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Washington Focus: The Senate passed H.J. Res. 371 on March 4, providing for congressional designation of March 16 as Freedom of Information Day. March 16, James Madison's birthday, has traditionally been designated as Freedom of Information Day since Madison, writing in the Federalist Papers, was the first of the Founding Fathers to point to the need for public access to government information. . .Environmental and industry groups held a press conference Mar. 10 to unveil legislation to reauthorize the Federal Insecticide, Fungicide and Rodenticide Act. The legislation, which will provide for release of certain types of health and safety data, will be introduced in the Senate by Sen. Richard Lugar (R-Ind), and in the House by Rep. Berkley Bedell (D-Iowa) and Rep. Pat Roberts (R-Kan).

STORIES IN THIS ISSUE:

DRAFT ON FOIA TRIBUNAL SUBMITTED TO CONFERENCE

After reviewing the draft of a report concerning creation of an administrative tribunal to resolve FOIA disputes, a committee for the Administrative Conference has expressed reservations as to whether such a solution is even needed.

The draft report, written by Mark Grunewald, a law professor at Washington & Lee, suggests the creation of an administrative authority which would resolve most access disputes which currently wind up in district court. Grunewald's tribunal, referred to for convenience as the Information Access Authority, would be headed by a presidential appointee confirmed by the Senate who would serve for a specified term and could be removed only for cause. The Authority staff would consist predominantly of

Editor: Harry A. Hammitt

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administrative law judges and support personnel, but would also include a staff of conciliators. Grunewald notes that staffing of such an agency should be "lean but sufficient to provide timely and professional case processing."

The report recommends that a trained conciliator be made available upon agreement of the parties in any dispute. The conciliator's role "should be tailored to the needs of the particular controversy, and could include examination of the disputed records."

Such dispute resolutions would normally take place in Washington, but if that location proved to be a hardship on the parties an administrative judge could travel to a more convenient location. At the end of the administrative process the agency and the requester could agree to submit their dispute to the Authority; its decision would then be reviewable by the appropriate circuit court. If the requester wanted to go immediately to court, he could do so, but the court could certify the case to the Authority on the request of either party. Review by the Authority would essentially be the same as current court procedures.

The Conference committee's reservations came as a result of the court workload statistics Grunewald presented indicating that about 500 new suits were filed each year and about the same number of cases were terminated each year. Because the number of cases has remained small and relatively constant, committee members wondered if there was a need for a new administrative apparatus to handle the workload. On the other hand, Washington attorney Tom Susman, a member of the committee, notes that many requesters file suit because they do not trust the government's decisions and that an ombudsman of sorts who was perceived as impartial might be able to cut down on the number of filings.

Grunewald found that "the courts are unquestionably perceived as a force of independence in the disposition of FOIA cases." But he did find complaints of shortcomings: that review of documents was more suited to an adjudicator than to a court, and that the courts, after having developed substantive guidelines for resolving access disputes, were beginning to lose interest in suits which presented the same circumstances time and time again.

Nevertheless, Grunewald found that many of those with whom he spoke were comfortable with the courts as a known quantity and found them invaluable in their role as the "disinterested" branch of government in FOIA disputes, acting in some ways as a counterbalance to the perceived interests of executive agencies. Grunewald noted that this perception was important and stands as a potential obstacle to any radical restructuring of the appeals mechanism. "The uncertainty that would be associated with any reassignment of the decisional role limits its appeal," he writes.

Grunewald also identified the dichotomy which exists between certain classes of requesters, what he calls the "core" users -- press, public interest groups, scholars -- and the "non-core" users -- business requesters, prisoners, and others. He noted that there was a split of opinion on whether the various groups should be treated differently during the dispute resolution stage.

JUDGE TURNS DOWN DISMISSAL OF FEES

A district court judge has turned down historian Harold Weisberg's request that the court reconsider its assessment of fees against Weisberg in an earlier FOIA action.

