Remarks Maine Press Association, September 6, 1974

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The officers of your association have been propelled into this part of the program by two considerations.

They were responding, in the first place, to that pregnant advice of Carl Becker, who said that once in a while, it is a good thing to take a look at the things that go without saying to see if they are still going.

And they were reacting, in addition, to the shrewd observation that in times of adversity men leave their mistresses and return to their wives. On both counts, it seemed a good idea, on this occasion, to take a look at the fundamental freedoms which, in the tense times through which we have been living, we have had occasion to examine again.

For the purpose of this discussion, I propose to set forth my own view of what rights people must have in a modern society if they are to be informed about their government; and what deficiencies in this these rights now exist here in our community.

This involves an examination of fundamental principles with which we are all familiar, and to some extent I suppose that familiarity breeds some contempt for what often sounds like belaboring the obvious. Nevertheless, new circumstances sometimes put old principles in new lights, and so I shall proceed with my assigned task.
Behind the blunt restraints of the First Amendment upon the power of Congress to limit freedom of the press and freedom of speech lay the conviction of Madison and the other founding fathers in the wisdom of an informed public. James Madison, in a letter written to W. T. Barry, on August 4, 1822, put it succinctly:

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. 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".

Jefferson, in his famous Norvell letter, spoke of the necessity of giving the people "full information of their affairs through the channel of the public papers", and stressed the importance of seeing to it that "those papers should penetrate the whole mass of the people".

Woodrow Wilson aptly described "information" as the "raw material of opinion", and emphasized the necessity of seeing to it that access to information was not obstructed.

We have long understood that secrecy in government confers a license to deceive. Where there is no independent means of verifying public accounts, there is no check upon authority. It then is possible for government to conceal disaster, to magnify successes, to distort the whole public view of the conduct of government.
It is particularly important, in these times, in my own view, to keep clearly in mind that the founding fathers were concerned with the right to know about government as a right of the people. They put the protection of the First Amendment about the press for the purpose of public information, not for the private advantage of printers. And it is one of my special anxieties that we do not confuse ourselves or our readers about this. We exercise the rights under the first amendment as surrogates of the readers we serve, not in our own behalf, in our own name, or for our own private benefit or advantage.

The founding fathers were trying to protect a principle, not a profession. They were trying to assure the open conduct of government; and the newspapers then seemed to them the best available agents for that purpose. It was not the press as such that concerned them, but the press as a means of achieving a climate, a state of mind, a philosophical attitude, and a kind of governmental administration under which the people would be able to know about their government and thus be able to determine and judge public policies. Of course, their concepts embraced larger consequences than those of government alone. They were trying to found an open society where opinion would be governed by knowledge, and free institutions would be able to respond to informed opinion.
The principles, the abstract ideas that they expounded, have not changed, fundamentally; but experience may have taught us more about the practical application of those principles. How do we put those principles into practical application in a modern free society? Well, it seems to me, there are five broad, definable, essential elements in the people's right to know, as they expounded it and as it exists today in a free society. I would say they are, in the order of their exercise:

(1) The right to obtain information.
(2) The right to print it, duplicate it, repeat it or reproduce it, without prior restraint.
(3) The right to print or speak without fear of reprisal for innocent publication or repetition.
(4) The right of access to the physical means of publication.
(5) The right to distribute without intervention of government under law or obstruction by persons acting outside the law.

Where these rights exist, a society may enjoy free government; to the degree that they are curtailed free government itself is inhibited.

The English jurist, Blackstone, understood freedom of the press to mean simply a freedom from prior restraint, but although achievement of that freedom alone was a great advance of freedom, subsequent generations have shown us how much more is involved in any effective exercise of the citizen's right to know about his government.
A review of the status of these rights in contemporary society in the most cursory way, suggests clearly, the points at which they are most in danger.

