversive advocacy showed confidence in the public right to hear and discuss political ideas.

In Schenk v. United States (1919), the Court upheld the conviction of a man whose political speech presented "a clear and present danger" of causing "evils that Congress has a right to prevent."[39] In Abrams v. United States (1920) the next year, came Brandeis's influential dissent calling for protection of a marketplace of ideas in which truth will surely prevail over falsehood and error.[40]

In Whiteney v. California (1972), the Court upheld the conviction of a woman for attending a Communist meeting, allowing the threat to public order to outweigh the right to free discussion.[41] However, in DeJong v. Oregon (1937), the Court overturned the conviction of a man for presiding over a communist meeting, pointing to the political importance of public discussion and the will of the people.[42] In Whitney, it was observed, in a concurring opinion, that "no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Only an emergency can justify repression."[43]

Prosecution for political belief began again in the 1950, and in Dennis v. United States (1951) the Court upheld the constitutionality of the Smith Act.[44] However, it again turned to champion free political expression, and considerably defused such statutes, in Yates v. United States 1957.[45] Finally in Pennsylvania v. Nelson (1956) it overturned state

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criminal syndicalism laws.[46]

In these cases, when the Court came to protect free political expression, it was through turning from the presumed motives and lack of respectibility of the speaker to the rights of individuals to hear all political commentary and discuss it.

The Abridgement of the Right to Publish
The Case of Frank Snepp

As mentioned in the Preface, Frank W. Snepp, a former government employee cannot publish a criticism of national security policies without submitting it first for review by the CIA. In what must be seen as an abridgement of the clear line of doctrine discussed in the preceding pages, in the Snepp case,the Supreme Court emphatically affirmed the government's authority to enforce security agreements whish require present and former government personnel to obtain prepublication approval of their "nonofficial" writing.[47] The signed secrecy agreements, which a number of agencies now require as a condition of employment, are a life-time waiver of individual protections under the First Amendment. The one upheld by the Court contained the promise of a former CIA employee "not to publish any information or material relating to the agency, its activities or intelligence activities generally, either during or after the term of his employment, without specific prior approval of the agency."[48] The Court held that this was no ordinary contract, but that it established a "fiduciary relationship" with the CIA

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enforceable in the civil courts. The Court by implication, also upheld the CIA regulation that:

> Agency employees and former employees under the terms of their secrecy agreements must submit for review by the (CIA) Board all writings and scripts or outlines of oral presentations intended for nonofficial publication, including works of fiction, which make any mention of intelligence data or activities, of contain data which may be based upon information classified pursuant to law or Executive order. . . .The responsibility is upon the employee or former employee.[49]

Of course, this regulation was originally to fulfill the CIA Director's responsibility for "protecting intelligence sources and methods from unauthorized disclosure."[50] The requirement is designed to prevent unwitting as well as the intentional disclosure of classified information, and therefore requires the submission of complete manuscripts, not just portions believed by the author to be sensitive.

A restraint policy of such scope poses some important constitutional questions. The system controls the individual during and after employment, applies to unclassified as well as classified information, and authorizes prior restraint on publication of material of potential political importance. Based on the Court's decision, the President has started to extend this CIA rule to other agencies. What is to prevent the incumbent political leadership from eventually gagging <u>all</u> federal employees as a condition of obtaining and holding their jobs?

Probably the most important question is whether an employee of the government can waive his individual rights to be free from prior restraint without, at the same time,

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waiving the public right to know the information he might provide. Aren't there occasions when government officials have a duty to speak out on controversial matters and abuses within the administration? Government employees are potentially the best sources of information of legitimate political interest to the public.

Although Frank Snepp's was the first case to reach the Supreme Court, another man, Victor Marchetti, was the first to undergo a judicial prior restraint order under the regulation.

The Marchetti Case.[51]

A year after the Pentagon Papers case, Victor Marchetti, a former employee of the CIA attempted to publish a book about that agency with co-author John Marks.[52] In keeping with the employee secrecy agreement, he submitted his manuscript for agency review and approval. The CIA demanded deletion of 339 items and when Marchetti resolved to publish many of the deletions, the government sued to effect restraint of certain items.[53] An injuction was obtained and upheld on appeal to the Fourth United States Circuit Court. The U.S. Supreme Court denied Marchetti's petition for review, and so let stand prior restraint under the CIA regulation and secrecy agreement.[54]

Frank Snepp's Fiduciary Trust

Frank W. Snepp III worked for the CIA from 1968 until 1976. In 1978, he published a book titled Decent Interval

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which was highly critical of government policy and CIA actions in Vietnam, such as the alleged abandonment of agents upon U.S. withdrawal.[55] The book is a comment on a public issue of great political importance, Furthermore, the book contained no classified material, according to the stipulation of the government.[56]

Even though he promised the CIA Deputy Director he would do so, Snepp did not submit his manuscript for prepublication review.[57] Upon publication of Decent Interval, the government brought suit to declare him in violation of his agreement with the CIA, to impound his profits from the book in a constructive trust, and to enjoin him from further publishing on intelligence matters without submission of the writing for review and approval. The Court of Appeals upheld the injunction, but remanded the case for retrial and limited the confiscation of funds to "nominal damages." The Supreme Court restored the constructive trust for all proceeds from the book, holding that he had breached a fiduciary obligation[58] It also left the injunction requiring prepublication review in force, dismissing Snepp's First Amendment argument in a footnote.[59]

Inasmuch as Snepp did not break the law by publishing classified information, the Court's reasoning is important, if somewhat tortured:

> Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The government does not deny--as a general principle--Snepp's right to publish unclassified information. Nor does it contend--at this stage of the litigation--that

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> Snepp's book contains classified material. The government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. (Empahsis supplied.)[60]

Thus, by the Court's reasoning, Snepp was penalized not for the harm of divulging classified information, but for omitting an administrative step in the security system. The Court is holding that a fiduciary obligation, not to protect classified information, but to comply with procedure, is superior in force to the First Amendment. Did Snepp have no residual First Amendment rights to inform the public of unclassified information, beyond the internal regulations of his former employer? In a footnote on the second page of the opinion of the Court is this observation:

> . . . In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.
>
> When Snepp accepted employment with the CIA he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. . . .Snepp's agreement is an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protect intelligence sources and methods from unauthorized disclosure.' . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to effective . . .foreign intelligence. . . . The agreement that Snepp signed is a reasonable means of protect ing this vital interest. (Emphasis supplied.)[61]

Here, buried at the end of a long footnote, we find the reason that justifies the submission of unclassified material for pre-publication review: The appearance of con-

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fidentiality. It was aruged at the District Court that if the government appeared powerless to impose prior restraint on former intelligence employees, foreign governments would be discouraged from cooperating with our CIA for fear their secrets would not be protected. In fact, testimony of the Director of the CIA, that Snepp's book, and others, had made foreign intelligence services unsure of his agency's ability to maintain confidentiality, was introduced.[62]

The Court conceded that the public interest lies in "an accommodation that will preserve the intelligence mission. . . while not abridging the free flow of unclassified information.[63] That would seem to require a balancing of the CIA's vital interest in protecting certain information, the writer's right of free speech and press, and most important, the public's right to know what the writer wants to say. The "appearance" of confidentiality is pretty thin to offset the importance of the First Amendment on balance. Are we to believe that the government is capable of no other measures to reassure its potential sources of information than the abridgement of the First Amendment?

Implications of the Snepp Decision

This case raises a host of questions. The first is the Court's glaring failure to reconconcile its reasoning in Snepp with the earlier case of the New York Times v. The United States; Richmond Newspapers v. Virginia, which was then before the Court; or the line of doctrine forbidding prior restraint in earlier cases. The Court, in its hasty,

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per curium opinion, made no attempt to demonstrate that any of the established tests for prior restraint had been passed. See the following summary.

The Public Right to Know

Information that may be enjoined from publication under such agreements may by right be public information.[64] The importance of a "fiduciary trust" hardly seems in the tradition of the "heavy burden" doctrine that almost all justices have up to now applied to questions of prior restraint and subsequent penalty. The strong presumption that the public may freely have what the press can obtain has melted away in the face of an administrative agreement, concocted by the executive branch. It hardly seems reasonable that an employee of the government should be deemed competent to waive the public's right to know what he can tell about the conduct of its government. If the government can silence its most effective source of truthful information about government available.

The Separation of Powers

Congress has already staked out the area of protecting national security information with statutory regulation and criminal penalties. One statute, *The Atomic Energy Act*, authorizes the Attorney General to seek injunctions against disclosure of nuclear energy information.[66] There are at least nine other statutes punishing the unauthorized disclosure of national defense, intelligence, cryptological, diplo-

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SUMMARY OF SUPREME COURT STANDARDS FOR FREEDOM TO EXPRESS POLITICAL INFORMATION*

AFFIRMATION FROM
1919 Schenck v. United States
1927 Whitney v. California
1931 Near v. Minnesota
1963 Bantam Books v. Sullivan
1971 New York Times v. United States
1971 Organization for a Better Austic v. Keefe
1978 Landmark Communications v. Virginia
1959 Smith v. California

1. Freedom of the press means principally, although not exclusively, immunity from previous restraint or censorship
2. Government repression requires a clear and present danger of an evil Congress has a right to prevent.
3. Only an emergency can justify repression; the evil must be so imminent there is no opportunity for discussion.
4. Any prior restraint comes to the Supreme Court with a heavy presumption against its constitutional validity.
5. The government carries a heavy burden of showing justification for the enforcement of such a restraint.
6. To justify prior restraint, publication must immediately imperil the national interest with extremely serious damage; it must surely result in direct, immediate, and irreparable damage to our nation and its people.
7. Executive branch claims of a security classification cannot per se meet the heavy burden of justifying prior restraint.
8. Legislative branch authorization is required; but even a legislative finding cannot limit judicial inquiry to determine to what extent a substantive evil is likely.
9. Legal devices and doctrines which in most applications are consistent with the Constitution nevertheless cannot be applied in settings where they have the collateral effect of inhibiting freedom of expression.

ABRIDGEMENT FROM: 1980 Snepp v. United States

1. The executive branch may administratively impose lifetime prior restraint on employees to prevent possible exposure of security information and to preserve the appearance of confidentiality.
2. Publishers may be prosecuted for attempting to print such material not reviewed by the executive branch.

*Paraphrased or quoted from opinions.

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matic, aerospace and atomic energy information.[67] As discussed earlier in this chapter, the separation of power was addressed by a number of the concurring opinions in the New York Times v. United States. For example, Justice White said, "At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."[68]

The statute cited by the government as authority for Frank Snepp's waiver agreement requires the Director of the CIA to "protect intelligence sources and method from unauthorized disclosure," and is silent on injunction, prior restraint and punishment.[69]

Bad Policy?

The reasonableness of requiring new, and often inexperienced, employees of the government to waive their right forever to publish without prior restraint is also questionable. An employee does not know what he will find out about the conduct of the government at the time he signs the secrecy agreement. But, more important to the public's right to know, is that the agreement is a restraint on the citizen's right to criticize his government. Should the determination of what an individual may publish be placed in the hands of administrators of the executive branch rather than the legislative? In its Snepp decision, the Court has authorized a system by which administrators can effectively silence

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criticism of their own agencies. The discretionary authority to censor is naturally used by bureaucrats to discriminate against individuals critical of their administration.[70]

The current expansion of the Snepp doctrine hands to the government a means of throttling the whistle blower and honest critic as well as employees who commit security violations. The publishing restriction is being extended to a host of officials who access classified information, or who simply possess a security clearance.

The Threat to Publishers

The Snepp decision poses a broader threat than the restriction of an official's right to speak and publish. The reasoning could be applied against third parties receiving and preparing to publish information from an individual who had access to classified information. Indeed, the Justice Department had considered bringing its suit against Snepp's publisher as well as against Snepp himself, but thought better of the idea.[71] Further, the broadly worded Snepp opinion implies that anyone who seeks to publish without review exposes classified information to the risk of disclosure.[72]

The question of action against a publisher was raised on July 29, 1980 by the House of Representatives Subcommittee on Civil and Constitutional Rights during an oversight hearing on prepublication reveiw and secrecy agreements. Assistant Attorney General Alice Daniel assured the committee that

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the Justice Department had "never given any thought to an attempt to apply sanctions to a publisher. " She then added ominously that the assurances could change, and that civil procedure rules permit injunctions against all who "act in concert with the defendant."[73]

In December, 1980, Attorney General Civiletti issued guidelines containing the reassurance that he would seek injunctions only against individuals or organizations under "an expression obligation to submit materials or information for pre-dissemination review." Against a publisher, the Attorney General implied, the "heavy burden" standard of New York Times v. United States would have to be met.[74] The assurance quickly dissolved with the caveat that the Attorney General reserved the right to bring injunctive proceedings against "individuals or organizations that actively solicit persons subject to secrecy obligations."[75] Henry R. Kaufman, in his critique of the guidelines, points out that active solicitation could include a wide range of situations common to the arrangement of publication. Thus, he believes that there is no question that the government claims to legal power "to secure prior restraint against the press regarding classified information received from a government employee."[76]

The Snepp "doctrine" became administration policy in August 1981 when Attorney General William French Smith issued a policy statement revoking the "Civiletti guidelines." He stated the moderate policy was discarded "to avoid any confusion over whether the United States will evenhandedly

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and strenuously pursue any violations of confidentiality obligations."[77] The new "strenuous pursuit" policy has grown since. Lie detector tests have been given to administration officials to determine who "prematurely disclosed" information. A March 1983 executive order authorizes telephone logs, greater use of the polygraph to detect those who "leak" information, and "Snepp" type pre-publication review requirements affecting thousands of individuals.

The Right to Gather Information

> Without some protection for seeking out the news, freedom of the press could be eviscerated.
> Justice Byron White,
> Branzburg v. Hayes (1972)[78]

The rights to receive, speak and (prior to Snepp), publish have historically received much more protection from the Supreme Court than the gathering of information. This selectivity of protection appears inconsistent with the following early case.

Grossjean v. American Press (1936)[79]

This case involved the American Press Company's suit to enjoin enforcement of a Louisiana state licence tax on newspaper revenues. In its majority opinion, the Court published its first comprehensive interpretation of freedom of the press. The Court observed that the First Amendment's origins lay in the struggle agasint newspaper licensing and tax acts, which began in England as a struggle for access to information of government. In the words of the decision,

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"the purpose of the tax acts was to prevent or curtail the opportunity for the acquisition of knowledge by the people in respect to governmental affairs." And, "the aim of the struggle was. . . to establish and preserve the right of the English people to full information of their government. (Emphasis supplied.)"[80]

According to the Opinion of the Court, the First Amendment reflects the framers' committment to this right. By its dictum that "mere exemption from previous censorship" is too narrow an interpretation of the First Amendment, the decision suggests a broader right to know. The decision quotes Judge Cooley's test that "the evils to be prevented" included "any action of government (which) might prevent" free discussion of matters essential to the people's rights as citizens.[81] The Grossjean opinion would seem to extend protection to news-gathering in it's final affirmation that there is a ". . . natural right of members of an organized society, united for their common good, to impart and acquire information about their common interests."[82]

Zemel v. Rusk (1965)[83]

This case is frequently cited in later key access decisions, particularly the following paragraph:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does

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> not carry with it the unrestrained right to gather information.[84]

The right to gather information was at issue in Zemel only as it adhered to a right of travel. The plaintiff, a reporter, wanted to travel to Cuba but was prevented by a State Department ban due to the "missile crisis." He challenged the regulation on several grounds, among them that it infringed on his right to gather information on the effect ofour governmental policies. The Court upheld the travel ban in a divided decision, holding among other things that it "is an inhibition of action" and therefore outside the protection of the First Amendment."[85]

A careful reading of the above quotation reveals that it does not deny a right of access to information or places in the custody of the government. It denies only that there is an "unrestrained right" to gather information generally.

The executive had the clear and constitutional authority to prescribe public entry to places in the public interest: ammunition dumps, gold depositories, research laboratories, diplomatic and military conferences, and code rooms, to name but a few. The question of whether the public has a right to some information about such places is far more related to the intent of the First Amendment than whether individuals can go there physically. Access to information, particularly in print, is obviously the more practical and common means of forming political opinions, than access to places.

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A better hypothetical question would have been First Amendment protection of alternative means to the information of government policies. If not access to places, does not the public have a right to politically relevant information about the happenings at those places, absent constitutional authority to conceal such information? Surely the public had a right to some information concerning the effect of our Cuba policies.

Branzburg v. Hayes (1974)[86]

This was a landmark case which further circumscribed the right to gather information. And, like Zemel, it has often been cited in the access cases later.

In Branzburg, the Court declared, in a five to four decision, that reporters have no First Amendment right to refuse to name a confidential source, or otherwise refuse to testify, before a Grand Jury. While paying lip service to "some protection for seeking out the news," without which "freedom of the press could be eviscerated," Justice White, writing for the Court emphasized that newsmen's prerogatives do not exceed those of the public generally.[87] Since they cannot go where the public is excluded, at scenes of disaster for example, then they should have no special privileges when on the witness stand.

In declaring that newsmen have no rights to gather information beyond those of the public generally, the Court sought to avoid the difficulty of differentiating "legitimate" newsmen from other members of the public.[88] However,

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the words of the First Amendment give protection to "freedom of the press" not "freedom to publish." The special agency of the press appears to be an important distinction. A member of the public is much more likely to seek information of government in the news media than to go to governmental facilities, or the scenes of newsworthy events, personally to demand information. It is also obvious that several related actions are required for the functioning of a free press, as was pointed out by Justice Stewart in his dissent in this case:

> A corollary of the right to publish must be the right to gather news. . . No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. (Emphasis supplied.) [89]

Thomas I. Emerson has written that the Court's central error in Branzburg was to treat the case as one of a reporter's privileges "rather than one of the citizenry to obtain hard-to-get information of immense social importance."[90] The state trial court and the Supreme Court treated the matter as a weighing of the public interest in law enforcement against the reporter's individual interest in protecting his sources.[91] More in keeping with the publics rights would be a weighing the public's interest in law enforcement against the public's interest in knowing the truth about the nature and extent of crime in its community.

At this writing, the Court is apparently satisfied with the decision and its doctrine. It has consistently

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refused certiorari to several cases a year in which reporters have been compelled to identify sources of information in both criminal and civil proceedings.[92]

The Right of Access to Government Information

The Supreme Court has not yet had to consider, as the central question of any case, whether there is constitutional protection of a general public right of access to government information or activities. It has approached the question only recently in its decisions involving demands by reporters to visit certain correctional facilities and to attend certain closed judicial hearings.

In five key decisions between 1974 and 1982 the Court has addressed the question of public access to government through the agency of press access.

The Prison Cases

In three cases announced between 1974 and 1978, the Supreme Court overturned lower court support for reporters seeking access to prisons and their inmates. In upholding prison regulations and policies that restrict or deny access by news media and the public, the Court generalized vaguely that there are few if any rights to access information from government sources.

Pell v. Procunier (1974)[93] and, Saxbe v. The Washington Post Co. (1974)[94]

These two cases involved challenging by news media representatives to prison regulations that prohibit voluntary

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interviews between reporters and specifically designated inmates. Except that Saxbe involved federal prison regulations, and Pell those of California, the Court found that one was "constitutionally indistinguishable" from the other.[95]

In five to four decisions, the Supreme Court upheld prison regulations that prohibit interviews between reporters designated inmates, relying on Branzburg that the media "have no constitutional right of access beyond that afforded the general public."[96]

The majority opinions, written by Justice Potter Stewart, contain an important contradiction regarding the public interest in access to government facilities. One the one hand the opinions assure us that the First Amendment interest is served in that, aside from the prohibition of personal interviews, the regulations in question do allow substantial access by press and the public to prisons. The purpose of the regulations is thus, "not to conceal from the public the conditions prevailing in . . . prisons."[97] The clear implication is that if all communication between public and prisons were cut off, it would be violative of the First Amendment.

However, on the other hand, the opinions assert that the First Amendment confers no right of access to news sources.[98] Justice Stewart, explainging the decisions several years later, declared this to be their significance:

> . . . The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any

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> guarantee that it will succeed. There is not constitutional right to have access to particular government information, or to require openness from the bureaucracy.[99]

If there is not even a qualified right of access by the press, why does the majority opinion make the point that members of the press are permitted to tour prisons and photograph facilities? That they are permitted written correspondence with inmates? That policy requires prison officials to give assistance to press representatives in providing background information and reports concerning inmate complaints.[100]

The opinion takes pains to explain that the "limitation on prearranged press interviews with inmates is motivated by . . . disciplinary and administrative considerations."[101] Why? The opinion goes on to tell us:

> In this case. . . it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment. For it is apparent that the sole limitation imposed on newsgathering . . . is no more that a particularlized application of the general rule that nobody may. . . designate an inmate he would like to visit(except) a lawyer, clergyman, relative, or friend . . . .the visitation policy does not place the press in any less advantageous position than the public generally. Indeed, the total access to prisons and . . . inmates (by) the press far surpasses that available to other members of the public.[102]

The Court goes on:

> . . . since (the regulation) does not deny the press access to sources of information available to members of the public we hold that it does not abridge the protections of the First and Fourteenth Amendments. (Emphasis supplied)[103]

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Here we have the Branzburg doctrine inverted. The press is adequately protected because it has at least the same rights as the public. To what access is the public entitled, then? The implication here is that a purely administrative determination of what the public and press may know will serve the interests of the First and Fourteenth Amendments.

The puzzle is why, if the press has no special right of access as the public's eyes and ears, is the fact of the press's superior "total access to prisons and . . .inmates" relevant. The Court trying to have its cake and eat it, too. It seems to be saying that there is no definable First Amendment right of access, but that such is nevertheless already well served.

