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Combatting the Opposition: English and United States Restrictions on the Public Right of Access to Governmental Information

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I. INTRODUCTION

Societies need vigorous criticism and challenges to their preconceptions to improve governmental decision-making. Public discussion and dissent are particularly essential during national crises, such as military engagements or attempted expansions of governmental powers. Ironically, when public scrutiny is most needed, governments impede the public’s access to information and the public right to criticize governmental activities.¹

Throughout Anglo-American history, those in government have sought to silence their opposition. Depending on the period, governments have utilized different means of limiting criticism. When autocratic principles have predominated, governments have punished criticism directly. As democratic principles overshadowed autocratic political philosophies, direct suppression of public criticism became in-

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¹ “[T]he freedom of speech is a principal pillar in a free Government: when this support is taken away the Constitution is dissolved and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the actions of the Magistrates.” Letter to the author of the Pennsylvania Gazette (Nov. 17-Dec. 8, 1737), reprinted in Freedom of the Press from Zenger to Jefferson 62 (L. Levy ed. 1966).

² In his book Rights on Trial, Arthur Kinoy highlights the role of governmental suppression of political dissent during the 1950's. According to Kinoy, the United States government used extreme measures to suppress all political opposition to escalation of the Cold War. A. Kinoy, Rights on Trial 80-87, 92, 96, 117-18 (1983).

To avoid vigorous opposition to the bombing of Cambodia and United States intervention in the Angolan civil war, the United States executive conducted these military operations in secret. M. Halperin & D. Hoffman, Top Secret: National Security and the Right to Know 1, 14-24 (1977). It is beyond question that the escalation of the Cold War and United States military intervention in the Third World have had enormous effects on the state of world affairs and that extensive public debate should have taken place before the fact.
consistent with contemporary political theory. Accordingly, democratic governments have used more indirect methods to control opposition, such as limiting access to governmental information.

A key element of a democratic system of government is public participation. To participate in democratic self-government, the people need to be informed about the government’s activities. Therefore, as Anglo-American governmental systems have become more democratic, the public right of access to governmental information has been expanded. As the public has gained greater access to information, however, English and United States governments have sought to protect certain governmental functions from public scrutiny. Accordingly, the law of both countries recognizes exceptions to public access designed to protect such areas as national defense and foreign affairs. Although some legitimate grounds exist for withholding governmental information, they are subject to abuse. Governmental leaders can expand and misuse legitimate grounds to prevent the disclosure of embarrassing or negative information, thus erecting a cloak of secrecy to lessen opposition to their actions.

In one striking respect, the English and United States systems differ in their limitations on public access. In England, public access can be limited to protect the operation of the judicial process. By limiting public access to information in the guise of protecting the judicial function, the English government can remove judicial actions from public scrutiny. No such limitation is recognized in the United States.

Restrictions on public access to governmental information lessen the effectiveness of public participation, for without such information, the populace cannot formulate informed opinions about governmental actions. This flaw in democratic self-government is especially destructive when the government restricts public access unjustifiably, for example, to limit the formation or effectiveness of opposition to the current government. If the public is left uninformed, it is deprived of the means with which to compel the government to consider alternatives and to account for sensitive and far-reaching decisions.

II. THE EFFECT OF POLITICAL THEORY ON SUPPRESSION OF DISSERT

The locus of sovereignty, as ascribed by Anglo-American political theories, determines the extent of permissible public criticism of government. When the ruler was regarded as a superior being and as the rightful arbiter of the people, it was manifestly wrong to reprove or censure
the ruler openly. As the ruler came to be viewed as an agent or servant to whom the people delegated certain sovereign powers, it became the duty of every member of the public, at least in theory, to censure the ruler. Accordingly, restrictions on criticism of the government were relaxed.

A. Monarchical and Parliamentary Sovereignty—Direct Suppression of Criticism in England

The growth of the nation-state, with its emphasis on centralized authority and order, was based on the political tenet that every state must have an indissoluble supreme power from which all governmental authority emanates. In the early nation-states, this absolute sovereignty vested in the King. Corresponding legal doctrines defined criticism of the King as treason. For example, in England under the Statute of Treason of 1315, the treasonous crime of imagining the King's death was punished by hanging, disembowelling, or quartering.

The seventeenth century English experience with an autocratic monarchy led to the English Civil War and the English Revolution, which partially shifted the locus of sovereignty from the King to Parliament. The Petition of Right, forced on Charles I by the Parliament of

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5. 1 W. Blackstone Commentaries 48 (1755), reprinted in E. Hudon, supra note 4; accord Leonard, The Tory View: Address to the Inhabitants of the Province of Massachusetts Bay (Jan. 9, 1775), in Great American Political Thinkers 97 (B. Brown ed. 1983).


7. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 98-102 (1984). In Algernon Sidney's Case, 9 How. State Trials 818 (K.B. 1683), the court ruled that an unpublished writing alleging that the King was subject to Parliament and that kings could be deposed constituted constructive treason because to argue that a king could be deposed might lead to his death. In Rex v. Twyn, 84 Eng. Rep. 1064 (K.B. 1663), Twyn was convicted and executed for printing a book that contended the King should be accountable to his subjects. Accord Peacham's Case, 79 Eng. Rep. 711 (K.B. 1629).

1628,9 and the Bill of Rights, to which William and Mary agreed at the end of the English Revolution in 1688,10 established parliamentary supremacy.11 According to the doctrine of parliamentary sovereignty, Parliament can pass any law, no matter how absurd or unfair, and the English judiciary cannot declare it illegal on its merits.12 Judicial review in England is limited to an analysis of legislative procedure. Moreover, because each Parliament is supreme, a Parliament cannot bind its successors and each can undo the acts of previous Parliaments.13

In eighteenth century England, which was governed by a hereditary monarchy and a legislature with hereditary underpinnings, the individuals and entities exercising sovereign powers were considered to be infallible and omnipotent. Under English common law, any criticism of the sovereign rulers, public officers, or the laws and institutions of the country was suppressed as seditious libel.14 The theory underlying the legal doctrines limiting criticism of the government was that such criticism might breed disrespect for the government, thus weakening its authority.15

11. E. Hudon, supra note 4, at 20. A surmise of parliamentary sovereignty contemporaneous with its establishment can be found in the words of Sir Edward Coke: "of the power and jurisdiction of the Parliament, . . . it is so transcendant and absolute, as it cannot be confined either for causes or persons within any bounds." E. Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 36 (1644); accord 1 W. Blackstone's Commentaries 49, 162 (1765), reprinted in E. Hudon, supra note 4, at 20. For a criticism of Blackstone's views on sovereignty in the English system, see E. Barker, ESSAYS ON GOVERNMENT 129-30, 144, 151 (2d ed. 1951).

The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to sound principles of government; but Parliament is not controlled in its discretion, and when it errs, its errors can only be corrected by itself.
See also B. Gupta, COMPARATIVE STUDY OF SIX LIVING CONSTITUTIONS 33-34 (1974).

De facto limitations on parliamentary sovereignty may now exist in the form of public opinion, executive power, and the party machine. B. Jones, BRITISH GOVERNMENT TODAY 210-11 (1972); E. Barker, supra note 11, at 71.
14. E. Hudon, supra note 4, at 21; R. Pound, supra note 8, at 166.
B. American Colonial Rejection of Parliamentary Sovereignty in Favor of Public Participation in Government

Initially, the American colonists espoused English concepts of absolute parliamentary sovereignty. The American settlers were concerned with their rights under the "English Constitution," a term used to designate the Magna Carta, the Declaration and Bill of Rights of 1689, and principles embodied in oral conventions.

When the English sought to tax the colonists and to tighten trade regulations, colonial theorists began to challenge the English Constitution. Arguing that Parliament had exceeded its authority, the colonists drew on their own experience with royal proprietary charters as an underlying contract between people and government and on the theory of inalienable natural rights inuring to the people before the creation of government. From the limits on colonial self-governance imposed by royal charters and colonial status, the colonists came to accept the concept of external limitations on governmental sovereignty. Similarly, the colonists argued that natural law limited parliamentary sovereignty and that any parliamentary act contrary to natural law was void.

In light of their rejection of parliamentary authority, the colonists had to restructure the nature of legislative authority and representation. Eventually, prominent American theorists resolved their quest for an appropriate relationship between people and government by transfer-

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The English Constitution, which is primarily an unwritten set of customary rules evolved over time, contains few guarantees of individual freedoms. A person possesses liberties only if the exercise of these freedoms does not infringe on other laws. H. Street, Freedom, the Individual and the Law 12-13 (5th ed. 1982).


20. G. Wood, supra note 6, at 354-63. See also W. Hocking, supra note 3, at 8-15.
ring sovereignty from the legislature to the people. 21 In the words of Thomas Jefferson, "I know of no safe depository of the ultimate powers of the society but the people themselves." 22 Accordingly, legislative bodies came to be viewed as trustees of the people, accountable to the public will. 23

The theory of a sovereign public prescribed a profoundly heightened role for the general populace in governmental affairs, one that included vigorous debate and criticism of governmental actions. 24 Free discussion of public measures and political opinions was viewed as essential for an informed populace to exercise its sovereign powers. 25 For example, James Madison opined: "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 . . . . A people who mean to be their own Governors must arm themselves with the power which knowledge gives." 26 Thus the press theoretically plays an important role in United States self-government by gathering and presenting to the public information about governmental actions. In essence, the press oversees the operation of democratic institutions. 27

23. G. Wood, supra note 6, at 371.
24. The early American emphasis on public participation in government has been attributed to the colonists' experiences in local self-government, the lack of feudal hierarchies and social rigidities in America, and the extensive discussions of political liberty that occurred throughout the colonial period. L. Leder, supra note 17, at 19-27. See J. Lofton, The Press as Guardian of the First Amendment (1980).

During the colonial period and the first decades of the new republic, the press assumed a formidable position as critic of government. Newsletters to Newspapers: Eighteenth-Century Journalism 237, 247, 303 (1977); Jensen, Book Review, 75 Harv. L. Rev. 456, 457 (1961). The colonists grew interested in freedom of speech and freedom of the press because lawyers' pamphlets, which argued against the Stamp Act, attacked the disallowance of colonial statutes by the Privy Council, and opposed the royal governor's arbitrary conduct, were considered seditious by the royal governors. R. Pound, supra note 8, at 66-67.


27. Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen as a favored class, but to bring fulfillment to the public's right to know"); R.
C. Direct Suppression of Criticism Diminishes as Democratic Principles Predominate

Although Anglo-American political theories have placed sovereignty in the people or in a governmental branch, clear delineations of the locus of sovereignty have given way to murkier realities. The United States government has attained a position of power and entrenchment that is inconsistent with a truly sovereign public. During periodic waves of repression in United States history, the government has shielded itself from criticism by punishing seditious libel.28 The methods of limiting opposition, however, have generally shifted from punishing criticism directly to limiting public access to information.

At the same time, the English system has become less autocratic and more responsive to the popular will. Through the evolution of political theory and the practical operation of the English political system, Parliament has arguably become the repository of the nation's sovereignty and a trustee of the people, much like the United States Congress.29 As a corollary, doctrines that limit public criticism of government in England have been greatly modified. Public discussion and public access to information have expanded as England has progressed from a relatively absolute monarchy to a more limited one, and then to a still more democratic system.30 The evolution of seditious libel and certain contempt of court


29. It is commonly inferred that the House of Commons derives its authority from the people. P. BROMHEAD, BRITAIN'S DEVELOPING CONSTITUTION 167 (1974); see also G. WOOD, supra note 6, at 346-48. Currently, there is a movement in England for the enactment of a bill of rights to protect civil liberties through written guarantees enforceable through judicial review. Such a bill would further limit parliamentary sovereignty. See generally DO WE NEED A BILL OF RIGHTS? (C. Campbell ed. 1980); J. JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS (1980).

30. F. SIEBERT, supra note 3, at 9-13. The Tudor-Stuart autocratic monarchies controlled the press through licensing, which effectively amounted to censorship. E. HUDON, supra note 4, at 9-10. During the eighteenth century, at a time when an arbitrary monarchy was no longer tenable, William Blackstone and Lord Mansfield propounded a theory of liberty of the press. F. SIEBERT, supra note 3, at 380-92. Although this new liberty freed the press from
powers illustrates the decreasing prominence of direct suppression of criticism in democratic systems.

1. The Decline of Seditious Libel

Throughout the evolution of Anglo-American seditious libel law, the amenability of the government to criticism has fluctuated in ways that reflect theories of sovereignty. Because the theory of seditious libel is inconsistent with the democratic political traditions of England and the United States, its use as a means of suppressing opposition has been sharply limited in both countries. In particular, the role of a sovereign public in a democratic system has led to the erosion of the doctrine of seditious libel.

a. The Doctrine of Seditious Libel Under English Common Law

At the beginning of the seventeenth century, a decision of the Star Chamber established seditious libel as a criminal offense. After abolition of the Star Chamber, the English courts adopted this offense predicated on the precept that any written reflection on the government was seditious. At the beginning of the eighteenth century, a prestigious jurist established an all-inclusive rationale for the law of seditious libel:

If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for every Government, that the people should have a good opinion of it. And nothing can be worse to any Government than to endeavour to procure animosities as to the management of it.

