# THE CONSTITUTIONAL RIGHT TO KNOW

*By David Mitchell Ivester**

## Introduction

Americans pride themselves on being a self-governing people. They have always believed that the right conclusions are more likely to be gathered from a multitude of minds and ideas than from any authoritarian selection. "To many this is, and always will be, folly; but we have staked upon it our all."[1] Indispensable to the continued success of our two hundred year old experiment in self-government is a free flow of information upon which individuals can make reasoned judgments. In any political system, those who make the decisions must have access to information upon which to base their decisions. Although pure democracy and an absolutely free flow of information are difficult, if not impossible, to achieve, the practical relationship between the two nevertheless remains unchanged. To the extent that a system shares responsibility for decisionmaking, information must also be shared.

Americans thus have a vital interest in acquiring information about their society, their government, the world, indeed, about any matter that will affect their lives. Recent controversies involving the Pentagon Papers, Watergate, executive privilege, congressional scandals, and secret government operations have aroused considerable public concern that the people are not being told that which they have a right to know. At the same time, there is a sense of uneasiness about the government's ability to keep secret all that should remain secret.

The right to know, as posited in this note, is a constitutional right, independent of parallel statutory and common law doctrines.[2] Included within its purview are the rights to receive information from willing sources, to gather information from willing or neutral sources, and to acquire information from a perhaps unwilling governmental source.[3] The right to know is

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* Member, third year class.

1. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.).

2. For a discussion of statutory and common law rights of access to and inspection of government information, see H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975).

3. To know means to be cognizant of, to be acquainted with, or to have a concept of in the mind. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (P. Gove

not absolute; rather, this note suggests that, like other important First Amendment rights, it should be limited only when necessary to further a compelling state interest.

Section I of this note briefly examines, in light of current political conditions, the role of a free flow of information in maintaining the system of checks and balances that characterizes the United States government. Within this perspective, the note explores the relatively undeveloped concept of the right of the people to know about their government and its activities. Section II focuses on the doctrinal and constitutional basis of the right, deferring to Section IV consideration of the ultimate scope of the right. Section III reviews the present status of governmental, most importantly judicial, recognition of the right to know. Section IV outlines the limits of the right, explores the government's power to withhold information, and discusses the appropriate elements of any test or standard used to determine what should remain secret and what should be available to the people. Section V then discusses the role of the judiciary in effectuating the constitutional right to know.

## I. Perspective: Balance in the American Political System

In contrast to an authoritarian government comprised of two distinct groups, the governors and the governed, a self-governing society is composed of only the self-governing people; rulers and ruled are the same

ed. 1971). Freedom of speech, freedom of information, the right to receive information, the right to gather information, and the right of access to government information are all related to, and part of, the right to know, but it is the desired end "to know" that is important. Only with knowledge can the people truly have a will to which the government can be accountable. The right to know, like all enduring constitutional principles, cannot be defined as if it were only a word in a dictionary. It must be allowed to grow and evolve with the circumstances. Perhaps at one time the right to receive information from an unrestrained press was adequate; in a more complex society the right to know may impose upon government an affirmative duty actively to inform the public even in the absence of prior requests for information. *See* Note, *Access to Government Information and the Classification Process — Is There a Right to Know?*, 17 N.Y.L.F. 814, 831-32 (1971). For further definition of terms, see J. WIGGINS, FREEDOM OR SECRECY 3-4 (1956) [hereinafter cited as WIGGINS]; Forkosch, *Freedom of Information in the United States*, 20 DE PAUL L. REV. 1, 10-22 (1970) [hereinafter cited as Forkosch]; Note, *The Public's Right of Access to Government Information under the First Amendment*, 51 CHI.-KENT L. REV. 164, 165-68 (1974).

For a discussion focusing on the nature of the source, whether willing, unwilling, or neutral (i.e., places and events), see Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (concluding that there is no right to acquire information from an unwilling source).

This note focuses on the right to know about the workings and activities of the federal government, but much of the same analysis can be applied to a correlative right regarding state and local governments.

individuals.[4] Such a governmental system rests on a compact in which the people assume all authority to exercise control, yet agree that all alike are subject to control. Further, although established and maintained by the consent of the citizens, this government must have independent power to compel all citizens to obey the laws.[5] How then, in the interest of liberty, is such a government itself to be controlled? The American response has been twofold: first, the government must be designed as a self-regulating system; second, the people, apart from the government, must exercise their inalienable power to oversee and discipline the government.[6]

The self-regulating design of the United States government is based on the concept of a balance of power. The founding fathers recognized that man, often motivated by self-interest and thus susceptible to corruption, is generally untrustworthy.[7] Absolute power could be entrusted to no one. The federal government was therefore divided into three branches, each with its own sphere of power and interest and each with some means to check the power of the others. The aim was, by means of the balanced tension, to prevent the exercise of arbitrary power by any one branch or by the system as a whole.[8] The constitutional division of power between the federal and state governments serves much the same purpose.[9]

The second basic check on the government rests on the principle that the people are sovereign. The people, in exercising their inherent power to make and unmake governments, delegated certain powers to governmental

4. *See, e.g.*, F. GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 12-13, 627-40 (1968) [hereinafter cited as GRIMKE]; A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 3-16 (1948) [hereinafter cited as FREE SPEECH].

5. FREE SPEECH, *supra* note 4, at 9. *See also*, Schlesinger, *Civil Disobedience: The Problem of Selective Obedience to Law*, 3 HASTINGS CONST. L. Q. 947 (1976).

6. "In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." THE FEDERALIST NO. 51, at 399 (J. Hamilton ed. 1904) (A. Hamilton). *See id.* Nos. 47-51; GRIMKE, *supra* note 4, at 12-13, 627-40; J. LOCKE, TWO TREATISES OF GOVERNMENT 118-19, 382-85 (P. Laslett ed. 1964); C. MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 74-83 (1906); J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 85-91, 165-87 (1879).

7. *See* C. ROSSITER, SEEDTIME OF THE REPUBLIC 371-72 (1953) [hereinafter cited as ROSSITER].

8. "The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

9. *See* U.S. CONST. amend. X; National League of Cities v. Usery, 426 U.S. 833 (1976).

authorities while reserving to themselves all remaining rights and powers.[10] From the outset, then, the national government was one of limited powers; the Bill of Rights imposed further limitations. Power thus is divided not only between the branches of government, but also between the government and the people. Here, too, must be a balance that allows the people effectively to oversee the operation of the government.[11]

This dual balance of power is threatened today by two interrelated phenomena: first, the tremendous growth of the federal government as a whole, and second, the gradually expanding power of the executive branch and relative diminution of the power of Congress.[12] The federal government, and particularly the executive branch, in 1977 stands in a much more powerful position vis-a-vis the people and the states than it did in 1789.[13] One important factor in the development of that power has been the executive's possession and control of vast amounts of information relating to government activities.[14] Not only is the executive, the President and his many agency officials and employees, in a position to gather information, but that branch generates much of the information itself.[15]

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10. U.S. CONST. amend. IX. The power to make and unmake governments refers not to the power to elect a new Congress and President, but to the revolutionary power to change the entire governmental system and structure.

11. *See* M. FORKOSCH, CONSTITUTIONAL LAW §§ 6-10 (1963). *See also* note 6 *supra*.

12. *See* A. LEWIS, *Introduction* to NONE OF YOUR BUSINESS—GOVERNMENT SECRECY IN AMERICA 13-14 (N. Dorsen & S. Gillers ed. 1974); Kalijarvi & Wallace, *Executive Authority to Impose Prior Restraint upon Publication of Information Concerning National Security Affairs: A Constitutional Power*, 9 CAL. W. L. REV. 468, 469 (1973) [hereinafter cited as Kalijarvi & Wallace].

13. *See* E. CORWIN, THE PRESIDENT, OFFICE AND POWERS (1957); A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973) [hereinafter cited as SCHLESINGER].

14. Ervin, *Secrecy in a Free Society*, 213 THE NATION 454, 455 (1971); Horton, *The Public's Right to Know*, 3 N.C. CENT. L.J. 123, 129-30 (1972) [hereinafter cited as Horton]; Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 2-3, 11 (1957) [hereinafter cited as Parks]. *See also* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 38-39 (1963) [hereinafter cited as EMERSON]; HOUSE COMM. ON GOV'T OPERATIONS, AVAILABILITY OF INFORMATION FROM FEDERAL DEPARTMENTS AND AGENCIES, H.R. REP. NO. 2947, 84th Cong. 2d Sess. 81-83, 88-89 (1956); B. LADD, CRISIS IN CREDIBILITY 220-21 (1968); Mathias, *Executive Privilege and Congressional Responsibility in Foreign Affairs*, in SECRECY AND FOREIGN POLICY 69-80 (T. Franck and E. Weisband ed. 1974) [hereinafter cited as Mathias]; Gillers, *Secret Government and What to Do about It*, 1 CIV. LIB. REV. 68 (Winter/Spring 1974); Kutner, *Freedom of Information: Due Process of the Right to Know*, 18 CATH. LAW. 50, 52-53 (1972); Murphy, *Knowledge is Power: Foreign Policy and Information Interchange Among Congress, the Executive Branch, and the Public*, 49 TUL. L. REV. 505-10 (1975); Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93, 94 (1973).

15. Of necessity, the executive has expanded its capacity to handle this informa-

The executive exercises control over the information in its possession in a number of ways. Information has been withheld under claim of executive privilege,[16] under the exemptions of the Freedom of Information Act,[17] and on the basis of the classification system.[18] Other less formal devices include losing, hiding, or destroying information, foot-dragging in response to requests for information, and evasiveness in answering questions;[19] on occasion government officials have resorted to lying.[20] The flow of information is controlled not only by such withholding techniques, but by the practice of feeding information to Congress and the public through "leaks" and "background reports."[21]

Adequate and accurate information about the government and other matters is not usually available in the public domain or within Congress itself.[22] Because the information upon which the public and Congress are so dependent lies largely within the executive branch,[23] the power of the executive to withhold and to control its flow assumes a position of primary

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tion. It is only through the use of modern information systems that the President and various department heads are able to steer the vast ship of state at all. Congress, on the other hand, has not sufficiently increased its capacity to handle information, neglecting even to avail itself of electronic computer technology until 1967 when it installed its first computer. By this time the executive was already operating 2,500 computers of its own. B. LADD, CRISIS IN CREDIBILITY 222 (1968).

16. *See generally* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (Bantam ed. 1975) [hereinafter cited as BERGER]; A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE (1974).

17. 5 U.S.C. § 552 (1970 & Supp. V 1975), *as amended by* 5 U.S.C.A. § 552 (West Supp. 4, pt. 1, 1976). For further discussion of the Freedom of Information Act, see notes 155-58, 218-20 and accompanying text *infra*.

18. Exec. Order No. 11,652, 3 C.F.R. 339 (1974) *reprinted in* 50 U.S.C. § 401 (Supp. V 1975).

19. *See, e.g.*, THE GEORGETOWN LAW JOURNAL, MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 37-47 (1973); NONE OF YOUR BUSINESS—GOVERNMENT SECRECY IN AMERICA (N. Dorsen & S. Gillers ed. 1974); SCHLESINGER, *supra* note 13 at 331-76.

20. *See* D. WISE, THE POLITICS OF LYING—GOVERNMENT DECEPTION, SECRECY, AND POWER (1973).

21. See notes 19 & 20 *supra*.

22. Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CALIF. L. REV. 3, 11 (1959). See notes 29-32 *infra*.

23. "The executive branch is, among other things, one of the more enormous information gathering machines ever devised by man. The Congress, on the other hand, in carrying out its unique responsibilities for assisting the President in the conduct of foreign policy must rely for information partly upon what it reads in the papers, partly upon what it can get from experts outside government, but most of all upon what the executive branch chooses to tell it." *Executive Privilege: The Withholding of Information by the Executive: Hearing on S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 16 (1971) (statement of Senator Mathias).

importance.[24] The potency of such a power lies in its pervasive yet totally flexible character. This power can be exercised on a day-to-day basis and may be molded to meet the needs of many different situations. The more obvious constitutional checks, such as the veto, the franchise, or the power of the purse, seem rather clumsy by comparison.[25] The executive, then, possesses a very usable power capable of producing serious imbalances in the American constitutional system.

Secrecy is not always a source of power; it has debilitating effects on the executive branch as well as on government as a whole. Traditional intrabranch rivalries have led to information hoarding, creating possible power imbalances within the executive branch itself.[26] Noted historian Henry Steele Commager, contrasting the ideals of the founders with the current political condition of the American republic, has expressed concern that secrecy has so clogged the machinery of government that even top decisionmakers occasionally operate in ignorance:

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President (witness the 'unauthorized' bombing of the North last fall and winter) are kept in darkness.[27]

## II. Foundations of the Right to Know

While maintenance of a balance of power between the branches of government is important, the balance between the people and the government is crucial.[28] The people's right to know about governmental affairs holds great potential for counteracting the power that the executive enjoys as a result of its possession and control of information. To understand the

24. Parks, *supra* note 14, at 2-3, 11; *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1190, 1209-10, 1216 (1972) [hereinafter cited as *Developments—National Security*]. *See* Environmental Protection Agency v. Mink, 410 U.S. 73, 94-95 (1973) (Stewart, J., concurring); BERGER, *supra* note 16, at 2-3, 249-51, 346-47.

25. *See* Mathias, *supra* note 14, at 80-83.

26. T. Franck & E. Weisband, *Introduction: Executive Secrecy in Three Democracies: The Parameters of Reform*, in SECRECY AND FOREIGN POLICY 8-9 (T. Franck & E. Weisband ed. 1974).

27. Commager, *The Defeat of America*, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7.

28. "[T]he measure of a good constitution is not simply the form of government but the effectiveness of the process by which the people out of government are constantly able to discipline government by exercising the inalienable power which ultimately sanctions all governments." J. Ward, *Introduction* to GRIMKE, *supra* note 4, at 12. *See* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

The balance between people and government is particularly important in the areas of national security and foreign affairs: "In the absence of the governmental checks and bal-

nature and scope of the people's right to know, which has remained a largely undeveloped area of constitutional law, it is necessary to explore the doctrinal foundations as well as any governmental recognition of the right.

### A. Political Foundations: Functioning Self-Government, Popular Sovereignty, and Limited Power with Correlative Right

The first foundation of the right to know flows from a functional analysis of democratic systems of government. Self-government is possible only to the extent that the leaders of the state are responsible and responsive to the will of the people. But if the will of the people is to have validity, if the people are to function as a rational electorate, they must have adequate knowledge of what the government is doing.[29] Without such knowledge the people can neither participate effectively in governmental processes[30] nor

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ances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). *See* T. Franck & E. Weisband, *Dissemblement, Secrecy, and Executive Privilege in the Foreign Relations of Three Democracies: A Comparative Analysis*, in SECRECY AND FOREIGN POLICY 401-02 (T. Franck & E. Weisband ed. 1974). *See also* note 6 *supra*.

29. "When men govern themselves it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." FREE SPEECH, *supra* note 4, at 26-27 (emphasis in original).

*See* Branzburg v. Hayes, 408 U.S. 665, 713-15 (1972) (Douglas, J., dissenting); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); Thornhill v. Alabama, 310 U.S. 88, 95, 102 (1940); Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 269-77 (1964); *id.* at 296-97 (Black, J., concurring); N. ANGELL, THE PRESS AND THE ORGANIZATION OF SOCIETY 17 (1922); H. CROSS, THE PEOPLE'S RIGHT TO KNOW 128-32 (1953); WIGGINS, *supra* note 3, at ix, 19; Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 14; Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667, 668 (1959) [hereinafter cited as Hennings]; Horton, *supra* note 14, at 123; Parks, *supra* note 14, at 3-4; Rogers, *The Right to Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83 (1956); Yankwich, *Legal Implications of, and Barriers to, The Right to Know*, 40 MARQ. L. REV. 3, 33-36 (1956) [hereinafter cited as Yankwich]; Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952) [hereinafter cited as *Access to Official Information*]; Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973).

