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THE RIGHT TO KNOW GOVERNMENT BUSINESS FROM THE VIEWPOINT OF THE GOVERNMENT OFFICIAL

WILLIAM P. ROGERS*

It is a pleasure to be here today to participate in part of Marquette University's 75th Anniversary Celebration and in this Conference on "Problems of Communication in a Pluralistic Society." I am particularly grateful for this opportunity to discuss this timely and important subject—the right of the people to know Government business.

No one who has had the privilege of serving in any official capacity in Government for any length of time can escape the fact that there is a body of opinion which sincerely believes that Government officials are antagonistic to the idea that the people have a right to know what they are doing. This view is, I believe, wholly erroneous. Our system of Government derives its powers from the "consent of the governed" and operates on the principle of majority rule. It is therefore not only essential, but basic to our system, that the people be fully informed concerning the conduct of their representatives to whom the functions of self-government have been delegated. Since there can be no awareness of the "will of the people" unless there is opportunity for full public discussion on all issues of general concern, it is the responsibility and duty of public officials to strive toward the fullest possible disclosure of their governmental activities. The public should view excessive secrecy among government officials as parents view a sudden quiet where the youngsters are playing. It is a sign of trouble.

Full knowledge of the facts makes for an intelligent electorate; it also provides the basis for an informed public opinion to guide elected representatives and others in the legislative process and in the formulation of policies affecting the public interest. That our Government officials recognize and carry out this obligation is attested by the fact that in no other nation in the world are the people more fully informed as to the policies and programs of their Government.

Thomas Jefferson once said: "When a man assumes a public trust, he should consider himself as public property." Thus, even the private lives of Government officials, if it can be said that they have any, are fully covered, discussed, and sometimes colorfully exaggerated. On occasions it would seem that there is considerably more interest in this facet of their lives than in their official responsibilities.

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To safeguard our people in their right to know Government business, the First Amendment to the Constitution protects the freedom of the press. A free press is essential to free government. It brings to light incompetence, injustice and corruption. It prevents the suppression of the truth which is an eternal bulwark against tyranny and oppression.

Most important, it is through the press, using that term to include all media for mass communication, that we depend for the facts and information upon which public opinion is to be formulated. Therefore, any discussion of the peoples' right to know Government business necessarily involves the relationships which public officials maintain with the press, the extent to which they make themselves accessible to its representatives, and the extent to which information concerning the conduct of Government business is withheld from them.

Insofar as accessibility to the press is concerned, I know of no major agency which does not maintain some type of office of public information. Most of them provide space for the convenience of the press and the major wire services normally assign staff members to cover the Departments on a full-time basis. Keeping the people informed is one of the most important functions of government. A constant flow of information is issued which, through the medium of the press, is immediately teletyped throughout the nation and in some cases throughout the world. Thus, within a matter of minutes, information concerning the activities of the Government is placed in the hands of the press for as wide a distribution as they see fit to give it. In the Department of Justice, for example, approximately 300 press releases were issued during 1955, covering the full gamut of its activities. In this process an attempt is made to make public at the earliest possible date any action or proposed action which may be of interest to any segment or part of the nation.

In addition, it has become customary through the years for the heads of departments and agencies to hold news conferences, that is, to meet face to face with representatives of the press and to submit to questioning on any subject.

The news conference is now accepted as routine, yet surprisingly, insofar as Presidents are concerned the practice has been in existence only 43 years. Prior to President Wilson, presidents had met occasionally with individual members of the press, a procedure which had led to charges of favoritism. The first conference was held March 15, 1913 and, instead of the expected handful of newsmen, was attended by over a hundred reporters. However, no procedure for regular meetings was established for many years.

Today, however, the President holds frequent, regular, and unrestricted news conferences at which wire recordings, newsreel cameras

and television are permitted. In this way the people may not only read but may hear and see for themselves what their chief executive is doing in their behalf. Full disclosure is the rule. On the question of his health and the decision to seek re-election, for example, President Eisenhower sought the assistance of all media of the press so that the people would be as fully informed as possible. The frankness and completeness with which the President confers with the press is noteworthy not only to Americans but to people throughout the world because it is a dramatic recognition by the Chief Executive of the peoples' right to know Government business.

It has also become the established practice for the heads of departments to accept speaking engagements for the purpose of discussing first hand with interested groups their problems, their policies and their activities. In order that the press may accurately report on these statements, copies of major speeches are released, often in advance of delivery.

This does not exhaust the means by which the people are constantly kept informed of the business of their government. A further example is the annual reports of the various government departments and agencies which contain a comprehensive statement of their operations. These reports are available to the public.

