

Declarations of Independence

Howard Zinn. 1990  
Free Speech:

Second Thoughts on the  
First Amendment

Growing up in the United States, we are taught that this is a country blessed with freedom of speech. We learn that this is so because our Constitution contains a Bill of Rights, which starts off with the First Amendment and its powerful words:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The belief that the First Amendment guarantees our freedom of expression is part of the ideology of our society. Indeed, the faith in pledges written on paper and the blindness to political and economic realities seem strongly entrenched in that set of beliefs propagated by the makers of opinion in this country. We can see this in the almost religious fervor that accompanied the year of the Bicentennial, 200 years after the framing of the Constitution.

In 1987, from newspapers, television, radio, from the pulpits and the classrooms, from the halls of Congress, and in the statements issued

the White House, we heard praise of that document drawn up by the Founding Fathers. *Parade* magazine, read by several million people, printed a short essay by President Ronald Reagan. In it he said,

I can't help but marvel at the genius of our Founders. . . . They created, with a sureness and originality so great and pure that I can't help but perceive the guiding hand of God, the first political system that insisted that power flows from the people to the state, not the other way around.

That same year, the newspapers carried large advertisements for "The Constitution Bowl," announced by the official Commission on the Bicentennial, to be made of "Lenox fine ivory China" showing the official flowers of the thirteen original states, and "bordered with pure 24 karat gold . . . a masterpiece worthy of the occasion." It was available for \$95. A beautiful bowl indeed. And it was a perfect representation of the Constitution—elegant, but empty, capable of being filled with good or bad by whoever possessed the power and the resources to fill it.

So it has been with the First Amendment. The First Amendment was adopted in 1791, as part of the Bill of Rights, in response to criticism of the Constitution when it was before the public for ratification. Needing nine of the thirteen states to ratify it, The Constitution was approved by very small margins in three crucial states: Virginia, Massachusetts, and New York. Promises were made that when the first government took office, a Bill of Rights would be added, and so it was. Ever since then it has been hailed as the bedrock of our freedoms.

As I am about to argue, however, to depend on the simple existence of the First Amendment to guarantee our freedom of expression is a serious mistake, one that can cost us not only our liberties but, under certain circumstances, our lives.

"No Prior Restraint"

The language of the First Amendment looks absolute. "Congress shall make no law . . . abridging the freedom of speech." Yet in 1798, seven years after the First Amendment was adopted, Congress did exactly what it passed laws abridging the freedom of speech—the Alien and Sedition Acts.

The Alien Act gave the president the power to deport "all such aliens whom he shall judge dangerous to the peace and safety of the United States."

The Sedition Act provided that "if any person shall write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the U.S. or the President of the U.S., with intent to defame . . . or to bring either of them into contempt or disrepute" such persons could be fined \$2,000 or jailed for two years.

The French Revolution had taken place nine years earlier, and the new American nation, now with its second president, the conservative John Adams, was not as friendly to revolutionary ideas as it had been in 1776. Revolutionaries once in power seem to lose their taste for revolutions.

French immigrants to the United States were suspected of being sympathizers of their revolution back home and of spreading revolutionary ideas here. The fear of them (although most of these French immigrants had fled the revolution) became hysterical. The newspaper *Gazette of the United States* insisted that French tutors were corrupting American children, "to make them imbibe, with their very milk, as it were, the poison of atheism and disaffection."<sup>1</sup>

The newspaper *Porcupine's Gazette* said the country was swarming with "French apostles of Sedition . . . enough to burn all our cities and cut the throats of all the inhabitants."

In Ireland revolutionaries were carrying on their long struggle against the English, and they had supporters in the United States. One might have thought that the Americans, so recently liberated from English rule themselves, would have been sympathetic to the Irish rebels. But instead, the Adams administration looked on the Irish as troublemakers, both in Europe and in the United States.

Politician Harrison Gray Otis said he "did not wish to invite hordes of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility, after having succeeded in the overthrow of their own governments." He worried that new immigrants with political ideas "are hardly landed in the United States, before they begin to cavil against the Government, and to pant after a more perfect state of society."<sup>2</sup>

The Federalist party of John Adams was opposed by the Republican party of Thomas Jefferson. It was the beginning of the two-party system in the new nation. Their disagreements went back to the Constitution and the Bill of Rights, to battles in Congress over Hamilton's economic program. The tensions in the country were heightened at this time by

an epidemic of yellow fever, with discontented citizens rioting in the streets.

Jefferson, a former ambassador to France, was friendly to the French Revolution, while Adams was hostile to it. President Adams, in the developing war between England and France, was clearly on the side of the English, and one historian has called the Sedition Act "an internal security measure adopted during America's Half War with France."<sup>3</sup>

Republican newspapers were delivering harsh criticism of the Adams administration. The newspaper *Aurora* in Philadelphia (edited by Benjamin Bache, the grandson of Benjamin Franklin) accused the president of appointing his relatives to office, of squandering public money, of wanting to create a monarchy, and of moving toward war. Even before the Sedition Act became law, Bache was arrested and charged on the basis of common law with libeling the president, exciting sedition, and provoking opposition to the laws.

The passage of the Sedition Act was accompanied by denunciations of the government's critics. One congressman told his colleagues, "Philosophers are the pioneers of revolution. They . . . prepare the way, by preaching infidelity, and weakening the respect of the people for ancient institutions. They talk of the perfectability of man, of the dignity of his nature, and entirely forgetting what he is, declaim perpetually about what he should be."<sup>4</sup> The statement about what man "is," could have been taken straight from Machiavelli.

The atmosphere in the House of Representatives in those days might be said to lack some dignity. A congressman from Vermont, Irishman Matthew Lyon, got into a fight with Congressman Griswold of Connecticut. Lyon spat in Griswold's face, Griswold attacked him with a cane, Lyon fought back with fire tongs, and the two grappled on the floor while the other members of the House first watched, then separated them. A Bostonian wrote angrily about Lyon: "I feel grieved that the saliva of an Irishman should be left upon the face of an American."<sup>5</sup>

Lyon had written an article saying that under Adams "every consideration of the public welfare was swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." Tried for violation of the Sedition Act, Lyon was found guilty and imprisoned for four months.

The number of people jailed under the Sedition Act was not large—ten—but it is in the nature of oppressive laws that it takes just a handful of prosecutions to create an atmosphere that makes potential critics of government fearful of speaking their full minds.

It would seem to an ordinarily intelligent person, reading the simple, straightforward words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press."—that the Sedition Act was a direct violation of the Constitution. But here we get our first clue to the inadequacy of words on paper in ensuring the rights of citizens. Those words, however powerful they seem, are interpreted by lawyers and judges in a world of politics and power, where dissenters and rebels are not wanted. Exactly that happened early in our history, as the Sedition Act collided with the First Amendment, and the First Amendment turned out to be poor protection.<sup>6</sup>

The members of the Supreme Court, sitting as individual circuit judges (the new government didn't have the money to set up a lower level of appeals courts, as we have today) consistently found the defendants in the sedition cases guilty. They did it on the basis of English common law. Supreme Court Chief Justice Oliver Ellsworth, in a 1799 opinion, said, "The common law of this country remains the same as it was before the Revolution."<sup>7</sup>

That fact is enough to make us pause. English common law? Hadn't we fought and won a revolution against England? Were we still bound by English common law? The answer is yes. It seems there are limits to revolutions. They retain more of the past than is expected by their fervent followers. English common law on freedom of speech was set down in Blackstone's *Commentaries*, a four-volume compendium of English common law. As Blackstone put it:

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.<sup>8</sup>

This is the ingenious doctrine of "no prior restraint." You can say whatever you want, print whatever you want. The government cannot stop you in advance. But once you speak or write it, if the government decides to make certain statements "illegal," or to define them as "mischievous" or even just "improper," you can be put in prison.

An ordinary person, unsophisticated in the law, might respond, "You say you won't stop me from speaking my mind—no prior restraint. But

if I know it will get me in trouble, and so remain silent, that is prior restraint." There's no point responding to common law with common sense.

That early interpretation of the First Amendment, limiting its scope to no prior restraint, has lasted to the present day. It was affirmed in 1971 when the Nixon administration tried to get the Supreme Court to stop the publication in the *New York Times* of the Pentagon Papers, the secret official history of the U.S. war in Vietnam.<sup>9</sup>

The Court refused to prevent publication. But one of the justices held up a warning finger. He said, we are making this decision on the basis of no prior restraint; if the *Times* goes ahead and prints the document, there is a chance of prosecution.

So, with the doctrine of no prior restraint, the protection of the First Amendment was limited from the start. The Founding Fathers, whether liberal or conservative, Federalist or Republican—from Washington and Hamilton to Jefferson and Madison—believed that seditious libel could not be tolerated, that all we can ask of freedom of speech is that it does not allow prior restraint.<sup>10</sup>

Well, at least we have that, a hopeful believer in the First Amendment might say: They can't stop free expression in advance. It turns out, however, that such optimism is not justified. Take the case of a book, *The C.I.A. and the Cult of Intelligence*, written by Victor Marchetti, a former CIA agent, and John Marks, a journalist. The book exposed a number of operations by the CIA that did not seem to be in the interests of democracy and that used methods an American might not be proud of. The CIA went to court asking that the publication of the book be stopped, or at least, that some 225 passages, affecting "national security" (or as Marchetti and Marks said, embarrassing the CIA) be omitted from the book.

Did the judge then invoke no prior restraint and say, We can't censor this book in advance; take action later if you like? No, the judge said, I won't order 225 deletions from the book; I'll only order 168 deletions.

Another bit of surgery on any citizen's innocent assumption that the First Amendment meant what it said. The book was published in 1972 with the court-ordered deletions. But the publisher left blank spaces, sometimes entire blank pages, where the deletions were made. It is, therefore, an interesting book to read, not only for what it tells about the CIA, but what it tells about the strength of the First Amendment.<sup>11</sup>

Or take the case of another CIA agent, Frank Snepp, who wrote a book called *Decent Interval*, a sharp critique of the actions of the U.S.

government and the CIA during the last-minute evacuation of American forces from Saigon in 1975. Snepp's book was not stopped from publication, but the CIA sued Snepp for violation of his contract, in which he had agreed to submit his writings for CIA approval before publication. Snepp argued the agreement only applied to material classified secret and he had not used any classified material in his book.

The Supreme Court ruled six to three (in an atmosphere of secrecy—no briefs were submitted, no oral argument took place) that even without an agreement the CIA had a right to stop publication because “the government has a compelling interest in protecting the secrecy of information important to our national security.” Because the book was already published, the Court ruled that all its royalties must go to the U.S. government. Any citizen who reads *Decent Interval* can decide whether Snepp in any way hurt “national security” by what he wrote or if that scary phrase was once again being used to prevent a free flow of ideas.<sup>12</sup>

### *Free Speech and National Security*

The powerful words of the First Amendment seem to fade with the sounds of war, or near war. The Sedition Act of 1798 expired, but in 1917 when the United States entered World War I, Congress passed another law in direct contradiction of the amendment's command that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” This was the Espionage Act of 1917.

Titles of laws can mislead. While the act did have sections on espionage, it also said that persons could be sent to prison for up to twenty years if, while the country was at war, they “shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the U.S.”<sup>13</sup>

This was quickly interpreted by the government as a basis for prosecuting anyone who criticized, in speech or writing, the entrance of the nation into the European war, or who criticized the recently enacted conscription law. Two months after the Espionage Act was passed, a Socialist named Charles Schenck was arrested in Philadelphia for distributing 15,000 leaflets denouncing the draft and the war. Conscription, the leaflets said, was “a monstrous deed against humanity in the interests of the financiers of Wall Street. . . . Do not submit to intimidation.”

Schenck was found guilty of violating the Espionage Act, and sentenced to six months in prison. He appealed, citing the First Amendment: “Congress shall make no law . . .” The Supreme Court's decision was unanimous and written by Oliver Wendell Holmes, whose reputation was that of an intellectual and a liberal. Holmes said the First Amendment did not protect Schenck:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The 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.<sup>14</sup>

It was a clever analogy. Who would think that the right of free speech extended to someone causing panic in a theater? Any reasonable person must concede that free speech is not the only important value. If one has to make a choice between someone's right to speak, and another person's right to *live*, that choice is certainly clear. No, there was no right to falsely shout fire in a theater and endanger human life.

A clever analogy, but a dishonest one. Is shouting fire in a crowded theater equivalent to distributing a leaflet criticizing a government policy? Is an antiwar leaflet a danger to life, or an attempt to save lives? Was Schenck shouting “Fire!” to cause a panic, or to alert his fellow citizens that an enormous conflagration was taking place across the ocean? And that they or their sons were in danger of being thrown into the funeral pyre that was raging there? To put it another way, who was creating a clear and present danger to the lives of Americans, Schenck, by protesting the war, or Wilson, by bringing the nation into it?

Also prosecuted under the Espionage Act was Socialist leader Eugene Debs, who had run against Wilson for the presidency in 1912 and 1916. Debs made a speech in Indiana in which he denounced capitalism, praised socialism, and criticized the war: “Wars throughout history have been waged for conquest and plunder. . . . And that is war in a nutshell. The master class has always declared the wars; the subject class has always fought the battles.”<sup>15</sup>

Debs's indictment said that he “attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military forces of the U.S. and with intent so to do delivered to an assembly of people a public speech.” Debs spoke to the jury:

I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose war if I stood alone. . . . I have sympathy with the suffering, struggling people everywhere. It does not make any difference under what flag they were born, or where they live.

He was convicted and sentenced to ten years in prison, the judge denouncing those "who would strike the sword from the hand of this nation while she is engaged in defending herself against a foreign and brutal power."

When the case came to the Supreme Court on appeal, again Oliver Wendell Holmes spoke for a unanimous court, affirming that the First Amendment did not apply to Eugene Debs and his speech. Holmes said Debs made "the usual contrasts between capitalists and laboring men . . . with the implication running through it all that the working men are not concerned in the war." So, Holmes said, the "natural and intended effect" of Debs's speech would be to obstruct recruiting.<sup>16</sup>

Altogether, about 2,000 people were prosecuted and about 900 sent to prison, under the Espionage Act, not for espionage, but for speaking and writing against the war. Such was the value of the First Amendment in time of war.

