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ADDRESS

BY

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BEFORE

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

8:00 P.M.
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42 WEST 44TH STREET
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I would like to speak to you this evening about confidentiality and democratic government. The subject is an important one. It is complicated and has many facets. I do not suggest there are easy answers. I do suggest, however, that public understanding of the issues involved and the relationship among the issues is extremely important. The bar as a profession has an enormous responsibility to help clarify these issues. My belief is that understanding may be increased by putting together certain doctrines and values with which most of us would agree. The relationship among these doctrines and values may have been obscured in the recent past. If hard cases sometimes make bad law, emergency situations also have distorted our perspective. The public good requires that we try to correct that distortion.

In recent years, the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government. Any limitation on the disclosure of information about the conduct of government, it is said, constitutes an abridgement of the people's right

to know and cannot be justified. Indeed, it is asserted that governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny. This perception of the relationship between confidentiality and government has been shaped in large measure by the Water-gate affair. The unfortunate legacy of that affair is a pervasive distrust of public officials and a popular willingness to infer impropriety. Skepticism and distrust have their value; they are not the only values to which our society must respond.

Our understanding of what is involved in the present controversy over government confidentiality is further inhibited by the very words sometimes used to describe the legal authority of the Executive branch to withhold information. I am referring, of course, to the term "executive privilege." The term fails to express the nature of the interests at issue; its emotive value presently exceeds and consumes what cognitive value it might have possessed. The need for confidentiality is old, common to all governments, essential to ours since its formation. The phrase "executive privilege" is of recent origin. It apparently made its first appearance in the case law in a Court of Claims

opinion by Mr. Justice Reed in 1958. It is only in the last few years that the phrase has preempted public discussion of governmental confidentiality, and the phrase has changed in meaning and connotation. Because it has been seen against the background of the separation of powers, and in this setting has often involved the directive of the President, the phrase has come to be viewed by the public as an exercise of personal presidential prerogative, protecting the President and his immediate advisers or subordinates in their role of advising or formulating advice for the President. Whether or not disclosure in response to congressional demands should be withheld only by Presidential directive, sweeping as was the case with President Eisenhower's order, or specific as President Kennedy promised, the phrase "executive privilege" has ceased to be a useful description of what is involved in the need for confidentiality. Our ability to analyze the legal and public interests involved has become a prisoner of our vocabulary. Much more is involved than the President's personal prerogative standing against the people's right to know. The problem is the need for confidentiality and its limitations in the public interest for the protection of the people of our country.

Let me suggest starting points for an analysis of the place of government confidentiality in our society. Government confidentiality does not stand alone. It is closely related to the individual's need for privacy and the recognition we frequently give to the needs of organizations for a degree of secrecy about their affairs. It also exists alongside the American citizenry's need to know and government's own right to investigate and discover what it needs to know. Those rights are not always consistent or fully compatible. They are circumscribed where they conflict. Yet sometimes these diverse interests are inter-related. One reason for confidentiality, for example, is that some information secured by government if widely disseminated would violate the rights of individuals to privacy. Other reasons for confidentiality in government go to the effectiveness --and sometimes the very existence -- of important governmental activity. Finally we should recognize that if there is a need for confidentiality, it is not necessarily based upon the doctrine of separation of powers found in our Constitution.

That doctrine may condition or shape the exercise of confidentiality, but governments having no doctrine of separa-

tion of powers have an essential need for confidentiality, and the doctrine does not diminish the need.

At the most general level of analysis, the question of confidentiality in government cannot be divorced from the broader question of confidentiality in the society as a whole. The recognition of a need for it reflects a basic truth about human beings, whether in the conduct of their private lives or in their service with the government. Throughout its history our society has recognized that privacy is an essential condition for the attainment of human dignity -- for the very development of the individuality we value -- and for the preservation of the social, economic, and political welfare of the individual. Indiscriminate exposure to the world injures irreparably the freedom and spontaneity of human thought and behavior and places both the person and property of the individual in jeopardy.