Justice Powell had this observation in his Saxbe dissent:

> . . . at some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require that government justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in Branzburg that without some protection for seeking out news, freedom of the press could be eviscerated.[104]

According to Justice Powell, the functions of the First Amendment is "the receipt of information and ideas as well as the right of free expression." The underlying right, he wrote, "is the right of the public to the information needed to assert ultimate control over the political

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process."[105] Justice Douglas added the observation, that it is not the rights of journalists that are at issue, "but rather, the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner."[106]

Houchins v. KQED, Inc. (1978)[107]

In the year following, a suicide in a California county jail set off a controversy that was to lead to the ultimate Supreme Court statement of the negative doctrine that runs in a line from Zemel through Branzburg, Pell and Saxbe. In a four to three plurality, the court held that the First Amendment neither guarantees nor mandates a public right of access to information generated by or in the custody of the government.[108]

The case involved access to a government facility where incidents had occurred in which the public had significant interest. In the Santa Rita Jail of Alamenda County beatings and rapes were said to have taken place. In a 1972 case, the U.S. District Court had declared that "shocking and debasing conditions constituted cruel and unusual punishment" there.[109] In March 1975, after a prisoner killed himself, a psychiatrist who worked at the prison told the press that conditions there caused mental illness.[110]

Sheriff Thomas I. Houchins, in reply to a request to inspect and photograph the jail stated that it was his discretionary policy not to permit any access to the jail by the news media. When KQED and the local chapter of the

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NAACP filed a civil rights action to obtain access to the jail, the Sheriff hastily instituted a program of public tours which would include reporters, but without recorders and cameras, and which would not visit the disciplinary cells.

Access beyond that afforded the public was sought by the press. Arguing that the public's right to know about conditions in the jail could not be served by the infrequent and limited tours, KQED requested to bring recorders and TV cameras into the facility so that it could prepare informative public broadcasts. The lower federal courts upheld KQED's suit.

The Ninth Circuit opinion struck a clear note when it observed that, while public and press have equal rights. "common sense mandates that the implementation of those correlative rights not be identical."[111]

Chief Justice Burger assigned the case to himself and proceeded to write an opinion for the Court in which only Justices White and Rehnquist joined. Justice Steward concurred in the decision of the Court, but prepared his own opinion which differed sharply on the matter of the rights of the press. Because Justices Brennan and Blackmum did not participate in the decision, the four justices decided the case, and only three concurred in the opinion of the Court. Three dissented vigorously. Thus, the force of Houchins is somewhat questionable.

In his opinion, Chief Justice Burger, brushed aside the lower courts' finding of constitutional protection for a

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right to gather information from government-controlled sources, and added yet another vague and restrictive dictum to the already cluttered landscape. ". . . the role of the media is important;" he wrote, "acting as the eyes and ears of the public, . . .but like all other components of our society media representatives are subject to limits." He did not hint at what those limits ultimately might be, and he did not explain why an institution specifically designated in the First Amendment for protection should have no standing different from "all other components of our society."

Instead of taking the occasion to advance and clarify important questions of standards, the Court has provided us with the following legacy in Burger's concluding generalizations:

> . . . We reject the Court of Appeals conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jailes and their inmates and presumably all other public facilities such as hospitals and mental instituitions.[112]

And:

> Neither the First nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.[113]

These vague and restrictive statements clarify little; they merely open further doors of confusion. What other government activities are included in "all other public facilities," for example? And, if the First Amendment does not "mandate" a right of access, does it permit one? Is there no right of access whatsoever? Why wasn't that said in so

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many words, if that is what these three Justices meant?

The dissent, written by Justice John Stevens and joined by Justices Brennan and Powell, went to the function of the First Amendment, "the preservation of a full and free flow of information to the general public."[118] It points out that "channels of communication" must be protected, to include "the acquisition of information," if self-governance is to be possible by the public.[117] It refutes Justice Burger's mock scholarship in finding that "access" is not mentioned in the precedent cases, by going to the essential rationalization of those cases and their contexts. The First Amendment has clearly been regarded as a guarantor of a "natural right of the members of an organized society. . . to impart and <u>acquire</u> information about thier common interests."[116]

The Judicial Hearing Cases

The Supreme Court's single affirmation of a First Amendment right of access to important information about government is the product of two related cases. They produced the first announcement of constitutional proection for press and public admittance to government activities. The implication of this announcemnt, like the other access decisions, is subject to rather conflicting interpretation in individaul opinions of the Court members.

<u>Gannett Company, Inc., v. Daniel A. DePasquale (1979)</u>[117]

A pretrial hearing in Seneca County, New York, was

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closed to the press and public by the presiding judge to avoid pretrial publicity. Afterwards, representatives of the Gannett Company newspapers wrote the judge, requesting access to the hearing and transcripts. The judge turned them down, declaring that constitutional rights of access to the pretrial proceeding, were outweighed by the defendant's right to a fair trial. The New York Supreme Court reveersed the trial judge, finding that the exclusionary order was an unlawful prior restraint in violation of the First and Fourteenth Amendments. The Court of Appeals of New York upheld the exclusion on its merits.[118] The Supreme Court affirmed the exclusion in an opinion written by Justice Potter Stewart.

As it affected the public right to know, the decision had two essential parts, one addressing the Sixth Amendment and one the First.

The Court declared that the public has no constitutional right, independent of the accused's, under the Sixth Amendment's guarantee of a public trial. Therefore, when the defendant has requested a closed judicial proceeding, and it is agreeable to the prosecutor and judge, the public and press cannot require that the hearing be opened.

The Court's opinion entertained, arguendo that there might be a right of the public and press to attend judicial proceedings protected by the First and Fourteenth Amendment, but that in this case it would not obtain. The trial judge had balanced the rights of the public and press against those

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of the defendants' at the hearing. By entertaining the core issue of Gannett arguendo, Justice Stewart's opinion enabled Justice Powell to join, while separately maintaining that there is a right of access, and Justice Rehnquist to join while separately declaring that there was no such right.[119]

The decision touched off a storm of controversy. It was predicted that "Many trial judges will view it as a signal. When in doubt, they will close a trial. It will become standard. . . for a defense attorney to ask to close a trial"[120] In the year after Gannett was announced, there were 272 motions to close pretrial hearings, arraignments, and criminal trials themselves, 160 of which succeeded based on the new Gannett doctrine.[121]

It was frequently pointed out that most felony cases are settled at the preliminary hearings rather than at trial, and thus, true public scrutiny of the judiciary in these matters would be defeated.[122]

Finally, in September of 1980, the Judicial Conference of the United States, of which Chief Justice Burger is chairman, adopted new policy guidelines for state courts recommending restricting the closing of pretrial hearings.[123] But, these voluntary policy recommendations could not shut off the flood of secrecy orders in pretrial proceedings. The Court meanwhile had found another case, similar enough to Gannett Co., to allow them to repair the damage.

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Richmond Newspapers v. Virginia (1980)[124]

In this case, the Supreme Court decided that the right of the press and public to attend criminal trials is guaranteed by the First and Fourteenth Amendment, absent overriding interests stated in findings. However, a majority were not able to agree on a single opinion of the Court. In fact, seven of the eight justices participating voted for the decision of the Court and they produced seven separate opinions, counting Justice Rehnquist's lone dissent.[125] The concurring opinions produced three theories of access. Therefore, the dimensions of the newly announced First Amendment right must await disclosure in future decisions. There is no doubt, however, that in addition to undoing the tangle of hearing closures following Gannett, the entire Court save one finally affirmed that there is an access right of some degree, protected by the First Amendment.

The case was similar to the one in Gannett, except it was a criminal trial rather than a pretrial hearing that was closed by the presiding judge, relying on the Gannett decision.

The Narrow Access Theory

The Chief Justice begins the principal opinion with the observation that there is a difference between Gannett v DePasquale and the case at bar: one involved a pretrial hearing and the other the trial itself, a distinction is not accorded much weight by most of the Court. Nevertheless,

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Chief Justice Burger addressed "the narrow question. . . whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.[126] His opinion begins with an exhaustive history of the open trial principle, reaching back to "pre-Norman England," concluding:

> From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. . . .the Court has voiced its recognition of it in a variety or contexts over the years.[127]

The narrow focus of his opinion becomes clear from the following:

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access" . . . or a 'right to gather information.' for we have recognized that "without some protection for seeking out the news, freedom of the press would be eviscerated.' . . . The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be arbitrarily foreclosed.[128] (Emphasis supplied.)

Lest anyone miss the restricted limits of the access right to which the Chief Justice refers, he goes on to generalize as follows:

> The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press.[129] (Emphasis supplied)

Having at last discovered at what point the *Branzburg* warning of First Amendment evisceration will occur; i.e.,

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places frequently and traditionally open to the public, the Chief Justice is anything but mysterious concerning the slant of this decision. He undoes the excess of Gannett Co., but lays the groundwork to deny access to non-judicial government activities and facilities, should such a case come before the Court. On the question of closing trials, the decision requires that the trial judge must announce findings that clearly show that there are overriding interests in a fair trial to be served in closing a judicial proceeding.[130] This opinion would support no general right of access to government information or activities beyond actions at traditionally open places.

This principal opinion was joined by Justices White and Stevens, which is curious in that each of them also prepared separate opinions in which there appear two distinctly different constitutional theories.

The Broad Access Theory

In sharp contrast to the principal opinion, the brief separate opinion of Justice Stevens announces a general theory of public access protected by the First Amenment. After observing that a majority of the Court has neither accepted nor rejected either the restrictive doctrines of Pell and Houchins, or his dissenting view of protected access, Justice Stevens declares:

> Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speecn and of the press protected by the First Amendment.[131]

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He also recalls the core of his Houchins dissent, "offical . . . policy . . . cutting off the flow of information at its sources abridges . . . the First and Fourteenth Amendments to the Constitution."[133]

Justice Brennan, in an opinion which was joined by Justice Marshall, made a more comprehensive and researched statement of a general access theory. He points out that, while the Court has not afforded a "categorical" assurance of freedom of access correlative with freedom of expression, it has not ruled out a public access component to the First Amendment in every circumstance.[134] Reconciling the precedent cases with his present view, he observes:

> Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to government information is subject to a degree of restraint dictated by the nature of the information and the countervailing interests in security of confidentiality. . . . These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.[135]

Justice Brennan then extends the underpinnings of his argument to the very structure of our "republican system of self-government." The First Amendment's structural role, he points out, is to provide the means by which public debate and participation can be informed.

> The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude, not only for communication itself, but for the indepespensable conditions of meaningful communication.[135]

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The Sixth Amendment Theory

Both Justice White and Justice Blackmum, while concurring in the judgment of the Court, revived their dissenting opinions in Gannett Co. that the Sixth Amendment guarantees the public, as well as the accused, a public trial. The right of the press or public to either a public trial or hearing on a motion to supress "is to be found where the Constitution explicitly placed it--in the Sixth Amendment."[137]

The general views of the members of the Court can be inferred as follows:

Justices Stevens, Brennan and Marshall clearly support a broad theory of First Amendment protection for public right to know government activities and information. They have announced a composit theory that gives structural and functional rationalization for the rights of the public and press to gather information in the custody of the government, absent a compelling public interest in the denial of such access.

Justices Berger and Stewart clearly subscribe to a narrow interpretation of the First Amendment protection, limiting it to trial access. They allow that the public and press have a right to go where they traditionally and frequently have gone. Parks, courtooms, and streets are not forbidden unless there is an overriding constitutional interest to be served, such as the guarantee of a fair trial.

Sixth Amendment theorists Blackmum and White grudgingly went along with the Court's decision in Richmond

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Newspapers, giving little or no exposition of their thoughts on First Amendment protection of public access to government. However, White voted with the Court in both Pell and Houchins, and can probably be counted as a narrow access theorists. Blackmum did not participate in Houchins but concurred with the Pell and Saxbe decisions. He also should be regarded as "narrow access" Justice.

Rhenquist position is at least unambiguous. He finds no authority for the Supreme Court to rule on this question at all.

Had Justice Powell voted, he might well have supported the broad access position. In Gannett Co., he expressed the view that the First and Fourteenth Amendments extend a right of access to pretrial hearings, and he dissented both to the Houchins decision and to the portion of the Pell decision that denied the protection of newsgathering.

At this writing, the personnel of the Court includes Justice Sandra Day O'Conner. She, like Justice Potter Stewart, whose seat she took can be counted as a "narrow access" justice. In a 1982 case, Globe Newspaper Company v. Superior Court (which was similar to Richmond Newspapers) she voted with the majority that a statutory mandate to close certain trials without consideration of the circumsntances was violative of the First and Fourteenth Amendments.[138] However, in her separate opinion, she was careful to disassociate herself from the broad interpretation of the decision by declaring, "I do not interpret (Richmond Newspapers) to shelter

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every right that is "necessary to the enjoyment of other First Amendment rights." She concluded that she interprets netiher that case nor Globe Newspapers "to carry any implications outside the context of criminal trials."[139]

Thus the alignment of the Court on questions of access to government information and activities is probably divided as it was before Justice Stewart's departure.

The Public Expenditure Case

United States v. Richardson (1974)[140]

This case was the single occasion on which the Supreme Court considered a right of access to government information mandated by the text of the Constitution itself. Article I, Section 9, Clause 7 of the Constitution more clearly establishes a public right to know than the First Amendment:

> No money shall be drawn from the Treasurey, but in consequence of appropriations made by law; and, a regular statement and account of the receipts and expenditure of all public money shall be published from time to time.

The Constitution notwithstanding, the "receipts and expenditures" of the CIA are not really published from time to time. Title 50, U.S. Code sec. 403j(b) authorizes the CIA to account for expenditures solely on the certificate of its Director. It is well known that large segments of the CIA budget are "hidden" in appropriations for other government agencies in order to conceal them for security purposes.[141]

William B. Richardson made repeated requests for

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records of the CIA's budgets and expenditures and finally sued, relying on the above quoted portion of the Constitution to chellenge the CIA statute. The District Court for the District of Columbia found that he had no standing for such a suit. However, the Third Circuit Court of Appeals reversed, ruling that his standing was adequate.[142]

The Supreme Court granted certiorari, and in a five to four vote, denied Richardson's plea soley on his lack of standing to bring the action. Avoiding the opportunity to clarify the overripe question of what the public constitutionally entitled to know about the federal government, Chief Justice Burger stated in the Opinion of the Court: "We need not and do not reach the merits of the constitutional attack on the statute; our inquiry into the 'substantive issue' is for the limited purpose indicated. . ."[143] The Court appears to have built a convenient barrier behind which to avoid difficult constitutional questions, and,it has deferred to the requirements of the CIA for secrecy by striking down the Court of Appeals.

Richardson described himself as a taxpayer who desired information of certain government expenditures so that he could follow the actions of government and vote intelligently. This, the Chief Justice declared, was insufficient to confer a standing to sue because there is "no logical nexus between the asserted status of taxpayer and the claimed failure of Congress to require a more detailed report of the

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expenditures of that agency." In terms of extant case law, which requires that an abuse of the taxing and spending powers be identified, this conclusion is technically correct.[144] However, the interpretive discretion of the Court would hardly have been taxed to find exactly the other way around.

Conclusions

Although it has spoken with an inconsistent and disunified voice, The Supreme Court over the past four and a half decades has provided a fragile constitutional protection to the public right to know information of political importance about its government.

The right to receive information has by now received virtually absolute protection. Even statues that would indirectly abridge such a right by gagging subversive and heretical speakers have been struck down or defused by the Court. The public right to receive information has finally become the rationale for extending constitutional protection to certain forms of commercial speech. In all manner of cases touching on communication, the Court has never questioned the right of public access to communications.

The right to publish with a singular exception, has received nearly absolute protection as a fundamental constitutional principle. Drawing its strength from the text of the First Amendment, publishing ahd enjoyed an unbroken line of protection based on a developing presumption against prior

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restraint, until the 1980 Snepp decision. Subsequent punishment of a publishing organization also has been suppressed by a strong presumption of latitude for the publishers of politically relevant information.

The gathering of newsworthy information appears to have support from the Court. The statement, "Without some protection for seeking out the news, freedom of the press could be eviscerated," has been cited in almost every access case by justices on both sides of the issue. The fact is that no standard of protection has been found for that doctrine, except for the Chief Justices limp declaration that the press may go gather news where the press and public have traditionally been allowed to go.

In the constitutional protection of the news, reporters and their sources still have a hazardous position. The Court has not respected the confidentiality of their relationship. They are liable, more than their publishers, for violation of security rules and they have no protection from the grasp of grand juries and prosecutors. It is only through the statutory protection of the news gathering process by state "shield laws," through freedom of information statutes, through the audacity and grit of reporters, through the conscience of government personnel, through the occasional malice of a disgruntled bureaucrat, and through the self-serving "leaks" of political officers of government, that politically important information of government can be gathered.

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A clearer identification of some reasonble standard for newsgathers is a task long overdue on the Court. If, the text of the First Amendment notwithstanding, the press has no more right of access than the general public, what of the special function of the press as the public's eyes and ears. What realistic significance does the Court attach to the opulent lodgings of the fourt estate in press rooms, the briefing rooms, gallaries, and parlors of the two political branches? Is there nothing special here? In other words, doesn't the political recognition that special standards of access and means are necessary to the press have any weight in considering the constitutional protection of newsgathering?

Almost in spite of itself, the Court has held that "arbitrary interference" with "access to important information" is an abridgement of the constitutional protection of speech and press. By recognition of a narrow right of access to newsworthy government activity, the Court has tentatively closed the circle of a full, public right to know. It seems unlikely that the present leadership on the high Court will want to embrace further consideration of the extent of that access right.

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CHAPTER III

FOOTNOTES

[1]Potter Stewart, "Or of the Press," The Hastings Law Journal 26 (January 1975): 2; 636.

[2]Houchins v. KQED, Inc., 438 U.S. 1 (1978), 15.

[3]Richmond Newspaers Inc. v. Virginia, 448 U.S. 555 (1980), 575.

[4]Ibid., 572.

[5]Reynolds v. Smis, 377 U.S. 533 (1964), 561-62.

[6]In Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), Houchins v. KQED, Inc., 438 U.S. 1, (1978), and Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980).

[7]Lamont v. Postmaster General of U.S., 381 U.S. 301 (1965).

[8]Stanley v. Georgia, 394 U.S. 557 (1969).

[9]Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

[10]Kleindienst v. Mandel, 408 U.S. 755 (1972).

[11]Ibid.

[12]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, (1976); declared First Amednment rights of druggists to advertise prices of generic drugs and thereby established protection of "truthful commercial speech." Bates v. State Bar of Arizona, 433 U.S. 350 (1977); upheld the rights of lawyers to advertise fees and services in "truthful advertisement," and overturned state rules banning such activity.

[13]For example, Justice William Douglas's concurring opinion in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).

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[14]Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), 7.

[15]E.g., New York Times v. Sullivan 376 U.S.254, 266-70: Grosjean v. American Press Co. 297 U.S. 233, 250; Branzburg v. Hayes 408 U.S. 665, 726 n.2; Red Lion Broadcasting 395 U.S. 367, 390; Stanley v. Georgia 394 U.S. 557, 564.

[16]Stewart, "Or of the Press," p. 634.

[17]Near v Minnesota, 283 U.S. 697 (1931)

[18]Mason's Minnesota Statues secs. 1 0123-1,3, (1927).

[19]Ibid., pp. 713-14

[20]Ibid., p.

[21]Fred W. Freindly, Minnesota Rag, (New York: Random House, 1981),

[22]Promotions Ltd. v. Conrad 420 U.S. 546 (1975), 559.

[23]Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), 416.

[24]New York Times Company v. United States, United States v. Washington Post Company, et al., 403 U.S.713 (1971).

[25]Ibid., p. 713. Cases cited are: Bantum Books, Inc. v. Sullivan, 372 U.S. 58(1963), 70; and Organization for a Better Austin, 402 U.S. 415 (1971), 416.

[26]New York Times, 403 U.S. 740

[27]Ibid., 717-18.

[28]Opinion in . . . Gilmore and Barron, Mass Communication Law: Cases and Comment (3d ed. 1979), 119.

[29]Hendrich Smith, Foreward, The Pentagon Papers, by Neil Sheehan et al, (Chicago: Quadrangle Books, Bantam Books, 1971), p. xviiii.

[30]Neil Sheehan, Introduction, The Pentagon Papers, p. ix and p. xii.

[31]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[32]Ibid., 256.

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[33]Ibid., 270. See also, Pennekamp v. Florida, 328 U.S. 331 (1946), generally, which reversed the contempt citation against a newspaper citation against a newspaper company.

[34]Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

[35]Virginia Code, sec. 2.I-37.13 (1973).

[36]Ibid.

[37]Bridges v. California, 314 U.S. 252 (1941), Pennekamp v. Florida, 328 U.S. 331 (1946), Craig v. Harney, 331 (1947), and Wood v. Georgia, 370 U.S. 375 (1962).

[38]Gitlow v. The People of State of New York, 268 U.S. 652 (1925).

[39]Schenck v. United States, 249 U.S. 47 (1919).

[40]Abrams v. United States, 250 U.S. 616 (1919).

[41]Whitney v. California, 274 U.S. 357 (1927).

[42]DeJonge v. Oregon, 299 U.S. 353 (1937).

[43]274 U.S. 357.

[44]Dennis v. United States, 341 U.S. 494 (1951).

[45]Yates v. United States, 354 U.S. 297 (1957) and Watkins v. United States, 354 U.S. 295 (1957).

[46]Pennsylvanian v. Nelson, 350 U.S. 497 (1956), and Brandenburg v. Ohio, 395 U.S. 444 (1969).

[47]Snepp v. United States, 444 U.S. 507 (1980). Concerning criticism leveled at this decision, see, for example the entire issue of <u>First Principles</u> 5 June (1980): 8. Also see, "A Symposium on the Snepp Case, New York City, April 2, 1989) <u>Alicia Patterson Foundation Reporter</u> 3 (May 1980): 13-18.

[48]Snepp v. United States 444 U.S. 507, 508.

[49]Sec. (2), H.R. 6-2, 27 September 1979. CIA regs. for pre-publication review.

