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THE ROLE OF THE PRESS IN SAFEGUARDING THE PEOPLE'S RIGHT TO KNOW GOVERNMENT BUSINESS

J. R. WIGGINS*

The right of citizens to know about the transactions of their own government has been perfected over so many generations; it is composed of so many elements; it rests upon authority so varied; it is in such constant state of change that it is of all rights of a democratic society one of the most difficult either to define or to defend.

Stated even in the most simplified terms, it is a complex of at least five basic rights: (1) the right to get information from the government, (2) the right to print it without prior restraint, (3) the right to print without fear of reprisal for publication that does not offend the laws, (4) the right to have access to printing materials, and (5) the right to distribute.

Any one of these rights may be fatally impaired by actions taken by any one of the three great branches of our government acting alone; by the action of all of them together; or by the actions of citizens proceeding in defiance of the government. And if any one of them be greatly impaired the total right of citizens to know suffers.

This collection of rights sometimes is loosely referred to as "freedom of the press." In some ways this is too bad. It is too bad because this term has created the impression that it is a freedom belonging to newspapers. Of course it is not. It would be as absurd to say that freedom of speech belongs to the man who owns a hall or operates a theater. It is a right that belongs to the people. Some of them exercise this right by writing, speaking or printing. More of them exercise it by reading or listening. The right of one to speak is another's right to hear; the right of one to write is another's right to read. The right is not solely concerned with either one or the other aspects of this process, but with both of them. Together the two processes are indispensable to the people's right to know.

The press has a special obligation to defend this right, just as it has an obligation to defend other rights. It has a duty to see to it that it is not impaired in any of its aspects. Each newspaper has a duty to be vigilant in the defense of this right whether its private interests as a commercial enterprise are involved or not involved at all in the issue at hand. Its commercial interests seldom will be involved directly and

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often may not appear to be involved at all. The obligation is not dependent upon such an interest.

The citizen's right to know about government seems to be most frequently menaced at the first point of its exercise, in our own time. Government, in the past few decades, whether local, state or federal, has been saying with increasing frequency, that some information, hitherto available to the public, now must be withheld.

The tendency is most conspicuous at the federal level.

The right to know about legislative proceedings steadily expanded from the middle of the 18th century until our own century. From the day John Wilkes successfully defied the power of the House of Commons to punish printers for the publication of the proceedings of the House right on down to our own times, those who have lived under democratic regimes have more and more asserted their right to know about the speeches and votes of those to whom they have delegated their legislative powers. In our own generation, however, this right has been diminished. This has come about, not through any change in the constitution, but as the result of subtle changes in the institutions of modern government. The sheer volume of legislative business (state and federal) has grown so great that the people no longer can find out what they need to know about their law-making processes by watching the proceedings on the floor of House or Senate. The legislative power, in great part, has emigrated back into committees or has been delegated to administrative agencies which have been given broad rule-making authority. In the national Congress, more than a third of the committee proceedings are secretly conducted and the rule-making functions of administrative agencies are carried on largely behind closed doors. There has been a similar development in state legislatures.

Newspapers, backed up by the people, ought to keep relentlessly after this sort of secret government. They ought not consent, by their presence under off-the-record rules, to the secret making of governmental policy. They ought not submit quietly to second-hand, hearsay reports of what went on in meetings to which the press and the people were not admitted. They ought to take the utmost care to let readers know what business is being openly and what business is being secretly conducted.

I acknowledge that it is not always in the newspaper's interest to be a nuisance about these matters. If legislative business be secretly conducted, there always is a chance that an individual newspaper may profit by the secrecy, if it has a private source from which it can obtain an exclusive report. Or if it is not possible to obtain any report at all, the newspaper, strictly as a commercial venture, can obtain more readily other sorts of news that will be read more avidly. I am not

talking about its private advantage but about its public duty. And it is its public duty to do everything within its legal power to make persons who are elected to legislative office execute their functions in public. It is not a mere matter of public curiosity that is involved. It is the very preservation of the democratic process.

Hume, Macaulay, Levy, and Acton and other students and historians of England have noted that public opinion in that country could not operate upon the House as long as its proceedings were secret. It was only when the people could witness the proceedings that they could make their wishes felt in the transactions of government. John Stuart Mill has pointed out the philosophic foundation of the public legislative body. Only by publicity can the work of the legislature be broadened so as to make every citizen a participant in the labors of government.