If a publication had a tendency to incite the people to change the
existing order, its author or printer could be punished for seditious libel.\(^{35}\) Under the English common law, truth was not a defense to a libel charge because criticism that reflected the truth was believed to have an even more damaging effect on public confidence in the government than false criticism.\(^{36}\)

Because seditious libel law was a creature of the Star Chamber, the common-law procedures that governed grand jury indictments and trial by jury did not apply.\(^{37}\) After the abolition of the Star Chamber, English judges tried to preserve unrestrained judicial authority by restricting the application of these common-law protections in seditious libel prosecutions.\(^{38}\) In an attempt to limit the moderating effect of a jury trial, seventeenth century judges adopted the position that publication of the matter, without more, was sufficient to establish seditious intent. In addition, the jury could decide only whether the person charged with seditious libel had published the offending material. The judge determined whether the material was seditious.\(^{39}\) Moreover, most jurists applied the standard that any reflection on government was seditious.\(^{40}\)

In 1792, after much public opposition to limited jury participation, Parliament enacted the Fox Libel Act. This law declared that the jury would determine the sedition and intent issues in libel cases, in addition to the fact of publication.\(^{41}\) The English law of seditious libel was further

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35. J. Stephens, supra note 4, at 299. It should be noted that the Criminal Libel Act of 1819 permitted a court in which a libel judgment had been obtained to confiscate copies of the libelous material in the convicted person's possession. The 1819 Act defined seditious libel as material tending to bring hatred or contempt on the King, the government, the constitution, or a House of Parliament, or tending to excite people to alter any matter of church or state. 19 Halsbury's Statutes of England 7 (3d ed. 1970). The seditious libel prosecution of John Wilkes in England illustrates how seditious libel can be used to curtail criticism of government. John Wilkes, a member of the House of Commons criticized governmental officials in his newspaper and was prosecuted and convicted for seditious libel. When he was expelled from Parliament, the House of Commons declared his seat vacant but it overturned three subsequent elections in which Wilkes was re-elected. After the fourth election, the first in which Wilkes ran opposed, his opponent was declared a member of the House of Commons in spite of his dismal showing at the polls. Z. Chafee, supra note 25, at 242-47.

36. See F. Siebert, supra note 3, at 269-75. As Lord Mansfield declared, "the greater the truth the greater the libel." Reprinted in Z. Chafee, supra note 25, at 499-500.

37. Mayton, supra note 7, at 104-07.

38. Goodhart, supra note 31, at 254.

39. F. Siebert, supra note 3, at 273-74. In Rex v. Carr, 7 State Trials 1111, 1128 (1680), Chief Justice Scroggs directed the jury: "[I]f you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or no." See W. Holdsworth, supra note 32, at 345.

40. Dean of St. Asaph's Case (Rex v. Shipley), [1784] 4 Douglas K.B. 73, 170 (Lord Mansfield); see also F. Siebert, supra note 3, at 380-92.

41. Fox Libel Act of 1792, 19 Halsbury's Statutes of England 5-6 (3d ed. 1970). One clause of the English Incitement to Disaffection Act made it a crime to possess any docu-
liberalized in 1843, when Parliament provided that truth was a defense to seditious libel charges.\textsuperscript{42}

\textbf{b. American Rejection of English Seditious Libel}

Some jurists and scholars contend that one purpose of the American Revolution was to free colonists from the English seditious libel law.\textsuperscript{43} Although this has been disputed, it is clear that since the trial of John Peter Zenger in 1735, American juries have decided whether a publication was in fact seditious and whether the material was truthful, a defense to seditious libel under colonial and United States law.\textsuperscript{44} Even the Sedition Act of 1798, a blemish on the United States law of freedom of the press, allowed the defendant to prove the truth of the publication in defense to a seditious libel charge. The Act also assigned the jury the task of determining whether the material was seditious and whether the defendant published the material.\textsuperscript{45}

\begin{verse}
In Regina v. Duffy, [1846] 2 Cox's Criminal Cases 45, 49, Chief Justice Blackburn held that "no one could contend that libels of a blasphemous, or treasonable, or seditious nature can come within the statute, for such can never be of public benefit." Hence, for some time, English courts still refused to allow truth to be pleaded in defense to seditious libel charges.


44. Z. Chafee, supra note 25, at 27. In his newspaper, Zenger had criticized the royal governor for incompetence, favoritism, tampering with trial by jury, and rigging elections. At trial, the judge instructed the jury that it could decide only whether Zenger in fact published the material, leaving to the judge the determination of whether the material was seditious. The judge further instructed that truth of the matter did not erase guilt. Contrary to the judge's instructions, the jury found Zenger not guilty. From that point on, the colonists accepted truth as a defense to seditious libel and assigned to the jury the task of deciding whether the publication at issue was seditious. N. Hentoff, \textit{The First Freedom: The Tumultuous History of Free Speech in America} 63-68 (1980).


Pennsylvania's Constitution of 1790 provided that truth was a defense to charges of seditious libel and that the jury decided whether material was seditious. See Penn, \textit{The People's Ancient and Just Liberties Asserted in the Trial of William Penn and William Mead}, 1670, in \textit{The Bill of Rights: A Documentary History} 144, 144-46, 148 (B. Schwartz ed. 1971).
\end{verse}
c. Restrictions on Seditious Libel in England and the United States

Because seditious libel conflicts with the theory of democratic self-government, its use as a means of suppressing criticism has declined in England and the United States. Nonetheless, both countries have curtailed liberties in wartime through laws which make it a crime to subvert the military. These laws have included some provisions that have been used to suppress unpopular opinions. For example, the American Sedition Act of 1918 made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the uniform of the Army or Navy of the United States" and to use "any language intended to . . . encourage resistance to the United States or to promote the cause of enemies."

In interpreting these statutes, the United States Supreme Court has adopted a standard that lessens the harshness of such sedition provisions: "[T]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Subsequently, the Court refined this "clear and present danger" test to require an imminent or immediate threat that the illegal act would follow, and advocacy of a specific violation of the law.


47. 40 Stat. 553 (1918).


49. Dennis v. United States, 341 U.S. 494 (1951). The Supreme Court had previously applied the clear and present danger test in contempt of court cases, see, e.g., Craig v. Harny, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941), in determining the validity of state statutes, see, e.g., Thomas v. Collins, 323 U.S. 516 (1945); Taylor v. Mississippi, 319 U.S. 583 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940), in determining the validity of local ordinances and regulations, see, e.g., West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Carlson v. California, 310 U.S. 106 (1940), and in reviewing a common law offense, see, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).

The seeds of the imminence or immediacy requirement were sown in Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes & Brandeis, JJ., dissenting); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes & Brandeis, JJ., dissenting); and Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis & Holmes, JJ., concurring).
rather than of an abstract doctrine. Moreover, in reviewing Cold War era convictions for advocating the overthrow of the government based solely on the defendants' membership in the Communist Party, the Court required intent as an element of the crime. Thus, statutes that punish mere advocacy of unlawful acts are interpreted to require an imminent danger of the result occurring, intent to accomplish that result, and incitement of a specific violation of the law as opposed to a general political doctrine.

The clear and present danger test is similar in effect to the twentieth century English concept of seditious libel. In the late nineteenth century, English courts began to distinguish between intent to bring about social or political change through unlawful means and mere expression of opinions critical of the government. In England, sedition now implies an

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52. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam). Current efforts in the United States to crack down on terrorism may run afoul of these standards. Proposed criminal provisions make it a crime to threaten to use force with the intent of influencing someone in furtherance of a political objective. It would also be a crime to support any group labelled terrorist by the Secretary of State. These provisions would criminalize advocacy without imminent danger of the result occurring and advocacy of general political doctrine. Ray & Schaap, Pentagon Moves on "Terrorism", 22 COVERT ACTION INFORMATION BULL. 4, 9 (Fall 1984). See also Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc) (reversing district court order enjoining operation of FBI guidelines that authorized investigations of domestic groups and individuals that advocate criminal activity without requiring a showing that the statements pose an immediate and substantial danger).

The government recently resurrected the doctrine of seditious libel. In response to a CIA complaint regarding an ABC broadcast, the FCC determined that governmental agencies can file complaints contending they have been unfairly abused on the airwaves. Karp, Liberty Under Siege: The Reagan Administration's Taste for Autocracy, HARPER'S MAG., Nov. 1985, at 65-66.

53. Regina v. Burns, [1886] 16 Cox's Criminal Cases 355, in which the judge instructed the jury as follows:

[I]f you trace from the whole of the matter laid before you that they have a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. . . . On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed—if they had a bona fide desire to bring the misery before the public by constitutional and legal means—you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.

In the 1970 Quebec October Crisis, precipitated by the kidnapping of James Cross, the United Kingdom Trade Commissioner, and the kidnapping and murder of Pierre Laporte, the
intent to create public disorder, tumult, or insurrection. Where an individual uses language calculated or likely to incite others to public disorder, insurrection, or violence, however, illegal intent is not a necessary element of sedition.

In sum, as democratic principles have predominated in England and the United States, the doctrine of seditious libel has been restricted. Thus, in both countries, intent to bring about some illegal act is generally required as an element of seditious libel. Under American law, this intent must be coupled with a likelihood of accomplishing, or inciting others to accomplish an unlawful act. While intent and likelihood of result are cumulative elements of contemporary seditious libel in the United States, they are considered alternative elements in England. For example, in the United States, advocacy of an abstract doctrine without propounding a specific illegal act cannot be punished as seditious libel. Contemporary English law has not yet adopted this distinction. Despite differences in the extent of modern restrictions, it is clear that seditious libel as it has developed in England and the United States no longer is an effective tool for silencing opposition.

2. Protecting Sovereignty Through the Contempt of Court Powers

The contempt power, used by governmental bodies to punish disobedience, interference, or criticism, coerces compliance with, and respect for, the government at the expense of individual opinion. The purpose and practice of the contempt power are more suited to a centralized system of government than to a democracy. In principle, the contempt power furthers the institutions of the monarchy and parliamentary

Quebec Labor Minister, the government proclaimed the War Measure Act which prohibited the publication of anything threatening security or supporting the Front Libération de Québec, the organization allegedly responsible for the violence. Doern, Canada, in GOVERNMENT Secrecy in Democracies 147-48 (I. Galnoor ed. 1977).

54. H. STREET, supra note 17, at 208-09. See generally S.A. DE SMITH, supra note 13, at 480.

The modern-day English attitude toward seditious libel, which requires an intent to incite people to violence against the laws or institutions of England, should be contrasted with the still far-reaching approach in the English colonies. See, e.g., Rex v. Wallace-Johnson, 1940 A.C. 231.


56. The Anglo-American law of contempt evolved from the divine law of kings. R. GOLDFARB, THE CONTEMPT POWER 8-13 (2d ed. 1971). Because of the divine ordination of the monarch, any resistance to the sovereign was a sin. The law of contempt is predominantly an Anglo-American legal tenet. See generally Goodhart, supra note 31, at 885.
supremacy by protecting sovereign authority, while it conflicts with the precepts of a democracy by quashing individual dissension. In a democracy, it is difficult to reconcile the use of the contempt power to punish criticism with the concept of a sovereign populace whose duty it is to debate governmental actions. The extent to which the contempt power is tolerated in a legal system indicates the society's tolerance of criticism of governmental actions.

The contempt power is particularly threatening to individual liberty because its exercise is not constrained by common procedural protections. Historically, judges punished contempt summarily on the theory that if the conduct took place before the judge, little remained for adjudication. Thus, the accused had no right to a jury trial, and the offended judge, rather than a disinterested one, tried the matter and sentenced the accused. Moreover, rights to appeal and to counsel traditionally were limited in contempt cases. Although recent statutes establishing contempt crimes are more specific, the common-law crime and its permissible sanctions are defined in vague and broad terms, thereby allowing

57. A justification for this inconsistency distinguishes between the government, which exercises sovereign power on behalf of the people, and those who disobey the sovereign will. Disobedience of judicial orders is viewed as disrespectful to, and contemptuous of, the people's sovereignty as manifested in governmental bodies, rather than as individual expressions of the sovereign will. See Watson v. Williams, 36 Miss. 331, 341 (1858). For alternative views, see R. Goldfarb, supra note 56, at 5-6, 14-18, 20-22.


60. See Ex Parte Terry, 128 U.S. 289, 307 (1888). A distinction has been made between direct contempt, which may be punished summarily and indirect contempt, which is subject to certain procedural protections by more recent statutes and judicial decisions. See generally J. Fox, Contempt of Court (1927); R. Goldfarb, supra note 56, at 61-69.

In England, a person convicted of contempt had no right of appeal prior to the passage of the Administration of Justice Act of 1960, § 11, 7 Halsbury's Statutes of England 718-23 (3d ed. 1969). For this reason, the pre-1960 appellate cases on the English law of contempt were from the Privy Council, which has jurisdiction over appeals in contempt cases from commonwealth territories. H. Street, supra note 17, at 166.
unconstrained judicial discretion.61

Under Anglo-American law, the contempt power has been used to punish statements that scandalize the court on the theory that such statements lower the court's dignity and destroy public confidence in the administration of justice.62 This limitation on public debate about judicial actions is inconsistent with the concept of controlling judicial conduct through pervasive public discussion and criticism.

