diction of all claims arising from one transaction where one plaintiff asserts a claim exceeding the requisite jurisdictional amount would accommodate litigants by preventing duplicate suits in state and federal courts and a multiplicity of suits in state courts where joinder is less liberal. Although the new interpretation would require a modification of the judicial practice to strictly construe jurisdictional requirements, it would permit the policy underlying the Federal Rules, an equally basic judicial policy, to be more fully implemented.

ACCESS TO OFFICIAL INFORMATION: A NEGLECTED CONSTITUTIONAL RIGHT

The Las Cruces Sun-News, a New Mexico newspaper, recently sought permission to attend a United States Navy test firing of a special rocket at White Sands proving grounds. The request was denied for "security reasons."[1] Earlier this year investigation through confidential sources revealed that in 1950 the Bureau of Internal Revenue discovered the adulteration of liquor in 368 taverns in the vicinity of Albany, New York. The Bureau levied fines upon the offenders without bringing them into court or revealing the fraud. The Bureau's chief counsel took the position that such compromises are not matters of public record, but are effected solely in the interest of the individual and the Bureau.[2] In Oregon, a secret hearing was held by the state board of education concerning the demand of the dental school to be separated from the university medical school.[3] The board offered to allow a reporter to attend only on the condition that she pledge to keep the matter "off the

1. Advance clipping from Shop Talk, Oct. 1, 1951, the official publication of the New Mexico Press Ass'n, Inc.

2. INTERIM REPORT OF COMMITTEE ON FREEDOM OF INFORMATION TO AMERICAN SOCIETY OF NEWSPAPER EDITORS 4 (April 21, 1951). Other records not readily available to the public in New York include marriage licenses. In Yonkers, only 63 of 123 issued in January and 15 of the 40 obtained in February were made public. *Id.* at 3. Many other instances of official secrecy are revcaled in Pope, *Suppression of News,* Atlantic Monthly, July, 1951, p. 50.

3. Communication to the INDIANA LAW JOURNAL from the Oregonian. The letter also describes a secret hearing conducted by the state director of agriculture concerning certain dairies' violations of the sanitary bottle-cap law. The director took the position that bad publicity might injure the violators' business.

The secrecy which encompasses meetings of school boards is not peculiar to Oregon. The public has been barred from school board deliberations in Chicago, Ill.; Columbia, Mo.; Denver, Colo.; Roanoke, Va.; Providence, R. I.; Evansville, Ind.; Flint, Mich.; and Baltimore, Md., "just to name a few." Raymond, *News the People Can't Get,* Reporter No. 7, Oct. 2, 1951, p. 26.

record." These incidents are illustrative of the numerous situations occurring daily which indicate that government suppression of information is a reality. The withholding of information is not limited to any particular type of fact nor is the practice confined to any one level of government.[4] Rather, it is a pervasive tendency of public officers to attempt to function in secrecy.[5]

Difficulties presented by the recurring instances of suppression by government officials are indeed serious. Their implications extend far beyond the mere right of a free press to print whatever news it obtains.[6] The examples here cited, as well as the countless other instances of concealment, must be regarded in the light of their effect on the American ideal of self-government.[7] Where there is alleged justification for keeping facts from the people, it seems reasonable to require the suppressor to establish the merit of his position. No court of law would permit national security to be jeopardized to satisfy the idle curiosity of a citizen regarding the number of atomic bombs in the United States' defense stockpiles. Conversely, no court should allow a public official arbitrarily to decide what facts the people have a right to know, when the only security involved is his position. Between these extremes lie many problematic situations which pose a serious challenge to democratic principles.

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4. A recent high level example is the Secretary of Agriculture's widely publicized discharge of an assistant to the Production and Marketing Administrator. The Secretary refused to offer any explanation for his action. Similarly, Arizona's Governor discharged the State Land Commissioner after an investigation and report submitted by the State Attorney General. Inspection of the report was refused to a reporter of the Arizona Daily Star on the ground that it was not a public record. INTERIM REPORT, *op. cit. supra* note 2, at 2.

The Mayor of Elkton, Md. banned, for a time, two newspapers from its council meetings after both had published a report of board proceedings allegedly contrary to the mayor's wishes. Communication to the INDIANA LAW JOURNAL from the American Newspaper Publishers Association.

5. Representative Keating, of New York, in a letter to Fay Blanchard, wrote: "There has been a growing tendency all through the Government to clam up on any information which might tend to reflect discredit on the administration of an agency. . . ." INTERIM REPORT, *op. cit. supra* note 2, at 2.

6. Suppression or distortion of facts by the press is not within the scope of this discussion. For a comprehensive study of the freedom, responsibilities, and functions of the press in a free society, see COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1946).

7. Benjamin Botts, attempting to procure papers in President Jefferson's possession for the defense of Aaron Burr, asserted: "In a government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, everything that is done in a public way by their public functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability. . . ." Aaron Burr's Trial, Robertson's Rep. II, 517 (1808).

Self-government is possible only to the extent that the leaders of the state are agents responsive to the will of the people.[8] If the public opinion which directs conduct of governmental affairs is to have any validity; if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided.[9] A thorough knowledge of official deportment is essential to protect the electorate from inadvertently condoning the mistakes of those in power.[10] The importance of freedom of information to a nation

8. See HALL, LIVING LAW OF DEMOCRATIC SOCIETY 88, 89 (1949). Professor Hall explains consent of the governed in a democracy to mean: ". . . chiefly, the privilege of all normal adults to vote, the free expression of ideas, and the responsibility of the government to the governed. It implies not mere approval or acquiescence but active participation in the processes of government. It implies such a relationship between citizens and officials that the will of the former is necessary to the right of the latter to officiate, *i.e.*, the officials are the agents of the citizens. It means that each person shall potentially have an equal participation in the control of government, with all that that implies for the determination of questions of public policy, law-making, and law-enforcing. . . . [I]n short, in a democratic society, 'consent of the governed' means self-rule." See also MEIKLEJOHN, FREE SPEECH 9 (1948); I CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 40 (1947).

9. "Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. 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." Statement of James Madison, chairman of committee which drafted the First Amendment, quoted in LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1950). Lasswell also is keenly aware of the importance to popular government of an informed public. *Id.* at 154. See also, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947), stating: "If the people are to govern themselves, their only hope of doing so wisely lies in the collective wisdom derived from the fullest possible information and in the fair presentation of differing opinions." *Id.* at 47.

10. "If government is the instrument which they [society] adopted for the promotion of general good; if it is the creature which they invested with powers for effecting the benevolent design of social felicity, it is society which must determine whether these purposes have been realized, or how far they have been departed from. It follows, therefore, as a necessary consequence, that the government which attempts to coerce the progress of opinion, or abolish the freedom of investigation into political affairs, materially violates the most essential principles of the social state. . . ." WORTMAN, TREATISE CONCERNING POLITICAL INQUIRY AND LIBERTY OF THE PRESS (1800), quoted in SCHROEDER, FREE PRESS ANTHOLOGY 36 (1909).

