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# Freedom of Information and the First Amendment in a Bureaucratic Age

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# CONSTITUTIONAL LAW

## COMMENTARY

### FREEDOM OF INFORMATION AND THE FIRST AMENDMENT IN A BUREAUCRATIC AGE

*Eric M. Freedman\**

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.

—James Madison<sup>1</sup>

Since before the American Revolution, students of democracy have debated the nature of the duty an elected representative owes to those who elected him. Some have argued that the representative is the mere agent of his constituents and bound to obey their will, since the legislature is only a convenient substitute for the town meeting. Others have contended that the representative's duty is to use his independent judgment on public issues, regardless of the sentiments of his constituents at any given moment, and subject only to their verdict on election day, since he must be free to participate in the political give-and-take necessary to the smooth running of any body that represents diverse interests.<sup>2</sup>

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<sup>1</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910) (quoted in part in S. REP. NO. 813, 89th Cong., 1st Sess. 2-3 (1965) as explanatory of purpose of Freedom of Information Act, 5 U.S.C. § 552 (1976)).

<sup>2</sup> On the central place of this debate in early American history, see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 25-28, 162-81, 188-96, 363-72, 380-82, 596-600 (1969). For later views, see J. KENNEDY, PROFILES IN COURAGE xi-xiii, 13-18, 43,

The effort to place limits on representatives' discretion had its origins in the belief that officeholders were not to be trusted and that the corrupting effect of power would inevitably cause them to seek their own aggrandizement at the expense of citizens' liberty.<sup>3</sup> Hence, the preservation of freedom required the maintenance of a ceaseless vigil over those in government.<sup>4</sup>

Although this attitude is as salutary today as it ever was, the question of the relationship between an elected representative and his electorate has become increasingly irrelevant to the exercise of political power. Today, we are ruled in large measure by the boards and bureaucrats of the executive branch of the federal government.

Whatever one thinks of the desirability of this development,<sup>5</sup> the layers of insulation protecting the actual decisionmakers from direct popular control have vastly increased the strength and technical precision with which the populace needs to express itself in order to influence the course of government. Administrators, particularly those below the top "political"

50-51, 74, 102, 137, 147, 150-51, 172-77, 196, 199-200, 239, 241-45 (1956). See also Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), reprinted in *BRITISH HISTORICAL AND POLITICAL ORATIONS* 67, 71-82 (Rhys ed. 1915).

<sup>3</sup> See, e.g., *THE ANTIFEDERALISTS* xxix (C. Kenyon ed. 1966); J. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 55 (1961); G. WOOD, *supra* note 2, at 21-22; Letter from John Adams to Thomas Jefferson (Nov. 13, 1815), reprinted in 2 *THE ADAMS-JEFFERSON LETTERS* 456 (Cappon ed. 1959). See also 1 T. GORDON, *CATO'S LETTERS* 255 (London 1733).

<sup>4</sup> The importance of this belief to a full understanding of the first amendment is developed at length in Vincent Blasi's valuable essay, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521. See also Lewis, *The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793, 805-06 (1980).

<sup>5</sup> In passing the Freedom of Information Act, 5 U.S.C. § 552 (1976) (FOIA), the legislature was concerned that "the very vastness of our Government and its myriad of agencies. . . the hundreds of departments, branches, and agencies which are not directly responsible to the people" has increased the difficulty of self-government. S. REP. NO. 813, *supra* note 1, at 2-3. See also H. REP. NO. 880, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2184 (Government in the Sunshine Act, 5 U.S.C. § 557(d)(1)(D) (1976), found necessary because "theoretical accountability" of agencies to people leaves them "far removed from the public view").

For some more favorable words, see Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 489-90 (1982). For a helpful proposal, see J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 137-48 (1980). See generally Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 33-35 (1979); Hollenberg, *Time for a Fourth Branch of Government?*, N.Y. Times, Mar. 3, 1983, at A26, col. 4.

ranks in each agency, do not feel themselves to be mere agents for the carrying into effect of the public's desires, nor is it clear that they should. The very concept of the newer agencies, and one purpose of civil service protection in the older departments, was to give disinterested experts an important role in governmental decisionmaking. But it will hardly do simply to assume the disinterest and the expertise, and to cede all control (except the uncertain remedy of quadrennial presidential elections) over vast areas of everyday life to autonomous bureaucrats. Arrangements for the exercise of popular control are necessary, and such arrangements, because they bear so directly on the public's power to control its governors, have a constitutional resonance, though they may be but statutes in form.<sup>6</sup>

The Freedom of Information Act (FOIA or Act)<sup>7</sup> is such a statute. It functions to give the citizens the factual information necessary for them to formulate their instructions precisely enough to penetrate the government to the level where those instructions must be carried out. Although the FOIA in its present form is less than a decade old,<sup>8</sup> the protection of this formula-

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<sup>6</sup> See note 8 and accompanying text *infra*.

<sup>7</sup> 5 U.S.C. § 552 (1976).

<sup>8</sup> Congress first attempted to provide public access to government in the Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237, which provided that agencies publish information "except to the extent that there is included (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." 5 U.S.C. § 1002 (1946). This provision, however, lacked reviewable standards and was often abused by agencies seeking to withhold information merely because disclosure would be embarrassing to the government. See S. REP. No. 813, *supra* note 1, at 3-5. Congress, therefore, amended the Administrative Procedure Act in 1966 by enacting the FOIA, 5 U.S.C. § 552 (1970).

The FOIA requires agencies to disclose all requested information that does not fall within one of nine exemptions, and provides for *de novo* judicial determination of an agency's exemption claim. The burden of proof as to the propriety of a decision to withhold information rests with the agency. *Id.* at § 552(a)(3).

Since 1966 Congress has amended the FOIA twice to correct Supreme Court interpretations of the exemption provisions. First, in *EPA v. Mink*, 410 U.S. 73 (1973), the Court construed exemption 1 concerning information "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy," 5 U.S.C. § 552(b)(1) (1970), as a congressional mandate that the executive's determination of the substantive propriety of the classification should be controlling. 410 U.S. at 81. The Court reasoned that an agency's affidavit claiming that proper classification procedures had been followed satisfied its burden of proof. *Id.* at 84. Congress responded by amending exemption 1 to require the withheld documents to be "specifically authorized to be withheld under . . . [classification]" and to be "in fact properly classified." 5 U.S.C. § 552(b)(1) (1976). The amendment further provided for *in camera* review, at the court's

tion process — the process of political debate in which the electorate uses information obtained from the press and the government to decide what views to convey to the government — has traditionally been at the center of first amendment concern.<sup>9</sup>

During the 1981-1982 Term, the United States Court of Appeals for the Second Circuit's record with regard to claims that information from the government was needed to facilitate the citizenry's exercise of political power was less strong than is consistent with a full understanding of the practical importance of such claims to the protection of individual liberties. But the court's record in the area more traditionally considered within the scope of the first amendment was praiseworthy.