Rejecting Weisberg's motion made under Rule 60(b) of the Federal Rules of Civil Procedure, Judge John Lewis Smith noted that "this Court is barred by the ironclad one-year time requirements imposed by Rule 60(b) from overturning its earlier dismissal. . .This time period expired prior to the plaintiff's Rule 60(b) motion and thus this Court is precluded from reopening this case on the basis of the newly acquired information."

Weisberg based his request for reconsideration on allegations that the FBI was guilty of fraudulent misrepresentation when it claimed in court that it could not locate documents concerning the assassination of President John F. Kennedy which Weisberg had requested. As proof of the Bureau's fraud, Weisberg indicated that documents released to another requester proved that the records which Weisberg had sought did exist, contrary to what the FBI had told the court. According to Weisberg, these claims on the part of the FBI amounted to a "concerted campaign of misrepresentation, fraud, and delay in the conduct of this litigation and that this action was tantamount to perpetrating a fraud upon this court.

Smith disagreed, noting that his review of the evidence had "failed to provide a foundation upon which to base even a suspicion that [the FBI] engaged in a systematic attempt to mislead the plaintiff and the Court." Smith added that, even assuming the FBI was guilty of fraud or misrepresentation, it was directed at Weisberg and not at the court. Such behavior could be addressed by the court under Rule 60(b), but was now barred by the one-year time limit imposed by the rule.

In his protracted suit against the FBI to gain access to assassination files, Weisberg had alleged that the FBI's search was inadequate. The government finally asked for discovery in the case in order to learn what evidence Weisberg might have concerning the inadequacy of the search. Weisberg refused to submit to discovery and Smith dismissed the suit, assessing attorney's fees against Weisberg and his attorney, Jim Lesar. After reconsidering the award, Smith decided to assess fees only against Weisberg. (Harold Weisberg v. William H. Webster, Civil Action No. 78-0322, and Harold Weisberg v. Federal Bureau of Investigation, Civil Action No. 78-420 (Consolidated cases), U.S. District Court for the District of Columbia, Mar. 4)

JUSTICE MEMO ACCOMPANIES NIXON PAPERS REGULATIONS

The National Archives has finally published its public access regulations for the Nixon presidential papers. While the regulations themselves are reasonably straightforward, there may well be some controversy over an accompanying memorandum from the Justice Department's Office of Legal Counsel interpreting the regulations.

The regulations call for the systematic review and release of portions of the Nixon papers. They allow for notice to interested parties, especially former President Richard M. Nixon and members of his White House staff, whenever the Archives proposes to release portions of the papers to historians or the public in general. When there are objections to release of any documents, including assertions of executive privilege, the Archivist, after informing the objector of his decision, will wait at least 30 days before releasing the disputed documents. Documents which are deemed to be personal, and do not relate to Watergate, will be segregated and returned to those persons with the greatest interest in them.

The Legal Counsel memorandum which was prepared at the request of the Office of Management and Budget spends much of its time on what it sees as potential problems with executive privilege. While the regulations imply that the Archivist will decide the validity of any executive privilege claims, the memorandum sharply limits that authority.

Since a sitting president can assert an executive privilege claim, the memo notes that "if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the Archivist's decision in court -- it would be an unconstitutional infringement on the President's power." But the memo points out that the regulations need not be interpreted to allow the Archivist to sit in judgment of the President. Rather, "we believe that the Archivist, as an officer of the Executive Branch, is legally bound to respect such claims."

Legal Counsel goes on to say that "while the Archivist is certainly free to offer advice as to whether particular documents, in his judgment, are or should be protected by executive privilege, the Archivist has no legal authority to make a determination inconsistent with the President's assertion of executive privilege."

The memo next takes up the problem of executive privilege claims made by Nixon. Although an incumbent president should not normally review or adjudicate claims of executive privilege made by his predecessors, the memo points out that "this principle must yield when it conflicts with the discharge of the incumbent's constitutional responsibilities. . .If the incumbent President believes that the discharge of his constitutional duties demands the disclosure of documents claimed by the former President to be privileged, it may be necessary for him to oppose a former President's claim."