Other early writers expressed concern over the importance of ascertaining the truth about governmental activities: "A sound and healthy state of public feeling depends everywhere upon the healthy state of public information. . . ." COOPER, LIBERTY OF THE PRESS (1830), quoted in SCHROEDER, *op. cit. supra*, at 42. "The whole strength and value, then, of human judgment, depending on the one property, that it can be set right when it is wrong, reliance can be placed on it only when the means of setting it right are kept constantly at hand." MILL, AN ESSAY ON LIBERTY (1859), quoted in SCHROEDER *op. cit. supra* at 48. "If a people are to be in a position to judge the conduct of their government, to decide whether it is doing well or ill, to decide the merits of public policy at all; if, indeed, they are to preserve the capacity for sound judgment, they must have facts before them not only as the government would have them put, but also as those who disagree with the government may desire to put them." ANGELL, THE PRESS AND THE ORGANIZATION OF SOCIETY 17 (1922).

A modern authority on First Amendment freedoms observes: "Freedom protects us from those in power. By and large, worse calamities would result if those in power

which professes self-government lies in the fact that without one the other cannot truly exist.

It is not enough merely to recognize the important political justification for freedom of information. Citizens of a self-governing society must possess the *legal* right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. This right must be elevated to a position of highest sanctity if it is to constitute an effective bulwark against unresponsive leadership.

The First Amendment provides that "Congress shall make no law . . . abridging freedom of the press . . . or speech. . . ." Admittedly, it contains no explicit guarantee of freedom of information; but this language, in the abstract, does not supply the ultimate criterion determining the rights protected. There is convincing evidence that the drafters of the Bill of Rights were aware of the vital need to keep the people informed of official operations. This realization was one of the considerations motivating the guarantees of free speech and press. Implicit in both is the right to know what the government is doing. Madison emphasized this soon after the adoption of the First Amendment in a discussion of its implications: ". . . the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right. . . ."[11] Judge Cooley, in his influential treatise, lends support to this interpretation of Constitutional history,[12] *i.e.*, that the First Amendment sanction was accorded not only to dissemination, but also to acquisition of information.[13]

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at the moment could manage affairs without having their conduct and policies subjected to a thorough-going review." CHAFEE, *op. cit. supra* note 8, at 41.

11. 6 WRITINGS OF JAMES MADISON 398 (1906). Thomas Jefferson, realizing the importance of an informed public, said: "The basis of our governments being the opinion of the people, the very first object should be to keep that right. The way to prevent [errors of] the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people." Quoted in LASSWELL, *op. cit. supra* note 9, at 62.

12. "To guard against repressive measures by the several departments of the government by means of which persons in power might secure themselves and favorites from just scrutiny and condemnation, was the general purpose. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 885, 886 (8th ed. 1927).

13. The framers had good cause for concern over preservation of a free press. For more than a century prior to the adoption of the Bill of Rights, history discloses a persistent effort on the part of the British Crown to prevent any criticism of its operation, regardless of its truth. The means adopted was the imposition of previous restraints upon the press, first by requiring all printed matter to be licensed and later by a tax on newspapers. The history of the struggle for freedom of speech and press

Public officials who prefer to remain unaccountable for their actions recognize their inability to prevent the publication of facts once they have been obtained. Thus, their efforts are directed to keeping the facts from the press initially. In many cases, a vigilant press has frustrated surreptitious governmental activities, but the right to know about official conduct is too fundamental to be entrusted solely to the fortuitous sanction of adverse publicity.[14] The courts no longer can tacitly assume that access to information is being uniformly permitted, in view of multiplying instances of arbitrary concealment. Instead they must expressly accord the same constitutional recognition to acquisition as they have to the dissemination of facts. To reject this indispensable complement of free

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in the American colonies closely paralleled that of England. Influenced by these encroachments, early statesmen were anxious to devise means of insuring responsiveness to the will of the people. See PATTERSON, FREE SPEECH AND A FREE PRESS cc. 1 to 17 (1939), for a detailed discussion of the struggle in England over freedom of expression. See also HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 3 *et seq.* (1947).

The First Amendment granted a much broader freedom of the press than existed in England at the time. The English law forbade only previous restraint, but "this idea of the freedom of the press can never be admitted to be the American idea of it, since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them." MADISON, *op. cit. supra* note 11, at 386. Madison explains the difference in the fact that Parliament is omnipotent, but in the United States "[t]he People, not the goverment, possess the absolute sovereignty. . . . Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition." *Id.* at 386, 387.

14. The police commission of Norwich, Connecticut, decided to close its records to the public. After publicity in the Norwich Bulletin, the commissioners removed the blackout. In Maysville, Kentucky, a county clerk closed his records on civil suits to the editor of the Daily Independent. A front page story of the suppression and a protest wire from the American Society of Newspaper Editors Committee on Freedom of Information induced the clerk to rescind his order. Collaboration between a naval officer and a sheriff resulted in seizure of a picture of a plane crash on a public highway in Barger, Texas. The newspaper ran a blank space where the picture would have been and it was promptly returned. After the police chief in Peoria, Illinois, refused to allow the Journal to see police records affecting a hospital board member, it sought a writ of mandamus. Two of the board members resigned before the police chief finally relented. The writ was withdrawn.

The United States Board of Parole initially refused to release to the Louisville Courier-Journal the names of indorsers of a parole for an income tax evader. Upon demand of a reason for such refusal, the chairman of the board released the names, declaring, however: "In the future . . . desired information will be supplied if, in our opinion, such information would be compatible with the welfare of society." How this compatibility will be determined and by whom was not made clear. The school board in Torrington, Connecticut, repeatedly denied a reporter access to its meetings and minutes. After months of secrecy, court action forced the minutes out of seclusion. The Standard-Times in New Bedford, Massachusetts, after two years, gained the right to attend school board sessions. The Freeport Press obtained access to Freeport, Maine, school records only after initiating court action.

Communications to the INDIANA LAW JOURNAL from the American Newspaper Publishers Association; Freedom of Information Committee of the American Society of Newspaper Editors; the Charleston, West Virginia, Gazette; and The Maine Journalist.

speech and press is not only to underestimate the wisdom of the architects of the Bill of Rights but also to deny an effective safeguard of responsive government.

II.

