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VOLUME XXIII DECEMBER 1978 NUMBER 1

The Ateneo Law Journal

Published twice during the academic year by the students of the Ateneo de Manila University College of Law

THE PROPOSED OFFICIAL INFORMATION ACT: A BALANCING OF FREEDOM AND AUTHORITY

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"All of politics begins by recognizing the need to maintain an effective balance between the claims of the individual and those of the community.

"Heraclitus of Ephesus, writing more than twenty-five centuries ago, saw the problem as one of how to combine that degree of individual liberty without which law becomes tyranny with that degree of law without which liberty becomes anarchy." President/Prime Minister Ferdinand E. Marcos, The Philippine Experience: A Perspective on Human Rights and the Rule of Law, p. 1.

"Some call the resulting balance justice, others call it equity. It also comes under the generic term 'public order'." President/Prime Minister Ferdinand E. Marcos, Human Rights and the Rule of Law (The Challenge of Liberty), (1977), p. 48.[1]

I. The Bill

The political balance must be established anew to determine the potential consequence of the proposed Official Information Act as modified[2] in the equilibrium of freedom and authority. Seeking to maintain a balance between indiscriminate disclosure and excessive secrecy, the bill declares its policy "to secure the constitutional right of the citizen to have free access to official information, subject only to the limitations imposed by the rights of individuals; public order and safety; the national interest; and the defense and foreign relations of the

[1] "The Roman codifier has said that the two pillars of public order are law and authority. The unrestrained practice of individual liberty, so it is said, is anarchy. It is also the survival of the strongest irrespective of the claims and rights of the weak. In short, the law of the jungle prevails. The unlimited use of authority, on the other hand, results in tyranny: the imposition of power by a few or by one over the many. In either case, force is its life and the degradation of the human being, its ultimate result. Thus, both must be avoided.
"A government of laws is in between these two extremes. How far in between is the continuing puzzle of mankind. In every period of ferment and innovation, the question presents itself. All countries, all states, all people must formulate their own peculiar, unique answer." Ibid., p. 48.

[2] Cabinet Bill No. 10 (C.B. 10) sponsored by Ministers Francisco S. Tatad and Juan Ponce Enrile entitled "An Act to Ensure Public Access to Official Information Subject to Certain Limitations". The full text of the modified bill is reprinted on page 18, infra, from the Philippines Sunday Express, 24 Sept., 1978, p. 2. The original bill was entitled "An Act to Prevent the Unauthorized Disclosure of Classified Official Information and for Other Purposes," published in Philippines Sunday Express, 20 Aug. 1978, p. 6.

Philippines(hereinafter collectively termed national security.) In particular, the government has the right to take adequate steps to prevent the unauthorized disclosure of official secrets. In no case, however, shall official information be classified and withheld to conceal official error, misconduct or inefficiency, to restrain free initiative, or to shield a public officer or office from embarrassment."[3] The bill prohibits and punishes any person, whether a public officer or private individual, who being unauthorized discloses or retains classified official information,[4] relating to "national security"[5] and categorized as Top Secret, Secret and Confidential depending on the degree of damage which the unauthorized disclosure would cause to national security, that is, exceptionally grave damage, serious damage, and damage, respectively.[6] Unauthorized disclosure means the unauthorized communication of classified official information; to communicate is "to divulge, disclose, or make known, or pass, transfer or transmit, in any manner or to any extent, any official information."[7] "The authority to originally classify official information shall be limited to: a) The Prime Minister, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Justice and the Minister of National Defense; b) Such other officials as may be authorized in writing by the Prime Minister."[8] "Information shall be deemed as classified within the meaning of the act if in the case of a document, it is marked with any of the three classifications described in this Section."[9] "No document shall be given more than one classification. In case of document which has more than one classification, the least restrictive shall apply."[10] "The responsible Minister or official concerned shall undertake a periodic review of the official information which has been classified by him under this act, for the purpose of ensuring the correct classification of official information at all times."[11] "A Minister may, in the performance of his duty and when the national interest requires it, communicate in confidence certain official information classified under this act to responsible members of mass media for the purpose of providing the latter with adequate background on vital national or international developments."[12] "Regulations concerning the classification, review and declassification of classified official information shall be promulgated by the Prime Minister."[13] "On complaint, the proper court may enjoin the agency concerned from withholding agency records and order the production of any agency records improperly withheld. If the agency can show that exceptional circumstances exist and that the agency is exercising due