But, according to the Justice memo, the Archivist's perogatives are severely limited by claims from former presidents. The memo states that "we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion." In other words, the Archivist has no authority to challenge executive claims made by Nixon. For those members of the public affected by such decisions the only recourse is a court appeal.

The memo also approves of the notice provisions of the regulations, agreeing with the Archives that notice to every individual identified in the documents would be unreasonably burdensome. For further information concerning the regulations, contact Gary Brooks, at (202) 523-3618. (Federal Register, Feb. 28)

JUSTICE CLAIMS FOIA SUIT BARRED BY STATUTE OF LIMITATIONS

The Justice Department is defending a FOIA suit awaiting decision at the district court in Washington by contending that the suit is barred by the six-year statute of limitations on civil actions brought against the government.

Arguing that Edward Spannaus, an associate of perennial presidential candidate Lyndon LaRouche, had the right to go to court after the FBI failed to respond to his request within the ten days allotted under the Freedom of Information Act, attorneys in the Justice Department's Office of Information and Privacy noted that, by this timetable, Spannaus had to file his suit no later than October 1983. The suit was filed in July 1985, more than a year and a half later.

In his brief filed on behalf of Spannaus, Washington attorney Jim Lesar argues that application of a statute of limitations would defeat the legislative intent of Congress, particularly since a requester could get around the time limit by simply making a new request. Continuing, Lesar points out that starting the six-year clock running on FOIA actions as soon as the agency has missed its initial ten-day deadline for a response would be unfair to requesters "because the administrative process at some government agencies exceeds the six-year period in [the statute of limitations]. . .Applying this bar would force requesters to either incur the heavy time and legal expenses of a lawsuit or else forego their rights under the FOIA. This is manifestly not the result Congress had in mind when it sought to ensure that requesters would get the documents to which they were entitled without bureaucratic obstacles being placed in their way."

Furthermore, Lesar claims that, even accepting a six-year limitation, the suit was filed in time. Noting that the D.C. Circuit's decision in *Impro Products v. Block* said that the right to sue first attaches when "all statutorily required or permitted agency review has been exhausted," Lesar notes that this would start the clock running after Spannaus lost his final administrative appeal in August 1979.

According to Lesar, it would make no sense for the six-year period to include the time a requester takes in pursuing his request through the administrative appeals process. "To hold otherwise," Lesar writes, "particularly in the absence of any notice to the requester that the agency intends to invoke [the statute of limitations] if he does not sue within six years of the date he is deemed to have exhausted his administrative remedies, would be to give the agency carte blanche to engage in a strategy of driving up the costs of obtaining information by forcing requesters either to sue or to forego their legal rights."

Finally, Lesar's brief notes that the suit was indeed filed with the U.S. District Court in New York in 1982 as part of an amended complaint in a civil rights action. The New York court dismissed the FOIA action in October 1984, saying that "plaintiffs are free to file a new FOIA action for the New York documents." Lesar contends that, in essence, the current action is a refiling of the earlier New York complaint.

In response, OIP notes that the statute of limitations necessarily applies in FOIA actions because it works to prevent agencies from having to

defend cases where records may have already been destroyed pursuant to normal destruction schedules.

The Justice Department also contends that the New York complaint did not apply to the same documents at issue here, and that that complaint was not actually "filed" as required by the statute of limitations, but merely lodged with the court as required by the Rules of Civil Procedure pending adjudication of Spannaus' motion for leave to amend the original complaint.