[50]50 U.S.C. Sec. 403 (d)(3)

[51]United States v. Marchetti, 466 F. 2d 1309 (CA 4) <u>cert</u>. denied, 409 U.S. 1063 (1972).

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[52]Victor Marchetti and John Marks, The CIA and the Cult of Intelligence (New York: Alfred Knopf, 1974).

[53]Excerpts from the Snepp Petition for Rehearing, First Principles 5 (June, 1998): 3.

[54]For further information regarding this matter, see: Warner, "The Marchetti Case: New Case Law," Studies in Intelligence 6 (1975), (CIA internal publication); and Alfred A. Knopf, Inc. v. Colby, 509 f.2d 1362 (4th Cir.), cert. denied, 421 U.S. 922 (1975).

[55]Frank W. Snepp, Decent Interval, (New York: Random House, 1977).

[56]Snepp v. United States, 444 U.S. 507 (1980), 512, 517. And 595 F.2d 926 (CA4 .979), 935-36.

[57]Snepp v. United States, 444 U.S. 507, n. 1

[58]Ibid. 509.

[59]Ibid., 508, n. 3.

[60]Ibid., 510.

[61]Ibid., 508, n.3.

[62]Ibid., 513, citing 456 F. Supp., 179-180.

[63]Snepp v. U.S. 507, 521.

[64]Assuming that the Snepp decision is otherwise constitutional, consider this statement from Smith v. California, 361 U.S. 147 (1959): "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in setting where they have the collateral effect of inhibiting the freedom of expression, by making the indidivual the more reluctant to exercise it."

[65]For example, New York Times , Co.v. The United States, 403 U.S. 715, (1971).

[66]Atomic Energy Act, 42 U.S.C., sec. 2280.

[67]18 U.S.C.,secs. 793 (gathering, communicating or losing national defense information), 795-97 (espionage) 798 (cryptographic material), 799 (aerospace information), and 952 (diplomatic correspondence and codes); 42 U.S.C., secs. 2272-277 (atomic energy information); and 50 U.S.C., secs. 783(b) (espionage, disclosure to foreign agents) and app. sec. 781 (photographing or sketching defense installations).

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[68]New York Times v. United States, 403 U.S. 713 (1971) 732.

[69]5 U.S.C., sec. 403(d)(3).

[70]Thoedore Jacobs, "The CIA Needs More than Glue," Washington Post(April 15, 1980) p. A17; Mark H. Lynch, "A Few thoughts on Mr. Colby's Proposal," First Principles 5 (June 1980): 6.

[71]Henry R. Kaufman, "The Civiletti-Snepp 'Guidelines:' Missing Assurances for Publishers and Journalists, First Principles 6 (March/April 1981): 10.

[72]Snepp v. United States, 444 U.S. 507 (1980), 512: ". . . a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified. When a former agent relies on his own judgement about what information is deterimental, he may reveal information that the CIA--with its broader understanding of sources--could have identified as harmful." Former intelligence agents comprise a tiny fraction of those who have had access to highly sensitive national defense information, information the disclosrue of which could do substantive harm to the national interest. Therefore, the same logic of "broader understanding" is now to be applied to any former official with access.

[73]U.S. Congress, House, Committee on the Judiciary. Hearings Sub-committee on Civil and Constitutional Rights regarding prepublication review and secrecy requirements imposed by law or contract upon current or former federal employees, 89th Cong., 2d sess. (July 29, 1980), pp. 69-70.

[74]See Mediation Law Reporter 6 (1980): 2261 text of the guidelines. Sec. III.A.2. provides for seeking an injunction when disclosure "will pose a serious and immediate threat to the natioanl security or foreign policy of the United States."

[75]Hearings, Prepublication Review, p. 70.

[76]Kaufman, "Guidelines," p. 10.

[77]Attorney General William F. Smith, in "DOJ Policy Statement on Secrecy Obligations," Association of Federal Investigators (Fall 1981): 2, 2.

[78]Branzburg v. Hayes, 408 U.S. 665 (1972).

[79]Grosjean v. American Press Co., 297 U.S. 233 (1936).

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[80]Gillmore and Barron, p. 161.

[81]Ibid.

[82]408 U.S. 236.

[83]Zemel v. Rusk, 381 U.S. 1 (1965).

[84]Ibid., 13-14

[85]Ibid.

[86]Branzburg v. Hayes, 408 U.S. 665 (1972).

[87]Ibid., 665.

[88]Ibid., 668.

[89]Ibid., 674.

[90]Thomas I. Emerson, "Legal Foundations of the Right to Know," Washington Law Quarterly 1 (1976): 20.

[91]408, U.S. 667.

[92]"Commotion from the High Court?" The Quill (Jul/Aug 78): 6.

[93]Pell v. Procunier, 417 U.S. 817 (1975).

[94]Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[95]Saxbe, 847 U.S., 846.

[96]Pell, 417 U.S. 833-34.

[97]Saxbe, 417 U.S., 848.

[98]Saxbe, 417 U.S., 850.

[99]Stewart, "Or of the Press," p. 636.

[100]Saxbe, 417 U.S., 847-48.

[101]Ibid., 848.

[102]Ibid., 849.

[103]Ibid.

[104]Saxbe, 417 U.S., 860.

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[105] Ibid., 861.

[106] Pell, 417 U.S., 837.

[107] Houchins v. KQED, IN.c, 438 U.S. 1 (1978).

[108] Ibid., 15.

[109] KQED Inc., Houchins, 546 F.2d 283 (9th Cir. 1976).

[110] Houcins, 438 U.S., 11.

[111] KQED, Inc., 546 F.2d (9th Cir. CA 1976).

[112] Houchins, 14.

[113] Ibid., 15.

[114] Ibid., 30.

[115] Ibid., 32.

[116] Ibid., 33, quoting Grossjean (297 U.S. 243).

[117] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[118] Gannett Co. v. DePasquale, 43 NY 2d 370, and 373 NY 2d 544 (1978).

[119] Gannett Co., Inc. v. DePasquale, 61 L.Ed. 2d 608 (1979) Summaries at 609-610.

[120] "The Men at the Bar Meeting Debate Gannett v. DePasquale," The Quill 68 (March 1980): 8.

[121] David M. O'Brien, "Reflections on Gannett and Richmond Newspapers," Communications and the Law 3 (Spring 1981): 33; citing "Court Watch Summary," Reporters Committee for Freedom of the Press, Washington, D.C. August 18, 1980, in appendix.

[122] O'Brien, "Reflections." Also see: James C. Goodale, "Open Justice: The Threat of Gannett," Communication and the Law 1 (Winter 1979): 3-13 passim. And see generally Helen Morriss, "The Press on Trial," Student Lawyer 8 (January 1980): 28.

[123] Ibid.

[124] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

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[125]Richmond Newspaper, 65 L. Ed. 2d 973, 974-75.

[126]Richmond Newspaper, 448 U.S. 558.

[127]Ibid., 573.

[128]Ibid., 576.

[129]Ibid., 577.

[130]It is noteworhty that of the 272 motions to close criminal proceedings in the year after Gannett Co. was announced, only 10 were based on jeopardy to a fair trial. Reporters Committee, "Court Watch Summary."

[131]Richmond Newspapers, 448 U.S. 583.

[132]Ibid., 582.

[133]Ibid., 583.

[134]Ibid., 585-86.

[135]Ibid., 586.

[136]Ibid.,587-88.

[137]Ibid., 608.

[138]Globe Newspaper Company v. Superior Court for the county of Norfolk, U.S. (1982).

[139]Ibid.

[140]United States v. Richardson, 418 U.S. 166, (1974).

[141]Title 50, U.S. Code sec. 403f(a) (1970), authorized the Director of Central Intelligence to "transfer to and receive from other Government Agencies such sums as may be approved by the Office of Management and Budget for the performance of any of the functions or activities authorized under Sections 403 and 405 of this title . . ." and see New York Times, sec 4, Dec. 29, 1974, p. 1.

[142]418 U.S., 168.

[143]Ibid.

[144]Flast v. Cohen, 392 U.S. 83, (1968).

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CHAPTER IV

THE SUPREME COURT AND THE STATUTORY RIGHT TO KNOW

One reason that claims to a constitutional right of access to government information have not been more litigated and have not attracted more judicial interest is that there are comprehensive statutory rights in this area. Virtually every state has "open records" or "freedom of information" law on the books. The federal open government acts are the most comprehensive of all, providing access not only to records, but to meetings of advisory bodies and commissions. There is even an act governing the eventual public access to presidential papers.[1]

Because such statutes outline not only the kinds of access, but the specific circumstances under which the government may deny access, they are useful to the courts. The balancing equations are already set up by the law and as the courts interpret statutory provisions, they build standards for access and withholding. If there were no statutory guidelines the courts would be in unchartered waters.

In the cases discussed in the last chapter, the Supreme Court has addressed components of a public right to know chiefly as First Amendment issues. This chapter dis-

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cusses recent litigation initiated by individuals seeking records in the custody of the federal government under statutory provisions of Title 5, U.S. Code sec. 552. Although this section comprehends several major pieces of open government legislation, to date the Supreme Court has only considered cases coming under the Freedom of Information Act (FOIA) section.

It is the FOIA that authorizes public access to executive branch records generally. This law basically mandates that all records in the custody of federal executive agencies be made available or provided to any member of the public, except those that may be exempted in nine specific categories listed in figure 1.[2] The FOIA directs that the disclosure of certain records may be through publication or availability for inspection. This includes final opinions and orders, including dissenting opinions, made in the adjucation of cases; statements of policy and interpretation not already publihsed in the Federal Register; and administrative staff instructions and manuals that affect the public.[3] The FOIA further directs that all other agency records must be provided upon the request of "any person," excepting those exemptions listed in figure 1, when an agency has good reason to them.

The law also has provision to encourage appeal of record denial to the courts; e.g., time limits on the docket and award of attorney's fees. By 1980, over 2,000 cases had been appealed to the federal courts, and the Supreme Court

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Figure 1

EXEMPTIONS TO THE FREEDOM OF INFORMATION ACT

Title 5, U.S. Code, sec. 552(b):

This section does not apply to matters that are:

(NATIONAL SECURITY) (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(PERSONNEL RULES) (2) related solely to the internal personnel rules and practices of an agency;

(OTHER STATUTES) (3) specifically exempt from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (b) established particular criteria for withholding or refers to particular types of matters to be withheld;

(BUSINESS SECRETS) (4) trade secrets and commercial or information obtained from a person and privileged and confidential;

(INTERNAL MEMORANDA) (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(PERSONAL PRIVACY) (6) Personnel and medical files and files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(INVESTIGATORY RECORDS) (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjucation, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, . . . confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel:

(FINANCIAL INSTITUTIONS) (8). . .related to. . .financial institutions; (NOT LITIGATED IN SUPREME COURT.)

(OIL WELLS) (9) geological. . . data. . . concerning wells.

(NOT LIGITIGATED IN SUPREME COURT)

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has considered nearly 30 of them. Some of the Court's decisions have clarified definitions, applicability and procedures under the act, but most have addressed the application of the exemption provisions.[4]

The constitutionality of the act itself, in whole or in part, has never been challenged before the Court. This is somewhat surprising because in his veto message, pertaining to the 1974 amendments, President Ford called the provision for judicial review of national security classifications "unconstitutional."[5] From time to time, government breifs in FOIA cases have suggested that the courts lack the power to release information that the executive claims is classified for national security reasons. However, in the very few cases in which courts have ordered release of records stamped with security classifications, the government has not pressed the issue of constitutionality. It has downgraded and released the records under dispute.[6]

The Freedom of Information Act Cases

This chapter discusses certain selected cases the Supreme Court has decided. It is intended to illustrate how a statutory right of access is protected by the Court. While in most cases, the public rights provided by the act are affirmed and upheld in keeping with the clear intent of Congress, in other cases the statutory protection of public rights in this area has proved to be perishable at the handle of the Court. This discussion is divided into two sections,

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one addressing key opinions that appear within the intent of Congress, and one addressing what appear to be abridgements of this intent.

Affirmations and Standards

In a large proportion of its decisions on the FOIA the Supreme Court has drawn a line between a government obligation to disclose records and an authority to deny them. In two cases, discussed below, where a close reading of the law has not served the stated purpose of Congress, the Court has pointed it out, and Congress has responded with additional amendments. In the following cases, the Court has generally affirmed the intent of the act and has worked to set balanced standards for it's implementation.

Environmental Protection Agency v. Mink (1973)[7]

This decision led to the most important substantive amendment of the act in 1974. In 1971, Congresswoman Patsy Mink and thirty-two other Members of Congress sued under the FOIA for government records concerning underground nuclear testing. The government denied the request, relying principally on exemption (b)(1) which at the time applied to matters "specifically authorized under criteria established by as Executive order to be kep secret in the interest of national defense or foreign policy." The District of Columbia Court of Appeals, reversing the District Court, stated that the judge in his chambers ought to separate the secret from

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the non-secret portions of the documents requested. The Supreme Court, however, reversed. Under its ruling, the only test necessary was whether the President had determined by executive order that certain documents were to be classified. In his concurring opinion, Justice Stewart explained apologetically that the Congress "has built into the FOIA an exemption that provides no means to question any Executive decision to stamp a document 'secret' however cynical, myopic, or even corrupt that decision might have been."[8]

The decision was announced in 1973, and Congress in the amendments to the FOIA in 1974, specifially authorized _in camera_ review and the release of "reasonably segregable" portions of classified documents.[9] The amended exemption now reads as in figure 1.

Thus, virtually at the invitation of the Court, Congress erected a provision that protects the public right to know from the more wielding of a rubber stamp by a government bureaucract.

However, in _Mink_, the Court did not suggest that Congress could erase Executive privilege through an amendment. The opinion declared that legislative enactment to provide judicial review of executive classification was subject to "whatever limitations the Executive privilege may be held to impose upon such congressional ordering."[10]

This first FOIA cas before the Court also elicited this recognition of Congressional intent:

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> Without question, the Act is broadly conceived It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.[11]

Department of the Air Force v. Rose (1976)[12]

In this decision, the Court sharply narrowed the government's use of the exemption for personnel rules, (b)(2), and for invasions of personal privacy, (b)(6).[13]

Students preparing a law review article requested summaries of ethics code violation hearing, with names deleted, from the U.S. Air Force Academy. The Air Force denied disclosure of any of this type of record, relying on exemptions (b)(2) and (6). Although the federal district court supported the Air Force's denial in a summary judgment, the Court of Appeals reversed, and the Supreme Court upheld the reversal.[14]

In a definitive interpretation of the exemption for personnel rules, (b)(2), the Court held that it was mainly intended to relieve the government from dealing with trivial matters of no substantial concern to the public. The legislative history indicates that it was not intended to apply to matters of genuine and important public interest such as the Academy's administration of discipline and methods of training.[15]

The Court also clarified the application of the next exemption for personal privacy, (5)(6). Writing the Opinion of the Court, Justice Brennan declared that the exemption

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cannot create a blanket exclusion of any files. Rather, it requries a balancing of public interest in disclosure with specific showings of a "clearly unwarranted" invasion of privacy. Furthermore, the opinion goes on, the act requires disclosure of portions that do not so invade, determined by examination, a court's in camera examination represents an appropriate compromise between individual rights "and the preservation of public rights to government," which is the statutory goal of the exemption, according to the opinion.[16]

The Court also pointedly noted that according to the legislative history the primary purpose of the exemption was to protect "the confidentiality of personal matters in such files as those maintained by HEW, Selective Service and the Veterans Administration."[17]

The Court made it clear in Rose that mere storage of information in a particular file cannot insulate it from disclosure. Moreover, not every invasion of personal privacy is forbidden under the FOIA; it could be warranted when balanced against the "basic purpose of the FOIA, 'to open agency action to the light of public scrutiny.'[18]

Administrator, Federal Aviation Administration v. Robertson (1975)[19]

This is another case where the Supreme Court's upholding of a broadly worded exemption stimulated Congress to amend it in order to achieve its objective of full disclosure.

In 1970, the Center for the Study of Responsive Law requested certain reports bearing on air safety from the

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FAA. The FAA administrator declined to provide the records, relying on the FAA Act of 1958, which gives him discretion to deny records when in his opinion it is not required in the public interest and would harm the submitter. The FAA maintained that this authority obtained through, FOIA exemption (a)(3) which protected matters "specifically exempted from disclosure by statute." Although the lower courts found for the requester, the Supreme Court reversed. It held that the broadly worded exemption did not require that a statute list precisely, or name, specific categories of data which may be withheld. In his concurring opinion, Justice Steward

> . . . when an agency asserts a right to withhold information based on a specific statute of the kind described in exemption 3, (the only question) to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be.[20]

Congress responded by attempting to plug the leak with an amendment which added the provisions shown in Figure 1.

Regardless of Congress's good intentions in amending this exemption it still remains the "loophole" in the FOIA. Special interest groups and government agencies have worked persistently on Members of Congress to erect special protections for themselves against unwanted disclosure under the FOIA. Since 1966, nearly 150 such statutes have been quietly enacted. At this writing, other bills are pending before Congress to exempt other records and agencies. The Reporters Committee for Freedom of the Press calls this

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phenomenon a "craze" that will "swallow up the FOIA" if it goes unchecked.[21]

Advisory Memoranda

By mid-1980, the courts had issued opinions concerning the exemption of "inter-agency and intra-agency memoranda," (b)(5), in some 140 cases.[22] Because of the number and variety of federal agencies producing memoranda, and the variety of memoranda they produce, this is not a simple area of litigation. The Supreme Court has generally tried to adhere to the intent of Congress and differentiate portions of contested records based on their content and substance. It has not allowed agencies to use this exemption to conceal a classification of records.

In NLRB v. Sears, Roebuck and CO. (1975),[23] and Renegotiation Board v. Grumman Aircraft (1975),[24] the Court announced its basic guidelines. It held that the exemption cannot be used to conceal any form of factual finding or final opinion, and cannot be applied to material the publication of which is required by other sections of the Act.[25] That is, policy resulting from the adjudication of cases and staff instructions that may affect a member of the public must be released even though they may also be considered advisory in part. However, the public does not work product of attorneys preparing litigation.[26] In drawing its line between sections (b)(2) and sections (a)(2)(A) and (B), the Court has generally leaned on the side of disclosure to the public.[27]

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The Right to Records

In Forsham v. Harris (1980), the Supreme Court held that "the FOIA deals with 'agency records' and not information in the abstract."[28] It decided that Congress' definition of records in the Records Disposal Act and the Presidential Records Act of 1978 obtained in the interpretation of the FOIA, and that the act does not apply to information until the agency creates or obtains a record containing it.[29] Therefore, while the decision means that an agency does not have to create a record to answer an FOIA request, it also means that the FOIA exemptions may only be applied to specific records and not information. This case is especially pertinent to FBI et al v. Abramson (1982), discussed in the next section.

Abridgements

In certain of its decisions, the Supreme Court has departed abruptly from its line of consistent balancing. The following cases represent an almost anomolous departure from the clear text of statutes, the intent of Congress and the Court's previous decisions. In these cases, the statutory public right of access appears to be abridged by abuse of the Court's power of judicial review. In the case of Henry Kissinger's removal of public records, the Court left the plaintiff's without a source of remedy. In the cases involving law enforcement records, the Court has rewritten the limits of statutory construction.

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Reporters Committee for Freedom of the Press, et al. v. Kissinger (1981)[30]

When he left his post at the Department of State, former Secretary Henry Kissinger took the most direct possible action to exempt from disclosure transcripts and memoranda of his official conversations as Director of the National Secuirty Council and later Secretary of State. With the assistance and cooperation of State Department officials, he had two batches of such documents screened for classified material and then removed to a private estate. Later, he deposited them in the Library of Congress under an agreement that allows him personally to control access to the documents until twenty-five years after the agreement date.[31] The unilateral action of both this former offical and the State Department is without precedent and apparently contravenes provisions of both the Federal Records Act of 1950 and the Records Disposal Act.[33]

The Reporters Committee for Freedom of the Press, two academic associations and a number of jorunalists and scholars brought suit claiming the records were government property and were illegally removed by Kissinger and the Department of State. The suit sought an order requiring either than the State Department recover the documents and provide access to them, or that Mr. Kissinger cancel his agreement with the Library of Congress and return them. Both the federal district and circuit courts found for the plaintiffs and ordered the documents returned.[34] However, the Supreme

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Court overturned the order, refusing to rule on the question of illegal removal.

Justice William Rehnquist, writing the opinion of the Court, declared that neither the Federal Records Act nor nor the Records Disposal Act confers a right of action on private parties. The only remedy provided in these statutes is action by the Attorney General of the United States, and no such action had been initiated. Under this interpretation, demands of the Archivist of the United States that the records be returned and maintained in accordance with the statutes, which were ignored by Mr. Kissinger, also could not be translated into litigative action.[35]

Justice Rehnquist also dismissed the claim that the documents were being improperly withheld under the FOIA with the observation that the "agency has neither custody nor control necessary to enable it to withold."[36] The FOIA provides that: "On complaint, the district court . . . has jursidiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[37] Considering that officials of the State Department participated cooperatively with the review, sorting, and transporting of the records in question to a private estate, this holding is especially serious. Under it, any agency can exempt records from the FOIA by simply handing them over to a depository technically not under its control. By giving up "custody and control" the agency immunizes itself from the FOIA and any

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other action except that of a political appointee of the President, the Attorney General.

Investigatory Records

The most litigated section of the FOIA is that which allows an agency to withhold "investigatory records compiled for law enforcement purposes.[38] This is for two reasons. There are six subsections, each authorizing exemption for a specific harm that disclosure might bring and each providing an avenue of defense to the versatile legal counsel. Second, law enforcement agencies, like intelligence agencies, seen to resist disclosure of their records and activities with unique ferver.