[3] Sec 2 (Declaration of Policy), C. B. 10.
[4] Secs 3(3), 9-11, ibid.
[5] Secs 7 & 8, ibid.
[6] Ibid.
[7] Sec 3(7), ibid.
[8] Sec 8(2), ibid.
[9] Sec 8(3), ibid.
[10] Sec 8 (1e), par. 23, ibid.
[11] Sec 8 (4), ibid.
[12] Sec 8 (5), ibid.
[13] Sec 8(6), ibid.

diligence in responding to the request, the court may allow the agency additional time to produce the records. Whenever the court orders the production of any agency records improperly withheld from the complainant and the court additionally issues a written finding that an officer or employee may have acted arbitrarily or capriciously in withholding such records, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee concerned. The administrative authority shall within thirty days take the corrective action recommended by the Commission."[14] "No prosecution of an offense under Section 9 shall be instituted without the written approval of the Minister of Justice, and without a certification of the responsible Minister or official concerned that: a) a review has been conducted by the responsible Minister or official concerned of the classification of the official information disclosed without authority; and b) at the time of the disclosure, the official information was properly classified in accordance with Section 8 of this act. In case the official information was originally classified by the Minister of Justice, no criminal proceedings shall commence without the written approval of the Prime Minister."[15]

II. The Balance

The bill affects the twin freedoms of information and of speech and press. Insofar as one is denied access to classified official information, his freedom of information is limited; insofar as a person is prohibited or becomes unknowledgeable to speak or write about classified information, his freedom of speech or press is affected.

A. FREEDOM OF INFORMATION

"The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizens subject to such limitation as may be provided by law." This is the mandate of Section 6 of the Bill of Rights of the 1973 Constitution. This constitutional guarantee is in accord with the basic principle that the right to participate in a democracy includes the right to be informed.[16] Sovereignty resides in the people and all government authority emanates from them.[17] The people however can have

[14] Sec 6, ibid.
[15] Sec 11, ibid.
[16] D. Q. Wickham, Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 Northwestern U L.R. 480 (1973).
[17] Art II, Sec 1, 1973 Constitution.

no real sovereign power without factual knowledge of governmental activities.[18] Thus, to be informed, the public should have access to official information. In the writings of James Madison, "(a) popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps both."[19] But "knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives."[20] Otherwise, "(h)ow can we govern ourselves if we know not how we govern?"[21] Thus, "the people have a right to know"[22]. In the language of the explanatory note of the amended information bill, "by guaranteeing the citizen access to official records and documents and papers pertaining to official acts, transactions and decisions of the government, the people are fully enlisted in the decision-making and legitimizing process."[23]

The constitutional guarantee of information, a new constitutional right, is self-executory.[24] No law is needed to grant or activate this guarantee. The right exists by virtue of the Constitution and the role of the legislature is not to confer this right but to set allowable limits on it, the right being "subject to such limitations as may be provided by law." Access to information, therefore, may not be prohibited but may only be regulated by law in the exercise of the inherent police power of the state or by an officer through his inherent power to prescribe reasonable guidelines on the time and manner of examination of the records in his custody.[25]

The question then is reduced to a determination of the scope of permissible official regulation. "In determining the allowable scope of official limitation on access to official records, it is important to keep in mind that the two sentences of Section 6 guarantee only one general right, that is, the right to information on matters of public concern. The right of access to official records is given as an implementation of the right to information. Thus, the right to information is both the purpose and the limit of the right of access to public documents. Thus, too, regulatory discretion must include both authority to determine what matters are of public concern and authority to determine the manner of access to them."[26] Once materials have been classified as of public concern and therefore open to the public, permissible regulation depends on reasonable standards prescribed by the law or as to time and manner of examination only, by the officer in custody of the records. "The real problem, however, lies in determining what matters are of public concern and what are not. Unwittingly, perhaps, by this provision the Convention has opened a Pandora's box. For certainly, every act of a public officer in the conduct of the governmental process is a matter of public concern. But then, there is also the obvious need, especially in matters of national security and foreign relations, of preserving a measure of confidentiality. Thus, the right of the people to information must be balanced against other genuine interests necessary for the proper functioning of government.

"This is a new era of constitutional jurisprudence for it involves not just the right to disseminate information but the right to access to information that is within the control of the government. While, however, it is a new area, it is not a totally unexplored area. It is submitted that the standards that have been developed for the regulation of speech and press x x x are applicable to the right of access to information. These, after all, are cognate rights, for they all commonly rest on the premise that ultimately, it is an informed and critical public opinion which alone can protect the values of democratic government."[27] Freedom of speech and press would be meaningless without information on matters one wishes to speak or write about.[28] Indeed, the exercise of such freedom in ignorance is dangerous irresponsibility.