The underlying request, like many under the FOIA, has a complicated and torturous history. Spannaus originally requested records in September 1977 from the New York FBI office on Gregory Rose, a paid informant. In a second request, sent a day later, he also asked for records on the National Caucus of Labor, the U.S. Labor Party, the Committee to Elect Lyndon LaRouche, and several other groups. The New York FBI office responded in October 1977, indicating that it had a few documents on the National Caucus of Labor and that some of the information would probably be withheld. Spannaus appealed that letter, and several other responses which he received at later dates. Eventually, the New York office uncovered over 5,000 pages responsive to his requests, after originally telling him there were no more than 11 documents. Spannaus lost his final administrative appeal in August 1979, and filed the FOIA action in the form of an amended complaint in U.S. district court in New York in October 1982. (Edward Spannaus v. Dept. of Justice, Civil Action No. 85-2401, U.S. District Court for the District of Columbia)

JUDGE DECLINES TO RULE ON FEE WAIVER GUIDELINES

In one of the first opportunities to review the validity of Justice Department fee waiver guidelines in light of the recent D.C. Circuit decision in *Better Government Association v. Dept. of State*, Judge Louis Oberdorfer has declined to address the issue.

Wrapping up several unresolved issues in an FOIA suit brought by reporter Inderjit Badhwar against several of the military departments, Oberdorfer declined to rule on the Justice guidelines because there was no admission by the Air Force that it had actually relied on the guidelines in denying Badhwar's fee waiver request. Oberdorfer had earlier ruled, however, that the Air Force action was arbitrary and capricious because the department failed to follow its own regulations.

Because the circuit court found that Better Government could challenge the legality of the Justice guidelines "specifically because the agency defendants undisputably had relied, and would continue to rely, on the challenged guidelines," Oberdorfer noted that "here, the causal link between the mandate of the DOJ Memorandum and the future determinations of the military departments under the FOIA is more tenuous." He added that "under the circumstances of the case presented 'there is no occasion to appraise the Justice Department memorandum of 1983.'"

After reviewing another affidavit submitted by the Navy concerning the existence of accident photographs, Oberdorfer observed that "the Navy's explanation as to the photographs is vague, and, in fact arouses suspicion that photographs were indeed destroyed. . .However, there is no suggestion

that whatever destruction may have taken place occurred after plaintiffs' FOIA request, or this case, was filed. . ." He suggested that the Navy's behavior in this instance might be a matter for the inspector general or congressional oversight committees, but noted that "there is no abuse actionable by this Court under the FOIA." (Inderjit Badhwar v. United States Department of the Air Force, etal., Civil Action No. 84-0154, U.S. District Court for the District of Columbia, Feb. 24)

SENATE STEPS OUT ONTO BROADCAST STAGE

The Senate takes its first tentative plunge into the world of broadcast today with live radio coverage of Senate debates.

The radio coverage is part of a package of rules changes which passed the Senate Feb. 27 committing that body to live radio coverage and experimental television coverage. The rules changes call for experimental in-house television coverage from May 1 to June 1. After that, television would be available to the public until July 15. At that time, both TV and radio coverage would cease for two weeks, followed by a Senate review and vote on whether to make broadcasting permanent, or to extend the test coverage another 30 days before a final vote.

The Senate has resisted live broadcasts in the past and many observers were surprised that it passed this time. Much of the resistance in the past has centered around the likelihood that Senators would play to the cameras too much, and that the very conduct of Senate proceedings was too laborious and arcane to make it a good subject for broadcast. These problems seem to have been ironed out by attaching several procedural changes to the broadcast resolution.

When the resolution was reported out of the Senate Rules and Administration Committee in October, procedural changes proposed by Sen. Robert Byrd (D-WVa) were scrapped. But once the proposal got to the Senate floor it became obvious that passage would depend, in part, on some procedural changes designed to make Senate proceedings more understandable. Although a number of amendments were proposed, the only one which survived the final vote limits the time for debate after a cloture vote to end a filbuster, lowering the time from the current 100 hours to 30 hours.

