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FREEDOM OF INFORMATION: DUE PROCESS OF THE RIGHT TO KNOW

Luis Kutner*

A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.

—James Madison

Long before the public mind was sharply focused upon the issue brought about by the publication of the Pentagon Papers and by other recent controversies over the denial of certain information (including the executive branch's denying Senator J. W. Fulbright any access to the five-year foreign military assistance plans), there has been a great concern expressed in regard to the public's right-to-know by this writer and others. For example, Arthur Krock raised some pertinent questions involving the culpability of the government in the successful Japanese attack at Pearl Harbor. Clearly, vital facts were withheld, and the people were never told the whole truth about Pearl Harbor. Again, in 1970, the House of Representatives debated whether or not a federal district court had the right, as a result of its ruling in Hentoff v. Ichord, to enjoin the printing and publication of an Internal Security Committee report (No. 91-1607) dealing with the financing of several revolutionary organizations by honoraria paid campus speakers. Fortunately, the House, asserting its will, passed a resolution ordering the printing of

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1 Ervin, Secrecy in a Free Society, The Nation, Nov. 8, 1971, at 454 [hereinafter Ervin].

2 See Krock, Pearl Harbor Echoes, N.Y. Times, May 31, 1944, at 8, col. 3.

the report and itself enjoined any person from interfering with the publication. 4

I

Perhaps the best place to begin this examination of the right to know is with the alleged power of the President to invoke "executive privilege," whereby he can withhold information from the Congress, and the public, as well. This situation gives rise to conflict in the executive's refusal to divulge information to the Congress which he feels might impede him in performing his own constitutional responsibilities vis- à-vis the right of Congress to obtain information vital to its legislative function in the decision-making process. Also involved here is the basic right of the public to know what the government is doing. 5

The Founding Fathers envisioned the principle of "accountability" within the Constitution, and they fully understood that governmental responsibility had to be shared. 6 The President, judges, and members of Congress were accountable to the people for their own official public actions and they would be held ultimately responsible. 7 Still, the Founders were aware that each branch must respect the duties and prerogatives of the other branches, for the purpose of the doctrine of separation of powers which they had fashioned over 200 years ago was to prevent any undue concentration of power in any one branch of government. 8 Madison commented on these conflicting principles when he wrote in the Federalist Papers (No. 48):

After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive or judiciary, the next and most difficult task is to provide some practical security for each. . . . 9

Indeed, the conflict between the branches over this issue is as old as the Union itself. When the legislative branch undertook an investigation of the St. Clair Expedition during the first administration of George Washington, the President did not question "that the House . . . might institute inquiries" and "that it might call for papers generally"—but while he noted "that the Executive ought to communicate such papers as the public good would permit," he contended that the executive also had the discretion "to refuse . . . (information), the disclosure of which would injure the public." 10 With "a just regard to the Constitution and to the duty of [his] office," President Washington further set down his reasons for refusing to comply with the House's request to furnish it with the documents in this case on the ground that

it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved. . . . 11

In the end, nevertheless, all the St. Clair documents were turned over to the House. 12

5 Ervin, supra note 1, at 454-55.
6 Id. at 454, 456.
8 Ervin, supra note 1, at 456-57.
9 Id. at 457.
10 Id. at 454.
11 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 196 (1899).
12 Ervin, supra note 1, at 454.
That Congress has the power to "institute inquiries," as accepted by Washington, and to "exact evidence," has been sufficiently supported in the past.\(^{13}\) Said the court in \textit{McGrain v. Daugherty},\(^ {14}\) "The power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power and to employ compulsory process for the purpose. . . ." Though there is nothing in the Constitution relating to the existence of executive privilege,\(^ {15}\) this privilege against disclosure of certain confidential papers under given circumstances in the decision-making process has been ascribed to the principle of separation of powers.\(^ {16}\) The purpose for this principle, as explained by Mr. Justice Brandeis in his dissent in \textit{Myers v. United States}, was "by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."\(^ {17}\)

And, on the basis of additional statements in \textit{Myers}—that "the President alone and unaided could not execute the laws . . . ," therefore requiring "the assistance of subordinates"\(^ {18}\)—"the alleged authority [of the President] to exercise executive privilege has been extended to the entire executive branch."\(^ {19}\) But, regardless of whether the advice the President receives and acts upon is good or bad, there can be no shifting of responsibility to subordinates.\(^ {20}\) Though President Kennedy initiated the basic policy, since reaffirmed by Presidents Johnson and Nixon, that the President would have the ultimate decision and responsibility in the invoking of executive privilege, practice has not always followed the theory.\(^ {21}\)