The right to get information, in my view, has for many years been the peril point. The exigencies of national defense, the sheer expansion of government, the emigration of power from legislative to executive departments, the harsh necessities of the cold war, the complications of life in a modern industrial society -- these factors have all contributed toward making information more inaccessible. It is here, in my opinion, that the structure is most menaced.

Freedom from prior restraint (the first gain of a free press) is probably better buttressed in our own society than ever before. This does not mean that its philosophical defense can be neglected. Twice in my lifetime, the government of the United States, has very openly attempted to restrain publication by the exercise of governmental power. Once it succeeded and once it failed. In June 1938, the New York Post, then owned by David Stern, announced a series of articles on German espionage. The Post advertised the series and arranged to syndicate the articles in other papers. The United States Attorney for the District of New York filed a petition for an injunction to restrain publication. President Franklin D. Roosevelt, without naming Stern, denounced at a press conference, the publication of such material from government sources, by a resigned FBI employee.
Stern said he would fight the injunction on First Amendment grounds. But he changed his mind, cancelled the series, and submitted.

More recently, of course, the Nixon Administration, attempted the same restraint, and failed. So, after all these centuries, the immunity to prior restraint is not yet wholly beyond challenge. But the Supreme Court's opinion in Near vs. Minnesota, has made that right about as unchallenged as Congress and the Courts can make it.

The right to print without fear of reprisal for innocent publication, also seems to me to be about as secure as it has ever been in any free society. The Bridges case and the New York Times cases have given the press defenses against libel actions greater than it ever has had anywhere in the world. These defenses confer an almost complete immunity to process for publications having to do with the conduct of government, although the limits set upon deliberately malicious publication remain to be precisely located, and this uncertainty ought to restraint completely reckless publication. If there is any terror in the libel laws, it is the expense of litigation, which may remain a formidable risk for small newspapers. But not even the greatest libertarian would describe the predicament of our society in the area of libel as a present serious threat to the right to know.
The right of access to the physical means of publication, so essential to the practical possession of the freedom of write or speak, is a more complicated matter in our modern society. One must view with some disquiet the progressive concentration of such facilities in fewer and fewer hands, at the national level. Multi-million dollar printing plants and communications networks are not readily available to the ordinary citizen. All of us do not have the same equal enjoyment of the right to address the multitude that was possessed by every citizen when the nearest stump made a suitable forum. For the full exercise of that right we have to depend upon those who control the media. This imposes upon printed and electronic media a responsibility to open their facilities to a diversity of opinion. But we can hardly restore society to the situation that existed when every stump afforded the same opportunity; or even to the more complicated world in which any citizen of substantial means could buy a common press and a shirt tail full of movable type. Even the most conscientious controller of our large broadcasting and publishing institutions must be perplexed to know how he can maintain public access to the large organizations that dominate our communication systems. We must be increasingly aware that time and circumstance have imposed limits upon popular access to the means of publication and the facilities of broadcasting.
The fifth right -- to distribute without governmental intervention by law or by the lawless, is the culminating, the final, and the essential concluding right. If all the other circumstances of a free press exist, they are unavailing, if the information cannot be put into the hands of readers or listeners. In my own lifetime, I think that the intervention of government at this stage of publication, has been steadily diminished. The status of the press has been left in confusion by the most recent Supreme Court opinions on obscenity, and I hope time will clarify that obscurity. The lottery laws of 1890 and 1895, amendment of which has been urged by this association, limit the right of access to the mails by lotteries, but this is almost the last vestigial remnant of a once vast structure of post office intervention in distribution. There is a natural reluctance on the part of most of the states that do not have lotteries to expose their citizens to the skin games of a bunch of state sanctified Costellos. They do not like to see the credulity and ignorance of their citizens exploited by their avaricious and unscrupulous neighboring commonwealths, but the means of preventing that calamity probably ought to be sought elsewhere than in the postal laws and regulations. Perhaps the answer is in better educating their citizens to the fact that lotteries are inherently, incontestably, unavoidably, corrupt, dishonest, deceitful, and fraudulent. If they didn't take from the participants more than the participants put into them, they would serve
the pecuniary purposes of the states or gratify the private appetites of the hoards of office holders who batten upon their payrolls without adding one cubit to the gross national product, or one enrichment to the lives of ordinary citizens.