Socialist leader Kate Richards O'Hare was sentenced to five years in prison because, the indictment claimed, she said in a speech that "the women of the United States were nothing more nor less than brood sows, to raise children to get into the army and be made into fertilizer."<sup>17</sup>

A filmmaker was arrested for making the movie *The Spirit of '76* about the American Revolution, in which he depicted British atrocities against the colonists. He was found guilty for violating the Espionage Act because, the judge said, the film tended "to question the good faith of our ally, Great Britain." He was sentenced to ten years in prison. The case was officially called *U.S. v. Spirit of '76*.<sup>18</sup>

The Espionage Act remains on the books, to apply in wartime and in "national emergencies." In 1963 the Kennedy administration proposed extending its provisions to statements made by Americans overseas. Secretary of State Rusk cabled Ambassador Henry Cabot Lodge in Vietnam, saying the government was concerned about American journalists writing "critical articles . . . on Diem and his government" that were "likely to impede the war effort."

Free speech is fine, but not in a time of crisis—so argue heads of state, whether the state is a dictatorship or is called a democracy. Has that not

proved again and again to be an excuse for stifling opposition to government policy, clearing the way for brutal and unnecessary wars? Indeed, is not a time of war exactly when free speech is most needed, when the public is most in danger of being propagandized into sending their sons into slaughter? How ironic that freedom of speech should be allowed for small matters, but not for matters of life and death, war and peace.

On the eve of World War II, Congress passed still another law limiting freedom of expression. This was the Smith Act of 1940, which extended the provisions of the Espionage Act to peacetime and made it a crime to distribute written matter or to speak in such a way as to cause "insubordination or refusal of duty in the armed forces." The act also made it a crime to "teach or advocate" or to "conspire to teach or advocate" the overthrow of the government by force and violence.

Thus in the summer of 1941, before the United States was at war, the headquarters of the Socialist Workers party was raided, literature seized, and eighteen members of the party were arrested on charges of "conspiracy to advocate overthrow of the government of the United States by force and to advocate insubordination in the armed forces of the U.S." The evidence produced in court against them was not evidence of the use of violence or the planning of violence, but their writings and teachings in Marxist theory.

Their crime, it appeared was that they were all members of the Socialist Workers party, whose Declaration of Principles, said the judge who sentenced them to prison, was "an application of Marxist theories and doctrines to . . . social problems in America."<sup>19</sup> The judge noted that in the raid of their headquarters a "large number of communistic books were seized." The appeal of the party to the federal courts lost, and the Supreme Court refused to take the case.<sup>20</sup>

The Communist party, a bitter rival of the Socialist Workers party and a supporter of World War II, did not criticize its prosecution. After the war, it was itself prosecuted under the Smith Act, and its leaders sent to prison. Here, again, the evidence was a pile of seized literature, the works of Marx, Engels, Lenin, and Stalin.

The First Amendment, said the Supreme Court, did not apply in this case. The "clear and present danger" doctrine laid down by Holmes was still a principle of constitutional law, and now Chief Justice Vinson gave it a bizarre twist. He said that while the danger of violent overthrow was not "clear and present," the conspiracy to advocate that in the future was a *present* conspiracy, and so, the conviction of the Communist leaders must stand.<sup>21</sup>

The First Amendment was being subjected to what constitutional experts call "a balancing test," where the right of free expression was continually being weighed against the government's claims about national security. Most of the time, the government's claim prevailed. And why should we be surprised. Does the Executive Branch not appoint the federal judges and the prosecutors? Does it not control the whole judicial process?

It seems to me that the security of the American people, indeed of the world, cannot be trusted to the governments of the world, including our own. In crisis situations, the right of citizens to freely criticize foreign policy is absolutely essential, indeed a matter of life and death. National security is safer in the hands of a debating, challenging citizenry than with a secretive, untrustworthy government. Still, the courts have continued to limit free debate on foreign policy issues, claiming that national security overrides the First Amendment.

For instance, in the spring of 1986 a debate on problems in the Middle East was scheduled in Cambridge, Massachusetts, between Harvard Law School professor Alan Dershowitz and Zuhdi Terzi, a Palestine Liberation Organization (PLO) observer at the United Nations. The State Department went into court to prevent Terzi from traveling from New York to Boston to participate in the debate, claiming that Terzi's appearance would hurt the U.S. government's policy not to recognize the PLO. The federal district court in Boston refused to stop Terzi, but the U.S. Court of Appeals accepted the government's argument, ordered Terzi to stay away, and the debate did not take place.<sup>22</sup>

Various court decisions have upheld the right of the government to bar many artists and writers from entering the United States because of their political views and activities, for example, the Nobel Prize-winning novelist Gabriel García Márquez and the Italian playwright Dario Fo. Their books could be read, but their voices could not be heard.

A Latin-American journalist Patricia Lara, a citizen of Colombia, was kept from entering the United States in 1986 to attend a journalistic awards ceremony at Columbia University. What was revealed in the legal proceedings was that the Immigration and Naturalization Service had a "lookout book" containing the names of 40,000 people who were to be kept out of this country on grounds of national security.<sup>23</sup>

Poet Margaret Randall gave up her American citizenship to live for seventeen years in Mexico, Cuba, and Nicaragua, but then married an American citizen and wanted to regain her citizenship and return to the United States. The Immigration and Naturalization Service insisted she

could not return. In court, it quoted from five of her books, saying, "Her writings go beyond mere dissent . . . to support of Communist dominated governments." In short, she was being kept out because of her ideas. (After a long battle in the courts, she won her case in 1989.)

Again for reasons having to do with national security, the First Amendment has been declared to have "a different application" for men in the military service. This was the language used by Supreme Court Justice William Rehnquist in the Court's decision in affirming the court-martial conviction of Howard Levy, an army doctor who served during the Vietnam War.<sup>24</sup>

Levy had been charged under the Uniform Code of Military Justice as guilty of conduct "unbecoming an officer and a gentleman" and of harming "good order and discipline" in the armed forces. As a physician stationed at Fort Jackson, South Carolina, Levy had supposedly said the following to enlisted men:

The United States is wrong in being involved in the Vietnam war. I would refuse to go to Vietnam if ordered to do so. . . . If I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Freedom of speech is supposed to protect even the strongest of words, but these words were too strong for Justice Rehnquist, who saw them as hurting the necessary discipline of the armed forces. He said, "The fundamental necessity of obedience . . . may render permissible within the military that which would be constitutionally impermissible outside it."

Earlier in the Vietnam War, an army lieutenant named John Dippel had tried to pin the Declaration of Independence to the wall of his barracks. This was not permitted by the commander of the base, and the army's legal office in Washington advised Dippel that he had no First Amendment right to do this.<sup>25</sup>

Another Supreme Court decision, in 1980, ruled that a base commander in the military had a right to approve any written material circulated or posted on the base, saying, "While members of the military services are entitled to the protections of the First Amendment, the rights of military men must yield somewhat to meet certain overriding demands of discipline and duty."<sup>26</sup>

As popular protest asserted itself powerfully during the Vietnam War and helped bring it to a close, in the higher reaches of government,

democracy itself came to be looked on with suspicion.

In 1975 Samuel Huntington, a Harvard political scientist and adviser to presidents, wrote a report for the Trilateral Commission, a group of powerful men from government and business in the United States, Japan, and Western Europe. Huntington pointed to the protest movements of the sixties, saying, "The essence of the democratic surge of the 1960's was a general challenge to existing systems of authority, public and private." Huntington worried about the United States losing its dominant position in the world and wrote of "an excess of democracy." He said there might be "desirable limits to the extension of political democracy."<sup>27</sup>

### *Police Powers and the First Amendment*

As we have seen, the national government can restrict freedom of speech in relation to foreign policy, through judicial reinterpretations of the First Amendment. But what about *state* laws restricting freedom of speech or press? For over a century, the First Amendment simply did not apply to the states, because it says, "*Congress shall make no law.*" The states could make whatever laws they wanted.

And they did. In the years before the Civil War, as abolitionists began to print antislavery literature, the states of Georgia and Louisiana passed laws declaring the death penalty for anyone distributing literature "exciting to insurrection" or with "a tendency to produce discontent among the free population . . . or insubordination among the slaves."

When in 1833 the Supreme Court had to decide if the Bill of Rights applied to the states, Chief Justice Marshall said that the intent of the Founding Fathers was that it should not.<sup>28</sup> Indeed, James Madison had proposed an amendment forbidding the states from interfering with various rights including freedom of speech, and the Senate defeated it.

Madison's intent seemed finally to become part of the Constitution with the passage of the Fourteenth Amendment in 1868, which said that *no state shall deprive any person of life, liberty, or property, without due process of law.*" But in 1894, someone wanting to make a speech on the Boston Common was arrested because he had not gotten a permit from the mayor as required by city law. When he claimed that the Fourteenth Amendment now prevented any state from depriving persons of liberty, including freedom of speech, the Supreme Court ruled unanimously that the mayor could "absolutely or conditionally forbid

public speaking in a highway or public park," that the Fourteenth Amendment did not affect the "police powers" of the state.<sup>29</sup>

This was a localized version of the national security argument for limiting freedom of speech, and it prevailed until 1925. In that year, 137 years after the ratification of the Constitution, the Supreme Court finally said that the states could not abridge freedom of speech, because of the Fourteenth Amendment.<sup>30</sup> However, this still left freedom of speech as something to be balanced against the "police powers" of the states. In the years that followed, the balance would sometimes go one way, sometimes another, leaving citizens bewildered about how much they could depend on the courts to uphold their rights of free expression.

For instance, in 1949, after Chicago police arrested Father Terminiello, an anti-Semitic preacher who had attracted an angry crowd around his meeting hall, the Supreme Court ruled that the Terminiello had a First Amendment right to speak his mind, and the fact that this excited opposition should not be used as an excuse to stop his speech. It said that one "function of free speech under our system of government is to invite dispute."<sup>31</sup>

Shortly after that, however, Irving Feiner, a college student in Syracuse, New York, was making a street corner speech from a small platform, denouncing the mayor, the police, the American Legion, and President Truman, when one of his listeners said to a policeman standing by, "You get that son-of-a-bitch off there before I do." The policeman arrested Feiner, and the Supreme Court upheld the arrest, saying this was not free speech but "incitement to riot," although the tumult and excitement around Terminiello's speech had been far greater than in Feiner's case.<sup>32</sup>

The uncertainty continues. In 1963 the Supreme Court overturned the arrest of 187 black students assembling peacefully on the grounds of the South Carolina state capitol to protest racial discrimination.<sup>33</sup> But three years later when a group of civil rights activists demonstrated peacefully on the grounds of a Tallahassee jail, the conviction was upheld. Justice Hugo Black said for the majority that people do not have a constitutional right to protest "*whenever and however and wherever they please.*"<sup>34</sup>

The right to distribute leaflets on public streets has been affirmed by the Supreme Court on a number of occasions, even when the street was privately owned, as in 1946 when the Court upheld the right of Jehovah's Witnesses to distribute their literature in a company town.<sup>35</sup> It affirmed this conclusion (that when privately owned areas are open to

public use, the First Amendment protections are not surrendered) in the 1968 case of union members distributing handbills about their labor dispute at a shopping mall.<sup>36</sup>

Four years later, however, when a group of people were arrested in a shopping mall for distributing leaflets against the Vietnam War, the Court said they were properly arrested. What was the difference between this case and the other? The union people, the Court said, were expressing themselves about an issue connected with the shopping center. But the Vietnam War had nothing to do with the shopping center, so those people had no First Amendment right to express themselves.<sup>37</sup>

For a long time, the public has been led to believe in the magic word *precedent*. The idea is that the courts follow precedents, that if a decision has been made in a case, it will not be overturned in similar cases. Lawyers and judges understand however, what laypeople often do not, that, in the rough-and-tumble reality of the courts, precedent has as much solidity as a Ping-Pong ball. All a court has to do is to find *some* difference between two cases and it has grounds for giving a different opinion.

In other words, judges can always find a way of making the decision they want to make, for reasons that have little to do with constitutional law and much to do with the ideological leanings of the judges. I would suspect that the decision against the Vietnam leafleters had much more to do with the justices' feelings about the war than with the fact that the shopping mall was not itself involved in the war.

What of the First Amendment rights of high-school students? Here again we find such conflicting decisions as to make us very dubious about the strength of the First Amendment. In the sixties, the Supreme Court said that school officials in Iowa could not prohibit students from wearing black arm bands to protest the Vietnam War. It said, "We do not confine . . . First Amendment rights to a telephone booth or the four corners of a pamphlet or to supervised and ordained discussion in a school classroom."<sup>38</sup>

We might have expected after this (if we had retained our innocence about the power of precedent) that the Court would not allow high-school officials to censor student publications. But in 1988, it ruled that a high-school principal in a suburb of St. Louis could cut out two pages of a student newspaper to eliminate stories on teenage pregnancy and on the effects of divorce on children.

The Court, straining to show the difference between this and the Iowa black arm band case, said, "The question whether the First

Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."

As it had done in the case of soldiers speaking their minds, the Court found that students were not the same as ordinary citizens in their rights. "The public schools do not possess all of the attributes of streets, parks, and other traditional public forums." So the First Amendment, shaky enough for ordinary citizens, is even more feeble when the issue is the right of free speech of soldiers, foreigners, and high-school students.

To this list of groups exempt from the usual protections of the First Amendment we must add another: prisoners. In a decision that at first glance looked like a rejection of the right of prison authorities to read and censor the mail of prisoners, the Supreme Court said that the state of California could not do this . . . *except* when the prison officials decided it was necessary for reasons of security. In other words, it left the issue up to the same people who wanted the censorship in the first place.<sup>39</sup>

The point in all this recounting of cases is that citizens cannot *depend* on the First Amendment, as interpreted by the courts, to protect freedom of expression. One year the Court will declare, with inspiring words, the right of persons to speak or write as they wish. The next year they will take away that right.

