

The Culture of Transparency:
The Right to Know in American Culture

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Mr. President, fellow Quest club members, and guests:

The reading and research done in conjunction with this paper has produced some personal pleasures and delight. If you will indulge me for a few moments, I would like to quote from the paper presented by my grandfather 65 years ago this month. I confess I was unaware of his membership, and I am grateful that members of the nominating committee were apparently unaware of this legacy as well. In his first paper, he stated, "I must confess that I was floored by the speed with which the chairman of the noon day program committee immediately called all freshmen members of this august organization. I am thankful for the fact that he left me till last, giving me a little chance to adjust and adapt myself to this group of which Ernie Gallmeyer, that champion speechmaker, says it even gives him an inferiority complex." I must confess that I am feeling a little of that family connection right now.

Almost exactly 25 years later, his nephew and fellow Quest member Walter P. Helmke, deceased one year ago, presented a paper on "Privacy and the Public's Right to Know". Many of the issues and questions raised by that presentation remain pertinent today and will be further addressed. It is almost impossible to discuss the "right to know" without also touching on its counterpoint, "the right to privacy". More on this later.

But before delving into that, is there even in fact a right to know? Rights are defined as legal, social, or ethical principles of freedom or entitlement, the fundamental normative rules about what is allowed of people or owed to people according to a legal system, social convention, or ethical theory. They are considered fundamental to civilization and regarded as the pillars of society and culture.

Despite this relatively rigorous definition, there continues to be considerable disagreement about what precisely is meant by the term "right". The Bill of Rights guarantees freedom of speech and of the press, and the Universal Declaration of Human Rights adopted by the United Nations General assembly includes a right to privacy as well. Neither addresses a right to know.

Though not stated specifically in the Bill of Rights, the right to privacy has gradually come to the forefront, frequently nudged along by technological developments. In the late 1800's, this included the development of the telephone (and its attendant party lines and human operators) as well as photography. Further intrusions were possible with the development of radio and television, and continued with the rise of the internet. Privacy famously was referred to by Samuel Warren and Louis Brandeis as the "right to be let alone" in an article in the Harvard Law Review in December, 1890. The Supreme Court has gradually acknowledged this right, primarily as an extension of the First, Fourth, and Fifth amendments. Though the definition of this concept remains challenging, it can be thought of as the prerogative to be "masters of our domain," including body, home, property, thoughts, secrets, and identity. It also implies the ability to choose what parts of this information can be disclosed to others, as well as when and how we choose to disclose such information. Certainly, the right to privacy is undergoing pronounced additional scrutiny and review in the age of social media and the internet.

Though not delineated in the Bill of Rights, the right to know, and for that matter the need for secrecy, is not a recent development. In a missive to Patrick Henry during the Revolutionary War, George Washington stated that "there are some secrets on the keeping of which so depends, often times, the salvation of an army. Secrets which cannot, at least ought not, to be entrusted to paper; nay which none but the Commander-in-Chief at the time should be

acquainted."

I believe the right to know can be viewed in several contexts:

-Is it an individual's right to know? Does he/she have a right to access the information that the government or others have acquired of an individual?

-Is it a public right to know? This essentially requires a free press, for an individual cannot be expected to have the resources or time to adequately fulfill this function. The Founders recognized the absolute necessity of a free press in democracy, even viewing it as the fourth branch or estate of the government. Thomas Jefferson stated, "Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter" as well as "When the press is free and everyone able to read, all is safe". (Jefferson became a little less enamored of the press by his Second Inaugural address, when he stated, "... the artillery of the press has been leveled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to our freedom . . . are deeply to be regretted inasmuch as they tend to lessen its usefulness..., and the offenders have therefore been left to find their punishment in the public indignation.) Freedom of the press may be defined as the right of the press to publish information of public interest within the limitations of the laws relating to national security, libel, and obscenity without the prior permission of the government. Freedom of information or the right to know deals with the proper limitations of those laws.

-Finally, is it the right of the government to know and seek certain facts about its people, as an extension of promoting the general welfare, and providing for the safety of its people from both internal and external threats. This aspect is in stark contrast to the right to privacy.