English courts have accordingly become reluctant to use the contempt power to punish criticism of judicial conduct, at least where such criticism pertains to an adjudicated matter.63 Instead, it is left to public opinion to evaluate attacks derogating judicial behavior.64 The modern approach to such attacks has been explained as follows: "an attack on the man is punished but criticism of his output in the shape of judicial utterances is allowed."65 The rationale behind the relaxation of this type of contempt is that public comment, including criticism of judicial decisions, will improve the state of the law. Nonetheless, statements challenging a judge's impartiality still have been punished as contemptuous on the theory that they undermine public confidence in the judicial system.66 For example, a newspaper editor was convicted and fined when


63. Although it has been argued that English courts no longer use the contempt power to punish comments scandalizing the courts after the case has been adjudicated, this does not seem to be the case elsewhere in the British Commonwealth. McLeod v. St. Aubyn, 1899 A.C. 549, 561. Accord Ambard v. Attorney General for Trinidad and Tobago, 1963 A.C. 322. The contempt power is still used in Canada to punish scandalous publications. The Vancouver Province: In re Rex v. Gash, 12 W.W.R. (n.s.) 349 (1964); D. Schmeiser, Civil Liberties in Canada 224 (1964). See infra text accompanying notes 151-77.
64. McLeod, 1899 A.C. at 561.
66. In an unreported case, Marie Stopes, a famous birth control advocate, asserted that the Daily Telegraph had refused to publish her advertisement because of Roman Catholic in-
he criticized a judge for possible bias in the adjudication of a matter arising out of an Act which the judge had steered through the House of Commons when he had served as attorney general.  

In the United States, it is also unusual for statements criticizing a judge or the judicial process to be punished as contempts of court. In theory, such publications must present a clear and present danger to the administration of justice before they can be punished as contemptuous. As the Supreme Court has stated:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.  

Despite this admonition, however, American judges sometimes use the contempt power to punish criticism of their judicial actions.  

Although more recent statutory and judicial developments in both England and the United States have limited the contempt power and subjected it to some procedural protections, the contempt power may still be used to silence criticism.  

Nonetheless, despite these sporadic digressions. After the newspaper successfully sued the doctor for libel, the New Statesman published an article questioning whether Dr. Stopes could have obtained a fair trial under the Catholic judge who had presided over the trial. In the contempt of court proceedings that followed, the court concluded that the New Statesman article scandalized the court because it impugned the judge's impartiality, thereby possibly undermining public confidence in the justice system. Rex v. Editor of the "New Statesman," [1928] 44 T.L.R. 301, 303.  

67. H. STREET, supra note 17, at 164; Goodhart, supra note 31, at 903-04.  


69. An Alabama judge recently fined a woman $100 for contempt for writing a letter to a local newspaper criticizing the judge's decision in a divorce case. Milwaukee J., Oct. 11, 1983, at 5, col. 6. Subsequently, the state disciplinary board concluded that the judge's actions violated state canons of judicial ethics. Nat'l L.J., Dec. 12, 1983, at 3. In another incident, a Texas judge imposed a thirty-day jail sentence on a woman who wrote him a letter asserting that her two sons were being railroaded in a criminal matter before the judge. Nat'l L.J., Feb. 27, 1984, at 10. In yet another case, an appellate judge suspended a lawyer's license to practice before the court because the lawyer wrote a disrespectful letter criticizing the court's system of reimbursing lawyers appointed to represent criminal defendants. In re Snyder, 734 F.2d 334 (8th Cir. 1984) (en banc), rev'd, 105 S. Ct. 2874 (1985). As these examples show, despite clear limitations on the use of the contempt power to curb public criticism, some American judges have not internalized these restraints.  

70. See, e.g., FED. R. CRIM. P. 42 (notice and trial before disinterested judge where charge is criticism of judge); United States v. Barnett, 376 U.S. 681 (1963) (jury trial).
sions, use of the contempt power to punish criticisms of the judicial process is on the wane in England and the United States. This decline of direct methods of silencing criticism of government in the form of seditious libel and contempt prosecutions parallels the evolution of democratic principles. Because public criticism of government officials is an integral part of popular self-government, these methods of direct suppression have been greatly limited.

III. CONSTRAINTING OPPOSITION TO ANGLO-AMERICAN DEMOCRACIES—LIMITING PUBLIC ACCESS TO GOVERNMENTAL INFORMATION

Along with the evolution of Anglo-American democratic principles has come an expansion of the public right of access to information about government. Exceptions have developed pertaining to the internal workings of government or to sensitive operations authorized by the government. In practice, those exercising governmental powers use these permissible grounds for restricting public access to prevent the disclosure of embarrassing or negative information.

In contemporary England and the United States, attempts to control public opinion through the selective release of critical information have replaced direct suppression of dissension as a means of limiting opposition. Although the courts in both countries have rejected an unlimited

71. For example, until 1868, a standing order of both Houses of Parliament forbade publication of parliamentary proceedings. T. ERKINE MAY, supra note 12, at 76. Although either House can still prohibit publication of its debates and proceedings, this power is rarely used except for misrepresentations, scandalous material, or premature disclosures of parliamentary committee proceedings. Id. at 76-77, 141-42; H. STREET, supra note 17, at 170-74. It is a breach of parliamentary privilege to divulge any committee act or evidence before it is reported to Parliament. T. ERKINE MAY, supra note 12, at 142-43. At present, however, breaches of this privilege are punished only when the committee proceedings have been closed. Id. at 143. Cf. infra note 143, for discussion of lack of means to punish premature disclosure of closed congressional proceedings in United States.

Similarly, other broad exclusions on attending and reporting of parliamentary and congressional proceedings were removed in the eighteenth century in the United States and in the nineteenth century in England. S. DAWSON, FREEDOM OF THE PRESS: A STUDY OF THE LEGAL DOCTRINE OF "QUALIFIED PRIVILEGE" 26, 30, 40-45, 66-69 (1924).

72. In contrast to the well-established right to express opinions critical of official policy or conduct, the right to information about government is less firmly established. Hoffman, Contempt of the United States: The Political Crime That Wasn't, 25 AM. J. LEGAL HISTORY 343, 360 (1981). See generally Abrams, The New Effort to Control Information, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22. For example, the Reagan Administration has resurrected a provision of the McCarran-Walter Act that allows the government to deny a visa if a consular officer or the Attorney General has reason to believe that the foreigner will "engage in activi-
privilege by which the executive can prevent the disclosure through the judicial process of whatever governmental information it chooses, the courts have recognized the viability of this privilege in areas which affect sensitive governmental operations. Similarly, both governments exploit classification systems to withhold information from the public for political reasons unrelated to national security. By retaining a monopoly on selected governmental information, officials can limit public criticism.

A. Unrestrained Crown or Executive Privilege Gives Way to Selective Nondisclosure

Crown or executive privilege is a judge-made doctrine exempting from discovery records of executive agencies. It refers to the Crown’s or the Executive’s power to withhold documents that a party normally would be required to produce, either through the process of discovery or in response to a subpoena for the production of documentary evidence.

An unrestrained executive right to withhold information from the public is reminiscent of the political theories of omnipotent, sovereign authority. Thus, it is not surprising that English and United States courts have rejected blanket claims of executive privilege where they conflict with the public right of access to governmental information.

1. Crown Privilege

Before World War II, English courts had begun to claim an inherent power to inspect documents over which Crown privilege had been declared, and they had disallowed the claim of privilege in exceptional circumstances. A wartime decision of the House of Lords sharply reversed this trend.

In *Duncan v. Cammell Laird & Company*, the House of Lords unanimously held that relevant documents otherwise subject to discovery in judicial proceedings could be withheld by the government when the ties which would be prejudicial to the public interest." This provision has been used to deny visas to foreigners with whom the current Administration disagrees, such as Hortensia Allende (wife of Salvador Allende, former Chilean President), Farley Mowatt (Canadian author), and Julio Espinosa (Deputy Cultural Minister of Cuba). Similarly, the Administration has sought to have certain foreign environmental films labelled as political propaganda and to restrict public access to these and other films. Washington Post, April 26, 1985, at A4, col. 1.

73. Robinson v. South Australia (No. 2), 1931 A.C. 704.

74. 1942 A.C. 624. In that case, descendants of the men who perished when the *Thetis*, an English submarine, was sunk shortly before World War II, sued the shipbuilder for negligence. The government objected, as an intervenor, to disclosure of plans and specifications of the vessel and reports of its condition after recovery on grounds of injury to the public interest. See *infra* note 196, for a comparison of discovery in England and the United States.
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public interest required nondisclosure. Under Duncan, a minister's decision was unreviewable in the English courts: if an English minister refused production of a document on the ground that disclosure would be against the public interest, the courts were required to accept the minister's assessment. The Lords protected a class of documents from disclosure under the public interest rubric because "the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation." The opinion provided the following examples of the public interest ground for nondisclosure: "where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Allowing governmental officials to maintain the secrecy of documents for the "proper functioning of the public service" vested in the government wide-ranging control over public information about government. Governmental officials exercised this authority extensively by withholding police reports of street accidents, navy reports of ship collisions, medical records of military and civilian employees, and civil servant personnel files.

Blanket claims of privilege for most classes of communication within and between central governmental departments and between those departments and outside groups led to widespread dissatisfaction. As a result, courts began to craft exceptions to the Duncan rule. Some courts reasserted a residual judicial power to review governmental claims of Crown privilege. For example, the Court of Appeal began to undermine the government's right to claim Crown privilege by allowing courts to inspect documents and order disclosure. Although the Court of Appeal never expressly overruled governmental claims of privilege, it did renew judicial review of such claims.

Judicial dissatisfaction with unlimited Crown privilege culminated

75. See D. Williams, supra note 46, at 203-04, for a critical view of executive decisions defining the public interest when it impinges on their actions. See S.A. de Smith, supra note 13, at 617-19.
76. Duncan, 1942 A.C. at 635.
77. Id. at 642.
in *Conway v. Rimmer*. In *Conway*, the House of Lords unanimously confirmed the existence of a residual judicial power to inspect documents withheld under claims of Crown privilege and to determine whether the interest in suppression outweighed the interest in disclosure. After *Conway*, routine documents generally will be disclosed. Those relating to formation of policy or to crime investigation techniques, however, normally will be inspected by the courts but not disclosed. Despite this recognition of judicial authority to review claims of Crown privilege, the House of Lords counseled against judicial inspection of documents concerned with national security, diplomatic relations, or cabinet decisions. Thus, *Conway* did not impair absolute executive discretion to withhold such documents.

The current English doctrine of Crown privilege embraces the concept of "public interest immunity": governmental officials may claim the privilege and courts will uphold such claims when the public interest requires nondisclosure. Public interest immunity is recognized as a legitimate and necessary device to shield the government from political criticism. Courts will uphold governmental claims of Crown privilege to prevent members of the public from obtaining information that would lead to criticism of governmental actions:

> [T]he most important reason [for the privilege] is that such disclosure would create or fan ill-informed or cáptious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.

81. 1968 A.C. 910. In *Conway*, a probationary police constable who had been prosecuted for theft was discharged from his post shortly after criminal charges against him were dismissed. In his subsequent action for malicious prosecution, he sought production of the probationary reports on which the agency relied for discharging him on grounds of inefficiency and theft. After inspecting the documents, the House of Lords overruled the minister's claim of Crown privilege and ordered disclosure of the documents. It should be noted that in the context of Crown privilege, English courts are solicitous of individual privacy rights in documents. In *Conway*, Lord Reid cited with approval *In re Joseph Hargreaves*, Ltd., [1900] 1 Ch. 347, a case in which the Inland Revenue objected to the production of income tax filings on Crown privilege grounds. Lord Reid declared: "If the State insists on a man disclosing his documents for a particular purpose, it requires a very strong case to justify that disclosure being used for other purposes." *Id.* at 946.

82. S.A. DE SMITH, supra note 13, at 620.


84. *Id.*
The application of public interest immunity to governmental policy-making has been arduously defended by a prominent jurist:

When ministers and high civil servants are forming important governmental policy, their discussions and their memoranda are, and should be, treated as highly confidential. No court should order the disclosure of these confidential documents to outsiders, even in the interests of justice, except under the most stringent safeguards against abuse. The danger of disclosure is that critics of one political colour or another will seize on this confidential information so as to seek changes in governmental policy, or to condemn it. So the machinery of government will be hampered or even thwarted.  

2. Executive Privilege

In contrast to the long-established and far-reaching English principle of Crown privilege, the United States Executive's attempts to exercise this power met with judicial opposition from the outset. In the dispute that led to Marbury v. Madison, the Secretary of State refused to supply relevant documentation of a judicial appointment. In its decision, the Court rejected the contention that confidentiality is an attribute of high office, declaring instead that the claim of confidentiality applies only to cabinet secrets. Since Marbury v. Madison, United States courts have adhered to the principle that there is a category of privileged, confidential, executive communications, but have generally exercised the power to review the propriety of any claim of the privilege.

President Eisenhower resurrected the doctrine of an unrestrained executive privilege in internal memoranda and in an executive order allowing departments to have such control. Subsequently, President Nixon asserted an executive privilege exempting him from producing tape recordings pursuant to a subpoena in a criminal trial. He claimed that withholding the information from the public was essential to the functioning of the executive branch. The United States Supreme Court
rejected the claim of an uncontrolled presidential privilege. It limited such a claim to military and diplomatic secrets and charged the courts, rather than the executive, with the responsibility of determining whether the privilege applies in a given situation.91

United States courts may balance the need for confidentiality in governmental decision-making against the need for evidence in a pending trial.92 Any claim of executive privilege must identify with particularity the material allegedly covered by the claim and set forth objections to its disclosure.93 The courts, rather than the executive, have the right to determine whether the claim of executive privilege will prevail. In theory, the courts will scrutinize even those claims of privilege that are based on a risk to national security, defense, or foreign policy. Executive claims in these sensitive areas, however, are still accorded great deference.94 In recent decisions, the Supreme Court has in fact established a standard of judicial deference to national security interests in determining the propriety of claims of privilege.95

One aspect of executive privilege extends protection to the decision-making processes of government, much like the English public interest immunity doctrine. This privilege, known as the governmental deliberative process privilege, protects from disclosure documents that reflect ad-

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91. Nixon, 418 U.S. at 706. One commentator has asserted that a British minister may have been successful in suppressing tapes similar to those President Nixon sought to withhold. Rourke, The United States, in GOVERNMENT SECRECY IN DEMOCRACIES 127 (I. Galnoor ed. 1977). Even in the days of an absolute Crown privilege, however, the right to withhold documents under a claim of Crown privilege did not extend to criminal cases.


vice, recommendations, and opinions that arise in governmental policy-making. It is designed to encourage open and frank policy-making, to prevent disclosure of proposed policies before they are finally adopted, and to avoid public confusion that could result from disclosure of rationales that were not the actual basis for the agencies' actions. Although courts have limited the application of this privilege, it still can be used to withhold important information from the public.