Too often has access to information been denied on the ground that it would not be "for the public good" to have the facts disclosed. Under this plea, dictatorial governments have succeeded in completely suppressing all freedom of information, thereby rendering the press and the people servile tools of their ambitions. In a garrison state thought control is of primary importance. Just as secrecy and democracy are incompatible, so totalitarianism and an informed public cannot coexist. As the preeminent propagandist has succinctly described the Nazi program of indoctrination, "We no longer want the formation of public opinion, but rather the public formation of opinion."[15] As a means to that end, Herr Goebbels masterminded the Reich Chamber of Culture, an all-embracing, government-controlled organization which policed every possible approach to the German mind, from the daily newspaper to the art gallery. The obvious result of such systematized oppression was that the German people were told not what they were entitled to know, but what their leaders wanted them to know.[16]

A more recent example of the natural resistance of dictatorships to an informed public was the Peron government's seizure of La Prensa. Its editor-publisher, Alberto Gainza Paz, who was banished for refusal to submit to the dictates of official censors, entertains no doubt as to the extreme importance of freedom of information.[17] Those who com-

15. Quotation from Goebbels in CHAFEE, *op. cit. supra* note 8, at 22.

16. See BRUCKER, FREEDOM OF INFORMATION 223 *et seq.* (1949), for a more complete picture of thought control in Germany. Mussolini employed a similar scheme. The editor of every newspaper had to be approved by the prefect, who had authority to prevent publication of any news which was embarrassing to the government. PATTERSON, *op. cit. supra* note 13, at 26.

17. "The first act of any dictatorship is to suppress freedom of information. If they can't make a frontal attack against the press, they try by insidious ways to capture and restrict that freedom of information. Then they try to create through government-controlled means, radio, newspapers, pamphlets, a unanimous line of thought by feeding the people what they want the people to know. . . . The result they hope for is only one opinion, one thought, one knowledge in the country. . . . The only way to oppose those evil forces is to defend freedom of information. . . . That defense should not be confined to newspapermen only . . . the public, the people must realize that it is a matter of vital importance for them." Paz, 17 Northwestern University Reviewing Stand 6 (Sept. 30, 1951).

See also, LIPPMAN, LIBERTY AND THE NEWS (1920), where it is stated: "Men who have lost their grip upon the relevant facts of their environment are the inevitable victims of agitation and propaganda. The quack, the charlatan, the jingo, and the terrorist can flourish only where the audience is deprived of independent access to information." *Id.* at 54.

placently shrug off the La Prensa episode with the observation that "it could never happen here" should be reminded that while Hitler shocked the entire civilized world by burning thousands of books in 1933, American cities were quietly banning dozens of them from their newsstands.[18] A positive danger lies in the realization that a totalitarian state makes no pretense; it suppresses the facts and admits that it does so. Withholding of information in a democracy conceals the very fact that suppression is taking place.[19] The numerous instances of governmental secrecy may seem inconsequential; they will appear so only if the right to know is confused with less fundamental liberties.[20]

III

While few would deny that an informed populace is essential to effective self-government, the means of achieving this end are the subject of much disagreement. The same controversy rages as to the appropriate limits of judicial intercession in behalf of established First Amendment guarantees. Illustrative of the view which would restrict the judicial prerogative is a recent analysis of the Supreme Court's function in the free speech cases.[21] The author's position is that the qualification "except as may be necessary" must be appended to the language of the First Amendment.[22] He proceeds to reason that Congress, not the courts, is the proper agency to determine this necessity. The courts' appropriate function, even in civil liberties cases, is limited; they should defer to a legislative judgement[23] despite their conviction as to its unwisdom.[24]

18. Small, *What Censorship Keeps You From Knowing,* Redbook Magazine, July, 1951, reprinted in AMERICAN CIVIL LIBERTIES PAMPHLET No. 45 (1951).

19. As an example, the Atomic Energy Commission, in 1948, made an apparently routine announcement that all the members of the AEC Personnel Security Review Board had resigned. The board had actually resigned during the summer because of dissatisfaction with certain Commission actions. What was not revealed was that the announcement of the Board's resignation would have been withheld indefinitely but for the fact that a committee of scientists had arranged to confer with the Commission about security procedures. Thus, "secrecy may be a device to conceal ignorance and error as well as knowledge and success." GELLHORN, SECURITY, LOYALTY, AND SCIENCE 50 (1950).

20. Although no one would contend totalitarianism presents an immediate threat to representative government in the United States, how long this system can survive once the precedent of arbitrary restrictions on information has become firmly entrenched is a matter of concern. See CHAFEE, *op. cit. supra* note 8, at 10. See also, GELLHORN, *op. cit. supra* note 19, where the author discusses this problem.

21. Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1 (1951).

22. *Id.* at 50.

23. Even as to legislative findings of facts! For example, Congress might enact legislation forbidding inclusion of the teachings of Karl Marx in college curricula on the ground that it presents a clear and present danger to national security. Under this theory the courts must defer to such a legislation finding.

24. "A more convincing justification for refusal to extend deference to legislative judgments touching freedom of utterance . . . springs from an awareness that these

The writer indicates his substitute for reliance on the judiciary to protect basic rights as follows: "The great battles for free expression will be won, if they are won, not in the courts but in committee rooms and protest meetings, by editorials and letters to Congress, and through the courage of citizens everywhere. The proper function of courts is narrow."[25] This statement overlooks the fact that those who are forced to "battle" for the right to free expression in reality have little power over Congress or the press. It is not the right to express majority opinions that needs protection. Rather, it is "freedom for the thought we hate" which requires the aid of the judicial process.

The perspective purporting to rest upon "courage of citizens everywhere" and the impropriety of allowing "undemocratic institutions . . . to govern"[26] is even less persuasive as applied to freedom of information.[27] Those who maintain that the public's interest in knowing the activities of its government officials is adequately safeguarded by a vigilant press and aroused public opinion overlook the fact that official suppression itself is often effectively concealed.[28] Even assuming the people are cognizant of official reticence, the remedy at the polls is an

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freedoms are vital to the democratic process. . . . [T]his being so, the courts must undertake the responsibility of correction." But Richardson answers: "The difficulty with this position is that it assumes that the Constitution compels the correction of unwisdom. But if a law is not so unwise—if, in other words, the competing considerations that have been resolved by its enactment have not been so arbitrarily resolved and if the inferences from the data upon which it rests have not been so irrationally drawn—that its provisions fall outside the area of reasonable judgment, a court in overturning it would be obeying not the command of the Constitution but its personal appraisal of what is wise." Richardson, *supra* note 21, at 50. But see CURTIS, LIONS UNDER THE THRONE 327-330 (1947): "Where the democratic process is not working and the statute is not its result, the Court is free to make up its own mind without the exercise of any self-restraint." And, ". . . license becomes a virtue when the legislature attacks the very process itself, as it does when it restricts the right to vote, prohibits peaceable assembly, interferes with political organizations, restrains the dissemination of information. . . . [Then] the court should exercise less than no restraint." And if the purpose of securing personal rights "is to protect the democratic process against itself, even to do that we must appeal to something outside it. When we say that these personal rights are essential and basic to the democratic process, we are implying that they rest on something other than that process. When we are saving that process from itself, we must have something other than itself to save it with." *Id.* at 330.