As a result, protections against unwarranted intrusion whether by the government or public have become an essential feature of our legal system. Testimonial privileges protect the confidentiality of the most intimate and sensitive human relationships -- between husband and wife, lawyer and client, doctor and patient, priest and penitent.

A number of the rights enumerated in the Constitution's first ten amendments are said to cast "penumbras" which overlap to produce the "right to privacy," a shadow that obscures from public view and intrusion certain aspects of human affairs. Several amendments -- most obviously the First and the Fourth -- mark off measures of confidentiality. The First Amendment -- guaranteeing freedom of expression -- shields the confidentiality of a person's thoughts and beliefs. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." In spirit this is an expression of the confidentiality of the person and his property and a recognition that a fundamental element of individuality would be sacrificed if all aspects of one's life were exposed to public view. In Katz v. United States the Court held that the Fourth Amendment guards not only the privacy of the person but also the confidentiality of his communications.

The need for confidentiality applies not only to individuals but also to groups, professions, and other social organizations. The Supreme Court in NAACP v. Alabama noted that public scrutiny of membership lists might well expose the members to "economic reprisal, loss of employment, threat

of physical coercion, and other manifestations of public hostility" and thereby condition their freedom of association upon their payment of an intolerable price. The point of the case is plain enough. Public disclosure would have destroyed the NAACP. Confidentiality was indispensable to its very existence. The claim of the news media for a privilege to protect the confidentiality of their sources of information is based on a belief that public disclosure of news sources, coupled with the embarrassment and reprisals that might ensue, could well deter informers from confiding in reporters. It would diminish the free flow of information. Another manifestation of the need for confidentiality of groups may be found in the law's protection of trade secrets. Again, businesses require some privacy as a prerequisite to economic survival.

Confidentiality is a prerequisite to the enjoyment of many freedoms we value most. The effective pursuit of social, economic, and political goals often demands privacy of thought, expression, and action. The legal rights created in recognition of that need undoubtedly infringe on the more generalized right of the society as a whole to know. But the absence of these legal rights would deprive our society of the quality we prize most highly.

The rationale for confidentiality does not disappear when applied to government. Indeed the Supreme Court recently noted that confidentiality at the highest level of government involves all the values normally deferred to in protecting the privacy of individuals and, in addition, "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making."

I doubt if we would wish the conferences of the United States Supreme Court to be conducted in public. We accept as fact that each Justice must be free to confer in confidence with his colleagues and with his law clerks if decisions are to be reached effectively and responsibly. And insofar as the product of the Supreme Court is primarily its words, the words it speaks publicly must be shaped and nurtured with care. We realize that some words are so important that their meaning should not be diluted by exposure of the often ambiguous process by which they were chosen.

For similar reasons, confidentiality is required in the decision-making processes with the Executive branch. As the Court recently stated, "Human experience teaches that

those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." */

Now I realize that linking law's protection of personal or organizational privacy with the government's need for confidentiality may seem disingenuous. It is of course true that a good deal of the law protecting individual and organizational privacy has been created to guard against the intrusion of government. But the origin of the threat to privacy should not obscure the value to be protected. It is the underlying wisdom about human nature found in the law of individual privacy that suggests the analogy. Much as we are used to regarding government as an automaton -- a faceless, mechanical creature -- government is composed of human beings acting in concert, and much of its effectiveness depends upon the candor, courage and compassion of those individual citizens who compose it. They are vulnerable to the same fears and doubts as individuals outside government. Undoubtedly we expect government officials to rise to the responsibilities they must meet. But this is just as true of the demands of private life.

*/ U. S. v. Nixon (1974).

Moreover, the law's protection of privacy does not only go to individuals but also to organizations, some of which rightly regard themselves as important adjuncts and correctives to the government. Just as the ability of these organizations to function effectively has come within the law's concern, so must the ability of government to function.