Prior to the 1974 Amendments to the FOIA, the Supreme Court did not grant certiorari to any of five cases appealed to it under the exemption, which at that time permitted withholding "investigatory *files* compiled for law enforcement purposes, except to the extent available by law to a party other than the agency."[39] The courts at first took a generally narrow view of the exemption, as Congress intended, holding among other things that files that did not result in prosecution or injury to law enforcement proceedings must be disclosed.[40] However, as time went on, the vagueness of the wording led to much conflict among federal circuits and finally a broadening of interpretation that gave law enforcement activities a virtual *per se* exemption.[41] For example, in 1973 and 1974, federal circuits upheld the denial of ac-

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cess to spectographic analysis of the bullet that killed President Kennedy, to the report on the My-Lai Massacre cover-up, to government correspondance with automobile manufacturers concerning possible safety defects, and to HEW reports on segregation and discrimination practices in Northern public schools.[42]

The present working of the exemption came through the 1974 amendments. It permits exemption of "records" rather than "files" (to avoid a per se exclusion of classes of records) and it requires that one of six specific harms be imminent.[43] While the change accomplished generally the purpose of narrowing the use of the exclusion, it has resulted in the most litigated section of the act. However, the Supreme Court rarely grants certiorari to cases concerning exemption (7) except, seemingly, to rewrite the law in a manner pleasing to law enforcement officials.

In NLRB v. Robbins Tire and Rubber Co. (1978)[44] the Court broadened the exemption of records from withholding where disclosure would "interfere with enforcement proceedings."[45] The intent of Congress was to allow nondisclosure of only those records containing information unknown to potential defendants where there is a concrete prospect of enforcement proceedings and the government's case "in a particular proceeding" would be harmed or impeded.[46] The Supreme Court relieved law enforcement agencies of being quite so specific, however, by declaring "that the Congress did not intend to prevent the federal courts from determining

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that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings."[47] (Emphasis supplied.)

This ruling must have come as a surprise to Senator Philip Hart for one. He introduced the amendment to the exemptions, and his remarks on the floor of the Senate made it clear that the intent was specificity in records and kinds of harm disclosure might cause.[48] But, the Court has not shied away from rewriting portions of the act, from time to time, as the description of the next case illustrates. Reversing the Federal Second Circuit, NLRB v. Robbins, the Court also broadened authority to withhold for the other two most frequently litigated clauses of the exemption: protection of confidential sources and individual privacly.[49]

Federal Bureau of Investigation, et al v. Abramson (1982)[50]

A bare majority of the Supreme Court has undertaken in this ruling to improve upon the FOIA as Congress wrote it by reconstructing the plain language of its text to something the Court asserts makes more "sense" as public policy. In fact, in this case, the Court has decided to protect under the law enforcement exemption a document compiled for political purposes. This case has more far-reaching implications, antithetical to the purpose of the act, than any previous decision. The Court has made this putatively legislative holding: information taken from a record that is exempt be-

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cause it was compiled for law enforcement purposes, itself remains exempt when incorporated into a record NOT compiled for law enforcement pruposes.[51] Nothing in the act, the legislative history or previous case law even hints at such an interpretation.

The five to four split in the Court contained these alignments. Joining in Justice White's majority opinion were the Chief Justice and Justices Powell, Rehnquist and Stevens. Dissenting opinions were written by Justice Blackmum (joined by Justice Brennan) and Justice O'Connor (joined by Justice Marshall).

The Case

Howard Abramson, a journalist, was investigating the use of the FBI and its files by the Nixon Administration to obtain derogatory information on its critics. He filed requests under the FOIA to obtain correspondence between the FBI and the White House on this matter. Only one document was in contest, a memorandum with attached pages of "name check" summaries, derived from existing FBI files. The FBI sought to withhold them under both the privacy exemption, exemption (6) and the law enforcement privacy exemption, exemption (7)(C). The District Court allowed the withholding under exemption (7)(C), but the Court of Appeals reversed, holding that the documents did not qualify as investigatory records compiled for law enforcement purposes. The Supreme Court reversed the Court of Appeals, holding that the "information" did not lose its "exemption 7 protection" when

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transplanted from a record prepared for law enforcement purposes to a record that was not. This holding was based on the FBI's assertion that the records from which the summaries were compiled were "created for law enforcement purposes."[52]

The Question

The plain language of the statute could hardly be more specific; see figure 1.

The question before the Court is represented as follows in the majority opinion:

> The sole question presented in this case is whether information contained in records compiled for law enforcement purposes loses that exempt status when it is incorporated into records compiled for purposes other than law enforcement.[53]

And,

> The sole question for decision is whehter information originally compiled for law enforcement purposes loses its Secion 7 exemption if summarized in a new document not created for law enforcement purposes.[54]

That the plain language of the text of the statute only authroizes exemption of "records compiled for law enforcement purposes" is brushed aside by Justice White as a "formalistic reading." In his creative view, it makes more sense that, since exact copies of law enforcement records transmitted to the White House did not lose the law enforcement exemption, "information" from similar records summarized in an admittedly political memo to the White House should also retain its exempt status.[55]

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As an examination of the act's legislative history will show, the choice by Congress of the words "records compiled for law enforcement purposes: was deliberate and pointed And, as the opinion of the Court ingenuously admits, the phrase was adopted as part of the 1974 amendments, replacing the term "investigatory files" specifically to narrow the authority of the government to withhold records, and to abolish a per se presumption of exemption developed by the federal courts.[56]

The clear text of the law, the exemption claimed by the FBI, and the action of the lower courts all suggest that the real question that should have been before the Court in Abramson was: whether a document compiled by a law enforcement agency for political purposes may be exempted from public disclosure under a provision permitting such exemption only for records compiled for law enforcement purposes?

The obvious problems such statement of the question would have presented to Justcie White is that they answer themselves. The deceptive phrasing of the question by the Court is a signpost that leads us down a path tangetal to the real statutory and constitutional questions. Statutorily, does the law really mean what it says and what Congress meant it to say? Constitutionally, what are the limits within the Supreme Court may change the meaning of an act of Congress in which it can find nothing repugnant to the Constitution? These matters are addressed only in Justice O'Connor's dissent to the decision of the court.

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It does not seem speculative to assume that Congress believed law enforcement officials could comprehend the plain language of the act and furthermore would know whether they were compiling documents for law enforcement or other purposes. If there were any doubts on how to apply the law enforcement exemption before Abramson, it was clearly explained for the executive branch by the Attorney General's Memorandum on the 1974 Amendments to the FOIA, a directive with which courts have not quarrelled.[57]

The Attorney General's Memorandum

The Attorney General's Memorandum explains that there is a two-question test for the invocation of the "law enforcement" exemption. The first question requires two determinations: is the document an "investigatory record," and was it "compiled for law enforcement purposes?" If the answer is affiramtive to both parts of the question, the record must then be subjected to a second question: will its release involve one of the six types of harm specified in clauses (A) through (F) of the exemption (7) section of the law? Only when a document has satisfied both steps of the test does it qualify for exemption under this section.[58]

In the text of the opinion, the Court admits flatly that "judicial review of an asserted exemption 7 privilege requires a two-part inquiry.[59] It describes the two-step test and footnotes it with the comment that "The Attorney Geenral's Memorandum . . . reads the amendment in this manner."[60] The footnote continues with this confusing non

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sequiter concerning the memorandum:

> . . . Respondants place undue emphasis on this document and the direction to first determine whether a record has been compiled for law enforecemtn purposes and then examined whether one of the six harms are involved. This is, of course, the prescribed order in which a court should interpret the exemption. It does not necessarily mean, however, that information admittedly compiled in a law enforcement record loses its exemption when recompiled.[61]

If the order is correct for a court's interpretation, why not the meaning of the words? This statement seems to imply that a first general step in the test might also be the question, "was the information originally compiled for law enforcement purposes?" To help us jump to that conclusion, the note concludes with this artful statement:

> . . . The Attorney General's Memorandum submits that the test is whether the requested material "reflect(s) or result(s) from investigative efforts" into civil or criminal matters. (Empahsis supplied.)[62]

The truth of the matter is this. The cited page of the Attorney General's Memorandum contains the word "material" only once, as follows:

> The threshold questions are whether the requested material is "investigatory" and whether it was "compiled for law enforcement purposes.[63]

In the next paragraph is the direct quote from the memornadum, here in its entirety:"'Investigatory records' are those which reflect or result from investigative efforts (Emphasis supplied.)"[64]

Note that when the Attorney General's memorandum defines exemptable materials under this section of the law,

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it specifically calls them "investigatory records," a matter concealed by Justice White in fabricating his "quotation."

In the deceptive amalgamation which Justice White attributes to the Attorney General's Memorandum, the "requested materials" must be tied to "investigative efforts." Again the truth is different. The Attorney General's Memorandum actually requires that teh requested materials be both "investigatory" and "compiled for law enforcement purposes," a condition that demolishes the arguement for exemption which Justice White is trying to concoct.[65]

The FBI Files

Because the courts did not inquire into the nature of purpose of the seminal FBI material beyond the agency's own assurance of law enforcement connection, some relevant questions remain unanswered.

Were the original FBI records from which the contested document was derived, "compiled" or "created" for law enforcement purposes? The law says that records "compiled" for law enforcement are exempt. The Supreme Court says that records "compiled" for law enforcement purposes can give birth to exempt information. However, the Court's review of the facts refers only to "information taken from documents in FBI <u>files</u> that had been <u>created</u> for law enforcement purposes." (Emphasis supplied.)[66] This poses two immediate questions.

Are files different from records? With respect to exemption (7) emphatically yes. The 1974 amendments pointed

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by abolished the word "files" from the exemption and substituted the term "records" so that "disclosable material is not exempt merely by being placed in an investigatory file."[67] Yet, here in 1982, the Supreme Court uncritically accepts the exempt status of "documents" in FBI files that had been created for law enforcement purposes."[68]

Is "created" different from "compiled?" "Create" has to do with bringing something into being; e.g., opening a file.[69] Compile, on the other hand, connotes collecting from several sources and possibly putting into a new form.[70]

If the FBI files that produced the documents that produced the information that went into the contested political memorandum were only "created" for law enforcement purposes, how do we know that their contents were "compiled" for the same purpose? There is no statement that these seminal FBI files were maintained for law enforcement purposes.

To take an hypothetical but plausible example, consider the file on Senator Lowell Weicker who was one of the subjects of Abramson's request. Why would the FBI create a law enforcement file on this public figure? A likely answer would be to grant him a security clearance.[71] Those documents in his file which accumulated for that purpose would be of course exempted from disclosure, assuming the second-step harm, invasion of privacy. But if there were other documents accumulated after the clearance adjudication, documents concerning political and social activities, does their placement in the same manila folder with the

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security documents bless them with a law-enforcement aura? It might be interesting to know what the FBI collected on this outspoken Republican critic of both the Watergate White House and the FBI.[72] However, public access to the record very well could be an unwarranted invasion of Senator Weiker's privacy. And, this raises the next troubling question.

The Privacy Exemptions

As blithely noted by the Court[73] it appears that the law-enforcement connection of both the memo and the documents in the FBI file, from which the information was compiled, is at least questionable.[74] And the one point on which all the courts are in agreement in this case is that release of the summary would constitute some kind of invasion of Senator Weicker's privacy.[75] Therefore, why did the Supreme Court not remand this case for settlement under the privacy exemption, (b)(6), rather than torture the English language of the law-enforcement privacy exemption, (7)(C), into meaning something it does not say?

The most attractive feature of exemption (6) would seem to be that it exempts whole "files" in which all kinds of documents for all kinds of purposes may be compiled. The only test is a clearly unwarranted invasion of privacy. Exemption (7)(C) requires not only the privacy test, which the political memo in question passed, but a law enforcement purpose text which all parties admit the memo flunked. Why support the inapplicable rather than the applicable exemption?

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Justice White considers the argument that exemption (6) should be applicable, and rejects it on two grounds. The first boils down to admitting that the majority of the Court has an urge to protect information derived from all kinds of records protected by exemption (7) generally. Nevermind, he implies, that this case is concerned with invasion of privacy, and exemption(6) protects privacy.". . . no such companion provision in the FOIA would halt the disclosure of information that might deprive an individual of a fair trial. . ." Virtually saying that the instant case is beside the point, Justice White goes on to disclose the Court's law-an-order agenda in this mater:

> . . . the threshold inquiry of what constitutes compilation for law enforcement purposes must be considered with regard for all six of the types of harm stemming from disclosure that Congress sought to prevent. It is therefore critical that the compiled-for-law-enforcment that would produce the undesirable results specified.[76]

Justice White's second prejudice against exemption (6) is that, because it contains the word "clearly", it does not provide overlapping protection. He notes that the word was dropped from exemption (7)(C) by the Joint Conference Committee at Presidential request and asserts that the apparent difference is "meaningful."[77]

The truth is that President Ford requested Congressman Morehead and Senator Kennedy to strike both words, "clearly," leaving exemption (7)(C) open to some invasion of privacy in the public interest. The legislative history is clear that (7)(C) was solely to affirm that exemption (6)

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applied to law enforcement records as well as others.[78] The Attorney General's Memorandum advises that under (7), the government's burden should be "somewhat lighter" but does not even hint at a standard since the law gives no definitions. To date, case law has generally considered the two exemptions as having a virtually common standard in terms of what information constitutes an invasion of privacy.[79]

Did Congress Mean What it Said?

A pivotal assertion of the Court in this case is that nothing in the legislative history indicates Congress intended any particular distinction between "records" and the "information" they contain.[80] Its holding essentially means that it is the information and not the record that must meet "threshold requirements of exemption (7)," the plain language of the section notwithstanding.[81] However, an examination of the legislative history indicates quite the contrary. At key points, legislative drafters used the terms "records and "information" distinctly and deliberately. It also becomes clear that the law enforcement purspoe of the requested material is determinative to the law enforcement exemption.

The first reference in legislative history to the current FOIA law enforcement exemption occurs in the 1972 report on the administration of the FOIA by the House Committee of Government Operations.[82] On the section concerning legislative objectives for strengthening the act is

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this:

> Subsection (b)(7) should be amended to substitute 'records' for 'files' as in subsection (b)(6) and to clarify that only 'specific' law enforcement purposes are to come within the scope of this exemption.
>
> This subsection could also be amended to provide that investigatory records or information shall be made available to the public once an investigation has ceased and adjudication, or the reasonable prospect thereof, has ended. . . .once an investigatory record becomes public information which would necessarily lead to the identification of such informant may continue to be withheld.[83]

This recommendation, which speaks clearly for itself, was adopted in the 1974 amendments except for the second sentence. The Committee unambiguously recommended that a document withheld under the scope of the exemption had to have a specific law enforcement purpose. That there is a difference between investigatory records and information is clear from the second sentence. And, the third sentence concerns the special problem of sensitive information, but it only pertains to the specific harm of identifying a confidential informant.

The current law enforcement exemption is based on the above and was offered by Senator Philip Hart during the floor debate on May 30, 1974.[84] As reported out of the joint Conference Committee (which eliminated one word: "clearly") on September 25th, 1974, the current law mentions "records" and "information" only as proposed by Senator Hart (see figure 1.)

The Joint Explanatory Statement of the Conference Committee reveals that the committee inserted the language

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"protecting information. . . compiled from a confidential source" specifically to protect the identity of confidential source" in a situation where the information itself was enough to give them away.[85] If the drafters had regarded "records" and "information" as roughly equivalent, the second part of clause (D) would be unnecessary and redundant. If any information enjoys extraordianry protection, it is information provided only by a single informant. However, the plain text of the section implies that even such protection might not be available if its law enforcement custodian were careless enough to recompile it into a document for other than law enforcement purposes.

A small excerpt of Senator Hart's remarks on the floor of the Senate when he introduced the adopted amendment will illustrate the novelty of the Supreme Court interpretation in terms of its understood legislative purposes:

> Mr. Hart. Mr. President, this act exempts from disclosure 'investigatory files compiled for law enforcement purspoes except to the extent avialable by law to a party other than an agency.'
>
> My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Governent's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he otherwise would have.
>
> Recently, the courts have interpreted the seventh exemption to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes--a stone wall at that point.
>
> I am offering this amendment. . . It explicitly places the burden of justifying nondisclosure on

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> government. . . . Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement proceeding. This would interfere with enforcement proceedings. This would apply whenever the Government's case in court--a concrete prospective law enforcement proceeding--would be harmed by the premature release of evidence or information . . . it is only relevant to make such a determination in the context of the particular enforcement proceeding.[86]

Concerning the purpose of separate privacy exemption Senator Hart explained:

> Second, the protection for personal privacy. . . (also) is a part of the sixth exemption in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption.[87]

And finally, regarding special protection of sensitive "information:"

> Fourth, the amendment . . . protects both the identity of informers and information which might reasonably be found lead to such disclosure.[88]

Justice O'Connor's Dissent

In words as clear and unambiguous as the statute in question, Justice Sandra O'Connor lists the reasons the opinion of the Court in this case exceeds the Court's power to interpret a statute.[89] Here is her introductory quotation of Justice Frankfurter's explanation of the limits of statutory construction:

> . . . The courts. . . are under the constraints imposed by the judicial function in our democracy. . . . no one will gainsay that the function in constructing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.[90]

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First she analyzes the plain language of the text citing the rule that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[91] Finding the text unambiguous, Justice O'Connor asserts that the question boils down to whether the contested documents are "investigatory records compiled for law enforcement purposes." Since both the lower courts and the majority opinion admitted that they were not, she notes that at first blush the case would seem to be over.[92]

She cites the author of the judicial review principle, Chief Justice John Marshall, to the effect that the intention of the legislature "is to be collected from the words they employ." Marshall's 1820 dictum goes on, "Where there is no ambiguity, there is no room for construction."

Justice O'Connor then turns to the legislative history and reports that there is no clearly expressed legislative intention to have exemption (7) mean other than what it says. Furthermore, she points out that the majority's concession that "no express answer is provided . . . by the legislative history" falls far short of the Court's own test requiring "a clearly expressed legislative intention" contrary to statutory language to dislodge its plain meaning."[93]

Another reason for rejecting the plain language of a statute is to avoid "patently absurd consequences" which the legislature could not have possible intended.[94] However, Justice O'Connor demonstrates that Congress's drawing a line between records compiled for law enforcement purposes and

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summaries compiled for other purposes is neither necessarily absurd nor even arbitrary. The "name check" summaries could reflect precisley the kind of interpretation and purpose Congress intended be made public under the FOIA.[95]

The only argument made by the majority, she notes boils down to the opinion that the judicial enlargement of exemption (7) "makes sense" as public policy. In the opinion of the court, the compiled-for-law-enforcement exemption should be construed to avoid release of "information that would produce . . . undesirable results."[96] The dissent concludes, "Evidently, the Court arrives at this conclusion, not because the language of exemption(7) requires it, not because the legislative history supports it, not because the statute would have 'absurd consequences' otherwise, but rather because (quoting Frankfurter), 'the statesmanship of policy-making . . . wisely suggests it.'"[97]

> . . .Our job does not extend beyond attempting to fathom what it is that Congress produced, blemished as the Court may perceive that creation to be. Our task is solely to give effect to the intentions, as best they can be determined, of the Congress that enacted the legislation. Absent compelling evidence requiring a contrary conclusion, the best indication of Congress' intent is Congress' own language. Therefore, I dissent.[98]

Discussion

It is difficult to avoid the impression that the Supreme Court has a special set of principles when it considers a case involving law enforcement. It is tempting to infer that in law enforcement cases at least five members of the Court see themselves as a part of the criminal justice system

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rather than as a judicial body autonomous from the rest of government, and intent on protecting the Constitution. One can see a reflection of the apparent attitude of some law enforcement agencies that much of what they do is none of the public's business.

Leonard W. Levy concluded that the influence of the four Nixon appointees has been to do violence to individual rights in the area of criminal justice. Add Justice White to these four, and you have the majority in Abramson. Nothing describes the reasoning in the Abramson opinion so well as this passage written eight years before that decision. The Court, Levy observes, has their law and order outcome in view at theoutset and rationalizes backwards.

> . . . reinterprets precedents, distinguishes them away, blunts them, ignores them, and makes new law without the need of overruling or being bound by the past. . . . When new cases arise it finds factual distinctions, always available, that alledgedly warrant watering down the constituitnal right at issue.[99]

Substitute the word "statutory" for "constitutional" in this passage, and it would apply to the FOIA cases which might open the records of law enforcement agencies against the desires of their bureaucratic leadership. The easy flexibility of the Court's standards is not exaggerated in terms of recent FOIA cases. In 1980, considering a non-law enforcement case, the Court held that HEW did not have to create records in response to an FOIA request because, "the FOIA deals with 'agency records' not information in the abstract." (Emphasis supplied.)[100] In 1982, when the issue concerned

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FBI files the Court use suddenly informed by an inrush of new knowledge. The purpose of the law it belatedly realized, should be to deal with information, not records.

In Department of the Air Force v. Rose (1976) the Supreme Court would not allow the Air Force to exempt a class of files but rather called for an evaluation of each record agasint the exemption criterion.[101]

In that case it directed that reasonably segregable portions of each record that did not meet exemption standards must be disclosed. But in 1978 (NLRB v. Robbins) in a decision affecting law enforcement records, it discovered that "kinds of records" for "kinds of proeceedings" could be exempted from disclosure after all.[102]

It is rather ironic to read today Philip Kurland's 1963 criticism of the Warren Court. He said it behaved like the political scientist's model of a policy-forming institution rather than the legal model of an enunciator of doctrine, and he then wryly suggested that the "subject of constitutional law should be turned back to political scientists."[103] His remarks are as apt today regarding a Court that has become "activist" in protecting law enforcement from public scrutiny, as they were regarding a Court active in protecting individual rights against the intrusion of law enforcement.

Conclusions

1. The constitutionality of the public access statutes has never been brought to the Court as an issue, and the Court has presumed the constitutionality of the various parts

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of the law it was asked to interpret. This is in spite of President Gerald R. Ford's suggestion in his 1974 veto message to Congress that certain provisions of the FOIA would violate constitutional principles." The area of President Ford's concern, national security information exemptions, has come before the Supreme Court only once in EPA v. Mink (1973). The issue may yet come back to the Court because the amendment which President Ford unsuccessfully attempted to veto specifically reversed the Court's holding in Mink.