25. Richardson, *supra* note 21, at 54.

26. *Ibid.* Compare CURTIS, *op. cit. supra* note 24, at 324. The courts are an undemocratic, "though *integral* part of our democratic process."

27. HOCKING, *op. cit. supra* note 13, at 170: "We say recklessly that readers or listeners have a 'right to know', yet it is a right which they are helpless to claim, for they do not know that they have the right to know what as yet they do not know." Congress itself is not fully informed. Witness the remarks of Senator Brien McMahon, concerning the secrecy of atomic production figures; he suggests that the United States is jeopardizing the fundamental principles of representative government because Congress, being uninformed, "lacks sufficient knowledge upon which to discharge its own Constitutional duties." GELLHORN, *op. cit. supra* note 19, at 10.

28. For a vivid example of concealed concealment, see note 19 *supra.*

impotent one. How, for example, could the electors of Elkton, Maryland, arrive at an intelligent decision as to which councilmen to re-elect when they had no way of knowing how and why those officials voted on specific issues, since the meetings were closed to press and public?[29] In addition, the seclusion of facts may be justified; hence political censure may not be warranted in every instance of nondisclosure. Until freedom of information is accorded constitutional stature, there is no adequate criterion with which to evaluate official silence. A moral standard is not sufficient.

Another disadvantage in placing implicit faith in the democratic processes is that those officials least responsive to the public will are most likely to attempt to insulate their conduct from scrutiny. The elective mechanism is too blunt an instrument to have much impact on an official far down in the administrative hierarchy. The most pronounced fallacy of those placing complete reliance in the political apparatus is their failure to perceive the effect of national emergency on the willingness of the people to relinquish their liberties.[30] The existence of a free society demands that regulation of freedom of expression be withdrawn to a large extent from the legislative and executive processes;[31] so also protection of the right to be informed of governmental activities falls within the special competency of the judiciary.[32]

IV

It is inaccurate to assume that express legal recognition of freedom of information would introduce a doctrine entirely unprecedented in our

29. See note 4 *supra*. That the real value of the right to vote is dependent upon adequate information pertaining to a candidate's worth was recognized at the dawn of our national history: ". . . the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends upon the knowledge of the comparative merits and demerits of the candidates for public trust and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." MADISON, *op. cit. supra* note 11, at 397.

30. In his book dealing with the problem of maintaining the correct balance between the nation's security and the individual's freedom in the present crisis, Lasswell points out that: "An insidious outcome of continuing crisis is the tendency to slide into a new conception of normality that takes vastly extended controls for granted and thinks of freedom in smaller and smaller dimensions." LASSWELL, *op. cit. supra* note 9, at 29.

31. See Mann, Book Review, 25 IND. L.J. 389 (1950).

32. In the words of Mr. Justice Jackson: "The very purpose of a Bill of Rights is 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 and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

legal system. This error is exposed by critical analysis of the rationale often employed to uphold the right freely to disseminate ideas. In the *Minnesota Gag Law Case*,[33] the Supreme Court held unconstitutional a statute which sanctioned suppression of information by providing for injunction against its publication. While admittedly this case is one sustaining freedom of dissemination against the threat of previous restraint, Chief Justice Hughes indicates that the interest to which the court defers is not primarily that of the newspaper to dispense the news but rather that of the public to acquire it.[34] Although clearly the vehicle through which the Court furthers this interest is not unique, the principle underlying the opinion is one which was regarded with great esteem by those who participated in the formulation of the Bill of Rights. As will be demonstrated in an examination of First Amendment cases, judicial solicitude for a well informed citizenry has been by no means infrequent.

Viewed in this perspective, the novelty of the thesis here proposed lies in the suggested means of advancing a frequently recognized interest, *i.e.*, that the public be accorded a legally enforceable right to compel divulgence of information by recalcitrant officials. It will be recalled that Madison frequently emphasized the importance of the interest itself and in no way proscribed the "remedies" for achieving it.[35] Nor does a literal reading of the free press Amendment inexorably foreclose the contention that compulsory disclosure of official activities is a legitimate means of reaching the end embodied in the Constitution. That a less drastic method has been reasonably effective in the past should not now prevent reliance on the only remaining practicable safeguard of this fundamental interest. Having recognized the significance of the public's right to secure facts about their government, surely the Framers should not be subjected to the gratuitous imputation that they intended to deny its effective implementation.

Some will contend that, although the Framers postulated a broad right, they perceived the need for, and hence contemplated, only a very

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33. Near v. Minnesota, 283 U.S. 697 (1931).

34. "Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious *public evil* would be caused by authority to prevent publication." *Id.* at 722 (emphasis added).

35. See note 11 *supra*, and accompanying text. It should be recognized that the driving force behind the First Amendment was primarily the desire to check possible abuses of government by preserving an untrammeled press, rather than any solicitude for the inherent right of the individual to assert his views. That the former was uppermost in the minds of the framers is indicated by the fact that state constitutions of that era protected only freedom of the press and by Madison's failure to include free speech in his proposal to the drafting Committee. See discussions in CURTIS, *op. cit. supra* note 24, at 267-269; and PATTERSON, *op. cit. supra* note 13, at 118-122.

limited remedy. However, it does not follow that the sole means now adequate to secure this interest is unavailable. That the Constitution is a dynamic instrument to be interpreted in light of present conditions needs no demonstration. To the originators of our Constitution, who contemplated an administrative hierarchy no larger than a medium-sized corporation of today, it may have appeared sufficient to entrust this fundamental right to the ability of the press to ferret out the facts and convey them to the public. That this reliance is no longer feasible is becoming increasingly apparent.

Five years after the *Gag Law Case,* the Supreme Court struck down another form of previous restraint upon publication when it held unconstitutional a license tax on the privilege of engaging in the newspaper business.[36] The levy was characterized a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[37] Here again the Supreme Court demonstrated its awareness of the necessity of an informed public in a democratic society and was not primarily interested in the right of the press, for its own sake, to circulate information.