3. Summary

In keeping with democratic notions of access to governmental information, both English and United States courts have greatly limited the doctrine of executive privilege by allowing the judiciary to review such claims and to determine whether the public interest calls for nondisclosure. In theory, claims of executive privilege are disallowed except when nondisclosure is necessary to protect governmental policy-making and sensitive governmental functions. Nonetheless, both English and United States courts will accord great deference to executive claims of privilege relating to national security, defense, and diplomatic relations.

Courts in both countries allow the executive to withhold documents pertaining to governmental decision-making, and thus the privilege can be used to shield governmental actions from public criticism. In fact, English judges have expressly shaped the public interest immunity doctrine for this purpose. English public interest immunity doctrine and the United States governmental deliberative process privilege, however, allow governmental officials to withhold from discovery documents that may fuel opposition to governmental actions.


98. There are several limitations to the scope of this privilege. Only pre-decisional documents are protected by the privilege. See Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Any document that explains the rationale behind an agency decision or that comprises agency working law is not covered by the privilege. See, e.g., Schlefer v. United States, 702 F.2d 233, 237-42 (D.C. Cir. 1983); Taxation with Representation Fund v. Internal Revenue Service, 646 F.2d 666, 668 (D.C. Cir. 1981). In addition, factual material cannot be withheld. E.P.A. v. Mink, 410 U.S. at 89; Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d at 867. For examples of recent attempts by the Reagan Administration to keep information from the public through claims of executive privilege, see D. Demac, KEEPING AMERICA UNINFORMED: GOVERNMENT SECRECY IN THE 1980'S, at 80-85 (1984).

99. See supra note 95.
B. Overclassifying Information to Disarm the Opposition

As the public right to information about governmental actions has increased, areas exempt from public access have been carved out. These exemptions are based on an articulated need to protect sensitive governmental functions. Both the United States and England have systems for classifying sensitive governmental information and for preventing and punishing disclosure to the public. Both systems protect disclosure of information that could be injurious to national security or national defense. In many respects, however, restrictions on the dissemination of governmental information extend beyond military and national security secrets and can be manipulated by the government to protect it from criticism.

1. English Law

In England, the Official Secrets Act limits public access to official secrets and other public documents to a far greater extent than anything known in the United States. The Official Secrets Act punishes disclosure of official documents and prohibits civil servants from publishing information related to their employment even after termination.100 Among its restrictive provisions, section 2 of this Act makes it a crime to communicate to unauthorized persons information obtained through governmental employment or through specific contacts with the government.101

Since its inception, the Official Secrets Act has been used for matters unrelated to national security.102 In addition to its far-reaching cover-

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100. Official Secrets Act of 1911 as amended by Official Secrets Act of 1920 and 1939. See S.A. De SMITH, supra note 13, at 481-82. Section 1 of the Official Secrets Act of 1911 prescribes the making of any sketch, plan, model, article or note, or other document or information that could be useful to the enemy, the obtaining or communicating of any such documents or information, and approaching any prohibited place as defined by the Act. Section 2 of the Act creates a series of misdemeanor offenses for acquiring secret or confidential information. The information need not be related to any matter of national importance. E. WADE & G. PHILIPS, supra note 55, at 505. The only defenses to section 2 offenses are lack of knowledge or that the information was communicated against the accused person's desire. See generally P. O'HIGGINS, CENSORSHIP IN BRITAIN 36-40 (1972). H. STREET, supra note 17, at 217-19; D. WILLIAMS, supra note 46, at 26-38, 94-115.


102. See P. O'HIGGINS, supra note 100, at 39-40; H. STREET, supra note 17, at 220-22; D. WILLIAMS, supra note 46, at 15-21, 32-38. For example, the Act has been invoked to prevent the publication of the wills of famous people, information that might threaten trade competition, and a hangman's memoirs. D. WILLIAMS, supra note 46, at 94-95; H. STREET, supra
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age, the Act is excessively harsh in its application. Although in a recent case, a judge, unsympathetic to section 2 of the Official Secrets Act, directed the jury that the prosecution had to prove criminal intent, many prosecutions have succeeded without proving such intent.

The most recent prosecution under the Official Secrets Act illustrates its use for political reasons and the popular dissatisfaction with its impact on access to information. The case arose when Clive Ponting, a senior civilian official from the Ministry of Defense, sent a member of Parliament documents dealing with the sinking of the Argentine cruiser Belgrano during the Falklands War. The documents showed that the facts surrounding the torpedoing of the cruiser differed from the information previously given publicly by the Prime Minister to Parliament. One of the documents was unclassified, and while the second bore a confidential classification, the prosecutor conceded that its disclosure did not actually damage national security. Nonetheless, the government prose-

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note 17, at 220. It has been said that embarrassment and security are the same justification for withholding information. Under this theory, disclosure of embarrassing information is not in the public interest because it would disturb trust within government. Sampson, Secrecy, News Management and the British Press, in SECRECY AND FOREIGN POLICY 218, 222-23 (T. Frank & E. Weisband eds. 1974).

103. In the Sunday Telegraph case, a journalist was prosecuted under section 2 for communicating to unauthorized persons a British diplomat's report on the Nigerian Civil War, after the secretary of the “D” Notices Committee had assured him the report did not compromise national security. Sunday Times v. United Kingdom, [1979] 12 E.C.H.R. 245 (European Court of Human Rights). The judge deciding the case admonished:

This case, if it does nothing more, may alert those who govern us at least to consider, if they have the time, whether or not Section 2 of this Act has reached retirement age and should be pensioned off, being replaced by a section that will enable men like the defendants and other editors to determine without any great difficulty whether a communication by any one of them or a certain piece of information originating from an official source, and not concerned in the slightest with national security, is going to put them in peril of being enclosed in a dock and facing a criminal charge.

Reprinted in P. O'HIGGINS, supra note 100, at 38. See also S.A. DE SMITH, supra note 13, at 482 n. 57.

104. S.A. DE SMITH, supra note 13, at 482-83. Recently, a committee made detailed proposals for amending section 2 to limit the criminal offenses to disclosures of certain classes of information. Under the proposal, mere receipt of information would no longer be an offense unless the recipient was a journalist who had reason to believe the information was conveyed in violation of the Act. The executive branch would have the exclusive responsibility for developing classification categories and for classifying information. Under the proposed reforms, however, it still would not be a defense that disclosure of the information did not in fact injure the public interest or that the information should not have been classified. Report of the Franks Committee on Section 2 of the Official Secrets Act of 1911 (Cmdn. 5104 1972).


cuted Ponting for leaking sensitive documents to an unauthorized person. Despite the judge's pro-conviction instructions, the jury acquitted Ponting.\textsuperscript{108} By invoking the Official Secrets Act, the government sought to punish the dissemination of politically embarrassing information, even though it did not damage national security. The jury by its acquittal, apparently refused to sanction this use of the Official Secrets Act to suppress information.

If the Official Secrets Act were enforced to its fullest extent, the press would be prosecuted continually for publishing matters unrelated to national security. Through unofficial arrangements, however, the English government identifies the material that may be published without risk of prosecution.\textsuperscript{109} By means of a system of notices, known as Defense or "D" Notices, the government identifies the material that is deemed to be secret, the publication of which will be prosecuted.\textsuperscript{110} In some instances, the government has issued "D" Notices to prevent public discussion of controversial issues rather than to protect security.\textsuperscript{111}

English law imposes additional limitations on public access to governmental documents by means of the Thirty-Year Rule, the principle of

\textsuperscript{108} The Official Secrets Act forbids communication of information when it is against the interests of the state. The judge instructed the jury that the interests of the state are the same as those of the government in power at the time. The judge also instructed the jury that the government did not want Ponting to make the information available. \textit{Washington Post, supra} note 106.

In contrast to Ponting's acquittal, another recent Official Secrets Act prosecution confirmed the vitality of the Act. In March 1984, Sarah Tisdall was convicted and sentenced to six months in prison under section 2 of the Act. She had leaked a document which set out how the government could manipulate public opinion concerning deployment of cruise missiles in the face of anti-cruise demonstrations and negative opinion polls. \textit{J. COOK, THE PRICE OF FREEDOM} 144-48 (1985).

\textsuperscript{109} \textit{H. STREET, supra} note 17, at 224.

\textsuperscript{110} \textit{Id.} at 225-28. \textit{See D. Williams, supra} note 46, at 80-87. For a discussion of the pervasive acceptance of the "D" Notice System, see Sampson, \textit{supra} note 102, at 215.

\textsuperscript{111} \textit{H. STREET, supra} note 17, at 227-28. A "D" Notice in 1956 forbade publications about a supersonic bomber project. Nonetheless, some newspapers published information criticizing the project. As a result of the adverse publicity the government ultimately abandoned the project without prosecuting the newspapers. \textit{See D. WILLIAMS, supra} note 46, at 84-87. The result of "D" notice prohibition of publication is that English citizens can learn about their government's actions from foreign newspapers, or not at all. For example, English citizens could not learn from English newspapers the contents of propaganda dropped in Germany, but could learn the contents from United States newspapers. \textit{H. STREET, supra} note 17, at 226.

The Official Secrets Act applies to a wide range of documents, such as those pertaining to nuclear power plant safety, \textit{see J. COOK, supra} note 108, at 90-105, and British Rail plans to discontinue certain lines of service, \textit{id.} at 11. In 1984, the government prevented timely public discussion of a proposal to transfer youth training responsibilities from local authorities to a centralized commission by prolonging disclosure of the plan for six months. \textit{Id.} at 12.
collective cabinet responsibility, and clearance requirements. Under the Thirty-Year Rule, cabinet records and departmental documents are transferred to the Public Records Office and made unavailable to the public until thirty years after their creation.\textsuperscript{112} The Lord Chancellor has the authority to shorten or lengthen the thirty-year period at the request of the minister involved.\textsuperscript{113} The inherent delays in gaining access to governmental information under the Thirty-Year Rule impede public scrutiny of governmental actions.

The principle of collective cabinet responsibility, which requires ministers to present a unified front in the name of the government, curtails ministerial criticisms of governmental actions.\textsuperscript{114} In accordance with this principle, the majority government has forced ministers to resign for publishing criticisms of governmental policy.\textsuperscript{115}

As a corollary to this tenet, every cabinet minister is obliged to maintain the secrecy of all cabinet proceedings absent permission of the prime minister to do otherwise.\textsuperscript{116} Sworn secrecy derives from an oath all cabinet ministers are required to take.\textsuperscript{117} All books written by ministers

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\item \textsuperscript{112} See H. Street, supra note 17, at 235-36; D. Williams, supra note 46, at 48-49, 65-68. Public Records Act of 1958, 6 & 7 Eliz. 2, ch. 51, Public Records Act of 1967, 15 & 16 Eliz. 2, ch. 44. The rationale behind the Thirty-Year Rule is based in part on the desire to encourage frankness in discussions on the part of civil servants and policy makers.
\item \textsuperscript{113} S.A. De Smith, supra note 13, at 477-78. Prior to the 1958 enactment of the Fifty-Year Rule, the predecessor of the Thirty-Year Rule, documents generated before 1794 were unavailable under the previous nondisclosure rule. D. Williams, supra note 46, at 48-49, 65-68. The Lord Chancellor may lengthen the thirty-year period if disclosure might cause personal distress, breach of confidences or trade secrets, or endanger national security. Seymour-Ure, \textit{England}, in \textit{Government Secrecy in Democracies} 162-63 (I. Gani\textsuperscript{'}ed. ed. 1977). The Fourteen-Day Rule, which was abolished in 1955, prohibited discussion on broadcast media of any subject due to be debated in Parliament within 14 days. \textit{Id.} at 172.
\item \textsuperscript{114} Seymour-Ure, supra note 113, at 158. This doctrine arose during the eighteenth century to protect individual ministers from the King by presenting a united front. It then served as a protection against the opposition in Parliament in that the entire government would have to be displaced for one minister's actions.
\item \textsuperscript{116} See D. Williams, supra note 46, at 43-48. Theoretically, permission to disclose information about cabinet proceedings comes from the Queen. In practice, however, the prime minister advises the Queen as to whether such permission should be granted. For an overview of how cabinet secrecy works, see Walker, supra note 115, at 42-50. For a discussion of the effect of cabinet secrecy on the relative accessibility of governmental officials to the press, see Barber, \textit{America You Have Lovely, Helpful, Open Bureaucrats}, Washington Post, Oct. 20, 1985, at C1, cols. 4-5, and at C4, cols. 1-2.
\item \textsuperscript{117} Cabinet members are made Privy Councillors, and as such are required to swear an ancient oath to keep the Queen's counsel secret. The disclosure of any information obtained as a cabinet member would violate this oath. H. Street, supra note 17, at 232-35.
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that relate to military and security matters must be submitted to the government for clearance.118 Without governmental approval, which is not subject to due process protections, prosecution under the Official Secrets Act generally will follow publication.119

The Official Secrets Act is the most restrictive Anglo-American statute governing public access to information. It not only gives government extensive control over the dissemination of information, but it also provides criminal penalties for the unauthorized disclosure of information.