The significance of these methods and procedures is that they demonstrate that the Government is deeply conscious of its responsibility and obligation to keep in touch with the people. They also dispel any notion that press coverage is not welcome and indispensable or that officials play cat-and-mouse with members of the press in order to throw a blanket of secrecy over their actions.

If, as we would all agree, Government officials are accountable to the people for their official actions, upon what grounds may the withholding of information, sometimes information of vital concern, be justified? This is a fair question which deserves a frank answer.

Before turning to certain specific reasons which justify the withholding of information, it may be useful to set forth briefly some general principles which must be kept in mind. First, while the people are entitled to the fullest disclosure, this right, like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest. Second, in recognizing a right to withhold information, the approach must be not how much can be legitimately withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process. Third, a determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying non-disclosure no longer

pertain. Finally, non-disclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal or pecuniary reasons.

What, then, are the reasons which justify non-disclosure?

First, and most obvious, is official information relating to the national defense which, if disclosed, would materially weaken our ability to defend ourselves against any hostile force which seeks our destruction by force or violence. Needless to say, the problem is aggravated by the cold war which requires that we be constantly alert against espionage, sabotage, and other subversive techniques. We must face the fact that while we are not at war, neither can it be concluded that there is no threat to our security.

A most delicate problem of our time is a selection of the kind of information which unavoidably and of necessity must be withheld in the interest of national security without overstepping proper bounds and obstructing the free flow of information so vital to the preservation of free government. As in any case requiring that competing interests be balanced, there is room for honest disagreement as to judgment and, because of the human element, possibility of error.

However, a safeguard against error is the right of the press to criticize the refusal to make disclosures which it believes to be wrong. Inquiries from the press, Congress, and the public, stemming from such criticism result in a continuing process of examination and evaluation to insure the judgments in this area comport with the interests of national security. Then too, the fact that the refusal to grant access often is reviewable by the courts is another most *important* safeguard against abuse.

Executive Order 10501, entitled "Safeguarding Official Information in the Interests of the Defense of the United States," sets forth the standards to control the non-disclosure of defense information. It was issued only after the most exhaustive study and after consultation with representatives of the press, radio, television and all other media of public information. Criticisms and suggestions of a most helpful nature were made by your next speaker, Mr. Wiggins, as well as by other prominent members of the press.

Because of the attention focused on this area of classification of defense information, it may be useful to set forth briefly some of the major features of the Order:

(1) It provides for three classification categories, "Top Secret," "Secret," and "Confidential." The "catch-all" classification "Restricted" which had resulted in over-classification but which was just as effective in removing information from the public domain as a classification of "Top Secret," was eliminated.

Now, just what do these terms mean? Are they just another bur-

eaucratic attempt to put a lid on information which should be public property? "Top Secret" is applicable only to information where the defense aspect is paramount and where unauthorized disclosure could, for example, result in an armed attack against the United States. The designation "Secret" is applicable to those disclosures which could compromise important defense plans. The authority to classify information as "Confidential" is applicable only to "information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation." These are serious matters and deserve the most thoughtful consideration. For it is the defense and security of your nation that is at stake.

(2) The Executive Order withdraws classification authority from departments and agencies having no direct responsibility for national defense. Twenty-eight agencies have been placed in this category.

(3) In agencies having only limited defense responsibilities, only the head of the agency has been authorized to classify. Seventeen agencies have been placed in this category, including the Departments of Agriculture, Interior, Labor, and Health, Education and Welfare. In all other agencies the authority to delegate classification authority is severely limited.

(4) Finally, the Order provides for constant review of all classified information to insure that none is classified and withheld "which the people of the United States have a right to know." It further provides that a member of the President's staff shall be designated to "receive, consider and take action upon, suggestions or complaints from non-Governmental sources" relating to the operation of the Order. Thus a mechanism is provided whereby any member of the public who feels aggrieved by Governmental action in this area may have the matter reviewed at the White House level.

A determination to withhold defense information by its very nature is not susceptible to disclosure to would-be-recipients for the purpose of testing or debating the validity of the decision. It is because of this fact, and the fact that secrecy for secrecy sake alone cannot be condoned and is repugnant to our way of life, that every effort is made and standards as precise as possible have been laid down to insure that defense information is withheld only in those situations where it is absolutely necessary and then only after careful examination of all the relevant facts by responsible public officials.

A second and closely related area in which the public interest requires nondisclosure is the field of foreign affairs. It is self-evident that often international negotiations between the heads of States or their representatives can not successfully be conducted in the spotlight of publicity. Nor could it be suggested that it would be in the public interest, for example, to disclose to the world what the plans of the

government would be in the event of an outburst of violence or aggression.