This contrast provides grounds for hope. If the Second Circuit were brought to understand that, in light of the realities of government by bureaucracy, the right to obtain the information necessary to bring the government to account is as significant as the right to disseminate it, perhaps the court would show as deft a touch in ruling on freedom of information claims under the FOIA as it does in ruling on freedom of speech and press claims under the Constitution.

## I. THE SECOND CIRCUIT'S FOIA CASES

The court's cases during the 1981-1982 Term have been adequate in their treatment of the FOIA as a statute. Were it merely another statute, there would be little to say. But the Second Circuit's failure to perceive that the Act is more than just a means for promoting general public enlightenment,<sup>10</sup> but rather

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discretion, whenever an agency claimed any of the nine available exemptions. *Id.* at § 552(d)(4)(B).

Similarly, in *FAA Administrator v. Robertson*, 422 U.S. 255 (1975), the Supreme Court broadly construed exemption 3, which covered matters "specifically exempted by statute." 5 U.S.C. § 552(b)(3) (1970). The Court found the exemption to include a statute authorizing any agency to withhold information when, in the agency's discretion, disclosure is not required in the interest of the public. 422 U.S. at 265. Congress overruled the Court with an amendment to exemption 3 that requires the exempting statute to establish either specific criteria for withholding or to provide for withholding in a manner leaving no discretion on the issue. 5 U.S.C. § 552(b)(3) (1976).

<sup>9</sup> See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (first amendment assures "freedom of communication on matters relating to the functioning of government"); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("The press was protected [by the first amendment] so that it could bare the secrets of government and inform the people.") (Black, J., concurring).

<sup>10</sup> The legislative history of the FOIA indicates that Congress intended the Act to

is a tool for direct day-to-day popular control of the executive branch,<sup>11</sup> has resulted in a failure to give the Act an interpretation that does justice to its significance for the structure of political decisionmaking.<sup>12</sup>

Perhaps the clearest example of this failure is the court's decision in *Weberman v. National Security Agency*.<sup>13</sup> In that case, Jules Webberman, an author engaged in writing a book on the assassination of President Kennedy, brought suit under the

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aid the populace in achieving more effective self-government:

Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively all their First Amendment rights, the people must know what their government is doing.

S. REP. NO. 854, 93d Cong., 2d Sess. 1-2 (1974), *discussed at* 1974 U.S. CODE CONG. & AD. NEWS 6267. Cf. Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 742 (1975) ("This statute is founded on the philosophy that because governmental decisions belong to the public, the people, as of right, may claim access to them.").

<sup>11</sup> See note 10 *supra*. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970) (values served by freedom of expression include both "advancing knowledge and discovering truth" and "provid[ing] for participation in decisionmaking by all members of society"). In recent years, an increasing body of first amendment literature has been concerned with the problem of giving the second of these values meaning by assuring citizens some sort of right of access to government-held information. See, e.g., *Globe Newspaper Co. v. Superior Ct.*, 102 S. Ct. 2613, 2618-20 (1982); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30-38 (1978) (Stevens, J., dissenting); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 857-64 (1974) (Powell, J., dissenting); *Newman v. Graddick*, No. 81-7886 (11th Cir. Jan. 5, 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 685 F.2d 550, 555-57 (3d Cir. 1982); Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 32 n.205 (collecting authorities). See generally Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L.R. 229, 233 (1971); Lewis, *supra* note 4, at 795. There has also been considerable state court interest in the problem. See, e.g., *Miami Herald Publishing Co. v. Lewis*, No. 59,392 (Fla. Sept. 2, 1982); *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d 927 (Tex. Crim. App. 1982); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 640 P.2d 716 (1982); *State v. Greco*, 8 MEDIA L. REP. (BNA) 2645 (N.J. Super. 1982).

<sup>12</sup> The approach to the interpretation of FOIA suggested in this Commentary is akin to that suggested for the interpretation of constitutional provisions in C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

<sup>13</sup> 668 F.2d 676 (2d Cir. 1982).

FOIA to compel disclosure of a telegram that he alleged had been sent to Havana by Jack Ruby's<sup>14</sup> brother in 1962 and intercepted by the defendant National Security Agency (NSA). The agency resisted disclosure, asserting that to acknowledge or deny possession of the telegram would be to reveal information that had been properly classified by the executive branch.<sup>15</sup>

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<sup>14</sup> For the benefit of any readers who are not of the generation to whom the history is well-known, Jack Ruby was a Dallas nightclub owner who on November 23, 1963 killed Lee Harvey Oswald, who had been taken into custody for the assassination of President Kennedy on November 22, 1963. Based on a reference in the report of the Commission chaired by Chief Justice Earl Warren which investigated these events, Weberman asserted that the telegram he sought had been sent on April 1, 1962, and requested access "to establish the nature of the relationship between Jack Ruby and Fidel Castro." Brief for the Appellant at 1 n.\*, *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982).

<sup>15</sup> 668 F.2d at 677. The FOIA requires that "the defending agency must prove that each document that falls within the class requested has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973) (footnote omitted). In *Weberman*, the National Security Agency (NSA) invoked exemption 1, which provides that an agency need not disclose matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1976). NSA claimed that the information was properly classified "secret" under the procedures set forth in Exec. Order 12,065, 43 Fed. Reg. 28,949 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9712 (repealed by Exec. Order 12,356, 48 Fed. Reg. 14,874 (1982)), which provided that information could only be classified secret if its "unauthorized disclosure . . . reasonably could be expected to cause serious damage to the national security."

NSA did not assert that the telegram itself would be exempt from disclosure, and it is difficult to see how such a claim could plausibly have been made. See *Weberman v. NSA*, 490 F. Supp. 9, 13 (S.D.N.Y. 1980) ("The issue in this case is not whether the Ruby message itself is exempt from disclosure. Clearly it is not."). Instead, the Agency claimed that simply revealing whether or not the document was in its files would pose a threat of serious damage to national security, an argument that has been accepted by other courts in FOIA exemption 1 cases. See, e.g., *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1981); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

NSA also claimed that the existence of the telegram was information exempt from disclosure under exemption 3. 668 F.2d at 677. See note 8 *supra*. Claiming that the requested information concerned the communications intelligence of the United States, the Agency argued that it was properly withheld under 18 U.S.C. § 798(a) (1976) and 50 U.S.C. § 403(d)(3) (1976), which protect such information. NSA also argued that the National Security Agency Act of 1959, Pub. L. No. 86-36 § 6 (currently codified at 50 U.S.C. § 402 (1976)), which allows the Agency to withhold information pertaining to its activities, authorized withholding in this case. Although courts have found these statutes to be within exemption 3, see, e.g., *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979) (§ 6 qualifies under FOIA), *cert. denied*, 446 U.S. 937 (1980); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978) (either 18 U.S.C. § 798 or 50 U.S.C. § 403(a)(3) would exempt information from disclosure), they have warned against "the potential for unduly broad construction" of them in the FOIA context and attempted to lay down standards to assure

After review of submissions by the parties, the district court rejected this argument and ordered NSA to disclose whether it held the telegram, and, if so, to release it.<sup>16</sup> NSA thereupon moved for reargument, proffering a classified affidavit for the court's *in camera* consideration. The court refused to view the affidavit, and adhered to its original decision.<sup>17</sup> After the Second Circuit in two brief unpublished orders directed the district court to view the affidavit and refused to permit plaintiff's coun-

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that FOIA requesters will receive "a true *de novo* review of their claims," *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 (D.C. Cir. 1979).