The claim that the exercise of executive privilege is an "inherent power" of the President if the executive branch is to have the autonomy necessary to properly discharge its duties has been supported by the allegation that said power derives from the duty imposed on the President under Section 3 of Article II of the Constitution: that he take care that the laws be faithfully executed. Yet, this so called power has been merely assumed, since there is neither constitutional grant, nor statutory authority, providing authority for it.\(^ {22}\)

While it is expected that the Chief Executive assume and display a certain amount of initiative through the wielding of his administrative power, the President can exercise no power which cannot reasonably be traced to either the Constitution or an act of Congress passed in pursuance thereof. Hence, any power not granted the President by a constitutional or statutory provision does not exist. The field of action within which he may operate is plainly marked for him—if in general terms so as not to embarrass him in the wide possible range of policy outlined. Constitutional limits imposing such restraints on the exer-

\(^{13}\) Id.
\(^{15}\) Ervin, supra note 1, at 455.
\(^{16}\) Soucie v. David, 448 F.2d 1067, 1081 (D.C. Cir. 1971) (Wilkey, J., concurring).
\(^{17}\) 272 U.S. 52, 293 (1926).
\(^{18}\) Id. at 117.
\(^{19}\) Ervin, supra note 1, at 455.
\(^{20}\) See Rogers, supra note 7, at 89.
\(^{21}\) Ervin, supra note 1, at 455.
\(^{22}\) Id.
The exercise of governmental power have prevented our democracy from destroying itself.

Through his increasing power, as with Executive Orders, the President, however, has been able to act without the restraints of congressional authorization which provide for effective legislative oversight, thereby eroding the principle of separation of governmental powers. For example, in 1952 President Truman seized the steel plants by Executive Order. The Supreme Court, very shortly thereafter, invalidated that act as unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer.* The several majority opinions delivered in the *Steel Seizure Case* "indicated that Congress is a co-equal branch [whose] prerogatives may not be usurped or impeded" by executive actions. Certainly, the President cannot increase his powers by such proclamations in order to raise his position of power to one that did not previously exist. If that were not the case, there would be nothing left to those limitations largely imposed by the Constitution.

Senator Sam Ervin, chairman of the Subcommittee on Separation of Powers, held hearings on executive privilege and found this assumed power has been invoked in a number of instances throughout the history of the nation. Expressing a concern for separated but balanced power, Senator Ervin has viewed with alarm the steady increase of executive power—resulting from the failure of Congress to assert its own power to prevent the executive branch from withholding information at its own sole discretion—because all this "has come close to creating a 'government of men, not of laws.'" Ervin specifically concludes that the practice of executive privilege "clearly contravenes the basic principle that the free flow of ideas and information, and the open and full disclosure of the governing process, are essential to the operation of a free society."25

II

Congress responded to the "persistent problem of legislators and citizens . . . of obtaining adequate information to evaluate federal programs and formulate wise policies. . . . [Recognizing] that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives,"26 Congress passed the Freedom of Information Act, which went into effect on July 4, 1967.27

The express purpose of the new Act (the FOIA) was to expand to the greatest practical extent the full disclosure of government actions to the public.28 This "public access to governmental records [was increased] by substituting limited categories of privileged material for discretionary standards and [by] providing an effective judicial remedy [under the Act, in which] . . . the usual principle of deference to administrative determinations [is rejected

24 Ervin, *supra* note 1, at 455.
25 Id.
26 448 F.2d at 1080.
28 Ervin, *supra* note 1, at 455.
in favor of a required] trial de novo in the district court."\textsuperscript{29}

Clearly, the legislative intent of the FOIA was to assure public access to all government records whose disclosure would not significantly harm specific governmental interests. The Act, in attempting to strike a balance between the public interest in the freedom of information and the public and private interests in secrecy, sets down nine specific exemptions to the general requirements of disclosure—and “expressly limits the grounds for non-disclosure to those specified.”\textsuperscript{30} While the disclosure requirements are to be construed broadly, the exemptions are narrowly interpreted, and many seek to encourage individuals to communicate certain kinds of information to the government on a confidential basis.\textsuperscript{31}

Among the exemptions, the first is related to matters “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.”\textsuperscript{32} The second exemption protects the “internal personnel rules and practices of an agency,”\textsuperscript{33} and the third precludes the disclosure of information “specifically exempted from disclosure by statute.”\textsuperscript{34} The fourth protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”\textsuperscript{35} Other such exemptions include “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,”\textsuperscript{36} as well as matters “contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”\textsuperscript{37} Also exempted are “investigatory files compiled for law enforcement purposes [both civil and criminal] except to the extent available by law to a party other than an agency.”\textsuperscript{38}