30. Pell v. Procunier, 417 U.S. 817, 832 (1974); Garrison v. Louisiana, 379 U.S.

hold the government accountable for its actions.[31] The right to know is inherent in the proper functioning of a system of self-government.[32] The people's right to know also facilitates the proper performance of the legislative function. As a representative legislative body, Congress is properly responsive to and dependent upon public opinion. To the extent that the right to know will result in a fully informed public no longer dependent upon information gratuitously provided by the executive, Congress will have a more solid political base from which to perform its legislative duties and to fulfill its role in the balance of power within the federal government.[33]

A second foundation, often associated with the functional argument but actually theoretically distinct, is that the right to know is implicit in the *structure* of a self-governing system. The sovereign people, by virtue of their station as the fundamental source of all governmental power, have an inherent right to know what their government is doing.[34] That right is implicit in the inalienable power of the people to make and unmake govern-

64, 74-75 (1964). *See* Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967); Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring); WIGGINS, *supra* note 3, at 19-20; Parks, *supra* note 14, at 3-4; Yankwich, *supra* note 29, at 33; Note, *The National Security Exception to The Doctrine of Prior Restraint*, 13 WM. & MARY L. REV. 214, 223 (1971).

31. "When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion." Ervin, *Secrecy in a Free Society*, 213 THE NATION 454, 456 (1971), *quoted in* Gravel v. United States, 408 U.S. 606, 640-41 (1972) (Douglas, J., dissenting). Saxbe v. Washington Post Co., 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (Black, J., dissenting). *See* Thornhill v. Alabama, 310 U.S. 88, 95, 102-03 (1940).

32. Pell v. Procunier, 417 U.S. 817, 839-41 (1974) (Douglas, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); *id.* at 725-28 (Stewart, J., dissenting). *See* Saxbe v. Washington Post Co., 417 U.S. 843, 860-64 (1974) (Powell, J., dissenting); Rosenbloom v. Metromedia, 403 U.S. 29, 41-44 (1971); Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* note 29 *supra*.

33. *See* BERGER, *supra* note 16, at 385-88; Parks, *supra* note 14, at 4.

For example, it was evident during the impeachment process of President Nixon that Congress, far from taking the lead in the impeachment drive, required considerable public support before it would take any definitive action. In this case the revelations to the public were more important to the proper fulfillment of the congressional role than any revelations to Congress alone could have been.

34. Pell v. Procunier, 417 U.S. 817, 839-41 (1974) (Douglas, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 713-15 (1972) (Douglas, J., dissenting); Gravel v. United States, 408 U.S. 606, 640-41 (1972) (Douglas, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 269-76 (1964); Ervin, *A Survey on Government and the Freedom of Information, Controlling Executive Privilege*, 20 LOY. L. REV. 11 (1974); Hennings, *supra* note 29, at 668-69 (this article also connects the theoretical rationales for the right to know to various constitutional provisions). *See* Roth v. United States, 354 U.S. 476, 487-88 (1957); Parks, *supra* note 14, at 7.

ments. It is a right that was not expressly forfeited when the people delegated powers to the government; nor, in view of the necessity of the right to the proper functioning of the system,[35] should it be assumed that the right was impliedly forfeited.[36] Logically, then, the right to know is one of those constitutionally protected unenumerated rights retained by the people.[37]

The third foundation of the right employs the theories of popular sovereignty and government by compact, but goes beyond the notion that the right to know is inherent in these ideas. Dr. Wallace Parks, in an early study of the constitutional right to know,[38] suggests that the right should be recognized as a corollary to the government's limited power to withhold information.[39] Such a power is nowhere expressly authorized or defined, but Parks observes:

> Whatever powers the President and Congress have to withhold information are derived, of course, from the powers entrusted to them by the Constitution. In view of the theory of popular sovereignty and of reserved powers and the fact that Members of Congress . . . and the President [are] elected by the people . . . , it would be extraordinary if the powers granted to the President or to the Congress were to authorize the general withholding of information needed for a responsible exercise of the franchise. "Nothing could be more irrational than to give the people power, and to withhold from them information without which power may be abused."[40] . . . It is reasonable to assert, therefore, that only a limited power to withhold government information can be derived from Articles I and II of the Constitution even apart from the Bill of Rights.[41]

Given that the government's withholding power is limited, Parks continues: "There are practical if not theoretical weaknesses, however, to power limitations which are not matched by correlative rights located in individuals, associations or corporate entities capable of asserting them when they are infringed."[42]

These weaknesses find their remedy in a right to know, "residing in the non-governmental community which [is] abridged if the President and the Congress should exceed their constitutional powers in withholding informa-

35. See notes 29-33 and accompanying text *supra*.

36. See Parks, *supra* note 14, at 7.

37. U.S. CONST. amend. IX.

38. Parks, *supra* note 14.

39. *Id.* at 7-8.

40. Parks did not footnote this quotation, but it corresponds, with the exception of a minor preposition, to Wiggins, *The Role of the Press in Safeguarding the People's Right to Know Government Business*, 40 MARQ. L. REV. 74, 78 (1956) (paraphrasing 4 T. MACAULAY, THE HISTORY OF ENGLAND 347 (1850-1861)).

41. Parks, *supra* note 14, at 7 (footnotes omitted). This rationale does not, however, take into account the possibility of extra-constitutional powers. See notes 182-87, 210 and accompanying text *infra*.

42. Parks, *supra* note 14, at 7. Footnote 8 of Parks' article illustrates the point: "For example, if we assume that President Jefferson exceeded his powers in agreeing to the Louisiana Purchase, whose rights were infringed?"

tion."[43] The right is textually grounded, if such is necessary, in the Ninth Amendment's reminder that "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[44]

### B. Constitutional Foundation: First Amendment

The fourth foundation is also the primary textual basis for the constitutional right to know. The First Amendment contains the limiting prohibition that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[45] Read literally, this provision may be interpreted to mean that only one's freedom *to* speak or *to* publish is protected by the Constitution. Apparently then, one would have a right only to inform and not *to be* informed.[46] But if the rights to speak, to publish, and to inform are more than theoretical ideals, certain implied rights must logically flow even from this strict construction.[47] These implied rights include the rights to receive and gather information and to have access to sources of information in order thereafter to be able to inform.[48] The First Amendment is not the guardian of mere "talkativeness";[49] its aim is "to prepare the people for an intelligent exercise of their rights as citizens."[50] Knowledge and the means of acquiring it are thus necessary prerequisites to the intelligent and effective exercise of the rights to speak and publish.

#### *1. Intent of the Founding Fathers*

The literal interpretation enunciated in the preceding paragraph is negated by the intent of the founding fathers, by the overall purpose of the First

43. *Id.* at 8.

44. U.S. CONST. amend. IX. Parks also finds textual support for the right to know in the First and Fifth Amendments. Parks, *supra* note 14, at 8-13.

45. U.S. CONST. amend. I. While this appears to be only a limitation on the exercise of legislative power, the First Amendment has generally been assumed to apply to all branches of government. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 254, 486 n.7 (1972) [hereinafter cited as HENKIN].

46. *See* Forkosch, *supra* note 3, at 36-37.

47. *Id.*; 47 NOTRE DAME LAW. 341, 342 (1971). *See Access to Official Information*, *supra* note 29, at 218-19. *But see* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273-77 (1971); Kalijarvi & Wallace, *supra* note 12, at 474-80; Mayo, *Comments Concerning the First Amendment and the People's Right to Know*, in UNIVERSITY OF MICHIGAN LAW SCHOOL SUMMER INSTITUTE ON INTERNATIONAL AND COMPARATIVE LAW, COMMUNICATIONS MEDIA LEGAL AND POLICY PROBLEMS 6-11 (1954).

48. Kleindienst v. Mandel, 408 U.S. 753, 775-76 (1972) (Marshall, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 725-28 (1972) (Stewart, J., dissenting); Lamont v. Postmaster General, 381 U.S. 301, 308-09 (1965) (Brennan, J., concurring); Thornhill v. Alabama, 310 U.S. 88, 95, 102-03 (1940); Forkosch, *supra* note 3, at 36-37; 47 NOTRE DAME LAW. 341, 342 (1971).

49. FREE SPEECH, *supra* note 4, at 25.

50. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

Amendment, and by the very idea of government embodied in the Constitution.[51] Although the quest for the intent of the framers is fraught with perils,[52] it can reasonably be said that some recognition and protection of the right to know was contemplated or presumed by many of those who participated in the process of producing the Constitution and the Bill of Rights. Indeed there is some evidence suggesting that the founding fathers intended to guarantee the right to know per se, that is, that the First Amendment was specifically intended to extend to the people a directly enforceable right to know about governmental affairs.[53] If, perhaps, this specific intent did not enter the minds of most of the framers, there is persuasive evidence, in light of the widespread awareness of the basic need for "popular information, or the means of acquiring it,"[54] that the freedom of speech and press clauses were intended at least as instrumental means of securing and protecting the right to know.[55] In other words, assuming the framers had no intent to create a directly enforceable right to know, they expected that the guarantee of freedom of speech and press would effectively secure the right of the people to know about their government.

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51. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 95-96 (1948); Forkosch, *supra* note 3, at 38-46. The Supreme Court has generally construed the Constitution liberally, especially provisions for the security of persons. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1956); Boyd v. United States, 116 U.S. 616 (1886). It has also recognized that certain basic rights, although not expressly mentioned in the Constitution, are nevertheless constitutionally protected. *See* Shapiro v. Thompson, 394 U.S. 618 (1968) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1964) (right to privacy).

52. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS 139-45 (1975).

53. See notes 56-63 and accompanying text *infra*.

54. Letter from James Madison to W. T. Barry, Aug. 4, 1822, in THE COMPLETE MADISON 337 (S. Padover ed. 1953). *See* note 65 *infra*. *See also* Forkosch, *supra* note 3, at 38-46; Hennings, *supra* note 29, at 668-70; Wiggins, *Government Operations and the Public's Right to Know*, 19 FED. B.J. 62-64 (1959).

55. See notes 70-96 and accompanying text *infra*.

Judge Cooley's interpretation of constitutional history also leads to the conclusion that the First Amendment accords protection not only to dissemination, but to acquisition of information as well: "To guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose [of the First Amendment.] . . . 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 T. COOLEY, CONSTITUTIONAL LIMITATIONS 885-86 (8th ed. 1927). *See also* Forkosch, *supra* note 3, at 38-46; Hennings, *supra* note 29, at 669; Parks, *supra* note 14, at 7; Wiggins, *Government Operations and the Public's Right to Know*, 19 FED. B.J. 62, 63-64 (1959).

But for an historical analysis that concludes that "[t]he persistent image of colonial America as a society in which freedom of expression was cherished is an hallucination of sentiment that ignores history," see L. LEVY, THE LEGACY OF SUPPRESSION 18 (1960) [hereinafter cited as LEVY]. Note, however, that Levy's study focuses on the meaning of

### a. Evidence of specific intent to embody the right to know in the First Amendment

The debate on the Bill of Rights during the ratification controversy provides little insight into the meaning of freedom of speech and press at that time.[56] The sentiments of certain individuals influential in shaping the Constitution and the Bill of Rights, expressed prior to the ratification of the First Amendment in 1791, however, indicate that to these individuals freedom of speech and press included some protection of a right to be informed about governmental affairs.[57] As early as 1722 Benjamin Franklin argued:

> The Administration of Government is nothing else but the Attendance of the *Trustees of the People* upon the Interest and Affairs of the People: And as it is the Part and Business of the People, for whose Sake alone all publick Matters are, or ought to be transacted, to see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scan'd. . . .[58]

In 1787, following Shay's Rebellion, Thomas Jefferson noted that the people, "the only censors of their governors," may be led astray momentarily, but will soon correct themselves:

> The way to prevent these [errors] of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[59]

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freedom of speech and press vis-a-vis the law of libel and does not purport to confront the question of the right to know. This difference in focus can significantly affect one's resulting impression. For example, Levy offers James Wilson as a prime example of an influential founding father who retained the Blackstonian idea that freedom of the press meant only freedom from prior restraints (*id.* at 201-02), yet the same James Wilson stood up before the Constitutional Convention to make one of the most unequivocal declarations of the people's right to know. See notes 96-97 and accompanying text *infra*.

56. *See* LEVY, *supra* note 55, at 214-15.

57. *See* ROSSITER, *supra* note 7, at 385.

58. 2 THE WRITINGS OF BENJAMIN FRANKLIN 26-27 (A. Smyth ed. 1907). Franklin's argument, made under the pseudonym "Silence Dogood" and offered as an *Abstract from the London Journal*, is a quotation of the most famous of *Cato's Letters*, *Of Freedom of Speech: That the same is inseparable from Publick Liberty*, originally published in London in 1720 and conveniently reprinted in abridged form in THE ENGLISH LIBERTARIAN HERITAGE: FROM THE WRITINGS OF JOHN TRENCHARD AND THOMAS GORDON 38-44 (D. Jacobson ed. 1965) [hereinafter cited as ENGLISH LIBERTARIAN HERITAGE]. For a description and further discussion of *Cato's Letters*, see notes 74, 78, 82 *infra*.

59. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 49 (Boyd ed. 1955). In a letter to John Tyler in 1804, Jefferson wrote: "No experiment can be more interesting than that we are now trying, and

In 1789, two years before ratification of the First Amendment, the Chief Justice of Massachusetts, William Cushing, addressed a letter to John Adams inquiring about the meaning of the state constitution's free press clause, which had originally been drafted by Adams.[60] While they were primarily concerned with the questions whether subsequent as well as previous restraints on the press were prohibited and whether truth was a proper defense against a charge of seditious libel, close examination of the Cushing-Adams correspondence indicates that both men understood and interpreted freedom of the press to include a freedom or right to know about governmental affairs.[61]

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which we trust will end in establishing the fact, that man may be governed by reason and truth. Our first object should therefore be, to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press. It is, therefore, the first shut up by those who fear the investigation of their actions." THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 576 (A. Koch & W. Peden eds. 1944).

60. Article 16 of the Declaration of Rights in the Massachusetts Constitution of 1780 provided: "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1892 (F. Thorpe ed. 1909) [hereinafter cited as THORPE].

61. Letters of William Cushing and John Adams, 27 MASS. L.Q. 12-16 (Oct. 1942), *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 147-53 (L. Levy ed. 1966) [hereinafter cited as FREEDOM OF THE PRESS]. After noting that the traditional Blackstonian concept of liberty of the press consisted only in laying no *previous* restraints upon publications, Cushing wrote: "But the words of our article understood according to plain English, make no such distinction, and must exclude *subsequent* restraints, as much as *previous restraints*. In other words, if all men are restrained by the fear of jails, scourges and loss of ears from examining the conduct of persons in administration and where their conduct is illegal, tyrannical and tending to overthrow the Constitution and introduce slavery, are so restrained from declaring it to the public *that* will be as effectual a restraint as any *previous* restraint whatever.

"The question upon this article is this—What is that liberty of the press, which is essential to the security of freedom? The propagating of literature and knowledge by printing or otherwise tends to illuminate men's minds and to establish them in principles of freedom. But it cannot be denied also, that a free scanning of the conduct of administration and shewing the tendency of it, and where truth will warrant, making it manifest that it is subversive of all law, liberty and the Constitution; it can't be denied. I think that the liberty tends to the *security of freedom in a State*; even more directly and essentially than the liberty of printing upon literary and speculative subjects in general." *Id.* at 14.

Adams, concerned with jury trial in libel cases, replied: "The difficult and important question is whether the Truth of words can be admitted by the court to be given in evidence to the jury, upon a plea of not guilty? In England I suppose it is settled. But it is a serious Question whether our Constitution is not at present so different as to render the innovation necessary? Our chief magistrates and Senators are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary." *Id.* at 16.

Both men perceived the fundamental necessity for public information in a democratic or representative system and the crucial role of freedom of the press in assuring the

The passage of the controversial Alien and Sedition Acts of 1798[62] provoked the first comprehensive public discussion of the meaning of the First Amendment.[63] In the ensuing national debate, James Madison, the drafter of the First Amendment, and others were moved to articulate and defend their understanding of freedom of speech and press.[64] The Virginia Resolutions of 1798, drafted by Madison and passed by the Virginia General Assembly, pronounced the Alien and Sedition Acts unconstitutional on the grounds, *inter alia*, that the acts exercise "a power which, more than any other, ought to produce universal alarm, because it is levelled against the *right of freely examining public characters and measures*, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[65]

availability of such public information. Cushing expressly recognized the distinction between acquiring information and disseminating it. He included the former, with no hint of surprise or disagreement by Adams, within the compass of the state constitutional provision protecting freedom of the press.