<sup>16</sup> 490 F. Supp. at 15. In reaching his conclusion, Judge Brieant relied on a number of facts of public record which rendered it highly improbable that the agency would be revealing any properly classified information by admitting or denying possession of the telegram. *Id.* at 11-15. He noted that Earl Ruby testified before the Select Committee on Assassinations of the House of Representatives that he was aware a telegram had been sent to Cuba from his store on April 1, 1962, and that the testimony had been published. *Id.* at 11.

Most importantly, Judge Brieant stressed that the NSA was known to have conducted an extensive monitoring program under the code name Shamrock through which the agency received copies of most international telegrams leaving the United States between 1945 and 1975. *Id.* at 12. In September 1975, a Senate Committee conducted a full investigation of the interception program and prepared a detailed report that was later read into the record. Judge Brieant reasoned that there could be nothing secret about Operation Shamrock since the Committee report was available for everyone, including foreign intelligence officers, to read. *Id.* Noting that Operation Shamrock had ended, Judge Brieant concluded that NSA's claim that a confirmation of the existence of a copy of the Ruby telegram would undermine its ongoing intelligence gathering activity was meritless. *Id.* at 13. Since NSA had no way of knowing whether the telegram, if it existed, had been obtained through Operation Shamrock or through another source, Judge Brieant reasoned that a foreign intelligence agency could similarly not discover the actual source. *Id.* at 14. Since there was no danger of revealing which channels of communication NSA was currently monitoring or capable of monitoring, he continued, there was no threat to national security justifying classification, and the information would not pertain to the type of activities described in the exempting statutes. *Id.* at 14-15.

<sup>17</sup> Judge Brieant wrote:

I decline as a matter of discretion to review this classified affidavit *in camera*, essentially for two reasons. First, the open affidavits submitted by NSA set forth sufficient undisputed facts necessary to reach a decision on plaintiff's request. Indeed, these now public facts compel the decision reached. Any classified information will serve no purpose in that regard. The age of the telegram, and the extent of prior public disclosure concerning it, and concerning operation SHAMROCK are particularly significant. Secondly, this Court believes that *in camera* proceedings by Judges should be conducted with great caution and only when some demonstrated necessity exists. Our adversary process relies on open argument, confrontation and cross-examination to assure that the evidence presented is trustworthy. These elements are sacrificed when a party is removed or excluded from the proceedings in his own case.

*Id.* at 17.



sel access to it,<sup>18</sup> the district court reluctantly considered the document *ex parte*. It thereupon reversed its earlier determination and granted summary judgment to the government.<sup>19</sup>

On appeal, the Second Circuit,<sup>20</sup> in a two-page opinion, affirmed both the holding that NSA need not reveal whether it held the telegram and the holding that plaintiff's counsel could not be granted access to the NSA affidavit that explained why this fact had been properly classified. While there is no way to evaluate whether the first of these holdings was correct, the second vitiates statutory purpose.

The history of the response of federal agencies to the FOIA has been a history of implacable resistance.<sup>21</sup> This is not surpris-

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<sup>18</sup> One of the attorneys representing Weberman was Mark H. Lynch of the American Civil Liberties Union Foundation. He pointed out, in support of the request for access, that he had previously been granted clearance under protective orders to receive far more sensitive information, Brief for the Appellant at 4 n.\*, *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982), and also offered to obtain other counsel acceptable to NSA if necessary, *id.* at 13. Although the district court correctly noted that serious questions would be raised by a system that required plaintiff's counsel to be acceptable to defendant as the price of access to the documents, 507 F. Supp. 117, 120 (S.D.N.Y. 1981), this voluntary offer mooted that issue here. The district court also expressed concern about granting counsel access to the documents by requiring him to keep them from his client. *Id.* This is a serious problem, see *Phillips v. District of Columbia*, No. 80-2171 (D.C. Cir. Jan. 11, 1983), although one which is ignored routinely in commercial cases where protective orders are entered, but it too would not have arisen here, since Weberman had consented to the restriction.

<sup>19</sup> Judge Brieant wrote that although the basic issue of the propriety of *in camera* proceedings was a highly significant one, the affidavit, "in this particular case is not so significant [, since it] merely makes concrete rather than theoretical the argument made all along in this litigation by the Government. . . . The Court, following its consideration of the Top Secret Affidavit, is persuaded that this argument is valid, and probably should have so found upon its initial consideration of the matters." Brief for Defendant-Appellee at 16, *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982).

<sup>20</sup> The panel consisted of Judges Lumbard, Waterman, and Van Graafeiland. The opinion was written by Judge Lumbard.

<sup>21</sup> For any lawyer whose practice includes litigating FOIA cases, this statement needs no citation. For a few examples, see *Ingle v. Department of Justice*, Nos. 81-5440 to -5441 (6th Cir. Jan. 17, 1983) (of 366 pages of material withheld from production under FOIA and sought to be protected by affidavit from *in camera* review, 307 were copies of magazine published by group of which plaintiff was director); *Dunaway v. Webster*, 519 F. Supp. 1059, 1064-72 & n.5 (N.D. Cal. 1981) (upbraiding government for procrastination and untenable national security claims, displaying "a cavalier attitude by the government" which "is not uncommon in litigation under the FOIA"); HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H. REP. NO. 1419, 92d Cong., 2d Sess. 15, 27-40 (1972) (detailing ways in which "the efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy"); Comment, *Developments Under the Freedom of Information Act — 1981, 1982* DUKE L.J. 423, 427-28 (SEC proposes regulation to keep

ing since knowledge is power<sup>22</sup> and bureaucrats have an ineluctable tendency to attempt to maximize their own and their agencies' power.<sup>23</sup> American political history over the last twenty years has been characterized by repeated instances of governmental agencies undertaking activities in secret that led to political outcries — and political reforms — once revealed.<sup>24</sup> Power to control political events has inevitably been in the hands of those who held the facts.

This is the background against which the *Weberman* court ruled in a few summary paragraphs<sup>25</sup> that a government, which

information filed with it outside of FOIA). For a detailed discussion of excessive governmental secrecy in a related context, see Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*, 91 YALE L.J. 570 (1982).

<sup>22</sup> See text accompanying note 1 *supra*.