B. FREEDOM OF SPEECH AND PRESS

Freedom of speech and press occupies a preferred position in the hierarchy of human rights, essential as they are to the vitality of our

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[18] Note 16.

[19] Letter to W. T. Barry, Aug. 4, 1822, 9 Writings of James Madison 103 (Hunt ed. 1910) noted in National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act, 123 U of Pennsylvania L.R. 1438, 1469 (1975).

[20] Ibid.

[21] Attorney General Ramsey Clark, quoted in Vaughn V. Rosen: Toward True Freedom of Information, 122 U of Pennsylvania L.R. 731 (1974).

[22] Open Meeting Statutes: The Press Fights for the Right to Know" 75 Harvard L.R. 1186 (1962).

[23] Quoted in Philippine Sunday Express, Sept. 24, 1978, p. 6. col. 3.

[24] I. Bernas, Constitutional Rights and Duties (A Commentary on the 1973 Philippine Constitution) 122 (1974).

[25] Subido v Ozaeta 80 Phil 383, 386-7 (1948); I Bernas 123.

[26] I Bernas 123.

[27] I Bernas 124.

Prior to the 1973 Constitution, access to official records was not considered to involve freedom of speech and press. (Subido v Ozaeta.) It was merely considered a statutory right, in the absence of explicit guarantee in the 1935 Constitution. In the United States, where there is no explicit constitutional provision on information, advocates of the "right to know" insist that access to information about governmental activities is subsumed in the guarantee of free speech and press. "They argue that the primary objective of the constitutional guarantees of free speech and a free press was to make government responsible to the governed by ensuring that the people would be informed about its conduct; thus they declare: It is obvious that the freedom of the press implies the right to gather news and the right of those who possess information to impart news. To the objection that the framers of the Bill of Rights were concerned with abolishing prior restraints to publication and not with guaranteeing access to sources of information, they answered that the Constitution is a living document and that freedom of the press and speech under contemporary conditions includes the right to gather information from government agencies ...." Harvard L.R. 1204; see note 22.

[28] "A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without a vendure. Freedom of the press means freedom to gather news, write it, publish it, and circulate it." Musmanao, J., dissenting; see Mack Appeal 386 Pa. 251, 273; 126 A. 2d 679, 689 (1956), quoted in 75 Harvard L.R. 1204, n. 37.

civil and political institution.[29] "The vital need in a constitutional democracy for freedom of expression is undeniable whether as a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social, including political, decision-making and of maintaining the balance between stability and change. The trend as reflected in Philippine and American decisions is to recognize the broadest scope and assure the widest latitude to this constitutional guaranty. It represents a profound commitment to the principle that debate of public issues should be uninhibited, robust and wide-open."[30]

Freedom of speech and press consists of two guarantees. The first guarantee which is the chief purpose of the constitutional provision is the prohibition of prior restraint, the official government restriction on speech and press in advance of actual expression or publication. Its most common form is executive licensing but it may also take the form of a legislative prohibition or judicial injunction.[31] "To subject the press to the restrictive power of a licenser x x x is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government"[32] leading to the standardization of ideas.[33] However, "the mere exemption from previous restraint cannot be all that is secured by the constitutional provision, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publication." Thus, freedom of speech and press is also a limitation on the state power to impose a penalty subsequent to expression.[34]

Yet, with all its essentiality, freedom of expression, like any freedom is not absolute.[35] "Where it alienable and absolute a man ought not to be prosecuted for slandering the name of another, or to use Holmes' vivid example, a man who cries 'Fire' in a crowded theater even when there is no fire would only be exercising his right to free speech."[36] Civil liberty may be said to mean that measure of freedom which may

[29] Philippine Blooming Mills Employees Organization v Philippine Blooming Mills. Co., Inc. 51 SCRA 189 (1973).
"No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances" Sec. 9, Art IV, 1973 Constitution.
[30] Gonzales v Comelec 27 SCRA 835, 857 (1969).
[31] I Bernas 166; Near v Minnesota 283 U.S. 697 (1931).
[32] Blackstone, Commentaries 145 (1976) quoted in I Bernas 165-6.
[33] Cox v Louisiana, 379 U.S. 536, 552 (1965).
[34] Cooley, Constitutional Limitations 421 (1808) cited in I Bernas 167.
[35] Gonzales v Comelec, supra., at 838.
[36] Ferdinand E. Marcos, The Philippine Experience: A Perspective on Human Rights and the Rule of Law, p. 21; see also Schenck v United States 249 U.S. 47, 52 (1919) per, Holmes, J.

be enjoyed *in a civilized community*, consistently with the peaceful enjoyment of like freedom in others.[37] Freedom is a demandable right and duty and connotes a system or authority by which it may be enforced. Freedom therefore is a relationship among authority and private individuals with their respective rights and responsibilities. Being a relationship, freedom is relative, not absolute. Absolute freedom under under any and all circumstances negates authority, the freedom of others and the whole human relationship.[38] Each will do as he pleases without restraint nor subsequent punishment. Thus, absolute freedom is anarchy, which is not freedom at all.