I believe it was Jenk Jones who coined the phrase: "Afghanistanism" to describe newspapers which concern themselves largely with the great issues of world affairs while they neglect the issues close at hand. We must take care that we do not submit to this affliction. So I would like to steer our discussion today to an examination of the condition of the public's right to information about government in Maine.

This association in 1959 played an important and leading role in obtaining, under the leadership of Brooks Hamilton, and other officers of this group, a sound and constructive open meetings law. Perhaps you have noticed that Dr. John B. Adams, of the North Carolina University School of Journalism, examined all the state laws on this subject for the Freedom of Information Center at Columbia, Missouri, and gave the Maine law a rating of nine out of a top possible score of 11. He found it deficient only in its failure to apply to legislative committees. So Maine has looked to its own problems; and the Maine Press Association, has not neglected the problems immediately at hand.

Maine's open meeting law had a court test this year when on May 21, 1974 Justice Roberts in York County Superior Court, handed down an opinion holding that Kittery officials
had violated the "right-to-know" law by holding private sessions and by failing to require a majority vote for calling such sessions. The Judge ordered them not to do it any more. The suit was brought by Arthur Sulloway and he gained a complete vindication for our law and for his point of view. At the same time, the suit demonstrated that the statute does not require with sufficient clarity, the invalidation of improperly passed ordinances or laws and the punishment of offenders. Public officials need more restraint than a slap on the wrist. So there may be proper work before us, in giving the fine access law of 1959 a few more teeth.

Gratifying progress has been made in Maine. It seems to me that the time now is at hand to seek for Maine citizens a better access to public records, not pertaining to or deriving from public meetings, but the public records having to do with the ordinary transactions of government, day by day, with the actions of administrative officials, at local, county, and state levels, acting singly, separately, and alone, and not as a commission, body or committee holding meetings.

I would put at the top of the list the need for a clear statutory definition of what constitutes a public record, and the unequivocal assertion of the right of citizens to consult and have access to records not expressly or explicitly designed by law as confidential.
Records relating to law enforcement, it seems to me, ought to be the most clearly defined as public records, open to citizen inspection. Nothing is more menacing to the rights of citizens than the exercise by government of the power of secret arrest, secret trial and secret imprisonment. These are the chief weapons by which totalitarian regimes impose their tyranny upon hapless subjects who can be divested of every legal right, and even of an appeal to public opinion, by being secretly apprehended and incarcerated, without access to counsel, appeal to authority, or even address to public opinion. I am sure that access to records of arrest, under the common law, can be obtained by legal process, but the resort to judicial proceedings to get day-to-day, routine arrest information, is tedious, expensive, and slow, and the access of citizens to arrest books ought to be instant, ready, and unobstructed.

The open arrest book provides citizens with a vital protection against arbitrary government or corrupt law enforcement. Here are some of the ways in which it furnishes this protection.

1. It protects the citizen against the likelihood of arrest without cause. The police, knowing that each arrest must be recorded, and may have to be explained are less likely to use arrest powers frivolously. Where there is no record of arrest or detention, citizens who are arrested and released have no public record to back up claims for redress.
(2) The open arrest book protects the individual citizen against illegal detention. If there is no record to disclose that a citizen has been apprehended, an individual can be picked up and held without access to family, friends or lawyers and denied in fact all the rights of due process assured him in theory. The entry in the arrest book, to which all citizens has access, is assurance that a man's disappearance into jail will not go un-noted.

(3) The open arrest book also protects the community against the release of persons quite properly arrested through pressure and influence. It is a safeguard against improper release of those arrested on good cause. The arrest book (where its alteration is made a crime) makes unavailing the efforts of those with power, influence, and money to secure an improper release of an arrested and accused person. Police, who dare not release a prisoner for improper cause, have their own integrity protected by the very risks of impropriety where a record is required.