One of the amendments which failed would have raised the number of votes need to invoke cloture from the current 60 to two-thirds of all members present and voting, 67 if all Senators were present. For some, including the public interest group Common Cause, such an amendment would have been too high a price to pay for broadcast coverage. "We've been for TV in the Senate for years," said Common Cause President Fred Wertheimer, "but we'd rather have no television that go back to that."

Under the new rules cameras will be operated by Senate staff and will be fixed on the speaker. Only during roll call votes will cameras be allowed to pan the chamber. Coverage will be prohibited during closed sessions and during quorum calls, which are usually held to stall while Senators confer.

It seems unlikely that Senatorial pandering to the television camera will have any substantial effect. Although C-SPAN, the cable network which

already broadcasts House proceedings, will air gavel-to-gavel coverage, few people will see more than the occasional few seconds broadcast on the network news.

News From Canada . . . .

From Canadian Correspondent Tom Riley, an international information consultant who heads his own company, Riley Information Services, P.O. Box 261, Station F., Toronto, Canada M4Y 2L5, Phone: (416) 593-7352.

Delegates from as far away as Australia and New Zealand attended the two-day National Forum on Access to Information and Privacy in Ottawa Mar. 6 and 7. The forum, convened to allow imput into the mandatory three-year review of the Access and Privacy Acts by a parliamentary committee, reflected the view that, while Canadians are increasingly seeking access to government information, many changes to the legislation would be needed. Many foreign delegates expressed the opinion that freedom of information was in some trouble due to more conservative trends and concerns over costs, but that Parliament would not harm the legislation, but merely fine-tune it.

Keynote speaker, Justice Michael Kirby, President of the Court of Appeals, Supreme Court of New South Wales, Australia, speaking to delegates at a banquet Thursday evening, said that there was a danger of an upcoming counter-reformation in freedom of information. From current trends in society coupled with the emergence of technology, Justice Kirby spelled out what he perceives to be the Ten Information Commandments. These are:

1. Contemporary technological developments endanger human rights and civil liberties and require responses from society -- including the legal system.

2. The fertile common law system, even as enhanced in some countries by constitutional rights, is insufficient to provide adequate responses to the challenges of technology; legislation is needed.

3. In some cases the technology itself demands or even produces legal reform.

4. The people are not always the best judges of their own interests. Informed observers have a duty to identify dangers to freedom.

5. The costs of information rights must be counted. But so must the intangible benefits.

6. Information laws must be developed flexibly because of changing technology and the rapidly changing perceptions of the problems.

7. Information rights must extend from the public sector (where they have been developed) to the private sector.

8. Information technology presents international issues that require international solutions.

9. Legal responses to information rights must attend to real problems and not content themselves with myths and mere symbols.

10. Democratic values must be preserved. It is at least questionable whether our democratic institutions can adequately respond to the challenges of technology.

Justice Kirby said we must remain optimistic "about our capacity to adapt our institutions and laws to rapid technological change. A loss of confidence or heart -- and a breach of the commandment of optimism -- is a surrender to the nagging doubt that technology is inherently elitist and autocratic, and that democracy, with all its inefficiencies, cannot survive into the 21st century."

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During a forum panel on privacy, Mr. R. Parker of the Royal Bank of Canada announced that the corporation had introduced their draft, "Proposed Policy on Individual Client Privacy." The Royal Bank was the first Canadian corporation to announce adherence to the OECD Guidelines on Privacy and Transborder Data Flows. The Bank, along with many other Canadian corporations, prefers self-regulation in the form of industry codes, rather than compulsory legislation.

In Brief . . .