<sup>23</sup> But cf. Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 9 n.26 (suggesting reasons why disclosure in bureaucrat's self-interest). Significantly, this suggestion is found in an article whose proposal for a drastic weakening of access rights under the FOIA is based on the premise "that educating the citizenry about the functions of government is a very idealistic and probably unattainable goal," *id.* at 33, a premise which the author finds wholly inconsistent with the overall history of political change in America, as well as the specific history of political changes following disclosures under the FOIA. See note 24 *infra*.

<sup>24</sup> A suggestive, albeit incomplete, source of documentation for the connection between FOIA disclosures and political reforms is H. Relyea & S. Cavanagh, *Press Notices on Disclosures Made Pursuant to the Federal Freedom of Information Act* (Congressional Research Service, Feb. 27, 1981) (listing 276 disclosures forming bases of stories in press). See also 3 *Japanese Americans Ask Court to Overturn Wartime Convictions*, N.Y. Times, Jan. 31, 1983, at A14, col. 3 (documents released under FOIA underlie suit charging that government falsehoods tainted outcome of *Korematsu v. United States*, 323 U.S. 214 (1944)); *Still Falling Out*, The Economist, Nov. 13, 1982, at 56, col. 1 (disclosures under FOIA enabled plaintiffs to sue for injuries from nuclear testing).

<sup>25</sup> The brusque nature of the Second Circuit's two-page opinion is in stark contrast to the detailed treatment of the issues in the only two cases which it cites, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (same fact pattern as *Weberman*; case remanded to district court for creation of fullest possible public record before consideration of in camera information), and *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979) (reiterating this requirement and holding it satisfied on the facts), *cert. denied*, 446 U.S. 937 (1980).

The *Hayden* court recognized that the sufficiency of the public record must be evaluated in light of the "peculiar circumstances" of an NSA claim that the fact of interception would reveal which communications channel the agency has been monitoring and of the congressional directive to accord substantial weight to agency affidavits in matters relating to national security, see S. REP. NO. 1200, 93d Cong., 2d Sess. 12, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 6290 [hereinafter cited as S. REP. NO. 1200 with page citations to U.S. CODE CONG. & AD. NEWS], 608 F.2d at 1388. Confronted with a claim of access to an *ex parte* affidavit like the one in *Weberman*, the *Hayden* court accordingly ruled "that a court has inherent discretionary power to allow such access where appropriate; but it is not appropriate . . . to allow access to classified defense-related material

classifies as secret requests for the purchase of used typewriters,<sup>26</sup> should be trusted to present a judge with a sufficiently neutral factual statement to enable him to reach a reasoned judgment without the benefit of a two-sided presentation. The government was permitted to prevail on summary judgment without having to justify to an informed adversary its position that the fact of releasing, or denying possession of, an 18-year-old document would cause such damage to national security that the public could be deprived of access to its contents.<sup>27</sup>

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to counsel who lack security clearance, unless a court has already determined pursuant to FOIA procedures that the material should be publicly disclosed," 608 F.2d at 1386.

In *Weberman*, counsel had previously obtained a security clearance, and the district court, on the basis of a rational evaluation of the threatened harm to national security, see note 16 *supra*, had determined that the material should be disclosed. The Second Circuit nonetheless found that the district court had abused its discretion in rejecting NSA's offer of an *in camera* affidavit and mandated counsel's exclusion without articulating the standard it would substitute for the *Hayden* principle. Yet it was the intent of even the more restrictive Senate draft of the FOIA that "procedures providing for the utilization of the adversary process in *in camera* proceedings . . . be encouraged wherever possible," S. Rep. No. 854, *supra* note 10, at 14-15, and the explicit authorization in that bill for *ex parte* procedures such as those employed in *Weberman* was stricken in conference. In light of these facts, even if the Second Circuit's results were correct, its opinion would remain unsatisfactorily delphic.

The Second Circuit was equally brusque, and equally unsatisfactory, in its ruling last term that a victorious pro se litigant under FOIA is not entitled to statutory attorney's fees, *Crooker v. United States Dep't of Treasury*, 634 F.2d 48 (2d Cir. 1980). That two-page opinion, which seems destined to be remembered only for its observation that "[t]he Freedom of Information Act was not enacted to create a cottage industry for federal prisoners," *id.* at 49, might far more appropriately have focused on the role that the award of attorney's fees plays in the vindication of the purposes of the Act, including the purpose of encouraging agencies to settle. Cf. *Cox v. United States Dep't of Justice*, 601 F.2d 1 (D.C. Cir. 1979) (adopting this approach).

<sup>26</sup> This example comes from an FOIA lawsuit in which the author participated as plaintiff's counsel, *Columbia Spectator v. CIA*, No. 78 Civ. 1705 (S.D.N.Y. Mar. 12, 1979). Like many others, this case was dropped by the plaintiff after negotiations between counsel subsequent to its filing led to disclosure of a significant number of documents and the publication of newspaper articles based on them, see Schachter & McCarthy, *Rip Cloak Off CIA's Columbia U. Research*, N.Y. Daily News, Apr. 22, 1980, at 7, col. 1.

<sup>27</sup> As the court pointed out in detail in *Phillippi v. CIA*, 546 F.2d 1009, 1014 nn.12-13 (D.C. Cir. 1976), discovery on such matters is perfectly feasible and may well cause an agency to change its position. Indeed, the agency did release a number of documents following remand in that case. See Claiborne & Lardner, *Colby Called Glomar Case 'Weirdest Conspiracy'*, Washington Post, Nov. 5, 1977, at A10, col. 1; Lardner & Claiborne, *CIA's Glomar 'Game Plan'*, Washington Post, Oct. 23, 1977, at A1, col. 5. In addition to leading to less informed decisionmaking, *ex parte* proceedings remove the functioning of the courts from the scrutiny of one of the parties, thereby diminishing an important institutional strength. See text accompanying note 36 *infra*.

In giving conclusive weight to the views of the defendant, the court's decision went beyond snatching from the plaintiff the summary judgment he had just won. FOIA cases are almost always settled in whole or in part. Generally speaking, it is not a judicial decision that extracts documents from an agency; it is the filing of a lawsuit. The court's decision deprived Weberman of the leverage to force a compromise disclosure of the sort that so often results in FOIA suits doing rough justice between the parties.<sup>28</sup>

The district court in *Weberman* characterized the Second Circuit's approach as sanctioning "star chamber" proceedings.<sup>29</sup> One need not go so far to see that the Court of Appeals' ruling cannot be squared with the role that the FOIA has assumed in our system of government — that of enabling the public to check the self-aggrandizing tendency of officeholders by helping to equalize the struggle for information, and hence for power, between the government and the people who are supposed to be its masters.<sup>30</sup>

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<sup>28</sup> Typically, the agency provides nothing or virtually nothing before suit is filed, considerably more after it is filed, and any judicial decision then determines the propriety of withholding the relatively small amount of material still at issue. See, e.g., *Ingle v. United States Dep't of Justice*, Nos. 81-5440 to -5441 (6th Cir. Jan. 17, 1983) (ruling on propriety of withholding 54 pages of 366 originally withheld; remainder released by agency after suit filed); *Irons v. Bell*, 596 F.2d 468, 470 (1st Cir. 1979) ("Although the FBI moved with glacial celerity throughout the proceedings and continually opposed *in camera* inspection of unclassified documents, much of the disputed material was ultimately released and [the requester] compromised on a number of his claims.").