The men who declared independence in 1776, like those who gathered in Philadelphia in 1787, knew that they would have to build an entirely new political structure. What emerged from their deliberations was a system based on a kind of openness the world had not previously known. Standing in opposition to authority based on mystery and secrecy was a simple proposition of democratic theory: true power could rest only on the informed consent of the governed. James Madison argued this point forcefully: "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."

After the Revolutionary War, for the most part the United States became relatively isolationist. The country chose to primarily focus on preserving the fragile democracy, avoid foreign entanglements, and focus on continental expansion. This began to change at the end of the 19th century. The United States became an economic powerhouse and could no longer avoid its position in the world. Despite being re-elected on a pledge to keep the United States out of the war in Europe, by 1917 President Woodrow Wilson could no longer avoid involvement in foreign conflict.

Responding to multiple acts of sabotage, President Wilson sent a set of proposals to Congress two days after The United States entered World War I. In his State of the Union address in December, 1917, Wilson argued in favor of the bill:

"There are citizens of the United States, I blush to admit, born under other flags, but welcomed under our generous naturalization laws the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life; who have sought to

bring the authority and good name of our government into contempt, to destroy our industries where ever they thought it effective for their vindictive purposes to strike at them, and to debase our politics to the uses of foreign intrigue...

I urge you to enact such laws at the earliest possible moment and feel that in doing so I am urging you to do nothing less then save the honor and self respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out. They are not many, but they are infinitely malignant, and the hand of our power should close over them at once. They have formed plots to destroy property, they have entered into conspiracies against the neutrality of the government, they have sought to pry into every confidential transaction of the government in order to serve interests alien to our own."

The bill passed three months after introduction as the Espionage Act of 1917, and made it a crime to convey information with intent to interfere with the operation or success of the Armed Forces or to promote the success of its enemies. It also was illegal to convey reports or statements with the intent to interfere with the military, to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or to obstruct recruiting of the same.

The Bill remains part of the US code. Among many others, it was used to convict fellow Hoosier Eugene V. Debs, Socialist Party presidential candidate, for making a speech that obstructed recruiting. Amazingly, he in fact ran for President in 1920 while still incarcerated. In 1921 his sentence was eventually commuted by President Warren Harding, no paragon of virtue himself, after serving nearly five years of his sentence. In June, 2013, Edward Snowden was also charged under the same act.

War is indeed one of the great engines of governmental secrecy. The United States has been in a nearly constant state of conflict, either hot or cold, from 1940 to the present day, with

the comparative exception of the 1990's. In particular, the American - Soviet balance of power brought about the heyday of American secrecy, made evident in new laws and new institutions. The most visible was the Central Intelligence Agency, established by the National Security Act of 1947 to coordinate clandestine intelligence functions of many other organizations scattered throughout the government. The National Security Agency came into existence by edict from President Harry Truman in 1952, without even congressional knowledge or oversight. Even the intelligence community referred to the NSA as "No Such Agency".

Anti-Communism reached peak fervor in the 1950's, led by Senator Joe McCarthy. The McCarthy era brought about the passage of the McCarran Internal Security Act, passed after being vetoed by President Truman. Truman sent a lengthy message to Congress in which he criticized specific provisions of the act as "the greatest danger to freedom of speech, the press, and assembly since the Alien and Sedition Laws of 1798, a mockery of the Bill of Rights, and a long step towards totalitarianism." Astoundingly, the House on the very same day overrode his veto without further debate by a vote of 286-48, and the Senate overrode it the next day 57-10. The bill modified the Espionage Act of 1917, removing the "intent" to harm or aid requirement and make "mere retention" of information a crime no matter what the intent. As an interesting footnote, the bill was used to revoke the passport of renowned singer and actor Paul Robeson.

With the decline of McCarthyism, there was a growing sense that government information needed to be made available to the public. Many also asserted that there should generally be governmental subservience to the individual as an inherent right. This viewpoint was led most notably by Congressman John Moss of California, chairman of the government information subcommittee. It took him six sessions of Congress to successfully get the bill passed. It was reluctantly signed by President Lyndon Johnson in 1966, who believed that certain

types of unclassified documents should still remain secret. The act applies to agencies of the executive branch of government and has nine specific exemptions including areas of national defense, foreign policy and trade secrets. It is noted with irony that Donald Rumsfeld, then a US Representative from Illinois, was one of the major cosponsors of this bill.