2. In cases concerned with access to law enforcement records, the Court has shown a bias toward the government. This has been demonstrated by its abridging without explanation principles it established in non-law enforcement cases, and in making policy that flies in the face of both the expressed intent of Congress and the plain text of the statute. In this area, the majority of the Court has a political color, identifying with "law and order" politics rather than impartial service to the Constitution. In supporting a partial domestic security autocracy the Court limits the public's ability to scrutinize and debate fundamental law enforcement policies. The balance between the rights of individuals and the authority of the government is thus tilted toward the federal law enforcement establishment of the government.

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CHAPTER IV

FOOTNOTES

[1]Presidential Records Act, 92 Stat. 2523 (1978), 44 U.S.C. secs. 2201-07.

[2]U.S.C. secs. 552(a) and (b).

[3]5 U.S.C. secs. 552(a)(2)(A), (B), and (C).

[4]U.S., Department of Justice, Freedom of Information Case List: September 1980 Edition, Office of Information Law and Policy (Washington, D.D.: U.S. Government Printing Office, 1980), pp. 1-70.

[5]Gerald Ford, "Veto Message," Weekly Compilation of Presidential Documents 10 (1974): 1318.

[6]E.g., Florence v. Department of Defense, 415 F. Supp. 156 (D.D.C. 1976); and Holy Spirit Association v. CIA Civ. No. 79-0151 (D.D.C. July 21, 1979).

[7]Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

[8]Ibid., 80-95.

[9]5 U.S.C. sec. 552(b)

[10]410 U.S. 73, 83.

[11]Ibid., 80.

[12]Department of the Air Force v. Rose, 425 U.S. 352 (1976).

[13]5 U.S.C. secs. 552(b)(2) and (6).

[14]425 U.S. 352, 352-53.

[15]Ibid., 363-70.

[16]452 U.S. 352, 371-74.

[17]Ibid., 375, n. 14.

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[18]Ibid., 361.

[19]FAA v. Robertson, 422 U.S. 255 (1975), 270.

[20]Ibid.,

[21]U.S., Congress, House, Committee on Government Operations, <u>Hearings before a Subcommittee of the Subcommittee of the Comittee on Government Operations: on Freedom of Information Act Oversight</u>, 97th Cong., 1st sess., 1981, p. 161.

[22]Department of Justice, <u>1980 Case List</u>, p. 143.

[23]NLRB v. Sears, Rosebuck and Co., 421 U.S. 132 (1975).

[24]Renogtiation Board v. Grumman Aircraft, 421 U.S. 168 (1975).

[25]NLRB v. Sears, 421 U.S. 132, 148.

[26]Ibid., 154, 160.

[27]Ibid., 153-54.

[28]Forsham v. Harris, 445 U.S. 169 (1980), 185.

[29]Ibid., 183-84.

[30]Reporters Committee for Freedom of the Press, et al, v. Kissinger, 445 U.S. 136 (1981).

[31]Ibid., 140-41.

[32]44 U.S.C. secs. 2901-09, 3101-07.

[33]44 U.S.C. secs. 3301-14.

[34]445 U.S. 136, 148.

[35]Ibid., 145.

[36]Ibid., 150-51.

[37]5 U.S.C. sec. 552(a)(4)(B).

[38]5 U.S.C. sec. 552(b)(7).

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[39]U.S. Congress, House, Committee on Government Operations, Freedom of Informatin Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st sess., 1975, p. 91, and see Department of Justice _1980 Case List_, pp. 143-44.

[40]Christine M. Marwick, ed., _The 1980 Edition of Litigation Under the Freedom of Information Act and Privacy Act_ (Washington, D.C.: Center for National Security Studies, 1979), pp. 93-94.

[41]Ibid., p. 93.

[42]Ibid., pp. 94-95

[43]Congress, FOIA Source Book, p. 337.

[44]_NLRB v. Robbins Tire and Rubber Co._, 437 U.S. 214 (1978).

[45]5 U.S.C. sec. 552(b)(7)(A).

[46]Congress, _FOIA Source Book_, pp. 332-34.

[47]437 U.S. 214, 236.

[48]Congress, _FOIA Source Book_, p. 112.

[49]437 U.S. 214, 215-36, passim.

[50]FBI, _et al_ v. Abramson, 456 U.S. 615 (1982).

[51]Ibid., 615-16, 631-32.

[52]Ibid., 618-21.

[53]Ibid.

[54]Ibid., 623.

[55]Ibid., 623-26.

[56]Ibid., 626 n. 11, 627.

[57]U.S., Attorney General, _Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act_, United States Department of Justice (Washington, D.C.: U.S. Government Printing Office, 1975).

[58]Ibid., pp. 4-7.

[59]456 U.S. 615, 622.

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[60]Ibid., 622 n. 5.

[61]Ibid.

[62]Ibid.

[63]Attorney General, Memorandum, p. 6.

[64]Ibid.

[65]Ibid.

[66]456 U.S. 615, 621.

[67]Ibid.

[68]Ibid., 621, 628.

[69]Black's Law Dictionary, 5th ed. (1979), s.v. "create."

[70]Webster's New Twentieth Century Dictionary of the English Language, 2d e. (1964), s.v. "Compile."

[71]Congress, FOIA Source Book, p. 345 (Senate Debate 30 May 1974).

[72]Ibid., pp. 344-46.

[73]456 U.S. 615, 620,628.

[74]Ibid., n. 10, 620, 631.

[75]Ibid., 620, 629, n.2.

[76]Ibid., 629.

[77]Ibid., 629, n. 13.

[78]Congressional Record, 1 October 1974, pp. S17828-30; Congress, FOIA Source Book pp. 370-71, and p. 133.

[79]Marwick, Litigation, p. 91.

[80]456 U.S. 615, 618, 628. And, see n. 12, where statutory definition of record is dismissed by ipse dixit.

[81]Ibid., 624, 628.

[82]U.S. Congress, House, Committee on Government Operations, Administration of the Freedom of Information Act, H.R. 92-1419, 92d Cong., 2d sess., 1972, p. 84.

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[83]Ibid., and FOIA Source Book, p. 91.

[84]Congress, FOIA Source Book, p. 332.

[85]Ibid., 229-30.

[86]Ibid., 332-33.

[87]Ibid., p. 333.

[88]Ibid., pp. 333-34.

[89]456 U.S. 615, 633-44, passim.

[90]Ibid., 633.

[91]Ibid., 635.

[92]Ibid., 636.

[93]Ibid., 638-39.

[94]Ibid., 640.

[95]Ibid., n. 12.

[96]Ibid., 643-44.

[97]Ibid.

[98]Ibid.

[99]Leonard W. Levy, Against the Law: The Nixon Court and Criminal Justice, (New York: Harper & Row, Publishers, 1974), p. 423, 438.

[100]445 U.S. 169, 185.

[101]425 U.S. 352, 371-74.

[102]437 U.S. 214, 236.

[103]Philip B. Kurland, "Forward to the Review of the 1963 Term of the Supreme Court," Harvard Law Review 78 (1964): 143, 164.

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CHAPTER V

DECEPTIVE GOVERNMENT SPEECH: THE MUTILATION OF THE RIGHT TO KNOW

> When man govern themselves, it is they--and no one else--who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, Un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. <u>It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed</u>. (Emphasis in original.)-
>
> Alexander Meiklejohn[1]
> <u>Political Freedom</u> (1965)

<u>Introduction: The Politics of Lying</u>

In 1973, just 13 years after the first public acknowledgment of an official lie by a President of the United States, journalist David Wise wrote <u>The Politics of Lying</u> (1973). In it Wise carefully documented the growth of an official policy of public deception. From the U-2 incident and the Bay of Pigs, to the Gulf of Tonkin and the Pentagon Papers, the examples demonstrate an official policy to lie to the public and the rest of the world. Wise's book shows that by the time of the finale of our Vietnam intervention

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and the denouement of the Watergate scandals, the political leadership of successive administrations in the executive branch had come to an implicit claim of authority to employ deceptive official speech in national affairs.

Wise recognized the causes to include the new internationalism of our foreign policy; the "explosion" of communications particularly the television news mechanism with its focus on the mouth of the government; and the growing national security elite who thought it knew better than the public what must be done. It was also the public relations approach to public opinion with the new opportunitites for "event shaping." But most of all, according to David Wise, it was the intelligence establishment, the new "invisible government," that since 1947 has been the origin and inspiration for official lying.[3]

There was little ambiguity about the first public disclosure of the government's official deception policy. After our U-2 reconnaisance plane suffered a mishap over the Soviet Union on May 1, 1960,the government announced that a "weather research plane based in Turkey" had gone off course and was missing.[4] On May 6, unaware that Nikita Kruschev was in custody of a smashed U-2 and a living Gary Francis Powers, State Department spokesman Lincoln White went before the press with this firm declaration: "There was absolutely no -"n" - "o" - no deliberate attempt to violate Soviet air space. There never was."[5] President Eisenhower later told several interviewers that the U-2 lie, and the resulting

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aborted summit conference, were his greatest regret as President.[6]

Wise's chronicle contains sobering examples. One instance was Ambassador Adlai E. Stevenson, mortified by his loss of innocence in the United Nations, denying half-heartedly the U.S. role in the Bay of Pigs incident.[7] The Pentagon Papers with thier disillusioning chapters on the growing divergence between the secret policies and the public pronouncements of the government was another.[8]

The most "crucial and disgraceful" deception of the era, according to Wise, was that orchestrated by President Lyndon B. Johnson to represent the Gulf of Tonkin incident as unprovoked aggression against U.S. warships on the high seas. As President Johnson smoothly requested the American press, public and Congress for a mandate to expand the lives and dollars of the Republic to fight "unprovoked aggression" from a foreign power, behind the closed doors of the Pentagon frantic naval officials wrung unwelcome news from the senior commander on the scene. "Recorded contact and torpedoes doubtful. . . no actual visual sightings. . . recommend withdrawal."[9] But at that moment, Wise records, American bombers were already en route to North Vietnam and the President, having briefed key Congressional leaders, was on television solemnly deceiving the public.[10]

Writing in 1973, David Wise reported an erosion of public trust, skepticism and even cynicism toward government. A handful of individuals polled by newspapers in seven cities

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even refused to believe that the United States had placed a man on the moon.[11]

In his study, David Wise documented a wide assortment of untruths, misinformation, deceptions, exaggerations, white lies and outright lies on the part of the Presidents and their key assistants. They range from hyperbole in the campaign trail, to official pronouncements from the oval office and press briefings at the Pentagon. However, he does not differentiate propaganda, personal speech, political speech and government speech, although he gives examples of each.

This chapter is concerned with deceptive government speech, of the several kinds of lie, which has the greatest potential to abridge a public right to know. By the employment of deception in government speech, officials signal that in national security issues they are no longer willing to engage in the balancing process between popular political rights and the authorities of government.

The Official "Right to Lie:" and the Public Deception Policy

> It's been my experience after a lot of years in Washington that lying increases the closer you get to the top.
>
> Lyle Denniston, The Baltimore Sun (1985)[12]

The United States government has become the largest single publisher in America. It has become the largest producer of records. It has become the focal public source of

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information on international affairs, national security, the economy, crime, environment--on virtually every matter of social importance.[13] And, at the same time, it has clearly exercised an executive policy to deceive the public when deception is believed to be in the public interest.

A comprehensive study of the whole matter of government speech is vital to the study of political science and government in this "age of information," however it has only recently been undertaken.[14] Government is the most prolific "speaker" in our society. The federal executive branch alone spends over $1 billion a year on public information and program promotion,[15] and yet only a handful of relevant judicial decisions exist, and an analysis of doctrine is inchoate.

The Government as Speaker

For purposes of this study we are concerned with official government speech and record. By that is meant words emanating from political officers and government employees acting in their official capacity, not merely exercising their rights of free speech.

While a line between political speech and government speech cannot always be drawn, it is reasonably discernible in the cases to be discussed. Common sense tells us that the floor debates and speechifying in Congress can hardly be considered government speech, but a joint resolution that has passed both houses can be. When a cabinet secretary announces his distain for a popular musical group, it is not

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the government speaking, but when he reports the facts and figures of his department to the Congress and the public, it is. When the President discloses to us his distrust of communist governments or his faith that private enterprise will create adequate employment under proper economic nourishment it is his political opinion. But when he signs a law or executive order, when he reports of the state of the union, or when he announces an armed attack by United States military forces, that is government speech.

Most government speech reaches the public through official government publications and announcements and not from the key poltiical officers of government. Official publications such as the Federal Register, the Code of Federal Regulations, the United States Code and official income tax instructions are government speech. Practically every element of the vast executive bureaucracy publishes regulations, directions, advice and other information for public consumption. Most agencies and departments have public information offices that produce official statements for the press as well as responses to public inquiries. The federal government reaches out in public relations style to reach segments of the public with such material as armed forces recruiting messages, public service announcements, product safety warnings, and other consumer information. This all qualifies as government speech, being identified as the product of a government official, department, or other official body.

On the local level, even the curriculum of public

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schools has been described as government speech.[16]

While a reveiw of the extent of government speech provides an appreciation of the potential effect of official deception, this study will focus only on certain speech of the executive branch. It is in certain military, law enforcement, intelligence and foreign policy elements of the executive branch that the policy of official deception has come to light and has had a significant effect on the course of public affairs.

By their very nature, the other two branches are unlikely sources of deliberately deceptive official speech. The judicial branch speaks through its judges and justices, and their opinions, are in part vigorous dissents. The very tradition of judicial speech is open and inclusive of dispute and questioning. And, it is the nature of the adversary system of litigation that parties freely and publicly contest the substance of opponent's cases.

It is also the very nature of Congress that disagreement and dissent is inevitable and open. This is not to say that these two branches carry a guarantee of accuracy, or even honesty, in their official speech. It is only to say that they are forums in which a deliberate and successful effort to deceive the public at large is unlikely.

Apparently the only time the Supreme Court has considered a charge of official deception was purely peripheral issue in Wickard v. Filburn (1942).[17] Although that decision chiefly concerned the interpretation of the Commerce Clause,

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one allegation made against Secretary of Agriculture Claude Wickard was that he deceived the public in a radio address regarding the content of a bill pending before Congress. In dismissing this argument, Associate Justice Jackson declared, "if high level executive officers were held accountable for every misstatement or omission, government leadership on vital matters might well come to a halt."[18]

Legal scholarship has not yet squarely addressed the matter of official deception either, but has recently begun to consdier the effects of government speech *per se.* Mark Yudof points out that government secrecy alone may make informed debate impossible "and thus may itself be thought of as a powerful mode of public communication."[19] Robert Kamenshine sees such potential in the government's power to communicate that he calls for the recognition of an implied "political establishment clause" in the First Amendment that would "prohibit government advocacy of political viewpoints and unequal government assistance to private political dissemination."[20]

While no court has explicitly ruled on the constitutionality of government speech, some scholars point to the Supreme Court's decision in *Wooley v. Maynard (1977)* as implying constitutional proscription of certain political speech by the government. In that case the Court reversed Maynard's conviction for obscuring the motto, "Live Free or Die" on his New Hampshire license plates.[21]

In his broad review of the government speech question

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Steven Shiffren points to the large number of ways the government exercises its formidable interest in communication.[22] As the controller of many public forums, as a speaker itself and as a subsidizer of speech the government has vast power to promote an orthodoxy, according to Shiffren. As an illustration he poins in particular to the public educational system which clearly promotes political values and to which there is no practical alternative for taxpaying parents who wish to resist objectionable instruction.[23]

While concern about the potential of government speech has not been broad, it is mentioned in earlier theory. In 1947 Zechariah Chafee noted that there was nothing like a clear and present danger test to limit the participation of government in mass communications.[24] He pointed out prophetically, "An ambitious official with enormous public funds at his disposal might be tempted to drown out the private press."[25]

Thomas I. Emerson in the conclusion of his _Toward a General Theory of the First Amendment_ (1966) took a somewhat blase view of government participation in political expression. He noted that the "government itself has always participated in the marketplace of ideas."[26] Observing that few limitations other than self-restraint were imposed on government speech, he saw little need of limitation in a marketplace where nongovernmental sources also had access. At that time, he wrote that only where the government expression operates as a monopoly "some principles of limitation may be necessary."[27]

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Four years later, writing The System of Free Expression (1970, Emerson expressed obvious alarm over the covert funding of propaganda by government agencies.[28] Referring chiefly to secret CIA subsidies to organizations engaged in expression, Emerson asserted, "failure to reveal the part played in the system of expression by the government, with its immense resources, jeopardizes the health of the whole system.[29] Calling such covert government speech a plain violation of the First Amendment, he observed that a judicial remedy would be difficult to devise or administer.

By 1970, Emerson was also sensitive to other forms of government expression that "distort the system of free expression."[30] This occurs when the government has a monopoly or near monopoly over the media, and its voice may "overwhelm or displace all others." In a simpler system, wherein monopoly might have developed only in the private secotor, the government was available to "restore diversity and balance." But what of the situation when the government causes the distortion and is "unwilling to yield voluntarily?"[31]

This situation, which Emerson admits was unforeseen by him and the Framers both, calls for government cooperation in permitting access to its forums, government divesting itself of the monopoly, or government voluntarily presenting a balanced viewpoint itself.[32] It seems a bit optimistic to expect any of these from a government which has already proved "unwilling to yield" its dominance in the system of expression.

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Back when Emerson first penned his theory, the Supreme Court in Red Lion Broadcasting v. FCC (1966)[33] proclaimes that the purpose of the First Amendment is to preserve an uninhibited "marketplace of ideas in which truth will ultimately prevail, rather than to coutenance monopolization of that market, whether it be by the Government itself or a private licensee."[34] "(S)peech concerning public affairs," it declared, "is more than self-expression; it is the essence of self-government."[35] To this citation Kamenshine bluntly rejoins, "If a government can manipulate that marketplace, it can ultimately subvert the process by which the people hold it accountable."[36] Perhaps with the events of the early 1970s in mind, he recalls Vincent Blasi's "checking value" of the First Amendment, observing that manipulation of the system of expression is most likely to occur in connection with official abuse of power.[37]

In summary, the means by which the executive branch may manipulate the system of communcation, short of deception are formidible. Government secrecy alone may prevent or postpone public debate on matters of political importance. There is the significance of political advocay by the government together with preferential assistance to private sources sharing the government's advocacy. The voice of government is perceived as authoritative because it can command as well as inform and advise. The voice of government is pervasive; it permeates the forums of education, commerce, agriculture, medicine, law enforcement, national seucrity,--every sphere

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of society.

The speaking resources of government are immense; they can overwhelm or drown our dissenting voices. Only an alert and contentious segment of the press, when it is inclined to do so, can challenge government advocacy and prod the machinery of checks and balances in Congress and the courts.[38]

Add to this formidable speaking power of government its claimed authority to deceive the public and there is the potential for almost complete information control.

Origins of the Official Deception Policy

A key to understanding the growth and significance of the official policy of deception is an examination of the use of deception before and after the Second World War. Before that war there was no significant claim of an authority to deceive the public. The public was deceived only incident to extreme circumstances, similar to the prior restraint criteria in Near v. Minnesota (1931).[39] That is to say, the public might be incidentally deceived by government efforts to deny hostile governments information of troop ship schedules or our military losses in war.[40] In the decades following that war, the use of deception by the government has grown to include new circumstances and new justifications. Moreover, the growth of deception policies has been more than a simple extension of an established and accepted practice; it has embodied a change in targetting. Until recent decades,

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the public was not the primary target of deceptive government speech. The existence of foreign agents with access to all public information made it necessary to deceive the public in time of war. But during the past three decades, segments of the public at first, and finally the entire public and even Congress have been the targets of deliberate government deception.

Several interrelated factors combined to bring about this development. First there was the intoxicating success of intelligence projects and special operations involving deception during the Second World War. And, second, there was the fateful decision to maintain an active, centralized and permanent secret intelligence organization in our government after the formal hostilities ended. But, most important, there is the perpetuation of a crisis mentality in the absence of a formally declared war. We fight a continual cold war with Communism. We have undergone a continual wartime attitude on the part of many of our political leaders, and experienced their emergency measures as a routine. In a sense, the First Amendment has become in part a casualty of "inter armes leges silent."

Before the Second World War

There is no evidence of moral outcry when historians have revealed our successful deception of the enemy. Facing a foreign enemy, our military commanders have employed the ruse de guerre, and our government has understated our losses and exaggerated the extent of victories without apparent

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damage to the constitutional balance. In time of national emergency , government officials reasonably adopt the same license with regard to the veracity of their public speech as with regard to the control of other activities protected by the First Amendment. There is no obligation of government to assist with information, or in any other way, an entity bent on the destruction of our state and Constitution. Even the most liberal reader of the First Amendment would hardly suggest that our wartime spies should be forthrightly introduced as agents of the United States Government.