There, of course, can be only limited disclosure with respect to matters pending in court. The Canons of Ethics of the American Bar Association generally condemn publications by lawyers with respect to pending or anticipated litigation since it may "interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice." Once an indictment or complaint is filed, however, it is proper for the Government, since its litigation involves matters of public concern, to disclose the information which may be found in these public documents. The Department of Justice, therefore, issues press releases on cases believed to be newsworthy. However, they contain no discussion of the merits of the case or of facts which might create an adverse attitude in the public mind respecting the alleged actions of the defendants. On the other hand, at the conclusion or settlement of a case, the public is entitled to be fully informed as to the outcome. As to settlements in tax and other civil suits where otherwise there would be no public record of the proceeding, the practice now is to make all the pertinent facts available.

And because the public is entitled to be fully informed as to all aspects of federal prosecutions, it is now the practice to make all pardons and commutations of sentences a matter of public record. Thus, in the event a question arises as to the propriety of a pardon, for example, the press, and other interested persons, may examine the record which now includes the names of all persons who interceded on behalf of, or expressed interest in the convicted person.

It is also necessary to keep confidential investigations which may lead to litigation. Premature disclosure could lead to the destruction of valuable evidence and, in criminal cases, perhaps persuade defendants to disappear.

The right of the people to know Government business does not include a right of access to all information which the Government obtains in confidence. Some information which the Government obtains is made confidential by statute. Thus, a number of statutes which require the filing of statements containing trade secrets and financial statements expressly provide that it may not be disclosed. Any officer or employee who discloses such information contrary to law is subject to criminal prosecution.

Apart from statutory restrictions, there are sound reasons why some other types of information obtained in confidence should not be disclosed. For example, investigative files of investigative agencies sometimes contain charges based on mere hearsay, at least in the initial stages. To disclose such information might well result in irreparable injury to innocent persons. The identity of confidential informants

is also not disclosed, because there are occasions when to identify the informant might be to destroy his usefulness or endanger his life.

Recognition of a legitimate right of the people to know Government business does not necessarily carry with it a right to know the private business of private citizens. For example, we are required to disclose many facts to the Government in income tax returns, but most people agree that they should not be made public.

There is another category of information which in the public interest is not disclosed and, which, for lack of a better name, might be described as information relating to internal government affairs. Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators or executive officials cannot conduct all public business at every step of the way in public.

A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of Government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously it cannot be if Government is to function.

Up to this point I have attempted to show the methods employed to keep the people informed and to delineate the areas in which disclosure would be contrary to the public interest. However, if the right to know is to have any meaning, it is absolutely essential that the people should receive accurate information. This is a dual responsibility of the government official and the press. Any distortion or slant-

ing of the facts at the source of information is incompatible with the obligation assumed by public servants. Respect for Government and the institutions of freedom which we seek to preserve would soon disappear if we should ever tolerate anything short of the fullest candor and honesty in our public officials. However, this is not enough. Those who receive and disseminate the information have a similar duty to the public to report it accurately and fairly.

On the whole a high standard of objectivity and factual accuracy has been met by the press in recent years. The great majority of its members are cognizant of the fact that the constitutional protection for freedom of the press is not a personal right but is for the benefit of the people. For the most part, newspapers and other media of the press no longer tolerate sensationalism, or other techniques designed to sell papers at any cost and at the expense of the facts. Because of the respectability with which the profession is clothed, it must assume responsibility for all the facts which it makes available to the public. This applies not only to the regular reporters but to all representatives of the press. Half truths and falsehoods should not be tolerated whether they appear in the news columns or anywhere else in the paper. Those responsible for publication of facts must assume not only legal but moral responsibility for everything they publish. This is particularly true in our country because our law, very properly, imposes few restraints or sanctions on the press.

Falsehoods can cause great damage, not only to the person but to the orderly administration of government. After a falsehood has been published recourse to the law of libel is of little help. Much that is false is not libelous. Generally speaking a person can recover only nominal damages unless he can show that he suffered actual financial loss as a result of the libel. In the case of a public official, this is almost impossible to do because normally he is not engaged in any business at the time in which there would be actual financial loss. Public officials have neither the time nor the money to engage in litigation to defend their reputations or to set the record straight. Sometimes the newspaper which prints false facts, when called to account, will retract. However, after publication of a falsehood it is slight consolation to the person maligned because a retraction never fully undoes the initial damage.

In the dual responsibility for keeping the people informed, Government officials and members of the press have a common obligation not to participate in or condone any abuse of the peoples' right to know the truth.

Today, more than at any other time, an informed citizenry is vital if we are to resolve intelligently the critical problems facing the free nations of the world. So long as we recognize that it is the function

of the Government to serve the people and with the help of fair and objective reporting to keep them informed, our cherished heritage of freedom will be secure.