Another line of cases involving First Amendment freedoms which manifests judicial concern for the right of the people to acquire the facts deals with constructive contempt. These decisions are doubly significant since the courts were confronted with the necessity of reconciling two frequently conflicting constitutional principles. The Supreme Court has taken the position that contempt proceedings may be used to restrict the exercise of rights protected by the First and Fourteenth Amendments only when such exercise creates a clear and present danger to the fair administration of justice.[38] And in *Pennekamp v. State of Florida,*[39] the Supreme Court reversed a conviction of constructive contempt, although recognizing that in criticizing the prosecution of justice in certain pending cases the defendant had distorted the truth. Mr. Justice Reed declared for the majority that the evil consequence of comment

36. Grosjean v. American Press, 297 U.S. 233, 250 (1936). "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

37. *Ibid.*

38. Bridges v. State of California, 314 U.S. 252 (1941). Justice Black, speaking for the majority, admitted that legal trials are unlike elections to be won through the use of the meeting hall, the radio, and the newspaper, but pointed out that the court cannot assume that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression bearing upon pending cases.

39. 328 U.S. 331 (1946).

must be "extremely serious and the degree of imminence extremely high before utterances can be punished."[40]

In another constructive contempt case, the Court reversed a Texas decision subordinating a free press to fair administration of justice.[41] The defendants had characterized a tribunal's action in a particular case as a "gross miscarriage of justice." The Supreme Court held that, inasmuch as a trial is a public event, what takes place in the courtroom is public property and may be reported with impunity. This was true despite the fact that the editorials were biased and did not reflect competent reporting.[42]

In the constructive contempt cases judicial preoccupation with the public's interest in procuring facts illustrates the lengths to which the courts are willing to go in subordinating the unobstructed administration of justice to freedom of information. Certainly it cannot be contended that the right to know what public officials are doing extends only to judicial officers. Even more essential to the democratic processes is a thorough knowledge of executive and legislative activities.

If further evidence of judicial awareness of the people's right to be informed is necessary, it is provided by a significant antitrust case involving an international newsgathering agency. The Government, alarmed over the steadily growing newspaper monopolies, contended that restricting access to information possessed by the Associated Press, in order to protect its members from competition, violated the Sherman Act. Judge Learned Hand, in granting an injunction against this practice, manifested great concern over the adverse effect of the challenged arrangement on an informed public.[43] The Supreme Court affirmed,[44]

40. *Id.* at 334. In a concurring opinion, Justice Frankfurter remarked: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society." *Id.* at 354, 355.

41. Craig v. Harney, 331 U.S. 367 (1947).

42. "There is no special requisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Id.* at 374. See also Sullens v. State, 4 So.2d. 356, 363 (1941), "It is not a postulate of democracy that the truth shall make men free; rather it is the right to know the truth that keeps them so. Thus courts become one of the means to the end that such rights may be protected."

43. In U.S. v. Associated Press, 52 F. Supp. 362 (S.D. N.Y. 1943), it was stated: ". . . neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *Id.* at 372.

44. Associated Press v. United States, 326 U.S. 1 (1945). Justice Black speaking for the majority declared: "It would be strange indeed however if the grave concern

observing that the First Amendment prohibition against governmental interference with a free press does not sanction repression of that freedom by private interests. In this case the Court not only recognized the public interest in being informed, but also condoned a type of compulsory disclosure at the instance of the Antitrust Division.[45] Of utmost significance is the fact that the party whose suppression was condemned was a private newsgathering agency, not a government official. Arbitrary governmental suppression of facts presents an even greater justification for judicial intervention. When the government refuses to divulge information, not only are the facts not presented by a "multitude of tongues," they are not presented at all.

A recent district court case explicitly recognized the right of a newspaper to compel disclosure of information suppressed by a city council.[46] In 1947, the city of Pawtucket, Rhode Island, granted certain citizens tax cancellations and abatements. Repeated efforts of a reporter for the Providence Journal to gain access to the records for publication were unsuccessful. Various city officials who were approached made no effort to justify their refusal to allow examination. The data were subsequently furnished to another local newspaper, after which the council passed an ordinance conditioning inspection of such documents upon its approval. In an action to enforce its right to inspect these records, the Providence Journal alleged that defendants' conduct violated its constitutional rights under the First and Fourteenth Amendments. The court granted the relief requested, holding that the lists were public records and that the officials' actions were so arbitrary and capricious as to deny the plaintiff the equal protection of the laws. As an alternative ground for its decision the court added: "Where such records as these are public records and where there is no reasonable basis for restricting their examination and publication, the attempt here to prohibit their publication is an abridgment of freedom of speech and of the press. They seek to place in the discretion of the city council the granting or denial of a constitutional right."[47]

On appeal, the First Circuit emphasized the denial of equal protection and affirmed without mention of the lower court's unique dictum

for freedom of the press which prompted adoption for the First Amendment should be read as a command that the government was without power to protect that freedom. . . . [T]hat Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Id* at 20.

45. See Marcus, *Antitrust Laws and the Right to Know*, 24 IND. L.J. 513 (1949), for a development of the thesis that a right to information is a legitimate concern of the antitrust laws.

46. Providence Journal Co. v. McCoy, 94 F. Supp. 186 (1950).

47. *Id.* at 195, 196.

recognizing the constitutional right of the press to require officials to make public withheld information.[48] The council's partiality unfortunately prevented a clear test of the constitutional right to demand revelation of information pertaining to government affairs.

While a number of First Amendment cases have reiterated the importance of a well-informed electorate to representative government, none proffered the only adequate means of attaining this end in the face of official resistance. But courts and legislatures which have recognized similar interests of lesser stature have not been so reluctant to provide the means for their realization. In most jurisdictions a limited common law or statutory right of access to public records is recognized.[49] The prevalent rule permits access to such documents upon proof that the intended examination is in the interests of society.[50] The right is commonly limited to public records, technically defined as those legally required to be kept or necessary to the discharge of a duty imposed by law. In a leading case,[51] the auditor general of Michigan refused to allow a news reporter to inspect records pertaining to expenditures of public money on the ground that there was no legitimate public interest in the documents and the reporter had demonstrated no special interest. The newspaper successfully mandated the auditor general on the theory that the common law rule grants the right of inspection. The public interest in official books and records was explicitly sustained.[52]

Though the Michigan decision may provide some impetus to official responsibility, the common law rule allowing inspection of records is a palpably inadequate safeguard. The pattern of judicial treatment of this right has been characterized by seeming indifference. Occasionally, the official successfully contends that the matters of record would tend to degrade the parties or injure public morals.[53] Denial frequently has been predicated on the claim that encouragement of public inquiry would unduly burden administrative machinery.[54] More often, the apology is

48. 190 F.2d 760 (1951).

49. See SEIBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS (1934) *passim*, for a comprehensive study of public records problems in relation to the press.

50. *Id.* at 19.

51. Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928).

52. Any rule to the contrary, the court said, ". . . is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules . . . . He [the auditor general] is their servant. His official books and records are theirs. . . . It would be a great surprise to the citizens . . . to learn that the law denied them access to their own books, for the purpose of seeking how their money was being expended and how their business was being conducted." *Id.* at 219, N.W. at 750.