The authority in the relationship of freedom is the State represented by the government. The State has the inherent and plenary power to prohibit all that is hurtful to the comfort, safety, and welfare of society.[39] This power is known as police power and has been characterized as "the most essential, insistent and the least limitable of powers, extending as it does to all the great public needs."[40] In the classic definition of Chief Justice Shaw, police power is "the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[41]

Freedom viewed in the historical origin of the bill of rights transplanted into our land from the American soil is a limitation on the inherent powers of government.[42] However, since freedom is not absolute, the powers of government, in effect, operate as a limitation on freedom. Thus, each mutually limits the other. But, the power of the state to abridge freedom of speech and press is the exception rather than the rule. Freedom is the rule, limitation is the exception. "The perfection of humanity is not possible without freedom for the individual. Thus, the existence of social institutions and all political organizations and relations are justified insofar as they have for their primary aim the defense and protection of freedom."[43] And as President/Prime Mi-

[37] John Donne wrote in one of his Observations:
"No man is an Iland, intire of it selfe; every man is a piece of the Continent, a part of the Maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Manor of thy friends or of thine own were. Any mans death diminishes me, because I am involved in Mankinde. And therefore never send to know for whom the bell tolls. It tolls for thee."
[39] Rubi v Provincial Board, supra.
[40] Ermita-Malate Hotel and Motel Operators Association Inc. v Mayor of Manila, 20 SCRA 849, 857-8. (1967).
[41] Commonwealth v Alfer 7 Cush. 53 (Mass 1851), quoted in Churchill v Rafferty 32 Phil 580, 603 (1915).
[42] Philippine Blooming Mills Employees Organization v Philippine Blooming Mills Co., Inc., supra.; New York Times Co v United States 403 U.S. 713 (1971), Black J., concurring, at 714-27.
[43] Marcelo H. del Pilar, quoted in C. Majul, The Political Ideas of the Philippine Revolution 40 (1957) and in I Bernas 14.

nister Marcos has written, "(a) midst all these contentions there appear to me certain common and persistent themes on which the variant philosophies and ideologies converge, even as they differ greatly in their construction of their meanings. This is the idea of human freedom. Every ideology or system asserts that freedom is a value, and that it is an essential condition for the fulfillment of human aspiration, and though the terminology may differ — — with some speaking of 'liberation', others of 'liberty' and still others of 'rights' — they all speak in the end of the freedom of the individual.

"And in consequence, they also speak of what this freedom means in relation to human society and government"[44] because "for the protection of freedom, a political institution must possess power. Hence, government becomes the delicate art of balancing the power of government and the freedom of the governed."[45]

a. Prior Restraint

No Philippine decision on prior restraint can yet be found in the casebooks. Thus, reference may be made to American jurisprudence even merely to view how their political balance operates, our bill of rights having originated from theirs. With the importance, however, of speech and press, it is difficult not to accept as reasonable the weight marked for this freedom in American constitutional law.[46]

New York Times v United States[47] asserts that "(a)ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." However, "the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited x x x(T)he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community

[44] Ferdinand E. Marcos, The Philippine Experience: A Perspective on Human Rights and the Rule of Law, p. 2.

[45] I Bernas 15.

[46] "I can conceive of no simple formula for the conception of rights except the one enunciated by some philosophers that freedom must be construed in the light of reason and common sense", Ferdinand E. Marcos, note 4, pp. 22-23.

[47] Note 42.

life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force."[48] "Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary."[49] "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant principally, although not exclusively, immunity from previous restraint or censorship."[50]

b. Subsequent Punishment

Prior restraint being the chief purpose of freedom of expression, at least, it must be evaluated by the "clear and present danger" standard developed for subsequent punishment, the guarantee's secondary purpose, although nonetheless important. Philippine jurisprudence has adopted Justice Holmes' formulation of the standard to be satisfied before expression may be penalized. In Holmes' formulation "(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 evil that Congress has a right to prevent. It is a question of proximity and degree."[51] The danger must not only be clear but also present. As explained by Justice Fernando, clear or extremely imminent must be the degree of the causal connection between the utterance sought to be punished and the danger of the extremely serious substantive evil sought to be prevented. The present, not the past nor the future, is the time or proximity of the danger.[52] The statement of the clear and present danger rule, however, does not resolve the whole problem. In the first place, the question of proximity and degree cannot and should not be captured in a formula. Courts must still evaluate when a danger shall be deemed clear, how remote the danger may be and yet be

[48] Near v Minnesota 283 U.S. 697, 716 (1931).