The legislative committee which sits in secret can not rise above the wisdom of its members; the committee which sits in public profits by the wisdom of the whole community. If it proceed upon a false premise, some informed citizen will correct it before it has gone far. If it arrive at a false conclusion, some wiser citizen will perceive the error and demand its correction. But if the committee sit in secret, all its errors of premise and conclusion will be incorporated into its legislative work, and to remove error from a finished bill will be difficult indeed.

Public judgment of a finished piece of legislation will be uninformed if citizens have not been privy to the debate that preceded its development. If Congress or a legislature be forced to commit the people to some difficult and dangerous course the attendant hardships will be better borne if the people know the processes by which the lawmakers arrived at their decision. If they are ignorant of these processes, they will not accept the conclusions of the lawmakers, in their minds and hearts, until they too have threshed out the issues that have been raised.

When citizens choose their state representatives and senators and their national representatives and senators, they do not relinquish forever their own inherent legislative power. They but delegate it for a fixed time, subject to subsequent review and withdrawal or extension. This is their inherent democratic right. They cannot exercise that right if most of the effective political activity of their elected representatives is secretly conducted.

John Nance Garner once said he saw no reason why any committee ought to meet in secret. Woodrow Wilson, in his New Freedom lectures 40 years ago, cried out against secret legislative proceedings. The Congress itself, in passing the LAFOLLETTE-MONRONEY CONGRESSIONAL REORGANIZATION ACT committed the Congress to the

principle of open committee proceedings. That principle now is all too frequently disregarded.

Our courts, too, are becoming more secretive. The angry barons of Runymede wrung from a reluctant King John, in 1215, in Magna Charta, the promise that the King's courts no longer would follow his person and would be open to all citizens. The open conduct of judicial proceedings is assured in our federal constitution and in many of our state constitutions and in many state laws. Yet, more and more of the proceedings of the courts are behind closed doors. Of all the court proceedings in the City of Philadelphia in 1953, nearly a third were closed, according to a study made by Walter Lister of the Philadelphia Bulletin. It seems to be a national trend. Many proceedings are closed by statute—because cases involving juveniles are being heard. Some are closed, from time to time, if the cases being heard include testimony that is offensive. The purposes behind such closures often are good. Among the results, however, is a diminution of the people's right to know about judicial proceedings and law enforcement. In terms of their individual freedom, there are few of the people's rights that are more precious. Whenever, for any cause whatever, courts or law enforcement operations are secretly conducted, we need to remember that secret arrest, secret trial and secret punishment prevail in all arbitrary governments.

It is the duty of the press to protest when the doors of the courts are shut and when the transactions of enforcement officials are carried forward in secret. They ought to assert the right to be present in the court room, not in their own behalf, but in behalf of the public. They ought to demand the right to publish the transactions of courts and police—not in their own behalf, but in behalf of the people who depend upon them for their information about their own government.

The executive departments of the federal government, since the turn of the century, have grown more secretive. This is not the result of the wish or intention of any one man, or group of men, or of any one party. It is not the result of any conspiracy of office-holders. It is the consequence of a conspiracy of circumstance. The people's right to know about the executive department is threatened:

- (1) By the vicissitudes of a world conflict in which safety compels a larger degree of secrecy in the preparation of our own military defense.
- (2) By the expansion of the duties and responsibilities of government so great as to defy the capacity of the press to report or the ability of citizens to keep informed.
- (3) By changes in the structure of government that have transferred functions from courts and congress, still relatively open, to relatively secret executive agencies.

It might as well be admitted that the legal right of the citizen to know about the federal government is pretty thin. What the people are permitted to know depends more upon official grace than upon legal authority. From the beginning of our government, two theories about access to information have persisted. One theory has it that in a democratic society the people are, of course, entitled to know, since (as Macaulay has put it) nothing could be more irrational than to give to the people power and to withhold from them the information without which power may be abused. The other theory has it that the right to withhold certain information, in the public interest, is inherent in the sovereignty of the state. What this gets down to is that the legal rights are very mixed indeed and the matter generally has had to be settled on the basis of political power. The people have as much right to know as they have the courage and will to assert the skill and the ingenuity to obtain. In this process the press is of the greatest importance. It has the first, the primary and the foremost obligation to assail secrecy since it is the first to know about it and the first to discover that information is being withheld.