The fifth exemption “intended to encourage the free exchange of ideas during the process of deliberation and policy-making,”\textsuperscript{39} by exempting the disclosure of “inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”\textsuperscript{40} This section covers most, if not all, of the information protected by the common law privilege against public disclosure: “that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly without fear of disclosure.”\textsuperscript{41}

Given all nine exemptions, though, none of them constitute “authority to withhold information from the Congress,” as Section (4)(c) of the FOIA specifically states.\textsuperscript{42}

Aside from the matter of the Garwin Report,\textsuperscript{43} several other suits have been brought

\textsuperscript{29} 448 F.2d at 1076-77.
\textsuperscript{30} Id. at 1077.
\textsuperscript{31} 448 F.2d at 1078.
\textsuperscript{32} Act, supra note 27, at (b)(1).
\textsuperscript{33} Id. at (b)(2).
\textsuperscript{34} Id. at (b)(3).
\textsuperscript{35} Id. at (b)(4).
\textsuperscript{36} Id. at (b)(6).
\textsuperscript{37} Id. at (b)(8).
\textsuperscript{38} Id. at (b)(7).
\textsuperscript{39} 448 F.2d at 1077.
\textsuperscript{40} Act, supra note 27, at (b)(5).
\textsuperscript{41} 448 F.2d at 1080-81 (Wilkey, J., concurring).
\textsuperscript{42} Ervin, supra note 1, at 455.
\textsuperscript{43} See Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).
under the FOIA. One particularly relevant to the disclosure of information not exempted under the Act is *Consumers Union v. Veteran's Administration*.44 The action arose out of the repeated attempts by Consumers Union of the United States, Inc. (CU), the non-profit organization which publishes evaluations of consumer products in its monthly *Consumer Reports*, to secure release of raw test scores and the scoring scheme and quality points used by the Veterans Administration (VA) to determine which brands of hearing aids for veterans qualified for that agency's annual purchasing. CU had finally sued the VA to compel the disclosure of the data. In its holding, the court rejected the VA's claim that the FOIA exemptions (specifically the second through the fifth) permitted the agency to refuse disclosure, and found the exemptions to be inapplicable in this case. The court added that when data is not thus exempted from disclosure under the Act, the court itself has judicial discretion to either withhold a remedy or grant an injunction compelling disclosure if an agency refuses to disclose non-exempt data.46

The court decided it "must, according to traditional equity principles, weigh the effects of disclosure . . . and determine the best course to follow at the present time."46 Support for this was found in *Hecht Co. v. Bowles*,47 where the Supreme Court ruled that the District Court did not have to grant an injunction, as the Emergency Price Control Act directed on complaint of the administrator of the Office of Price Administration, if equitable considerations so indicated. In further extending *Hecht* to *Consumers Union*, the court would exercise its discretion to uphold an agency's refusal to disclose data only for those clearest equitable considerations for which Congress did not establish standards for exemptions under the FOIA.48 Because the Act places the burden of proof on the agency seeking to prevent disclosure,49 the court held in *Consumers Union* that it

must order . . . disclosure unless the agency proves that disclosure will result in significantly greater harm than good.50

So while the court agreed to compel the disclosure of the raw test scores, it nonetheless felt that the VA had met the burden of proof relative to the scoring scheme and quality points,51 for, in the court's opinion, the "release of the scoring scheme would result in manufacturers designing and submitting hearing aids that would score well in the VA tests." Thus, the court was led to find that while "[r]eleasing the scoring scheme would help other laboratories" (such as the plaintiff) in "their own testing programs, . . . this benefit is outweighed by the disruption of [gov-

46 301 F. Supp. at 806.
48 Comment, supra note 45, at 132.
49 Act, supra note 45, at (a)(3).
50 301 F. Supp. at 806.
51 Id. at 807-08.
ernment testing programs.” In sum, the effect of this decision was “to shift discretionary authority to withhold information under the FOIA from the administrative agency to the judiciary.”

Another important case based on the FOIA was Epstein v. Resor, the first test case concerning the Act to be taken to the Supreme Court of the United States. At issue was the historic problem dealt with in this paper: the public’s right to know versus national security.

In this case the appellant, an historian and research associate at Stanford University’s Hoover Institution on War, Revolution and Peace, had, since 1954, unsuccessfully sought the release of a United States Army file to review for his historic research. The file, “Operation Keelhaul,” dealing with the forced repatriation of Soviet nationals from German prison camps during and after World War II, was classified “top secret” under an executive order protecting government records classified in the interest of national security or foreign policy. The plaintiff had an interest in immigration and refugee problems—in 1959, under the Eisenhower Administration, he had been appointed a member of the White House Conference on Refugees—and he was now preparing a book on this subject of forced repatriation. He estimated “that between 2 and 5 million people in prison camps in Germany, Britain, Canada, and the United States were forcibly shipped back to the Soviet Union against their wishes.”