District Court Judge Harold Greene has ruled in favor of the FBI, upholding all of its claimed exemptions for materials withheld or deleted from documents related to the assassination of President John F. Kennedy. Ruling on claims left over from several FOIA suits filed by Gary Shaw, Greene noted that, after reviewing documents concerning four French mercenaries whom Shaw alleged had played a role in the assassination, the court agreed with the FBI's contention that "the public interest in the disclosure of the materials is substantially outweighed by the privacy interests of the individuals involved." In an earlier ruling on this information, Greene had ordered the FBI to search its files under the names of the mercenaries after the agency had said there was no need to search files other than those offically designated as part of the Kennedy assassination documents. Greene had disagreed, observing that such an assumption "does not take account of the possibility that documents exist in the agency's archives which are filed under other headings -- documents, that is, that do not fit the FBI's theory of the Kennedy assassination but are nevertheless relevant to that subject." (J. Gary Shaw v. Federal Bureau of Investigation, Civil Action No. 82-2109, U.S. District Court for the District of Columbia, Feb. 21)

After reviewing the withheld portions of documents, District Court Judge Thomas Flannery has upheld all claims made by the FBI in an FOIA suit brought by Paul Anthony White. The documents in question involved an investigation of White's activities while he was an assistant U.S. attorney in Missouri. Flannery found that much of the requested information was exempt under (b)(3) (other statutes), using Rule 6E of the Rules of Criminal Procedure which forbids release of information presented to a grand jury. White, presently serving a prison term, had alleged that the FBI's affidavits were too broad and conclusory. Flannery agreed in part, but noted that "while the *Vaughn* declaration presented here by [the FBI] could

be considerably improved, this court is satisfied after reviewing all the documents as released that a proper showing has been made by [the FBI] to withhold the portions of these documents sought by plaintiff." (Paul Anthony White v. United States Department of Justice, Civil Action No. 84-2746, U.S. District Court for the District of Columbia, Feb. 25)

The Police Commission, a civilian agency that oversees the Los Angeles Police Department, has released a 1,453-page summary of a 50,000-page report of the police department's investigation of Robert Kennedy's assassination in 1968. According to Paul Schrade, a Kennedy aide who was wounded during the shooting, the report is the only major assassination file which has not yet been made public. The commission is expected to recommend that the rest of the report be released to an archive selected by a special committee appointed by Los Angeles Mayor Tom Bradley. Portions of the summary were excised to protect the privacy of individuals involved in the investigation, and Schrade expects to ask the commission to make public the standards by which the remaining documents will be edited before release.

A federal district court judge in Alexandria has ruled that the Army did not violate the Financial Right to Privacy Act when it obtained credit card records without first notifying the individuals involved. The Army contended that the American Express card in question was used by Lt. Col. Dale E. Duncan for government business expenses, not personal use. Although Duncan and his wife testified that they had maintained the account for personal use since 1969, Judge Albert V. Bryan noted that "this was not [the] plaintiffs' personal account, except marginally." Testimony indicated that most of the charges on the card were for travel and other expenses incurred by Duncan as head of Business Services International, an Army cover operation providing security for secret Army operations. The records had been obtained in connection with an Army audit of Duncan's company. In ruling in favor of the Army, Bryan said "it would stand [the Right to Financial Privacy Act] on its head if [government] auditors could not determine or find the records which supported expenditures for business purposes." But Duncan's attorney, David J. Fudala, had another point of view. In announcing that the court's decision would be appealed, Fudala said the implication of the ruling was "that when a person uses his private credit card for business expenses, he loses his right to privacy." (Dale E. and Laura A. Duncan v. U.S. Department of the Army, Civil Action No. 85-0566-A, U.S. District Court for the Eastern District of Virginia, Mar. 5)

The Department of Agriculture has published proposed changes in its FOIA regulations. The new regulations introduce business submitter notification procedures similar to those already in use at other agencies. They also specify that the Office of Governmental and Public Affairs has primary administrative responsibility for FOIA. Slight changes are also made to the fee schedule for reproduction. For further information, contact Milton Sloane, (202) 447-8164. (Federal Register, Mar. 6)

The Department of Defense has published new regulations for its Privacy Act implementation, revising their regulations which were first published in 1975 and incorporating changes announced in DoD directives in June 1982 and August 1983. For further information, contact Norma Cook at (202) 697-2501. (Federal Register, Feb. 28)