The Privacy Act of 1974 amended this bill, prohibiting the disclosure of information from government records without the written consent of the individual, again with certain exceptions noted. It also reinforced methods by which individuals could seek access and amend their own records.

President Johnson's concerns about freedom of information and the right to know were to become more apparent in the early 1970's. Former Marine First Lieutenant Daniel Ellsberg had become disillusioned with the war in Vietnam. He had spent two years there as a member of the State Department and on his return worked on a top-secret study of classified documents on the conduct of the war that had been commissioned by Secretary of Defense Robert McNamara. These subsequently came to be known as the Pentagon Papers.

The release of these papers was politically embarrassing to multiple administrations as well as the Department of Defense. Upon hearing of their initial publication, Nixon's chief of staff, HR Haldeman, made the following comment to the President: "To the ordinary guy, all this is a bunch of gobbledygook. But out of the gobbledygook comes a very clear thing. You can't trust the government; you can't believe what they say; and you can't rely on their judgment and the implicit infallibility of the president, which has been an accepted thing in America and is badly hurt by this, because it shows that people do things the President wants to do even though it's wrong, and the president can't be wrong."

As the Papers reflected poorly mainly on prior administrations, Nixon's initial inclination was to essentially ignore their publication. The Papers might have faded away quietly had that course been followed. But Nixon, not known for having the highest of moral standards himself, was swayed by Haldeman as well as his Secretary of State Henry Kissinger. The Nixon White House began a campaign against Ellsberg personally (including a burglary of his psychiatrist's office), and against further leaks by creating what became known as the White House plumbers. They infamously were responsible for the bungled Watergate burglaries, cover-up, and subsequent constitutional crisis.

The Nixon administration made multiple attempts to cease publication of the Pentagon papers. Judge Murray Gurfein declined to issue such an injunction writing that "the security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know." On June 30, 1971 the Supreme Court agreed with this in a 6–3 decision, though the 9 Justices wrote 9 different opinions disagreeing on significant, substantive matters. Politicians weighed in with their opinions as well. Indiana Senator Birch Bayh stated, "The existence of these documents, and the fact that they said one thing and the people were led to believe something else, is a reason we have a credibility gap today, the reason people don't believe the government. . . . There is a difference between what the President says and what the government actually does, and I have confidence that they are going to make the right decision, if they have all the facts." Nixon's own Solicitor General Erwin Griswold later called the Papers an example of "massive over-classification with no trace of a threat to the national security." It is generally conceded that the Pentagon Papers had little or no effect on the ongoing war because they dealt

with events and documents written years before publication.

However, a result of the Pentagon Papers and subsequent Watergate affair was the introduction and passage of the Government in the Sunshine Act in 1976. The name stems from a well-known quote made by future Supreme Court Justice Louis Brandeis in 1913 that "sunshine is said to be the best of disinfectants". With 10 specified exemptions, this act provides that every portion of every meeting of a federal agency, including Congress and federal commissions, be open to public observation. The bill passed in the Senate by a vote of 94 - 0 and in the House by a vote of 391 - 0. Two years later, the Presidential Records Act was passed, granting access to all official documents of former Presidents after no more than 10 years.

The next major advance in transparency in government was the bipartisan Commission on Protecting and Reducing Government Secrecy chaired by US Senator Daniel Patrick Moynihan. The Commission was tasked with conducting "an investigation into all matters in any way related to any legislation, executive order, regulation, practice, or procedure relating to classified information or granting security clearances." After three years of study, the commission released their conclusions in 1997. Their were multiple key findings including:

- Secrecy is a form of government regulation.
- Excess of secrecy has significant consequences for the national interest when policymakers are not fully informed, the government is not held accountable for its actions, and the public cannot engage in public debate.
- Some secrecy is important to minimize inappropriate spread of details in relation to national defense and ongoing security operations, as well as to allow public servants to secretly consider a variety of policy options without fear of criticism

-The best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.