In any case, the degree of secrecy which now obtains in federal government threatens our free institutions. The people can not find out enough about federal policy to exert the influence upon it that they ought to have in any democratic society.

The Defense Establishment, as a result of the necessities of life in a world threatened by Soviet military power, must operate under a large degree of secrecy. Still, its operations involve nearly two-thirds of our federal expenditures and nearly two-thirds of all government personnel. All these operations, and all these people, work under a degree of secrecy that leaves few citizens sufficiently well informed to say authoritatively whether these activities are conducted efficiently and honestly. For the most part, we must take it on faith. There is good reason to have faith, to be sure. America has been singularly fortunate in the integrity of its military people. It has been extremely lucky in those who have administered its military affairs, on the whole. But, if this world crisis persists for 25, 50 or 75 years, can we, for that long a period, count upon good luck and good fortune? Can we go on depending upon the say-so of an informed elite as to the soundness of our military defenses? Perhaps we can, but it is something about which we ought to worry. We ought to worry if our military affairs are in the best hands, for even if they are, if they long continue to be conducted in secrecy, they will cease to command the support in Congress and in the country that they must obtain if we are to succeed over the long decades in obtaining for the continuance of our military strength the money and the manpower required.

There are other areas of government in which there is no military

reason for secrecy whatever, in which there is altogether too much business transacted behind closed doors. The Special Subcommittee on Government Information, under the direction of Congressman John Moss, is making a study of this secrecy out of which some good ought to come. For the first time in our history, Congress really is making an examination of the policies under which countless agencies of government have asserted the right to withhold information. The more some of these policies are examined, in my opinion, the more information will be made available.

What can the newspapers do about this? What is the role of the press in seeing to it that the people do have an effective right to know about their government?

The first thing it can do, of course, is see to it that it makes the most of the information at hand. There are a great many newspaper critics who seem to think that this is all it needs to do, but I do not agree with them. This is, of course, nonetheless of first importance. We are not, I concede, doing as good a job as we could do with the information we can get now. The means of doing a better job are under constant study in most newspapers. If the government were operated in a crystal ball, it would challenge the techniques and facilities now available to the press, to so report these operations as to inform adequately all our newspaper readers. The press needs more paper, more people and more resources of every kind to do its job.

More than it needs physical resources, it needs the sort of integrity that will vindicate the faith of the founders in the press. The public reactions to the newspaper coverage of the last political campaign indicates that there are many readers who are not confident that the press, as a whole, possesses such integrity. In most of the independent studies of the newspaper campaign coverage I have seen, these criticisms have been found exaggerated. Still, there was some foundation for them, in individual newspapers. I think it too bad that efforts to set up a scholarly, independent study of the 1956 election coverage did not succeed. As imperfect as the research tools for such a study now are, I have a feeling that the study would have diminished the criticism or the press.

Most newspapers, with or without such a study, will try to cover the campaign impartially. In the handling of political news, I have always tried to keep in mind the excellent admonitions of Joseph A. Wheelock, Editor of the *St. Paul Press* from 1875 to 1906, who said:

“He who assumes the high responsibility of conducting a public journal misapprehends the province and privileges of the press if he thinks he may treat men and events in relation to himself personally. He who cannot in the management of a journal rise above considerations of friendship or enmity and regard men, women and events impartially in their public aspect and

influence is unworthy of his position. The press, otherwise, is degraded and its powers perverted or abdicated."

Such performance of duty, important as it is in maintaining the right of the people to know about their government, does not fully discharge the responsibilities of the press. It must not only deal honestly and adequately with the information that is available to it and which it can pass on to its readers; it must unceasingly guard the people's right to obtain information not now available to them. It must wage an unremitting struggle for the right of the people to know.

The press will be the first to feel the effect of the withholding of information and it ought to be the first to protest it. It ought to resist the temptation to find the easy way around barriers to information. It should equally resist the inclination to get along with officialdom by submitting to restraints that newspapermen know are improper.

Its role in resisting other encroachments on the right to know is equally important. Take the second of our five rights, the right to print without prior restraint. There are more ways than one of trespassing upon this right. Few persons in government, nowadays, care to attack the right frontally. More of them are perfectly equal to tempting the press with information, providing that prior to publication, officials may have the chance to restrain and correct. Readers have a right to see reports of government that government officials have not approved. It was the purpose of the prohibition on prior restraint to enforce that right. Unfortunately nothing in the constitution can prevent newspapermen from giving away this right of the people.