[49] New York Times Co. v United States, supra., Brenham, J. concurring at 726-7. Although the New York Times case involved attempted executive prior restraint by judicial injunction, the principles enunciated there are applicable, mutatis mutandis, to legislative prior restraint; see also II Tañada & Carreon, Political Law of the Philippines 161 (1962).

[50] Near v Minnesota, supra, at 716.

[51] Schenck v United States 249 U.S. 47, 52, partly in Gonzales v Comelec, supra., at 860.

[52] Gonzales v Comelec, supra., at 860-1; Bridges v Caliornia 314 U.S. 252 (1941).

deemed present.[52a] Secondly, not all questions on freedom of expression can be answered in "proximity and degree". Chief Justice Castro in a concurring opinion said that "where the legislation under constitutional attack interferes with freedom of speech and assembly in a more generalized way and where the effect of speech and assembly in terms of the probability of realization of a specific danger is not susceptible of impressionistic calculation" the "balancing of interests" test is the more suitable standard.[53] The basis for the test is that:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an *indirect, conditional, partial abridgment of speech*, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented x x x we must, therefore, undertake the 'delicate and difficult task x x x to weigh the circumstances and to appraise the substantiality of the reason advanced in support of the regulation of the free enjoyment of rights x x x[54]

The two tests, however — — the clear and present danger rule and the balancing of interests test — — are or should be integrated into each other. Considering the importance of speech and press the process should be balancing of interest but the substance of the process should be clear and present danger. As Professor Freund has observed:

> Even where it is appropriate, the clear and present danger test is an oversimplified judgment unless it takes account also of a number of other factors. The relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are *not a substitute for the weighing of values*. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[55]

Thus, courts must still transcend formulas and grapple with facts.

[52a] Bridges v California, supra., at 216.

[53] Gonzales v Comelec, supra. at 888, 898-901 opinion, Castro, J.

[54] American Communication Association v Douds 339 U.S. 383, quoted in I Bernas 1975 (emphasis added).

[55] Freund, The Supreme Court of the United States 44 (1961), cited in Gonzales v Comelec 27 SCRA 835, 860 (1969), (emphasis added). Holmes, averse as he was to generalizations, wrote: "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage." The Common Law p. 1 (1881).

III. The Bill in the Balance

The bill may now be weighed in the constitutional balance marked with the following standards.

1. Only an exceptional case akin to imperiling a transport at sea or at least a clear and present danger justifies a limitation of information, speech and press. The substantive evil sought to be prevented must be extremely high.[56a] The Top Secret classification meets this standard as the category contemplates an unauthorized disclosure that would cause "exceptionally grave damage" to the national security. The Secret criterion may liberally be allowed although it anticipates only a "serious damage", falling short of the extremely serious standard. What is more constitutionally debatable is the Confidential classification. Thereunder, the anticipation of damage which need not be serious may justify withholding of information or punishment of violation.

2. Every instance of prior restraint bears a heavy presumption against its constitutional validity. The government, therefore, must bear the burden of showing justification for the restraint. Insofar as a person is barred from information or banned from expression, so is the system one of prior restraint. The modified bill places the burden on the agency to "show that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request," in which case "the court may allow the agency additional time to produce the records."[56] Apparently, the burden of proof contemplated in the bill is for the extension of time for the production of information. It is suggested that the bill provide for the burden of proof *to sustain the classification itself* which should be placed clearly and heavily upon the restraining officer or authority.

3. Freedom is the rule, limitation is the exception. The bill as amended now reflects fidelity to the rule of freedom by explicitly mandating access to information and restricting it only under specific exceptions. Freedom and limitations will now be more understandable in theory and their balancing more workable in practice.[57]

4. The transcendence and sensitivity of information and expression ought to manifest in the importance, competency and responsibility of the officers empowered to make classifications. This, the modified bill embodies. The authority to originally classify official information is limited to the Prime Minister and Ministers of Foreign Affairs, Finance, Justice and National Defense. Only the Prime Minister may authorize in writing other officials to classify information.[58] The limited number and prestigious character of the offices authorized to classify will prevent or rectify overclassification or misclassification.