-secrets in the Federal government are whatever anyone with a stamp decides to stamp secret. This inevitably produces problems where mistakes might be avoided with a more open system.

-new legislation is needed to set forth the principles for what may be declared secret.

Attitudes towards transparency changed after the terrorist attacks of 9/11 and Congress rushed to pass legislation to strengthen national and international security controls. The result was The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or USA PATRIOT act. This legislation deals with increasing domestic security against terrorism, increasing surveillance programs, allows financial tracking and anti-money laundering measures, enhances border security, and removes obstacles to terrorism investigation. The bill ran 342 pages and has generated its share of controversy. Liberal documentarian Michael Moore brought this aspect to attention in his controversial film Fahrenheit 9/11. He recorded US Congressman John Conyers, Jr. as saying "We don't read most of the bills. Do you really know what that would entail if we read every bill that we passed?" He then rushed to answer his own question asserting that if they did, "it would slow down the legislative process". As a dramatic device in the film, Moore then hired an ice cream van and drove around Washington, DC with its loudspeaker, reading the bill out loud to puzzled passersby, including several US senators.

Controversial elements of the bill include indefinite detention of immigrants, permission for law-enforcement to search homes or businesses without the owner's or occupant's consent or knowledge, expanded use of national security letters which allow the FBI to search telephone, email, and financial records without court order, and expanded access to business records, including library and financial records. Since its passage, several legal challenges have been brought against the act, and federal courts have ruled that a number of provisions are indeed unconstitutional. The bill has been re-authorized twice, in 2011 and 2015. Certain parts dealing with mass and a global surveillance were addressed by the USA FREEDOM act, passed in 2015 as well.

Some of these pervasive and primarily hidden aspects of the PATRIOT Act came to the public's attention in 2013. Without prior authorization, computer expert and former CIA employee Edward Snowden leaked classified information from the National Security Agency. His disclosures revealed numerous global surveillance programs, run by the NSA with the cooperation of telecommunication companies and European governments. He came to international attention after multiple stories based on the leaked materials appeared in the media. In June, 2013 he was charged with two counts of violating the Espionage Act of 1917. The same month, he flew to Russia where he has been granted asylum and currently lives in an undisclosed location while continuing to seek asylum. He has been described as a hero, whistleblower, dissident, traitor, and patriot. His disclosures have opened debate over issues of mass surveillance, government secrecy, and the balance between national security and informational privacy.

The United States continues to operate under the general consensus that secrecy runs counter to democratic rule and can encourage disruption and corruption of our democratic

institutions. As Joseph Pulitzer wrote, "There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy".

But have we in fact gone too far in this principle? Is there a place for closed door discussion and meetings? Particularly in our current realm of highly polarized politics, there may indeed be a place for this. It is interesting to note that in the formative years of our nation, the need for closed door discussion was both recognized and mandatory. The First Continental Congress began by establishing rules of conduct for their weighty deliberations. High on the list was the requirement that "the doors be shut during the time of business. Members were to consider themselves under the strongest obligations of honor, to keep the proceedings secret, until the majority shall direct them to be made public." The Second Continental Congress went even farther, imposing a compulsory oath of secrecy in which each member pledged "under the ties of virtue, honor and love of his country, not to divulge, directly or indirectly, any matter or thing agitated or debated in Congress" unless Congress gave its express permission.

These principles were reapplied in 1787 when the Constitutional Convention met in Philadelphia. The sessions were conducted in a total information blackout, with sentries posted at the doors and the convention's deliberations protected under the rule that "nothing spoken in the house be printed, or otherwise published or communicated without leave." The Revolutionary War was over. National security could no longer be the reason for covering the deliberations in secrecy. George Washington, President of the convocation, provided insight to why this was when chastising a member who had been "neglectful" in leaving a copy of its records in public view in the state house. "I must entreat our gentlemen to be more careful, lest our transactions get into the newspapers, and disturb the public repose by premature speculation." Furthermore, the records of the Convention contain passages further explaining

this necessity:

"It was best for the Convention for forming the Constitution to sit with closed doors, because opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit. Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety in truth, and was open to the force of argument."