(4) The open arrest book protects the integrity of criminal statistics, upon which public knowledge of the problems of law enforcement, the number of arrests, the number of prosecutions, and the ratio of successful prosecutions.

Law enforcement in Maine is a matter sufficiently complicated so that even with good records, it is not easy to keep track
of the agencies enforcing the law. Authority is dispersed among state police, county sheriffs, local constables and village justices, game wardens, park authorities and others. There must be adequate and accessible records at every level if anyone is going to make any order or sense out of law enforcement.

I regret to say that arrest books are, not in my own experience, carefully kept, properly open to inspection, and invariably complete and accurate, in all Maine jurisdictions. And I am sorry to say that the Maine Legislature has itself made two statutory contributions to the defacement of arrest books that strike directly at sound public policy. Maine laws require that the record of arrest of accused citizens, upon acquittal, be extinguished. And they require that the records of the arrest of persons convicted and incarcerated be extinguished upon gubernatorial pardon. These interventions in the integrity of the written record are mischievous and dangerous. They were intended, no doubt, to protect the good name of the innocent; but they frequently are damaging to the very persons they were intended to benefit. Some court attendants, for a period, construed the acquittal law to mean that upon a finding of innocence in court, the public could not be furnished any information upon the very act of acquittal. These created the awkward circumstance that persons falsely accused never got news of their acquittal into print. Fortunately, the judges now seem to have straightened that out. The pardon statute has not been tried, yet, and probably is not a matter
of widest general importance, but the possibility exists, under this law, that a man, pardoned by the Governor, who decided to sue the state for false imprisonment, would find all the basic records of his apprehension, conviction, and imprisonment, destroyed. Both these laws ought to be repealed.

Over the years, there have been frequent incidents in which Maine authorities have withheld the names of persons fatally injured pending notification of next of kin. The State Police headquarters in Section C, Rule 5, of their guidelines, state: "Pending notification of next of kin, the news media have agreed to wait two hours before publication or broadcast of the name of victims in fatal highway accidents; no formal agreement with regard to homicides and other fatalities has been established but the same general policy applies". Local police authorities have, on occasion, held up disclosure pending notification of next-of-kin-, for indeterminate periods.

Sheriff Merrit Fitch withheld the names of two drowning victims, this summer, pending notification of the kind of the boys involved.

Now what is wrong with this policy?

It is in the first place, an assertion of official right without any sanction of law, and therefore objectionable, in my opinion, whatever humanitarian, compassion to or political reason for it is urged. Names of homicide or accident victims
Ought to be released on identification. The information does not belong to officials. Citizens have a right to know as soon as the police have a right to know. Their knowledge, in the long run, may be important to public justice and general welfare.

State and local police got this bad habit from the military during World War II. For many years, the armed forces refused to give out the names of military personnel involved in accidents, on or outside of military installations, until next of kin were notified. This often involved delays of many hours or days. Delays up to 12 hours were common. The policy inflicted great anguish and hardship upon the parents of many military personnel. A shore boat overturned in the Mediterranean and the names of the victims were withheld. Meanwhile the fact of the accident itself was reported without the names. More than 2,000 families frantically telegraphed the Navy for the names to find out if their own sons were involved.

An aircraft had crashed into a truck and killed and injured many of the occupants at Camp Kilmer, N.J. The accident was reported, but the names were withheld and thousands of parents frantically sought information.

A commendable solicitude for the parents of the few who were injured or killed resulted in imposing upon thousands of others long intervals of anguish. In May of 1952, the policy reached a ridiculous application. An airman and his wife were killed in a highway accident near Cheyenne, Wyoming.
The wife's name was given the press, but the airman's name was held up under the next-of-kin rule. Air Force Public Relations men tried to get the press to say the wife was killed while riding with an unidentified man.