This consideration suggests that the court should not have permitted the government in another of this term's FOIA cases, *Brown v. FBI*, 658 F.2d 71 (2d Cir. 1981), to escape the requirement of indexing the withheld documents pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), even though the requested material itself could in all likelihood have properly been withheld.

<sup>29</sup> *Weberman*, 507 F. Supp. at 121.

<sup>30</sup> For both structural and legal reasons, the government always has the upper hand in this ongoing contest. The government generates or uses the information in the first place, and the public ordinarily only discovers that it exists after revelation of the government's actions based on it. Cf. *Vaughn v. Rosen*, 484 F.2d 820, 823-38 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (canvassing burdens placed upon FOIA plaintiffs by inability to know what defendants are withholding). Legally, moreover, the FOIA contains an exemption. 5 U.S.C. § 552(b)(1) (1976), for material properly classified pursuant to an Executive Order. Therefore, to defeat FOIA claims, the executive branch need only rewrite the classification rules, as the Reagan Administration has done, see Exec. Order 12,356, 47 Fed. Reg. 14,874 (1982), with immediate results. See *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C. Cir. 1983). See generally *Secrecy and Insecurity*, N.Y. Times, Apr. 30, 1983, at A22, col. 1.

Furthermore, as the Reagan Administration has also demonstrated, there is consid-

The structural analysis I suggest does not require disclosure in every instance, only that in every instance the decision to grant or deny access should be made with full judicial awareness of its constitutional context.<sup>31</sup> Thus, I would not change the result denying access in this term's decision in *Federal Deposit Insurance Corp. v. Ernst & Ernst*,<sup>32</sup> only the opinion announcing the result. The case arose when a public interest group asked the Federal Deposit Insurance Corporation (FDIC) for access under the FOIA to the terms of a settlement agreement reached between the FDIC and the accounting firm of Ernst & Ernst in litigation in the Eastern District of New York growing out of the collapse of the Franklin National Bank. The FDIC denied the request on the ground that the settlement agreement had been sealed by order of the district court. The public interest group moved the judge who entered the order for a modification of it, and he denied the motion.<sup>33</sup>

On appeal, the public interest group urged that the FOIA controlled the discretion of the district judge to withhold access to the document. The Second Circuit summarily rejected this claim on the basis that Congress did not intend the Act to apply

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erable executive control over such matters as the search fees to be charged by the agencies, see Taylor, *Information Act Gets New Fee Rule*, N.Y. Times, Jan. 12, 1983, at A17, col. 1, and the litigation posture to be assumed by the Department of Justice. See generally Lewis, *Afraid of Freedom*, N.Y. Times, Mar. 3, 1983, at A27, col. 1; Bok, *Secrecy vs. Security*, N.Y. Times, Feb. 23, 1983, at A23, col. 3; Simon, *FOIA Requests: Resistance Growing?*, Nat'l L.J., Oct. 11, 1982, at 20, col. 2.

<sup>31</sup> The way in which such an approach enables scholars and the judiciary to make the most valuable possible contribution to American public life is eloquently set forth in Fiss, *Objectivity and Interpretation*, 34 STAN. L.R. 739 (1982). See also Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law and the Burger Court*, 96 HARV. L. REV. 4, 60 (1982) (in modern bureaucratic state, courts should be thought of as exercising oversight on behalf of those affected by bureaucracy). For an excellent example of the application of an appropriately self-aware approach to routine statutory interpretation questions arising under the FOIA, see McGhee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).

<sup>32</sup> 677 F.2d 230 (2d Cir. 1982).

<sup>33</sup> *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 92 F.R.D. 468, 471-72 (E.D.N.Y. 1981) (Weinstein, C.J.), *aff'd*, 677 F.2d 230 (2d Cir. 1982). FDIC and Ernst & Ernst reached a settlement agreement that was sealed, pursuant to the district court's protective order, upon the parties' request and a finding that secrecy was in the public's best interest. When the public interest group asked FDIC to disclose the terms of the agreement a year later, FDIC informed the group that Ernst & Ernst had the sole option to disclose under the protective order. After another year elapsed, the group instituted proceedings to modify the confidentiality order. Although the district court granted the group's motion to intervene, it denied the modification request. 677 F.2d at 231-32.

to the judicial branch.<sup>34</sup>

In dealing with an ordinary statute, this response, which correctly states congressional intent, would perhaps be sufficient; but in dealing with issues of constitutional moment, there are few who would consider a resort to original intent to be wholly dispositive of any question.<sup>35</sup> The court would have written a more satisfying opinion had it set forth the perfectly sound structural reasons why FOIA ought not to apply to the judicial branch.

It might have said simply that the principal day-to-day function of the courts is to resolve disputes, usually ones of the most mundane variety, and to do so as efficiently as is consistent with fairness. Unlike an administrative agency, a court ordinarily performs this function under the watchful eye of at least two interested observers — the parties.<sup>36</sup> Hence, there is no danger to be apprehended from judicial collusion with one of the parties; the only possible collusion must involve all the parties. Such “collusion” is more usually called “settlement,” and is generally thought to be a desirable outcome of judicial proceedings. If a member of the public perceives a danger that the settlement of a private lawsuit may prejudice his interests, or those of the public at large, his remedy is to move to intervene in the lawsuit before the settlement is finally approved. Particularly if the underlying action happens to be a FOIA case, the motion is likely to be granted.<sup>37</sup> The citizen will then be heard, and have the

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<sup>34</sup> 677 F.2d at 232.

<sup>35</sup> *But cf. Jaffree v. Board of School Comm'rs*, Civ. No. 82-0554-H 51 U.S.L.W. 2426 (S.D. Ala. Jan. 14, 1983) (prayer in public school does not violate Constitution, since authors of fourteenth amendment did not intend to incorporate Bill of Rights), *stay granted*, 51 U.S.L.W. 3614 (11th Cir. Feb. 11, 1983) (Powell, Circuit Justice); R. BERGER, *DEATH PENALTIES* (1982) (Supreme Court's death penalty jurisprudence unacceptable because unsupported by original intent). While it is unlikely that this approach would command wide scholarly support, it does raise questions concerning the legitimacy of today's judicial review which have not yet received a satisfactory answer. See Levinson, *Book Reviews*, 59 TEX. L. REV. 395, 419 (1981). Any such answer will require a careful synthesis of the elements of continuity and change that characterize the evolution of a constitutional democracy. For an example of such a synthesis in the context of a proposed change in a common law rule, see Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979).