[56a] Gonzales v Comelec, supra., at 860. Bridges v California, supra.

[56] Sec 6(2), C.B. 10.

[57] Sec 7, ibid.

[58] Sec 8(2), ibid.

5. The exceptional nature of permissible prior restraint and the clear and present danger requisite for subsequent punishment require a narrowly delimited and precisely defined statute. The modified bill identifies,[59] national security, i.e. defense and foreign relations, as the substantive area in which classification may occur and prescribes national security and the graduated danger of damage thereto as classification criteria. National security has been recognized by American courts and commentators as a wide ranging concept. In one American definition, "national security is a generic concept of broad connotations referring to the Military Establishment and the related activities of national preparedness including those diplomatic and international political activities which are related to the discussion, avoidance or peaceful resolution of potential or existing international differences which could otherwise generate a military threat to the United States or its mutual security arrangements."[60] In another American conceptualization, national security deals "with all forms of security threats, military and nonmilitary; nonmilitary threats to security include the energy crisis, retarded economic growth, higher costs of industrial production, new deficits in international payments, increased inflation, the oil weapon, and the population explosion."[60a] In the Philippine situation, the agrarian problem and the secessionist threat may be added to the mentioned components. The contemporary conception of national security depending on a calculation of future contingencies and on an assessment of the priorities of the nation in foreign affairs raises serious difficulties to judicial review of executive classifications. The policy-determined and prophylactic or preventive nature of national security was noted by the Yale Law Journal in relation to the damage criterion of classification and its judicial review.

The journal said:

> "2. *Uncertainties and Intangibles in National Security Determinations*
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> National security is a prophylactic concept, concerned with potential dangers—with "intangibles, uncertainties and probabilities rather than [with] concrete threats readily foreseeable and easily grasped."[56] Hence the "damage to the national security" standard is so intrinsically vague and elastic that courts will have difficulty applying it to executive classification decisions. The question is not, as it is sometimes phrased, whether courts have enough technical expertise to assimilate the factual information necessary to conduct such a review,[57] but whether the "damage to the national security" standard is specific enough to permit the use of this expertise even if available to the courts.

[59] Sec 2, ibid.

[60] U.S. Executive Order No. 11, 652 quoted in National Security and the Amended Freedom of Information Act 85 Yale L. J. 401, 411-5 (1976).

[60a] Taylor, The Legitimate Claims of National Security, 52 Foreign Affairs 577, 592-4 (1974), noted in 85 Yale L. J. 401, 410, fn. 54.

> 3. *Foreign Policy in National Security Determinations*
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> Although political rhetoric often invokes national security as if it were a "fact" beyond the control of policymakers,[58] national security is dictated by policy rather than the reverse.[59] It is not possible to supply national security with a content, military or otherwise, that is distinct from a political determination of foreign policy goals.
>
> In the first place, security is largely subjective;[60] even in the absence of "objective" threats, a nation is not secure if it is afraid. Hence, security is not synonymous with power.[61] Moreover, national security decisions require commitments of national resources which could be placed elsewhere; thus "acceptable" levels of security can only be achieved by other than purely military means. Switzerland seeks her security through a policy of neutrality, while we seek ours largely through alliances and armaments.[63] Because national security essentially deals with a wide variety of vague, contingent circumstances, security decisions generally are not dictated by urgent military necessity, but instead are made at a time when a whole spectrum of military and diplomatic responses are possible.
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> The dependence of national security on policy determinations creates difficulties for courts attempting to review executive classifications. Although courts will decide what is in form a factual question—whether disclosure of a particular document would reasonably be expected to damage the national security—that decision will turn on prior policy decisions.
>
> For example, if an FOIA plaintiff sought in 1967 to obtain the disclosure of documents revealing presidential dissimulation in the Gulf of Tonkin incident,[64] a court would certainly have to accept the executive's factual claim that the release of such information would damage the Vietnam war effort. The real issue in the case would be whether, in light of this information, the court would accept the executive's prior policy determination that the Vietnam war was vital to our national security. If courts do not accept such executive policy judgments, they will have placed themselves in the position of independently evaluating foreign policy planning,[65] a position they have always been reluctant to assume.[66] But if courts accept at face value executive foreign policy judgments, they will have eliminated a major element in that impartial review by which the sponsors of the FOIA amendments sought to check executive classification abuses.[67] This deference would create a heavy presumption in favor of executive definitions of national security interests, although the amended FOIA requires that the burden of proof be placed on the executive to sustain its classifications.[68]
>
> Of course, this presumption need not extend to the question whether the disclosure of particular documents will in fact "damage" the national security interests as defined by the executive. But the power to define national security is in large measure the power to define the meaning of "damage". Moreover, courts must resolve how "damage" is to be determined. On the one hand, any attempt to weigh the public's right to know against national security interest[69] cannot be distinguished from the policy determinations which created the initial classification.[70] On the other hand, if courts refuse to balance[71] and adopt a narrow, literal approach to the meaning of damage, the prophylactic quality of the concept of national security will tend to eviscerate the damage criterion altogether.[72]" [61]

[61] National Security and the Amended Freedom of Information Act, 85 Yale L. J. 401, 411-5 (1976).