Interestingly, in his paper 200 years later Mr. Helmke, a former Indiana state senator, made reference to this necessity as well: "The late-night meetings at the Columbia Club for Republicans and Indianapolis Athletic Club for Democrats have continued too long and serve too useful a purpose . . . to be terminated".

These practices were viewed with suspicion in the post-Watergate era. As we have already heard, closed-door meetings have been virtually outlawed. Generally, most people would view this transparency as good. But a concurrent casualty is the inability to conduct candid conversation and subtle negotiation. Closed doors do in fact provide space for brokering complex issues where nothing is settled until everything is settled. Focused interest groups and politicians seeking the spotlight can prevent a compromise before it is even formed. Former Senate majority leader Tom Daschle has stated that "the lack of opportunities for honest dialogue and creative give-and-take lies at the root of today's dysfunction".

I hope to some extent you will forgive me for the somewhat mad and furious 50 yard dash of what is truly a complex, convoluted, and controversial topic. Time constraints prevent dealing with multiple ancillary topics that are germane and timely, some of which may be worthy of their own presentation. Some of these could include:

- WikiLeaks, defender or destroyer of democracy
- mass and global surveillance in the age of terrorism
- the death of privacy in the age of the Internet
- maintaining a free press in the presence of declining revenues and readership
- fake news, the new yellow journalism

For centuries, the right to know has been recognized as a foundation of democratic society. This has not changed in the 21st-century and was even emphasized last week at, of all places, the Golden Globes awards ceremony. The noted political commentator and talking head Meryl Streep made the following eloquent observation when accepting an award: "This brings me to the press. We need the principled press to hold power to account, to call them on the carpet for every outrage. That's why our Founders enshrined the press and its freedoms in our Constitution. So I only ask ... all of us in our communities to join me in supporting ... journalists, because we are going to need them going forward, and they will need us to safeguard the truth."

What has changed dramatically in the 21st Century is the technology to both spread information, much of it uncensored and unverified, as well as gather information on individuals in the populace. It seems irrefutable that some sacrifice of individual privacy may be necessary in an age of global terrorism. We live in a world in which small numbers of people are plotting to

take the lives of countless innocent people. Our national security system works to contend with this, inevitably operating in a cloud of secrecy. Leaks within this realm run the serious risk of jeopardizing lives and increasing the possibility of terrorism.

A critical issue is how much control should the government have over information it prefers to keep to itself? There is, of course, no simple, clear-cut answer. In fact the answer may be a moving target. In war, that need will of necessity be greater. The right to privacy and the right to know will always be, to some degree or another in conflict with each other. The government should and must have areas of privileged information clearly defined by law. And in a democracy, the electorate must have access to as much knowledge as possible to be adequately and appropriately informed. The balance will depend to a great degree on respective trust, primarily of the electorate of their chosen officials but also to a great extent of the press. It remains to be seen what impact nontraditional news sources may have on this relationship. Those who are entrusted with these responsibilities will hopefully be guided by moral principles of justice, truth, and decency, thereby maintaining the solid principles of democracy.

BIBLIOGRAPHY

Assange, Julian. *Cyberpunk: Freedom and the Future of the Internet*. London, UK: Bennett, Coleman & Co. Ltd, 2013.

Brin, David. *The Transparent Society*. Reading, MA: Addison Wesley, 1998

Carter, Joseph. *Freedom to Know*. New York, NY: Parent's Magazine Press, 1974

Estulin, Daniel. *Deconstructing Wikileaks*. Chicago, IL: Trine Day LLC, 2012

McClellan, Grant S, editor. *The Right to Privacy*. New York, NY: H. W. Wilson Company, 1976

Riley, Tom and Harold Relyea, eds. *Freedom of Information Trends in the Information Age*. Totowa, NJ: Frank Cass and Co., 1983

Schoenfeld, Gabriel. *Necessary Secrets: National Security, the Media, and the Rule of Law*. New York, NY: W. W. Norton and Co., 2010

Theobaris, Athan G., editor. *A Culture of Secrecy: The Government Versus the People's Right to Know*. Lawrence, KS: University Press of Kansas, 1998