A cloud of uncertainty hovers over how the Supreme Court will decide free speech cases. Nor is there any guarantee, if you decide to exercise your right of free expression by speaking in public or distributing literature, that the Supreme Court will even *bear* your case on appeal. It does not *have* to take appeals in free speech cases, and your chance of getting a hearing in the Supreme Court is about one out of eighty.

A young black man named Charles MacLaurin learned this by hard experience in the year 1963. That summer, he addressed a group of fifty black people in front of the courthouse in Greenville, Mississippi, protesting the arrest of several young black people who had been demonstrating against racial segregation. It was a peaceful meeting, in which MacLaurin criticized the conviction and urged that blacks register to vote to deal with such injustices. A police officer told MacLaurin to move on. He said he had a right to speak and continued. He was arrested, charged with disturbing the peace and resisting arrest, found guilty by



the local court, sentenced to six months in jail, and this was affirmed by the Mississippi Supreme Court.

When he appealed to the U.S. Supreme Court, he discovered the rule that most citizens (who grow up hearing again and again from some aggrieved person: "I'll take this to the Supreme Court!") don't know: Four of the nine justices must agree to take a case (in technical terms, to grant *certiorari*). Only three Supreme Court justices voted to take MacLaurin's case. By now, it was 1967, and so, four years after his conviction, he went to prison.

An even more serious problem with the First Amendment is that most situations involving freedom of expression never make it into the courts. How many people are willing or able to hire a lawyer, spend thousands of dollars, and wait several years to get a possible favorable decision in court. That means that the right of free speech is left largely in the hands of local police. What are policemen likely to be most respectful of—the Constitution, or their own "police powers"?

I was forced to think about this one day in 1961 when I was teaching at Spelman College and several black students showed up at my house to talk to me about their plan to go into downtown Atlanta to distribute leaflets protesting racial segregation in the city. They wanted to know from me, who taught a course in constitutional law, if they had a legal right to distribute leaflets downtown.

The law was plain. A series of Supreme Court decisions made the right to distribute leaflets on a public street absolute. It would be hard to find something in the Bill of Rights that was more clear cut than this.

I told my students this. But I knew immediately that I must tell them something else: that the law didn't much matter. If they began handing out leaflets on Peachtree Street and a white policeman (all police were white in Atlanta at that time) came along and said "Move!" what could they do? Cite the relevant Supreme Court cases to the policeman? "In *Lovell v. Griffin*, sir, as well as in *Hague v. C.I.O.* and *Largent v. Texas* . . ."

What was more likely at such a moment, that the policeman would fall prostrate before this recitation of Supreme Court decisions? Or that he would finger his club and repeat, "Move on!" At that moment the great hoax in the teaching of constitutional law, the enormous emphasis on the importance of Supreme Court decisions, would be revealed. What would decide the right of free expression of these black students in Atlanta in 1961, what would be more powerful—the words in the Constitution, or the policeman's club?

It wasn't until I began to teach constitutional law in the South, in the midst of the struggle against racial segregation, that I began to understand something so obvious that it takes just a bit of thought to see it, something so important that every young person growing up in America should be taught it: Our right to free expression is not determined by the words of the Constitution or the decisions of the Supreme Court, but by who has the *power* in the immediate situation where we want to exercise our rights.

One of those immediate situations is the street. Another is the workplace.

### *Free Speech on the Job*

As we have seen, for more than a hundred years it was only Congress that was forbidden by the First Amendment to curtail freedom of speech and press. Then in 1925 the Supreme Court wrote freedom of speech into the Fourteenth Amendment and ruled that states could not violate that freedom. But nothing in the Constitution says that private employers may not limit the free speech of their employees.

Not many Americans distribute political pamphlets or speak on street corners, but most Americans work for employers, in situations where to speak their full minds might result in losing their jobs. And while political speakers might have recourse to the courts—weak as that protection is—speakers on the job have no constitutional support.<sup>40</sup>

In 1971 a man named Louis McIntire, who had worked for sixteen years as a chemical engineer with the DuPont Corporation in Texas, published a novel cowritten with his wife that satirized a chemical company. After the book came out, he was fired. He could sue for damages, but he had no constitutional right to his job.

David Ewing, an editor of the *Harvard Business Review*, discussing this case in *The Nation* wrote, "Corporate employees do not enjoy, and have never enjoyed, such basic guarantees of the Bill of Rights as free speech, free press and due process of law—at least, in activities that concern their employers."<sup>37</sup>

Staughton Lynd, a distinguished young historian and a professor at Yale University, visited North Vietnam shortly after the United States began its massive intervention there. He was a strong opponent of our government's actions. Shortly after he returned from his trip, he lost his job at Yale and, despite his impressive record as scholar and teacher, had

such difficulty getting another teaching position anywhere that he left the profession and, in his forties, went to law school.

It was clear that his statements on the war, his opposition to American policy, his visit to North Vietnam, and his writings had resulted in his being, in effect, blacklisted in his chosen profession. We had been colleagues together at Spelman College, and when I was a professor at Boston University, I suggested to a member of the history department that they consider Staughton Lynd to fill a vacant faculty position. A senior member of the department said to me, "Oh, Lynd. I was on his doctoral committee at Columbia. A brilliant young man. But no, there's no point in our proposing him. He will never make it through the administration."

When Lynd had finished law school and went to work for a firm of labor lawyers, he wrote a little booklet addressed to working people to give them simple advice on labor law. The booklet started off with the suggestion: "You don't need a labor lawyer." When the book appeared, Lynd was dismissed from his job with the labor firm.

Chuck Atchison, a forty-year-old quality-control inspector for a construction company that built a nuclear energy plant in Texas, spoke out publicly in 1982 about numerous violations of safety regulations at the plant. He was fired. He lost his house, couldn't find a job in his field and at one point walked the highway picking up beer cans to sell for scrap aluminum. The Bill of Rights could give him no protection.<sup>42</sup>

With no constitutional protection, employees sometimes look to the National Labor Relations Board (NLRB) to protect their rights. But this has proved a very flimsy defense against the power of employers. In the mid-1980s, a truck driver in Michigan was fired from his job because he insisted on inspecting his rig after it was involved in an accident where its brakes malfunctioned. He appealed to the NLRB, which is supposed to protect members of labor unions against "unfair labor practices." But the NLRB said the truck driver, because he was not a union member, could be legally dismissed from his job.<sup>43</sup>

Private colleges and universities do not fall within the scope of the First Amendment, and so their employees are without constitutional protection for their freedom of speech. Arlyn Boudreau, a nurse for twenty years, had worked for seven years with the Boston University Health Clinic when she and several other workers there began to protest the health and working conditions at the clinic. She and another worker were called in by the clinic director and told that they could either

resign and get severance pay, or be fired without pay. They refused and were fired.

The official reason given for firing Mrs. Boudreau was "insubordination." *Webster's Dictionary* defines *subordinate* as "placed in a lower class or rank; inferior in order, nature, importance; submissive to authority." She refused to be submissive to authority, insisted on speaking her mind, and was without a job.

Standing in front of the clinic on a picket line protesting the situation, she said, "It's the first time I've been on a picket line in my life. I feel like such a radical I can't believe it. My three daughters, aged 17, 19, and 20, they all came out to picket too." It was 1975, and the nation was getting ready to celebrate the bicentennial of the Declaration of Independence. Mrs. Boudreau kept her independence, although she didn't keep her job.<sup>44</sup>

In reality, the difference between working for a private institution, with no constitutional protection, and working for a public institution, where the First Amendment is supposed to operate, is insignificant. In either case, the power of the employer in the immediate situation is the critical factor, and what legal redress there is must be exercised at the expense of thousands of dollars and years of time, and still remain uncertain in its outcome.

The writer Jonathan Kozol taught in a public school in a black district of Boston. Presumably, his freedom of speech was covered by the Fourteenth Amendment ("nor shall any state deprive any person of life, liberty, or property, without due process of law") because the Supreme Court in 1925 interpreted this clause to cover freedom of speech. But one day in the 1960s Kozol recited something to his class by the black poet Langston Hughes called "Ballad of the Landlord." The poem begins:

Landlord, landlord,  
My roof has sprung a leak.  
Don't you 'member I told you about it  
Way last week?

The poem goes on to describe the man complaining about the steps, broken down too, whereupon the landlord threatens to cut off his heat, to evict him, to throw his furniture out in the street. The man threatens to hit the landlord. Then come the last stanzas.

Police! Police!  
Come and get this man!  
He's trying to ruin the government  
and overturn the land!

Copper's whistle!  
Patrol bell!  
Arrest.

Precinct station.  
Iron cell.  
Headlines in press:

MAN THREATENS LANDLORD  
TENANT HELD NO BAIL  
JUDGE GIVES NEGRO 90 DAYS IN COUNTY JAIL

Jonathan Kozol was removed from his teaching job by the school committee, which said in its report: "It has been established as a fact that Mr. Kozol taught the poem 'Ballad of the Landlord' to his class and later distributed mimeographed copies of it to his pupils for home memorization."<sup>45</sup>

It is a special irony that in schools and colleges—supposed to be special places for the free dissemination of ideas—it can be dangerous to express yourself. The power of the high-school principal or the school board or the university president or the board of trustees is far more important than the words of the First Amendment.

At Boston University, under the dictatorial power of its president John Silber in the 1970s and 1980s, faculty who spoke their minds were in danger of losing their jobs or their pay raises.<sup>46</sup> Students who expressed themselves freely feared losing scholarships or being suspended. Administrators who differed with Silber might not hold their jobs long. Members of the board of trustees who wanted to stay on the board learned not to disagree with the president's policies.

Student newspapers were required to submit to censorship. Students and faculty who picketed peacefully in front of university buildings were photographed by the campus police. A news director of the university radio station was asked to resign because he refused to censor a broadcast of a speech that criticized President Silber. The Civil Liberties Union of Massachusetts reported that it had never received such a

volume of complaints about any institution as about Boston University.

A remarkable student named Yosef Abramowitz, a Zionist who was also active against apartheid in South Africa and who was a member of a group asking that Boston University divest itself of its stock in corporations connected with South Africa, learned firsthand about free speech at the university. One day he hung a banner from his dormitory window, with one word scrawled large on it: "Divest." When he returned to his room at the end of the day, the banner was missing. This happened several times more and he kept putting it back. Then he got a letter from the University Housing Office, telling him he would be evicted from his room if he continued to hang the sign from his window.

Yosef asked the Civil Liberties Union for help, and they secured a lawyer for him. Although private universities are not covered by the First Amendment, a new civil rights law passed in Massachusetts in 1980 seemed to cover civil liberties at private institutions also.

In court, Boston University pretended that it was not at all interested in Abramowitz's message. All it cared about was the aesthetic effect of a banner hanging from his window. Abramowitz's lawyer brought a number of students to the stand who testified that they had the most ugly things hanging from their windows for months (an inflated yellow chicken, for one) and no one had said a word to them. The university's case began to look ludicrous. The judge found that Boston University had violated Yosef Abramowitz's freedom of speech and ordered it to stop harassing him about his banner.

What happened after that shows how the holders of power in any situation are very little perturbed by the law. Abramowitz proceeded to hang three Divest signs from his windows. The university then announced that the court decision only applied to him, and that any other student who hung a banner outside his or her window would face disciplinary action.

There is another institution where the restriction of free speech is especially ironic: the courtroom. The United States has long prided itself on "due process of law," which includes the right to have a lawyer and the right to a fair trial. But in the courtroom itself, the judge controls what can be said in the trial, by excluding any witnesses he chooses to exclude, or any testimony he considers irrelevant.

We thus have a peculiar situation in a country where people vote freely in elections, where a Bill of Rights exists, and something we call *democracy* operates in the society. In the everyday institutions of that democracy—in the schools, in the workplaces, on the military bases, in

the courtrooms—freedom of speech is restricted by the power of the people who dominate those institutions.

### *Secret Police in a Democracy*

In our country, so proud of its democratic institutions, a national secret police has operated for a long time, in a clandestine world where the Constitution can be ignored. I am referring to the Federal Bureau of Investigation and the Central Intelligence Agency. It was a CIA official Ray Cline who, when there was talk of the CIA's activities violating the First Amendment, told Congress, "It's only an amendment."<sup>47</sup>

We might comfort ourselves with the thought that the FBI and the CIA are not as fearsome as the KGB of the Soviet Union or the death squads that have operated in right-wing dictatorships supported by the United States—El Salvador, for instance. The *scale* of terror is not comparable. A radical critic of American foreign policy is not likely to be picked up in the middle of the night, immediately imprisoned, or taken out and shot. (Although it is sobering to recall that the FBI conspired with Chicago police in 1969 to murder the black leader Fred Hampton in his bed.)

But should citizens who cherish democracy use the standards of totalitarian states to measure their freedom? We want something better than to be able to say we're not as bad as *those* countries.

The actual apprehension of dissidents is on a much smaller scale in our country compared to theirs. But the mere existence of organizations secretly collecting information on citizens must have a chilling effect on the free speech of everyone. The FBI, according to a Senate report of 1976, has files on 500,000 Americans.

However, the FBI goes far beyond the collection of information. We learned this from a mysterious raid in 1971 on FBI offices in the town of Media, Pennsylvania (its perpetrators have not yet been found). The FBI files were ransacked and then leaked to a small radical magazine that published them. Many of the documents were headed with the word *COINTELPRO*, and only later was it discovered what that stood for: Counter Intelligence Program. The Senate committee investigating the FBI in the mid-seventies wrote in its report:

COINTELPRO is the FBI acronym for a series of covert action programs directed against domestic groups. In these programs, the Bureau went

beyond the collection of intelligence to secret action designed to "disrupt" and "neutralize" [the FBI's words] target groups and individuals. The techniques . . . ranged from the trivial (mailing reprints of *Readers Digest* articles to college administrators) to the degrading (sending anonymous poison-pen letters intended to break up marriages) and the dangerous (encouraging gang warfare and falsely labeling members of a violent group as police informers.)<sup>48</sup>

The program began in 1956, according to the Senate committee, ending in 1971 because of the threat of public exposure. (The raid on the Media office took place on March 8, 1971; the FBI decided to terminate COINTELPRO April 27, 1971.) The Senate report said,

In the intervening 15 years the Bureau conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.