Epstein contended in his suit that the file on Operation Keelhaul was over 20 years old and, therefore, the restriction as to national security or foreign policy seemed rather absurd. Arguing from the FOIA’s specification that various classifications of information could not be withheld from the public, Epstein also maintained that it was the intent of Congress under the Act that a United States district court would review the file and make a judgment as to whether it was properly classified. The courts ruled otherwise, however. Still, the importance of the case lies in its bringing into question the workability of the FOIA, as now constructed. It must be determined whether amendments are necessary to clarify the intent of Congress with respect to this act and enhance its utility, or if other changes are needed to protect both the interest of the nation’s security and the availability of government information to which the public is entitled. In this vein, Congressman Ogden R. Reid of New York has suggested that the FOIA be tightened by (1) sharply limiting the types of information now permitted to be withheld, and (2) reducing from the present 60

52 Id. at 808.
53 Comment, supra note 45, at 132.
54 421 F.2d 930 (9th Cir.), cert. denied, 398 U.S. 965 (1970).
56 Id.
days the time permitting the government to respond to a court suit.59

III

When it comes to federal or state legislation to loosen or tighten government information procedures, the Freedom of Information Center at the University of Missouri School of Journalism in Columbia has been a strong advocate of the right to know. Though relatively little-known, the center is believed to be the world’s largest clearing-house for information on the public’s right to know, but it does more than merely process requests for information and guidance. In addition to the research role and the publication of reports on right-to-know issues, the center’s efforts in behalf of the news media and against secrecy—such as its fight to defeat a Senate bill restricting the release of pre-verdict information in criminal cases—have been recognized by Senate civil libertarian Sam Ervin, as a “valuable contribution” to that body’s information studies. The Freedom of Information Center was founded in 1959 by 24 representatives of newspapers, broadcasting operations and other interested groups. The idea behind the center can be found in the summation of Herbert Brucker of the Hartford Courant: “Today’s struggle for the right to know is but another battle in the historic war for freedom of the press. . . .”60

A free press was rooted “in the openness of the Athenian democracy and in the principle of public accountability,”61 but that long, bitter struggle to establish and preserve freedom of the press has been a part of Anglo-American history as kings and parliaments attempted to control the press by a licensing system for the printing of material. Later, in 17th and 18th century England, the common law crime of seditious libel emerged as a new means of control and there were hundreds of convictions under it.62 Seditious libel was defined in England by Chief Justice Holt in the Tuchin’s case of 1704 when he wrote that

[a] reflection on the government must be punished, because if people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.63

The great Blackstone commented, “Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous or illegal, he must take [the] consequences of his own temerity.”64 Albeit a reasonable statement, Al-

63 Id. See also 117 CONG. REC. E6393 (daily ed. June 23, 1971) (reprint of lecture by Professor Alfred C. Emery) [hereinafter Emery].
Fred C. Emery, president of the University of Utah, perceives a danger in that rule because "there are few or no limits" to the term "illegal." In Blackstone's words that "seditious or scandalous libels are punished by the English law . . . for the preservation of . . . a government . . ." or that "the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects," Professor Emery finds license for the state "to prosecute anything it finds threatening to its policies or even inconvenient." Further, given Blackstone's remark that freedom of the press did not mean "freedom from censure," Emery concludes that the effect of all this "is to so chill the exercise of free speech by the threat of criminal prosecution that there is no freedom at all."65

The climate of freedom in colonial America was no greater, the law of seditious libel being enforced with equal vigor. Indeed, the issue of freedom of the press was one of the major grievances that led to the American Revolution. Of the many cases involving this issue, the one to have the greatest lasting significance was, of course, the Zenger trial.66 The verdict in this 1735 case was to establish the principle of freedom of publication in America. Briefly, John Peter Zenger, an editor-printer, was opposed to the policies of the colonial governor of New York;67 in his weekly newspaper, the Journal, Zenger published a series of articles accusing Governor Cosby of tyranny.68 Zenger was forthwith arrested for seditious libel and jailed; but, "following a trial by jury that gained world-wide attention, Zenger was acquitted."69 The jury, in finding Zenger not guilty, followed the urgings of the New York printer's attorney, Andrew Hamilton, by determining whether the statements of Zenger were libelous and providing truth as a defense—a precedent later adopted in some state constitutions.70

The Constitutional Convention, meeting in 1787, did not sufficiently detail the freedoms of speech and press so as to allay popular dissatisfaction. Madison was promptly enlisted to draft a number of amendments to the Constitution.71 Madison had expressed in the Federalist the concern of the people that the tyranny of a majority was just as destructive to freedom as was the tyranny of kings.72 In effect, no majority, no matter how great, should deprive a minority, no matter how small, of certain fundamental rights.