<sup>36</sup> As observed in note 27 *supra*, this statement must be qualified to the extent that ex parte proceedings are permitted.

<sup>37</sup> See *LaRouche v. FBI*, 677 F.2d 256 (2d Cir. 1982) (permitting intervention in FOIA case); *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 92 F.R.D. 469, 471-72 (E.D.N.Y. 1981) (Weinstein, C.J.) (court would have entertained views of public interest

right to appeal, while the parties will be able to rely on the settlement (including any confidentiality provisions it may contain) once it becomes final. In this way, the rights of the public are protected while the courts are enabled to achieve their functions.<sup>38</sup>

The inclusion of an analysis of this type in the *FDIC* opinion would not have changed the court's answer, only its questions. But the change would have been for the better.

## II. THE SECOND CIRCUIT'S FIRST AMENDMENT CASES

Perhaps the most significant of the traditional first amendment cases this term was *McGraw-Hill v. Arizona*.<sup>39</sup> There, several states, seeking information to aid in price-fixing proceedings they had brought against a number of oil companies, served a subpoena seeking information from Platt's Oilgram Price Report, an industry newsletter. The newsletter, a publication of McGraw-Hill, Inc., refused to produce certain documents on the basis that they contained the names of confidential sources. The district court ordered disclosure of the documents and, when this was not forthcoming, held McGraw-Hill in contempt.

On appeal, the Second Circuit reversed per curiam.<sup>40</sup> Rely-

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groups on protective order if intervention had been sought at time of the well-publicized settlement), *aff'd*, 677 F.2d 230 (2d Cir. 1982). The rationale of these cases—that intervenors seeking to protect public rights should be held to only a “minimal” burden of showing that existing representation may be inadequate for that purpose, *see* *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)—should be liberally applied to permit representatives of the public to intervene at any stage of the proceedings to ensure that public watchdog agencies are performing responsibly in the presentation and settlement of their cases. *Cf.* *United States v. ATT*, 1982-2 Trade Cases ¶ 64,979, at 73,143 (D.D.C. 1982) (challenges to settlement brought by various affected groups and heard by courts); *In re IBM Corp.*, 687 F.2d 591 (2d Cir. 1982) (*Amicus curiae* permitted to challenge dismissal of government antitrust suit).

<sup>38</sup> The remaining implication of the exemption of the courts from the FOIA, that their deliberative processes are to be shielded from scrutiny, may be justified by similar structural reasoning—that the protection is necessary to enable them to perform their functions and that the need to issue written opinions makes them adequately accountable to the public. *See* *Lewis*, *supra* note 4, at 803. *Cf.* note 68 *infra* (criticism of use of unpublished opinions).

<sup>39</sup> 680 F.2d 5 (2d Cir. 1982). The appeal was heard by Judges Friendly, Kaufman, and Pierce.

<sup>40</sup> “Because the law regarding the qualified privilege of reporters as it applies in this case is relatively clear,” the court wrote, “there is no need for us to engage in an elaborate exegesis at this time.” *id.* at 6. Subsequent developments suggest the wisdom of this choice. In *United States v. Burke*, No. 82-1028 (2d Cir. Jan. 28, 1983), the court, in the

ing on its decision in *Baker v. F. & F. Investment*,<sup>41</sup> the court reiterated that

to preserve the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.<sup>42</sup>

The subpoena served upon McGraw-Hill was improper because of "the absence of concrete evidence that the information sought was relevant to the underlying antitrust action and could not be obtained elsewhere."<sup>43</sup>

This ruling, although hardly a pathbreaking one,<sup>44</sup> is a welcome instance of first amendment solicitude for those whose messages would otherwise go unheard. By hypothesis, the source

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course of reaching the welcome and correct decision that the rules governing reporter's privilege are the same in the criminal context as they are in the civil one, see *United States v. Cuthbertson*, 630 F.2d 139, 147-49 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), marred its opinion with a footnote of dictum suggesting that the district courts should routinely examine in camera documents for which the privilege is claimed. The question of the propriety of in camera review of such documents has been the subject of considerable dispute, see, e.g., *New York Times Co. v. Jascalevich*, 439 U.S. 1304, 1305 (1978) (Marshall, J.) (in chambers); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *State v. Boiardo*, 83 N.J. 446, 414 A.2d 14 (1980), and the better view is probably that such review should only be carried out as a last resort. It would have been considerably more prudent for the court not to address this question until a case actually presented it.

<sup>41</sup> 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

<sup>42</sup> 680 F.2d at 7.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> Despite the somewhat unpromising beginnings of modern reporter's privilege jurisprudence in *Branzburg v. Hayes*, 408 U.S. 665 (1972), a beginning from which the field may never fully recover, the privilege has now been widely recognized among the Courts of Appeals, see, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). It has also been widely recognized by the states, both in their statutes (25 at last count), see, e.g., IND. CODE § 34-3-5-1 (Supp. 1979); MINN. STAT. §§ 595.021-.024 (1980); MONT. CODE ANN. §§ 26-1-901 to -903 (1979); NEB. REV. STAT. §§ 20-144 to -147 (1977); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1977), and as a matter of state common law, see, e.g., *State v. Siel*, 122 N.H. 254, 444 A.2d 499 (1982); *Senear v. Daily Journal-Am.*, 97 Wash. 2d 148, 641 P.2d 1180 (1982); *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App. 1976); *State v. Saint Peter*, 132 Vt. 226, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974). See generally G. CALABRESI, A COMMON LAW FOR AN AGE OF STATUTES 86 (1982) (consistent course of statutes likely to exert gravitational pull on common law).



in these cases is unwilling to disclose his information except to a reporter under a promise of confidentiality.<sup>45</sup> The effect of recognizing a reporter's privilege is to enable the source's information to become public, thereby maximizing the number of voices competing to put forward their versions of the truth, and so maximizing the possibilities of public enlightenment.<sup>46</sup> The court thus rendered an important service to first amendment values by maintaining its tradition of leadership in this area.<sup>47</sup>

Similarly, in *New York City Unemployed and Welfare Council v. Brezenoff*,<sup>48</sup> the court conducted a thorough and sensitive review of administrative regulations placing limitations on the right of plaintiff welfare-rights organizations to proselytize on the premises of New York City's welfare offices. The court upheld the defendant City officials' time, place, and manner restrictions,<sup>49</sup> but vacated a ban on the solicitation of funds and remanded the case for consideration of whether less restrictive

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<sup>45</sup> Where the terms of the hypothesis are not met, i.e. the source does not insist that his information be communicated only to a reporter and in confidence, obtaining the information would raise no first amendment difficulties.