62. The Naturalization Act, ch. 54, 1 Stat. 566 (1798) (extended the period of residence for naturalization from five to fourteen years); The Alien Act, ch. 58, 1 Stat. 570 (1798) (authorized the President to expel any alien he considered dangerous); The Enemy Alien Act, ch. 66, 1 Stat. 577 (1798) (permitted the detention of subjects of an enemy nation); The Sedition Act, ch. 74, 1 Stat. 596 (1798) (outlawed the publication of false or malicious writings against the government and the incitement of opposition to any act of Congress or the President).

63. At the time, the United States was on the verge of war with France. Fear of French revolutionary ideas and rumors of French plots and espionage were sweeping the country. The Federalists, then in power and engaged in a bitter controversy with the Republicans, passed the acts, proposed by the more extreme among the party, to curb the power of the Republican party and the aggressive press, which had been leading the Republican attack. The three alien laws were aimed at French and Irish immigrants, who were mostly Republicans. Although the Alien Act was never applied, it induced many aliens to leave the country or go into hiding. The Sedition Act was vigorously enforced, always against Republicans, but the victims were later pardoned by Jefferson and eventually Congress repaid most of the fines. The acts profoundly shocked the country and were a major factor in the Republican victory over the Federalists in 1800. The constitutionality of the Alien and Sedition Acts, so hotly contested in Congress, never reached the Supreme Court; all of the acts either expired or were repealed between 1800 and 1802. The validity of the Sedition Act, however, was sustained by the lower federal courts and by three Supreme Court justices sitting on circuit. *See* 1 N. DORSEN, P. BENDER & B. NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 25-28 (4th ed. 1976).

64. It has been suggested that the "Sedition Act debates are unreliable as evidence of the Framers' original understanding of freedom of speech and press." LEVY, *supra* note 55, at 249. Recognizing that the debates were intensely political and occurred subsequent to the ratification of the Bill of Rights, they should not, however, be entirely discounted; the statements were made not long after the ratification of the First Amendment and often by the very individuals who actively participated in the drafting and ratification process.

65. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528-29 (J. Elliot ed. 1901) (emphasis added) [hereinafter

The congressional debates over the acts produced a series of statements by leaders of the Jeffersonian party equating freedom of speech and press with the right of the people to know about the affairs of their government. John Nicholas of Virginia, arguing against the acts, observed:

> It has been the object of all regulations with respect to the press, to destroy the only means by which the people can examine and become acquainted with the conduct of persons employed in their Government. . . . If this bill be passed into law, the people will be deprived of that information on public measures, which they have a *right to receive*, and which is the life and support of a free Government . . . .[66]

Albert Gallatin opposed the acts, not only as violative of the First Amendment, but as contrary to the nature of representative government and to the doctrine of popular sovereignty:

> If you put the press under any restraint in respect to the measures of members of Government; if you thus deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory . . . .[67]
>
> [I]n the case of the sedition law, the [First Amendment] prohibitory clause, respecting an abridgement of the liberty of the press, is attempted to be construed away [by the law's proponents] by . . . doctrines incompatible with the principles of a Government elective in all its Executive and Legislative branches; of a Government which the people, the sole fountain of power, cannot properly carry into execution, if the sources of information are shut up from them; if a free and full discussion of every public measure is at the will of those who enjoy only a delegated authority . . . .[68]

Other opponents of the acts expressed similar views.[69] Supporters of the acts did not dispute the democratic principles espoused by the opponents.

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cited as ELLIOT]. For further elaborations in Madison's Report on the Virginia Resolutions, see *id.* at 569, 573-76. Years later, in his usual eloquent style, Madison made what has become a classic statement of the underlying rationale for the right to know: "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. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry, Aug. 4, 1822, in THE COMPLETE MADISON 337 (S. Padover ed. 1953).

66. 8 ANNALS OF CONG. 2140 (1798) (emphasis added) [hereinafter cited as ANNALS]. Before the final vote, Nicholas urged his colleagues "to reflect on the nature of our Government; that all its officers are elective, and that the people have no other means of examining their conduct but by means of the press, and an unrestrained investigation through them of the conduct of the Government."

He said "that he never yet saw the time when he would not again have voted for this Constitution, relying upon the operations which complete information, with respect to the transactions of Government, would have upon the minds of the people." *Id.* at 2144. For further statements by Nicholas, see *id.* at 2104, 2142; 9 *id.* at 3006-07.

67. 8 *id.* at 2110.

68. 9 *id.* at 2996. See further statements by Gallatin in *id.* at 2162, 2164.

69. Edward Livingston said: "The Constitution seems to have contemplated cases which might arise at a future day. It seems to have forseen that majorities . . . might be

Rather, they recognized that "[i]n Governments like ours, where all political power is derived from the people, and whose foundations are laid in public opinion, it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities."[70] The emphasis of the proponents of the act, however, was on *truly* informing the people, and it was deemed the duty of the constituted authorities "to keep in a state of purity the channels of public information, and to make liable to exemplary punishments malicious persons, who, by wantonly disseminating unfounded suspicions, impose upon the understandings, inflame the passions, and mislead the judgments of their fellow-citizens."[71]

Although the evidence above suggests a specific intent of some of the framers to guarantee the right to know, there is insufficient direct evidence to proclaim confidently that this was the intent behind the First Amendment. There is, however, substantial evidence of the political and legal thought in England and America and the thinking of the framers on closely related subjects that further supports such a conclusion. At the very least, the fundamental need for public information about governmental affairs was

actuated by dispositions hostile to the Government; that it might wish to pass laws to suppress the only means by which its corrupt views might be made known to the people, and therefore says, *no* law shall be passed to abridge the liberty of speech and of the press." 8 *id.* at 2153.

Nathaniel Macon argued that "if elections are to be free, the people ought to have the liberty of freely investigating the character, conduct, and ability of each candidate to fill any place of public trust . . . .

. . . .

"A considerable argument in favor of the liberty of the press, if there was a necessity for one, might be derived from the old saying, that truth will always prevail. This Mr. M. said he firmly believed, and could not discover any reason for preventing a free investigation of all public acts . . . .

". . . [T]hat part [of the Constitution] which declares that the President and other officers may be impeached . . . also shows the propriety of examining into the conduct of all officers, because it supposes that some one of them may commit a crime for which he ought to be impeached and punished." 10 *id.* at 406. See further statements by Macon in 10 *id.* at 964-65.

Mr. Claibourne "remarked that the conduct of our public men should always be investigated; that free investigation was inseparable from a representative Government, and essential to its preservation . . . ." 10 *id.* at 929.

Mr. Nicholson also opposed the acts, expressing similar views. 10 *id.* at 923.

70. 10 *id.* at 930-31 (Mr. Rutledge).

71. 10 *id.* at 931 (Mr. Rutledge). Such an argument would generally be rejected today in recognition of the fact that no one, including the government, has a monopoly on truth and purity. *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Note however, that if one accepts Mr. Rutledge's unstated premise that it is actually possible for one person or group of persons (*e.g.*, an administration) to separate truth from untruth, then his ideas, far from being inconsistent with the right to know, appear designed to promote it by providing the public with more reliable information. For further remarks by proponents of the acts, see 10 ANNALS, *supra* note 66, at 924-25 (Mr. Dana); *id.* at 961 (Mr. H. Lee).

widely perceived, and freedom of speech and press were seen as crucial and instrumental in fulfilling that need; indeed, that was often expressed as the ultimate function of freedom of speech and press, its *raison d'être*.

**b. Evidence of general thinking on a people's right to know**

One of the earliest and most famous defenses of freedom of the press is John Milton's *Aeropagitica*, written in 1644. Recognizing the vital function performed by the press in disseminating information, Milton appealed to the British Parliament for an end to licensing of the press: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . ."[72] During the course of the long political struggle in England for freedom of the press, including freedom to publish parliamentary debates, the argument was repeatedly made that the people need to know and have a right to know about the affairs of government.[73]

72. J. MILTON, AEROPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), in PRIMER OF INTELLECTUAL FREEDOM 169 (H. Jones ed. 1949).

73. Matthew Tindal, England's leading Deist at the turn of the eighteenth century, like most writers of the time, was primarily interested in freedom openly to discuss matters of religious controversy, but "he also claimed that everyone 'has a natural Right in all matters of Learning and Knowledge' to discover what can be said by speech or press on all sides of every subject, including civil and governmental matters . . . ." LEVY, *supra* note 55, at 108 (quoting M. TINDAL, REASONS AGAINST RESTRAINING THE PRESS 9-10 (1704)).

At least one newspaper, the *Craftsman*, recognized its informative function and expressed a determination to inquire into the whole field of politics. The aim of the *Craftsman* "was first, to establish those general principles of government, upon which the true interest, happiness and glory of this nation are founded, and upon which only they can subsist; secondly, to give countrymen, from time to time, a genuine account and information of all great transactions of state, which might occur, whilst we continue to write." Craftsman, no. 264, July 24, 1731, in L. HANSON, GOVERNMENT AND THE PRESS 1695-1763, at 6 (1936) [hereinafter cited as HANSON].

During the struggle over the publication of parliamentary proceedings the *London Magazine* maintained: "Every subject not only has the right, but is in duty bound, to enquire into the publick measures pursued; because by such enquiry he may discover that some of the publick measures tend towards overturning the liberties of his country; and by making such a discovery in time, and acting strenuously according to his station, against them, he may disappoint their effect. This enquiry ought always to be made with great deference to our superiors in power; but it ought to be made with freedom and even with jealousy." HANSON, *supra*, at 82 (quoting *The London Magazine*).

Another writer declared: "It is absolutely necessary towards the well being of a State that the People should have an Opportunity of being informed of the Behaviour of their Governours, and of those with whom they intrust their Liberty: It is their undoubted Right to know the Opinion of wise and honest Men in relation to Publick Matters, and to form Judgments upon them.

. . . .

"Since, therefore, any Infringement of the Liberty of the Press can answer no End but that of depriving the People of the Assistance of all those Men of Capacity and Integ-

American colonists were well acquainted with the English experience, and American political thought was shaped to a considerable extent by English writers.[74] But concern on this side of the Atlantic for openness in

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rity, who are able and willing to inform and advise them; since it will make the People utter Strangers to what they have a Right and Interest to be acquainted with, or what is worse, liable to have every Thing represented to them in a false Light by those in Power, who will allow no other Accounts than their own to be transmitted to them, and as this cannot but be introductory of the most abject Degree of Slavery, I hope every true *Englishman* will so express his Abhorrence of such a Design, as shall entirely discountenance and defeat it." COMMON SENSE: OR, THE ENGLISHMAN'S JOURNAL 335-40 (1738). *See also id.* at 349-54.

By 1738, "when the House of Commons made its last great effort to prevent the publication of its transactions, there was a considerable body of opinion within the House itself which thought the attempt as politically retrograde as it was to prove impossible of execution. Sir William Wyndham, the leader of the opposition, declared: 'I do not know but that they [the people] may have a right to know somewhat more of the proceedings of this House than what appears upon your votes; and if I were sure that the sentiments of members were not misrepresented, I should be against our coming to any resolution that could deprive them of a knowledge that is so necessary for their being able to judge of the merits of their representatives within doors.' " HANSON, *supra*, at 4 (quoting 10 W. COBBETT, PARLIAMENTARY HISTORY 803 (1812)) (Hanson's quotation of Sir Wyndham varies from Cobbett's in minor respects).

During the years before the Revolutionary War, English writers continued to associate freedom of press with the need and right of the people to have information about their government. In 1762, the famous *North Briton* papers reiterated: "The *liberty of the press* is the birth-right of a BRITON, and is justly esteemed the firmest bulwark of the liberties of this country. It has been the terror of all bad ministers; for their dark and dangerous designs, or their weakness, inability, and duplicity, have thus been detected and shewn to the public, generally in too strong and just colours for them to long bear up against the odium of mankind. Can we then be surprised that so various and infinite arts have been employed, at one time entirely to set aside, at another to take off the force, and blunt the edge, of this most sacred weapon, given for the defence of truth and liberty? A wicked and corrupt administration must naturally dread this appeal to the world; and will be for keeping all the means of information equally from the prince, parliament, and people. Every method will then be tried, and all arts put in practice, to check the spirit of knowledge and enquiry." THE NORTH BRITON NO. 1, at 1 (1766) (originally published June 5, 1762).

In 1766, a writer identifying himself only as "Father of Candor" (but from the internal evidence, Levy concludes that he was probably an eminent public figure with a legal background; LEVY *supra* note 55, at 150) replied to a conservative tract: "The liberty of 'exposing and opposing a bad Administration' . . . was a necessary right of a free people and the foremost benefit that could be derived from an unrestrained press." LEVY, *supra* note 55, at 150-51 (quoting a letter from Father of Candor *reprinted in* 1 A COLLECTION OF INTERESTING POLITICAL TRACTS (J. Almon ed. (probably) 1773)).

74. Perhaps the most influential English writers were the Whig political journalists John Trenchard and Thomas Gordon. Under the joint pseudonym "Cato" they wrote a series of essays published in London newspapers beginning in 1720. "No one," wrote historian Clinton Rossiter, "can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political

government can be found as early as 1641 in the Massachusetts *Body of Liberties*.[75] Section thirty-nine of that document provides:

> Every Inhabitant of the Country shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell, And to have a transcript or exemplification thereof written, examined, and signed by the hand of the officer of the office paying the appointed fees therefore.[76]

The famous *Zenger* case of 1735,[77] in which printer-publisher John Peter Zenger was tried for seditious libel, prompted the first major American contributions to libertarian theory of freedom of speech and of the press. Andrew Hamilton, Zenger's eloquent defense attorney, successfully argued to the jury, despite common law doctrine to the contrary, that truth cannot be a libel. In his closing statements, which were subsequently published and widely read,[78] Hamilton appealed to the jury to see the question not as "the Cause of a poor Printer," but as "the Cause of Liberty," concluding that "by an impartial and uncorrupt Verdict" the jury would earn the honor of "every Man who prefers Freedom to a Life of Slavery" for having "laid a noble Foundation for securing to ourselves, our Posterity, and our Neighbours, That, to which Nature and the Laws of our Country have given us a Right—The Liberty—both of exposing and opposing arbitrary

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ideas in the colonial period." ROSSITER, *supra* note 7, at 141. The most famous of *Cato's Letters* was *Of Freedom of Speech: That the same is inseparable from Public Liberty*, quoted above by Benjamin Franklin. See note 58 *supra*.

In another letter entitled *The Right and Capacity of the People to judge of Government*, Cato observed that "some have said, *It is not the Business of private Men to meddle with Government*. A bold, false, and dishonest Saying; and whoever says it, either knows not what he says, or cares not, or slavishly speaks the Sense of others. It is a Cant now almost forgot in *England*, and which never prevailed but when Liberty and the Constitution were attacked . . . .

. . . .

"But to the Falsehood of the Thing: Publick Truths ought never to be kept Secrets; and they who do it, are guilty of a Solaecism, and a Contradiction: Every Man ought to know what it concerns All to know. Now, nothing upon Earth is of a more universal Nature than Government; and every private Man upon Earth has a Concern in it, because in it is concerned, and nearly and immediately concerned, his Virtue, his Property, and the Security of his Person . . . ." Cato, *The Right and Capacity of the People to judge of Government* (1721), in ENGLISH LIBERTARIAN HERITAGE, *supra* note 58, at 96-97. The popular letter *Reflections upon Libelling* is discussed in note 80 *infra*.

75. The *Body of Liberties* is an early code of laws that laid the foundation of Massachusetts government and law. *See* 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691, at xiii-xxv (J. Cushing ed. 1976).

76. 3 *id.* at 696.

77. The Trial of Mr. John Peter Zenger, 17 HOW. ST. TR. 675 (1735).

78. "*A brief Narrative of the Case and Tryal of John Peter Zenger*, published by Zenger in 1736, was, with the possible exception of *Cato's Letters*, the most widely known source of libertarian thought in England and America during the eighteenth century." LEVY, *supra* note 55, at 133.