Ten of the dozen amendments which Madison drafted were then adopted by the first Congress in 1791 as the Bill of Rights. These ten amendments, dealing with the fundamental political rights of every man, began with freedom of speech and press "designed . . . to insure an unlimited exchange of ideas in a context of free expression."73 Under the first amendment, the

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65 Emery, supra note 63, at E6391-92.
66 Id. at E6393.
freedom of the press was removed from the sphere of government in strong language prohibiting any interference by Congress: "Congress shall make no laws . . . abridging the freedom of speech or of the press." The creation of this amendment was a response to the past experience of those who had conceived and ratified it. They had been oppressed, as previously stated, and knew the anger and frustration aroused by the suppression of opinion and expression through the threat of criminal prosecution. Incorporated into this amendment was the sentiment expressed by Thomas Jefferson at the birth of the Republic:

No government ought to be without censors and where the press is free, no one ever will.

Nevertheless, there are exceptions to the rule of totally free expression, and even in a democracy there cannot be complete freedom at all times. To be sure, this means that freedom to publish is not always an absolute under all circumstances. It is certainly a reasonable restriction in time of war to censor press reports in order to prevent the giving of aid to the enemy by exposing military secrets. In wartime the minds of men are confused and diverted to the needs of the moment. Government regulation is indefinitely extended in time of war because the situation requires certain controls to which everybody must submit—and which the people recognize when they surrender their rights. Still, the censorship imposed on the press by the government in completely suppressing a great deal of news relating directly to the Laos adventure was far more complete than seemed necessary for any legitimate war purpose. Many facts had been censored which would have done the enemy no good. Regardless of the success of the military expedition, the government had shown a surprisingly reckless regard for freedom of the press.

Indeed, the mishandling of the press during the United States' excursion into Laos led to formal protests from several groups of correspondents who criticized the availability of information. While restrictions on wartime news coverage are nothing new, there was concern over whether the news restriction in the Laos campaign was a departure from the now-established journalistic tradition of U.S. war coverage. The Freedom of Information Committee of Sigma Delta Chi, the national professional journalism society, felt basic principles were at stake in Laos, and they issued a strongly-worded statement critical of "the excessively prolonged limitations which the U.S. government imposed on press, radio, and television coverage of an operation in which so many Americans had deep interest and concern." The statement continued, recognizing that

[although the embargo on reporting of the Laos operation may have been initially necessary in the interest of protecting our forces and those of our allies, extending the blackout well past the point when the operation had been reported by foreign news agencies, including those of North

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74 Emery, supra note 63.
75 Statement, supra note 62.
76 See Tobin, supra note 67, at 53.
Vietnam and Communist China, rendered it ridiculous.\textsuperscript{78}

Further acts of censorship, according to the Freedom of Information Committee, were "the early prohibition of correspondents from riding in American aircraft participating in the Laos operation . . . [and] the order prohibiting U.S. helicopter pilots returning from missions over Laos from talking with correspondents."\textsuperscript{79}

The freedom of institutions (particularly the press, radio and television) through which free expression reaches the people of the United States is essential to their freedom of speech. If speech is to be free, there must be freedom of every possible means of communicating ideas, views, principles, and hopes from one citizen to another, and from one section of the country to another. Only by free means of communications can people remain free. There is no more fundamental liberty, for if freedom of speech and press is destroyed, every other freedom can be whittled away without the realization that it is being done. That is the goal of creating an arbitrary government. But free speech does not mean that those in control of government shall alone have the right and means to speak. Whenever news is suppressed (as in the Laos adventure) all comment on it is automatically destroyed and it amounts to a denial of freedom of speech.

Out of the Laotion effort emerged the immediate issue of freedom of the broadcast press, which is the only federally licensed medium of journalism. In its own way, that particular freedom is just as important as the war in South East Asia,\textsuperscript{80} where, hopefully, a victory will contribute to the establishment of freedom of expression.

There has been such an ingrained insistence on the freedom of the press in this country that any great attempt to actually suppress that freedom has been prevented (note, for example, the early repeal of the Sedition Act, which Congress had passed in 1789 to punish by fine and imprisonment "any false, scandalous and malicious writing" published against the government, Congress, or President).\textsuperscript{81} Today anyone who has a real message can find publications covering every shade of opinion to print it. But, whereas there is as yet no federal agency in control of newspapers, nor any federal bureau which licenses the press, this is not true of the broadcast media which as a means of communication and a facility of free speech, is an equally important instrument of free speech along with the press.