Again, the excuse of national security. James Madison, back in 1798, had warned about this in a letter to Thomas Jefferson: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended from abroad."<sup>49</sup>

In a totalitarian state, we assume that the head of state is aware of the operations of his secret police. In a country like the United States, however, the higher officials may claim that they don't know what is going on. Former Attorney General Katzenbach said he didn't know, but couldn't have stopped it anyway. Officially, the attorney general is higher in rank than the director of the FBI, but the FBI has a power that attorneys general, and even presidents, have been afraid to touch.

It should not be thought that the president or the attorney-general strongly disapproved of these activities, illegal as many of them were. J. Edgar Hoover's successor Director Clarence Kelley told the Senate committee "the FBI employees . . . did what they felt was expected of them by the President, the Attorney General, the Congress, and the people of the United States." How the FBI knew what "the people" wanted is not clear. But the bureau did have a fairly good idea of what the president wanted and what would get support in Congress.

There is a long record, at least from 1953 to 1973, of illegal opening of citizens' mail by the FBI. There is also a long record of illegal

break-ins, "black bag jobs," sometimes called "surreptitious entry." The report of the Senate committee concluded:

We cannot dismiss what we have found as isolated acts which were limited in time and confined to a few willful men. The failures to obey the law and, in the words of the oath of office [of the president], to "preserve, protect and defend" the Constitution have occurred repeatedly throughout administrations of both political parties going back four decades.<sup>50</sup>

In 1973 staff assistant in the White House Tom Huston drew up a plan, approved by Nixon, that included wiretapping, mail coverage, and "surreptitious entry." He said, "Use of this technique is clearly illegal. It amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the kind of intelligence which cannot be obtained in any other fashion."<sup>51</sup>

One wonders about the files on those 500,000 people (or is it 1 million or 2 million—how can we tell, because the FBI operates in secret). We know from the records of the loyalty investigations of the 1950s that the FBI filed reports on government employees who had been seen entertaining black people, or who had been seen at a concert where Paul Robeson sang, and so on.

One employee was told, "We have a confidential informant who says he visited your house and listened in your apartment to a recorded opera entitled *The Cradle Will Rock*, and that the opera followed along the lines of a downtrodden laboring man and the evils of the capitalist system."<sup>52</sup>

The FBI also maintained files on a number of famous American writers. (This was disclosed when journalist Herbert Mitgang managed to get documents under the Freedom of Information Act.) There was a file on Ernest Hemingway, whom the FBI labeled a drunk and a Communist. The novelists John Steinbeck (*The Grapes of Wrath*) and Pearl Buck (*The Good Earth*) were in the FBI records as people who promoted the civil rights of blacks. John Dos Passos (*U.S.A.*), William Faulkner (*The Sound and the Fury*), and Tennessee Williams (*A Streetcar Named Desire*) were all on the list. About Sinclair Lewis, on whom there was a dossier of 150 pages, the FBI said his novel *Kingsblood Royal* was "propaganda for the white man's acceptance of the Negro as a social equal."<sup>53</sup>

There were more serious FBI files than these—the ones kept on

members of radical groups, whose names were put on a "Security Index," which at one time listed 15,000. The people on this list were to be picked up and detained without trial in case of a "national emergency." In 1950 Congress passed an Emergency Detention Act, which provided for a set of detention centers (perhaps more accurately, concentration camps) for those people on the Security Index. And although the Act was repealed in 1971, the FBI continued its index.<sup>54</sup>

When the former head of the FBI's Racial Intelligence Section was asked if during the fifteen years of COINTELPRO anyone in the FBI questioned the legality of what was being done, he replied, "No, we never gave it a thought."<sup>55</sup>

As part of the COINTELPRO the FBI in 1970 tried to discredit Jean Seberg, an actress (famous for her part in the French film *Breathless*) who was a sympathizer of the Black Panther party. The FBI suggested she be "neutralized." Seberg was in her seventh month of pregnancy when she read in a newspaper that she had become pregnant by a member of the Black Panther party. It was a false story planted by the FBI. The shock of the story led to premature labor, and the child was born dead. She tried to commit suicide, according to her husband, every year on the anniversary of her baby's death, and in 1979 she did kill herself.<sup>56</sup>

It is hard to tell how many people lost their lives as a result of COINTELPRO, but documents from FBI files, obtained under the Freedom of Information Act, indicated that in the late 1960s and early 1970s, when the FBI was trying to break up the Black Panther organization, nineteen Black Panthers across the nation were killed by law-enforcement officials or by one another in internal feuds (some of which were provoked by the FBI).<sup>57</sup>

One of those deaths was of Fred Hampton, the Chicago Black Panther leader. It turned out that his personal bodyguard, William O'Neal, was an FBI infiltrator, who gave his FBI contact, Roy Mitchell, a detailed floor plan of the apartment occupied by Fred Hampton and others. In a predawn raid, Chicago police fired hundreds of bullets into the apartment, and Hampton, asleep in his bed, was killed. There was an FBI memorandum from the Chicago field office on December 8, 1969 (a few days after the raid):

Prior to the raid, a detailed inventory of the weapons and also a detailed floor plan of the apartment were furnished to local authorities. . . . The raid was based on the information furnished by the informant.<sup>58</sup>

Although the COINTELPRO was declared suspended in 1971, the FBI continued to keep tabs on organizations that were carrying on nonviolent political activities, but in opposition to official government policy. In 1988 it was revealed (in documents given to the Center for Constitutional Rights under the Freedom of Information Act) that the FBI had infiltrated and kept records on hundreds of organizations in the United States that were opposed to President Reagan's policies in Central America. There were 3,500 pages of files. The excuse was that the FBI was concerned about terrorism. But the records showed a concern for what these organizations were saying, in speech and in writing. A dispatch from the FBI field office in New Orleans in 1983 said:

It is imperative at this time to formulate some plan of action against CISPES [Committee in Support of the People of El Salvador] and specifically against individuals who defiantly display their contempt for the U.S. government by making speeches and propagandizing their cause.<sup>59</sup>

What happens to members of the secret police who engage in illegal acts? Hardly anything. If there is a particularly flagrant set of actions that are exposed to the public, there may be a token prosecution of one or two minor figures. But they certainly will not be sent to prison, as would ordinary people who intercepted mail or broke into people's homes.

We have as evidence the case of Mark Felt and Edward Miller, two FBI agents, who were the only FBI men prosecuted despite the evidence of thousands of illegal acts brought out by the Senate committee investigating the FBI. Felt and Miller were convicted of authorizing nine illegal break-ins at homes of friends and relatives of members of the Weather Underground (a radical offshoot of the sixties student movement).

There was no evidence that any of these friends and relatives had broken the law, but FBI agents broke in, photographed personal papers, including diaries, statements of political philosophy, and love letters. None of this turned up evidence that helped them find members of the Underground. Felt and Miller could have received maximum prison sentences of ten years. They were not sent to prison, but were fined \$5,000 and \$3,500, respectively.<sup>60</sup>

The most striking evidence that the FBI was not acting against terrorism or for national security, but was in fact interfering with the First Amendment rights, was its harassment of Martin Luther King, Jr.

In 1961-1962 there were mass demonstrations by black people in Albany, Georgia, against racial segregation there. The Southern Regional Council, an Atlanta research group, sent me (I was teaching at Spelman College in Atlanta at that time) to Albany to report on the situation there. My report was critical of the federal government in general and the FBI in particular. It said, "With all the clear violations by local police of constitutional rights, with undisputed evidence of beatings by sheriffs and deputy sheriffs, the FBI has not made a single arrest on behalf of Negro citizens."<sup>61</sup>

The 1976 Senate committee report on the FBI referred to my report on the Albany situation:

Before even receiving the full report, Bureau officials were describing it as "slanted and biased" and were searching their files for information about the report's author.

Shortly after the Report was issued, newspapers quoted Dr. King saying that he agreed with the Report's conclusions that the FBI had not vigorously investigated civil rights violations in Albany. FBI headquarters was immediately notified of Dr. King's remarks.

It was not long after this that the FBI began its serious surveillance of King. According to the Senate report: "From December, 1963 until his death in 1968, Martin Luther King Jr. was the target of an intensive campaign by the Federal Bureau of Investigation to 'neutralize' him as an effective civil rights leader."<sup>62</sup> William Sullivan, the FBI man in charge of this operation, told the committee, "No holds were barred. We have used similar techniques against Soviet agents. . . . We did not differentiate. This is a rough, tough business."

Of course, King was not a Soviet agent but an American citizen exercising his constitutional right to speak, write, and organize. The FBI tried its best to stop him from doing this effectively. It tried to discredit him in various ways, tried to get universities to withhold honorary degrees from him, to prevent the publication of articles favorable to him, to find "friendly" journalists to print unfavorable articles. It put microphones in his hotel rooms and offered to play the recordings to reporters. In May of 1962 the FBI included King on its "Reserve Index" as a person to be rounded up and detained in event of a national emergency.<sup>63</sup>

It should be noted that all this cannot be attributed simply to the racial bias of FBI Director J. Edgar Hoover. The Kennedy administration and

the Johnson administration collaborated with the FBI. David Garrow, biographer of King, referred to Attorney General Robert Kennedy's "unquestioning acceptance of the Bureau's reports on King." And Burke Marshall, head of the Civil Rights division of the Department of Justice, defended Robert Kennedy's action in authorizing the FBI to eavesdrop on King's conversations.<sup>64</sup>

What all of this indicates is that, despite the Constitution, despite the First Amendment and its guarantees of free speech, American citizens must fear to speak their minds, knowing that their speech, their writings, their attendance of meetings, their signing of petitions, and their support of even the most nonviolent of organizations may result in their being listed in the files of the FBI, with consequences no one can surely know. It was Mark Twain who said, "In our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either."

### *The Control of Information*

We have not yet come to perhaps the most serious issue of all in regard to freedom of speech and press in the United States. Suppose all of the restrictions on freedom of speech were suddenly removed—the Supreme Court's limitations on the absolute words of the First Amendment, the power of the local police over people wanting to express themselves, the fear of losing one's job by speaking freely, and the chill on free speech caused by the secret surveillance of citizens by the FBI. Suppose we could say anything we want, without fear. Two problems would still remain. They are both enormous ones.

The first is Okay, suppose we can say what we want—how many people can we reach with our message? A few hundred people, or 10 million people? The answer is clear: It depends on how much money we have.

Let's say no one can stop us from getting up on a soapbox and speaking our mind. We might reach a hundred people that way. But if we were the Procter and Gamble Company, which made the soapbox, we could buy prime time for commercials on television, buy full-page ads in newspapers, and reach several million people.

In other words, freedom of speech is not simply a yes or no question. It is also a "how much" question. And *how much* freedom we have depends on how much money we have, what power we have, and what

resources we have for reaching large numbers of people. A poor person, however smart, however eloquent, truly has very limited freedom of speech. A rich corporation has a great deal of it.

The writer A. J. Liebling, who wrote about freedom of the press, put it this way, "The person who has freedom of the press is the person who owns one."<sup>65</sup> Owning a press gives you a lot more freedom of speech than having to write a letter to your local newspaper, hoping the editor publishes it. It takes more and more money to own a newspaper, and even if you owned one, it is harder and harder to prevent it being taken over by some giant corporation. At the end of World War II, more than 80 percent of the daily newspapers in the United States were independently owned. Forty years later only 28 percent were independent, the rest owned by outside corporations. And fifteen huge corporations controlled half of the nation's newspaper business.<sup>66</sup>

Three television networks (CBS, ABC, and NBC) control about three-fourths of the prime time on television. With 90 million households owning TV sets, that gives those networks enormous influence on the American mind. Ten publishing companies have half of the \$10 billion in book sales. Four giants dominate the movie business.

Mergers and consolidations have created huge media empires, in which ordinary business corporations have bought out publishers, television stations, and newspapers. For instance, International Telephone and Telegraph (IT&T) merged with ABC television in the mid-sixties. Time, Inc. and Warner Communications, Inc. joined in the 1980s to form the world's largest media firm, worth \$18 billion. Ben Bagdikian, dean of the Graduate School of Journalism at the University of California, Berkeley, and author of *The Media Monopoly*, summarized the situation: "When 50 men and women, chiefs of their corporations, control more than half the information and ideas that reach 220 million Americans, it is time for Americans to examine the institutions from which they receive their daily picture of the world."<sup>67</sup>

Not only is the usefulness of the First Amendment dependent on wealth, but when occasionally a state legislature tries to remedy the situation slightly, the corporations plead the First Amendment. This is what happened in 1977 when the Massachusetts legislature said corporations could not spend money to influence a public referendum. The idea behind the law was that corporations could so dominate the debate around a public issue as to make freedom of speech on that issue meaningless for people without money.

The corporation lawyer, arguing before the Supreme Court, said,

"Money is speech." (He might have added, "And we have lots of money, so we should have lots of speech.") The Supreme Court decided heroically that the First National Bank of Boston should not be deprived of its First Amendment rights by limiting its use of money to influence a referendum.<sup>68</sup>

The Supreme Court is clearly reluctant to put meaning in the First Amendment by recognizing the great inequality of resources and trying to do something about that. Back in 1969 it unanimously upheld the Federal Communications Commission's "fairness doctrine," which said people attacked on the air had a right to respond.<sup>69</sup> But since then the Court has refused to interfere with the moneyed powers in broadcasting and their ability to keep off the air views they don't like.

In 1973 the Supreme Court decided that CBS had a right to refuse an ad placed by a group of business executives who opposed the war in Vietnam. Even the liberal Justice William O. Douglas went along with the majority, arguing that the government should not interfere with the right of CBS to sell time to whomever it wanted. In saying that, of course, it was approving the right of CBS to interfere with the access of concerned citizens to television time.<sup>70</sup>

Douglas argued that "TV and radio . . . are entitled to live under the laissez faire regime which the First Amendment sanctions." He was succumbing to the basic flaw in all of laissez-faire theory: It pretends to leave people free by keeping government out of a situation and ignores the fact that they are then left to the mercy of the rich in society.