The clear conception of damage thus depends on the precise conception of the area protected from damage, i.e. national security. The only remedy therefore to the resultant vagueness of the damage criterion is the clarification, definition, delimitation and delineation of the all-too-broad concept of national security.

6. The system of classification must not give finality to executive determination but must provide opportunity for prompt and effective judicial review. Only the judiciary is not an interested party in the administrative classification. The interest of government is to sustain its classification while the party seeking information contests the justification. Thus, only a judicial determination in adversary proceeding ensures the necessary impartiality to freedom of expression and information,[62] and therefore, consonant with the due process guarantee of an impartial tribunal,[63] only a procedure requiring a judicial determination suffices to impose a valid final restraint.[64]

Judicial power is "the authority and responsibility[65] to settle justifiable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violation of such rights."[66] In essence, it is the power and duty of a court to settle conflicting claims under the law. The most fundamental of such conflicts — — the claims of freedom and authority — — is recognized and harmonized in the fundamental law. The resolution of the conflict is therefore preeminently constitutional in nature and any law or governmental act which resolves the conflict in a contrary manner must suffer the burden of unconstitutionality. Inherent therefore in judicial power is the power and duty of judicial review, the right and obligation to declare unconstitutional any governmental act repugnant to the Constitution.[67] Judicial review then is the authority and responsibility of the judiciary "to allocate constitutional boundaries" and when the judiciary does so, "it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the right which that instrument secures and guarantees to them."[68]

Four principles may be invoked against the power of judicial tribunals to review executive decisions on the classification of materials.[69]

62 Bantam Books Inc., v Sullivan 372 U.S. 58, 70 (1963).
63 Mateo v Villaluz 50 SCRA 18 (1973).
64 Note 62.
65 Angara v Electoral Commission 63 Phil 139 (1936).
66 Lopez v Roxas 17 SCRA 756, 761 (1966).
67 Marbury v Madison I Cranch 137 (1803).
68 Angara v Electoral Commission, supra., at 158.
69 See National Security and FOIA, 123 U of Pennsylvania L.R. 1462-73 (1975).

a. At least in matters of foreign relations, the legal issues are "political" rather than judicial, and are therefore better suited — — constitutionally and practically — — to resolution by one of the other branches of government. The classic guideline of a nonjusticiable political question comes from Baker v Carr.[70] There, the United States Supreme Court, through Justice Brennan, laid down two principal rationales for judicial noninvolvement in matters political. The first is that political questions lack satisfactory criteria to provide the basis for a judicial determination; the second is that the nonjusticiability of a political question is primarily a function of the separation of powers.

In the case of freedom of information and of speech and press, there are judicially determinable standards for review already discussed in this essay. Moreover, whatever be the applicability of the political question doctrine to executive classification, the legislature may obviate the question by enacting the express provision for judicial review embodied in the modified information bill. The bill provides that "(o)n complaint, the proper court may enjoin the agency concerned from withholding agency records and order the production of any agency records improperly withheld."[71]

As to separation of powers, the theory is that the executive department can only function effectively in an area like foreign affairs if it can operate undisturbed by the courts. The doctrine of separation of powers, however, does not require that the executive exercise unchecked power. The purpose of the doctrine is to preserve the integrity of the branches of government and to ensure each branch's independence, at least in regard to the executive and judiciary in view of the principle of integration of the executive and legislature in the parliamentary system of government. Separation of powers does not require absolute deference to executive decisions when the withheld information does not fulfill classification criteria.