53. Payne v. Staunton, 55 W.Va. 202, 46 S.E. 927 (1904).

54. Randolph v. State, *ex. rel.* Collier, 82 Ala. 527, 2 So. 714 (1887); Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 45 (1887).

that the records sought are not "strictly public."[55] That the facts most essential to the preservation of official integrity never become matters of public record, however, is the predominant reason why the efficacy of the common law right of inspection should not be overemphasized. A more basic deficiency has reference to the transient nature of legislative pronouncements. So fundamental a right should transcend the fluctuations of the political environment.

The right to inspect the records of federal departments is even more nebulous and far less heartening to proponents of accountability in government. The legal authority of these agencies to restrict access to their files, so far as it exists, is derived from a general "housekeeping" statute, which authorizes department heads to "prescribe regulations . . . not inconsistent with law. . . ." for the management of their departments.[56] Blanket regulations promulgated under this enactment, such as Department of Justice Order No. 2339, forbid production of agency files by subordinates.[57] Unforunately, they have been invoked indiscriminately to clothe agency documents with a sanctity frequently unwarranted by the nature of the information withheld.[58] The potentiality of this statute as an instrument of suppression in the hands of administrative officials was early demonstrated. A San Francisco newspaper requested permission to examine files of executive departments to ascertain the identity of those recommended for government positions by two California Congressmen. The Administrators, having requested an advisory opinion, were informed by the Attorney General that they were authorized by regulations issued under the "housekeeping" statute to deny access to the files involved. Compliance with the newspaper's request would impose an

55. State *ex. rel.* Beckley Newspapers Corp. v. Hunter, 127 W.Va. 738, 34 S.E.2d 468 (1945); People *ex. rel.* Stenstrom v. Harnett, 226 N.Y.S. 338 (Sup. Ct. 1927).

56. 1 STAT. 28 (1789), 5 U.S.C. § 22 (1946): *Departmental Regulations:* The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its bnsiness, and the custody, use, and preservation of the records, papers, and property appertaining to it.

57. "General rule as to non-availability of Department of Justice records. All official files, documents, records and information in the offices of the Department of Justice . . . or in the custody or control of any officer or employee of the Department of Justice are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same . . . except in the discretion of the Attorney General. . . . Whenever a subpoena duces tecum is served to produce any such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise directed by the Attorney General, will appear in conrt in answer thereto and respectfully decline to produce the records specified therein, on the ground that disclosure of such records is prohibited by this regulation."

58. See Berger and Krash, *Government Immunity From Discovery,* 59 Yale L.J. 1451 (1950). The article discusses the difficulty faced by litigants attempting to obtain information from government files, because of the excessive reliance by government on departmental regulations like that of the Justice Department.

onerous burden on the department. The relaxation of legislative responsibility encouraged by this ruling is emphasized by the fact that the data were sought to establish that the Congressmen had recommended improper persons for government positions.[59]

Most frequent resort to this statute has been for the purpose of thwarting efforts of private litigants to introduce, as evidence in judicial tribunals, materials contained in official files.[60] The insulation afforded agency documents by administrative regulations pursuant to the act has far exceeded the proper bounds of "official" and "state secrets," to the serious detriment of fair administration of justice.[61] The doctrine of immunity from process of department heads,[62] coupled with recognition of judicial impotence to compel subordinate officials to disobey dictates of their superiors,[63] has facilitated agency reliance on non-disclosure regulations and impeded judicial determination of the scope of the statutory privilege, if any, authorized by the act. Where Government is a party to the litigation the courts have adroitly circumvented these obstacles by imposition of indirect inducements to disclosure.[64] However, the plight of the litigant in a private action, whose case depends on evidence obtainable only from government files, is a serious one.

The key to rational construction of the act, compromising the rights of private litigants with the policies underlying the privileged character of official and state secrets, lies in the phrase "not inconsistent with law."[65] A recent case,[66] distinguishing language in *Boske v. Comingore*,[67] which has been the touchstone of non-susceptibility of department heads to compulsory process, has removed the chief barrier to interpreta-

59. 15 OPS ATT. GEN. 342 (1877).

60. Examples are: Boske v. Comingore, 177 U.S. 459 (1900); Bank of America National Trust & Savings Ass'n v. Douglas, 105 F.2d 100 (D.C. Cir. 1939); United States v. Chadwick, 76 F. Supp. 919 (N.D. Ala. 1948); United States v. Potts, 57 F. Supp. 204 (M.D. Pa. 1944); Harwood v. McMurtry, 22 F. Supp. 572 (W.D. Ky. 1938); Stegall v. Thurman, 175 Fed. 813 (N.D. Ga. 1910); *In re* Lamberton, 124 Fed. 446 (W.D. Ark. 1903); *In re* Weeks, 82 Fed. 729 (D. Vt. 1897); *In re* Hirsch, 74 Fed. 928 (D. Conn. 1896); *In re* Huttman, 70 Fed. 699 (D. Kan. 1895); Fowkes v. Dravo Corp., 5 F.R.D. 51 (E.D. Pa. 1945); U.S. v. Schine Chain Theatres, 4 F.R.D. 108 (W.D. N.Y. 1944); Walling v. Cometcarriers, 3 F.R.D. 442 (S.D. N.Y. 1944).

61. Dean Wigmore takes the position that the courts should be the final arbiters as to the necessity for secrecy. 8 WIGMORE, EVIDENCE § 2379 (3d ed. 1940).

62. Boske v. Comingore, 177 U.S. 459, 470 (1900). See also Note, 51 COL. L. REV. 881, 885 (1951), and authorities cited therein.

63. U.S. *ex rel.* Touhy v. Ragen, 180 F.2d 321, 324 (7th Cir. 1950), *aff'd*, 340 U.S. 462 (1951), contains a discussion of authorities on this point.

64. See Note, *supra* note 62, at 886.

65. 1 STAT. 28 (1789), 5 U.S.C. § 22 (1946). See Berger and Krash, *supra* note 58, at 1460-61.

66. U.S. *ex rel.* Touhy v. Ragen, 180 F.2d 321 (7th Cir. 1950).

67. 177 U.S. 459 (1900).

tion of the act.[68] Critics of this suppression of evidence under the authority of blanket statutory privilege have indicated the considerations which should be influential in determining the meaning of the provision. The statute was calculated merely to enable officials to provide for internal administration of their agencies.[69] The Federal Rules relating to discovery have the force of law. Hence, administrative rulings purporting to rest upon authority of the housekeeping statute cannot create a privilege inconsistent with these rules.[70] The common law privilege accorded to state and official secrets also imposes limits on the scope of such rulings.[71] Future decisions should achieve a more acceptable accommodation of the public interest in access to information in the hands of government officials, the exigencies of national security, and feasible division of functions among the agencies of government.