2. United States Law

The United States also maintains an extensive classification system and places restrictions on government employees who have access to confidential information. The executive branch has broad discretion in classifying information, which it often uses to withhold from the public information unrelated to national security. Until recently, however, United States law, unlike English law, generally had not been construed to impose criminal penalties for violations of classification restrictions that fell short of espionage.120 There has now been an unprecedented conviction of a civilian Navy official who disclosed classified information to the press, despite evidence that no damage to national security occurred.121 With this conviction and dangerous precedent, the United

118. H. STREET, supra note 17, at 232-35. This pre-publication clearance is not limited to former government employees.

119. Id. The clearance decision is made by civil servants according to unpublicized guidelines. The author is provided no opportunity to be heard before the decision-makers and is not informed of the reasons for refusing an application.

120. Until the Pentagon Papers prosecution of Daniel Ellsberg, the pertinent espionage laws, 18 U.S.C. §§ 793-794, were believed to apply only to spies who sought to pass information to foreign governments to injure the United States or to aid the foreign government. M. HALPERIN & D. HOFFMAN, supra note 2, at 107-11, 115-16. Because the indictment of Daniel Ellsberg for unauthorized possession and disclosure of the Pentagon Papers was dismissed for governmental misconduct, the purview of the espionage statutes was not resolved. Id. at 107-11. But see id. at 117-23 for the judge's preliminary views.

The issue arose again when Samuel Loring Morison was indicted for releasing copies of three photographs of a Soviet submarine to Jane's Defense Weekly. See infra note 121.

121. Washington Post, Oct. 18, 1985, at A1. Morison moved to dismiss the indictment on several grounds. In denying the motion to dismiss, the court held that the espionage statute applies to leaks as well as to classic espionage because "the danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government." United States v. Morison, 604 F. Supp. 655, 660 (D. Md. 1985). The leaked information need not be properly classified, but rather need only be related to the national defense. Id. at 658-59. Moreover, according to this opinion, intent to injure the national defense is not a necessary element of the offense. Id. at 659. Applying the espionage statutes to the unauthorized disclosure or possession of governmental information in this manner approximates the pervasiveness of the Official Secrets Act. See also 5 U.S.C. § 8312 (1976) (withdraws retirement benefits from persons convicted of violating espionage statutes); Exec. Order
States classification system has attained the coercive power of the English Official Secrets Act.

In the United States, the classification system is the primary tool for preventing public access to governmental information. It allows the executive to prevent access if disclosure might be harmful to national defense or foreign policy. By promulgating an executive order, the President establishes criteria for determining what material should be classified. An administration can expand the categories of material subject to classification by changing the factors to be considered in the classification process. For example, an administration solicitous of secrecy might not require that potential harm to national security be identifiable or that the public right to know be considered in classifying information. Similarly, executive orders may establish presumptions in favor of the lowest or highest level of secrecy that may be applicable to any given information.

No. 12,065, 3 C.F.R. 190 (1979), Note following 50 U.S.C. § 401 (provides administrative sanctions, including discharge, for employees who publish classified information).

The Reagan Administration has threatened to prosecute individuals under the espionage statutes for presenting research on such topics as arms control verification and the downing of the Korean Air Lines jet. Karp, supra note 52, at 53, 64.


124. 50 U.S.C. §§ 401-426 (1983). The current executive order defines the security classification grades from highest to lowest as follows: 1) "Top Secret" classification applies to material, the unauthorized disclosure of which "reasonably could be expected to cause exceptionally grave damage to national security"; 2) "Secret" applies to material, the unauthorized disclosure of which reasonably could be expected to cause serious damage; and 3) "Confidential" applies to information, the unauthorized disclosure of which reasonably could be expected to cause damage. Under this executive order, doubts are resolved in favor of classification at the highest level. Exec. Order No. 12,356, 3 C.F.R. 166 (1982). Classification of information under this order has resulted in more government secrecy. See D. Demac, supra note 98, at 13-18; Administration Keeping More Facts Secret, Washington Post, May 8, 1985, at A21, col. 3.

125. See Abrams, The New Effort to Control Information, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22. In an executive order issued in 1978, President Carter set limits on the type and amount of information subject to classification by requiring governmental officials to consider the public's right to know in classifying information and by confining classification to documents that could reasonably be expected to cause identifiable harm to national security. Moreover, the material had to be classified at the lowest level of clearance. Exec. Order No. 12,065, 3 C.F.R. 190 (1979). In an executive order signed on April 2, 1982, President Reagan reversed these reforms. Governmental officials classifying information no longer need identify the harm to national security or consider the public's right to know. In addition, when in doubt, officials are to classify information at the highest level of secrecy. Exec. Order No. 12,356, 3 C.F.R. 166 (1982). See also D. Demac, supra note 98, at 13-18.

126. See supra note 125.
Overclassifying information, that is, classifying information for reasons other than national security, such as politics or job security, is possible and prevalent in the current scheme. The classification system may be used to hide errors in judgment or politically sensitive information. There are certain checks, however, on the ability to overclassify information, the foremost of which is the Freedom of Information Act.

The Freedom of Information Act affords a legally enforceable right of access to governmental documents and files, subject to certain exceptions. Some of these exceptions correspond to established limitations on the public right of access, such as those pertaining to classified information and the governmental deliberative process privilege. Even with these restrictions, the legally enforceable right embodied in the Freedom of Information Act is more extensive and protective of the public right of access than anything in English law. It has broadened public access to governmental information and has brought before the courts the question of the propriety of withholding information from the public.

The Freedom of Information Act instructs courts not to defer to the classification system when determining whether the government could

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128. For example, on the international front, the government kept its destabilization policies and other involvement in the overthrow of Salvador Allende from the public. See M. HALPERIN, J. BERMAN, R. BOROSAGE & C. MARWICK, THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES 19-29 (1976). On the domestic front, the FBI’s surveillance of Martin Luther King and its attempts to disrupt his activities for political reasons were kept secret to “protect domestic security.” Id. at 61-89; C. MORGAN, JR., ONE MAN, ONE VOICE 174 (1979). See generally D. WISE & T. ROSS, THE INVISIBLE GOVERNMENT (1976); C. MORGAN, JR., supra, at 192-93; M. HALPERIN, J. BERMAN, R. BOROSAGE & C. MARWICK, supra, at 5-12.


prohibit publication of information.\textsuperscript{132} Rather, courts are to determine independently the national security or other governmental interests at stake, regardless of the classification status of the information. In practice, however, the courts have adopted a far more deferential approach to governmental claims of national security than that envisioned in the Act.\textsuperscript{133}

Traditionally, United States courts have permitted restrictions on public access to information only when publication of the information would implicate national security interests, but the common-law justifications for withholding information have since been expanded.\textsuperscript{134} In \textit{Near v. Minnesota}\textsuperscript{135} the Supreme Court acknowledged the need for prior restraints to protect the disclosure of national security information in wartime. \textit{Near} was subsequently applied in times of peace as well. The \textit{Near} rule was expanded further in \textit{Haig v. Agee}\textsuperscript{136} where the Supreme Court upheld the passport revocation of a former CIA agent who disclosed information about intelligence operations, including the names of intelligence personnel. Relying on the \textit{Near} rule, the Court held that the government could restrict the publication of insider information detrimental to national security interests, military activities, or intelligence operations.\textsuperscript{137}

For the past fifteen years, governmental officials have argued that information must be withheld from the public to ensure that the United States will retain its reputation, crucial in diplomatic and intelligence en-


\textsuperscript{133} \textit{See, e.g.,} Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981) (Court did not determine whether information about location of nuclear weapons was properly classified, but merely accepted government's assertion that it could neither confirm nor deny the presence of nuclear weapons at a particular location) and Halperin, \textit{Never Question the President}, The Nation, Sept. 29, 1984, at 285-88. \textit{Accord CIA v. Sims,} 105 S. Ct. 1881 (1985); \textit{see discussion, infra notes 144-45 and accompanying text.}

\textsuperscript{134} \textit{See, e.g.,} New York Times v. United States, 403 U.S. 713 (1971) (per curiam). \textit{See also infra notes 135-37 and accompanying text.}

\textsuperscript{135} 283 U.S. 697, 716 (1931). The Court upheld prior restraints in wartime to prevent "actual obstruction of its recruiting service or the publication of sailing dates of transports or the number and location of troops."


deavors, for preserving secrets. Until recently, the courts had rejected this argument. The Supreme Court, however, has now acknowledged a governmental need to maintain a reputation for preserving confidentiality in the context of prepublication reviews of insiders' writings and in intelligence gathering.

As in England, federal governmental employees who have access to classified information must sign secrecy agreements requiring them to submit for prepublication review all writings relating to their employment. Relying in part on the government's need to maintain a reputation for keeping secrets, the Supreme Court upheld prepublication reviews required by these secrecy agreements and bans on governmental employees' publications during the time it takes the government to determine whether classified information has been disclosed. The government may prohibit the publication of any material not submitted for review, but if submitted, the government may prohibit only publication of classified information. In an attempt to establish extensive govern-


140. Snepp, 444 U.S. at 509 n.3. Persons with access to sensitive classified information must sign similar secrecy agreements. Persons with access to classified information must sign nondisclosure agreements that do not provide for pre-publication review. Presidential Directive on Safeguarding National Security Information, Dep't of Justice release (Mar. 11, 1983). The wording of the agreement complies with Snepp, see infra notes 141-42 and accompanying text. See N.Y. Times, Mar. 12, 1983, at A1, col. 4. Several agencies other than the CIA require similar secrecy agreements. See, e.g., 22 C.F.R. § 10.735-303(b) (1985) (Department of State); and 28 C.F.R. § 45, 735-12(c) (1985) (Department of Justice).

141. Snepp, 444 U.S. at 509 n.3. The Court did not address the First Amendment implications of prepublication clearance requirements. The dissent, however, asserted that the reviewing agency could misuse its authority to delay publication or to modify the contents of writings critical of the government. Id. at 526. Accordingly, prepublication review could go beyond legitimate secrecy demands and inhibit free speech. Id. at 526 n.17.

142. In Snepp, the government conceded that Snepp's book divulged no classified information, thus distinguishing the case from United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (1972). Moreover, the government acknowledged a right to publish unclassified information. Snepp, 444 U.S. at 511. What the government claimed, and the Supreme Court approved, was a right to review former insider employees' writings prior to publication to determine whether they compromised classified information. Id.

The government has no interest in ensuring that unclassified or public domain information is not published. Id. at 513 n.8. Accord United States v. Heine, 151 F.2d 813, 815 (2d Cir. 1945) (L. Hand) (the espionage statutes cannot be used to punish the dissemination of information from "sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it"); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975). But see United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), appeal dismissed as moot, 610 F.2d 819 (7th Cir. 1979) (district court issued preliminary in-
ment censorship of former employees’ writings, President Reagan is seeking to expand the applicability and scope of prepublication clearance reviews. The proposed prepublication reviews would apply to the writings of former employees who had access to sensitive or classified information, if the published material implied any proscribed fact.

In the context of the government's intelligence gathering functions, the government's need to maintain confidentiality has recently been given greater weight than the public right to know. The Supreme Court held that the government can withhold from the public unclassified information pertaining to intelligence sources and methods, in part to protect the government's appearance of confidentiality. In so ruling, the Court mandated judicial deference to the government's decision to withhold the intelligence-related information from public disclosure, regardless of the merits of that decision.


Although the government has not formally adopted a policy in this regard, security clearance agreements are now routinely imposed on employees of many governmental departments. The Reagan Administration has also sought to maintain stricter control over the release of governmental information by curtailing information leaks. Specifically, the Administration has increased the use of polygraph tests in leak investigations and to determine the "trustworthiness, patriotism and integrity" of non-intelligence personnel who might have access to secret information. Washington Post, Jan. 4, 1985, at A1, col. 4. See also Washington Post, Dec. 19, 1984, at A4, col. 5 (House Ethics Committee issued a subpoena for a reporter's notes in investigating an embarrassing leak of its investigation of Geraldine Ferraro's compliance with financial disclosure rules; after media outcry, the subcommittee abandoned the leak probe). These efforts to control the release of governmental information represent attempts by the United States government to exercise the broad powers conferred on the British government by the Official Secrets Act.

143. See Abrams, supra note 125, at 22; D. Demac, supra note 98, at 18-25.

144. Sims, 105 S. Ct. at 1886-90. Through a Freedom of Information Act request, Sims and Wolfe sought the grant proposals and contracts and names of individuals and institutions that performed research as part of a large CIA project on controlling human behavior through biological, chemical, and radiological means.

145. Id. at 1886-90. Because the National Security Act of 1947 makes the Director of Central Intelligence responsible for protecting intelligence sources and methods from unauc-
Despite increasing judicial deference to the government's claims of national security and confidentiality, the legally enforceable right of access to governmental records under the Freedom of Information Act stands in sharp contrast to the English Thirty-Year Rule. The United States statutory right protects the public from overzealous public officials, while the English rule protects officials from embarrassment and criticism.

The recognized justifications for withholding information from the public are broader in the English system than in the United States system. The additional criteria accepted under English law tend to be those that enable the government to protect itself from the dissemination of information that can foment criticism. The Official Secrets Act prohibits the unauthorized communication and possession of any information obtained through governmental employment or contacts. Accordingly, the Official Secrets Act reaches beyond classified information and is not limited to information related to important national interests. Through the system of "D" Notices, the English government can determine what information will be made available to the public. The Thirty-Year Rule and the principle of collective cabinet responsibility likewise forestall public access to information pertaining not only to security but also to governmental policies and actions.