The fairness doctrine itself, which is at least a step toward insisting that the broadcast media give time for opposing views, was considerably weakened by Congress in 1959, when it exempted news conferences and debates. This means that the president or any of his staff can hold news conferences, say whatever they want to a huge television audience, with no opportunity for rebuttal by political critics of the president. It also means that in the campaign for president, the debates between contenders can be limited to the Republican and Democratic parties, excluding minor parties. The Democratic party challenged the provision on news conferences, but the Supreme Court would not hear its appeal. The Socialist Workers party also went to court, claiming its presidential candidate had a right to be heard by the public. The Court refused to take the case.<sup>71</sup>

The second enormous problem for free speech is this: Suppose no one—not government, not the police, not our employer—stops us from speaking our mind, *but we have nothing to say*. In other words what if

we do not have sufficient information about what is happening in the country or in the world and do not know what our government is doing at home and abroad? Without such information, having the freedom to express ourselves does not mean much.

It is very difficult for the ordinary citizen to learn very much about what is going on, here or in other countries. There is so much to know. Things are so complicated. But what if, in addition to these natural limitations, there is a deliberate effort to keep us from knowing? In fact, that is the case, through government influence on the media, through self-censorship of the media (being prudent, as Mark Twain said), and through the government's lies and deceptions.

There is no democratic conscience at work when the government decides that it must manipulate the press on behalf of its foreign policy objectives. An editor of *Strategic Review* (A. G. B. Metcalf, also chairman of the board of trustees of Boston University), a right-wing publication dealing with military strategy, delivered a stern warning to the media in 1983:

In a free democracy where every act, every appointment, every policy is subject to public questioning and public pressure, the mass media have a special responsibility for not impairing, in the name of free speech, the credibility of its duly elected leadership upon whose success in a dangerous world the maintenance of that freedom depends. . . . This is a matter which—in the name of the First Amendment—has gotten completely out of hand.<sup>72</sup>

It's the old argument of national security. It goes like this: We are in a dangerous conflict with a ruthless foe; our leaders are taking care of us in this conflict, so don't criticize them too much. Sure, we have a free press, but it must behave responsibly. Trust our leaders.

Metcalf is a private citizen, but undoubtedly he reflected some of the thinking in the highest circles of the government. Rather than trust the press to be responsible on its own, our government, for a long time, has tried to use the press as an adjunct to official policy. Sometimes it fails. Sometimes it succeeds. Here are a few examples of how it was done.

In 1954 the U.S. government was secretly planning to overthrow the democratically elected government of Guatemala, which had decided to take back land from the United Fruit Company. A *New York Times* correspondent there, Sidney Gruson, thought it was the job of the press to report what it saw. His reports became troublesome. CIA Director



Allen Dulles contacted his old Princeton classmate, Julius Ochs Adler, business manager of the *Times*, and Gruson was transferred to Mexico City.<sup>73</sup>

In late 1960 the editor of *The Nation* magazine, Carey McWilliams, was informed by a Latin American specialist at Stanford University, just returned from Guatemala, that Cuban exiles were being trained in that country by the United States for an invasion of Cuba. McWilliams wrote an editorial on this and sent copies to all the major news media, including the Associated Press (AP) and United Press International (UPI). Neither the AP nor the UPI used the story. Nine days later, the *New York Times* reported that the president of Guatemala denied rumors of any pending invasion.<sup>74</sup>

The press went on playing the role of adjunct to the government, even though the evidence of a U.S. sponsored invasion began to grow. *Time* magazine (which later confirmed that it was a CIA operation) at first talked of Castro's "continued tawdry little melodrama of invasion." This was right in line with the statement by the U.S. ambassador to the United Nations James J. Wadsworth, who said the Cuban charge of a planned invasion was "empty, groundless, false and fraudulent."

The White House asked the magazine *New Republic* not to print a planned story about the invasion preparations, and it complied. Arthur Schlesinger, Jr., later referred to this as "a patriotic act which left me slightly uncomfortable."<sup>75</sup>

Four days before the invasion began, Kennedy told a press conference, "There will not be under any conditions an intervention in Cuba by the U.S. armed forces." Kennedy knew that the CIA was using Latin Americans for the invasion. But he also knew that American pilots were flying some of the planes in the invasion. Four of those pilots were killed, but the circumstances of their deaths were withheld from their families. By the time of that press conference, the evidence of U.S. complicity in the invasion was clear, yet the press did not challenge Kennedy.

When the *Times* Latin American correspondent Tad Szulc prepared a story that the CIA was behind the invasion plans, and that the invasion itself was imminent, the big guns of the *Times*—publisher Orvil Dryfoos, editor Turner Catledge, and columnist James Reston—got together to edit Szulc's story to eliminate references to the CIA and to the imminence of the invasion. Instead of a headline running over four columns, it was given a one-column headline.

In their 1963 essay on the press and the Bay of Pigs, Victor Bernstein and Jesse Gordon wrote,

The press had a right to be angry. It had been lied to, again and again, by President Kennedy, Allen W. Dulles, Dean Rusk, and everyone else. . . . But it also had the duty to be ashamed. No law required it to swallow uncritically everything that officialdom said. On the very day the American-planned, American-equipped expedition was landing at the Bay of Pigs, Secretary Rusk told a group of newsmen: "The American people are entitled to know whether we are intervening in Cuba or intend to do so in the future. The answer to that question is no." Where was the editorial explosion that should have greeted this egregious lie?

The general manager of the Associated Press, retiring in 1963, said, "When the President of the United States calls you in and says this is a matter of vital security, you accept the injunction."<sup>76</sup>

The slavishness of the major media (with a few heroic exceptions) to the power and the bullying of government goes a long way toward nullifying that right declared in the First Amendment, "the freedom of the press." More instances of government influence on the media include the following.

1. When CBS correspondent Daniel Schorr managed to get a copy of the House of Representatives report on the CIA in 1976 (a report suppressed and withheld from the public), he was investigated by the Justice Department and then fired by CBS.
2. At one time the CIA secretly owned hundreds of media outlets and also used the services of at least fifty individuals who worked for news organizations in this country and abroad, including *Newsweek*, *Time*, the *New York Times*, United Press International, CBS News, and various English-language newspapers all over the world.<sup>77</sup>
3. After Ray Bonner, Central American correspondent for the *New York Times*, wrote a series of articles critical of U.S. policy in El Salvador in 1982, he was removed from his post.<sup>78</sup>
4. In 1981 a new one-hour series titled *Today's FBI* began on national television. The program got official approval and support from William Webster, the director of the FBI, who was given veto power over all the scripts.<sup>79</sup>
5. A CBS television show on the Vietnam War called *Tour of Duty* was given free use by the Pentagon of all sorts of military facilities,

including helicopters, planes, and personnel. In return, the Pentagon was allowed to review and veto the scripts. The producer of the show, Ron Schwary, said, "The outlines are sent to Washington, and if they approve them, they're written and then the final approval is made through the project officer here."<sup>80</sup>

6. In the 1980s a number of documentary films were labeled as propaganda by the U.S. Information Agency (USIA) and denied the certificates that would enable them to be sent abroad. One of them was about children and drug problems. It had won an Emmy award and a prize at the American Film Festival but the USIA said it "distorts the real picture of youth in the U.S." A film on the historical roots of the Nicaraguan revolution was also refused certification because, the USIA said, it gave "an inaccurate impression of U.S. policy toward Nicaragua today."<sup>81</sup>

7. President Jimmy Carter tried to discourage the *Washington Post* from printing a story about CIA payments to King Hussein of Jordan.<sup>82</sup>

8. Also in the Carter era, a dispatch in the *New York Times* related, "The White House made several calls to officials of CBS News late last week to try to delete a long segment from the '60 Minutes' news program about American relations with the Shah of Iran and on the activities of Savak, the deposed Shah's secret police force." (The CIA had helped train the Savak, which was notorious for its use of torture and general brutality.)<sup>83</sup>

9. In the spring of 1988 it was disclosed that the FBI was asking librarians to report suspicious behavior by library users. The American Library Association listed eighteen libraries that in the last two years were approached by the FBI. For instance, at the University of Maryland, FBI agents asked for information on the reading habits of people with foreign-sounding names.<sup>84</sup>

10. During Reagan's administration, CBS News management kept toning down White House correspondent Lesley Stahl's coverage of the president. Her scripts were changed a number of times to make her stories less critical of Reagan.

11. A documentary film made by Japanese scientists who rushed to Hiroshima just after the bombing to record the effects of the bombing on the city's residents was confiscated by the American army and then finished. But the film was not allowed to be shown until 1967. It was nicknamed in Japan "the film of illusion," because it was not supposed to exist.<sup>85</sup>

12. When in 1981 the U.S. government leaked documents designed to

prove that the Cubans, with the aid of the Soviet Union, were suddenly sending large amounts of arms to El Salvador—a claim that turned out to be a great deception—CBS correspondent Diane Sawyer and others reported it without a critical examination. It was an attempt to portray the rebellion in El Salvador as a foreign operation rather than arising from the terrible conditions in that country. *National Wirewatch*, a newsletter for editors of wire-service dispatches, criticized the wire services for "heeding in lock-step fashion" the "party line from Washington on Communist infiltration."<sup>86</sup>

In general, according to *Washington Post* writer Mark Hertsgaard, during Reagan's presidency the press, although claiming objectivity, "was far from politically neutral—largely because of the overwhelming reliance on official sources of information."<sup>87</sup> Hertsgaard said the press and television were "reduced . . . to virtual accessories of the White House propaganda apparatus." The role of a critical press was especially important at that time, because the supposed opposition party, the Democrats, "were a pathetic excuse for an opposition party—timid, divided, utterly lacking in passion, principle, and vision."

All this is not just a recent phenomenon. During World War II, the U.S. government put all sorts of pressure on the black press to support the war. Attorney General Francis Biddle pointed to news stories in the black press about racial clashes between white and black soldiers and said this hurt the war effort; he threatened to close down the black newspapers.<sup>88</sup>

The evidence is powerful that the government has tried, often successfully, to manipulate the press. But, as Noam Chomsky has said, "It is difficult to make a convincing case for manipulation of the press when the victims proved so eager for the experience."<sup>89</sup>

In short the First Amendment without information is not of much use. And if the media, which are the main source of information for most Americans, are distorting or hiding the truth due to government influence or the influence of the corporations that control them, then the First Amendment has been effectively nullified.

Nevertheless, it would be wrong to say that in the United States we have no freedom of speech, no freedom of the press. There are totalitarian countries all over the world in which one can say that. In the Soviet Union, before Gorbachev's *glasnost* policies opened things up, such a flat statement would have been accurate. Here the situation is too complicated for that.

Perhaps the difference between totalitarian control of the press and democratic control of the press can be summed up by the observation of Edward Herman and Noam Chomsky in their book *Manufacturing Consent*: In Guatemala dissident journalists were murdered; in the United States they were fired or transferred.<sup>90</sup>

By reading the mainstream press carefully (the inner pages, the lower paragraphs, the quick one-day mention) it is possible to learn important things. Occasionally, there is a burst of boldness, as when the *New York Times*, the *Washington Post*, and the *Boston Globe* printed, in defiance of the government, the Pentagon Papers, revealing embarrassing facts about the Vietnam War. From time to time, honest, courageous pieces of reporting appear in the big newspapers.

A dissident media exists in the United States. Its editors and writers are not jailed. But they are starved for resources, their circulations limited. On the air, there is a glimmer of independence in cable television, which, of course, has only a small corner of the viewing population. There are small local radio stations (for example, WBAI in New York and Radio Pacifica on the West Coast) that run programs not heard on national radio.

Public radio and television teeters between constant caution and occasional courage. The *MacNeil-Lehrer NewsHour*, the leading news program of national public television, concentrates on caution. It loads its programs with establishment spokesmen and cannot discuss any major issue without bringing in government officials and members of Congress. It is open to ultraconservatives, but not to radicals. For instance, it has never put on the air the leading intellectual critic of American foreign policy, a man who is a world-renowned scholar, Noam Chomsky. It would be as if, throughout the post-World War II period, Jean-Paul Sartre had been blacklisted in France and could not be heard by any mass audience. Courage was shown by Bill Moyers, who interviewed Noam Chomsky in two extraordinary sessions on public broadcasting.

We mislead ourselves if we think that "public television," because it has no commercial advertising, is therefore *free*. It depends on government funding, and it worries about corporate donations. Here is an Associated Press dispatch that appeared in the *New York Times* under the headline "Public Broadcasting Head Eyes Donors."

William Lee Hanley Jr., the new chairman of the Corporation for Public Broadcasting, wants to make educational radio and television programs such

a good investment for American businesses that they will readily donate more money.<sup>91</sup>

The problem with free speech in the United States is not with the *fact* of access, but with the degree of it. There is *some* access to dissident views, but these are pushed into a corner. And there is *some* departure in the mainstream press from government policy, but it is limited and cautious. Some topics are given big play, others put in the back pages or ignored altogether. Subtle use of language, emphasis, and tone make a big difference in how the reading public will perceive an event.

Herman and Chomsky in *Manufacturing Consent* document this with devastating detail. They point out how the American press paid much attention to the genocide in Cambodia (which deserved attention, of course), but ignored the mass killings in East Timor, carried on by Indonesia with U.S. military equipment. They note the very large attention given to Arab terrorism and the small attention given to Israeli terrorism. They comment on the sensational coverage of the break-in of Democratic party headquarters (Watergate) and the very tiny coverage of the much more extensive series of break-ins by the FBI of the headquarters of the Socialist Workers party.

There is difference of opinion in the American mainstream press, but it is kept within bounds, just as there is difference between Republican and Democratic parties, but also within bounds. It is a puny pluralism that gives us a choice between Democrats and Republicans, *Time* and *Newsweek*, CBS, ABC, and NBC, MacNeil-Lehrer and William Buckley.