The press also has the duty of resisting the intimidation of the government, whether or not a personal interest is involved. It will not profit the people very much if government doors are open and government censors kept from exerting prior restraint on printing if the penalties for harmless publication are so great that many editors dare not hazard them.

This is a real menace to the people's right to know about their government. Unfortunately, it is one against which the press itself has not always united. When the ALIEN AND SEDITION LAWS were being used to fling Republican editors into jail in the Adams administration, Federalist editors generally applauded. When a congressional committee harassed and assailed the Hearst newspapers in the thirties, many of their colleagues were silent. When a House committee on lobbying exceeded its jurisdiction and tried to punish a reactionary pamphleteer for his publications, few liberal newspapers objected. When the junior senator of this state, as the chairman of a committee on government operations, pilloried the editor of the New York Post for editorials critical of congressional investigators on the sly pretext of examining books in government libraries, many editors were silent.

When the Eastland committee undertook to examine the loyalty of members of the staff of the New York Times, many newspapers did not object.

Yet, if congress habitually can summon before it, for examination, those who report the transactions of congress or who criticize those transactions in print, on the pretext of assuring their loyalty or disloyalty, the comment upon the proceedings of congress will not be as full or as free as it would be in the absence of such intimidation. Let those who never have appeared before a congressional committee boldly rise to say that this is not intimidating, that the New York Post was not intimidated and that the New York Times was not intimidated. Perhaps they were not, but the danger exists if the inquisitorial policies of congress intimidate editors and newspapers of less courage. There should not be any reprisal for harmless publication; and the courtroom and not the Congress is the place in which penalties should be imposed for harmful publication.

The press, in addition, must be alert to protect the access of those who wish to address the public, to the means and facilities of publication. In our day, this includes the access to ownership and use of radio and television facilities. In my own view we have not been sufficiently alert to the dangers inherent in a system of licensed utterance such as we have been compelled by mechanical reasons to set up for radio communications. We ought to give them a great deal more scrutiny. The licensing power has been a menace to freedom of speech throughout history, and there is no reason to suppose that the modern contrivances through which men speak make that menace any less.

Finally, the press has a duty to protest the interruption of distribution by government, or by persons acting in defiance of government. The Treasury Department and the Post Office Department presently assert authority to obstruct the distribution of printed material that is inconsistent with the right of citizens to know. And the press, on the whole, has been surprisingly indifferent to the exercise of a governmental power which can be as readily turned against one publication as against another. A government that can keep printed matter from being distributed is quite as well equipped to destroy the right to know as one that can keep it from being printed in the first place.

The press has a first duty to protect the people's right to know about their government. Included among its duties are those of vindicating that right and fulfilling it by the faithful performance of the obligations that our system imposes upon the press itself.

While I acknowledge these obligations, I cannot forbear saying that the inadequacy with which an individual newspaper performs its role does not justify nor condone the disregard of the right to know by government itself. Government defiance of the rights which make

up freedom of the press is not made palatable by the shortcomings of the press. The press that existed at the time the first amendment was adopted was not a perfect press. It was not regarded as perfect by the men who framed the first amendment. They had confidence in the principle, no matter what sort of press invoked it. They sought freedom to print and to read the false as well as the true, in the full understanding that it is not the business of government to decide what is false and what is true. They were content to rest their case with citizens who enjoyed unrestricted access to all sorts of information. They contemplated without alarm the publication and dissemination of every sort of attack upon our principles of government, confident that the people would not be subverted from loyalty to our institutions, as long as others were equally free to circulate arguments in support of our establishments.

We need a revival of that faith. The real threat to our right to know about our own government is a weakening of that faith. There is abroad in this country a fear that the people, if they are told too much about their government, will not judge it wisely. There is loose in this land an apprehension that citizens who are exposed to subversive propaganda, domestic and foreign, will not be able to discern the fallacies it contains. There is present in officialdom a kind of arrogance of the elite that is strange to our democracy and alien to our American philosophy. There is too frequently encountered, at local, state and federal levels, the theory of official omniscience. We need to restore the old faith in the sturdy virtues of our people and to reassert their right to know about their own government. In the restoration of that faith and the reassertion of that right, the press has a foremost role and a primary responsibility.