Although the United States classification system legitimately applies only to information related to national security and foreign policy, it allows the executive sufficient latitude to manipulate the classification of information for purposes other than national security. Extensive prepublication reviews of the writings of former governmental officials can prevent timely public discussion of important issues in much the same way as the Thirty-Year Rule, although for a shorter period of time. More-
over, the Reagan Administration's recent attempts to expand prepublication reviews of former employees' writings beyond classified information parallel the scope of the Official Secrets Act.

In England and the United States, the executive is accorded broad discretion to act in the name of national security. In both systems the executive can use the rubric of national security to restrict public access to governmental information in an effort to limit criticism of governmental actions. In this way, the executive can foreclose public access to information despite other protections accorded access rights under the legal system. For example, the Reagan Administration's limitations on press coverage of the invasion of Grenada illustrate a governmental restriction of public access to information to stem public criticism of governmental activities. Similarly, Prime Minister Thatcher withheld pertinent information about an order to sink a battleship in the Falklands War. By disallowing independent press coverage of military operations until after the events had occurred, both governments were able to limit and shape the media presentation of their actions to the public.

Until recently, the most striking difference in the ability of English and United States governments to restrict public access to information lay in the punishments meted out for unauthorized disclosures. Under the Official Secrets Act the English government could prosecute and imprison those who leaked governmental information. For most of United States history the government did not attempt, nor did courts recognize its power to impose criminal penalties for unauthorized disclosure of governmental information to the press. Now that the current administration has succeeded in obtaining a criminal connection for an unauthorized disclosure, the power of the United States executive to control access to governmental information more closely approximates that of the English under the Official Secrets Act.

148. See An Off-the-Record War: The Pentagon's Restrictions Prove a Powerful Weapon in the Campaign for Public Support of the Invasion, Newsweek, Nov. 7, 1983, at 83; D. Demac, supra note 98, at 98-101. For other examples of recent attempts to restrict public access to governmental information, see supra notes 142-43 and accompanying text.

149. Milwaukee Journal, Aug. 20, 1984, pt. I at 2; see also supra notes 105-08 and accompanying text; C. Ponting, supra note 105. See generally R. Harris, Gotcha! The Media, the Government and the Falklands Crisis (1983).
IV. LIMITING PUBLIC ACCESS TO INFORMATION
ABOUT THE JUDICIAL PROCESS—A THREAT
TO DEMOCRACY?

Since the Magna Carta, an open judicial process has been a recognized check on governmental abuses. More than most other governmental functions, the administration of justice illustrates the impact of societal values on individual rights. Secrecy in trials can mask the ways that a government imperils individual rights.

In England, the administration of justice has been removed from public scrutiny by a bar on dissemination of information disclosed in the judicial process. In contrast, access to information about judicial proceedings is guaranteed in the United States as a right of self-government.150

A. Limiting Trial Publicity to Protect Fair Trial Rights

In the clash between the public's right to information and the right of an accused to an impartial trial based solely on the facts presented at trial, the English legal system favors fair trial rights while the American system protects the public's right to know.151 To ensure a fair trial, English courts use the contempt power to suppress trial publicity and public debate during the pendency of a trial. The contempt power is not similarly available in the United States.

1. English Law

In England, the contempt power has been used to punish acts and published writings that are calculated to obstruct or interfere with the administration of justice.152 English common law generally prohibits

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150. The negative effects of trial publicity, such as infringements on litigants' privacy rights, are beyond the scope of this article.

151. See Rex v. Parke, [1903] 2 K.B. 432, 437; H. Street, supra note 17, at 148. See also D. Schmeiser, supra note 63, at 222-23 (English and Canadian courts are far more solicitous of fair trial rights than their American counterparts which favor free press rights).

152. Attorney General v. Times Newspapers, 1974 A.C. 273. See also Onslow's & Whalley's Case, [1873] 9 Q.B. 219 and Skipworth's Case, [1873] 9 Q.B. 230 (statements at public meetings that an accused person facing a second indictment had been denied due process and had been a victim of perjury and injustice held to be contemptuous and subject to fines and imprisonment); Rex v. Editor & Printers & Publishers of the "Evening Standard," 40 T.L.R. 833 (K.B. 1924) (in Crumple's Murder Case, a newspaper published reports of its investigation at the scene of the crime, including witnesses' statements, for which it was fined £1000 and costs); see also Rex v. Daily Mirror, [1927] 1 K.B. 845 (contempt conviction of editor for publishing photograph of an accused person before it was certain identity was not an issue); Rex v. Astor, 30 T.L.R. 10 (K.B. 1913) (contempt of court to publish together information about civil and criminal proceedings relating to the same transaction because jury might be
comment on the merits while a case is sub judice; that is, under judicial consideration or otherwise undetermined by a court. In St. James's Evening Post Case: Roach v. Garvan, Lord Chancellor Hardwicke described the rationale behind this rule:

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard. . . . There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

This sub judice rule applies in both civil and criminal cases, although it is more restrictive as applied to criminal matters. While recognizing newspapers' rights to publish accurate reports of public informed of civil matter which was not its concern); Rex v. Clarke, 103 T.L.R. 636 (K.B. 1910) (newspaper editor fined £200 and costs for publishing a report that an individual who fled to Canada and was arrested there confessed to the crime). It is not necessary to show that prejudice has resulted; all that is necessary is that the information has a tendency to interfere with a fair trial. Rex v. Tibbits & Windust, [1902] 1 K.B. 77, accord Goodhart, supra note 31, at 899-90. See generally H. STREET, supra note 17, at 148-61.

This common-law rule has been relaxed by the Contempt of Court Act of 1981, see supra note 153. The right to publish information about a case depends on whether a final decision has been rendered and on whether a new trial is a certainty. Goodhart, supra note 31, at 894; H. STREET, supra note 17, at 156-57. Before the Contempt of Court Act of 1981, it was impermissible to publish claims or defenses in pending civil litigation. Chesshire v. Strauss, 12 T.L.R. 291 (Q.B.D. 1896); accord Granger v. Brydon-Jack, [1918] 25 B.C. 526, 528 (Canadian law).

For example, the Contempt of Court Act of 1981 begins the ban on press comment at a much earlier stage in criminal, as opposed to civil matters. See supra note 153. The Sunday Times could not publish the scenario of the thalidomide drug tragedy for seventeen years while cases on the subject were pending in the courts. The English courts enjoined the Sunday Times from publishing an article criticizing a settlement amount as being too small. The European Court of Human Rights held that the injunction interfered with the newspaper's freedom of expression secured under Art. 10 and was neither justified nor necessary under Art. 10(2) of the European Convention on Human Rights. Sunday Times v. United Kingdom, [1979] 12 E.C.H.R. 245 (European Court of Human Rights). For a discussion of the case, see Abernathy, Should the United Kingdom
court proceedings, English courts have admonished that "it is [the newspapers'] duty to confine themselves to that, and they have no right to publish comments or publish anything which does not actually occur." 157 Because they generally are limited to reporting court proceedings, English newspapers may not publish the results of independent investigations of matters under judicial consideration. 158 After all rights of appeal have elapsed, the press may criticize the parties, the acts of judges, and the overall administration of justice, provided such criticism neither imputes improper motives to jurors and judges nor attempts to impair the administration of justice. 159

Under recent modifications of this contempt power, media discus-


157. Hatfield v. Healy, [1911] 18 W.L.R. 512, 516 (Harvey, C.J.). For example, newspapers have been punished for contempt for publishing information derived from preliminary hearings that was not admissible at trial on the grounds that such publication was prejudicial to the defendants. See Rex v. Tibbits & Windust, [1902] 1 K.B. 77.

158. The law of contempt of court can prevent newspapers from assisting in criminal investigations. Because the press may not publish anything prejudicial to a suspect of a crime, newspapers may not publish photographs of the accused or soon-to-be accused or other information that may induce members of the public to provide useful information to police. The law of contempt stands in the way of press interviews of witnesses and suspects, assistance in detection and investigation of crime, and most other methods by which the media can assist law enforcement officers in crime investigation. H. STREET, supra note 17, at 149-61. Accord Rex v. Editor & Printers & Publishers of the "Evening Standard," [1924] 40 T.L.R. 833 (a newspaper may not conduct and publish the results of an independent criminal investigation of a person charged with a crime).

Editors and publishers of newspapers have been convicted of contempt for publishing material before the suspect was arrested. See, e.g., Regina v. Odham's Press, Ltd., [1956] 3 All E.R. 494 (editors of an article on vice and prostitution that attacked an individual were contemptuous even though the editors did not know the person had recently been charged with keeping a brothel); Rex v. Davis, [1906] 1 K.B. 32 (editor of newspaper fined for publishing an article about a woman arrested for abandoning a child even though the article was published one month before she was charged with the crime); Rex v. Parke, [1903] 2 K.B. 432 (articles depicting a man's character were contemptuous once he was later charged with a crime); Rex v. Clement, [1821] 4 Barn. & Ald. 218, 106 Eng. Rep. 918 (newspapers cannot publish information about trial until indictments of codefendants are judicially resolved).

Under the Administration of Justice Act of 1960, 8 & 9 Eliz. 2, ch. 65, § 11, 7 HALSBURY'S STATUTES 718-23 (3d ed. 1969), lack of knowledge in the exercise of reasonable care is now a defense to a contempt charge even though the crime of contempt is still recognized when proceedings are imminent but not yet pending. Under the Contempt of Court Act of 1981, lack of knowledge is a defense, but only insofar as it relates to knowledge that a proceeding is pending.

159. See Ambard v. Attorney-General for Trinidad & Tobago, 1936 A.C. 322, 335 (Privy Council overturned contempt conviction for publishing article that criticized unequal criminal sentences).

Press comment is limited in another way under the Contempt of Court Act. It is a contempt of court to obtain or disclose the details of jury deliberations or any other information from jurors about the proceedings.
sion of pending cases may be more readily permitted provided it does not give an opinion on the merits or does not otherwise prejudice pending proceedings. Nonetheless, it has been charged that the government has recently commenced or prolonged judicial actions to prevent public discussion of the underlying issues.

2. United States Law

In the United States, the courts give more credence to the public's right to information about pending trials than to the effect publicity may have on the fairness of the trial. Although the contempt powers of United States courts are derived from the English common law, the power to punish out-of-court publications that purportedly threaten the fair administration of justice is constrained by the public right of access to judicial information.

The Judiciary Act of 1789 empowered the federal courts to "punish by fine or imprisonment at the discretion of said courts, all contempts of authority in any case or hearing before the same." This broad authorization was viewed as the equivalent of the English judicial power to punish contempt summarily. Judges exercised this discretion without restraint. For example, one judge used the contempt power to punish a lawyer who published a critique of the judge's decision. This dispute ultimately led to the enactment of a more restrictive contempt statute, which empowered the courts to punish contempt, "[p]rovided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto

161. See, e.g., Robinson, Bad News from Britain, HARPER'S MAG., Feb. 1985, at 65-66 (when Director of Public Prosecutions commenced an investigation into the discharge of radioactive waste into the Irish Sea, media coverage and public debate about the issue lessened because of the catastrophic fines for violating the sub judice rule). This contempt power has been applied to prevent parliamentary discussion of matters pending in the courts. For example, in one extreme instance, the contempt power was invoked by the Lord Chancellor to prevent discussion of a case in which the jury had returned a verdict of not guilty even though it is not possible to appeal a not guilty verdict. H. STREET, supra note 17, at 160-61.
163. Ch. 20, § 17(b), 1 Stat. 73, 83 (1789).
164. E. HUDON, supra note 4, at 97.
as to obstruct the administration of justice.”

In 1918, the Supreme Court interpreted the terms “presence” and “near” as causal; that is, a court could apply the contempt power to an out-of-court statement only if it caused an obstruction to the administration of justice. Subsequently, in 1941, the Supreme Court overturned this causal rule and read the words “presence” and “near” to imply geographic rather than causal requirements. This decision marked the first judicial rejection of the expansive contempt powers of the English common law.

During the 1940’s, a trilogy of Supreme Court cases established the constitutional parameters of judicial power to punish contempt by publication. In *Bridges v. California* the Court applied the clear and present danger test as the measure against which these limitations on free press should be judged, and stated that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.” Under this test, the Court found no justification for the restrictions on free press, concluding that the possible effect on the administration of justice was negligible, notwithstanding the pendency of the cases. Soon after *Bridges*, the Supreme Court decided two other cases involving strongly worded criticisms of judges in pending nonjury cases. In reversing summary contempt convictions, the Supreme Court applied the clear and present danger test, declaring that “freedom of public comment should weigh heavily against a possible tendency to influence pending cases.”

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167. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918) (Court upheld summary contempt conviction for extra-judicial publication of articles intimating a judge’s bias in favor of one party); accord Patterson v. Colorado, 205 U.S. 454 (1907). See Nelles & King, supra note 165, for a history and survey of the law regarding contempt by publication in the United States.

168. Nye v. United States, 313 U.S. 33 (1941) (Court held that court’s contempt power could not reach a person 100 miles from the courthouse who was trying to induce a plaintiff to withdraw a pending lawsuit and rejected the *Toledo Newspaper* rule as a historic inaccuracy).

169. 314 U.S. 252 (1941).

170. Id. at 265. See discussion of the clear and present danger test supra notes 48-52 and accompanying text.


172. Pennekamp v. Florida, 328 U.S. 331 (1946)(two editors held in contempt for asserting that local judges had used technicalities excessively to free criminals) and Craig v. Harney, 331 U.S. 367 (1947)(media criticized judge’s refusal to accept a jury verdict until jury changed its position).

degree of harm to the administration of justice is necessary to justify the exercise of the contempt power. Since the *Bridges* decision in 1941, the Supreme Court has not upheld a single factual predicate for the use of the contempt power to punish the publication of information about pending matters.