By its very nature, the broadcast media must be regulated in a manner not necessary in the case of publications. Unlike the situation of newspapers, it is essential that stations be confined to specific wave lengths, and powers, so that they might not conflict with each other. In order to prevent confusion in the airwaves by a flood of voices which would exist in broadcasting—thus rendering the medium useless—sans some regulations, the Communications Act was passed in 1934. Yet, as is so often

\textsuperscript{78} Id. at 41.
\textsuperscript{79} Id. at 41-42.
\textsuperscript{81} Statement, supra note 62, at S15818.
the case with government control, this limited authority has increased under the Federal Communications Commission to such a point that many broadcasters fear the principles of a free press relative to broadcasting no longer have any significance.\footnote{82} The fact that broadcasting is the only medium of journalism that is licensed by the government makes it subject to special restraint. These licenses to broadcast come up every three years for review or renewal—the latter depending on the judgement of the FCC as to how each broadcaster has performed in "the public interest." If the commission has the authority to grant or deny a license, it has the power to judge a news medium—and that power can have an impact on what is broadcast. In that way, this subordinate agency of the government could pressure the broadcast media into presenting only those views of events with which the government agrees, instead of the information to which the public is entitled, thereby prejudicing the very function the press is supposed to have in our society: to serve, in the words of Mr. Justice Sutherland, "as one of the greatest interpreters between men and government and the people."\footnote{83} While the airwaves should prevent confusion, have decent expression and afford facilities to all points of view, unlimited government regulation of broadcasting could foreshadow the end of a free broadcast media by presenting a most serious infringement on first amendment rights. The dangers inherent in leaving to a few government officials the power to decide what can or cannot be discussed is a part of the major problem involved in authorizing government regulation of broadcasting "in the public interest" while protecting the freedom of the press, as well.\footnote{84}

It should be pointed out, in passing, that the media is not immune from criticism, and some of it has come from those within the journalism profession itself.\footnote{85} Within the right of the people to know there is a role of responsibility, as well as a right of free press, in the coverage of public affairs. Journalism's own standards of professional behavior are established in the Code of Ethics of the American Society of Newspaper Editors. The code states that the "opportunities" of journalism "as a chronicle are indissolubly linked (to) its obligations as teacher and interpreter"; it adds, in part, "... a journalist who uses his power for any selfish or otherwise unworthy purpose is faithless to a high trust."\footnote{86} One particular problem here is the case of a re-write man who can infringe on individual freedom even when the original reporting is responsible. As in the spirit of the initial Agnew attack on the media, simply put, it is for a vigilant and vocal citizenry to provide adequate protection against the potential misuse of vast powers of influence possessed by public information media.

Certainly no consideration of the principles of a free press as it relates to the right to know is complete without a discussion of the United States v. New York Times Co.,\footnote{87}
in which the government attempted through the federal courts to restrain publication by the New York Times (and the Washington Post) of the now-famous Pentagon Papers which contained classified information concerning the country’s involvement in the Vietnam war. It was the first time since the adoption of the Bill of Rights that the courts had been asked by the government to halt the publication of an article.

In the Times case, the government and the press put forth conflicting positions, with the basis of the government’s argument being that the “inherent” presidential power to protect the national interest was superior to the protections of the first amendment. Thus, the government felt that it was entitled to an injunction against publication on the grounds of “the President’s constitutional responsibility for foreign affairs and for national security;” publication, charged the government, “seriously interfered with the conduct of our foreign relations,” and it “urged the courts to establish a standard ‘allowing’ the government to prevent” the revelation of such material that could do “great and irreparable harm to the nation’s security.”

As for the New York Times, it maintained that the reason the material was published originally was its belief “that it is in the interest of the people of this country to be informed.” The paper subsequently added in a later editorial:

... but, even more emphatically, it would have been an abrogation of responsibility and a renunciation of our obligations under the First Amendment not to have published it.

* * *

It is the effort to expose and elucidate (the) truth that is the very essence of freedom of the press.

The Times invoked the argument of “prior restraint”, the practice of which would mean “that the public’s right to know and the First Amendment guarantee of press freedom ruled out pre-publication censorship.” Still the definite word on the legal weapon of prior restraint was the one delivered by Chief Justice Hughes in Near v. Minnesota in 1931. Noting that suppression of publication “is of the essence of censorship,” Hughes wrote on the guaranty of freedom of the press: “[I]t has been generally, if not universally, considered that it is the chief purpose . . . to prevent previous restraints upon publication.” Hughes, in speaking for the majority in this 1931 case where the court (by a 5-to-4 decision) barred prosecution of an anti-Semitic paper which claimed that Minneapolis officials were in league with a Jewish gangster, also reiterated: “[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.” Even so, Hughes left a loophole open by adding that the ban on prior restraint “is not absolutely limited,” as in