<sup>46</sup> In any given case, of course, it will seem to the party seeking the information that the privilege serves to make less, rather than more, information available. But, because the very existence of the information would not have come to light without the privilege, this is not even true in the individual case. More significantly, it is certainly not true on an overall basis. If sources insist on confidentiality as a condition of giving information, and the courts remove the possibility of reporters meeting the condition, then the public will be deprived of any knowledge of what the sources have to say. This was the thrust of Justice Stewart's comprehensive dissent in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which warned that, without the privilege, "valuable information will not be published and the public dialogue will inevitably be impoverished," *id.* at 736. The Second Circuit's recognition of the privilege is based on the same rationale, *see Baker v. F. & F. Investment*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

<sup>47</sup> *Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), was the first Court of Appeals case following *Branzburg v. Hayes*, 408 U.S. 665 (1972), to recognize the reporter's privilege. *See also United States v. Burke*, No. 82-1028 (2d Cir. Jan. 28, 1983); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977).

<sup>48</sup> 677 F.2d 232 (2d Cir. 1982). Judge Kearse wrote the majority opinion for herself and Judge Timbers. Senior Judge Murphy of the United States District Court for the Southern District of New York contributed a somewhat opaque partial dissent.

<sup>49</sup> The regulations upheld by the court provided that: (1) plaintiffs would be confined to a designated table, except for one organization representative who could circulate freely about the welfare center's waiting room to converse and to distribute literature; (2) each organization would be limited to two representatives at the table; and (3) organizations desiring to use the table would be required to telephone in advance so that the agency could assure that all organizations would have equal access to the table. *Id.* at 235 n.4.

means could be found to serve defendants' legitimate purposes.

The case is noteworthy not only because of the fullness with which the court explicated the "public forum" doctrine under the first amendment,<sup>50</sup> but also because of the accuracy with which it identified the competing interests at stake. The Second Circuit correctly perceived that its role was to require the defendants to fashion rules that maximized the plaintiffs' ability to communicate their messages, subject only to the necessity of permitting the government to carry out its legitimate functions. It performed this role in a masterly fashion. It should do the same for the next Jules Weberman who comes before it.

The court should also treat the government's claims that imminent catastrophe will flow from greater public knowledge with the same healthy skepticism that it displayed in *Selfridge v. Carey*.<sup>51</sup> In that case, plaintiff rugby players had scheduled a match with the national team of South Africa. A few days before the event was to take place, the defendant governor issued a press release banning the match on the asserted basis that there was an "imminent danger of riot."<sup>52</sup> The district court, after viewing in camera an affidavit from the Superintendent of the State Police said to support the action, found that the governor had failed to meet the heavy burden of showing that there was a need for any prohibition and that the one imposed was the least restrictive alternative.<sup>53</sup> Accordingly, the district court enjoined state interference with the rugby match.<sup>54</sup> The Second Circuit, acting on the same afternoon that the match was to take place,

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<sup>50</sup> For a comprehensive review and reevaluation of the doctrine, see Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979), which collects at 1304 n.112 other cases holding that a welfare office is a public forum. The Supreme Court's most recent pronouncement in the area reiterates the doctrine in the traditional context of a public sidewalk, *United States v. Grace*, 51 U.S.L.W. 4444 (U.S. Apr. 20, 1983) (No. 81-1863) (government may not bar communicative activities on sidewalk in front of Supreme Court building). *But cf.* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 51 U.S.L.W. 4165 (Feb. 23, 1983) (No. 81-896) (public school system may provide union currently representing teachers with access to employee mail boxes and deny it to rival union).

<sup>51</sup> 660 F.2d 516 (2d Cir. 1981). The panel consisted of Judges Newman and Kearse and Judge (now Chief Judge) T.F. Gilroy Daly of the United States District Court for the District of Connecticut.

<sup>52</sup> Meislin, *Albany Calls Off Springboks Match*, N.Y. Times, Sept. 18, 1981, at A1, col. 4.

<sup>53</sup> *Selfridge v. Carey*, 522 F. Supp. 693, 696 (N.D.N.Y. 1981).

<sup>54</sup> *Id.* at 696-97.

affirmed the ruling below in a summary order that basically adopted the reasoning of the district court, while permitting the government to intervene if any dangerous situation did in fact arise.<sup>55</sup>

The opinions in the case reflect a palpable belief that the defendant's motives were political rather than grounded in the public interest and a corresponding determination to hold the government to a high standard of proof in its demonstration of the likelihood of harm that would flow from allowing the game to take place. That attitude is perfectly proper in a case, such as *Selfridge*, where a speaker asserts his right to communicate and the government seeks to prevent<sup>56</sup> or punish<sup>57</sup> the speech for fear of some physical danger. It is equally appropriate where a citizen seeks to assert a common law,<sup>58</sup> statutory,<sup>59</sup> or constitutional<sup>60</sup> right of access to information in the hands of the gov-

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<sup>55</sup> 660 F.2d 516 (2d Cir. 1981) ("the game may be played, but the defendants are not prevented from taking steps, including cancellation or termination of the game, to prevent any dangerous situation from getting out of control"). As it turned out, 300 spectators and 1000 demonstrators attended the match, and no violence occurred. Montgomery, *Protesters in Albany Shout as Springboks Triumph in Rainfall*, N.Y. Times, Sept. 23, 1981, at A1, col. 1, B2, col. 5.

<sup>56</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

<sup>57</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>58</sup> In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the Court described the common-law right of access as one whose "contours have not been delineated with any precision," *id.* at 597, and, in language that suggested that it was not particularly hospitable to a broad reading of the concept, declined to delineate them itself, *id.* at 599. Nonetheless, it was willing to assume *arguendo* that the right was applicable to the material at issue, *id.*, and decided the case on purportedly statutory grounds. While this history cannot be particularly encouraging to advocates of an expanded common law right of access, it may be of significance that in *Nixon* the right was being asserted against the judicial branch itself. The idea may still have a future, particularly on the state level, see, e.g., *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 637 P.2d 966 (1981), and particularly after the history of the doctrine is written.

<sup>59</sup> FOIA states that in a suit to compel disclosure "the burden is on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B) (1976). See *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) ("An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA"). For a comprehensive survey illustrative of the current statutory situation on the state level, see Comment, *The Pennsylvania Right to Know Statute: A Creature of the Legislature Shaped by the Judiciary*, 82 DICK. L. REV. 749, 749 n.4 (1978) (listing of 47 state statutes granting access to public records).

<sup>60</sup> In light of the judicial and scholarly attention constitutional claims of access are currently receiving, see note 11 *supra*, it may well be that a unified theory is in the wings. Such a theory might appropriately incorporate the familiar doctrine which the court applied in *Selfridge*: that governmental limitations on first amendment rights must

ernment and the government resists on the grounds that release of the material would impede its functioning.<sup>61</sup>

Two final cases, *In re Rosahn*<sup>62</sup> and *In re Fula*,<sup>63</sup> may eventually help teach this lesson. Both arose out of politically-charged robberies,<sup>64</sup> and in both the court extended Supreme Court opinions condemning secret trials for criminal contempt of court<sup>65</sup> to reverse adjudications of civil contempt against recalcitrant grand jury witnesses because the courtroom had been closed over their objections. In view of the often tenuous distinctions between civil and criminal proceedings in the contempt context,<sup>66</sup> this result is unsurprising legally. But it is useful prac-

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be the least restrictive ones that will achieve their purposes and the governmental purposes themselves must be compelling ones. See 660 F.2d at 516. In the access context, this would require that, subject to restraints analogous to those on time, place, and manner (e.g., directing the request to the appropriate official), the government could withhold information only to the extent that it could demonstrate compellingly that the limitation was necessary to enable the agency to perform its lawful functions. Cf. *Cowles Publishing Co. v. Murphy*, 96 Wash. 2d 584, 637 P.2d 966 (1981) (issue of access should be determined by role records sought play in system of government).