Yet of course there is another side -- a limit to secrecy. As a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made. This commitment is embodied in the First Amendment to our Constitution. In a democracy, the guarantee of freedom of expression achieves special significance. The people are the rulers; they are in charge of their own destiny; government depends on the consent of the governed. If the people are to rule, then the people must have the right to discuss freely the issues relevant to the conduct of their government. As Professor Meiklejohn noted, the First Amendment is thus an integral part of the plan for intelligent self-government. ^{*/} But it is equally clear that it is not enough that the people be able to discuss these issues freely. They must also have access to the information

^{*/} Meiklejohn, Political Freedom (1960).

required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government. Our theory of government seeks an informed electorate. As James Madison wrote

"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." */

So it has been urged that the news media should enjoy under the First Amendment an extraordinary right of access to information held by the government. Indeed, it cannot be doubted that our press has assumed a special role as an indispensable communicator of information vital to an informed citizenry. Investigative reporting, however annoying, has often served the public well by discovering governmental abuse and corruption.

The concern over the need of the general public for access to information about government has not gone unanswered. The Freedom of Information Act has conferred a visitatorial right on each citizen to inquire into the myriad workings

*/ (To W. T. Barry, Aug. 4, 1822) 9 Writings of James Madison 103 (G. Hunt ed. 1910).

of government. It is not an exaggeration to observe that the broad provisions of the Act have engendered a general uncertainty as to whether disclosure of almost any government document might not be compelled. The administrative burdens of compliance with the Act are enormous. The demands for information have constantly increased. Between October 1, 1973 and December 1 of that year, for example, the Federal Bureau of Investigation received 64 requests for information under the Act, or 1 per work day. Throughout the whole of 1974, the Bureau received 447 requests. In the current year, the Bureau is now receiving an average of 88 to 92 requests per work day. From January 1 to March 31 of this year, the Bureau received 705 requests, including 483 in the month of March and 161 on March 31 alone. As of March 31, compliance with outstanding requests would require disclosure of more than 765,000 pages from Bureau files. This does not include a request for information relating to the Communist Party which itself would entail over 3,000,000 pages. At present, the information released by the federal government pursuant to the Act, especially when coupled with information released as a matter of course, make it difficult to maintain that the volume of facts and opinions

disclosed to the public about the conduct of government is not truly of leviathan proportions. Yet claims persist that even the Act does not extend far enough and that official secrecy still holds too much sway.

As is so often the case in human affairs, we are met with a conflict of values. A right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government. But a duty of complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity. Moreover, neither the concept of democracy nor the First Amendment confer on each citizen an unbridled power to demand access to all the information within the government's possession. The people's right to know cannot mean that every individual or interest group may compel disclosure of papers and effects of government officials whenever they bear on public business. Under our Constitution, the people are the sovereign but they do not govern by the random and self-selective interposition of private citizens. Rather, ours is a representative democracy, as in reality all democracies are, and our government is an expression of the collective will of the people. The concept of demo-

cracy and the principle of majority rule require a special role of the government in determining the public interest. The government must be accountable, so it must be given the means, including some confidentiality, to discharge its responsibilities.

For similar reasons, the special role of the news media cannot be understood to include a trespassorial easement over all that lies within the governmental realm. The Supreme Court addressed the point when it said:

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies in executive session, and the meetings of private organizations. */

Just last term the Court reaffirmed this principle.

Demands by Congress for information from the Executive, while obviously raising problems of comity among the branches of government, do not change the need of all govern-

*/ Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972)

ments, however organized, for some confidentiality. Such demands, however, emphasize the point that the preservation of confidentiality where really necessary requires special modes of responsibility, as it indeed does in the executive branch. The risk that the confidentiality of information may be breached, even by inadvertence, is of course ever present. In this country, constitutional guarantees create special limitations on the ability of the Executive to prevent unauthorized disclosure of information. The Speech and Debate Clause, for example, confers on Members of Congress and their aides absolute immunity from civil or criminal liability, including questioning by a grand jury, for conduct related to their legislative functions. The Gravel case, in particular, raises the question whether laws legitimately restricting the dissemination of classified or national defense information can provide any assurance of confidentiality. New York Times Co. v. United States, or the so-called Pentagon Papers Case, further demonstrates the inability of the government to prevent publication of classified documents. The apparent lesson to be drawn from such cases is that once information is improperly released, its publication to the world becomes a certainty.