On a very small scale, I got a taste of American freedom of the press—its positive side and its limits—back in the mid-1970s. The *Boston Globe*, in the more open atmosphere created by Vietnam and Watergate and the increased skepticism of government, invited me and young Boston radical Eric Mann (he had spent time in prison for trashing the offices of Harvard's Center for International Affairs) to alternate in writing a weekly column. We were to be the left counterpart of George Will and William Buckley, conservatives whose columns appeared regularly on the *Globe's* Op-ed page.

And indeed, our columns appeared, uncensored, for more than a year. Probably no big-city newspaper in the country went as far as the *Globe* in opening its pages to radical views. But then two things happened. A column by Eric Mann critical of Israel was not run. When we went to the *Globe* building to protest, the person who regularly received our

column explained to us sadly that the *Globe* had to think about its Jewish advertisers.

Not long after that, on Memorial Day 1976, I submitted my column as usual. It was not a traditional Memorial Day statement, celebrating military heroism and past wars, but a passionate (I would like to think) statement against war. It certainly did not fit in neatly with the usual Memorial Day pictures of veterans with caps and flags and the tributes to patriotism. The column didn't get printed. When I inquired, I was told that, in fact, no column of mine would appear again. There was a new editor of the op-ed page, who explained that the page needed less political material and more family columns. Buckley and Will, I noted, continued to appear. They seemed to constitute a family.

### *Lies, Deception, Secrecy*

When the government acts in secrecy, free speech is thwarted, and democracy undermined. With World War II over, the two victorious nations, the United States and the Soviet Union, immediately became rivals in a race for world power. The cold war was on. In such an atmosphere, the openness of a democratic society was bound to suffer.

The National Security Council was created in 1947 to consult with the president on foreign policy. Established with it, presumably to feed it information and advise it, was the Central Intelligence Agency. *National Security Council Report #68*, prepared in early 1950 under the direction of Secretary of State Dean Acheson, called for a larger military establishment. It also said that people had to "distinguish between the necessity for tolerance and the necessity for just suppression." It worried about the "excess of tolerance degenerating into indulgence of conspiracy."<sup>93</sup>

The mood of the government became the mood of vigilantism, which might be expressed this way: We are good. Our enemy is evil. We mustn't tie our hands with the law, the Constitution, democratic procedures, or the ordinary rules of decency. In 1954 Lieutenant General James Doolittle, appointed by President Eisenhower to head a commission to advise him on foreign policy matters, reported back that what was needed was

an aggressive covert psychological, political and paramilitary organization more effective, more unique and, if necessary, more ruthless than that em-

ployed by the enemy. No one should be permitted to stand in the way of the prompt, efficient, and secure accomplishment of this mission. . . . There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."<sup>94</sup>

The commission was just putting into frank language what the United States, like other imperial powers in the world, had been doing throughout its history, long before there was a "Communist threat." But there was something different now in the language of the Doolittle Commission—the word *covert*. It is always a tribute to the citizenry when a government must do its dirty deeds in secrecy. The phrase *covert operations* was defined in National Security Council memorandum #5412 of March 15, 1954, as "all activities . . . which are so planned and executed that any U.S. Government responsibility for them is not evident to unauthorized persons and that if uncovered the U.S. Government can plausibly disclaim any responsibility for them."<sup>95</sup>

When the Doolittle Commission made its report, covert actions had already begun. The CIA had already tried to influence elections in Italy (that *had* to be secret; wasn't this country always talking about "free elections"?). In 1953 the CIA successfully engineered a coup in Iran to overthrow the nationalist leader Mossadegh, because he was too unfriendly to our oil corporations. And in the very year of the report, the United States was preparing to overthrow the government of Guatemala.

The excuse for covert action is that telling the truth will endanger the country, while secrecy will save lives. But secrecy may result in the *taking* of people's lives, behind the backs of the public, which if it knew what was happening, might stop it. People were killed in the coup that put the shah back on the throne of Iran; many more were killed by the shah's police afterward. The secret operation in Guatemala resulted in a police state that later killed tens of thousands of Guatemalans. In the invasion of Cuba, thousands died. Secrecy did not save lives.

Nor did it save lives in Vietnam. The secret undermining of the elections that were supposed to take place in 1956 to unite Vietnam led to a hard division between North and South, and ultimately to a war that cost over a million lives. What if the *American public had been told* what the government recorded secretly in the Pentagon Papers—that the South Vietnamese government whose independence we were supposedly defending was "essentially the creation of the United States"? And that "only the Viet Cong had any real support and influence on

a broad base in the countryside"? Perhaps the movement to stop the war would have started sooner and saved countless lives.

The covert actions in Chile that overthrew the democratically elected government of Salvador Allende in 1973 was, in part, a conspiracy between the CIA and IT&T, according to a 1975 Senate report.<sup>96</sup> It led to a murderous regime whose death squads killed thousands of Chileans and engaged in torture and mutilation. Suppose the American people had known that our government was interfering in an honest election and putting a military dictatorship in place? Might there not have been a public protest, and perhaps a change in policy?

Is not that one of the purposes of the First Amendment, to enable the free flow of information, so that policies in the interests of the citizenry can be pursued, so that a few people at the head of government cannot secretly, with no accountability to the public, do things that later make the citizenry ashamed of its own government?

It was the World War II experience that led influential American journalist Walter Lippmann to distrust public opinion, and, therefore, to support government secrecy: "The unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures. The people have imposed a veto upon the judgments of informed and responsible officials."<sup>97</sup>

Years later, when the United States began military action in Vietnam, Lippmann knew it was wrong. His old words must have haunted him. Because here was a case when public opinion, once it learned what was happening in Vietnam, was right in wanting out, and the "informed and responsible officials" were continuing an unspeakably brutal war.

A huge mythology has been built up in the public mind about secrecy. Perhaps it is the fascination of spy stories or the childhood delight in secrets. But most of the secrets nations make a big fuss about are either not secret at all (the secret of the atomic bomb could not be secret for long) or, if disclosed, would hardly make any difference in the world situation.<sup>98</sup>

The cold war atmosphere after World War II has produced a kind of hysteria about secrecy. It led to the execution of the Rosenbergs for allegedly passing atomic information to the Soviets when such information could not have made any significant difference to the Soviet making of an atomic bomb.

Similarly, the press went wild over the "pumpkin papers"—documents supposedly stolen by Alger Hiss and given to Whittaker Chambers—but there was nothing of value, no important secrets, in those

famous pumpkins, although they contributed to Hiss spending four years in prison.<sup>99</sup>

The arms race, the fascination with nuclear weapons, has led to secrecy that is dangerous to the public. From the *New York Times*:

The Department of Energy said today that it was responsible, along with its predecessor, the Atomic Energy Commission, for keeping secret from the public a number of serious reactor accidents that occurred over a 28-year period at the Savannah River Plant in South Carolina.

The Energy Department said the failure to disclose the problems illustrated a deeply rooted institutional practice, dating from the days of the Manhattan Project in 1942, which regarded outside disclosure of any incident at a nuclear weapons production plant as harmful to national security.<sup>100</sup>

### *The Iran-Contra Affair*

Covert action and "plausible denial" once again became prominent news stories during the second Reagan administration. A dispatch in the foreign press led to disclosures that were enormously embarrassing to the White House. It is not a tribute to the American press that aside from a few isolated stories here and there, it did not do the kind of investigative work that would have exposed the "Iran-Contra" affair earlier.

The root of the situation was the Nicaraguan Revolution of 1979, in which the rebel Sandinistas overthrew the Somoza regime, a family dictatorship that was long the darling of the U.S. government. The revolutionaries were named after the Nicaraguan rebel Sandino, who in the 1920s and 1930s had led a guerrilla force against the dictatorship and against the occupation of Nicaragua by the U.S. Marines. Sandino signed a truce, then was lured to a spot where he was executed by the National Guard headed by Colonel Somoza, who established the Somoza dynasty in Nicaragua.

The Sandinistas, a coalition of Marxists, left-wing priests, and assorted nationalists, set about to give more land to the peasants and to spread education and health care among the very poor and long-oppressed people of Nicaragua. Almost immediately, the Reagan administration began to wage a secret war against them, hoping to get rid of

a government that would not play ball as submissively as the Somozas did.

The covert war against Nicaragua consisted of organizing and training a counterrevolutionary force, the contras, many of whose leaders were former National Guard officers under Somoza. The contras seemed to have no popular support inside Nicaragua and so were based in Honduras, a very poor country dominated by the United States and dependent on U.S. economic and military aid. From Honduras, they moved across the border into Nicaragua, raiding farms and villages; killing men, women, and children; and committing many atrocities.

When one of the contras' public relations people, Colonel Edgar Chamorro, learned what they were doing—essentially acts of terrorism against poor Nicaraguan farmers—and saw that the CIA was behind the whole operation, he resigned, telling his story to the newspapers. He also testified before the World Court:

We were told that the only way to defeat the Sandinistas was to use the tactics the Agency [the CIA] attributed to Communist insurgencies elsewhere: kill, kidnap, rob and torture. . . . Many civilians were killed in cold blood. Many others were tortured, mutilated, raped, robbed, or otherwise abused. . . .

When I agreed to join . . . in 1981, I had hoped that it would be an organization of Nicaraguans, controlled by Nicaraguans. . . . [It] turned out to be an instrument of the U.S. government, and specifically of the CIA.<sup>101</sup>

One of the reasons for the secrecy of Reagan's operations in Nicaragua was that public opinion surveys showed that the American people were not in favor of U.S. military operations in Central America. He decided he could do certain things openly, like strangling the Nicaraguan economy with an embargo, which the law permitted him to do if he declared the situation a national emergency.

But other actions were to be taken secretly. In 1984 the CIA, using Latin American agents, put mines in the harbors of Nicaragua to blow up ships. Secretary of Defense Caspar Weinberger told ABC news, "The United States is not mining the harbors of Nicaragua." The deceptions multiplied after Congress, responding perhaps to common sense, public opinion, and the memory of our embroilment in Vietnam, passed the Boland Amendment in October 1984, making it illegal for the United States to support "directly or indirectly, military or paramilitary operations in Nicaragua."

The Reagan administration decided to ignore this law and to find ways to fund the contras secretly, by looking for "third-party support." Reagan himself solicited funds from Saudi Arabia, at least \$32 million. The friendly government of Guatemala was used to get arms surreptitiously to the contras. Honduras was used, as always, for the final passage to the contra army on its soil. Israel, so dependent on the United States and, therefore, so dependable, was also used.<sup>102</sup>

All of this was illegal, but the only ones prosecuted were several of Reagan's aides. Reagan himself was kept out of it. It was a perfect example of plausible denial, where an operation is conducted by underlings, so that the president can simply deny he was involved and no one can prove it.

At Reagan's news conference November 19, 1986, when asked about the disclosure that weapons had been sent to Iran (supposedly a bitter enemy of the United States) and profits from this given to the contras, he told four lies: that the shipment to Iran consisted of a few token antitank missiles (it turned out to be 2,000), that the United States didn't condone shipments by third parties, that weapons had not been traded for hostages, and that the purpose of the operation was to promote a dialogue with Iranian moderates (the purpose was to help the contras).

In October 1986 when a transport plane that had carried arms to the contras was downed by Nicaraguan gunfire and the American pilot captured, the lies multiplied. Assistant Secretary of State Elliot Abrams lied. Secretary of State Schultz lied ("no connection with the U.S. government at all"). There was so much nonsense being told the public that even the patient *New York Times* became irritated and wrote in an editorial, "It may cross the reader's mind that Americans are learning more of the truth from Managua than Washington."<sup>103</sup>

The whole Iran-Contra affair is a perfect example of the double line of defense of the American establishment. The first defense is to lie. If exposed, the second defense is to investigate, but not too much; the press will publicize, but they will not get to the heart of the matter.

Neither the House-Senate committee that investigated the scandal (once the scandal was out in the open) nor the press nor the trial of Colonel Oliver North, who oversaw the contra aid operation, got to the critical questions: What is U.S. foreign policy all about? How are the president and his staff permitted to support a terrorist group in Central America to overthrow a government that, whatever its faults, is a great improvement over the terrible governments the United States has supported there over the years? What does the scandal tell us about democ-

racy, about freedom of expression, about an open society?

Out of the much-publicized scandal came no powerful critique of secrecy in government or of the erosion of democracy by actions taken in secret by a small group of men safe from the scrutiny of public opinion.<sup>104</sup> The media, in a country with a First Amendment, kept the public informed only on the most superficial level.

There are scholarly pundits who shake their heads sadly at the idea that the public should be told the truth about foreign policy operations. In the midst of the Iran-Contra affair, Harvard professor James Q. Wilson came forward to warn that too much was being exposed. Wilson, a member of Reagan's Foreign Intelligence Advisory Board, wrote in the *New York Times*, "We may disagree over foreign policy, but hardly any American interests are served by extensive leaks about every sensitive operation we may wish to undertake."<sup>105</sup> Wilson did not like the Democratic party acting like an opposition party, as if it were a true two-party system. He had little to fear. The limits of Democratic opposition were revealed by a leading Democrat, Sam Nunn of Georgia who, as the investigation was getting under way, said, "We must, all of us, help the President restore his credibility in foreign affairs."

But Wilson seemed to deplore the fact that *some* Democrats were *somewhat* critical. He looked back nostalgically to a "bipartisan consensus" (the equivalent of the one-party system in a totalitarian state). What he worried about most was "a lack of national resolve to act like a great power."

Machiavelli would have agreed.

### *Taking Our Liberties*

If the government deceives us and the press more or less collaborates with it—to keep us from knowing what is going on in the most important matters of politics: life and death, war and peace—then the existence of the First Amendment will not help us. Unless, of course, we begin to act as citizens, to put life into the amendment's promise of freedom of expression by what we do ourselves. British novelist Aldous Huxley (*Brave New World*) once said, "Liberties are not given; they are taken."

We, as citizens, want freedom of expression for two reasons. First, because in itself it is fundamental to human dignity, to being a person, to independence, to self-respect, to being an important part of the

world, and to being alive. Second, because we badly need it to help change the world and to bring about peace and justice.