It is also unlikely that Congress or a state could constitutionally enact a criminal statute to punish disclosure of information about pending proceedings. In deciding a challenge to one such statute, the Supreme Court applied the clear and present danger test. The Court followed its rulings in the contempt cases and held that out-of-court commentary does not constitute a clear and present danger to the administration of justice.

In jury trials, United States courts have tended to give more weight to fair trial rights, but, at least over the course of the last decade, they have been reluctant to limit pretrial and trial publicity. Instead of resorting to the contempt power to limit publicity, courts generally rely on curative procedural devices, such as *voir dire*, change of venue, continuances, and jury instructions to eradicate the effect of prejudicial pretrial publicity. Not long ago, however, in a case of pervasive and prejudicial trial publicity, the Supreme Court reversed the conviction on due process grounds, concluding that the defendant did not receive a fair trial. Since that case, the balance has generally been struck in favor of publicity.

In summary, English courts use the contempt power extensively to punish publication of commentary on pending judicial matters. Newspapers are restricted to publishing fair and accurate reports of ongoing judicial proceedings. In contrast, United States newspapers can publish virtually all information in the public domain during the pendency of a case. Moreover, United States newspapers are not limited to information in the public domain, but may publish confidential information that is


175. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). See also *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), *aff'd without opinion*, 105 S. Ct. 1155, 84 L.Ed. 2d 309 (1985) (statute that punishes by criminal contempt person who truthfully publishes name of individual against whom an indictment has been filed prior to arrest, violates First Amendment).


B. Public Scrutiny of the Judicial Process—Access to Judicial Records and Products of Discovery

English and United States courts differ in the weight they accord the public right of access to judicial records. Courts in these countries have considered divergent factors to be of primary concern in evaluating similar public access issues.

Historically, the English common law recognized a right of access to public records.178 This right did not exist merely to satisfy individual curiosity, but rather it accrued to individuals who had a direct interest in a document and who sought inspection for a legitimate purpose.179 This doctrine was further refined to require a showing of a proprietary interest in the document or a need for the document as evidence in pending or prospective litigation.180 United States courts extended the right of access to the public-at-large.181 An individual seeking access to a public record did not have to show that he or she needed the document as evidence in order to defend or maintain an action in court.182 As a right of citizenship, every individual acquired a right to inspect and copy public records. In extending this right to the public, one court stated, "If there be any rule of the English common law that denies the right of access to public records, it is repugnant to our democratic institutions. Ours is a government of the people. Every citizen rules."183 Over time, English

179. Rex v. Justices of Staffordshire, 6 A & E 84, 96 (K.B. 1837); Rex v. Lucas, 10 East 235 (K.B. 1808); Rex v. Tower, 4 M & S 162 (K.B. 1815).
182. Nowack, 243 Mich. at 201, 219 N.W. at 750 (an editor and publisher of a newspaper granted permission to inspect public records pertaining to expenditures of public funds). See also Ex Parte Uppercu, 239 U.S. 435, 439-40 (1915) (the right of an individual to examine judicial records does not depend upon his or her interest in the documents).
183. Nowack, 243 Mich., at 201, 219 N.W. at 749-50. Like English courts, some American courts have held that government agencies may regulate the public right of access both to safeguard individual privacy, see, e.g., In re Caswell, 18 R.I. 835, 29 A. 259 (1893); and to protect administrative efficiency, see, e.g., Bruce v. Gregory, 65 Cal. 2d 666, 56 Cal. Rptr. 265, 423 P.2d 193 (1967); State ex rel. Colescott v. King, 154 Ind. 621, 57 N.E. 535 (1900).
courts also redefined this right to inure to members of the public without requiring a showing of a special interest in the document.\textsuperscript{184}

Under both English and United States common law, the right of access to public records applies to judicial records.\textsuperscript{185} The public right of access to judicial records derives from the openness of the Anglo-American judicial systems, the rationale being that access to judicial records provides those who are unable to gain entry to a courtroom the same opportunity to be informed about the proceedings as those present.\textsuperscript{186}

From the rationale behind the public right of access to judicial proceedings, it would appear that the right of access to judicial records should be coextensive with the openness of the proceedings. In other words, the public should have the right to inspect and copy all judicial records offered as evidence or discussed in open court. In practice, however, the public right of access to judicial records falls short of the openness of the underlying proceedings.\textsuperscript{187} The extent to which this is true and to which the right of access extends beyond that which is brought out in open court define the breadth of the public right.

1. English Law

English courts have rejected the contention that once a document is read in open court, every member of the public or the press has a right of


\textsuperscript{186} It is a settled principle in English law that "every Court of Justice is open to every subject of the King." Scott v. Scott, 1913 A.C. 417, 440, [1911-1913] 1 All E.R. 1, 11, and that "[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improvidence. It keeps the judge himself while trying under trial." Harman, [1982] 1 All E.R. at 537. The United States Supreme Court has evoked the same rationale for freedom of the press: "A responsible press has always been regarded as the handmaiden of effective judicial administration.... The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny." Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).


access to the document. While a final adjudication of a matter is pending, prior to exhaustion of all avenues of appeal, public commentary about the underlying issues and facts is curtailed by contempt of court powers. Moreover, an English judge has the power to prohibit accurate reports of the proceedings, even those without commentary when publication may infringe on an interest such as the right to a fair trial. An English judge's discretion to limit dissemination of information about judicial proceedings is untrammeled by public access concerns.

There is a presumption under English law that documents read in open court retain their confidentiality. The press may publish such confidential documents only with the owner's consent or when the public interest in disclosure outweighs the owner's interest in continuing confidentiality. Under English law, a party obtaining documents through discovery impliedly agrees not to use the discovered materials for collateral purposes. A party is protected against an adversary's use of discovered documents for purposes other than the action for which they were discovered. In Home Office v. Harman, the House of Lords held that the implied obligation does not end once discovered documents are read in open court.

In Harman, a lawyer who represented a prisoner in an action chal-
lenging a prison detention program sought to obtain documents pertaining to the program. The Home Office objected to disclosure of the documents on the ground of public interest immunity. The trial court rejected the immunity argument and ordered the production of 6,800 pages of documents. At the Home Office’s request, Ms. Harman, the lawyer for the prisoner, expressly agreed that the “documents obtained on discovery should not be used for any other purposes except for the case in hand.”

At the trial, material parts of 800 pages of the documents were read in open court. A few days after the trial, Ms. Harman allowed a journalist access to portions of the documents disclosed in court. The journalist published an article which was highly critical of the establishment of the detention program by the Home Office. Consequently, the trial court found Ms. Harman guilty of contempt of court for breaching the duty, both implied by law and confirmed by her express promise, not to use documents obtained in discovery for collateral purposes. Both the Court of Appeal and the House of Lords dismissed the subsequent appeals. The House of Lords emphasized the integrity and limited func-

196. The Home Office objected to the production of several of the documents on the ground of public interest immunity. After a hearing and judicial inspection of the documents, the judge ordered production of the documents. Williams v. Home Office, [1981] 1 All E.R. 1151. For a description of the public interest immunity doctrine see supra text accompanying notes 83-85.


199. The journalist told Ms. Harman that he was writing a feature article about some of the issues raised at trial. Since he had been absent from some of the proceedings, he requested the opportunity to inspect the documents that had been read in open court. The requested documents included those that had been the subject of the Home Office’s public interest immunity challenge. Harman, [1981] 2 All E.R. at 353-54.

200. Id. at 361-62.

201. Id. at 358.


[It] was in the public interest that these documents should be kept confidential. They
tion of the discovery process and valued the primacy of privacy rights in documents subject to discovery over a right to impart or receive information. 203

The juxtapositioning of the right to publish information based on documents read in open court with the implied obligation not to disclose discovered documents for collateral purposes leads to what one jurist called "the guilty left hand—innocent right hand anomaly." Theoretically, Ms. Harman could have shown a reporter a transcript of the hearing including portions of the documents read in open court. Because she showed the reporter the actual documents, however, her actions constituted a contempt of court. 204 Lord Diplock minimized the importance of this postulated anomaly in two ways. First, obtaining a transcript of a proceeding involves great expense and is a long and arduous task. If an attorney embarks on this journey and obtains a transcript, presumably this expenditure of time and money was undertaken in some capacity other than the legal representative of the client in the litigation. 206 Thus, the sacrosanct implied obligation would not be violated. Second, Lord Diplock cautioned judges not to allow sensitive documents to be read aloud in court. 207 Instead, if the admissibility of a document has been contested, albeit unsuccessfully, the judge should read the document in advance of the trial or silently in court. 208

Public access to judicial proceedings in England allows the public to attend trials and to publish reports of the proceedings from their own notes or any available transcripts. Where fair trial rights are implicated,

should not be exposed to the ravages of outsiders. I regard the use made by the journalist in the case of these documents to be highly detrimental to the good ordering of our society. They were used so as to launch a wholly unjustified attack on Ministers of State and high civil servants, who were only doing their very best to deal with a wicked criminal who had harassed society . . . .

Id. at 364.

203. Harman, [1982] 1 All E.R. at 534, 536. Several jurists articulated a fear that allowing public disclosure of discovered documents after they have been read in court could create an incentive for noncompliance with discovery.

204. Id. at 538.

205. Id.

206. Id.

207. Id. at 539. Lord Roskill found availability of information conditioned on whether a document was read in open court (as opposed to out-of-court or silent readings by the judge) largely a matter of chance and difficult to justify. Id. at 552-53.

208. Id. Ms. Harman has appealed the House of Lords' determination to the European Court of Human Rights in Strasbourg. A confidential, provisional decision has been rendered and final settlement negotiations are underway. Discussion with A. Lester, Q.C., barrister for Ms. Harman (Oct. 2, 1985). For an analysis of the Harman case under the European Convention on Human Rights, see Eagles, supra note 193, at 288-89.
however, publicity is curtailed. Similarly, an initial owner's privacy right in documents subject to discovery supersedes any public right of access to the material even when it is already in the public domain. Thus, the public right of access to judicial records under English law does not correspond to the openness of the underlying proceedings.

2. United States Presumption of Public Access to Judicial Records

In contrast to the English courts' concern with fair trial rights and the property rights of the party from whom discovered material is obtained, United States courts have created a strong presumption in favor of public access to judicial records:

Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence. . . .

The privilege to disseminate information disclosed in public judicial proceedings is arguably absolute. A court cannot prohibit truthful reporting of evidence adduced at an open hearing. Moreover, states cannot impose civil or criminal sanctions on the accurate dissemination of information disclosed in public court documents.

In contrast, the presumptive right to inspect and copy judicial records is not absolute. It does not attach to all records used in the judicial process, and it can be overcome by countervailing factors. As a general rule, the presumption arises once evidence is offered or admitted

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209. United States v. Myers, 635 F.2d 945, 952 (2d Cir. 1980). Some courts have ascribed constitutional dimensions to this presumption. See Associated Press v. District Court, 705 F.2d 1143, 1145 (9th Cir. 1982); United States v. Dorfman, 690 F.2d 1230, 1233-34 (7th Cir. 1982).


212. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In Cox, the Court invalidated a statutory ban on broadcasting rape victims' names that applied even when the information was obtained from public records.

213. The common-law right to inspect and copy public records originally permitted copying of the content of written documents. With the advent of technology, the right has been extended to include copying the physical embodiment of the document. See United States v. Myers, 635 F.2d 945, 950 (2d Cir. 1980); Zenith Radio Corp. v. Matsushita Electronic Industrial Co., 529 F. Supp. 866, 898-99 (E.D. Pa. 1981).
in open court or is used in the adjudicative stages of litigation.\textsuperscript{214} It generally does not attach to evidence entered under seal, assuming there is a valid reason for the seal, because the session of court is not open with respect to that item of evidence.\textsuperscript{215} The presumption may apply, however, to sealed information that is critical to a judicial matter of public interest, even though such information has not entered the public domain.\textsuperscript{216}

Even when the presumption of public access applies, it may be overcome by countervailing factors, such as privacy interests and the right to a fair trial. Except when the public or the media demand the right to copy taped exhibits in addition to the right to inspect and publicize their contents, courts have uniformly attached greater weight to the public right of access than to conflicting rights. Thus, to prevent public access, courts generally must keep information out of the public domain by sealing items of evidence or by otherwise avoiding public disclosure.\textsuperscript{217} In some instances, however, courts will not allow the media to copy and broadcast evidence in order to protect the privacy rights of third parties.\textsuperscript{218}


\textsuperscript{215} United States v. Myers, 635 F.2d 945, 952 n.4 (2d Cir. 1980). Courts may seal evidence to protect trade secrets, see Natta v. Zletz, 405 F.2d 99 (7th Cir. 1968); to protect national security interests, see International Products Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963); and to avoid hampering law enforcement efforts, see United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); but see Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983) (lifting seal where court found no valid reason to keep information from the public).

\textsuperscript{216} See, e.g., In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1314 (7th Cir. 1984); In re "Agent Orange" Product Liability Litigation, 104 F.R.D. 559 (1985). Sealed evidence may be unsealed depending on many factors, including the need for public access. Cf. United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980) (privacy interests must be considered in decisions to unseal documents used to show search was overbroad); In re Reporters Comm. for Freedom of the Press, slip op. No. 82-1820 (D.C. Cir. Sept. 20, 1985), petition for reh. en banc pending (court upheld against first amendment challenge delay in unsealing exhibits used in Tavoularea libel trial until after final judgment).