In light of the political question doctrine, the role of the courts in the classification scheme must be accurately situated. The issue is not the wisdom of the criteria but that the executive must be bound by the legislative criteria, that is, the materials must be classified in accordance with the applicable standards.

b. The second objection to judicial review is the need for secrecy in foreign relations and national defense. In foreign relations, secrecy encourages candor, permits flexibility in negotiations and enables expression of contrary opinions without the fear of fragmenting governmental policy. In national defense, unauthorized disclosure may invite international conflicts or internal disturbance. However, demo-

70 369 U.S. 186, 7 L. ed. 2d 633 (1962); see also the 1973 Ratification Cases 50 SCRA 30 (1973).
71 Sec 6(1), C.B. 10.

cracy requires that citizens be educated in matters concerning the operation of the government. The bill may balance these competing considerations by ensuring that information that would indeed endanger the nation's foreign policy or defense will not be released except exclusively to the courts for review, excluding the public.

c. That the executive department has a special expertise in the sensitive areas of classification is undeniable. The agency classifying a document is likely to have a broad understanding of the significance of its decision, for example in defense strategy or foreign policy. The court will only have access to the particular data involved in the litigation. A judge, however, aside from his proven capability to perceive delicate issues in complex problems, can at least require the agency to submit an explanation for the classification decision.

d. It may be argued that courts neither have the aptitude nor facilities to review classification cases. As just hinted at in passing, courts are often called upon to render difficult judgments on prolix problems. Through the process of judicial review courts can serve as impartial arbiters of government claims and public demands. To the extent that disclosure of information will not jeopardize the national security as precisely defined, the adversary system may serve as an important instrument for determining the balance in protecting properly classified information without sacrificing the public right to know.

"We should add, however, that the striking of the balance needs to be more pragmatic than ideological; to the wisdom of the law, we must add the probility of science," said President/Prime Minister Marcos in his keynote address during the 58th Conference of the International Law Association last August 28, 1978. In that international gathering of lawyers, the President/Prime Minister further stated:

> You have come to a country in which the core of philosophic issue, as I have referred to, of liberty and individual right, is being passionately debated from day to day. This should not come to you as a surprise. For after all, this country is a country that did aspire and did proclaim the first republic in Asia after the revolution of 1896. This republic that was proclaimed was based on a fundamental law, the Malolos Constitution, which probably bore the mark of the sovereign Filipino people. And before that great period, our ancestors wrote down their codes of law and morality.
>
> It has been said that the Philippines has too many lawyers and that we have a tendency towards legalism. I presume the speeches in this morning's ceremonies will prove this.
>
> The other side of course is that for us, the rule of law is an unalterable fact of both our history as well as our tradition. Thus, even at the time of transition from the old to the New Society, even in the face of rebellion and violence, and while confronting a separatist war, we remain faithful to the tradition of legality.
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> * * * * *

> Thus, martial law was instituted in accordance with law and the demands of our people. And as Justice Fernando has opined in writing, "the merit of martial law was that we were able to apply the Constitution in appropriate cases.
>
> In all these labors, we did not change the concept of liberty in order to adjust it to the purposes and aims of our new society. We simply set an order of priorities. While setting forward to transform our society and in this sense to reform popular attitudes in favor of more civic responsibility, we did not say or we did not ask our people to sacrifice what is human in themselves to achieve a stronger, better world for future generations. On the contrary, we hold that this is our finest hour and that the little sacrifice we make now will be redeemed not only in the future but in the present. That ultimately, in accepting the challenge of remaking our society, we are serving our best individual interest.
>
> But the core of the philosophical question as I have said, is the fine balance between authority and liberty.[72]

The philosophical question is "the controversy in critical times between law and authority on the one hand, and individual rights and independence on the other."[73] The core of the philosophic question is the balance between them, the equilibrium, where before there were various counterpoised factors, now there is only one balanced unity, stable but not static, moving in the creative course of history, the unity of life, in the existential language of Buber, the lived unity of the life of dialogue, the unity of man holding his ground before reality, existing but once, single, unique, irreducible, this creaturely one, living the question which bursts all formulas asunder, where each concrete hour with its content drawn from the eloquent world and inflicted destiny is speech for man who is attentive, where nothing that he believed he possessed as always available would help him, no knowledge, and no technique, no system and no program, for now he would have to do with what cannot be classified, with concretion itself, with the unity of life, the unity of unbroken, raptureless perseverance in concreteness, in which the word is heard and a stammering answer dared.[74]

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[72] Keynote address of President/Prime Minister Ferdinand E. Marcos during the 58th Conference of the International Law Association, Aug. 28, 1978, pp. 3-6.

[73] Ibid, p. 3.
"I look with hope to the day when philosophers will be kings and kings would be philosophers." Ferdinand E. Marcos, Human Rights and the Rule of Law (The Challenge of Liberty) p. 61.

[74] Martin Buber, Between Man and Man (Dialogue), trans. and intro. by Robert Gregor Smith (London and Glasgow: Fontana Library, 197). pp. 25, 34, 43, 44.