We should know by now that we cannot count on the courts, the Congress, or the presidency, to assure us the freedom to speak, to write, to assemble, and to petition. We cannot count on the government or the mainstream press to give us the information necessary to be active, critical citizens. And we cannot count on those who own the media to give us the opportunity to reach large numbers of people.

Therefore, it seems Huxley is right; we will have to *take* our liberties. Historically, that has always been the case. Despite the Sedition Act after the American Revolution, in which some people were jailed for criticizing the government, hundreds of other pamphleteers and writers insisted, at the risk of prison, on writing as they pleased. They *took* their liberty.<sup>106</sup>

We need to remind ourselves of individuals who have insisted on their freedom to speak their minds. Emma Goldman was a feminist and anarchist of the early twentieth century whose views on patriotism, (agreeing with Samuel Johnson, "the last refuge of a scoundrel"), on preparedness for war ("violence begets violence"), on marriage ("it has nothing to do with love; it is an insurance contract"), on free love ("what is love if it is not free?") and on birth control ("a woman should decide for herself whether or not she wants a baby") outraged many people and certainly the authorities.

She lectured all over the United States, and wherever she went, the police were there to stop her. In one month, May 1909, police broke up eleven meetings at which she spoke. She was arrested again and again. But she kept coming back.

In San Francisco, she spoke to 5,000 people on patriotism; the crowd stood between her and the police, and the police retreated. When she came back to San Francisco the following year, the police broke up the meeting, using their clubs on members of the audience.

In East Orange, New Jersey, police blocked the entrance to the lecture hall. She spoke to her audience on the lawn. In San Diego, a mob kidnapped her lover and manager and tarred and feathered him. She insisted on coming back to San Diego to speak the next year.

When she lectured on birth control and the use of contraceptives, she was repeatedly arrested. But she refused to stop.

She opposed U.S. entrance into World War I, as most Socialists and anarchists did. She knew she was in danger for encouraging young men to resist the draft, but she continued to speak. She was tried and impris-

oned for two years, and when she came out of prison she was deported from this country. But she continued to speak her mind on American events—the Tom Mooney case and the case of Sacco and Vanzetti—flinging her thoughts across the ocean, during her long exile in Europe.<sup>107</sup>

In the decade before World War I, the Industrial Workers of the World (IWW), a radical trade union, was organizing all workers—skilled and unskilled, men and women, native born and foreign—into “One Big Union.” IWW organizers, going to speak in cities in the far west to miners and lumberjacks and mill workers, were arrested again and again. They refused to stop. They engaged in what they called “Free Speech Fights”: when one of them was put in jail, hundreds of others would come into that town and speak and be arrested until the jails could not hold them and they were released. But they refused to be silent.

This is always the price of liberty—taking the risk of going to jail, of being beaten and perhaps being killed.

There is another risk for people speaking and organizing in the workplace: loss of one’s job. Historically, the only way workers, subject to the power of a foreman or an employer, could have freedom of expression, was to join with other workers and form a union so that they could collectively defend themselves against the power of the employer.

Freedom of the press depends on the energy and persistence of people in developing their own newspapers, magazines, and pamphlets, to say things that will not appear in the mainstream press. Throughout American history, these little publications, pressed for money, have managed to form a kind of underground press.

The Populist Movement of the late nineteenth century spread literature throughout the farm country, north and south. The Socialist press of the early twentieth century was read by 2 million people. Black people, taking a cue from the first abolitionist newspaper printed by a black man in 1829, developed their own newspapers, because they knew they could not depend on the orthodox press to tell the truth about the race situation in the United States.

When in the 1950s journalist I. F. Stone decided he could not count on having an outlet in the regular press, he published his own little four-page newspaper. *I. F. Stone’s Weekly* contained information unavailable elsewhere, which Stone, in Washington, D.C., put together by reading obscure government documents and the *Congressional Record*; it soon became a famous source of reliable facts. The first rule of journal-

ism, Stone declared, is that “governments lie,” and so alternate sources of information are desperately needed if we are to have a democracy.

The movements of the sixties—the black movement, the antiwar movement, the women’s movement, and the prisoners’ rights movement—produced an enormous underground press. There were 500 underground high-school newspapers alone.

Soldiers against the Vietnam War put out their newspapers on military bases around the country. By 1970 there were fifty of them: *About Face* in Los Angeles; *Fed Up* in Tacoma, Washington; *Short Times* at Fort Jackson, South Carolina; *Last Harass* at Fort Gordon, Georgia; *Helping Hand* at Mountain Home Air Base, Idaho.

Underground newspapers sprang up during the war in cities all over the country. In early 1969 J. Edgar Hoover instructed his field offices to target these publications. FBI agents raided and ransacked the offices of newspapers in San Diego, Philadelphia, Phoenix, Jackson, and other places. Advertisers were persuaded to withdraw. One landlord after another agreed to evict newspapers from their offices. The Underground Press Syndicate and Liberation News Service became targets of FBI infiltrators.<sup>108</sup>

By 1972 these attacks badly crippled the underground press. But slowly it made its way back and today around the country community newspapers continue to print material not found in the regular media.

In the past few years, a new form of free speech has become important: “whistle-blowing.” A whistle-blower is a person who risks his or her job with the government or with a large corporation to expose truths that have been kept under wraps.

For instance, Pentagon employee A. Ernest Fitzgerald embarrassed his employer in 1969 by telling Congress that a transport plane ordered by the air force would cost \$2 billion more than it expected to pay. Fitzgerald was dismissed from the Pentagon, then reinstated but given lesser assignments.

Dr. Jacqueline Verrett, of the Bureau of Foods of the Food and Drug Administration, granted an interview with a television reporter. She was told never to speak to the press again. She was warned (in her words), “not to answer my phone but to get someone else to answer it and say I wasn’t there.”

Nevertheless, Fitzgerald and Verrett continued to speak their minds.<sup>109</sup> So did others. A safety engineer with the Ford Motor Corporation exposed the fact that Ford, to save money, had chosen a gas tank that was prone to rupture under stress. Peter Faulkner, an engineer,



exposed faults in a nuclear device made by General Electric. He was called in to discover why he had such "deep-seated hostility." Then he was fired. But he published a book about his experience.<sup>110</sup>

It takes courage to divulge information embarrassing to the government, especially when there are laws that can be used to imprison you for doing that. Daniel Ellsberg faced 130 years under the Espionage Act for photocopying the 7,000 pages of the Pentagon Papers and sending them to the newspapers, to expose the truth about the war in Vietnam. But he went ahead.

It is impossible to judge the impact of those papers on the public, but it is reasonable to assume that the several million people who read the *Times*, the *Washington Post*, and the *Boston Globe* learned things about the war they had not known before. This, along with all the other disclosures about the war going on at the time, helped turn public opinion against the war. But Ellsberg, and codefendant Tony Russo, had to risk prison to make the First Amendment come alive.

During the Vietnam War, with the government lying and with the press slow in getting past official propaganda, a whole network of techniques was developed to spread information about the war. There were teach-ins on college campuses, alternative newspapers, rallies, picket lines, demonstrations, petitions, ads in newspapers, and graffiti on walls.

In Southeast Asia an alternative news organization was created—*Dispatch News Service*—which sent out news items revealing what the government was keeping secret, like the story of the My Lai massacre.

The thousands of acts of civil disobedience during the war were acts of communication, small works of art, appealing to the deepest feelings of people. Art plays a critical role in any social movement, because it intensifies the movement's messages. It tries to make up for the lack of money and resources by passion and wit. It communicates through music, drama, speech, demonstrative action, drawings, posters, songs, surprise, sacrifice, and risk.

During the Vietnam War, a very successful commercial artist (Seymour Chwast) turned his talents to the antiwar movement, and produced a poster with a simple design and eight large words printed on it: WAR IS GOOD FOR BUSINESS. INVEST YOUR SON.

It was chilling and powerful. It was just part of the work of hundreds of thousands of people all over the country, speaking to millions of people in many different ways, bringing life to the First Amendment and an end to a war.

All parts of the world's oceans are polluted and face the possibility of irreversible damage within 25 years according to scientists at an ocean pollution conference here.

John Vandermeulen of the Bedford Institute of Oceanography, summarizing the conclusions of the weeklong conference, said, "There exists no longer any virgin, contaminant-free nook or corner in the marine environment, including the high Arctic and the sediments of the deep oceans."

48. *Cosmopolitan Magazine*, Jan. 1907.
49. Quoted by Howard Zinn, *A People's History of the United States* (Harper & Row, 1971), 317-318.
50. Richard de Lone, *Small Futures* (Carnegie Foundation, 1979).
51. See the chapter on European social welfare programs in Harrell Rodgers, *The Cost of Human Neglect* (M. E. Sharpe, 1982).
52. Jerre Mangione, *The Dream and the Deal: The Federal Writers Project 1935-1943* (Little, Brown, 1972).
53. See Kai Nielsen, "Global Justice, Capitalism, and the Third World," *The Journal of Applied Philosophy* (1984), reprinted in Tibor R. Machan, ed., *The Main Debate* (Random House, 1987).
54. Between 1970 and 1982, according to the World Bank, the foreign debt of sub-Saharan Africa increased from \$5.7 billion to \$51.3 billion. An official of the British relief organization Oxfam was critical of the World Bank for putting pressure on these nations to use their resources for cash crops for export instead of for food for their own people. *New York Times*, Nov. 12, 1984.
55. Op-ed piece, *New York Times*, Jan. 10, 1977.
56. *Boston Globe*, Dec. 27, 1981.
57. John Rawls, *A Theory of Justice* (Harvard University Press, 1971).
58. *Washington Post*, Oct. 30, 1988.
59. John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* (Summer 1985), tries to clarify the points he made in his book. He says his intention was practical, that his conception of justice is supposed to serve as a basis of "informed and willing agreement between citizens viewed as free and equal persons." He talks about "public agreement in judgment on due reflection . . . free agreement, reconciliation through public reason . . . social cooperation on the basis of mutual respect . . . given a desire for free and uncoerced agreement, a public understanding." Through all this, there is no indication that such an understanding can only be reached "free and uncoerced" among that majority of the population that constitutes the lower and middle classes and has a pressing need for economic justice. There is no recognition that conflict and struggle are inevitable in the attempt to achieve justice, even if we try to moderate that conflict as much as possible, to shorten that struggle by reaching "a public understanding" among a large enough part of the population to overwhelm the resistance of the rich and powerful.
60. Alec Nove, professor of economics at the University of Glasgow, in his book *The Economics of Feasible Socialism*, (George Allen & Unwin, 1983), has tried to work out a common sense approach to a socialist economy. He believes *scale* is important—that is, small enterprises wherever possible. He also thinks no one need get paid more than two or three times anyone else. He says, "We should envisage the degree of inequality which is necessary to elicit the necessary effort by free human beings. . . . There seems no good reason to make some individuals many times richer than others in order to obtain the necessary incentive effect," pp. 215-216.

61. *New York Times*, July 12, 1988.
62. Reeve Vanneman and Lynn Cannon, *The American Perception of Class* (Temple University Press, 1987) make an important distinction. They say it is true that the working class in the United States has been unsuccessful in forming its own political party or in making any radical changes in the economic structure of the country. But, they insist, this is not proof of the lack of class consciousness. What it does prove is the lack of strength of American workers against the enormous power of the capitalist class. After a great deal of research into the self-perceptions of American workers, the authors found "impressive evidence documenting the class consciousness of American workers was already on the record."
63. Studs Terkel, *Working* (Pantheon, 1972), xi, xxii.
64. For an account of the early popular actions in the New Deal period see Maurice Hallgren, *Seeds of Revolt* (Knopf, 1934). For the strikes of the New Deal period, see Irving Bernstein, *The Turbulent Years* (Houghton Mifflin, 1969).
65. See the discussion of this in Peter Irons, *The New Deal Lawyers* (Princeton University Press, 1982).
66. Frances Piven and Richard Cloward, *Poor People's Movements* (Pantheon, 1977).
67. *Ibid.*, 264-359.