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88 Statement, supra note 62, at 15818.
89 CHICAGO TODAY, June 16, 1971, at 45.
91 See note 89 supra at 13.
92 Id.
93 See note 90 supra.
94 283 U.S. 697 (1931).
95 283 U.S. at 713.
96 Id. at 716.
time of war, for instance, relative to "the publication of the sailing dates of transports . . . ," or the like.97

In an historic precedent in the *Times* case, Federal District Court Judge Murray I. Gurfein at first temporarily blocked the newspaper from continuing the series on the *Pentagon Papers*.98 Upon issuing the restraining order, the judge had stated that the questions involved here were "serious and fundamental" to the very heart of the government—free press relationship.99 It was his view that "a free and independent press ought to be willing to sit down with the Department of Justice and screen these documents that you have . . ." as a matter "of simple patriotism to determine whether the publication of any of them is or is not dangerous to the national security."100 However, after the hearings, Judge Gurfein finally concluded that the government had not proven its case, thus leaving the *Times* free to resume publication of the documents.101

The Supreme Court had to resolve the battle in the end.102 The decision in *New York Times Co. v. United States*104 was a landmark in analyzing the state of law concerning freedom of the press. In this most important ruling of June 30, 1971, the Court rejected the government's application for an injunction and reaffirmed the belief, as emphasized by Mr. Justice Black, that "the Founding Father's gave the free press the protection (from government control) it must have to fulfill its essential role in our democracy."105 Quoting further from Black's opinion in the case:

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.106

A postscript to this case was provided on December 7, 1971, when Federal District Judge Gerhard A. Gesell denied a suit by Congressmen Reid of New York and Moss of California asking the court to examine the still classified segments of the *Pentagon Papers* in secret session and then decide whether all or part should be released. Judge Gesell, who had ruled against the government when it had sought to restrain the Washington *Post* from publishing articles based on the *Pentagon Papers*, held a court review of the material in question to be undesirable, since "[i]t is entirely foreign to our traditions to place papers in the hands of a judge for his private ex parte inspection, excluding them from the eyes of the litigants." He added: "The determination of the interests of national defense

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97 *Id.*
99 *Id.* at 325.
100 *Newsweek*, June 28, 1971, at 27.
101 328 F. Supp. at 331.
102 *Id.*
103 *See* note 90 *supra*.
104 403 U.S. 713 (1971).
105 *Id.* at 717.
106 *Id.*
or foreign policy cannot be made by applying some simple litmus test to a document presented.\footnote{107}{N.Y. Times, Dec. 8, 1971, at 16, col. 1. It is also interesting to note that it was Judge Gesell who entered a final order permanently enjoining the printing and distribution of the Internal Security Committee report in Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970).}

IV

The whole matter of the Pentagon Papers also involves the classification system, "a more generalized attempt" than executive privilege to withhold data which may be of "potential interest to the public"—thereby preventing any meaningful use of that information.\footnote{108}{Ervin, supra note 1, at 455-56.} Such information cut-off from the public and press through the government's practice of routinely stamping much material as "secret" may later be revealed at a more convenient time or calculated to be leaked out whenever the government wants to get a point across.\footnote{109}{Time, July 5, 1971, at 14-15.}

President Eisenhower endeavored to straighten out the chaos of classification, spawned by America's rise as a world power before and during World War II and heightened by the advent of the cold war. In 1953 the President issued an executive order breaking down classification into three categories—top secret, secret, and confidential—still in use today (although Executive Order No. 10501,\footnote{110}{3 C.F.R. 292 (1971). See also Time, July 5, 1971, at 14.} on forbidding or restricting the disclosure of classified information on defense matters whose release might injure, or embarrass the national defense or foreign relations, was somewhat amended by Mr. Eisenhower himself in Executive Order No. 10816, and by President Kennedy in Executive Order No. 10964\footnote{111}{See supra note 109.}). However, according to William G. Florence, an ex-classifier for the Defense Department, in his testimony before the House Foreign Operations & Government Information Subcommittee, the Eisenhower executive order led to a "mass of weird confusion." The top secret classification was intended to cover critical military or defense plans or secret technological developments whose disclosure would result in "exceptionally grave damage to the nation," that is, be of use to the enemy. Yet, much dubious material was labeled top secret, including all but one of the volumes of the Pentagon Papers. Certainly, all the furor created by those documents is likely to curtail the license of Washington bureaucrats to label almost anything as secret so the government can avoid bad publicity.\footnote{112}{See note 109 supra.}