From the very beginning of its existence, our government has been no stranger to deception in matters such as military capability, war industry, intelligence collection and security. Among his other virtues, George Washington has been described as an imaginative and successful intelligence officer.[41] Historians have studied the use of confidential "executive agents" in this country since the time of the continental Congress and have documented early examples of covert intelligence collection, covert procurement, covert funding and covert military action. They also describe the early protection of intelligence sources and techniques through deception.[42]

With the first World War came the dawning of modern wireless military communications and with it the beginnings of communications intelligence, inerception and code breaking. With the ability to read the enemy's mind on occasion, imaginative commanders in Europe were able to employ vastly

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effective deceptive strategies. In at least one campaign, radio intelligence was decisive.[43] The importance of cryptologic intelligence and its potential for exploitation were not lost on American intelligence code clerks serving in Europe in that war. They returned to set up the famous "black chamber" which ultimately broke the Japanese diplomatic code at the beginning of the Second World War.[44]

<u>The World War Ii Experience</u>

Although the United States had developed an advanced capability to obtain communications intelligence, at the outset of the Second World War her ability to exploit it was best described as amateurish.[45] In the employment of intelligence and particularly its integration into strategic operations, the Americans in the European Theater of Operations were instructed by the British. Perhaps because they began at a distinct disadvantage, the British in World War I established remarkably effective intelligence and deception programs that were decisive to the outcome of the war. The experience as Britain's ally and apprentice in the European intelligence war forever changed American intelligence thinking and policy.[46]

The British programs were based on two brilliant and successful intelligence operations: Ultra and the Double Cross System. Ultra was the term given the produce of the code-breaking activities at Bletchley Park.[47] The Double Cross System was an extensive counterintelligence effort run by Britain's MI-5 organization.[48]

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Upon the information and communicating capability of Ultra and MI-5 was built an overall deception plan for the second front. One of its major efforts persuaded the Germans that an entire U.S. Army Group was poised to land in Pas de Calais _after_ the Normandy landings.[49] This phantom army tied up half the entire German army group, which was held in reserve while the Allies broke out of the real beachhead German hesitancy to commit all available forces to the defense of the Cehrbourg area was also due to a deception which persuaded them another phantom Allied Task Force was headed for an invasion of the Balkans in the summer of 1944.[50] The Germans had been out of position for the Allied landings in Sicily, thanks to successful deception as to time and place.[51] This decpetion was begun by the well-known "man who never was" ploy in which bogus documents were planted on a dead British marine apparently killed in an air crash of the coast of Spain.[52]

The British imagination, commitment to detail and success were eye-opening to American intelligence officers. The British took their intelligence seriously and were willing to pay a price for effective deception.

The examples now available in print of the exploitation of intelligence and counterintelligence, both on the battle field and in the strategy of the war, are numerous. It was not out of mere courtesy that General Dwight Eisenower called the British inspired system "decisive."[53]

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The Birth of Centralized Intelligence in the U.S.

Although the United States possessed only a modest intelligence capability at the outset of the war, it quickly built effective intelligence systems of its own. Their contribution to the war in Europe were substantial, and in the Pacific, the role of such brilliant Naval intelligence operations as the "Hypo" project in Hawaii was undoubtedly decisive to the initially outnumbered U.S. Fleet.[54] The United States did not leave its intelligence resources decentralized very long after it entered the war, however.

In July 1941, President Roosevelt created the first centralized intelligence organization in the United States government, the Office of the Coordinator of Information.[55] It became apparent that the most effective and secure exploitation of the strategic information compiled by this office would require a similarly centralized organization. Therefore the office was transformed into the Office of Strategic Services (OSS) and placed under the Joint Chiefs of Staff (JCS) where it directed both world-wide collection of intelligence and certain exploitation operations not feasible for existing military units.[56] World War II are by now well docuented and well known. Organized as a wartime contingency, the OSS was remarkably effective in a world-wide operation that included clandestine collection, sabotage, raids, guerrilla operations, and even some political subversion. Most of the men who became the leadership of America's post-war intelligence establishment began their careers in OSS. All of

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them graduated from that experience deeply impressed with the effectiveness of centralizing the accumulation of intelligence the planning and execution of further intelligence collection, and the special deceptive and covert exploitation of that intelligence.[57]

After the atomic bomb had mooted the end-play of the Second World War, the United States began to demobilize most of its armed forces and the emergency wartime governmental apparatus. With it went the OSS, which in October 1945 President Truman broke into two parts. The administrative and operating units, he assigned to the War Department. The intelligence analysis and evaluation elements, he placed in the State Department.[58] This was reflected the idea that a centralized intelligence apparatus with extraordinary powers was inconsistent with an open and democratic society.

But the United States quickly found that it was not at the threshold of a world at peace. Joseph Stalin did not withdraw Soviet troops from the countries of eastern Europe; instead communist governments were installed, to the dismay and apprehension of her former allies. The United States found herself the leader of the Western democracies, facing an apparent Communist bloc. President Truman responded by discarding the policy of non-intervention in European affairs and led the country to resist further communist take-over in Greece and Turkey. The new "Truman doctrine" was "to help free peoples to maintain. . . their national integrity against aggressive movements that seek to impose on them to-

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talitarian regimes."[59]

In 1946, President Truman recentralized intelligence production under the Central Intelligence Group. This group was to coordinate the collection activities of U.S. intelligence agencies, assemble intelligence from all sources and provide special analysis and evaluation to various government agencies. Strong pressure built among the OSS veterans to establish secret and centralized operating agency, and by the next year such respected men as Allen Dulles and William Donovan had persuaded Congress to grant the new agency extraordinary immunity from oversight and supervision.[60] In 1949, the year the Soviet Union exploded its first atomic bomb, Congress passed the Central Intelligence Agency Act, increasing the immunity and discretion of the organization. This legislation permitted the CIA to perform, "such other function as the National Security Council may, for from time to time, direct."[61]

In the tense, cold-war atmosphere Congress had constructed a permanent, centralized agency capable of clandestine and covert or "paramilitary" intervention in the affairs of other countries.

In 1951, Truman consolidated all elements of national intelligence under the new Director of Central Intelligence, Bedell Smith.[62] The requirements of strategic intelligence for input from signal analysis and decryption, and the complimentary requirement to secure our own signal transmissions from hostile interpretation, led to the secret establishment

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of the National Secuirty Agency in 1952. Such was the security surrounding the creation of this organization that its very existence was not acknowledged for five years! Money for its construction and operation was hidden in Defense Department and other appropriations.[63]

Certain cynics among the alumni of the intelligence community suggest that it was less a pressing policy requirement, and more a search for employment, that turned the CIA's covert eyes toward the third world.[64] On the other hand, considering the events since the end of the world war, and especially the intervention of the Chinese in Korea, our cold warriors had a solid rationale for supposing we were engaged in a struggle against communist world domination. For whatever the mix of reasons, the possession of a deceptive covert action capability gave the government a "third option" between diplomacy and outright war with which to contest the "uncommitted" and emerging nations. If armed conflict were to be assumed inevitable it was seen as more sensible to fight it as a disguised counter-insurgency than to engineer a strategic confrontation on the brink of nuclear war.[65]

A problem for self-government is that convert action is by its nature deceptive. As Daniel Ellsburg put it bluntly in his Senate testimony, "lies are to be expected in the conduct of cover operations--that is what makes them covert . . ."[66] The readiness to use covert operations puts the government on a kind of continual wartime status. Secrecy and other contingency measures of the past became a way of

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life. The executive branch has responded to the continual "war with communism" by centralizing the White House into full time command center.[67] As the contingency authority to protect national security continued on in time, an increasing strain with constitutional government was inevitable.

Secrecy as a mode of government led to President Eisenhower's denial of the U-2 overflight, President Kennedy's personal army and presidential war, President Johnson's deceptive initiation of a ground war, and finally President Nixon's "covert" bombings of a neutral country. During the years of the Vietnam conflict, only members of Congress known to be sympathetic were briefed on our covert actions. Ultimately it led to Cabinet officers and top military leaders lying to Congress and the public as a matter of "right."[68]

The attractiveness of covert action sprang in part from their smooth and effective course at the outset. One of the CIA's first was a joint effort with Britain's MI-5 called Operation AJAX. The action was carefully planned in 1951 by cool British professionals and OSS vetran Kermit Roosevelt, who was the CIA case officer. It was reviewed and approved by both governments and was aimed at the overthrow of Prime Minister Mossadegh of Iran. When the British were ejected from Iran, Roosevelt slipped into the country and personally directed the successful completion of the operation.[69] Whether the American public would have agreed to the restoration of the Shah to the throne will never be

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known because they were not informed. The action put in power a regime clearly friendly to the United States, but hardly democratic. It would be hard to say the secret action conformed to the understood public policy of resisting "totalitarian regimes."[70]

Deception and the War in Southeast Asia

> . . . you should do something that no other high-level American administrator connected with Vietnam has ever done, . . . punish lying.[71]

These words were written in a letter from Daniel Ellsberg, then Special Assistant to our Deputy Ambassador to Vietnam, to Robert Komer who was about to take over direction of United States civil field operations in that country. Ellsberg, an economist whose speciality was decision-making under conditions of risk and uncertainty, had gone to Vietnam in August 1965 to get a first-hand view of the situation. As a special assistant on international affairs in the Office of the Secretary of Defense, he had become concerned that information received in cable traffic and through official reporting was inadequate and distorted.[72] He became convinced that a major source of our problems in that country was a state of ignorance among top policy makers and government leaders, and he further became convinced that a source of this ignorance was lying, evasion and concealment of information at all levels. It was this belief that led him to recommend "harsh" penalties for military and civilian officials who lied or caused their subordinates to lie to the Ambassador or the President.[73]

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Theodore White believes that deception in government during this period can in part be attributed to the influence of the "new style" in election politics with its public-relations approach, dirty tricks, and cynical view of the truth.[74]

In addition to David Wise's The Politics of Lying (1973), there is considerable excellent study and documentation of the policy of official deception. The most thoughtful and comprehensive recent analysis of the presidency is Arthur M. Schlesinger's The Imperial Presidency (1973) which examines the roots of the official "power" and "right" to lie.[75] David Halberstam's interesting The Best and the Brightest (1973) is a comprehensive chronicle of the Kennedy and Johnson administrations' misadventures with the Vietnamese war.[76] A more focused documentation of the deception by government officials during that period is Daniel Ellsberg's Papers on the War (1972).[77] The essential source on government lying during that war is The Pentagon Papers (1971), particularly as edited organized and summarized by the New York Times reporters.[78] The Papers, in close to the form released by Daniel Ellsberg, are also available in five volumes as The Defense Department History of United States Decision-Making on Vietnam (c 1971) in the "Gravel" edition. The final volume of that set contains commentary by scholars and journalists.[79] An interesting commentary and documentation of the early war is in Ralph Stavins, et al's somewhat polemical Washington Plans an Aggressive War, (1971).[80] For an account

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of the numerous deceptive and disguised activities managed by the CIA, there are two seemingly reliable sources. The first is Victor Marchetti and John Marks's The CIA and and Cult of Intelligence (1974),[81] and the other is the compilation of news stories and documentation in The CIA and the Security Debate: 1975-76, published by Facts on File, Inc.[82] Finally, an excellent perspective on the Nixon years is available in the carefully researched recent book by Seymore Hersh, The Price of Power: Kissinger in the Nixon White House, which contains a well-focused account of President Nixon's and Henry Kissinger's decpetiveness.[83]

Becuase they presided over the denouement of the war and other government deception, Hersh's comment on their blindness to a fundamental truth about this country is relevant: "As their memoirs showed, neither manever came to grips with the basic vulnerability of their policy," he wrote, "they were operating in a democracy, guided by a Constitution, and among a citizenry who held their leaders to a reasonable standard of morality and integrity."[84] Three presidents, Kennedy, Johnson, and Nixon, apparently employed deception concerning the war because of immediate political concerns; i.e., losing Saigon might have meant losing the White House.[85]

Their decpetions were often self-defeating because they were not durable; they were doomed to boomarang on the President from the outset. The Presidents found they had to decieve a good many people, our foes, our allies, the Congress and the public. As Daniel Ellsberg observed concerning news-management:

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> The deceptive games with Congress and the public were played for serious stakes. The penalty for frankness would be to ally against his programs those who might conclude them were not worth attempting at all, and those who would condemn him for not doing much more. . . .Honesty, it appeared, would only earn him opposition whatever he did. . .
>
> Yet internal analyses, estimates, . . . recommendations, all indicated that . . . these chosen programs were inadequate. Thus . . . documents and opinions had to be concealed,by secrecy and deception.
>
> In short, the Presdients conclude, the public must be lied to; about what the President's decison is, what advice he rejects, what he was told to expect, what he foresees and intends for the future.[86]

Once the President began a policy of deception, it was exacerbated at all levels. Ellsberg also observed;

> When the President starts lying, he begins to need evidence to back up his lies because in this democracy he is questioned about his statements. It then percolates down through the bureaucracy that you are helping the Boss if you come up with evidence that is supportive of our public postion. . . . The effect of that is to poison the flow of information to the President himself.[87]

It is obvious that the Presidential deceptions were not durable. The war was too long and too public for illusions to be maintained.

It was a hallmark of the official deceptions of this period that they were directed, not against enemies of the United States, but against the American public.

When President Kennedy initiated his disguised operations against North Vietnam, he had learned what they already knew, the war in the south was a civil war.[88] Yet, officially we were helping resist aggression "from the north."[89]

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When 1,000 American advisors were withdrawn in late 1963, the effect was more than off-set by the beginning of a secret U.S. build-up.[90]

What President Johnson described as South Vietnamese strikes against communist infilitration installations in 1964 were actually covert raids directed by the CIA and the US. military.[91] When Secretary of Defense McNamara denied knowledge of them and further claimed that the U.S.S. Maddox was unaware of them when the Gulf of Tonkin incident occurred, he was concealing the fact that he approved the targets for the raids and the Maddox was monitoring the radio traffic they caused.[92] The testimony of both McNamara and Secretary of State Dean Rusk before Congress onthis matter was also untruthful.[93] In fact the executive leadership was not sure what really happened in that incident until after the retaliation had been launched and the Gulf of Tonkin resolution had been passed.[94] It wasn't until four years later that the truth came to Congress.[95]

When U.S. forces were committed to full-scale ground combat in Vietnam, a fact not lost on the Viet Cong, it was initially denied to the American public.[96]

In late 1967 and early 1968, the U.S. military command and CIA officially understated the Viet Cong strength.[97] Only after an unprepared U.S. force suffered 10,000 killed in the Tet Offensive did the official figure reflect what CIA analysts had known for two years before, the official

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figures were deliberately discounted from 100% to 200%.[98]

Finally, when he testified in his confirmation hearings before Congress that the CIA had nothing to do with the overthrow of President Salvatore Allende in Chile, Henry Kissinger neglected to mention that he had approved part of the $11 million spent for that purpose by the CIA.[100]

Discussion

Even during a national emergency, the power to promote internal security can be abused. Should it be limited? Although increased governmental authority over communications is necessary, there still exist political issues about which citizens have a right to information and discussion. It should be presumed that a democratic government is releasing all the information security permits, and that it is as complete and acurate as the conditions of the emergency will allow.

Dame Rebecca West tells of the excessive use of lurid propaganda by the Allies in World War Ii. After a point, its effect became deleterious: those who detected deception became distrustful of their own government and those who did not were led into pointless misconceptions about the enemy and the war.[101]

In a post-emergency period, there will be policy matters before the public which are related to the emergency. It is easy to see how public debate on such issues may be distorted by the residual effects of government

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deception or confused by public distrust resulting from it. The cynicism and apathy of a citizenry wise to governmental fraud could be destructive to the ends of self-government as the fraud itself. One can hardly blame officials during an emergency to err on the side of security, but it is an intelligent policy that they also strive to maintain public faith in the form of govenrment as well as trust in the power of government.

The unique strategic perils of the cold war pose difficult policy and moral judgments. What should be the reaction of the President if he learns that sometime within the next hour, New York City may be transformed into incandescent plasma by a Soviet warhead? Should he announce it and permit those who can to evacuate, but thereby imperil lives through panic and riot?

In this technological age, war is not the only potential source of a severe public emergency. For example, there are 58 nuclear power stations throughout the United States.[102] Any one of them is capable, through sabotage or accident, of causing massive public injury and death. When trouble begins to develop in the mechanisms of such a plant, at what point does the government stop pretending that everything is OK? At what point does it suggest to the residents in the surrounds that they quietly drop what they are doing, and evacuate?

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National Security Argument

The ultimate argument in behalf of a government deception policy is that national security requires it. In his comprhensive essay on the free speech principle, Frederick Schauer has considered such an argument made to supress free speech, and his analysis applies equally well to claims of justified public deception.[103] This is because the national security argument in both cases is essentially the same: "A threat to national security is commonly held to be a danger of sufficient magnitude that the interest in freedom of speech must be subordinated."[104] If a purpose of freedom of speech is informed public debate on government, then the term "information of government" may be substituted.

But, as Schauer points out legitimate arguments from national security presuppose conditions of national emergency in which opportunity for rational discussion and the separation of truth from error may not exist. While national emergency would seem to justify much of the deception practiced by our government during the Second World War, it is harder to believe in terms of the past three decades. Any rules for determining whether a true national emergency exists, according the Schauer,

> . . . must ensure that a claim of emergency is only availing when the conditions for deliberation do not exist. This is the point of the 'clear and present danger' doctrine in American free speech theory, and it is equally useful in other contexts as well.[105]

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In the context of justifying deception, it is especially difficult to suppose that the threat to national security during the Vietnam War, for example, was sufficient to prevent the operation of the deliberative process. "National Secuirty" was raised more to prevent rejection by the American public of the whole intervention policy than it was to deceive the hostile forces. The irony is that official government mendacity itself eventually became an issue in the debate and contributed to the termination of U.S. invovlement. But, it has not led to a renunciation by government of the policy of domestic deception.

Schauer leaves us with a standard for evaluating the claim of danger to the national security. It is the immediacy of its effect, as well as the probability and extent of the claimed harm, that must be weighed in balancing national security interests against free speech and informed debate interests.[106]

The Imperial Presidency

In the recent changes in the executive branch approach to foreign policy historical Arthur Schelsinger has seen the emergence of an "imperial presidency."[107] Along with the centralization of foreign policy control in the White House has come a developing "secrecy system" which has offered the chief executive the advantages of a power to withhold, a power to leak, and ultimately a power to lie.[108] Reviewing the use of deception from President

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Eisenhower's use of the CIA through President Johnson's "misrepresenting one episode after another," to President Nixon's secret air war against Cambodia, Schlesigner observed that the "longer the secrecy system dominated government, the more government assumed the right to lie." This, he notes, is based on the idea that foreign policy is "no ones business" but the executive's, a concept obviously hostile to representative government.[109]

With the disorderly and divisive end of the Vietnam intervention, and the resignation of President Nixon, came an attention of the deception policy. Reforems have been legislated and Congress has assumed a more assertive oversight role in foreign relations.[110] However, the conditions and premises that gave rise to the policy of deception still exists. Congress has not refuted the executive branch assertion that under certain conditions, deception is legal. One expression of this assertion came from the Chairman of the JCS in a letter to Congress in 1973. He explained with rather obscure logic, that it is not illegal to lie to Congress if there is no intent to deceive, and no intent is to be assumed if deception is "in conformity with orders from a higher authority in possession of the true facts (sic)."[111]

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Conclusion

Since the Second World War, the executive branch has evolved and practiced an official deception policy. It began as a wartime, emergency measure to deceive foreign enemies of the United States. During the past two decades, however, the American public has become the primary target of false information, often in cases where hostile and neutral foreign governments are in possession of the truth. The purpose of such deception is largely political, to prevent debate and dissent regarding national security and foreign policy. Although deceptiveness, along with other "security" measures appears to contribute to the success of some diplomatic and security undertakings, there is little specific information that its use is justified in terms of the circumstances

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CHAPTER V

FOOTNOTES

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[36]Kamenshine, "Political Establishment Clause," p.1105

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[38]See Justice Potter Stewart's opinion in New York Times v. United States, 403 U.S. 713 (1970).

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CHAPTER VI

DISCUSSION AND CONCLUSIONS

> The public should view excessive secrecy among government officials as parents view sudden quiet where youngsters are playing. It is a sign of trouble.
>
> William P. Rogers, 1961[1]

Introduction

Chapter I has illuminated a solid expectation that the citizen may receive information about his government sufficient for his basic political role in a self-governing society. We have reviewed affirmations of a right to this information from every direction. Our fundamental law, our political philosophy, our history and traditions of government, our common law, statutory enactments reflecting current popular will, and certain Supreme Court decisions all combine to declare that the individual member of the public is entitled to politically important information concerning his government.

We have not discovered a "balanced" political system, however. The constitutional mechanism that limits governmental power by means of public rights is badly out of calibration with respect to scrutiny of official actions and intentions. In certain national security and law enforcement matters, an information autocracy has appeared that

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overweighs efforts of the public, its press and the Congress to scrutinize the executive branch effectively. It is a diminutive autocracy, but autocracy nonetheless due to the support of the Supreme Court as an accomplice. The Court in these matters has departed from its line of precedent cases to support government secrecy. The autocracy is also maintained through a policy of deceptive official speech.

This chapter first summarizes and discusses the abridgement of the government's obligation to allow adequate citizen scrutiny of its actions and policies.

It then discusses the affirmation of the public's right to know official information and presents an argument for its protection by the Constitution.

The final section presents conclusions regarding a constitutional right to know including it's importance, implications and possible consequences.

Before going on to these sections, two qualifications limiting the scope of this discussion should be explained.

First there are genuine requirements for secrecy in military matters, intelligence operations, certain law enforcement matters and international relations. It is the <u>means</u> of secrecy, and the extent of secrecy that are issues in this study. The requirements for secrecy, the existence of international threat, the problem of crime, are all recognized as important to information policies. But, they are beyond the scope of this study. The premise concerning

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these matters is that a system presuming openness and disclosure can survive with effective intelligence, effective foreign policy, effective law enforcement--perhaps better than a closed system. Democracy is not obsolete, and truthful public information will help not hinder national policy. For example, the Pentagon Papers disclosed that much of what was concealed about the Vietnam experience concerned the Presidents' ignoring accurate and well-founded advice from intelligence and military experts. When this official dissent became public, we found we had good intelligence but bad political decision-making. That is a political matter, not a military intelligence or security matter.

The public right to information about official actions and intentions has been expressed as both a right of access and a right to know. Both have been used in the sense of an ultimate right to information. However, in considering the implications of constitutional protection in the third section, the differences between the right of access and the right to know becomes important. A right to access suggests a right to existing records and activities of government. The broader right to know implies an obligation on the part of government to assemble and verify information, and perhaps create documents, specifically in response to the exercise of the right. In the following consideration of abridgements and affirmations, we are considering a right to information, its form notwithstanding.