Power (in these Parts of the World, at least) by speaking and writing Truth."[79]

In the ensuing years before the Constitutional Convention, American writers often associated a right to know with freedom of speech and of the press.[80] For example, in 1766 William Bollan of Massachusetts wrote:

> After giving this matter the best consideration in my power, it appears to me that *the free examination of public measures*, with a proper representation by speech or writing of the sense resulting from that examina-

79. *A brief Narrative of the Case and Tryal of John Peter Zenger*, in FREEDOM OF THE PRESS, *supra* note 61, at 59.

80. In an excellent but apparently little-known essay, James Alexander, Zenger's original attorney and mastermind of Zenger's defense, declared that "THE FREEDOM OF SPEECH is a *principal pillar* in a free Government: when this support is taken away the Constitution is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a *popular examination* into the actions of the Magistrates." The Pennsylvania Gazette, Nov. 17, 1737, *quoted in* FREEDOM OF THE PRESS, *supra* note 61, at 62 (emphasis in original). *See also id.* at 66-67.

Andrew Bradford, publisher of *The American Weekly Mercury*, has generally been overlooked as a libertarian thinker "because he was on the 'wrong' side of [the] popular [Zenger] cause and he was the journalistic opponent of the revered Franklin." *Id.* at 38. But even before the Zenger controversy stirred others to put pen to paper, Bradford had declared that "by the *Freedom of the Press*, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of *Religion* and *Government*; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. I mean a *Liberty* of detecting the wicked and destructive Measures of *certain Politicians*; of dragging Villany out of it's [sic] obscure lurking Holes, and exposing it in it's [sic] full Deformity to open Day; of attacking Wickedness in high Places, of disintangling the intricate Folds of a wicked and corrupt Administration, and pleading freely for a Redress of *Grievances* . . . ." The American Weekly Mercury, Apr. 25, 1734, *quoted in* FREEDOM OF THE PRESS, *supra* note 61, at 41-42 (emphasis in original).

In 1747, the New York governor and the General Assembly became embroiled in a dispute over the appropriation of defense funds. When the governor attempted to prevent the publication of a remonstrance drawn up by the legislators, they voted unanimously: "That it is the undoubted Right of the People of this Colony, to know the Proceedings of their Representatives . . . That any Attempt to prohibit the printing or re-printing, any of the Proceedings of this House, is an infringement of the Privileges of this House, and of the People they represent . . . ." 2 JOURNAL OF THE GENERAL ASSEMBLY OF NEW YORK 193, *quoted in* LEVY, *supra* note 55, at 45. *But see* Levy's critical interpretation, *id.* at 45-49.

Richard Bland, an influential member of the Virginia House of Burgesses and later a delegate to the first Constitutional Convention, wrote to George Washington in 1756 about a public controversy over alleged mismanagement in the military. Of freedom of speech and press he wrote: "If what I may say should give Offence to any, for I give you free Liberty to communicate it, tell them, that I have the Honour to be a British Subject, and, under that glorious Character, enjoy the Privileges of an Englishman, one of which is to examine with Freedom, our public Measures, without being liable to the Punishments of French Tyranny; and, if I think proper, to expose those public Errors which have had to[o] long a Course, and which have been blindly embraced by many, as the most true

> tion, *is the right of the members of a free state*, and requisite for the preservation of their other rights; and that all things published by persons for the sake of giving due information to their fellow subjects, in points mediately or immediately affecting the public welfare, are worthy of commendation.[81]

Concern for the right to know about public affairs is evidenced in the early state constitutions and conventions as well.[82] The Pennsylvania Constitution

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Opinions." 22 PA. MAGAZINE OF HIST. & BIOGRAPHY 445 (1898), in ROSSITER, *supra* note 7, at 275.

81. W. BOLLAN, THE FREEDOM OF SPEECH AND WRITING UPON PUBLIC AFFAIRS, CONSIDERED, WITH AN HISTORICAL VIEW 4 (1766) (emphasis added), *reprinted in* FREEDOM OF THE PRESS, *supra* note 61, at 85. *See also* A. SCHLESINGER, PRELUDE TO INDEPENDENCE 140 (1958).

82. The people of Massachusetts rejected a constitution proposed in 1778 largely due to its omission of a bill of rights. Most states had followed Virginia's lead in protecting freedom of the press by a constitutional guarantee, and "the omission of such a provision in Massachusetts ran counter to the current of the political thought of the day. The return of the Lenox town-meeting contained the following clause, which was perhaps a typical endorsement of a carefully limited freedom of the press," and, it may be added, is indicative of thought at that time equating freedom of press with the right to know about governmental affairs: "We further suppose that by a Constitution the printing presses ought to be declared free for any Person who might undertake to examine the proceedings of the Legislature or any part of Government." C. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 132-33 (1906) (quoting the Lenox return in 156 MASS. ARCHIVES 381). *See also id.* at 134-38.

The 1792 Constitution of Delaware, although ratified after the First Amendment, may nevertheless be indicative of contemporary thinking. Section 5 of Article I states: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty." Here, again, preserving freedom of the press is seen as a means of preserving the even more fundamental right of the people to know what their agents are doing. The section goes on to adopt Hamilton's position in the *Zenger* case (see notes 77-79 and accompanying text *supra*): "In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases." 1 THORPE, *supra* note 60, at 569. The second part of section 5, drawing a distinction between proper and improper matter for public information, seems to follow the thinking of Cato in *Reflections upon Libelling*, where it was noted that some truths—relating to personal and private matters—are not fit to be told. But "it is quite otherwise when the Crimes of Men come to affect the Publick. . . . Every Crime against the Publick is a great Crime . . . .

"The exposing therefore of publick Wickedness, as it is a Duty which every Man owes to Truth and his Country, can never be a Libel in the Nature of Things . . . ." Cato, *Reflections upon Libelling* (1721), in ENGLISH LIBERTARIAN HERITAGE, *supra* note 58, at 73-74.

The public-private, proper-improper dichotomy was common in discussions of the subject of libel. In 1789 Benjamin Franklin remarked that if freedom of the press meant the liberty of affronting and defaming one another, he favored limiting it by a civil libel statute, but if it meant "the Liberty of discussing the Propriety of Public Measures and

of 1776 declared: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[83] In 1788 the Pennsylvania Supreme Court was called upon to determine the meaning of this clause, together with the provision that "the freedom of the press ought not to be restrained."[84] Chief Justice McKean replied:

> However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a *right of investigating the conduct of those who are intrusted with the public business*; and they effectually preclude any attempt to fetter the press by the institution of a licenser.[85]

Thus by the time the First Amendment was drafted, one state, Pennsylvania, had already expressly interpreted its free press clauses to guarantee to the people a right to acquire as well as to disseminate information concerning government business.[86]

The attitude of the framers toward the people's right to know is perhaps most clearly indicated not by their discussions of freedom of speech and of the press, but by their discussions of the provisions relating to the treaty power,[87] to publication of the journal of each house of Congress,[88] and to publication of the accounts of public monies.[89] The overwhelming consen-

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political opinions, let us have as much of it as you please . . . ." B. Franklin, *An Account of the Supremest Court of Judicature of the State of Pennsylvania, viz. The Court of the Press*, The Federal Gazette, Sept. 12, 1789, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 38 (A. Smyth ed. 1907). Such remarks and the entire public-private, proper-improper dichotomy are important for their reflection on the thinking of the time; greater importance and greater freedom were accorded to activities designed to investigate government and to inform the people about public affairs.

83. PA. CONST. of 1776, *Frame of Government*, § 35, in 5 THORPE, *supra* note 60, at 3090.

84. PA. CONST. of 1776, *Declaration of Rights*, § 12, in 5 THORPE, *supra* note 60, at 3083.

85. Respublica v. Oswald, 1 U.S. (1 Dall.) *319, *325 (1788) (emphasis added). On the question of the Constitution's effect on the law of libel, Chief Justice McKean maintained that freedom of the press in Pennsylvania meant just what it had meant in England—the absence of prior restraints. *Id.* at *325.

86. In apparent recognition of this judicial gloss, the 1790 Pennsylvania Constitution substantially repeated the provision guaranteeing access to presses to anyone examining government proceedings, adding that "no law shall ever be made to restrain the right thereof." PA. CONST. of 1790, art. IX, § 7, in 5 THORPE, *supra* note 60, at 3100.

87. U.S. CONST. art. II, § 2, cl. 2: The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ."

88. U.S. CONST. art. I, § 5, cl. 3: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."

89. U.S. CONST. art. I, § 9, cl. 7: A "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

sus expressed in the federal convention and in state conventions was that secrecy should be tolerated only in cases of necessity, such as during war and treaty negotiations.[90]

Patrick Henry expressed the sentiments of those who feared that the Constitution provided inadequate protection against secrecy:

> The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. . . . I am not an advocate for divulging indiscriminately all the operations of government, though the practice of our ancestors, in some degree, justifies it. Such transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected. But to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to his country.[91]

John Marshall speaking for proponents of the Constitution, answered Henry's fears and objections:

> Is there no secrecy [in the British government]? When deliberating on the propriety of declaring war, or on military arrangements, do they deliberate in the open fields? No, sir. The British government affords secrecy when necessary, and so ought every government. In this plan [the Constitution], secrecy is only used when it would be fatal and pernicious to publish the schemes of government.[92]

The exchange between Henry and Marshall is typical of other debates on government secrecy in that fears of secrecy were usually answered with assurances that the Constitution authorized secrecy only when absolutely necessary.[93]

Generally the discussions of secrecy focused on the powers conferred on the national government by various provisions and potential abuses of those powers rather than on the role of the people in checking government

90. *See* the statements of Mr. Widgery, Mr. Gorham, and Rev. Mr. Perly in 2 ELLIOT, *supra* note 65, at 52; Gov. Randolph in 3 *id.* at 201-02, 401; Mr. Mason in 5 *id.* at 408; Mr. Davie in 4 *id.* at 72-73; Mr. Iredell in 4 *id.* at 73; Mr. Charles C. Pinckney in 4 *id.* at 264-65; Mr. Franklin in 5 *id.* at 284; and Mr. Sherman in 5 *id.* at 523. See notes 91, 93, 96 *infra*.

91. 3 ELLIOT, *supra* note 65, at 170. For further statements by Henry, see *id.* at 315-16, 398, 462.

92. *Id.* at 233.

93. During the Virginia convention, in response to a suggestion by George Mason to specify the circumstances warranting secrecy as the Confederation had done (*id.* at 404), James Madison remarked: "With respect to secrecy, if every thing in which it is *necessary* could be enumerated, I would have no objection to mention them. All the state legislatures can keep secret what they think ought to be concealed. The British House of Commons can do it. They are in this respect under much less restraint than Congress. There never was any legislative assembly without a discretionary power of concealing *important transactions, the publication of which might be detrimental to the community*.

secrecy. But in an interesting discussion in the federal convention of the provision requiring each house of Congress to publish its journal from time to time, "excepting such Parts as may in their Judgment require Secrecy,"[94] two major figures in the Convention disclosed their understanding of the people's power and right in this regard. Oliver Ellsworth of Connecticut observed: "As the clause is objectionable in so many shapes, it may as well be struck out altogether. The legislature will not fail to publish their proceedings from time to time. The people will call for it, if it should be improperly omitted."[95] What is striking about Ellsworth's remarks is the ease with which he presumes the people have it within their power and ability to monitor and check government secrecy even without an express constitutional provision. James Wilson of Pennsylvania shared Ellsworth's high regard for the people but not Ellsworth's cool confidence in the people's ability to check secrecy without the aid of a constitutional provision: "Mr. WILSON thought the expunging of the clause would be very improper. *The people have a right to know what their agents are doing or have done*, and it should not be in the option of the legislature to conceal their proceedings."[96] Here, in the most explicit language, one of the most influential members of

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There can be no real danger as long as the government is constructed on such principles." *Id.* at 409 (emphasis added). See notes 90-92 *supra* and note 96 *infra*.

Madison's defense of secrecy and the sentiments expressed by other framers in this regard are remarkably consistent with the thesis (developed in notes 156-226 and accompanying text *infra*) that the people have a right to know all information that it is not necessary to withhold in order to further a compelling state interest. Foreign negotiations and military operations, the two most commonly voiced justifications for secrecy in the various constitutional conventions, represent two of the most widely acknowledged illustrations of a situation likely to involve a compelling interest in secrecy.

During the debate in the Virginia convention over the provision directing publication from time to time of the accounts of public monies, George Mason again sought to specify the circumstances warranting secrecy and to assure that the people would be informed of everything else. His analysis, although expressed in terms of the immediate issues at hand, is in practical terms identical to the above thesis: "Mr. GEORGE MASON apprehended the loose expression of 'publication from time to time' was applicable to any time. It was equally applicable to monthly and septenial periods. . . . The reason urged in favor of this ambiguous expression was, that there might be some matters which require secrecy. In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes; but he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money; but that this expression was so loose, it might be concealed forever from them . . . ." *Id.* at 459.

94. U.S. CONST. art. I, § 5, cl. 3.

95. 5 Elliot, *supra* note 65, at 408.

96. *Id.* (emphasis added). Others, such as Patrick Henry, saw too little protection against secrecy in this clause because it failed to specify how often the journals were to be published or under what circumstances parts of the journal could be kept secret. Wilson, however, evidently focusing on the provision's affirmative command to publish the journals, saw it as primarily supportive of the people's right to know; hence his objection to expunging the clause. The Convention voted to retain the clause. *Id.* at 409.

the Constitutional Convention of 1787 declared before that Convention that the people have a right to know.[97]

The evidence suggests that most of the participants in the process that produced the Constitution and the Bill of Rights recognized the fundamental need of the people to be informed about their government's transactions. Although some evidence points to a specific intent to embody a directly enforceable right to know within the protective coverage of the First Amendment, the question remains debatable. It would be understandable if the framers focused their concern on the dissemination of information among the people, rather than on the initial problem of obtaining the information. The new nation was large and communication and travel were difficult and uncertain, whereas the government was small and relatively easy to watch and monitor for one who was interested.[98] Moreover, it would be natural for attention to be drawn by the English and colonial struggle for a free press to the problems of licensing, taxation, and direct censorship.[99] What emerges clearly from the evidence, however, is that while concern often centered on the freedom to disseminate information, there was an acute awareness that the underlying and ultimate purpose of this freedom was to provide the people with the information they needed and had a right to acquire. Freedom of speech and of the press in this sense were seen as instrumental in effectuating the more fundamental right to know.

97. Of course, while Wilson's statement is couched in terms applicable to the general relationship between the people and the government, he was at the time confronted only with a specific provision applicable to the legislature. It should be noted, however, that at the time of the Convention, the national legislature was generally expected to be the most powerful and active branch of government.

During the Pennsylvania convention, Wilson had occasion to speak of secrecy in a different context, involving the executive branch. His comments indicate the narrow confines within which he would sanction government secrecy. While discussing the allocation of the treaty power between the President and the Senate, he observed: "Treaties are frequently (especially in time of war) of such a nature, that it would be extremely improper to publish them, or even commit the secret of their negotiation to any great number of persons. For my part, I am not an advocate for secrecy in transactions relating to the public; not generally even in forming treaties, because I think that the history of the diplomatic corps will evince, even in that great department of politics, the truth of the old adage, that 'honesty is the best policy,' and this is the conduct of the most able negotiators; yet sometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons." 2 *id.* at 506. For further statements by Wilson, see 5 *id.* at 284, 523.

98. Parks, *supra* note 14, at 10. *See* THE FEDERALIST NO. 84, at 633-34 (J. Hamilton ed. 1904) (A. Hamilton). *See also Access to Official Information*, *supra* note 29, at 219.

99. Parks, *supra* note 14, at 10. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936). The lack of an express statement regarding the right to know also can be explained by the fact that, "like many other fundamental rights, it was taken so much for granted that it was deemed unnecessary to include it." Hennings, *supra* note 29, at 668. *See* THE FEDERALIST NO. 84 (A. Hamilton); 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1857-68 (1891).

In the early days of the republic, guaranteeing the freedom to disseminate information may have adequately effectuated the right to know.[100] But today the growth of government and governmental secrecy has greatly complicated the preliminary problem of gathering and acquiring information while modern transportation and communication have rendered dissemination practically effortless. The Constitution is and was intended to be a dynamic instrument to be interpreted in light of present conditions.[101] If, indeed, the framers, in an effort to effectuate the right to know, concentrated their efforts on the freedom to disseminate, it does not follow that, confronted with today's problems, adequate constitutional protection for the right to know is unavailable. Having recognized the importance of the right to know and being fully aware of the flexible nature of the Constitution, surely one should not attribute to the framers an intention to deny effective implementation of the right today. On the contrary, it would do justice to the evident sentiments of the framers to recognize and effectuate a directly enforceable right to know.

