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## COMMENT ON "ACCESS TO CLASSIFIED INFORMATION: CONSTITUTIONAL AND STATUTORY DIMENSIONS"

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I agree with Bruce Fein's position that "[p]reservation of the Nation's democracy depends in large measure on access by the public to information regarding government practices or policies."<sup>1</sup> The crucial role played by the citizen's right of access to information is apparent if we simply stop to think for a moment what the difference between citizen knowledge and citizen ignorance would make upon the course of history. Suppose that the information embodied in the Pentagon Papers had been made available to the public at the time. Is there any doubt that the Viet Nam War would have ended long before it did? Or suppose that the FBI's harassment of Dr. Martin Luther King, Jr. had been revealed to the citizens of this country when it was occurring. Would anyone believe that it would have continued beyond the moment of disclosure? Or would the CIA's assistance in mining the waters of Nicaraguan ports ever have taken place if the information about plans to engage in that operations had been public knowledge? Thus, on the importance of the citizen's unimpeded access to information I am in full accord with Mr. Fein.

Conversely, in my judgment, Mr. Fein's paper overstates the case for our system of classification and gives too little weight to the public's right to know. Some secrecy in some operations of the government is, of course, necessary. But the strong presumption should be against government secrecy. In a democratic society withholding information from the public should bear a heavy burden of justification. Nondisclosure should be confined to a narrow area roughly limited to tactical military operations, design of weapons, and those aspects of diplomatic relations when confidentiality in the negotiation process is expected by all parties.

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1. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805 (1985).

If we start with these assumptions, as I think we should, there are at least five points at which Mr. Fein's position fails to measure up to the requirements of a democratic system. First, Mr. Fein largely ignores the background against which the judgment to conceal information from the public must be made. When we base our decision to classify on relevance to "national security" we are dealing with a concept of enormous ambiguity. The term "national security" is virtually without limitation. It could embrace almost any aspect of our national life. Moreover, past experience demonstrates that the classification process is grossly overused and frequently abused. Millions of documents are routinely stamped classified, a high proportion of which cannot be justified on any theory of harm to national security. At times the classification symbols are used to cover up incompetence, mistakes, or even corruption. In addition, experience has also shown that, as in the *Pentagon Papers*<sup>2</sup> case, government claims of harm to national security are highly exaggerated and must be viewed with the utmost skepticism. Finally, the classification system is permeated with leaks. A significant proportion of information reaching the public through the press and other sources is actually in violation of the classification rules.

In formulating the principles for shutting off the public's access to government information these and similar factors must be taken into account. A fool-proof, iron-clad system of government secrecy smacks more of a totalitarian than a democratic system.

Second, Mr. Fein underestimates the force of the precept that, under the first amendment, the press and the public have a constitutional right to know. Mr. Fein argues that "[g]enerally [speaking], neither the public nor the media enjoy any constitutional right of access to information or records generated or controlled by the government,"<sup>3</sup> citing only the *Houchins*<sup>4</sup> case. He goes on to say that the Supreme Court "has recognized only one exception to the 'no access' rule,"<sup>5</sup> that being the right of access to criminal trials upheld in the *Richmond Newspapers*<sup>6</sup> case. I think it clear that the right-to-know principle carries much more weight than Mr.

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2. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

3. See Fein, *supra* note 1, at 819.

4. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

5. See Fein, *supra* note 1, at 820.

6. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980).

Fein acknowledges. The first amendment theory from which the doctrine springs—that the people as sovereign need to be kept informed of all matters affecting the public interest—is a powerful one. It goes to the essence of democratic government. And I believe the Supreme Court will, over time, give the right-to-know a greater role in first amendment adjudication than it has in the past. I would think, for example, that a strong case can be made for the proposition that the right of the press to report first-hand on the invasion of Grenada, apart from matters of military tactics that would endanger our armed forces, is constitutionally guaranteed under right-to-know principles.

Third, Mr. Fein downgrades the power and the competency of the judicial branch of government to play a significant part in checking abuses of the classification system by the executive branch. He goes as far as to argue that claims by the Executive to withhold information from Congress on grounds of executive privilege ought to be considered "political questions," and thereby not within the jurisdiction of the courts. It is quite true that any system of secrecy is difficult to hold in check; the very process of supervision involves sharing the secrets with others. Yet this does not mean that the search for checks and balances must be abandoned. On the contrary the courts, through devices such as proceeding in camera, and the legislature, through measures such as the Classified Information Protection Act, already have begun the search for methods by which more effective supervision of secrecy claims can be effectuated.

Fourth, there has been a strong tendency on the part of the government to press toward the goal of creating and maintaining a precision-like system in which vast amounts of information will be classified and no leaks will be permitted. Thus, the President in March 1983 issued a Directive which would have required some 100,000 government employees to sign pre-publication agreements, under which for the rest of their lives they could not publish any material, classified or unclassified, which dealt with matters arising in the course of their government employment, unless they first obtained clearance from their former agencies. The same directive called for increased use of polygraph tests and FBI investigators to police the system. As a result of objections from Congress and others these measures have not yet been put into effect, but there

is no assurance that they will not be. Meanwhile the Department of Justice, in the case of Samuel Loring Morison,<sup>7</sup> is attempting to persuade the courts to interpret the espionage laws as applying to the transmission of classified information to the press. And the CIA has been preparing to ask Congress for legislation to make it a criminal offense for government employees to disclose classified information.

Mr. Fein's paper appears to support this draconian approach. Thus, he endorses the Supreme Court decisions in *Marchetti*<sup>8</sup> and *Snepp*,<sup>9</sup> upholding CIA prepublication agreements, and indeed assumes that these decisions are applicable throughout the government, even though they concerned only the CIA. In my judgment the effort to tighten up the classification system in this way poses a serious threat to the democratic way of life in this country. So much material is classified, access to classified material is so essential to the decisionmaking process, the actual harm to national security from improper disclosures so unproven, that only a relatively loose system for keeping government secrets will prevent us from ending up as a virtually closed society.

Fifth, the same considerations apply to laws and government machinery designed to control the dissemination of classified information which has already escaped the government's grasp. Mr. Fein accepts Justice Stewart's concurring opinion in the *Pentagon Papers* case as laying down the applicable rule of law. According to this doctrine, the government can enjoin the publication of classified information when its disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people." There are serious drawbacks to the Stewart formula: it is exceedingly vague, giving little advance notice of what the law is; it accords no weight to the social and individual interests in freedom of expression, considering only the alleged harm to national security; it violates the rule against prior restraint. Moreover, if a similar principle is embodied in legislation establishing a criminal prosecution for divulging classified information, the result is the creation of an "official secrets act," attaching a criminal penalty to the cir-

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7. *United States v. Morison*, 604 F. Supp. 655 (D. Md. 1985).

8. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

9. *Snepp v. United States*, 444 U.S. 507 (1980).

ulation of a particular piece of information by anybody under circumstances where publication could be deemed to harm national security.

It would seem clear to me that the opportunity to obtain information necessary to the discussion of public issues on a knowledgeable and intelligent basis would not exist under these formulations of the law. Rather, our efforts should be directed toward marking out specified categories of information, such as that involving tactical military operations, where the right to communicate information could legitimately be restricted.

In summary, I would say that our present rules on classification play a profoundly inhibiting role in our system of freedom of expression, one that is growing more restrictive day by day. Our efforts should be directed, not toward expanding the structure or making it more effective, but toward focusing its restrictions on a specified narrow area and loosening up its administration.