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The distinctions made in the third section on implications would be important only to an appellate court's choice of terms.

The Abridgement of the Right

The continuing abridgement of the public right to know what its government is doing and planning comes from an apparent political sub-system within two branches. Although the initiative for a security autocracy is from the executive branch, supression of public access also depends on support from the Supreme Court. This extra-constitutional coalition has expressed itself in two key decisions in which the Supreme Court has laid the legal foundation for discretionary prior-restraint and exemption of law enforcement information from public access.[2]

Perhaps, zeal to combat the "criminal forces" in society and the threat of international communist expansion has produced this information autocracy. Its increasing power feeds on the public's diminishing store of political rights. The imbalance is fed by successive events creating the perception of crisis. We are informed that we are "at war" with crime and communism. But is it war in the clear sense that justifies emergency governmental means? Does it embody a present national emergency that so immediately imprils the state that it precludes opportunity for political debate? That is to say, does it meet the conditions justifying propaganda, deception, prior restraint and other forms of censorship?

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No convincing information of so dire a situation has been forthcoming.

The Executive's "New Era"

Although journalists have recently expressed alarm over a seeming new era of governmental secrecy, as Chapter IV indicates, there is nothing new about it. The executive impulse to practice as much secrecy as possible seems to be a constant. The means are now more overt. Considering our periodic sanctions against heretical political speech, (Chapter III) it is tempting to sense a recurring thirty-year cycle of political exploitation of national security concerns. Like the early 1920s and 1950s, are these years to bring increased governmental abridgement of political freedom? The present administrations security program certainly suggests such an idea.

Censorship

In addition to an unprecedented restriction on news coverage of recent U.S. military actions, this administration is building other forms of information blackout. Its pending gag regulation will require over 100,000 government employees to sign life-time waivers of their First Amdnement right to publish because they have access to classified information. New government security policies are causing the classification of thousands of documents to put them beyond reach of the FOIA. Employees of the executive branch must report their contacts with reporters, and some have been

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subjected to lie-detector tests in an investigation of the "premature" disclosure of information.[3]

If the outcry in the press is correct, this administration is more closed than previous ones. Whereas several earlier presidents practiced deception, which in a sense acknowledges the importance of public scrutiny and opinion, the present incumbent prefers more forthright censorship, news blackout, and other measures to control information. In fact this President's use of fait accompli interventions implies a greater independence from public will than earlier attempts to sway opinion with deceptive information.

The executive branch is fighting the statutory right of public access with restrictive implementation, document classification policies, and sustained efforts to amend the FOIA with sweeping exemptions. Both the CIA and FBI have brought claims to Congress that the FOIA hampers their effectiveness.[4] In 1978, a congressionally ordered GAO study failed to substantiate the Bureau's claim.[5] In 1982, a Supreme Court decision, written by Justice White, stretched its holding beyond the instant case to give FBI the virtually unlimited exemption it had prior to the 1974 amendments to the FOIA. Congress also turned a deaf ear to CIA claims,[6] and in 1980, the Supreme Court presented that agency with the Snepp decision giving it control over former employees' writings to the grave!

The members of the Freedom of Information Committee of The American Society of Newspaper Editors believe the

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policies of secrecty, deception and seclusion practiced by former administrations will pale by comparison to the current administrations. They met in early November 1983, just as they did thirty years earlier, to condemn the ever-growing secrecy. As one member put it, this administration has "elevated (former) infatuation with secrecy to the heights of passion."[7]

Propaganda

The administration's clampdown on reporters' access to newsworthy events has been matched with increased use of news management and outright propaganda. Journalists were disturbed that the first news release on Grenada after the United States intervention was an Army-produced film purporting to show communist arms and material uncovered there. Initial information of the operation was available only from military briefing officers describing the "rescue" mission. Not only was the press barred from the scene during the actual invasion, but for the following three days, only a handful of reporters was allowed there, and they were kept under military supervision.[8]

As noted in Chapter IV, the government is the most pervasive, powerful and influential source of information in society. In spite of specific statutory prohibition of "public relations" expenditures, the government mounts a massive public information campaign to shape public opinion, estimated to cost over $1 billion annually.[9] Government speech designed to deflect attention from, or otherwise

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neutralize, critical or dissenting views, or to mask unfavorable information, must be considered in effect a form of censorship.

The Threat of General Censorship

The prior restraint policies that flowed from Snepp v. The United States (1980) (Chapter III) may represent a more direct threat to individual liberties than government secrecy and news management. When that decision was announced, as the earlier chapter noted, it provided the government a somewhat open-ended authority to exercise prior restraint. Taking the Court's dicta at face value, nothing would prevent the government from applying this decision to other individuals, and the President at this writing has indeed expanded the "gag" policy.

Before Snepp, the publishing restriction was required as a condition of employment only for that handful of government employees who worked in extremely sensitive intelligence matters. Taking his cue from the decision, in March 1983, the President announced that the lifetime publishing restriction would be applied to all within the executive branch who have access to the many thousands of classified documents in the government's custody. Present estimates are that the new policy, which is scheduled to be effective in March 1984 will affect over 100,000 government employees. However, the extent of classification grows daily, and with it the extent of eligibility for the gag policy.[10]

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The justification for this type of restraint is the protection of both classified information and the appearance of confidentiality. Furthermore, it applies to the publication of unclassified manuscripts in which a government expert reviewer might discover something that should be concealed. But from the administration's point of view there still must be serious gaps. As noted (Chapter III) one authority, who was never a government employee, wrote a revealing book about the CIA based on interviews with former CIA members.[11] It clearly has the same potential to jeopardize classified information and the appearance of confidentiality as a book written by a former government employee.

Further, the Snepp decision did not preclude action against the publisher. Department of Justice officials have twice hinted that such action might become necessary under certain conditions.[12]

The momentum and direction the present executive branch security program suggests it may well be applied to other individuals who access information the government considers classified, or sensitive. For example, thousands of employees of private corporations have security clearances to work on government contracts involving classified information. Private researchers and inventors may find their projects classified by the government;[13] even though they are not employed by government they would to qualify for the executive prior restraint policy, seemingly.

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Secret Law

In his Administrative Law Treatise (1978), Kenneth Culp Davis wrote that he expected that one effect of the amended FOIA would be to do away with secret law.[14] Even the National Security Agency, the very existence of which was secret for five years, had become responsive to requests under the act. However, part of the government's purpose in "gutting" the FOIA is to rescue secret regulations. The IRS letter opinions, considered a classic example when they were briefly exposed under the FOIA, are now back under wraps with a statutory exemption. As also discussed, portions of the CIA's charter and its annual budget are also still secret. In United States v. Richardson (1974), the Supreme Court has walled off any constitutional challenge to the statute protecting such secret law with a procedural technicality.[15]

The Supreme Court Complicity

Finding few allies in Congress for its security programs, the leadership of the executive branch has found accomplices on the high Court with whom to form an extra-constitutional Political sub-system to support its information autocracy in law enforcement and national security matters.

The abridgements discussed in Chapter III and IV , clearly show that in matters of national security and law enforcement, the Supreme Court often does not function as an autonomous branch or impartial tribunal. Rather, the Chief Justice, and usually Justices White, Powell, and Rehnquist,

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merge politically with the executive branch to form the sub-system described in the previous section.

The Supreme Court, like other appellate courts, must explain its decision. For that reason we have evidence, in the form of the artless and often polemical opinions in the Snepp and Abramson cases, of the unmistakable political biases of certain Justices. These two decisions fly in the face of the line of cases leading up to them. Abramson nakedly supports a desire of the law enforcement community to seclude its records, by flatly ignoring both the text of the law and precedent cases. Snepp ruptures a solid American tradition against prior restraint as though it were a minor procedural matter.

Any action Congress has taken to provide effective statutory access rights can be untied like a shoe by this Court. Justices, who can unblinkly tell us that "record" means "information from a record," that the records of Congressional debate mean the opposite of their clear Enlgish words, and that the First Amendment is of less weight in a publishing question than an administrative rule--may be fully capable of ruling that the First Amendment protects nothing more than the right to talk to neighbors and to publish government handouts.

Official Deception

Nothing can vitiate a political theory of the First Amendment more insidiously than deliberate deception by

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government officials under the color of their offices. Where a public right to know is held to spring from rights of self-government, an indispensable assumption is that government speech and records, once revealed, contain truthful information. The interjection into public discussion of a fabricated record or pronouncement not only conceals the truth but creates the illusion of informed debate. To the extent that the government deceives its citizens, participatory democracy is transformed into a disguised autocracy based on public delusion.

There is a crucial distinction between government concealment or withholdings of recorded facts and government deception. A jury aware it is not in possession of sufficient facts must acquit. A jury deceived by false evidence may unjustly convict. Meiklejohn's town-meeting analogy of the First Amendment makes the significance of government mendacity all too clear.[16] A town meeting persuaded by falsehoods is no longer a reliable forum; it is an instrument of the successful liar.

A town meeting or a legislature in which the participants are aware they are not fully informed may suspend action without a decision. More facts may be sought from public officials and elsewhere. The risk arising from what is not known is at least considered and may lead to prudent compromises and delays. But a body believing it is in possession of sufficient facts is more likely to be decisive in making policy. And, it is therefore more vulnerable to

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manipulation through successful deception.

When officials raise the government's vast speaking resources to drown out dissent and to propagandize the public, the remedy is in the freedom of competing voices from the private sector and legislative branch. But, where officials speak as the government, and place deliberate falsehood in the public record, there is no remedy in theory. There is only the hope of eventual exposé through investigation and extraordinary individual action. It was only by way of personal courage and conviction that men such as Sam Adams and Daniel Ellsburg, defying the bureaucratic system, stepped forward to publicize how the official record was fabricated.[17] The principle of "checks and balances" has been notoriously slow and spasmodic in identifying and correcting official deception; there is as yet no law against deliberate government lying.

Security Policy

The policy of official deception, as it arose in covert operations, is not only destructive of protected political communication but appears unnecessary. There is no evidence that a debated policy of open intervention would not have served us as well. To attempt to conceal our involvement in the internal strife of another country is as futile and pointless as concealing the location of CIA headquarters or the existence of the National Security Agency.

The deception itself tends to weaken support for an intervention when it is found out. A Harris Poll in 1974

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found that after learning the truth about our efforts to overthrow Allende in Chile, only 18% of the sample approved while 60% disapproved. Compare this with the support for President Reagan's recent intervention, the invasion of Grendada. Newspaper and wire service polls report that this openly announced action received support of about 53% of those questioned compared with 34% who disapproved. After the President made a public address explaining the action, support for it increased to 65% in the polls, while disapproval dropped to 27%.[18] There is more than a suggestion here that an appearance of openness may be a political asset, even though there is evidence of controlled news, if not outright propaganda, adhering to the Grenada action.[19]

Although the military interventions of the present administration are not made in covert fashion, at least as far as can be known, it is not necessarily renunciation of government deception. There is no indication that the overt use of arms signals consideration for the people's right to know. It more probably reflects both the realization that truly secret wars are impossible, and the desire to intimidate certain foreign governments.

"Security" policies requriing polygraph exams for suspected "leakers," prior review of personal writings, control of contacts with jouralists by officials, war news blackouts, and pending measures to eviscerate the Freedom of Information Act make it clear that this administration is not open. It does not respect even a statutory public

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right to know. It's deception may take different forms; propaganda, censorship, and intimidation. It still suggests an imperial presidency's claim to unshared powers.[20]

It is tempting to agree to some extent with Victor Marchetti and John Marks concerning a "clandestine mentality." They write of an intelligence "cult" that insists on concealing its actions from public view to prevent the American people from passing judgment on either the utility or the ethics of their policies generally.[21]

They claim:

> The cult is intent upon conducting the foreign affairs of the U.S. government without the awareness or participation of the people. It recognizes no role for a questioning legislature or an investigative press. Its adherents believe that only they have the right and the obligation to decide what is necessary to satisfy national needs. . . . it pursues outmoded international policies and unattainable ends. . . (it) demands that it not be held accountable for its actions by the people it professes to serve.[22]

If somewhat overstated, this passage may reasonably describe a certain segment of the national security leadership. Whether the actions of government officials are motivated by a patriotic, if extreme, view of national interest is beside the point. It is not "national needs" but "national emergency" that can justify suspension of First Amendment guarantees.

To accept secrecy and deception policies is to accept that we live in a continual state of national emergency. And, that idea may well sum up the argument of government officials in this area. A more discouraging possibility, in

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terms of national values, is perhaps best expressed in this chirping of Newsweek magazine:

> Why not arm the rebels in Afganistan? . . . Why not make trouble for Muammar Kaddafi? . . . Why not send secret financial aid to Solidarity? If we're doing that, most Americans would approve --and would rather not know. There are worse things than covert action. But if a democratic nation is to meddle in the affairs of another country, it must abide by certain rules: don't violate your own principles. Don't make things worse. Don't get caught. (Emphasis supplied)[23]

Ignoring the internal inconsistency in this passage, we can sense in it the expression of a juvenile morality too unsophisticated to comprehend the contract of constitutional government. It may reflect yet another face of the deception policy: the idea of paternalistic government.

It attributes to the public a selfish desire that the government foster a good life for Americans by any means, but also a "don't-tell-us-how-you-do-it" infantilism. It says that portions of the population want to be deceived because they do not want to take responsibility for their government.

Official deception must rank with nuclear weapons as a powerful and dangerous legacy of the winning of the Second World War. To trace its history from the last global war to the myrmidonian White House of Presidents Kennedy, Johnson and Nixon, is to trace the development of the politics of continual crisis. Modern deception began as an innovative and effective facet of the intelligence war, which included espionage, code-breaking, propaganda and covert operations. But it has been transformed from being a contingency of war-

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time to being a routine of cold war security.

To sacrifice the expectation of official honesty and openness is to destroy a basis of self-government. It is an uncomfortable fact that most modern police states have set aside individual rights by alluding to a continuing crisis with a continuing "enemy." Do we really have a crisis of such proportions that we must consider a de facto change in our Constitution and form of politics?

Deception is like prior restraint in that its action strikes deeply into the system of political communication. It is a form of more powerful censorship that extends the secrecy system of the government. Part of its secrets the government may conceal by legitimate classification. But, if unable to exercise prior restraint over what the press learns, the government may seek to mask the truth with deception before it can be discovered. This has the additional effect of causing the public to believe it is informed and may draw it into a fraudulent concensus. Therefore, the presumption against deception should be at least as strong as that against prior restraint.

The public must not be regarded as mere spectators of domestic and international crisis. Their role in policy matters is as important as any of the three federal branches of govenrment. However, there is no informed consent when the public does not know to what it is consenting. If self-restraint is the only control on government speech and its claimed authority to deceive, then representative democracy--

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or any form of self-government--exists only at the pleasure of the officials of government. It no longer exists by protection of the Constitution.

Public Susceptibility

Certain important aspects of human nature play into the hands of government speech and cause the public to be especially susceptible to government propaganda and deception.

First, people are psychologically vulnerable to official statements in super-ego terms. Most are taught in childhood that adherence to government and obeying its laws are basically moral and good. Many forms of falsehood are against the government's law; e.g., perjury, fraud, etc. Parents, schools, and churches are apt to teach faith in government along with ideas of respect and obedience to law. Integration in society depends on the perception that things are as they appear, and, therefore, a well-socialized individual is likely to presume that government speech is truthful as well as authoritative. Trust in official speech goes beyond purely rational thinking.

In a philosophical sense, the individual is vulnerable, beyond the simple idea that falsehood is wrong. Even, an individual who is not sophisticated in political theory can sense the contract between himself and government. He pays taxes and obeys the law; the government provides protection and services. Therefore, if he must tell the truth

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to the government, why should the government be able to lie to him? He commits a crime if he lies on a tax return, swears falsely in court, or misinforms a police officer. Surely the government which enforces the law cannot itself break it.

With this deep predisposition to believe official speech, individuals may tend to resist factual information of official lying in a number of ways. Social psychologists tell us that many individuals will initially change their perception of reality when it conflicts sufficiently with deeply held beliefs. Furthermore, persuasive government communications will be perceived and interpreted to reinforce preexisting attitudes, opinions and beliefs.[25] The cognitive dissonance theory explains that when facts and beliefs are in conflict, they may easily be made consistent through guided interpretation.[26] It has also been observed that attitudes and beliefs held for a long time are harder to change than new ones.[27] This all indicates that the public, initially at least, might be expected to believe the government version of an event over unfavorable information or the allegation of official deception.

The stability of deep attitudes and beliefs is such that conflicting factual communications will be disregarded or distorted for a time. Conflicting information must accumulate persistently before public opinion will shift significantly.[28] It takes controversy of considerable dimension to rouse a large segment of the public. Then, when

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conflicting communications stop, the public soon returns to nearly the same attitudes and beliefs as before. Apparently, the psychological needs met by government are so fundamental that the public even seems quite susceptible to arguments justifying official deception!

Consider the public reaction to the revelation of the massacre at My Lai of Vietnamese civilians, including children, by American troops. When the story broke, complete with color pictures taken by a participant, the initial public reaction was denial. Various polls found from 43 to 49 percent of those questioned believed the pictures fake, the story a hoax or enemy propaganda.[29] The opinion often expressed was that American boys just wouldn't do something like that. Next there came a period of reaction formation, especially hostility toward the press which was blamed for blowing things out of proportion. Over 65 percent of another poll sample believed that news media should not have carried the reports.[30] Later dissonance-reducing reactions were exculpatory; e.g., the soldiers had expected deadly fire, many women and children might be Viet Cong terrorists, and this kind of thing was inevitable in war. In his study of the incident, Seymore Hersh found American reactions ranged from fiercely defensive to skeptical, but only a small segment reacted with horror or concern.[31]

Government propaganda and deception can easily be made to play on the basic human need to believe and trust government. The authoritative and pervasive official speech

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of government, so much of which must be trusted, usually receives an initial presumption of veracity.

The Affirmation of the Right

In reviewing the affirmations of a public right to know in Chapter II, we do not have to discover some perfect argument through deduction. The facts and theories speak for themselves. The variety of sources affirming the right testifies to how fundamental it is to our form of society. Only one element is missing and that is a recognition of constitutional protection for the right.

What do these affirmations of a public access right really suggest? First, the right is upheld by the need for it in our society. It is needed to balance the power of government, including its ability to speak and to censor. As the officials of government feel greater need for national security, and spend more tax money on it, the public has a greater need to know from neutral sources what it is investing in and what may come of it.

Such a right, and the open atmosphere it brings, is needed by journalists watching government. A congressional analyst has counted from 25 to 50 major news stories of national political importance, based on information obtained through the FOIA, each year since the 1974 Amendments.[32] Thus, the exercise of an enforceable right of access has yielded newsworthy government information. This seems to illustrate that such a means of access requires protection

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of the same magnitude as the government power it seeks to balance. It must be a "right" to offset government "power."

A public right to know is not forbidden by the Constitution. The idea of such a right would seem congenial to most of the authors of our fundamental law, and certainly friendly to the Constitution itself. It would be a logical component of the First Amendment, especially in light of its major interpretations. It would be a logical rationale for the constitutional provisions requiring republican government, publication of the journals of Congress, and the public accounting for public monies.

The deep and traditional committment to a public informed concerning important actions of government is evident from the common law. And, it is even more clearly affirmed as popular will in the recent statutory enactments of both state and federal governments.

It appears that the evidence here for affirmation of a public right to know government information is sufficient to argue for constitutional protection. The public interest, the law and the constitutional theory are all here. This does not say that there is such protected right. Its political existence depends on its exercise, which in turn depends upon its recognition by the Supreme Court.

If there is any urgency to the question of a constitutionally protected right in this area, it is occasioned by the increasing information powers being assumed by the federal executive. Government requirements for security

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and secrecy do not mitigate against the constitutionality of a right to know. To the contrary, they tend to justify it as a limit on government power and ultimate safeguard of the liberty of the individual. In light of current government information practices, arguments on certain legal and policy grounds can be considered timely. Why should constitutional protection be afforded the public's right to know what its government is doing and what it plans to do?

Legal Grounds

As we have seen, constitutional protection for a public right to know about the executive departments is consistent with the fundamental law. It is a logical component of both self-expression and self-government theories of the First Amendment. It is essential to informed consent.

In our political structure, rights limit the powers of government. There are inherent meanings in the Constitution that imply such rights. Today, a public right of access to government information is essential to the enjoyment of other rights. With the government in control of so much politically important information, the right to vote intelligently, the right to discuss issues, and the right to publish political opinion, all are in jeopardy.

The theory of correlative rights emerges as the most compelling argument in light of present government behavior. The government assumes greater and greater power to execute controversial foreign policy, and at the same time to choke

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off information regarding it. The increase in the importance of public opinion and press scrutiny parallels this inflation of government power. We have come to the point envisioned by Potter Stewart in 1971: neither the legislative nor judicial branch is fully capable of balancing the executive's "unshared powers" in national security and international affairs. Only the people can now protect their interest in self-government. As Justice Stewart concluded, an informed and critical public opnion is required to protect democratic government.[33]

If government's information-power has reached the point of outright censorship, then the public's right to know has reached the point of constitutional protection. There is now a constitutional imbalance between the people and the executive branch. The people's right to know cannot destroy the government's power to withhold secret information, that power is constitutionally implied. But, the executive's power can gobble up the people's right to know because it is only statutory. The executive branch can exempt records from disclosure by over-classification, or in more sweeping cases, by presenting itself to the sympathetic Supreme Court. In matters of national security and law enforcement, the political coalition members need to pick up the vote of only one additional Justice to bend the law.