If the dissemination to Congress of some information is to be limited, acquiescence in this responsibility and limitation becomes a duty which must be willingly recognized. The choice which must be made concerns the extent of dissemination, the likely travels of disclosure, and the consequences which may follow. Successful democracies achieve an accommodation among competing values.

No provision of the Constitution, of course, expressly accords to any branch the right to require information from another. Article II does state that the President "shall from time to time give to the Congress information of the State of the Union. . . ," but the decision as to what information to provide is left to the discretion of the President.

So far I have referred only to the free and candid discussion of policy matters that is promoted by the governmental confidentiality. There are, however, several additional contexts in which confidentiality is also required and where the primary effect of disclosure would be to prevent legitimate and important government activity from occurring altogether. Aspects of law enforcement, including the detection of crime and the preparation of criminal prosecutions, cannot be conducted wholly in public. Of

particular importance is the confidentiality of investigative files and reports. The rationale for confidentiality in this regard was stated by Attorney General Robert Jackson in 1941 in declining to release investigative reports of the Federal Bureau of Investigation demanded by a congressional committee. The Attorney General wrote:

"[D]isclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. . . [M]uch of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants -- sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency."

Disclosure could infringe on the privacy of those mentioned in the reports and might constitute "the grossest kind of injustice to innocent individuals." Mr. Jackson observed that "investigative reports include leads and suspicions, and sometimes even the statements of malicious and misinformed people," and that "a correction never catches up with our accusation."

Government must also have the ability to preserve the confidentiality of matters relating to the national

defense. Espionage statutes and national security classification procedures are examples of the acknowledged need to prevent unauthorized dissemination of sensitive information that could endanger the military preparedness of the nation. The Supreme Court addressed the issue in United States v. Reynolds, where disclosure of information possibly relating to military secrets was sought in the context of a civil suit. The Court stated:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

The value of safeguarding the confidentiality of national security intelligence activities has recently been made even more apparent with the publication of Fred Winterbotham's book, The Ultra Secret. Britain's success in learning the Germans' cipher in 1939 later proved to be an important factor in the Allies' victory in World War II. Could anyone claim that Britain should not have worked secretly in

peacetime to prepare itself in case of war? Or that once prepared, it should have disclosed that it had broken the code? To have disclosed that information would have destroyed its usefulness.

Closely related is the need for confidentiality in the area of foreign affairs. History is filled with instances where effective diplomacy demanded secrecy. In the first of his Fourteen Points, President Wilson exuberantly proclaimed his support for "Open Covenants of Peace openly arrived at." As Lord Devlin has recently pointed out, "What Wilson meant to say was that international agreements should be published; he did not mean that they should be negotiated in public." Under our Constitution, the President has special authority in foreign affairs. In numerous decisions, the Supreme Court has recognized the unique nature of the President's diplomatic role and its relationship to confidentiality. Thus, in United States v. Curtiss-Wright, the Court stated that Congress must

"Often accord to the President a degree of discretion and freedom from statutory restrictions that would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy

in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which has never since been doubted."

The inappropriateness of the Judicial branch requiring disclosure of foreign policy information was emphasized in C & S Airlines v. Waterman Steamship Corp., where the Court said:

"The President, both as Commander-in-Chief, and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would not be tolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In United States v. Nixon, the Court strongly intimated that disclosure of information held by the Executive would not be required even in the context of a criminal trial if "diplomatic or sensitive national security secrets were involved," and expressly noted that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities."

In the context of law enforcement, national security, and foreign policy the effect of disclosure would often be to frustrate completely the government's right to know. Government ignorance in these areas clearly and directly endangers what has been said to be the basic function of any government, the protection of the security of the individual and his property.