<sup>61</sup> As noted at text accompanying note 49 *supra*, this is precisely the way in which the Second Circuit treated the constitutional claim of access for communicative purposes in *New York City Unemployed*. Such a claim, which should be tested by the standards proposed in note 60 *supra*, is conceptually distinct from a claim that release of the information would harm some other private party. Because the citizen's right to know derives from his right to control the actions of his government, and not from any right to appropriate the efforts of other citizens that may have wound up in government files, the case for non-disclosure is likely to be stronger in this context. The public interest should be held to outweigh the private, however, once the information is used to support a government policy decision. Cf. *Munn v. Illinois*, 94 U.S. 113, 126 (1877) (private property becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the country at large").

<sup>62</sup> 671 F.2d 690 (2d Cir. 1982). The decision was written by Judge Mansfield for a panel whose other two members were Chief Judge Feinberg and Judge KeARSE.

<sup>63</sup> 672 F.2d-279 (2d Cir. 1982). Judge Meskill wrote the panel opinion, which was concurred in by Judge Cardamone and Chief Judge Holden of the District of Vermont.

<sup>64</sup> See *In re Rosahn*, 551 F. Supp. 505, 506 & n.2 (S.D.N.Y. 1982); Flaherty, *A Terrorist Conspiracy or Political Repression?*, Nat'l L.J., May 9, 1983, at 8, col. 1. Rosahn was originally charged in state proceedings with participation in the robbery, but those charges were dropped by the government for lack of evidence. See *id.* at 509 n.8.

<sup>65</sup> *In re Oliver*, 333 U.S. 257 (1948). See *Levine v. United States*, 362 U.S. 610, 618 (1960).

<sup>66</sup> The *Rosahn* Court wrote:

Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to insure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system.

tically,<sup>67</sup> since otherwise the prosecutor would have the power to determine the question of public access by his choice of the form of the contempt proceeding.

Because the decisions, in order to protect grand jury secrecy, permit the government to shield from public view the precise demand it is making, they are hardly monuments to American liberty. But because they require that the witness be permitted to refuse the demand in public, they provide a potentially important forum for protest.<sup>68</sup>

In *Rosahn* and *Fula*, the court, confining itself to the problem before it, considered only the individual defendant's right to be tried in public. But the rulings may well have their greatest long-term significance to representatives of the press or public as they seek implementation of the Supreme Court's latest cases holding that there is a first amendment right of access to criminal trials because "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process."<sup>69</sup> The attempt to use these cases in efforts to gain ac-

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671 F.2d at 697. For a state case reaching the same result, see *P.R. v. District Ct.*, 637 P.2d 346 (Colo. 1981). See generally *Universal City Studios, Inc. v. N.Y. Broadway Int'l Corp.*, No. 82-7900 (2d Cir., Apr. '20, 1983) (reversing criminal contempt sanctions because imposed in civil contempt proceeding); Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 678 (1981) (Wisconsin abolished distinction between civil and criminal contempt by statute after concluding it was "an exercise in futility").

<sup>67</sup> But cf. *In re Bongiorno*, 694 F.2d 917 (2d Cir. 1982) (demand for open courtroom must be unambiguous).

<sup>68</sup> After remand, *Rosahn* (like *Fula*, see *Woman Jailed for Contempt in Grand Jury Brinks' Probe*, Associated Press, Mar. 9, 1982), was adjudicated in contempt in an open hearing attended by about 25 chanting supporters. See *Rosahn*, *United Press Int'l*, New York Metropolitan Wire, Feb. 25, 1982. Her appeal, which charged, among other things, that the grand jury was being abused by the government to harass a political activist, was rejected by the Second Circuit on April 21, 1982 in an unpublished order which is summarized in *Rosahn*, 551 F. Supp. at 506. In light of the nature of the case, and the apparent substance to *Rosahn's* claims, see *id.* at 508-09 & n.9, the same concerns the court had just enunciated, see note 66 *supra*, made this a particularly inappropriate occasion for it to indulge in the dubious practice of writing an opinion but withholding it from publication. See generally Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); Feinberg, *U.S. Appeals Court: Separating the Significant from the Trivial*, N.Y. Times, Feb. 28, 1983, at A14, col. 4; Chambers, *U.S. Appeals Court Restricts Use of Opinions by Lawyers*, N.Y. Times, Feb. 21, 1983, at B1, col. 1.

<sup>69</sup> *Globe Newspaper Co. v. Superior Ct.*, 102 S. Ct. 2613, 2620 (1982). See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).

cess might have the desirable effect of requiring the court to focus on the underlying unity of self-expression and access claims.

## CONCLUSION

Because there is in modern America no unitary idea of what constitutes political truth,<sup>70</sup> political truth in modern America is synthetic. It must be constantly assembled by the public from the variety of incongruous materials that the first amendment bazaar offers. Today, failure of the people to formulate, transmit, and enforce political instructions accurately reflecting informed public opinion will not result from the citizens' failure to receive a truth,<sup>71</sup> but rather from their inability to create one properly, because they lack some vital ingredient.<sup>72</sup>

This term's rulings of the Second Circuit have been solicitous of the right of the electorate to maintain a dialogue with itself, a right indispensable to political organization,<sup>73</sup> but insufficiently solicitous of its right to maintain a dialogue with the government, a right indispensable to the translation of political organization into political control of the government by the people.<sup>74</sup>

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<sup>70</sup> Cf. W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 115 (1975) (social and legal changes visible in 1820s reflected "that the age of moral certainty had passed and that truth could no longer be seen as a unitary set of values formulated by God and readily ascertainable by man"). The implications for the law of the absence of God were sketched out with his customary grace by Professor Arthur Leff in *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

<sup>71</sup> Cf. *John* 8:31-32 (by obeying teachings of Jesus "you will know the truth, and the truth will set you free").

<sup>72</sup> Cf. A. TYLER, *DINNER AT THE HOMESICK RESTAURANT* 293 (1982) (without bananas, eggplant soup is nothing).

<sup>73</sup> See generally *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *Whitney v. California*, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring).

<sup>74</sup> Cf. AMERICAN BAR ASSOCIATION SECTION OF LABOR LAW, *THE DEVELOPING LABOR LAW* 309-22 (1971) (employer must provide information necessary for union to represent members intelligently).