A purely common law example of judicial cognizance of society's interest in obtaining official information is the "public figures" exception to the right of privacy. Since the famous Brandeis-Warren collaboration in 1890,[72] legal recognition has been accorded to the individual's desire to withdraw his personal affairs from general scrutiny. However, this tribute to the individual's reluctance to be subjected to publicity from the outset has been subservient to the public interest in acquiring information of general significance. In *Pavesich v. New England Life Insurance Company,* the court remarked: "One who holds public office . . . [subjects his life] at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands. . . . [T]he law considers that the welfare of the public is better served by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with . . . the publication of every matter in which the public may be legitimately interested."[73] If a governmental officer's private affairs become the legitimate target of idle curiosity, his official life is a matter of even greater public concern.

Another prominent current recognition of the import of unrestrained access to information is that embodied in the Freedom of Information

68. See Note, *supra* note 62, at 887, in which the author suggests that the recent case of Land v. Dollar, 190 F.2d 366 (D.C. Cir. 1951), citing the Secretary of Commerce for contempt, further indicates that agency heads are amenable to compulsory process.

69. Berger and Krash, *supra* note 58, at 1460, n.50.

70. *Id.* at 1454-55.

71. In this connection, see Note, 58 YALE L.J. 993, 996 (1949).

72. Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 214 (1890). The first limitation recognized by the authors was: "The right to privacy does not prohibit any publication of matter which is of public or general interest."

73. 122 Ga. 190, 200-204, 50 S.E. 68, 72 (1905).

Article of the United Nations proposed Declaration of Human Rights.[74] The United States has been a leading advocate of adoption of this declaration by the General Assembly. In December of 1946, the Assembly convened the International Conference on Freedom of Information to undertake an intensive study of suppression of ideas. The U. S. representative to the Draft Convention recently made clear to the committee his position that this fundamental principle should not be the subject of compromise.[75] It would indeed be anomalous to loudly proclaim the universality of this right and yet deny it to our own citizens.[76] It doubtless is one purpose of the United Nations in attempting to secure recognition of the right to freedom of information, to retard the growth of totalitarian ideologies. Certainly it is equally important to the preservation of self-government in the United States to foster a similar right to combat occasional arbitrary proclivities of government officials.

A major step toward achievement of this goal is a recent decision of a New Jersey Superior Court.[77] This case attracted wide attention as an initial recognition that radio is embraced within the constitutional guarantee of free press. A radio station and a citizen-taxpayer of Asbury Park, New Jersey, sought to restrain city officials from interfering with the broadcast of a council meeting concerning a luxury tax ordinance. In an oral opinion, the court granted a temporary injunction on the ground that news broadcasting is within the definition of "press" under the New Jersey and United States Constitutions. More important to the present

74. See 10 UNITED NATIONS BULL. 212 (March 1, 1951).

75. "Freedom of information is the right of every person to have access to all available facts, ideas, and opinions regardless of source and not only to the information approved by his government or his party. . . . [T]he exercise of this freedom is the inalienable right of every person. . . . [T]his freedom belongs to that relatively small vital area of the democratic process which must remain, as far as possible, immune from governmental interference. This is the absolute test of democratic government. To the extent that the exercise of this freedom is not free, no other liberty is secure." 24 DEPT. STATE BULL. 194, 195 (1951).

76. However, it should not be inferred that the United Nations efforts are directed toward compulsory disclosure of information. While the interest recognized by the Draft Convention is a well-informed public, the only means to this end with which the United Nations group have been concerned are the channels of dissemination.

The limitations incorporated in the Article have been the subject of heated debate in the United States. For a discussion of arguments against adoption of the proposals see Hanson, *Freedom of the Press, Is it Threatened in the United Nations,* 37 A.B.A.J. 417 (1951), and Holman, *The Convention on Freedom of Information: A Threat to Freedom of Speech in America, id. at* 567. These writers take the position that adoption of the proposed measures would sanction imposition of previous restraints on First Amendment freedoms. In direct opposition to this view is Chafee, *Legal Problems of Freedom of Information in the United Nations,* 14 LAW & CONTEMP. PROB. 545 (1949). He contends that the fears that United States' ratification of the Covenant would impinge upon First Amendment rights are unfounded.

77. Asbury Park Press, Inc. v. City of Asbury Park, 20 U.S.L. WEEK 2155 (October 23, 1951) (N.J. Eq., Super. Ct., Sept. 24, 1951).

inquiry, however, is the judge's concern for the public's right to procure information regarding official conduct: "An enlightened local citizenry is the best offense against foreign oppressive thinking and against the state and municipal corruption that has been revealed in our country. The greater the light that can be shed upon public affairs the better will our country be run by the officials who are elected or chosen to do the work."[78] This decision approaches an outright acknowledgment that freedom of information, augmented by compulsory access, comes within the purview of the First Amendment.

V

A rigorous absolutism in asserting access to official information is neither practicable nor desirable. It is impossible to foresee all the diverse situations which will confront the courts. Yet it is clear that the right to be informed occasionally must yield to other demands of a complex democratic society. Brief mention of a few anticipated objections to enforced access will reveal some of the pertinent considerations which must enter into any adjustment of the conflicting interests.

Obviously use of this basic prerequisite to a free society as an instrument of political aggrandisement and harassment of responsible public officials should not be tolerated. But it is unlikely that a qualified right to invade official secrecy will ultimately discourage high calibre government personnel.[79] Official renunciation of concealment in government will, in the long run, enhance the prestige of public servants.

Nor should the right be so readily available as to encourage a deluge of trivial applications leading to eventual breakdown of governmental machinery. That no effort ordinarily is made to suppress such trivia, coupled with the fact that disappointed applicants are unlikely to perservere in their annoyance of agency personnel unless their claims are legitimate, suggests that the nuisance aspect of the right to access will be minimal.

Access to information may be balanced against considerations other than administrative convenience. Depending on the type of governmental function involved, the necessity to disclose and justifications for nondisclosure may vary widely. For example, where judges and grand and petit juries are concerned, the need for complete independence of judgment and freedom of debate has been promoted by attempting to insulate

78. The attorney for the radio station argued "that the whole history of democracy is to keep the public informed. . . . [T]his public right should transcend all other interests." Asbury Park Evening Press, Sept. 25, 1951, p. 2, col. 5.