### 2. *Functional Interpretation*

If the historical evidence of the intent of the framers is deemed inadequate to resolve doubts, one can resort, as the Supreme Court often does, to a functional analysis.[102] The purpose of a provision is usually determined, under this method of interpretation, by looking to the language in question together with generally understood principles regarding the structure and values of society, rather than to the specific intentions of those who originally adopted the provision.[103] Once the purpose is defined, the provision

100. "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." *Access to Official Information, supra* note 29, at 219; Parks, *supra* note 14, at 10.

101. *See, e.g.*, Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Div., 312 U.S. 126, 145 (1941); Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819). *See also* Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 263-66.

"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom . . . than the people of Great Britain had ever enjoyed . . . .

"[T]he unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." Bridges v. California, 314 U.S. 252, 265 (1941).

"[T]he First Amendment . . . must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id.* at 263. *See* Parks, *supra* note 14, at 11.

102. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40-41 (1971); Rosenblatt v. Baer, 383 U.S. 75, 84-85 n.10 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269-77 (1964).

103. Purpose is thus a broader, more inclusive concept than the more specific intent

should be interpreted whenever possible to further that purpose.[104]

The widely acknowledged purpose of the freedom of speech and of the press clauses are "to protect the free discussion of governmental affairs."[105] Obviously, the people cannot discuss governmental affairs of which they are totally unaware. Even when the people have some, perhaps substantial, knowledge of a particular matter, discussion cannot be full, and certainly not free, if the people are denied selected information of special importance and relevance.[106] The power to withhold information holds the potential for manipulation of public opinion and provides the government with the means to reduce its accountability to the people. When information concerning governmental affairs is concealed, public discussion may be nipped in the bud; public attention may be diverted to other matters; and the will of the people may never reach fruition.[107] Freedom of discussion is illusory unless preliminarily there is an effective means of acquiring accurate and adequate knowledge upon which to make reasoned and informed judgments. If the First Amendment is to function properly, if it is to fulfill its purpose, the right of the people to know what their government is doing must be recognized as a necessary element of freedom of speech and press.[108]

## III. Government Recognition of the Right to Know

All three branches of the federal government have acknowledged that the people have an undoubted right to know some things about their government. The full extent of this right remains unarticulated, however, and it is apparent that the different branches do not always operate under the same conception of the nature and scope of the right.

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of the framers. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS 41-43 (1975).

104. *See, e.g.*, United States v. Classic, 313 U.S. 299, 316 (1941).

105. Mills v. Alabama, 384 U.S. 214, 218 (1966). Even broader purposes have been suggested: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)); and "to guarantee the maintenance of an effective system of free expression" (EMERSON, *supra* note 14, at viii, 48). The same result would ultimately flow from these broader statements of purpose. *See* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2, 4 (right to know serves individual interests such as personal fulfillment as well as the societal interests underlying the First Amendment).

106. "It can plausibly be said that, since no act is free unless it is adequately equipped, no regular *function* of expression is free unless it is supplied from whatever source with the stuff which is to be expressed." W. HOCKING, FREEDOM OF THE PRESS 159 (1947). See statement of A. Meiklejohn, note 29 *supra*.

107. *See* F. ROURKE, SECRECY AND PUBLICITY: DILEMMAS OF DEMOCRACY 101-102 (1961) [hereinafter cited as ROURKE].

108. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940). For a functional analysis of the First Amendment in a case

### A. Judiciary

Noting the fundamental link between public knowledge of governmental affairs and a viable democracy, the Supreme Court has recognized protection of the free flow of information as a basic objective of the First Amendment.[109] Maintaining the flow of information requires protection for both acquisition and dissemination of information because if either process is interrupted, the flow inevitably ceases.[110] The Court's development of First Amendment doctrine so far has focused primarily on dissemination.[111]

Recognizing, however, that the paramount interest is that of society in "an uninhibited marketplace of ideas in which truth will ultimately prevail," rather than that of the individual in self-expression,[112] the Court has extended First Amendment protection to receivers as well as disseminators of information. In a case involving a restriction on the flow of communication by mail, Justice Brennan wrote: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[113] The right to receive has been held applicable to

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involving the right of the press to gather news, see Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting).

109. "The constitutional guarantee of a free press 'assures the maintenance of our political system and an open society' . . . and secures 'the paramount public interest in a free flow of information to the people concerning public officials.' " Pell v. Procunier, 417 U.S. 817, 832 (1974) (citations omitted). *See* Saxbe v. Washington Post Co., 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 713-15 (1972) (Douglas, J., dissenting); Gravel v. United States, 408 U.S. 606, 640-41 (1972) (Douglas, J., dissenting); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41-43 (1971); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 266-70 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1944); Thornhill v. Louisiana, 310 U.S. 88, 95, 100-02 (1940); Stromberg v. California, 283 U.S. 359, 369 (1931).

110. "Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When anyone of these integral operations is interdicted, freedom of the press becomes a river without water." *In re* Mack, 386 Pa. 251, 273, 126 A.2d 679, 681 (1956) (Musmanno, J., dissenting), *cert. denied*, 352 U.S. 1002 (1957). *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972), *id.* at 727-28 (Stewart, J., dissenting); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

111. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (symbolic conduct); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Martin v. City of Struthers, 319 U.S. 141 (1943) (right to distribute); Near v. Minnesota, 283 U.S. 697 (1931) (right to publish without prior restraint).

112. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

113. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). The *Lamont* case involved a statute conditioning delivery of mail from abroad containing communist propaganda upon a written request of the recipient. The Court held that the statute violated the addressee's right of free speech.

personal correspondence,[114] political[115] and religious material,[116] pornography,[117] commercial information,[118] and information, ideas, and experiences of all sorts.[119] None of these cases has involved government-held information; rather, at issue was government interference with the flow of information from private willing sources to willing receivers. Recognition of the right to receive is, nevertheless, a significant step toward a comprehensive right to know; it is grounded on the same fundamental bases as the right to know, and it establishes that First Amendment coverage extends to both ends of the flow of information.

Receipt of information, however, is passive.[120] If the right to know consisted only of a right to receive, the flow of information would be totally dependent upon the willingness of the source to communicate. Because much of the information necessary for informed public evaluation of government activity is in the hands of the government, the potential for control and manipulation of public knowledge and opinion is obvious.[121] Self-government under such circumstances would be little more than an illusion. In order to preserve the free flow of information essential to a democratic

114. Procunier v. Martinez, 416 U.S. 396 (1974).

115. Lamont v. Postmaster General, 381 U.S. 301 (1965).

116. Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943).

117. Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene materials in one's home).

118. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

119. *Id.*; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (describing the right to receive as within the penumbra of freedom of speech and press).

The Supreme Court has, however, occasionally ignored or failed to give weight to the right to receive. In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court acknowledged that the First Amendment right to receive was involved in the government's exclusion of an alien from this country, where he was scheduled to speak. The Court held, however, that the political branches possess inherent and plenary power to exclude aliens and that when this power is exercised "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Court's underlying concern was that the federal courts would be drawn into reviewing all exclusions of aliens. *See also* Zemel v. Rusk, 381 U.S. 1 (1965) (discussed in text accompanying notes 122-26 *infra*).

120. As conceived by the Court in Pell v. Procunier, 417 U.S. 817 (1974), the right to receive apparently does not extend to a right actively to acquire information from the source: "[T]he First and Fourteenth Amendments . . . protect the right of the public to receive such information and ideas *as are published*." *Id.* at 832 (emphasis added).

121. Note, *The Public's Right of Access to Government Information Under the First Amendment*, 51 CHI.-KENT L. REV. 164, 177-78 (1974). *See* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1510-11 (1974) [hereinafter cited as *Rights of the Public and Press*].

system, the right to know must encompass not only a right to receive, but also a right actively to acquire government information. While the Court has never expressed a definitive opinion on the constitutional right to acquire information from an unwilling government source, in a series of recent cases it has recognized a right involving an active quality not found in the right to receive—the right of the press to seek out and to gather information from willing or neutral sources.

In *Zemel v. Rusk*,[122] the Court's first encounter with an asserted right to gather information, the claim was given a cool reception. In that case, a United States citizen contended that the State Department's denial of his request to have his passport validated for travel to Cuba interfered with his First Amendment right "to travel abroad so that [he] might acquaint [himself] at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies."[123] The plaintiff, in effect, asserted a right to gather information from a neutral source, a place. The Court held that no First Amendment right was involved, reasoning that the refusal to validate passports for Cuba, although inhibiting the flow of information, was a prohibition directed at action.[124] The Court went on to assert that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information,"[125] implying that perhaps a restrained right might be included within First Amendment coverage.[126]

In *Branzburg v. Hayes*[127] the Court was confronted with an assertion by the press of a constitutional privilege not to reveal confidential sources and information before a grand jury. The reporters argued that to force them to reveal such confidences would dry up many important sources of news, to

122. 381 U.S. 1 (1965).

123. *Id.* at 16.

124. *Id.* at 16-17. In other contexts, the Court has afforded First Amendment protection to conduct. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972) (protecting right to picket); United States v. O'Brien, 391 U.S. 367 (1968) (test for protecting conduct involving speech and nonspeech elements); Lovell v. City of Griffin, 303 U.S. 444 (1938) (protecting right to distribute pamphlets). *See also* Saxbe v. Washington Post Co., 417 U.S. 843, 857-59 (1974) (Powell, J., dissenting) (discussing the speech-conduct dichotomy in *Zemel*). The Court's cursory treatment of the First Amendment claim in *Zemel* may have been the result of judicial reluctance to interfere with congressional and executive control over foreign affairs. *See* Kleindienst v. Mandel, 408 U.S. 753, 764 (1972); Zemel v. Rusk, 381 U.S. 1, 17 (1965); *Rights of the Public and Press*, *supra* note 121, at 1520. *See also* note 254 *infra*. The Court's later discussions of *Zemel* and treatment of similar claims suggest a greater willingness to consider the First Amendment interests involved. *See* Kleindienst v. Mandel, 408 U.S. 753, 764-65 (1972); Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

125. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

126. *See* Branzburg v. Hayes, 408 U.S. 665, 728 n.4 (1972) (Stewart, J., dissenting).

127. 408 U.S. 665 (1972).

the detriment of the free flow of information protected by the First Amendment.[128] While acknowledging that "news gathering is not without its First Amendment protections,"[129] for "without some protection for seeking out the news, freedom of the press could be eviscerated,"[130] the Court held that the First Amendment accorded newsmen no testimonial privilege. The Court analyzed the asserted privilege by balancing the interests involved, but found "no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant" grand jury questions.[131] The Court's approach leaves open the possibility of development of a right to gather information in other contexts involving different aspects of news gathering or different state interests.

The most recent case squarely presenting the issue of a right to gather information is *Pell v. Procunier*.[132] State prison inmates and journalists challenged the constitutionality of a state regulation that prohibited face-to-face interviews between news media representatives and individual willing inmates selected by the reporters. The media plaintiffs contended that the state's interference with their access to sources of newsworthy information, unless justified by a substantial government interest, violated their First Amendment right to gather news. Reiterating that "news gathering is not without its First Amendment protections,"[133] the Court nevertheless concluded that because the state regulation did not deny the press access to sources of information available to members of the general public, it did not abridge the protections that the First Amendment guarantees.[134] While the Court did discuss the special circumstances and interests presented by the state's corrections system, it did not reach its result by balancing the interests of the various parties. Rather, by simply equating the right of the press to gather information with that of the public, the Court seems to have defined one unknown in terms of another and avoided determining the parameters of either.[135] The Court was careful to point out, however, that the state's corrections policy did allow substantial access to the prisons by the press and the public, and that the regulation in question was not designed to conceal from the public conditions prevailing in the prisons.[136] The appa-

128. *Id.* at 679-80.
129. *Id.* at 707.
130. *Id.* at 681.
131. *Id.* at 690-91.
132. 417 U.S. 817 (1974).
133. *Id.* at 833.
134. *Id.* at 835.
135. *See Rights of the Public and Press*, *supra* note 121, at 1506-07. *See generally* Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 HASTINGS CONST. L.Q. 829 (1975).
136. 417 U.S. 817, 830 (1974). The Court made similar observations in the companion case to *Pell*, Saxbe v. Washington Post Co., 417 U.S. 843, 846-48 (1974).

rent implication was that for the state completely to cut off access to information within its control would impinge on First Amendment rights.[137]

Despite recognition that information gathering is not without constitutional protection, the majority opinions in *Zemel*, *Branzburg*, and *Pell*, in both language and result, have not displayed great enthusiasm for the right.[138] But mere acknowledgment that "a right to gather news, of some dimensions, must exist,"[139] is important for establishing that First Amendment protection extends not only to passive receipt of information from willing sources, but also to information gathering activities initiated by the recipient and thus not totally dependent on the willingness of the source to communicate. A willing source is therefore not necessarily a precondition for First Amendment inquiry.[140] While the interests affected by acquisition of information from an unwilling source will differ from those affected when the source is neutral or willing, the extension of First Amendment coverage to recipient-initiated activities opens the door to the consideration of such interests to determine whether the right to know should indeed apply in various situations where the source is unwilling. Development of a right actively to acquire government information thus remains a distinct possibility.

In contrast to the cautious approach of the majority, most of the dissenters in *Zemel*, *Branzburg*, and *Pell* either wholeheartedly endorsed the people's right to know or argued for broader application of the right to gather information. In *Zemel*, Justices Douglas and Goldberg, characterizing the right to know as one of the peripheral rights of citizens under the

137. *See* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 15.

138. The decisions have consistently avoided expanding the right or explaining its nature and scope; the later opinions have simply quoted the language of the earlier opinions with little or no elaboration. The language, such as that quoted in the text, is couched largely in negative terms, and all of the decisions resulted in denials of the contentions based on the right to gather information. It should be noted, however, that the result in all of these cases is not necessarily inconsistent with the right to know as posited in section IV of this note; all of the results arguably can be rationalized on the basis of necessity to further a compelling state interest.

139. Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

140. *But see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where the Court asserted: "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 1823. The Court in this case was confronted with a contention based on the right to receive. The quoted statement merely reiterates that a willing source is an integral element of the right to receive, and as indicated by the Court, the statement is derived from previous right to receive decisions. *Id.* The right to gather information was not involved in the case; nor were the right to gather information decisions considered or discussed by the Court. The language quoted above is, however, susceptible of a broader interpretation than its context warrants—that is, preconditioning all First Amendment inquiry on the presence of a willing source.

First Amendment giving meaning and substance to freedom of expression and freedom of the press,[141] argued that restrictions on the right to travel in times of peace should be so particularized that such First Amendment rights are not impaired unless some clear, countervailing national interest stands in the way of their assertion.[142]

Elaborating on his conception of the right to know in *Branzburg*, Justice Douglas embraced the view of Alexander Meiklejohn that the self-governing people possess broad rights and powers over their servants in government.[143] Based on the vital role of the press in maintaining the flow of information to the people, Justice Douglas would have accorded reporters an absolute right not to appear before a grand jury.[144] As he explained it:

> The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.
>
> . . . The press was protected so that it could bare the secrets of government and inform the people.[145]

In *Pell*, in which the majority had only implied that complete concealment by the state of information within its control would run afoul of the First Amendment, the dissenters made the point explicit. Justices Brennan and Marshall endorsed Justice Douglas' *Branzburg* statement[146] and joined in the conclusion that the state's prohibition of press interviews with specific

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141. 381 U.S. at 24 (Douglas, J., joined by Goldberg, J., dissenting).

142. *Id.* at 26.

143. 408 U.S. at 713-14 (Douglas, J., dissenting).

144. *Id.* at 712.

145. *Id.* at 721. Justices Stewart, Brennan, and Marshall would have accorded reporters a qualified right not to appear before a grand jury and reveal confidences. They grounded this right in "the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press . . . because the guarantee is 'not for the benefit of the press so much as for the benefit of all of us.' . . .

"Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. . . .

. . . .

"No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. . . .

"The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source." *Id.* at 725-28 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting) (footnotes omitted).

146. 417 U.S. at 840 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (quoting the first paragraph of the statement in the text accompanying note 145 *supra*).

prison inmates "is an unconstitutional infringement of the public's right to know protected by the free press guarantee of the First Amendment."[147]

Not all of the Supreme Court's pronouncements relating to the right to know have occurred in the context of the recent development of the rights to receive and to gather information. *Grosjean v. American Press Co.*[148] stands out as one of the Court's most comprehensive interpretations of the First Amendment. Several newspapers sought to enjoin the enforcement of a state statute imposing a license tax on their revenues. At issue was the scope of the protection afforded by the First Amendment, a question the Court regarded as "of the utmost gravity and importance; for . . . it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart *and acquire* information about their common interests."[149] The Court discussed the history of the First Amendment in detail and noted that opposition to the newspaper licensing and tax acts in England and the colonies arose as a result of the dominant purpose of the acts, "to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs."[150] The Court observed further:

> The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. . . . In the

147. *Id.* at 841. In the companion case to *Pell*, Justice Powell, joined in his dissent by Justices Brennan and Marshall, and also enlisting the aid of Alexander Meiklejohn, argued that the First Amendment "embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. . . . Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974).

Noting that this reasoning underlies the Court's recognition that news gathering is not without its First Amendment protections, Powell continued: "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities.

". . . The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally." *Id.* at 863-64 (Powell, J., joined by Brennan and Marshall, JJ., dissenting) (footnotes omitted). *See also* Kleindienst v. Mandel, 408 U.S. 753, 771 (1972) (Douglas, J., dissenting); Gravel v. United States, 408 U.S. 606, 661 (1972) (Brennan, J., joined by Douglas and Marshall, JJ., dissenting); Rosenblatt v. Baer, 383 U.S. 75, 83 n.8 (1966); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

148. 297 U.S. 233 (1936).

149. *Id.* at 243 (emphasis added).

150. *Id.* at 247. For criticism of the Court's use of history in this case, see Murdock v. Pennsylvania, 319 U.S. 105, 121-29 (1943); C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 78-80 (1969).

> ultimate, an informed and enlightened public opinion was the thing at stake. . . .[151]

In light of the familiarity of the framers with the English and colonial experience, the Court was compelled to conclude that they intended the First Amendment "to preserve an untrammeled press as a vital source of public information. . . .[A]nd 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."[152] The focus in *Grosjean* was on the press, but the Court's analysis of First Amendment principles, emphasizing that the *raison d'être* of a free press is to inform the people about their government, is an entirely adequate basis upon which to predicate and develop the direct right of the people to know what their government is doing.[153]

The Supreme Court has long recognized many of the underlying foundations of the right to know and has, on the basis of these foundations, extended constitutional protection to the rights to receive and to gather information in some circumstances. The Court so far, however, has stopped short of recognizing a comprehensive right to know that encompasses a right to acquire government information. While it cannot be known whether and how far the Court will ultimately move toward such recognition, several members of the Court, as demonstrated above, have already indicated a willingness to accord considerable weight to the right to know, extending it to require the government to justify limitations on access to information within the government's control.

### B. Congress and the Executive

The other two branches of government, activated by the Supreme Court's broad conception of the First Amendment and its place in our democratic system, have not been as cautious as the judiciary in recognizing a comprehensive right to know.[154]

Congress took a major step in effectuating the public's right to know when it enacted the Freedom of Information Act in 1966.[155] As indicated in the legislative history, Congress was concerned that restriction of the flow of information to the people endangered our democratic system of govern-

151. 297 U.S. at 247.

152. *Id.* at 250.

153. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting); Hennings, *supra* note 29, at 670.

154. Of course, this may be a manifestation of the possibility that the other two branches of government are less responsible in their pronouncements, as under the doctrine of judicial supremacy the courts will usually have the last say anyway. *See also* Forkosch, *supra* note 3, at 45-46.

155. 5 U.S.C. § 552 (1970 & Supp. V 1975) and 5 U.S.C.A. § 552 (West Supp. 4, pt. 1, 1976).

ment.[156] The act was intended to insure maximum public disclosure of information held by various government agencies. It requires that all agency records, except those specifically exempted in subsection (b) of the act,[157] be made available to any member of the public who properly requests them. If the request is denied, a suit can be brought in federal district court to compel release of the material sought. Broad executive interpretations of the act's nine exemptions, obstructive agency practices, and court decisions further restricting disclosure under two of the exemptions, however, threaten to make a "shambles" of the act.[158] Recent corrective amendments hold some promise of increasing the flow of information from the agencies and of more fully effectuating the right to know.[159]

In a clear expression of executive recognition of the right to know, President Johnson declared when signing the Freedom of Information Act:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the

156. "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quality and quantity of its information varies. A danger signal to our democratic society in the U.S. is the fact that such a political truism needs repeating . . . . The repetition is necessary because the ideas of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in government." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2429. For the Senate Committee Report, see S. REP. NO. 813, 89th Cong., 1st Sess. (1965).

157. 5 U.S.C. § 552(b) (1970 & Supp. V 1975) *as amended by* 5 U.S.C.A. § 552(b) (West Supp. 4, pt. 1, 1976), provides for nine exemptions encompassing (1) national security matters, (2) internal personnel rules and practices, (3) statutory exemptions, (4) trade secrets, (5) inter-agency and intra-agency memoranda, (6) matters of personal privacy, (7) investigatory files, (8) financial institution records, and (9) geological information concerning wells.

158. Environmental Protection Agency v. Mink, 410 U.S. 73, 109 (1973) (Douglas, J. dissenting). *See, e.g.*, Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Engel, *Public Access to Information—Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U.L. REV. 184 (1973); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970); Nader, *Freedom of Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); Note, *The Freedom of Information Act—A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969). *But see* Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741 (1975).

159. 5 U.S.C.A. § 552 (West Supp. 4, pt. 1, 1976) (amending 5 U.S.C. § 552 (1970)); 5 U.S.C. § 552 (Supp. V 1975) (amending 5 U.S.C. § 552 (1970)). *See* Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741 (1975); Comment, *National Security and the Public's Right to Know: A New Role for the Courts under the Freedom of Information Act*, 123 U. PA. L. REV. 1438 (1975) [hereinafter cited as *National Security: New Role for Courts*]; Statutory Comment, *Judicial Review of Classified Documents: Amendments to the Freedom of Information Act*, 12 HARV. J. LEGIS. 415 (1975) [hereinafter cited as *Judicial Review*].

> security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . .
>
> . . . .
>
> I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[160]

The continued secretiveness of the executive in the face of these fine expressions of principle only highlights the most troublesome problems: given that some right to know exists, what is its scope, and how is it to be effectuated?

## IV. Scope of the Right to Know

### A. Government's Power to Withhold Information

Before exploring the scope of the right to know it is useful initially to examine the power of government to withhold information in the absence of such a right. Because most government secrecy involves the executive branch, the subject is usually discussed in terms of executive power and often in terms of executive versus congressional power. This note posits the right to know as a constitutional right limiting the powers of government as a whole; thus, it is necessary to consider not only the powers of the executive and Congress individually, but the powers of both branches acting in conjunction in such activities as congressionally authorized executive secrecy under the Freedom of Information Act exemptions or under the espionage statutes.[161]

The only time secrecy is mentioned in the Constitution is with regard to the right of the houses of Congress to delete certain information from their published journals.[162] Nowhere is a general power to withhold information expressly authorized.[163] From the earliest days of the republic, however, government officials have asserted the right and power to conceal information,[164] and it has generally been acknowledged that in certain circumstances this assertion cannot realistically be denied. As a matter of public policy

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160. Statement by President Johnson upon signing Public Law 89-487 (July 4, 1966), *reprinted in* 20 AD. L. REV. 263-64 (1968). For the more recent views of an attorney general, see Levi, *Confidentiality and Democratic Government*, 30 REC. N.Y.C.B.A. 323 (1975).

161. 18 U.S.C. §§ 793-98 (1970).

162. U.S. CONST. art. I, § 5, cl. 3 *quoted in* note 88 *supra*.

163. The one reference to secrecy in the Constitution is a very specific and limited authorization. The term "general power" is meant, in contradistinction, to refer to a broader power, such as the power to regulate commerce, of wider application than simply to the journals of the legislature.

164. For example, in 1790 President Washington submitted to the Senate under an injunction of secrecy an article that was later to form part of a treaty with the Creek Indian Nation. FOREIGN AFFAIRS DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, 92d Cong., 1st Sess., SECURITY CLASSIFICATION AS A PROB-

secrecy may, in certain instances and under adequate safeguards, be required for the public's safety and welfare.[165] Disclosure of investigatory files may spread false charges or alert a law violator in advance of prosecution.[166] Enormous amounts of information are voluntarily furnished to the government by individuals and private organizations with the understanding that it will be kept confidential. Disclosure of such information may infringe upon the privacy of those involved and impair future government operations by inhibiting the government's sources of information.[167] As the government has expanded its economic regulatory activities, it has acquired information that, if released prematurely, may have undesirable economic consequences or may provide some with an unfair advantage over others.[168] Disclosure of information pertaining to intragovernmental communications may disrupt the government's decisionmaking process, for officials exposed to personal and political attack might refrain from fully and freely airing their views and offering their advice in advance of a decision.[169] Foreign affairs, including national military defense and foreign relations, is perhaps the most obvious area requiring some secrecy, and for this reason the following examination of the government's power to withhold information will focus on that area.

The Constitution is surprisingly sketchy about foreign affairs; indeed there is no express power to conduct foreign relations.[170] While it can hardly be questioned that the federal government has the power to maintain relations with other sovereign nations, the sources of this power remain elusive.[171] Even less certain is the manner in which such power is distributed among the branches of government.[172] For present purposes, however, a

LEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY 2 (Comm. Print 1971). Six years later, in justifying his refusal to honor a request by the House of Representatives for the documents relating to the negotiation of the Jay Treaty (Nov. 19, 1794, U.S.-Great Britain, 8 Stat. 116, T.S. No. 105), Washington noted that the success of foreign negotiations "must often depend upon secrecy." 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194 (J. Richardson ed. 1897). *See* BERGER, *supra* note 16; A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE (1974); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044 (1965).

165. The Freedom of Information Act lists nine categories of information warranting secrecy. See note 157 *supra*.

166. Levi, *Confidentiality and Democratic Government*, 30 REC. N.Y.C.B.A. 323, 329 (1975); Parks, *supra* note 14, at 5.

167. ROURKE, *supra* note 107, at 14, 33-35, 102-03; Levi, *Confidentiality and Democratic Government*, 30 REC. N.Y.C.B.A. 323, 324-29 (1975); Parks, *supra* note 14, at 5.

168. Parks, *supra* note 14, at 5; ROURKE, *supra* note 107, at 33-35, 49-50.

169. United States v. Nixon, 418 U.S. 683, 705 (1974); Parks, *supra* note 14, at 5.

170. *See* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL 216-19 (1974); HENKIN, *supra* note 45, at 15-28.

171. *See* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL 216-19 (1974); HENKIN, *supra* note 45, at 15-88.

172. *See* HENKIN, *supra* note 45, at 15-88.

precise delineation of each branch's share of foreign affairs powers is unnecessary; it will suffice to examine the broad outlines to discern the aggregate power of the federal government as a whole.

Primary responsibility for the conduct of foreign affairs rests with the executive,[173] although congressional powers overlap in some instances.[174] The executive has claimed that the authority to withhold information is an implied power stemming from the general grant of executive power,[175] the designation of the President as commander in chief,[176] and the provision stating that the President "shall take Care that the Laws be faithfully executed."[177] Such authority, having been implied from the Constitution on the ground of necessity, logically exists only when the necessity exists.[178] But the courts have generally been quite liberal in finding such necessity, interpreting expressly granted powers to authorize "that which [is] reasonably appropriate and relevant to the exercise of [the] granted power."[179] The courts have been particularly liberal in the area of foreign affairs,[180] but even assuming a broad interpretation, the doctrine of implied powers has necessary limitations.[181] The executive, however, has not found it necessary to rely solely on this doctrine as the source of its power.

173. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (see quotation in text accompanying note 184 *infra*); HENKIN, *supra* note 45, at 37-65.

174. *See* notes 188-194 and accompanying text *infra*.

175. U.S. CONST. art. II, § 1.

176. U.S. CONST. art. II, § 2.

177. U.S. CONST. art. II, § 3. This claim was made in REPORT OF THE COMMISSION ON GOVERNMENT SECURITY OF 1957, 84th Cong., 1st Sess. 158 (1957). *See* Note, *Secrecy in the Conduct of United States Foreign Relations: Recent Policy and Practice*, 6 CORNELL INT'L L.J. 187, 197-98 (1973).

178. Implied and inherent powers are often discussed together with little regard for their differences. In order to discover the nature and source of the power to withhold, they are analyzed separately in this note. *See generally* 2 ANTIEAU, MODERN CONSTITUTIONAL LAW §§ 11:4 to -:6 (1969).

The necessary and proper clause, which has been liberally construed since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), does not by its terms apply to the executive. Indeed, its terms seem to preclude a concept of *implied executive powers*. The clause provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*." U.S. CONST. art. I, § 8, cl. 18 (emphasis added). *See also* HENKIN, *supra* note 45, at 17-18. But, in United States v. Nixon, 418 U.S. 683 (1974), the Court observed that the "rule of constitutional interpretation announced in McCulloch v. Maryland," which was based on the necessary and proper clause, had been "universally applied." *Id.* at 705 n.16. With this, the Court found certain implied powers and privileges to flow from the nature of the executive's article II powers. *Id.*

179. United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) (quoting Marshall v. Gordon, 243 U.S. 521, 537 (1917)).

180. See notes 196-97 and accompanying text *infra*.

181. *See* Henkin, *supra* note 45, at 15-19. *See also* Wright v. United States, 302 U.S. 583, 588 (1938); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

The Supreme Court has long recognized that certain powers are inherent in the very nature of a general government,[182] and nowhere is this more evident than in the field of foreign affairs. In the leading case of *United States v. Curtiss-Wright Export Corp.*,[183] while expounding the theory of inherent powers, the Court accorded to the President the lion's share of power over the conduct of foreign relations:

> The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality . . . .
>
> . . . .
>
> In this vast external realm [of foreign affairs], with its . . . delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . .
>
> . . . .
>
> . . . [W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations . . . .[184]

In *Curtiss-Wright*, the Court acknowledged the need for secrecy and implied that the President possessed the power to withhold information concerning foreign affairs.[185] The existence of such a power has since been more explicitly confirmed.[186] Thus, while the executive's implied power may encompass only that information reasonably requiring secrecy in order to enable the executive effectively to exercise its enumerated or established powers, the theory of inherent powers provides the executive with an un-

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182. *See* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 556 (1871).

183. 299 U.S. 304 (1936).

184. *Id.* at 318-20. The Court's extended discussion of inherent powers is largely dictum. A joint resolution of Congress had authorized the President to embargo arms to the countries at war in the Chaco and had imposed criminal penalties for violating such an embargo. President Roosevelt proclaimed an embargo and the defendant company, indicted for violating it, challenged the resolution and the proclamation as an improper delegation of legislative power to the President. Sustaining the indictment, the Court held that principles limiting delegation in domestic affairs do not apply equally in foreign affairs.

Justice Sutherland's opinion and the theory of inherent powers have not been unanimously acclaimed. *See, e.g.*, BERGER, *supra* note 16, at 100-08; HENKIN, *supra* note 45, at 19-27; Goldberg, *The Constitutional Limitations on the President's Powers*, 22 AM. U.L. REV. 667 (1973); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

185. 299 U.S. 304, 320 (1936).