In commenting on the publication of the Pentagon report during a television interview, former Secretary of State Dean Rusk—though he said his sole regret over the publication was "because of the great importance of protecting the ability of the United States to talk privately with other governments . . . if we lose that chance then we are in great trouble"—did admit, nonetheless, that "there are a lot of things in the Government that are overclassified, and many of them remain classified far too long."\footnote{113}{N.Y. Times, July 14, 1971, at 35, col. 3.} He explained:
One of the problems is if you declassify only a part of the story then you are putting out only a part of the story, and in these diplomatic transactions we usually wait for a period of about 20 years before we make all this correspondence public.\textsuperscript{114}

Still, the State Department has only gotten up to 1941 in its de-classification program, and if anyone wishes to look at the records later than this he must get a security clearance and submit all the notes he takes for inspection.\textsuperscript{115}

Of course, the executive branch is privy to a great deal of information that the other branches do not have—nor, in some cases, should have; and the President is surely not going to consult with his opponents or critics in advance on every decision. Rusk has commented that “in a democratic society the public does have a right to know, but the public also has a right to have its public business transacted in a responsible fashion. . . .”\textsuperscript{116} But, in the wake of the \textit{Pentagon Papers},\textsuperscript{117} policies determined in secret—sans full and free discussion to safeguard against fatal errors—in a possible attempt to cover up faults or failures, could commit the nation to dangerous and disastrous obligations.

Congressman Reid of New York has been among those who have denounced the “unilateral executive decision making” of the Kennedy and Johnson Administrations on Vietnam and the concerted attempts by the Nixon Administration to prevent that past history from reaching the Congress. Reid has proposed a remedy by calling upon Congress to adopt a law governing classified documents, which would limit what would be labeled secret and provide for automatic de-classification and congressional oversight. Should a matter remain secret after a stated period, then Reid suggested that “there should be an affirmative, positive finding as to why continued secrecy is necessary.” Further, whenever material is improperly classified by the executive simply to avoid governmental embarrassment, contrary to the proposal, the Congress would have the right to make it public. Finally, and uppermost in Reid’s mind, is the vast reduction in the 8,000 officers in the Defense Department with authority to designate material as secret or top secret.\textsuperscript{118}

Senator Muskie has favored an independent review board on classified material,\textsuperscript{119} and, clearly, Reid has become even more convinced of the need for such a body, “accountable to the Congress and the people,” with “the authority and resources to evaluate classified documents and order declassification of those which are being improperly withheld from the public domain”—especially after the denial of his suit for full disclosure of the \textit{Pentagon Papers} by Judge Gesell. It was the observation of the Congressman, that some way had to be found to break the pattern of the executive branch in withholding information from the Congress and public.\textsuperscript{120}

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} See note 109 \textit{supra} at 14.
\textsuperscript{116} See note 113 \textit{supra}.
\textsuperscript{117} \textit{Newsweek}, June 28, 1971, at 12-15.
\textsuperscript{118} See note 59 \textit{supra}.
\textsuperscript{119} See note 109 \textit{supra} at 15.
\textsuperscript{120} See note 107 \textit{supra}.  

Lest it be otherwise ignored in the issues generated over the Pentagon Papers, their publication raises still another question of whether the public's right to know is so absolute and all-pervasive that it justifies any means, including the theft of government documents, that will serve the end of public disclosure; for, in fact, the papers were apparently stolen. Daniel Ellsberg, who allegedly distributed most of the secret Pentagon study he had worked on in 1967 to the New York Times, after having previously offered some of the classified documents to several members of Congress could not be considered a hero, but, perhaps a self-appointed surrogate for the people, instead, who respected nothing but the achievements of his own ends. Chief Justice Burger was moved to remark on the paper pilfering that he was naive enough to think that every citizen coming into possession of stolen property had a "basic and simple duty" to "report forthwith to responsible public officers."

Thus far the scope of this paper has dealt with the right to know in this country. Yet, all channels of news, for example, must be kept open with equality of access to information at the source. It would be highly desirable, therefore, if an international agreement of complete freedom from censorship for the press media throughout the world could be achieved. Such an agreement among the states of the world would be a valuable contribution to future peace, and, hopefully, there would be no more truth within foreign nations to the words of Beaumarchais as he commented on censorship in The Marriage of Figaro:

They all tell me that if in my writings I mention neither the government, nor public worship, nor politics, nor morals, nor people in office, nor influential corporations, nor the opera, nor the other theaters, nor anyone who has ought to do with anything, I may print everything freely, subject to the approval of two or three censors.

In conclusion, a public demand for full disclosure of essential facts for public scrutiny is all important. Too often, military and diplomatic excuses tend to cover up bungling or failure. The American public is entitled to decide its own fate, and open and candid presentation of pertinent facts —within the bounds of national security— is essential to this process of freedom.

122 Time, July 5, 1971, at 6-8.
124 See note 121 supra.
125 Id.