\textsuperscript{217} If there are privacy interests to be protected in judicial proceedings, the courts must respond by means which avoid public documentation or other exposure of private information. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-96 (1975). See Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962) (newspaper article implicitly identifying rape victim allowed because based on public court records). See, e.g., In re Gannett News Service, 12 Media L. Rptr. 1113 (5th Cir. Sept. 9, 1985) (court sealed material to preserve fair trial rights of Louisiana Governor Edwards).

Public access to taped evidence also may be tempered by the court’s duty to assure the accused a fair and reliable determination of guilt or innocence based only on evidence presented in open court. In recent cases, television networks have sought to transmit taped evidence to the public, arguing that showing a videotape conveys more complete information to the public than recitation of a transcript. In evaluating these claims, courts have been unpersuaded by arguments based on the fair trial rights of the defendant. Generally, however, if the tape was shown as evidence to the jury in open court in a criminal trial of public interest, courts are apt to rely on voir dire, change of venue, and continuances to cure prejudice resulting from the broadcast.

The right to disseminate information extends beyond public court

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1168, 1172 (D.D.C. 1982) (court denied media the right to broadcast videotape of Jodie Foster’s testimony played at John Hinckley’s hearing because of safety considerations).


220. In the course of the ABSCAM trials, broadcast journalists sought permission to copy and broadcast the tapes admitted into evidence. See United States v. Jenrette, 653 F.2d 609 (D.C. Cir. 1981); United States v. Criden, 648 F.2d 814 (3d Cir. 1981) on appeal after remand, 681 F.2d 919 (3d Cir. 1982); and United States v. Myers, 635 F.2d 945 (2d Cir. 1980). See also Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981).

221. Myers, 635 F.2d at 953 (court relied on jury instructions directing jurors to avoid publicity about the trial). Accord Associated Press v. District Court, 705 F.2d 1143 (9th Cir. 1983); United States v. Alberico, 604 F.2d 1315 (10th Cir. 1979) (broadcast did not interfere with defendant’s fair trial rights because the defendant relied on an entrapment defense, thereby admitting that the events occurred); In re Application of CBS, Inc., 540 F. Supp. 769 (N.D. Ill. 1982) (court allowed copying of tapes because defendant had pleaded guilty and been sentenced, and prejudice to fair trial rights of those yet-to-be-tried was speculative).

222. United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982) (possibility of future trials supported denial of access); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981) (the Fifth Circuit Court of Appeals affirmed the district court’s refusal to permit broadcast copying of BRILAB tapes on the grounds that publication of the tapes would severely prejudice a yet-to-be-tried defendant’s Sixth Amendment right to a fair trial and would impair the selection of a fair and impartial jury).

223. Criden, 648 U.S. at 814; Myers, 635 F.2d at 945 (court rejected the argument that exposure to the tapes would prejudice the trials of other ABSCAM defendants on the grounds that the public’s awareness of the news was overestimated as shown by the fact that only half those summoned for jury selection for this case had any knowledge of ABSCAM); United States v. Mouzin, 559 F. Supp. 463, 468 (C.D.Cal. 1983) (the possibility of a retrial is too remote and voir dire would be a sufficient safeguard against prejudice in the trial of a severed defendant because only four of the sixty-six people questioned in empanelling the jury had sufficient knowledge to warrant dismissal for cause despite widespread publicity shortly before the trial). Accord Jenrette, 653 F.2d at 609.
records. For example, even where evidence has been admitted under seal or is otherwise not publicly disclosed, courts and legislatures cannot punish publication of information lawfully obtained through routine reporting techniques.224

3. Public Right of Access to Products of Discovery

In contrast to the English courts' concern with the property rights of the party from whom discovered material is obtained, United States law allows a party to use discovered material freely in the absence of a protective order.225 Although the discovery rules place no limitations on a party's use of discovered materials, Rule 26(c) of the Federal Rules of Civil Procedure allows a court to impose such limitations, upon a showing of good cause.226 Absent a protective order, a party may use discovered materials for any purpose, including dissemination to the public.227

United States courts have ascribed first amendment protections to the right to disseminate information obtained through discovery.228 The Supreme Court has recognized the legitimate use of litigation as "a vehi-


225. In re Halkin, 598 F.2d 176, 188 (D.C. Cir. 1979). Certain discovery rules require that responsive material be filed with the court, which becomes part of the public record. See, e.g., FED. R. CIV. P. 30 (depositions), FED. R. CIV. P. 33 (interrogatories), FED. R. CIV. P. 36 (requests for admissions). Rules pertaining to other discovered materials, for example requests for documents, FED. R. CIV. P. 34, do not require filing of responsive materials with the court. Accordingly, these discovery materials become part of the public record only if a party introduces them into evidence or relies on them in a pleading. Once discovered materials become part of the public record, the common-law right of access attaches; accordingly, the public has the right to inspect and copy such materials in the absence of exceptional circumstances. A statutory presumption of openness of discovery materials derives from the Federal Rules of Civil Procedure, even if those materials are not used at trial. See FED. R. CIV. P. 5(d) & 26(c); In re "Agent Orange" Product Liability Litigation, 104 F.R.D. 559, 567-68 (E.D.N.Y. 1985).

226. A party may move for a protective order to limit the scope of discovery, the method of disclosure, or the subsequent use of discovered material under FED. R. CIV. P. 26 (c). The person from whom discovery is sought must so move and must show good cause for the protective order to be issued. FED. R. CIV. P. 26 (c).

Protective orders are commonly sought to protect national security information, see International Products Corp. v. Koons, 325 F.2d 40 (2d Cir. 1963); to preserve privileged information, see Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976); and to maintain trade secrets, see Natta v. Zletz, 405 F.2d 99 (7th Cir. 1968).


228. In re Halkin, 598 F.2d at 176, 188 (D.C.Cir. 1978).
Right of Public Access

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for effective political expression and association, as well as a means of communicating useful information to the public." In *Chicago Council of Lawyers v. Bauer*, the Court of Appeals for the Seventh Circuit accepted the notion of litigation as a means of obtaining information to disseminate to the public. In that case, an association of lawyers challenged the validity of disciplinary rules proscribing extra-judicial comments by attorneys. The court stated,

> In our present society many important social issues become entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. . . . [W]e should be extremely skeptical about any rule that silences that voice.

In several recent cases, courts have evaluated the first amendment rights of attorneys and parties to disclose information obtained through discovery. Although some courts held that orders restraining attorneys and parties from disclosing discovery materials were unlawful prior restraints, the Supreme Court closed the door to this prior restraint protection.

In *In re Halkin*, the plaintiffs alleged that certain government agencies had conducted unlawful surveillance of individuals who opposed the Vietnam War through lawful political activities. By means of discovery, the plaintiffs obtained documents from the defendants pertaining to operation CHAOS — the CIA's surveillance program of antiwar activists. The defendants did not seek a protective order. After the plaintiffs issued notice of their intent to release the documents to the press, the defendants obtained an order restraining the parties and counsel from publicly disclosing the documents and from making extra-judicial statements about the information obtained through discovery. The

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231. *Id.* at 258. In discussing the broad rights of attorneys and parties to disclose discovered material, the court in *In re Halkin* observed that certain civil suits may be instigated to invoke discovery as a means of obtaining information for the public. 598 F.2d at 187.
232. 598 F.2d 176 (D.C. Cir. 1979).
233. *Id.* at 180. The plaintiffs requested, under *Fed. R. Civ. P.* 34, production of documents relating to Operation CHAOS. The defendants responded by producing the requested documents purged of all material that the government asserted would impair the United States' foreign relations, reveal CIA intelligence sources and methods, or implicate third parties' privacy interests.
234. *Id.* at 179-81. The restraining order issued by the district court did not forbid the
court of appeals held that the restraining order violated the first amendment by prohibiting political expression without a clearly articulated, legitimate justification.235

In *In re San Juan Star Company*,236 the Court of Appeals for the First Circuit upheld a protective order that prohibited attorneys from disclosing information obtained during a trial about the killing of two Puerto Rican *independentistas*. The court held that the protective order did not violate the first amendment according to the following four factors: 1) the magnitude and imminence of the threatened harm of disclosure; 2) the effectiveness of the protective order in preventing the harm; 3) the availability of less restrictive alternatives; and 4) the reach of the protective order to ensure that it is narrowly drawn to prevent only the perceived harm.237

The practice of limiting public access to the products of discovery by means of more restrictive and far-reaching protective orders recently passed constitutional scrutiny. In *Seattle Times Company v. Rhinehart*,238 the leader of a fanatical religious group sued several newspapers and reporters for libelous statements contained in articles published about the religious group. The defendants initiated extensive discovery, seeking financial information, a list of members, and the identities of the group's donors over the preceding ten years. Because the defendants intended to use the information obtained through discovery in future articles about the leader and his group, the plaintiffs refused to disclose the information and sought a protective order. The trial court issued a protective order covering all information obtained through the discovery process pertaining to donors' and members' identities and to the financial affairs of the group's leaders. The Supreme Court rejected the tests applied by the courts of appeal in *Halkin* and *San Juan Star*

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235. *Id.* at 197. The court identified three constitutional restrictions on protective orders that restrain expression: (1) the harm posed by dissemination must be substantial and serious; (2) the restraining order must be narrowly drawn and precise; and (3) there must be no alternative means of protecting the public interest which would be less intrusive on expression. *Id.* at 191. In Doe v. District of Columbia, 697 F.2d 1115 (D.C. Cir. 1983), the court applied the three-part test set forth in *Halkin* and concluded that the district court abused its discretion by issuing an overbroad protective order when less restrictive means of serving the legitimate interest were available.

236. 662 F.2d 108 (1st Cir. 1981) (a protective order prohibited the plaintiffs' attorneys from disclosing to the press information obtained through depositions).

237. *Id.* at 114-17.

concluding that they would impose an unwarranted restriction on the trial court’s duty to oversee the discovery process. The Court recognized that information obtained through civil discovery is protected by the first amendment, but held that a litigant has no unrestrained right to disseminate such information. The Court identified only the following three constraints on the issuance of protective orders: (1) the protective order may be issued only on a showing of good cause as required by Federal Rule of Civil Procedure 26(c); (2) the protective order must be limited to the context of pretrial civil discovery; and (3) the protective order must not restrict the dissemination of information obtained from other sources. The Court limited appellate review of the issuance of a protective order to an abuse of discretion determination and thus limited the extent to which the discovery process can be used to disseminate information to the public.

Even after Seattle Times, use of discovered material in the United States legal system is not limited to the particular action for which the information is initially sought, unless the court issues a protective order. Not only may civil litigation be used to obtain and disseminate information, but some courts have been hesitant to restrain a lawyer’s freedom to disclose any discovery material publicly. The special role that United States lawyers play in the dissemination of information obtained through discovery contrasts with that of the silenced English solicitors. The guilty left hand—innocent right hand dichotomy illustrates the limitations on the solicitor’s use of information obtained through discovery. In some respects, the English solicitor is subjected to greater scrutiny with regard to the dissemination of information than the general public, while the United States lawyer is subjected to less scrutiny than the public by some United States courts.

V. CONCLUSION

In any governmental system, those in power seek to limit public criti-
icism and public access to embarrassing information. Unchecked governmen
tal power could succeed to a large degree in punishing and forestalling negative public opinion. Neither in England nor in the United States does this sort of unlimited censorship exist.

When sovereignty resided in a monarch or in one specific branch of
government, public criticism of governmental actions could be punished
directly. The sovereign could punish political criticism directly through
seditious libel prosecutions and the exercise of the contempt power.
Moreover, because the public had no right to participate in the govern-
ment, there was no corresponding public right of access to governmental
information. The sovereign, as sovereign, could shape public opinion
about governmental affairs completely.

As democratic principles replaced the notions of infallible sover-
eignty and autocratic government, the public gained rights of direct par-
ticipation. Theoretically, because sovereignty resides in the people, the
law protects public access to information and public right to criticize the
government. In both England and the United States, this shift in political
theory led both to a steady expansion of the public's right to know about
governmental activities and to less direct suppression of public criticism.

Punishing citizens for opposing governmental actions conflicts with
democratic principles of public participation in government. Accord-
ingly, seditious libel prosecutions and certain exercises of the contempt
power have either fallen into disuse or have been sharply limited in scope
and availability. Similarly, claims of Crown or executive privilege have
become limited in scope and in subject matter by judicial oversight. In
place of direct governmental suppression of dissension, English and
United States governments now limit access to information as a more
discrete, and perhaps more palatable, means of suppressing opposition.

Governmental restrictions on public access to information also clash
with democratic principles. For that reason, the English and United
States systems recognize legitimate limitations on the public right of ac-
cess only when necessary to protect sensitive governmental functions. In
practice, however, these limitations have been greatly expanded in both
systems to prevent the disclosure of embarrassing or negative informa-
tion. For example, English and United States governments selectively
withhold information from the public by manipulating its classification
or by asserting a claim of executive privilege.

Most of the governmental functions removed from public scrutiny
involve national security, foreign affairs, or governmental decision-mak-
ing. In England, however, the judicial process is also shielded from pub-
lic discussion through a bar on publications about pending proceedings
and limitations on public access to information disclosed in the judicial process. In many respects, these restrictions remove an important governmental function, the administration of justice, from the arena of effective popular self-government.

As manifested in established legal doctrine, the English system is more restrictive of the public right of access to information than the United States system. Nonetheless, many recent developments in the United States demonstrate that governmental officials who desire to limit access to negative or embarrassing information can do so within the existing system. In many respects, the recent expansions of governmental power to suppress information in the United States approximate the air of secrecy inherent in English legal doctrine.