186. United States v. Nixon, 418 U.S. 683, 705-11 (1974); New York Times Co. v. United States, 403 U.S. 713, 730, 744-45, 761 (1971); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965); Chicago & Southern Air Lines, Inc., v. Waterman, 333 U.S. 103, 111 (1948).

defined and therefore seemingly unlimited authority to withhold information, particularly in the area of foreign affairs.[187]

The government need not solely rely on the executive's authority, however, in its efforts to conceal information. Whatever power the executive may lack, Congress is empowered by the Constitution to supply the complement. Several of the legislative powers enumerated in the Constitution touch on foreign affairs.[188] In addition, Congress is vested with a portion of the unenumerated foreign affairs powers inherent in national sovereignty.[189] Finally, Congress has the power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[190] The necessary and proper clause provides Congress with broad powers over foreign affairs[191] by authorizing Congress to carry out not only its own powers but those of the executive as well.[192] Since Chief Justice Marshall's famous pronouncement in *McCulloch v. Maryland*,[193] this clause has been broadly construed to require only that the legislation be reasonably appropriate and relevant to the exercise of a power granted by the Constitution.[194]

### B. Role of the Right to Know

The powers allocated to Congress, of course, limit the powers of the executive, and vice versa, but considered together and in the absence of a right to know, these two branches of government possess practically unlimited power to conceal information from the public.[195] The judiciary is

187. Hennings, *supra* note 29, at 769-70, effectively argues that "[s]ince the power [to withhold] is implied as a necessary corollary to some other power, it may be exercised only when the effective exercise of some other power requires it," but he fails adequately to account for the theory of inherent powers, lumping even *Curtiss-Wright* under his implied power analysis.

188. These include the powers to regulate commerce with foreign nations (U.S. CONST. art. I, § 8, cl. 3), to define and punish piracies, felonies committed on the high seas, and offenses against the law of nations (*id.*, cl. 10), to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water (*id.*, cl. 11), and other general powers that are indispensable to the conduct of foreign relations, such as the power to tax and to spend for the common defense and general welfare (*id.*, cl. 1), and to appropriate funds from the treasury (*id.*, § 9, cl. 7). *See* HENKIN, *supra* note 45, at 67-88.

189. *See* HENKIN, *supra* note 45, at 68, 74-76.

190. U.S. CONST. art. I, § 8, cl. 18.

191. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

192. *See* HENKIN, *supra* note 45, at 78.

193. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819).

194. Marshall v. Gordon, 243 U.S. 521, 537 (1917).

195. It is not clear precisely to what extent each branch can limit the other's power

unlikely to impose limits. Absent a question of infringement of individual rights, the courts have generally adopted a deferential policy regarding action in the field of foreign affairs.[196] The Supreme Court has never invalidated a statute, treaty, or executive act intimately related to foreign affairs on the ground that it was beyond the power of the federal government; in light of the expansive interpretation of the Constitution since the New Deal, it is doubtful the Court will do so in the near future.[197]

When the Constitution was written, the federal government was small. Keeping track of information in and about the government—except for secret diplomatic correspondence—presented no great problem to those interested.[198] Today, however, with a vast bureaucracy that could hardly have been envisioned in 1789, the implications of an unlimited power to withhold information are ominous. The recent experiences of this nation demonstrate that it is entirely conceivable that such a power

> could be used in a way that would destroy government by consent, the separation of powers, checks and balances, and the creative and disciplinary role of free inquiry. A general power to withhold and to centralize in a small top political directorate the giving out of information . . . could become the Achilles' heel of the American Constitution as was the Emergency Clause of the Weimar Constitution.[199]

Since the mid-1930's, the courts have increasingly extended the protections of the Bill of Rights, while on the other hand generally leaving governmental powers free to expand. When the exercise of power clashes with individual rights, the courts have been more willing to scrutinize the government activity, even though it may be in the field of foreign affairs.[200] As noted in

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to withhold information. The scope of executive privilege is still largely an open question. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974), *discussed in* 22 U.C.L.A. L. REV. 1 (1974); Nixon v. Administrator of General Services, 408 F. Supp. 321 (1976), *prob. juris. noted*, 97 S. Ct. 483 (1976). Given the propensity of the executive to exaggerate national security fears and to indulge in excessive secrecy (*Developments—National Security*, *supra* note 24, at 1134-1215), and of Congress generally to follow the executive's foreign policy lead (E. CORWIN, THE PRESIDENT 185 (1957)), it is important to consider the possibility that the two branches will combine their powers to conceal from the public rather than to check each other. The seriousness of this possibility has been evidenced by a proposal recently under consideration by Congress. Certain provisions of the proposed federal criminal code relating to espionage and disclosure of national defense and classified information would significantly broaden the scope of such crimes and provide the executive for the first time with the power to use criminal sanctions to enforce its secrecy system. S. 1, 93d Cong., 2d Sess., §§ 1121-24 (1973).

196. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 2 THE POWERS OF GOVERNMENT § 210 (1963) [hereinafter cited as SCHWARTZ].

197. HENKIN, *supra* note 45, at 26-27, 208.

198. *See* note 98 *supra*.

199. Parks, *supra* note 14, at 10-11. *See* Gillers, *Secret Government and What To Do About It*, 1 CIV. LIB. REV. 68 (1974). *See generally* SCHLESINGER, *supra* note 13.

200. HENKIN, *supra* note 45, at 205-10, 251-66; SCHWARTZ, *supra* note 196, at §§ 210-11.

*United States v. Curtiss-Wright Export Corp.*,[201] the inherent powers of the federal government, and particularly the President's power in foreign affairs, are subject to constitutional limitations. The President's power "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[202]

The right to know thus assumes a position of vital importance, for aside from the political checks imposed by the separation of powers and the American people, such a right stands as the only major constitutional limitation of the power to withhold information.[203] Given that a right to know of some dimensions must exist,[204] the major remaining question is what restraining effect it should have on the otherwise seemingly unlimited power to withhold.

### C. Scope Derived from the Foundations

A search for the scope of an implied or inherent right most logically begins with a re-examination of foundations upon which the right rests. The reasons for inferring the existence of the right may also provide some insight into the scope of the right. The first foundation is that the right to know is essential to the proper functioning of a system of self-government.[205] This is a compelling argument for *some* right because it is predicated on necessity. The apparent basis for determining the scope of the right would be the extent of the necessity. Logically, then, the right to know would be coextensive with the people's need for information. Need, however, is not a simple question of absolutes. It is usually a matter of degree ranging from that which is vital to that which is merely useful or convenient. Any standard based on need will therefore be inherently vague and susceptible of wide disagreement about its application. Moreover, it should be recognized that self-government is an ideal that can be only imperfectly achieved in the real world; for all practical purposes, it too is a matter of degree. The extent of the people's need for information will depend upon how fully and actively they are to participate in the governing process; yet by gauging the need for

201. 299 U.S. 304 (1936).

202. *Id.* at 320. The Court later restated the principle more explicitly and applied it to the powers of Congress as well: "Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations." Perez v. Brownell, 356 U.S. 44, 58 (1958) (overruled on other grounds in Afroyim v. Rusk, 387 U.S. 253 (1967)).

203. The political checks, moreover, are caught up in a vicious circle that raises doubts about their efficacy. It is the very exercise of the power to withhold that, by denying Congress and the people needed information, renders these checks less able and less likely to function effectively. See Introduction and section I of this Note *supra*; note 195 and accompanying text *supra*.

204. See sections II & III of this Note *supra*.

205. See notes 29-32 and accompanying text *supra*.

information, one is, in effect, determining the extent of the people's participation in government.[206] Need, then, is a standard without a reference point and involves no less than deciding just how self-governing the people are to be.

The second foundation is that the right to know follows logically and necessarily from the idea that a sovereign people formed the government to serve them.[207] The precise scope of the right is not apparent in the mandate of sovereignty. It would appear to be an absolute right,[208] but perhaps only because a simple statement of the principle fails to indicate how the government is to serve the people. For instance, the people may have agreed when forming the government that they should not know what could not be told them without damage to the public interest. The principle of popular sovereignty does, however, aim the search in a promising direction. While a standard based on need tends to build the right from the ground up, the principle of popular sovereignty begins by encompassing all government information within the scope of the people's right to know; thus, any adjustment can only be downward. This is the approach of the Freedom of Information Act,[209] an approach popularly taken simply out of recognition of the fact that ours is basically an open society in which secrecy is the exception.

The third foundation establishes the right to know as a logical corollary of the government's theoretically limited power to withhold.[210] Since such a right is designed to fill a void and prevent the power from spilling over its legitimate boundaries, the obvious assumption is that the people should have a right to know at least all that they have not authorized the government to withhold from them. Perhaps at one time this approach was plausible, but since the Supreme Court has largely ceased to define the outer limits of the federal government's powers and has accepted the theory of inherent sovereign power in the area of foreign affairs, to define the right to know in terms of the government's limited power to withhold would be meaningless. While the third foundation is a doctrinally sound basis for recognizing the existence of the right to know, it is of little help in determining the scope of that right.

The fourth foundation is the First Amendment, which, as indicated

206. *See* FREE SPEECH, *supra* note 4, at 3-4.

207. See notes 34-37 and accompanying text *supra*.

208. Indeed, much of the early discussion of the right to know apparently revolved around whether it was an absolute right. *See, e.g.*, Mardian, *What Should the People Know?*, 8 TRIAL 16 (Mar./Apr. 1972); Parks, *supra* note 14, at 4-5; Philos, *The Public's Right to Know and the Public Interest—A Dilemma Revisited*, 19 FED. B.J. 41 (1959); Rogers, *The Right to Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83 (1956).

209. 5 U.S.C. § 552 (1970 & Supp. V. 1975), *as amended by* 5 U.S.C.A. § 552 (West Supp. 4, pt. 1, 1976).

210. See notes 40-44 and accompanying text *supra*.

earlier, can be interpreted in a number of ways: literally, based on a strict construction,[211] broadly, based on evidence of the framers' intent,[212] or functionally, based on the general purpose of the amendment.[213] The right to know follows as a necessary corollary of the literal interpretation in order to enable the people intelligently to exercise their rights to speak and to publish. Apparently the right should encompass all government information needed for that purpose. This approach, however, suffers from the same difficulties as those encountered above in attempting to define the right to know in terms of the people's need for information. Similarly, the functional analysis is concerned with effectuating the broad purpose of the First Amendment, to protect such free discussion and activity as is necessary to prepare the people to fulfill their role in a system of self-government. This, too, suggests defining the scope of the right in terms of need. The intent of the framers raises different problems. While ample evidence points to some right to know, only a portion of this evidence addresses the issue of the scope of that right. The documentation is insufficient to verify the precise extent of the right to know envisioned by the framers. With that caveat in mind, it is nevertheless clear that the framers regarded the right to know as basic to self-government, so it is unlikely they would be niggardly with the scope of its protection. Moreover, the available evidence suggests that the framers expected and intended government secrecy to be strictly circumscribed to those instances in which it is necessary in the public interest, such as during war and treaty negotiations.[214] Presumably, information of all other types of governmental affairs was thought to fall within the compass of the people's right to know.[215]

On the basis of what can be gleaned from the foundations, the people's right to know includes at least what the people need to know, nebulous as that is, and above that the people have a right to know all government information whose nondisclosure would serve no public interest. Obviously this formulation is inadequate, for it fails to indicate where to draw the line above the minimal need to know in order to delineate the proper exercise of the power to withhold. From all available indications, the framers would probably draw the line at the point where, as Madison put it, secrecy becomes necessary because the information involves "important transactions, the publication of which might be detrimental to the community."[216] The scope of the right to know should not and need not, however, be predicated solely on this rather narrow ground. Because the right to know is a constitutional right and is based at least partially on the First Amendment, further

211. See notes 45-50 and accompanying text *supra*.
212. See notes 51-101 and accompanying text *supra*.
213. See notes 102-08 and accompanying text *supra*.
214. See notes 90-96 and accompanying text *supra*.
215. See note 93 *supra*.
216. 3 ELLIOT, *supra* note 65, at 409.

guidance is provided by the judicial treatment of other First Amendment interests.

### D. Scope Derived from First Amendment Principles

One of the primary stumbling blocks to judicial development of the right to know has been the difficulty of formulating an appropriate standard for judicial review of governmental decisions to withhold information. The need to balance the public interest in knowing what the government is doing against the necessity of secrecy in certain areas of government is widely recognized, but where and how the balance should be struck is the subject of much disagreement.[217] This problem is not peculiar to the right to know; the Supreme Court has long struggled to develop a workable formula by which to determine the scope of protection afforded by the First Amendment.

There are actually two points at which the courts must apply standards. To illustrate, the Freedom of Information Act directs the courts to determine whether national security information is properly withheld based on the criteria established by executive order.[218] The courts must employ some standard, such as reasonableness, in deciding whether the executive has correctly applied its own criteria.[219] A separate standard must be applied by the court initially, however, to determine whether the criteria established by the executive are constitutionally adequate.[220] If they are not, the court should not reach the issue of their reasonable application. It is the standard by which the executive criteria themselves are evaluated that is the focus of inquiry here.

Whatever may be the correct standard, it is clear that if the government uses no criteria at all—"if the determination of government secrecy is made by executive fiat upon no principled ground—then such determination cannot pass constitutional muster."[221] The Supreme Court considers it well settled that any law that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an

217. Few contend that the people have a right to know everything and that the government is powerless to conceal information in the public interest. Generally rejected, too, is the opposite extreme, that once the legislature or executive decides to keep a document secret all First Amendment inquiry by the courts is ended. *See, e.g.*, Mardian, *What Should the People Know?*, 8 TRIAL 16 (Mar./Apr. 1972); Nimmer, *National Security Secrets v. Free Speech: Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 328 (1974); Parks, *supra* note 14, at 4-5.

218. 5 U.S.C. § 552(b)(1) (Supp. V, 1975).

219. The original Senate bill amending the Freedom of Information Act contained such a reasonableness standard, but fears that it was not a sufficiently stringent test led to its deletion in favor of judicially developed standards. *See National Security: New Role for Courts, supra* note 159, at 1447-50; *Judicial Review, supra* note 159, at 434-35.

220. This would apply equally to congressionally established criteria.

221. Nimmer, *National Security Secrets v. Free Speech: Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 329 (1974).

official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.''[222] Anything less than this minimal requirement would constitute an abdication of the judiciary's duty to preserve First Amendment rights, for Congress or the executive could easily avoid any meaningful judicial review of government decisions to conceal information by the simple expedient of eliminating the criteria for making such decisions.

The right to know also dictates that the criteria evidence some degree of specificity. Otherwise they could be framed in such broad and general terms as to be no criteria at all. In other First Amendment contexts, the Court has generally demanded a stricter than normal standard of permissible vagueness;[223] there is no apparent reason to demand less when the right to know is at stake. ''Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,''[224] because the free dissemination of information and ideas might otherwise suffer.[225]

The crucial question in balancing the public interest in knowledge against the need for secrecy is where to set the scale. How much must the state's interest in secrecy weigh to offset the people's interest in knowledge? While secrecy is often vital to the security of the nation and is occasionally accompanied by a sense of urgency,[226] the continuous, unceasing need for public information is no less fundamental. Indeed, as former Chief Justice Earl Warren stated when assessing claims of national defense:

> [T]his concept of ''national defense'' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ''national defense'' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[227]

Moreover, national security and disclosure of information are not totally irreconcilable interests. Ultimately, the security of the nation lies in the proper functioning of the system of self-government. Justice Hughes expressed the same thought in *De Jonge v. Oregon*,[228] in which the Court held that a person could not be punished for attending a meeting run by Communists:

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222. Staub v. Baxley, 355 U.S. 313, 322 (1958).
223. Smith v. Goguen, 415 U.S. 566 (1974).
224. NAACP v. Button, 371 U.S. 415, 438 (1963).
225. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).
226. *See* notes 165-69 and accompanying text *supra*.
227. United States v. Robel, 389 U.S. 258, 264 (1967).
228. 299 U.S. 353 (1937).

> [I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[229]

Inevitably circumstances will arise in which the people's right to know will clash with genuine needs for secrecy. In such situations the public interest in information, while perhaps not the "breath of civilization itself,"[230] can hardly be overemphasized. It should not be sacrificed unless secrecy is necessary to the proper exercise of the powers of government. Any standard or test designed to draw the line between the power to withhold and the right to know should reflect this fundamental principle by incorporating some reference to the necessity for concealment in any given context. While a simple standard or test of necessity or essentiality would be inherently vague and probably unworkable,[231] the idea of necessity should be the underlying theme of any more sophisticated standard or test.[232] To lose sight of this principle and to adopt a formula based on convenience, expediency, or anything less than necessity, is to sacrifice too cheaply the people's constitutional right to know and to sell short the ideal of self-government. The right to know should not be limited unless essential to the furtherance of a substantial and compelling state interest. Insistence that restrictions of the right be justified by such a standard would coincide with the treatment generally accorded other important First Amendment rights.[233]

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229. *Id.* at 365.