Such incidents led to the modification of the next-of-kin rule on October 22, 1952, but, I am sorry to say, news of the modification has been a long time reaching all officialdom.

Now, this is no great problem with weekly newspapers, but it involves a matter of principle; that principle concerns the right of officials to withhold facts at their own discretion.

The Ellsworth drowning accident illustrates the harm the policy might do the public. Maine is a State in which, during the summer, there are increasing numbers of young men and women, wandering about the State on their own, without much knowledge on the part of parents, as to where they are in the State. When the Associated Press or United Press International, broadcasts to the nation, a report that two young men have been drowned, without giving names, hundreds, or even thousands of parents, who see or hear that news, must be given moments or hours of anxiety, until they can locate their own children. It seems to me to be an unwarranted imposition on the part of officials.

I think the practice ought to be stopped.
Another municipal office at which records are not available on occasion, is that of the assessor. To arrive at any intelligent estimate of the merits of relative assessments in a town, citizens (and the newspapers that represent them) must have comparative figures, and must be able to find out the basis on which the assessor arrives at valuations. That these records are public records, needs to be made quite explicit and clear.

I hope this association will take the same leadership role in a fight for a public records law that it took in the fight for an open meetings law. If it does, I am confident that Maine will have, eventually, a statutory assurance of access to records made by State, County and Local agencies of government.

I know that this will not cure all the defects of society, as they relate to secrecy in government. Whatever the express provisions of law, the itch for secrecy still will persist in government, and officials will find ways to frustrate the right of citizens to know about what they are doing. The laws have to be supplemented by unremitting assertion of the right to know, by vigilant people like Sulloway at Kittery, and by newspapers and broadcasters.

One of the curious acts of the last Maine Legislature was the passage of a law licensing printers, of which you may or may not be aware. Section 338 of Chapter 14 declares:
"...no Maine printer shall print raffle tickets or other materials to be used in the conduct of a licensed game of chance unless licensed by the Chief of the State Police". Who would have imagined the necessity of making a defense of unlicensed printing, in this day and age? But there it is. If it is quietly accepted by printers, other printing may be equally controlled. The general reluctance of printers to ask for a license, of course, is turning the printing of such materials to out of state printers ---and maybe that was the object of the legislation. Who knows? In any case, we have Licensed Printing in Maine for the first time in the State's history.

The Ellsworth American, this past summer, had an experience illustrative both of the usefulness of a right-to-know law and the necessity of having newspapers willing to use it. When the Food Stamp plan was inaugurated in Hancock County, The Ellsworth American asked the Augusta Food Stamp Official, Joseph Bricher, for a list of the participating grocers. The paper was told the list was not public. So, an appeal was made at once to Edward Hekman, Food and Nutrition Division of the Department of Agriculture, which, in due course, advised that this was indeed the situation. So, the Ellsworth American wrote the Secretary of Agriculture and Mr. Hekman, and asked for confirmation in writing that this was indeed Department Policy, and stated that this information was desired preparatory to commencing action under the Freedom of Information Act.
The help of Representative William Moorhead, chairman of the congressional subcommittee on Freedom of Information, also was sought. In due course, there was a written response that also was sought. In due course, there was a written response that the information would be made available. Finally, after a lapse of weeks, the Food Stamp Office at Augusta, released the list of Hancock County grocers who would deal with food stamps. Now, this story was by no means worth the effort it took to get it ---- if it was really worth anything at all to the newspaper. But, it seems to us, that newspapers, as defenders of the public's right to know, have an obligation to insist on the release of information to which citizens are entitled, even if each effort involves a disproportionate expenditure of money and time, as this one did.

The repeated refusal to accept bland assertions that proceedings and records are secret must have an impact, ultimately, upon official minds, and lead to a climate of open conduct of affairs, consistent with the fundamental principles of our system, and in accord with the notion that government must operate in the full light of day, in any free society.