79. See GELLHORN, *op. cit. supra* note 19, for a discussion of the impact of secrecy on the recruiting of qualified personnel into security-connected undertakings.

deliberations from all outside influences.[80] Members of Congress have been accorded the same privilege on similar grounds. While such concessions to a legislative body are of doubtful propriety, it is unlikely that a practice so firmly rooted in American tradition could be successfully challenged.[81]

Failure to recognize that the right to compel disclosure of governmental activities will often conflict sharply with other highly valued public interests would be unrealistic. To require proof of the justification for nondisclosure, occasionally may jeopardize the public welfare by necessitating near-revelation of the very facts sought to be withheld. That a problem defies perfect solution, however, should not preclude attempts to achieve the best possible answer.[82]

Perhaps the whiskey dilution episode, previously alluded to, presents just such a dilemma.[83] The excuse submitted for withholding the infractions from the public was facilitation of revenue collection. Since tax liability was doubtful, the likelihood of negotiating any settlement entailing disclosure of the violators' identity was slight. Hence, secret compromise was deemed expedient to avoid the delay and expense attendant upon litigation of uncertain outcome. The question is whether efficient collection of revenue is of such paramount national importance as to override the public interest in knowledge of governmental affairs. Only where the highest vindication can be exhibited should suppressive activi-

80. The policy supporting the privilege of secret jury deliberations was explained by Mr. Justice Cardozo in Clark v. United States, 289 U. S. 1 (1932): "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* at 13.

"In the United States the executive Magistrates are not held to be infallible, nor the Legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?" MADISON, *op. cit. supra* note 11, at 388.

81. The Constitutional Convention of 1787 convened in secrecy. Its deliberations were not made public until its task was near completion. See PATTERSON, *op. cit. supra* note 13, at 116. For an historical development of the right to report legislative sessions in the United States see SIEBERT, *op. cit. supra* note 49.

82. Problems defying perfect solution are not unique in our legal system. For example, in a criminal case in which defendant was convicted for contempt because he refused to answer questions of the grand jury on the claim of privilege against self-incrimination, Judge Learned Hand posed such a problem: "Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available." U.S. v. Weisman, 111 F.2d 261, 262 (2d Cir. 1940).

83. See note 2 *supra*, and accompanying text.

ties be condoned. Often judicial ingenuity will devise means of keeping intact the people's right to know without completely obliterating the interest sought to be protected by concealment. Perhaps the court might find that the interest in requiring disclosure is adequately served without revealing the identities of offenders, by publication of the fact that such compromises have been effected. The people, cognizant of the practice, may then seek to obviate it by political means if they desire its discontinuance.

Greatest opposition to legal recognition of the right to information is embodied in the commonly accepted dogma that national defense efforts sanctify official reticence of every variety. While national security does necessitate certain inroads upon democratic prerogatives, frank realization that the present emergency is not a transient one should render the public increasingly solicitous of its most fundamental civil liberties.[84] Mere mention of the magic phrase "national security" should not automatically close all avenues of public enlightenment regarding the conduct of government.[85] Professor Chafee has admonished: "Freedom

84. See LASSWELL, *op. cit. supra* note 9, at 75. "In a continuing crisis of national defense the freedoms which are most vulnerable require special vigilance on the part of everyone engaged in the review of security policies. Hence the application of four principles deserves extra care: . . . freedom of information. . . ." See also, GELLHORN, *op. cit. supra* note 19.

85. While still chairman of the Atomic Energy Commission, David Lilienthal warned: "We should stop this senseless business of choking ourselves by some of the extremes of secrecy to which we have been driven, extremes of secrecy that impede our own technical progress and our own defense." GELLHORN, *op. cit. supra* note 19, at 4.

In an effort to prevent unauthorized disclosure of "security" information, the President issued an Executive Order on September 24, 1951, prescribing regulations for the executive branch in creating a system for safeguarding official information. The rules establish minimum standards for the classification, transmission and handling of categorized security information. The department heads are urged not to overclassify, and to constantly *review their own actions* with a view toward downgrading the withheld facts as soon as conditions warrant. EXEC. No. 10290, 16 FED. REG. 6413 (1951). It is conceded that it is extremely important that matters which directly concern the nation's defense do not inadvertently reach subversive elements. The evil inherent in the provisions recently promulgated is that they invest the suppressing official with the right to pass judgment on his own actions. This, coupled with the fact that many of the departments' security activities are unavoidably intertwined with non-defense endeavors, gives rise to the possibility of secluding those facts which may only embarrass the agency. An example of such an attempt was the order issued by the Office of Price Stabilization instructing its employees not to make public any information that "might cause embarrassment to the O.P.S." Fortunately, the President demanded its withdrawal four days later. 46 AMERICAN NEWSPAPER PUBLICATIONS ASSOCIATION FEDERAL LAWS BULL. 143 (October 5, 1951).

The directive is obviously an outgrowth of the steady pressure of security-consciousness, but it should be remembered that "overzealousness in the cause of national defense weakens rather than strengthens total security. Under some conditions officials and the public at large are likely to develop a "state of nerves", of crisis impatience, that can burst into full hysteria and encroach unnecessarily and perilously upon individual freedom." LASSWELL, *op. cit. supra* note 9, at 23, 24.

makes possible the victory of long-time aims over short-time aims. One of the main advantages of the Bill of Rights is to protect certain fundamental long-time aims from being sacrificed to short-time aims by existing organs of government, particularly when officials are tempted to act in response to popular excitement which will eventually be modified by sober thinking."[86] Public officials must constantly be reminded that self-government is our "long-time" aim and that its accomplishment requires a fully informed citizenry. Due to the inescapable complexity of government it is unrealistic to assume that security and non-security matters can be neatly categorized. However, the official predicating his silence on national security must conclusively demonstrate that the information withheld bears an essential relation to the country's safety.[87]

No attempt has been made to evolve a standard to be applied in weighing the validity of official concealment because it is believed that precise articulation of a rule of thumb is impossible.[88] The thought which should remain uppermost in the public conscience in striving for the preservation of self-government is the necessity of imbuing officials with a sense of responsibility to communicate their doings to the people. An enlightened citizenry is the vanguard of a democratic society.[89]

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86. CHAFEE, *op cit. supra* note 8, at 41. "No doubt there are many matters which ought not to be disclosed for a time, but the officials should not have a free hand to determine what those matters are or to lock them up forever. The possession of such a power would allow them to hoist public safety as an umbrella to cover their own mistakes." *Id.* at 14.

87. See 8 WIGMORE, EVIDENCE § 2379 (3d ed. 1940). Determining the necessity for secrecy of a document on the ground of privilege falls upon the court. Wigmore asks: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? The truth cannot be escaped that a court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege." *Id.* at 799.

88. Mr. Justice Holmes has indicated the dangers inherent in such a mechanical approach to the solution of legal problems: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Dissent in Hyde v. United States, 225 U.S. 347, 384 at 391 (1911).

89. It has been the purpose of this discussion to present, rather than to solve, one of today's most pressing problems. Even if the Supreme Court decides to accord the proposed protection to freedom of information, it can not be expected that the problem will at once cease to exist. In the words of Justice Frankfurter: ". . . the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." McCollum v. Board of Education, 333 U.S. 203, 212 (1948).