Even as to national security and foreign policy, of course, the tensions between confidentiality and disclosure continue to place stress on the fragile structure of our government. The desire of Congress to know more about the activities of government in these areas, for example, has recently produced a legislative proposal that would impose extraordinary burdens on the ability of the Executive to conduct electronic surveillance even where foreign powers are involved. It would require the government not only to procure a court order as a precondition to electronic surveillance, but also to report to both the Administrative Office of the United States Courts and to the Committee on the Judiciary of both the Senate and the House of Representatives detailed information, including a transcript of the proceedings in which the order was requested, the names of all parties and places involved in the intercepted com-

munications, the disposition of all records and logs of the interceptions, and the identity of and action taken by all individuals who had access to the interceptions.

The wisdom of this scheme is dubious at best, since it would represent a severe incursion on the Executive's ability both to guard against the intelligence activities of foreign powers and to obtain foreign intelligence information essential to the security of this nation. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress previously disclaimed any attempt to place limitations on the President's constitutional authority in this area. In addition, the Supreme Court has specifically left open the question whether and to what extent the Fourth Amendment, and specifically the warrant requirement, applies to electronic surveillance authorized by the President to obtain information relating to the national security and the activities of foreign powers. In United States v. United States District Court, while holding that the warrant requirement of the Fourth Amendment applied in the domestic security field, the Court expressly stated that "the instant case requires no judgment with respect to the activities of foreign powers, within or without this country." It is not without significance that the words of the Court focus on the subject matter of the surveillance, rather than on the physical location where it is conducted.

It is by no means clear that the proposed legislative measures are compelled by the Fourth Amendment. Indeed, the only two Courts of Appeals to address the issue, the Third Circuit and the Fifth Circuit, have held that the warrant requirement does not apply to national security cases involving foreign powers, and that the President has the authority to conduct such electronic surveillance as part of his military or commander-in-chief and diplomatic responsibilities. I think it is also helpful to recall the exact words of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." It is the "people" whose security is to be protected, not that of foreign powers. The Fourth Amendment was intended to protect the privacy, not of other nations, but of the "We, the People" of this nation. Nor is there a requirement of public disclosure inherent in the Fourth Amendment. It was not designed to compel exposure of the government, but to prevent the unreasonable exposure of the individual. I think all of us understand the impulse which leads to such proposals. It comes in part from a desire to protect citizens from harass-

ment and from unfair prosecutions, and personal abuses of this nature. But this is to misstate the purpose and need of such surveillance; and therefore to misconceive the remedy for possible abuses.

As history has shown, implicit in the concept of government, including democratic government, is the need and hence right to maintain the confidentiality of information. Confidentiality cannot be without limit, of course, and must be balanced against the right of all citizens to be informed about the conduct of their government. An exercise of discretion is clearly required. In each instance the respective interests must be assessed so that ultimately the public interest may be served.

In most governments, the question of which governmental body shall have the authority to determine the proper scope of the confidentiality interest poses no problem. Under our Constitution, however, the answer is complicated by the tripartite nature of the federal government and the doctrine of separation of powers. But history, I believe, has charted the course. For the most part, we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the

other branches and to the public. Competing claims among the branches for information have been resolved mainly by the forces of political persuasion and accommodation. We have placed our trust that each branch will exercise its right of confidentiality in a responsible fashion, with the people as the ultimate judge of their conduct.

The only exception to this rule was established by the Supreme Court last Term in United States v. Nixon. The Court held in effect that need for demonstrably relevant and material evidence in the context of a criminal trial prevailed over the need of the Executive for confidentiality in decision-making. The Court also held, however, that the Executive's right of confidentiality was founded in the Constitution and in the doctrine of separation of powers. Thus, the Court stated:

"The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."

* * *

"Nowhere in the Constitution. . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."

The Court was careful to emphasize that the information sought was not claimed to involve military, diplomatic, or sensitive national security secrets, the disclosure of which the Court has repeatedly suggested could never be compelled and which as a matter of historical fact no court has ever compelled.