However, if the public right to know were given constitutional protection, there would be no necessary imbalance. The executive branch would no longer be able to erase

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such a right by its own devices, or by going to Congress or the Court. Furthermore, the right to know could not destroy the governments powers of legitimate secrecy; their foundations would remain constitutionally intact. Of course, the courts would face the formidable task of setting standards and drawing lines, now provided by statute. They would have to look more closely at precisely what the executive branch wants to hide. There would still be means to hide properly secret information in the public interest.

There is an argument that such a situation will permit the opinions of judges to intrude on national security matters which should be run by experts in their field. There is no reason to believe that judges could do any worse, in most cases, than government bureaucrats have during the past four decades. The views of government experts would be balanced by views of judges who are supposed to be expert in matters of objectivity and impartiality.

Policy Grounds

Martin Shapiro recently stated that, if he were preparing an argument for a constitutionally protected public right to know, he would submit the following on policy grounds: "The speaking resources of the federal government should be balanced by the effective speaking resources of the press and public."[34]

The government has an overwhelming speaking advantage in the marketplace. It can spend over $1 billion a year on

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its official speech, more than any speaker in the world. It commands the instant attention of all important news media. It speaks with authoritative force, and, it can now suppress many opposing views. Currently, the administration's security program is preparing an unprecedented blockage of information that would otherwise feed opposing views or raise questions. It subsidizes friendly political speech and controls many forums of speech and debate.

If the government can limit the protection of the First Amendment to literal dimensions; i.e., speaking and printing what is already available with no special protection of newsgathering, then the amendment protects only unsupported opinion. As long as there is no right of access from unwilling government sources, government spokesmen can quite properly accuse critics and dissenters of having only opinions unsupported by facts. The facts will be locked up where only the government can use them and, it's argument will simply be, only we know the whole story.

To be effective, then the private speaking resources of our society must have at least equal access to the relevant facts in government custody.

In addition to correcting the damage done to constitutional structure, constitutional protection will reduce social cost incident to government censorship, deception and excessive secrecy.

Such a cost is the lost opportunity for significant policy changes that would occur if there were truly an open,

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robust and informed debate over important national issues. In reviewing the evidence of government deception, it is clear that things could have been no worse had the government informed the public fully during the past three decades. If the public and Congress had known the truth about the key deceptions concerning our involvement in Southeast Asia and the actions taken against the advice of military and intelligence experts, support for the war in Vietnam might never have materialized. For example, what would have been the result of telling our own planners the truth about Viet Cong strength and popular support? Most real experts in government would have known that we should either pull out or send in a much larger force if we expected to "win." Of course it is impossible to know what would really have happened under more candid government disclosure. However, when the truth seeped out, the public wanted no part of the war under the conditions existing.

The example of Vietnam illustrates the quasi-wisdom of the public. Had it been consulted, it probably would not have countenanced another overt war in Asia. Many influential voices were already raised against it. There was no chance of winning and not much of a stake in that area of the world.

This does not mean that the public is in all ways wiser than the President and his top aides, the "best and brightest" among us. It does mean that the public is wiser concerning what it will stand for when the truth is available.

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The larger policy wisdom argued here is that of the "framers" who realized clearly that the government must have their consent before spending the people's lives and treasure on a drastic enterprise.

The policy argument is that the government must be prevented from deceiving the public through secrecy, propaganda censorship or outright lies because it vitiates the very foundation of our political system. The Constitution can limit such governmental action by affording protection to the public's information gathering. If the government wishes to adopt an important policy, such as stopping Marxism at all costs throughout the world, then it had best do it with and effective referendum of a knowing public. The public will have to pay the cost.

Conclusions

It is the conclusion of this study that recognition of constitutional protection for gathering information of government actions and intentions, from government sources, is essential to restoring and maintaining the balance between government power and the people's rights.

The abridgement of the right to information necessary for self-government cannot be corrected by statute. It has been tried, and while partly successful, open government laws have several weaknesses. They may be repealed, diluted or ignored. Any reasonable statute requiring access to government records must contain exception provisions

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protecting legitimate government secrecy. Such provisions are subject to abuse. Documents may be reclassified or even removed to evade disclosure.

Statutory access rights require a good faith observance by executive personnel. However, in the past, some officials have demonstrated that they regard lying to be a matter of duty in national security matters. Might not ignoring inconvenient access requirements be regarded the same way?

Would a consitutional right elicit any better respect from the executive branch? Probably. It would require much more attention to the substantive basis for classification and would give a firmer platform from which to launch legal appeals for its enforcement.

While there appears to be no constitutional problem with protection of a right to know, and no public policy problem, there is clearly a political catch. A key element in the requirement for constitutional recognition is the Supreme Court's cooptation into a coalition to abridge the public right to know. It is the same Court that must bestow the recognition of constitutional protection. In matters not involving national security, the present Court barely tilts toward a narrow right of access to government activities. Even though there has been no test of the Court concerning a general right, it seems unlikely when security and law enforcement interests are laid before it by the executive branch. It is a classical Catch 22, and there could

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well be a considerable wait for a Court with membership disposed toward the constitutional protection this study finds essential. The preservation of self-government in a form recognizable to Americans may be up to the Congress for some years to come.

Importance

That the existence of statutory access policies does not moot the constitutional question is clear. The point was well expressed by Judge Murry I. Garfein in response to the suggestion that an FOIA exemption could control the First Amendment right to publish stolen government documents: "That is a statutory matter. . . we are talking of the consitutional matter beyond that, I think the question would be whether . . . in the guise of security if the government wishes to suppress matters that might be embarrassing to it domestically, the Government has the right to do that under the First Amendment."[35] A constitutional right forces a judicial, and presumably impartial, balancing of interests on both sides. As shown in Chapter IV, a statutory right must defer to presumptions created by rules for exceptions.

Legislative

Timony H. Ingram, who was staff director of the House subcommittee with oversight of the FOIA during and after the passage of the 1974 amendments, reported that if a right to know were grounded in the Constitution, it would make a great difference in the way Congress could approach

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legislation dealing with access.[36] For one thing, he observed, there would be a greater presumption of openness generally, and for another the burden for justifying government secrecy would include the task of identifying constitutional grounds.

Ingram went on to describe the legislative impact:

> Now, an agency proposes to exempt certain categories of files from government disclosure, and the Congress and its staff talk about public and government interests involved. Will business newspapers stimulate or hurt U.S. trade abroad by publishing export data culled from customs manifests? Will release of details concerning CIA experiments on humans or domestic activities curb abuses or unnecessarily dry up intelligence sources abroad? The . . . lobbying and the perceptions invovled in drafting these measures would shift to a different plane if everyone felt we were dealing with a constitutional balancing, would be enormous.[37]

National Security

As commander-in-chief, the President assumes power to protect vital information concerning military and diplomatic matters the disclosure of which would cause harm to the United States. The identification of that information is a matter of judgment, and his power is not absolute. There must be a means to limit it, and a right to know would provide the basis for a case or controversy in this area.

One security practice that could be limited in such a balancing is the practice of official deception. Another is prior restraint. Both of these techniques are effectively forms of censorship in that they have the same effect of secluding information. If a constitutional right to know must

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yield to censorship only when there is an emergency that would allow no opportunity for public reflection and discussion and would immediately imperil the existence of the state, then such an emergency is the sole occasion for the employment of deceptive government speech.

In fact, military and intelligence security could be greatly enhanced by a constitutional right to know. Such a right would only obtain for truly unclassified information and would cause judicial review of information to determine proper classification. This would permit a purge of political information from the security files. It would prevent political use of the security system to cover up waste, inefficiency, mismanagement, bad decisions, and other politically damaging information.

Some Policy Implications

1. A constitutional right could not be repealed or eviscerated by legislation such as the amendments aimed at the FOIA. Government nondisclosure or denial of the right to an individual would have to be based on particular constitutional authority. All of the some 150 special statutory nondisclosure statutes, such as that for IRS letter opinions, would be subject to challenge and judicial review for their constitutional merit.

2. Rights of access, both statutory and constitutional, are commonly rights only to existing records, even those containing incomplete, inaccurate or deceptive information. A broad political right to know implies a right to

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the truth and may require the government to review and correct records for release. Such a general right might place on government the obligation to create records for informational purposes where none exist.

3. A constitutional right would limit the powers of the entire government, not just the executive branch. Congress would have to consider the constitutional basis for its executive sessions, closed hearings and other use of secrecy and confidentiality. The federal courts would likewise be subject to increased scrutiny. However, the Congress and the courts are traditionally open forums, and the issues of access versus closure would be fewer by far than in the case of the executive branch. A curious situation would result from a constitutional challenge of the Supreme Court's traditional secrecy. Could they properly sit in judgment of their own case? Such a question about that body is merely philosophical curiosity however. The Court has never lacked for judicial imagination when the occasion demands.

4. The status of the FOIA under a constituitonal access right would be uncertain. No doubt all of the disclosure provisions would draw strength from the right. However, the statutory exemptions would all be in question until the courts settled in each case the constitutional authority behind each.

Collisions and Pitfalls

There would no doubt be several serious collisions of constitutional interests and legal pitfalls in a con-

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stitutional right to government information. A survey of likely possibilities yields the following.

Privacy

The constitutional right to privacy could conflict directly with a right of access, where personal data are in the custody of government. Now there is a statutory standard in the FOIA to establish the threshold of privacy protection. Such standards might no longer obtain, but decisions establishing new lines between individual interests in privacy and access should not be difficult to construct in constitutional terms.

Governmentl privilege

Both executive and congressional privilege have been vigorously argued as products implied by the Constitution. In truth, their underpinnings are almost invisible, except the permission for secrecy in congressional journals. Under a challenge the executive branch would have the harder task justifying privilege because it rests on more or less structural (separation of powers) and functional (uninihibited advice) grounds. Advisory opinions and memoranda might be sought, for example, on constitutional grounds, and this could cause a serious problem because many arguments for executive confidentiality in decision-making are persuasive.

Scope

A constitutional right to know would be subject to some to the same broad interpretations that Emerson brought

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to First Amendment rights.[18] Individuals may seek to enjoy the right in terms of information not in the custody of government, but accessible to it. This could lead to a host of collisions with the private information rights of third parties.

Along another dimension, Frederick Schauer sees the possibility of individuals having a private law right against the press. It is likely that certain expressions of a right of access would be limited to the press, and the press would use its judgment as to what to report and what not to report. Thus a citizen, within his region of the right, might have a cause to challenge the press policies <u>not</u> to report.[39]

A broad view of a right to know could give rise to claims that the government has an obligation to make public information, from time to time, that has not been specifically requested. For example, a standing public requirement for certain politically important information is conceivable. If sustained, such a requirement would lead to a considerable enlargement of the principle of notice. The bureaucracy might balk at having to publish even more information than it already does, but then it commands the largest publishing business in the world.

<u>Judicially secluded information</u>

There are many categories of information secluded by the courts for privacy and other interests. How would a constitutional right of access affect records ordered expunged or sealed in the interest of promoting rehabilitation

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or protecting minors? What of information from informants promised confidentiality? Would the courts continue to enjoy the same authority to close hearings for good cause?

Third party information

Much information in the custody of government comes from third party sources such as foreign governments, private corporations, private indidivuals, state and local government units, etc. How would present laws and rules affording confidentiality to such information be affected? For example, would Privacy Act protection of personal data in a government record have to yield to a request based on a constitutional right?

The Right to Publish

New York Times attorney James Goodale sees a legal pitfall in a constitutional right of access.[40] The First Amendment right to communicate is self-executing, and exercise of the right to publish now rests exclusively with the judgment of editors. If the courts recognize a right of access, then judges will first begin to gather information, and then to edit it. Thus, adding a right of access to the right to publish, may also add the editing function of judges where previously publication was unfettered. The whole requirement to know about government, according to Goodale, might be better served if the editor collected information by asking, begging, sueing and stealing--but was still free to publish everything he could collect.

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Comment

Such collisions and pitfalls do not wreck the argument for a constitutionally protected right to government information. They simply indicate the rather massive scope of implementation lying ahead. The conflicts mentioned above, and others that emerge, must be handled by the courts. The Supreme Court has been historically creative in discovering implied powers and implied rights. This it will have to do to construct reasonable and balanced resolutions of the collisions of interests. They simply open a pandora's box of controversies for the high Court. It is a situation faced by the Court in the past, in civil rights, in one-man-one-vote litigation, in the rights of the accused, and so on. In this case, the work of the Court takes on a new dimension, however. It will be in the service of a right that is vital to every other right in our society.

Perspective Concluded

The Preface and Introduction to this study began a political perspective on the question of a public right to know its government's actions and intentions. This section concludes that perspective by considering the political balancing that is the very essence of our system of self-government.

The framers could not, and did not, try to perfect a mechanism of government. They did not attempt to codify every requirement of law. They did not try to constitution-

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alize every principle and right necessary to preserve the limited form of government they envisioned. While they allowed for the continued development of the law, they distributed the powers of government among largely autonomous branches and levels of government, and limited them to specifically delegated authorities. The liberty of the people they left open-ended and protected by the fragmentation of government interests and powers. Through the separation and division of powers, they clearly sought to prevent the capture of overpowering authority by a single element of government.

Therefore, ours is a system of political adversarialism. It is a system in which conflicts and disputes must arise out of the varied competing social and administrative interests. The essence of the system is in the protection of the procedures for challenging policy, advocating ideas and resolving conflict.

Procedures are established to govern the contest between political parties over the general aims of public policy and setting of national goals. The executive and legislative branches battle annually over national priorities, the budget, social programs, national security and other important social issues. The struggle over public policy is also waged between local, state and federal agencies. Interest groups and lobbies in the private sector are also influential warriors in the political fray.

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For many questions, the ultimate battleground in American politics is the judicial system. Particularly in the individual's struggle to assert his political rights, the courts are paramount in importance. Individual rights typically challenge executive poicy and actions, and legislatures can only provide limited protection to them.

For an individual member of the public to challenge the authorities of government, there are three vital elements in the adversarial process. The first is an impartial judicial body empowered and disposed to enforce individual rights over government overreaches of authority. The second is individual standing before the judiciary to voice his grievance and to seek governmental respect for his rights. And, third, there must be a justiciable case or controversy as a means to bring the individual before the courts and to allow the courts to adjudicate and enforce the right.

With respect to certain national security and law enforcement authorities claimed by government, the system has begun to fail in all three respects. The tribunal of the high court is no longer impartial, but has demonstrated its cooptation into an extra-constitutional coalition with the executive on these matters. The Court has denied the individual standing to assert his rights to know about public policy formation and execution in those areas. And, the Court has denied recognition of a right that would provide justiciable controversy to limit the claimed powers of government to withold information.

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The recognition of the Constitution's protection of the individual right to scrutinize his government, through access to information in its custody, would put the individual and government on equal footing before the courts on this issue. And, it would provide a basis to develop controversies justiciable before the courts. It would thus restore the constitutional balance.

We do not expect law enforcement officials to place the majority of their attention and resources on the question of preserving individual rights. We expect them to concentrate their efforts on the enforcement of law and the protection of the community from crime. We do not expect the leadership of national security programs to ponder overlong on matters of informing the public, when they are dealing with crises. In a sense, we expect them to exceed their constitutinal limits somewhat in their zeal of office. This is acceptable if the system assigns the role of adversary to other entities which will attempt to restore the limits tresspassed. We expect a friendly battle from a loyal opposition, but a battle nonetheless.

When the judiciary is predisposed toward one of the adversaries the system is wrecked. There can be no balancing or limiting; there is only a sham battle.

The case of Frank Snepp is one such sham battle. The Supreme Court consideration described in Chapter II was but a continuation of the biased treatment he received, beginning with the federal district court. The judge who sat at

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Snepp's initial trial had been cited by appeallate courts for improperly denying Snepp a jury trial and with unconcealed bias. That judge was severely criticized for his obviously "predetermined outcome" the appellate court reduced Snepp's penalties and ordered a retiral. By delivering a per curium opinion, the Supreme Court avoided a full hearing of the issues, the errors of the district, even the submission of briefs. It ignored the complex dispute, the many procedural irregularities alleged and the clear First Amendment interests invovled.[41] It refused to "air the facts."

The Snepp case probably illustrates better than the other examples in this study that something has gone wrong in the mechanism of government. It suggests, along with Richardson and Abramson, that the Supreme Court constitutes, in part, a political branch of government. That mutation is a malignancy in the body of self-government.

The control of information permits the control of society. The question of the public's right to political information about its government is overripe. The control of information, like the control of political power generally, must be dispersed and limited if a form of democracy is to survive in this society. The vital element in such control of government power is the protection of the public's right to know.

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CHAPTER VI

FOOTNOTES

[1]William P. Rogers, "The Right to Know Government Business from the Viewpoint of the Government Official," 40 Marquette Law Review, 1956, p. 83.

[2]Snepp v. United States, 444 U.S. 507, (1980); and Abramson v. FBI, 456 U.S. 615 (1982); discussed in Ch. II and Ch. III, respectively.

[3]See, Frank Snepp, "This President Wants Silence by Censorship," the Washington Post, 12 June 1983, pp. B1-4; William Safire, "Paranoia in the White House," (col.) S. F. Chronicle, 1 Nov. 83, p. 39; and, Jim Hampton, "Reagan's Mistrust of the Public's Right to Know," S. F. Examiner, 5 Nov. 83, p. B3; George Lardner, Jr., "Reagan Faulted on Openness Issue," Washington Post, 31 Jan. 82, p. A22.

[4]George Lardner, Jr., "Reform of Freedom of Information Act Sought," Washington Post, 4 April 81, p. A5; Ronald J. Ostrow, Freedom of Information Act due for Major Change," L. A. Times, 18 Apr. 81; Jack Anderson (col.), "Reagan Forces Attack Public Right to Know," Washington Post, 14 Jul. 81, p. C13. George Lardner, Jr., "CIA Asking Hill to Cut Back Public Access to Agency's Files," Washington Post, 29 Feb. 80, p. A2.

[5]"GAO Study Fails to Back FBI Cliam that Law Hampers Agents," 4 ACCESS Reports 19, (1978), pp. 1-2.

[6]"The CIA and the Freedom of Information Act: A Report on the Proposals for an Exemption," Center for National Security Studies Report No. 106, (Washington D.C. CNSS, 1980), passim.

[7]Hampton, "Reagan's Mistrust," note 3 supra.

[8]William Buckley, "The Apocalyptic Press," (col.) S. F. Examiner, 4 Nov. 83, p. B2; and see, "A War Without Reporters," same page; and see, Hampton, "Reagan's Mistrust," note 3, supra.

[9]Dominick Bonafede, "Uncle Sam: The Flimflam Man?" 1 Washington Journalism Review, Apr/May 1978, p. 66.

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[10]Snepp, "Silence."

[11]Thomas Powers, The Man Who Kept Secrets, (New York: ALfred A. Knopf, 1979). According to Powers, in his introduction to the book, his writing was based on interviews with 40 former CIA officials who provided sensitive information not previously published.

[12]Chap. II, p.

[13]See, for example, U.S. Congress, House, Committee on Government Operations, Government Classification of Private Ideas, H. R. 96-1540, 96th Cong., 2d sess, 1980, pp. 1-11, 62-69, 173-87.

[14]Kenneth Cup Davis, Administrative Law Treatise, (San Diego: K. C. Davis Publishing Co., 1978), pp. 307-446.

[15]United States v. Richardson, 418 U.S. 166 (1974).

[16]Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People, (New York: Oxford University Press, 1965) pp. 24-27.

[17]Sam Adams, "Vietnam Coverup: Playing War with Numbers," Harper's Magazine, July 1975, pp. 41-73, passim; and Daniel Ellsberg, Papers on the War, (New York: Simon and Schuster, 1972), passim.

[18]"Polls Show Support for Reagan," San Francisco Chronicle, 31 Oct. 1983, p. 8. And see, Robert L. Borosage and John D. Marks, "Destablizing Chila," (Mimeographed) (Washington: Center for National Security Studies, 1976) p. 9.

[19]See, for example, Safire, "Paranoia," and "Grenada Invasion: Why the Petnagon Barred the Press," San Francisco Chronicle, 31 Oct. 1983, p. 10.

[20]Ibid., and see, Hampton, "Reagan's Mistrust."

[21]Victor Marchetti and John D. Marks, The CIA and the Cult of Intelligence (New York: Alfred A. Knopf, 1974), Chp. 1, passim.

[22]Ibid., p. 5.

[23]"Is Covert Action Necessary?" Newsweek, 8 Nov. 1982, p. 53.

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[24]Bernard Berelson and Gary A. Steiner, Human Behavior: An Inventory of Scientific Findings, (New York: Harcourt, Brace & World, Inc., 1964.), p. 574.

[25]Ibid., p. 536.

[26]Ibid., p. 266.

[27]Ibid., p. 576.

[28]Ibid., p. 578.

[29]Seymore M. Hersh, My Lai 4: A Report on the Massacre and its Aftermath, (New York: Random House, 1970; New York: Vintage Books, 1970.) p. 153.

[30]Ibid.

[31]Ibid., pp 151-158, passim.

[32]U.S. Congress, House Committee on Government Operations, Freedom of Information Act Oversight. Hearings Before a Subcommittee of the Committee on Government Operations. 97th Cong., 1st sess., 1981, pp. 9151-44

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

[34]Martin Shapiro, interview at Univ. of Calif., Law School, 18 Nov. 1981.

[35]Murry J. Garfein, hearing of 18 June 1971, 71 Civ. 2662, U.S.O.C., So. Dist. N.Y., transcript pp. 479-80.

[36]Timothy M. Ingram, interview, Washington D.C. 5 Mar. 1981.

[37]Ibid.

[38]Thomas I. Emerson, The System of Free Expression, (New York: Random House, 1970).

[39]Frederick Schauer, interview Marshall Whythe School of Law, College of William and Mary, August 1982.

[40]James C. Goodale, "Legal Pitfalls in the Right to Know," Washington University Law Quarterly, 1976:29., pp. 31-32.

[41]See; e.g., Anthony Lewis, "More Threats to the First Amendment," (col.) S. F. Chronicle, 25 Mar. 83, p. 59.

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