#### CHAPTER EIGHT *Free Speech*

1. Much of my data on the Alien and Sedition Acts and the colorful accusations surrounding them come from John C. Miller, *Crisis in Freedom* (Atlantic-Little, Brown, 1952).
2. See Leonard Levy, *Freedom of Speech and Press in Early American History* (Harper & Row, 1963).
3. James Morton Smith, "Political Suppression of Seditious Criticism: A Connecticut Case Study," *The Historian*.
4. Miller, *Crisis in Freedom*, 74.
5. *Ibid.*, 104.
6. For an analysis of the early interpretations of the First Amendment, see Levy, *Freedom of Speech and Press*.
7. Levy, *Freedom of Speech and Press*, 243-244.
8. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Beacon Press, 1962), 161.
9. *New York Times v. U.S.* 403 U.S. 713 (1971).
10. We should note that when Thomas Jefferson became president in 1801, although the Sedition Act had expired, prosecutions of critics of government for seditious libel continued. Jefferson had written to Madison back in 1788 that he accepted the common law interpretation of freedom of speech as meaning no prior restraint, and that people should be held accountable for "false facts." For Jefferson's attitude to civil liberties, read Leonard Levy, *Jefferson and Civil Liberties* (Quadrangle, 1973), although Levy offended many lovers of Jefferson by his critique.
11. Victor Marchetti and John Marks, *The C.I.A. and the Cult of Intelligence* (Knopf, 1974).
12. Snapp pointed out that former Secretary of State Henry Kissinger, former CIA head William Colby, and other former CIA men of high rank were not prosecuted for

- failing to let the CIA see their manuscripts in advance. Frank Snepp, *Decent Interval* (Vintage, 1978).
13. H. C. Peterson and Gilbert C. Fite, *Opponents of War, 1917-1918* (University of Washington Press, 1957), 17.
  14. *Schenck v. U.S.*, 249 U.S. 47 (1919). In a later case, *Abrams v. U.S.* (1919), Holmes and Justice Louis Brandeis dissented from the majority decision to uphold Abrams's conviction. Holmes wrote in his opinion: "I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe." Why Schenk's leaflets were a "clear and present danger," and Abrams's leaflets were not, remains a mystery.
  15. See the biography of Debs by Ray Ginger, *The Bending Cross* (Rutgers University Press, 1949), 358.
  16. *Debs v. U.S.*, 249 U.S. 211 (1919).
  17. Peterson & Fite, 34.
  18. For an account of this case, see H. C. Peterson and Gilbert C. Fite, *Opponents of War 1917-1918* (University of Washington Press, 1957), 92-93.
  19. The case was *Dunne v. U.S.*, 138 F.2d 137 (8th Circuit, 1943). See an account of the trial by a leader of the Socialist Workers party, James P. Cannon, *Socialism on Trial* (Pathfinder Press, 1970).
  20. *Ibid.*
  21. *Dennis v. U.S.*, 341 U.S. 494 (1951). In later decisions, the Court seemed less ready to convict radicals for merely teaching and advocating doctrines of violent revolution. And ten years later, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) the Court ruled that a state can prosecute only for action that advocates immediate unlawful acts and when the advocacy is likely to have an immediate effect. But, as Staughton Lynd pointed out in his article "*Brandenburg v. Ohio: A Speech Test for All Seasons?*" there was no assurance, knowing the erratic behavior of the Supreme Court, especially in times of international tension, that it would hold to this test of "imminent action." *University of Chicago Law Review* (Fall 1975).
  22. See *The Docket* (May 1986), published by the Civil Liberties Union of Massachusetts.
  23. *New York Times*, Sept. 20, 1989.
  24. *Parker v. Levy*, 417 U.S. 733.
  25. John V. H. Dippel, "Getting Nowhere Through Channels," *New Republic*, May 22, 1971.
  26. *Brown v. Glines*, 444 U.S. 348 (1980).
  27. Huntington's essay, "The Democratic Distemper" appears in a volume by Nathan Glazer and Irving Kristol, *The American Commonwealth, 1976* (Basic Books, 1976).
  28. *Barron v. Baltimore*, 7 Pet. 243 (1833).
  29. *Davis v. Massachusetts* 167 U.S. 43 (1895). In Massachusetts it was Oliver Wendell Holmes, sitting on the Supreme Judicial Court of Massachusetts, who wrote the decision against the man Davis, who wanted to speak on the Boston Common without having to get permission from the mayor.
  30. *Gitlow v. New York*, 268 U.S. 652 (1925).
  31. *Terminiello v. Chicago*, 337 U.S. 1 (1949).
  32. *Feiner v. New York*, 310 U.S. 315 (1951).
  33. *Edwards v. South Carolina*, 372 U.S. 229 (1963).
  34. *Adderley v. Florida* 385 U.S. 39 (1966).
  35. *Marsb v. Alabama* 326 U.S. 501 (1946).

36. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.* 391 U.S. 308 (1968).
37. *Lloyd Corporation v. Tanner* 407 U.S. 551 (1972).
38. *Tinker v. Des Moines Independent School District* 393 U.S. 503 (1969).
39. *Procunier v. Martinez* 416 U.S. 396 (1974).
40. See David Ewing, *Freedom inside the Organization* (Dutton, 1977).
41. *The Nation*, June 15, 1974.
42. *New York Times*, Nov. 9, 1986.
43. *Boston Globe*, Oct. 6, 1986.
44. Howard Zinn, "Four Women of Courage," *Boston Globe*, Apr. 24, 1975.
45. Jonathan Kozol, *Death at an Early Age* (Bantam, 1970). The text of the Langston Hughes poem is on page 235.
46. Helen Epstein, who wrote an article on Silber that appeared April 23, 1989, in the *New York Times Magazine*, reported that faculty members were afraid to give their names in speaking to her about Silber.
47. *Boston Globe*, Dec. 28, 1977.
48. This quotation and other material in this section is drawn from the *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, Book 3 (1976). (Hereafter cited as Church Committee report.) This was the Senate committee sometimes known as the Church Committee, headed by Senator Frank Church. Pages 1-78 deal with COINTELPRO.
49. Madison to Jefferson, May 13, 1798.
50. Church Committee report, Book 3, 289.
51. Church Committee report, Book 2.
52. David Cate, *The Great Fear* (Simon & Schuster, 1978), 281.
53. *Associated Press dispatch* Sept. 30, 1987.
54. The Emergency Detention Act was part of the 1950 Internal Security Act. Detention plans actually began before World War II. In 1938 J. Edgar Hoover had proposed keeping an index of subversives, and Franklin D. Roosevelt approved this. They were first known as Custodial Detention Cards, then as a Security Index, and after the Emergency Detention Act was repealed in 1971 it was called an Administrative Index. See Robert Goldstein, *Political Repression in Modern America* (Schenkman, 1978).
55. Church Committee report, Book 2, 140.
56. *Organizing Notes* (a newsletter on the activities of the FBI and other national security organizations), Sept. 10, 1979.
57. *New York Times*, Oct. 19, 1980.
58. Church Committee report, 223.
59. *Boston Globe*, Jan. 27, 1988.
60. *New York Times*, Dec. 16, 1980.
61. Howard Zinn, *Albany: A Study in Federal Responsibility* (Southern Regional Council, 1962)
62. The Church Committee report deals with the campaign against Martin Luther King on pp. 81-184.
63. See David Garrow, *The F.B.I. and Martin Luther King* (Penguin, 1981).
64. *Ibid.*
65. Quoted by Richard Kluger, *The Paper: The Life and Death of the New York Herald-Tribune* (Knopf, 1986).

66. Much of this material on the monopolizing trend in the media comes from Ben Bagdikian, *The Media Monopoly* (Beacon, 1988).
67. Bagdikian, *The Media Monopoly*. Also, "The Lords of the Global Village," *The Nation*, June 12, 1989.
68. *First National Bank v. Bellotti* 435 U.S. 765 (1978).
69. *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367 (1969).
70. *Columbia Broadcasting System, Inc. v. Democratic National Committee* (1973). Two years later, in a unanimous decision, the Supreme Court struck down a Florida statute that gave an attacked political candidate a right to reply in the press. Again, it was the laissez-faire doctrine, keeping the power of government away from the newspaper business, but allowing the power of a rich newspaper to decide whose views would be published. *Miami Herald v. Tornillo* (1974).
71. A longtime student of free speech in this country, Franklin S. Haiman of Northwestern University, pointing to the control of the mass media, suggested that

the freedom of speech we practice is a counterfeit enterprise . . . the debates in which we engage are over means rather than ends, form rather than substance, appearances rather than essences, and that they are limited in scope, depth, and meaning by cultural brainwashing. . . . We in the United States have our own ways of insuring that the variety of opinions expressed and communicated to large numbers of people is kept within boundaries that are tolerable to those who hold the reins of power.

Franklin Haiman, "How Much of Our Speech is Free?" *Civil Liberties Review* (Winter 1975).

72. *Strategic Review* (Summer 1983). This view by a private person was similar to that expressed by William Westmoreland, who was commander of U.S. forces in Vietnam during the war there and who on March 20, 1982 (according to a UPI dispatch on that date) told a college audience in Colorado that the armed forces could not win without public support and therefore should control the news media in wartime.
73. Harrison Salisbury, *Without Fear or Favor: The New York Times and Its Times* (Times Books, 1980), based on his many years as a correspondent for the *Times*, has a good deal of information on the way *Times* editors and publishers played ball with the U.S. government.
74. The details of the press blackout on the Bay of Pigs preparations are told by Victor Bernstein and Jesse Gordon, "The Press and the Bay of Pigs," *Columbia University Forum* (Fall 1967).
75. Arthur Schlesinger recounts this in his book *A Thousand Days* (Houghton Mifflin, 1965), 261.
76. *Editor and Publisher*, Feb. 2, 1963. Quoted by Bernstein and Gordon, "The Press and the Bay of Pigs."
77. See *New York Times*, Dec. 25, 1977. Also, the article by William Preston, Jr. and Ellen Ray, "Disinformation and Cuba: A Case History," *Cuba Update* (Center for Cuban Studies, New York, June 1983).
78. Mark Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency* (Farrar, Straus & Giroux, 1989), 191. Also Noam Chomsky, *Necessary Illusions* (South End Press, 1989), 371.
79. *Boston Globe*, Oct. 24, 1981.
80. *In These Times*, Feb. 3-9, 1988.
81. *Boston Globe*, Jan. 5, 1988.

82. *Boston Globe*, Feb. 26, 1977.
83. *New York Times*, Mar. 7, 1980.
84. *USA Today*, May 24, 1988.
85. *New York Times*, May 18, 1967.
86. Quoted by North American Council on Latin America, *The Media Go to War: From Vietnam to Central America*, N.A.C.L.A., July-Aug. 1983.
87. Mark Hertsgaard, "How Reagan Manipulated a Passive Press," *Boston Globe*, Nov. 2, 1988. See also Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency*.
88. Patrick S. Washburn, *A Question of Sedition* (Oxford University Press, 1986).
89. Noam Chomsky, "All the News That Fits," *Utne Reader* (Feb.-Mar. 1986). The *Utne Reader* is an extraordinary source of information that cannot be obtained in the mainstream press. It gives digests of articles that appear in small publications throughout the country and it regularly prints descriptive lists of important publications that are ignored by the regular media.
90. Herman and Chomsky, *Manufacturing Consent* (Pantheon, 1988).
91. *New York Times*, Jan. 5, 1987.
93. See David S. McLellan, *Dean Acheson* (Dodd Mead, 1976).
94. Congressional Research Service, Library of Congress (prepared for the Senate Committee on Foreign Relations), *The United States Government and the Vietnam War: Executive and Legislative Relationships, Part I, 1945-1961* (U.S. Government Printing Office, 1984). (Hereafter cited as Congressional Research Service.) This volume is reviewed by James Crown, *Presidential Studies Quarterly* (Fall 1984).
95. Congressional Research Service, quoted by Crown.
96. Senate Select Committee on Intelligence, *Covert Action in Chile, 1963-1973* (Government Printing Office, 1975).
97. Walter Lippmann, *Essays in the Public Philosophy* (Little, Brown, 1965).
98. Secrets sometimes make a difference during war. But even in World War II, where both war and secrecy looked at their best, there was much exaggeration about the importance of secrecy. The famous secret operations *Ultra* and *Sigint* and *Enigma* were much overrated in their importance. See the review of F. H. Hinsley and others, *British Intelligence in the Second World War* (Cambridge University Press, 1982) by Zara Steiner, *New York Review of Books*, Oct. 21, 1982.
99. Alger Hiss, *Recollections of a Life* (Henry Holt, 1988).
100. *New York Times*, Oct. 4, 1988.
101. See Chamorro's letter to the *New York Times*, Dec. 30, 1985. Also the *New York Times*, Mar. 18, 1985. Also an article on Chamorro in the *New Republic*, Aug. 5, 1985.
102. *Boston Globe*, Oct. 28, 1986. Also the *New York Times*, Feb. 7, 1987.
103. *New York Times*, Oct. 12, 1986.
104. This point is made in Theodore Draper, "Revelations of the North Trial," *New York Review of Books*, Aug. 17, 1989.
105. *New York Times*, Dec. 24, 1986.
106. Leonard Levy, *Emergence of a Free Press* (Oxford University Press, 1985), looked at the press in the postrevolutionary period, studying thirty-three newspapers in eight colonies from 1704 through 1820. He wrote, "That so many courageous and irresponsible editors risked imprisonment amazes me."
107. Alice Wexler, *Emma Goldman in Exile* (Beacon, 1989).

108. Brian Glick, "Neutralizing the Underground Press," Oct. 1984 (an unpublished paper in my files).
109. *New York Times*, Apr. 29, 1975.
110. Alan F. Westin, *Whistle Blowing! Loyalty and Dissent in the Corporation* (McGraw-Hill, 1980).

#### CHAPTER NINE *Representative Government: The Black Experience*

1. James Michener, "The Secret of America," *Parade*, Sept. 15, 1985.
2. "Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii," May 6, 1987.
3. Leon Litwack, "Trouble in Mind: The Bicentennial and the Afro-American Experience," *Journal of American History* (Sept. 1987).
4. John Locke, *Second Treatise of Government*, of which there are many editions. One of them is Peter Laslett, ed., *Locke's "Two Treatises of Government"* (Cambridge University Press, 1969).
5. The political philosopher C. B. Macpherson analyzed Locke as a theorist of bourgeois property rights in his book *The Political Theory of Possessive Individualism* (Oxford University Press, 1962).
6. This point is made in John Dunn, *The Political Thought of John Locke* (Cambridge University Press, 1969).
7. *Federalist* #10.
8. *Federalist* #63.
9. See Leon Litwack, *North of Slavery* (University of Chicago Press, 1961).
10. Various statements of black defiance in this and other periods of American history can be found in Herbert Aptheker, *A Documentary History of the Negro People in the United States* (Citadel, 1973).
11. *Ableman v. Booth*, 21 Howard 506.
12. For excellent accounts of the resistance to the Fugitive Slave Act, see James McPherson, *Battle Cry of Freedom*, (Oxford University Press, 1988), 82-83.
13. Quoted by Richard Hofstadter, *The American Political Tradition* (Vintage, 1974), 148.
14. *Ibid.*, 169-170.
15. Alden Morris, *The Origins of the Civil Rights Movement* (The Free Press, 1985), traces the complex and fascinating roots of the civil rights movement.
16. Article on W. E. B. DuBois by Bob Hayden, *Bay State Banner*, Oct. 18, 1979.
17. For the description of DeLaine and the story of the *Brown* case, see Richard Kluger, *Simple Justice* (Knopf, 1976). See also William Strickland, "The Road Since Brown," *The Black Scholar*, (Sept.-Oct. 1979).
18. Quoted by John Hope Franklin, *From Slavery to Freedom* (Knopf, 1967), 556. Also in Strickland, "The Road Since Brown."
19. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). The Nixon administration had tried to delay court-ordered desegregation of thirty-three Mississippi school districts, and the Supreme Court was unanimous in insisting that segregation must be ended "at once."