230. Parks, *supra* note 14, at 4.

231. *See* text accompanying notes 205-06 *supra*.

232. The *idea* of necessity to be incorporated into a comprehensive standard or test (*see, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968), *quoted in* note 233 *infra*) is meant to be distinguished from a simple standard or test asking only whether it is necessary to withhold certain information or whether secrecy is essential in a specific case.

233. "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (footnotes omitted). While First Amendment rights do not enjoy an expressly "preferred status" as they did in the forties and fifties, they are "still treated somewhat more tenderly than, if not given such an exalted or preferred position over, the others." Forkosch, *supra* note 3, at 57-58.

Justice Powell argued in his dissent in Saxbe v. Washington Post Co., 417 U.S. 843 (1974): " 'there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.' . . . [But at] some point official restraints on access to news sources, even though not directed solely at the press, may so under-

## V. Role of the Judiciary

"[T]he mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer."[234] Considerable disagreement surrounds the role of the courts in reviewing decisions to withhold information by either of the other governmental branches. The means of applying the right to know and who is to have responsibility for its effectuation are matters of vital importance, for they will in large part determine the forcefulness of the right.

With the right to know on a constitutional footing, protection of the right naturally falls within the special competence of the judiciary "as ultimate interpreter of the Constitution."[235] This does not mean the other branches are relegated to secondary positions in balancing the people's need to know against the need for secrecy. Indeed, the general policies and daily practices of those branches will be crucial in determining how open our society is to be. But judicial review of executive and congressional decisions is essential if the right to know is to have any force at all. Vesting in the self-interested political branches unbridled discretion to withhold information would only encourage government secrecy.[236] A right so fundamental

mine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in *Branzburg* that 'without some protection for seeking out the news, freedom of the press could be eviscerated.' " *Id.* at 860 (Powell, J., dissenting).

In New York Times Co. v. United States, 403 U.S. 713 (1971), in which the issue was whether the government could prevent dissemination of information by enjoining publication, the government suggested that the standard should be whether disclosure posed a grave and irreparable danger to national security. Brief for the United States, in 2 THE NEW YORK TIMES CO. V. UNITED STATES, A DOCUMENTARY HISTORY 1166-67 (1971). The *Times* suggested that prior restraint can be permitted "only in circumstances where a publication will directly and immediately cause, by a probability amounting to a certainty, a grave and disastrous breach in the security of the country." Brief for The Times, *id.* at 1147. Justices Stewart and White applied a standard of whether disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. 713, 730 (1971). Justice Brennan would require "proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . ." *Id.* at 726-27.

234. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948).

235. Baker v. Carr, 369 U.S. 186, 211 (1962).

236. "Professor Wade, an acute observer of the English administrative scene, called the 'civil servant' occupational love of secrecy, the 'official instinct of hiding as much as possible from the public gaze.' " BERGER, *supra* note 16, at 214 (1974), (quoting H. WADE, ADMINISTRATIVE LAW 18 (2d ed. 1967)). "The English experience . . . demonstrated that whenever the bureaucracy is 'given a blank cheque,' it unfailingly yields 'to the temptation to overdraw,' as is confirmed by our own experience." Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 28 (1974) (quoting H. WADE, ADMINISTRATIVE LAW 285 (2d ed. 1967)). *See* EMERSON, *supra* note 14, at 16-25; *Developments—National Security*, *supra* note 24, at 1201-02, 1219; *Access to Official Information*, *supra* note 29, at 215-17.

as the right to know cannot be left to such fickle guardians.[237]

The scheme of a separation of powers presupposes that the judiciary should have some power to compel the other branches to produce information. The doctrine of separation of powers was designed in conjunction with a system of checks and balances to preserve the integrity and independence of each of the branches of government so that no one of them would be able to monopolize political power. But an executive branch with uncontrolled discretion to withhold information about its activities could achieve such a monopoly by "operat[ing] behind a curtain of secrecy, relatively free from the checks of legislative inquiry, judicial review, and public opinion."[238]

The Supreme Court recognized in *United States v. Reynolds*[239] that "complete abandonment of judicial control would lead to intolerable abuses."[240] In that case the widows of civilian observers who had crashed on a military plane carrying secret electronic equipment moved for production of the Air Force's investigation report. The Court recognized the existence of an evidentiary privilege for military secrets. It warned, however, that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[241] "The court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ."[242] On the basis of the government's formal claim of privilege, a supporting affidavit, and judicial notice that "this is a time of vigorous preparation for national defense,"[243] the Court sustained the withholding of the report, deeming inspection of it unnecessary to determine whether military secrets were at stake.

The question of the court's proper role in dealing with claims of executive privilege arose recently in connection with the special prosecutor's efforts to obtain recordings of White House conversations relevant to investigation of the Watergate affair. The Supreme Court in *United States v. Nixon*,[244] confronted with "a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege," conceded that "each branch of the Government must initially interpret the

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237. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

238. *Developments—National Security*, *supra* note 24, at 1219.

239. 345 U.S. 1 (1953).

240. *Id.* at 8.

241. *Id.* at 9-10.

242. *Id.* at 8.

243. *Id.* at 10.

244. 418 U.S. 683 (1974).

Constitution, and the interpretation of its powers by any branch is due great respect from the others."[245] Nevertheless the Court reasserted its position "as ultimate interpreter of the Constitution," which requires that it "on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."[246] Deeming its conclusion compelled by "the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government,"[247] the Court reaffirmed that "it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege . . . ."[248]

President Nixon's next contention in effect asked the Court to say that as a matter of constitutional law the executive privilege to withhold information is absolute and unqualified, "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena."[249] Recalling that in designing the tripartite structure of our government the framers "sought to provide a comprehensive system [in which] the separate powers were not intended to operate with absolute independence," the Court rejected the absolute privilege because it "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III."[250]

The Court proceeded to balance the competing interests and concluded that "the generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[251] Carefully pointing out, however, that the claim of privilege in this case did not involve military or diplomatic secrets—"areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities"[252]—the Court intimated that a simple claim of national security would preclude in camera inspection.[253]

In terms of their implications for the role of the courts in effectuating the right to know, *Reynolds* and *Nixon* are important primarily for their recognition of the need for the judiciary to exercise control over executive discretion. Of course, both cases involved requests by interested parties for

245. *Id.* at 703.
246. *Id.* at 704.
247. *Id.*
248. *Id.* at 705.
249. *Id.* at 706 (citations omitted).
250. *Id.* at 707.
251. *Id.* at 713.
252. *Id.* at 710.
253. "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide." *Id.* at 706.

information relevant to ongoing judicial proceedings, rather than an ordinary citizen's request for information about some aspect of his government's operations. But regardless of the context, both opinions establish the power of the judiciary to review executive decisions to withhold information and it is on the basis of this principle that the courts can assume an active role in effectuating the right to know. While the reluctance of the courts to confront the executive on the uncertain territory of military and foreign affairs is understandable,[254] it logically would be inconsistent to abdicate to the caprice of executive officers in any right to know case, including those involving claims of national security.[255] It is not inconceivable that cases may arise in which the court could satisfy itself that nondisclosure is appropriate without inspecting the matter claimed to be privileged. But this determination should be made on a case-by-case basis;[256] a blanket rule excepting claims of national security from judicial scrutiny would only invite abuse.[257]

Congress has recently recognized that the courts have been too deferential to executive claims of national security under the classified information exemption of the Freedom of Information Act.[258] The courts had severely limited de novo review of such claims by declining to inspect the contested documents in camera and the scope of review had been restricted to the

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254. For discussion of judicial reluctance, see Henkin, *supra* note 45, at 205-24, 251-70; Kalijarvi & Wallace, *supra* note 12, at 483-85; SCHWARTZ, *supra* note 196, at §§ 210-11; *National Security: New Role for Courts*, *supra* note 159, at 1451-62; *Judicial Review*, *supra* note 159, at 437-43.

255. *Cf.* SCHWARTZ, *supra* note 196, at § 211 (distinguishing between judicial treatment of foreign affairs cases involving individual rights from those not involving such rights).

256. The case-by-case approach is entirely consistent with language in *Reynolds*, part of which was quoted in *Nixon*: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It *may* be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." United States v. Reynolds, 345 U.S. 1, 9-10 (1953) (emphasis added).

Depending on the level of scrutiny required to satisfy a court of the "reasonable danger," this language could portend a judicial retreat from examination of national security claims or it could merely point out that in cases where the reasonable danger is already evident, it is unnecessary for the court to probe further. *See* Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 U.C.L.A. L. REV. 47, 64 & n.94 (1974).

257. *See* Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 26-29 (1974); *Developments—National Security*, *supra* note 24, at 1222-23.

258. 5 U.S.C. § 552(b)(1) (Supp. V 1975).

question whether the classification decision was arbitrary or capricious.[259] In order to encourage the courts to play a more aggressive enforcement role and actively to involve themselves in reviewing government exemption claims, Congress amended the act in 1974 explicitly to require de novo review of agency decisions to withhold requested material and to permit in camera inspection at the court's discretion.[260] The scope of review was expanded to require the court to reach its own independent judgment about whether the material was properly classified under the executive's criteria.[261] The amendments clearly authorize more active judicial participation, but it is largely left to the courts to determine how rigorously they will examine agency refusals to disclose information. How eagerly the courts will respond to the congressional invitation is uncertain, but it is reasonable to predict that, as a result of the congressional stimulus, the judicial role will expand somewhat in the future.

Perhaps the courts would be less hesitant to examine executive decisions to withhold national defense and foreign policy information if a constitutional right to know were injected into the constitutional equation.[262] The added responsibility of safeguarding such a right would provide the judiciary with a solid ground for insisting that the need for nondisclosure be fully demonstrated. Through the Freedom of Information Act, Congress has provided the courts with a much needed procedural framework within which many claims of a right to know can be adjudicated. But to the extent that the act authorizes the courts to use particular powers and procedures that they ordinarily would refrain from using, those powers and procedures cannot be considered fixed components of the judiciary's protective role. Nevertheless, as the courts grow accustomed to scrutinizing executive claims of the need for secrecy under the Freedom of Information Act, they can be expected to shed some of their reluctance to confront the executive on national defense and foreign policy matters and to expand their notion of the proper judicial role even absent supplementary statutory direction.[263]

When the right to know is denied, the courts should be quick to recognize that the very process of self-government is threatened. Judicial defer-

259. *See* EPA v. Mink, 410 U.S. 73 (1973); Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970).

260. 5 U.S.C. § 552(a)(4)(B) (Supp. V. 1975). For discussion of congressional intent in amending the act, see *National Security: New Role for Courts*, *supra* note 159, at 1447-50.

261. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

262. This would be consistent with the Court's tendency to be more willing to scrutinize foreign affairs actions alleged to violate individual rights. *See* text accompanying note 200 *supra*.

263. *Cf.* Henkin, *supra* note 45, at 272-73. This assumes that the congressional grants of general jurisdiction remain in place. The judicial role in the face of congressional withdrawal of jurisdiction is much more problematic. The authority of Congress to regulate the jurisdiction of and the remedies available in the courts, and hence to control

ence to the decisions of the political branches of government is in many instances a wise and necessary policy; judicial review does not mean "government by judiciary."[264] But where the foundation of democratic government is at stake, the courts should not hesitate to fulfill their "constitutional obligation to keep it possible for the people to govern themselves."[265]

## Conclusion

Since the 1930's the federal government has grown tremendously, and since World War II, has conducted its business in increasing secrecy. Americans have recently been shocked to discover what their government has been doing without their knowledge, and as a result, the United States is today confronted with a somewhat alienated and distrustful populace—an unhealthy condition for any democratic system. Some have questioned whether self-government can long survive in an era of big government and global hostility.[266] While the need for occasional secrecy is apparent, and the administrative costs of effectuating the right to know in a complex modern society are no doubt great, these complications do not warrant abandoning basic democratic principles.

The most significant potential application of the right to know lies in acquiring withheld government information. Of the variety of contexts in which the right could be asserted, perhaps the most obvious is a challenge to the constitutionality of an agency's invocation of one of the Freedom of Information Act exemptions to deny a citizen's request for information. Unless nondisclosure could be justified as necessary to further a compelling state interest, the citizen's right to know should prevail. The act's exemptions thus would be circumscribed by the constitutional right to know.[267] If

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the circumstances in which they can exercise judicial review, is an unsettled area of constitutional law. While congressional power is undoubtedly broad, the limitations on this power have not been clearly defined. *See generally* HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 309-434 (2d ed. 1973).

264. *See* HENKIN, *supra* note 45, at 206.

265. Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550, 552 (1974). Charles Curtis, in his study of the Supreme Court, *Lions Under the Throne*, maintains that "license becomes a virtue when the legislature attacks the democratic process itself, as it does when it restricts the right to vote, prohibits peacable assembly, interferes with political organizations, *restrains the dissemination of information*. All these, as Stone said, require 'more exacting judicial scrutiny' than the general prohibitions of Due Process. And surely this is obvious, so much so the Court has more often acted than spoken on the principle. Some of these examples are the subject of specific prohibition in the Bill of Rights, but it is their effect upon the democratic process that justifies the more exacting scrutiny, not the fact that they have been more specifically prohibited and seem therefore easier to apply. '. . . [W]here the democratic process is itself attacked, the Court should exercise less than no restraint." C. CURTIS, LIONS UNDER THE THRONE 328 (1947) (emphasis added and footnotes omitted).

266. *See, e.g.*, CHALLENGES TO DEMOCRACY: THE NEXT TEN YEARS (R. Hutchins ed. 1963); R. DAHL & E. TUFTE, SIZE AND DEMOCRACY (1973); C. FRANKEL, THE DEMOCRATIC PROSPECT (1962).

no compelling state interest can be offered to support the exemption as a whole, or if the exemption cannot be shown to be necessary to further such an interest, it should be invalidated on its face.[268] Moreover, the courts may, as they do in other situations when First Amendment interests are threatened, invalidate an exemption that can be justified in some cases but, by its terms, sweeps too broadly into protected areas.[269]

Other possible applications of the right to know abound. It could be used when the government attempts to interfere with the flow of information and ideas by applying sanctions directly against recipients rather than against communicators. Such sanctions have not been common in our society, but they are not inconceivable; indeed, recent proposals to codify the federal criminal law have included penalties for mere receipt of classified information.[270] The right to know could also provide effective protection against government interference with communication in situations where the communicator is unable to assert his right or, if he is able, fails to do so.

Ultimately, the constitutional right to know holds the promise of helping to maintain a relatively open society in which self-government remains possible. Of course, the people's desire to participate, the political attitudes of the day, and the good will of those in government will largely determine the ultimate success of efforts to operate the government openly. But attitudes can change, and freedom of information acts can be repealed; acknowledgement and enforcement of the constitutional right to know can help restore and maintain the healthy balance of power between citizens and government.

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267. There has already been some movement toward narrowly drawing and construing particular exemptions in congruence with the interests served by that exemption. Mindful of the policies underlying the inter-agency and intra-agency memoranda exemption, the courts have limited the reach of that exemption, subjecting some documents fairly characterizable as memoranda to disclosure if withholding would serve no substantial policy interest. Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895, 937-41 (1974); Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 HARV. L. REV. 1047 (1973). In contrast, it was Congress that narrowed the investigatory files exemption to counteract expansive court interpretations. The amended exemption permits nondisclosure only when production of the information would invade someone's personal privacy or would impinge on specified policy interests, such as interference with enforcement proceedings. *See* 5 U.S.C. § 552(b)(7) (Supp. V 1975); S. REP. NO. 1200, 93d Cong., 2d Sess. 6-7 (1974).

268. The right to know would thus preclude Congress from creating an exemption for all government information relating to, for example, federal school lunch programs or interstate highways.

269. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

270. *See* S. 1, 93d Cong., 2d Sess., §§ 1121-24 (1973). Sanctions against recipients, although uncommon, are not unknown. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965). For a discussion of the various areas in which the right to know could usefully be applied, see Emerson, *Legal Foundations of the Right to Know*, 1976 WASH U.L.Q. 1.