The practice as between the Executive and the Congress has been of a similar order. Each branch has traditionally accorded to the other that proper degree of deference and respect commanded by the doctrine of separation of powers and by the concomitant need for confidentiality in government. Attorney General Jackson, in declining to disclose investigative files to the congressional committee, observed that the precedents for such refusals extended to the very foundation of the nation and to the Administration of President Washington. He concluded:

"This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine."

Congress, of course, has an oversight function under our Constitution. But that function has never been thought to include an absolute right of access to confidential information within the possession of the other branches. Its limits are necessarily defined by the legitimate need of the Judiciary and the Executive for confidentiality.

Comparative law may offer an insight in this regard. In resolving legal issues, we have often looked to Great Britain and the Parliament as helpful models. Many of our most cherished notions concerning justice and government have been shaped and influenced by the English tradition. The issue that presently confronts us is no exception. An examination of the British system reveals that little or no confidential information is ever disclosed by the Cabinet to parliamentary committees in the House of Commons. This is so despite the fact that maintaining the confidentiality of such information would be far easier than in this country. Parliamentary committees, for example, have far fewer members and staff than their American counterparts, thus appreciably minimizing the dangers of unauthorized disclosure. Moreover, the sweeping criminal provisions of the British Official Secrets Act, coupled with the absence of a First Amendment, deter unauthorized disclosure to a far greater extent than would be possible under our system.

More generally, having surveyed the democracies of Western Europe, it may be said without equivocation that it is not the practice of governments to disclose sensitive, national security, or foreign policy information to parliamentary committees. Furthermore, congressional committees in this country, through the cooperation and acquiescence of the Executive, receive far more such information than do legislative counterparts in any other country.

The more general question of disclosure by government to the public may also be illuminated by a comparison between the American system and the Swedish system. Under the Freedom of the Press Act, which is a part of its Constitution, Sweden is committed to the "principle of publicity," which states that both Swedish citizens and aliens alike shall have free access to all official documents. The extent of disclosure of official documents in Sweden is exceeded by few, if any, other governments in Western Europe. Sweden's principle of publicity is, however, subject to numerous exceptions specified in its Secrecy Act. These exceptions not only parallel but in many instances exceed the exceptions specified in our own Freedom of Information Act. It is also worth noting that under the

Swedish Act the unauthorized release of a document excepted from disclosure subjects a civil servant to criminal liability. By contrast, under the Freedom of Information Act, it is the arbitrary failure to release a document required to be disclosed that subjects a civil servant to disciplinary action.

Again, when compared with the democratic governments in Western Europe, it is fair to conclude that there is by far a greater degree of public disclosure of information by the United States Government than by any other government. As Professor Gerhard Casper has recently written, "From the vantage point of comparative politics, I think, there can be little doubt that governmental Geheimniskrämerei (petty secretiveness) looms less large in the United States than anywhere else."

Measured against any government, past or present, ours is an open society. But as in any society conflicts among values and ideals persist, demanding continual reassessment and reflection. The problem which I have discussed this evening is assuredly one of the most important of these conflicts. It touches our most deeply-felt democratic ideals and the very security of our nation. I am reminded of the

title which E. M. Forster gave to a collection of his essays, Two Cheers for Democracy. The third cheer, he suggested, must still be earned. I do not share that hesitancy. The structure established by our Constitution itself represents a compromise and a genius for government.

What I have said is not intended to minimize in any way the need for candor between the government and the people to whom it is responsible. Indeed this talk is an exercise in candor -- an attempt to confront issues directly because the issues are there. The issues will not go away. The American public is misused if it does not understand that important values are involved, that these values must be balanced, and that among these values are confidentiality, the right of the people to know, and the right of the government to obtain important information. No trick phrases will solve our problem. Reactions built upon crises in the immediate past are suspect. Rather we must reach back into the sources of our government, and to our own history of endeavor and accommodation, where wisdom has often been exercised to make the difficult choices.

As these choices are made I trust it is the bar's responsibility to enlighten them with understanding, to help

all see them in perspective because that is essential
for the future of our country and for the protection and
freedom of our citizens.