UNITED STATES OF AMERICA

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Freedom of Information in the United States

1964-1967

The First Amendment to the United States Constitution, adopted in 1791, guarantees freedom of speech, of the press, and of assembly. These guarantees assure the basic right of freedom of information within the United States. It has been recognized that these rights are not absolute and may be exercised only with due regard for the needs of society and the protection of other competing rights.

I. Significant developments with regard to the recognition and enjoyment of freedom to seek, gather, receive and impart information and ideas of all kinds:

(a) Nationally

One of the more important advances in making additional information available to the general public is the Freedom of Information Act passed by the Congress in 1966, and effective 4 July 1967. This new law, which amended Section 3 of the Federal Administrative Procedure Act, requires Government agencies to publish certain information in the Federal Register, to make certain kinds of records available for inspection and copying, and to furnish copies of specifically identified records upon the request of any member of the public. These requirements do not apply to records involved in matters within the following exemptions:

(1) Matters specified by the President, through Executive Order, in the interest of the national defense or foreign policy,

(2) Matters related solely to the internal personnel rules and practices of any agency,

(3) Matters specifically exempted from disclosure by statutes,

(4) Trade secrets and commercial or financial information from a person, and privileged or confidential,

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation,

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constituted an official act which limited unfettered exercise of the addressee's rights under the First Amendment. Lamont v. Postmaster General 381 U.S. 301, (1965). Even though there is doubt as to whether the foreign Press is a direct beneficiary of the First Amendment, the amendment protects the public and hence applies to attempts to seize foreign magazines; U.S. v. 18 Packages of Magazines, 238 F. Supp. 846 (1964).

(b) Regardless of Frontiers

Under the passport laws of the United States it is a crime to leave the country without a valid passport, and for many years under the Subversive Activities Control Act it was a felony for a communist to apply for or attempt to use a United States passport, thus American communists were potentially restricted in the exercise of the individual's right to leave his country. In Aptheker v. Secretary of State, 84 S. Ct. 1659 (1964), the Supreme Court decided that the section of the subversive activities Control Act making this a felony was an unconstitutional restriction on freedom of association, although a United States citizen does not have the right to go anywhere he pleases, but is subject to the determinations of the Secretary of State as to which areas would be within the best interests of the United States. This proposition was upheld in the case of Zemel v. Rusk, 85 S. Ct. (1965) when the Court decided that the geographical restrictions imposed by the Secretary of State on travel to Cuba are authorized by valid and constitutional statutes, and are not an undue restriction on freedom of travel.

During the period under review, the United States acceded to two United Nations Conventions on the importation and circulation of educational, scientific and cultural material: The UNESCO Agreement for facilitating the international Circulation of Visual and Auditory Materials, TIAS 6116, 197 UNTS 3 and the Agreement on the Importation of Educational, Scientific and Cultural Materials, TIAS 6129; 131 UNTS 25. These Conventions entered into force for the United States on 12 January 1967 and 2 November 1966 respectively. At the same time the United States continued its programme of bilateral agreements providing for cultural and other exchanges etc. one of which relates to materials from the Soviet Union. This agreement with the USSR on Exchanges in the Scientific, Technical, Educational,

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,

(7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency,

(8) Matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, or

(9) Geological and geophysical information and data, including maps, concerning wells.

The law requires each agency to make available for public inspection all the documents resulting from adjudication which have significance as precedents. For such documents published after 4 July 1967, a public index must be maintained. Moreover, this law eliminates the "properly and directly concerned" test of the previous law and substitutes, with regard to the great majority of records, access for "any person", subject of course to reasonable regulations and record search fees.

In 1966, Congress amended the Foreign Agents Registration Act of 1938. The amendment (PL 89-486, 80 Stat. 244 (1966) 22 U.S.C. 611 et seq.) made it clear that an attorney representing a disclosed foreign principal need not register under the Act. However the Amendment added a provision that when contacting members of Congress or Committees or government officials on behalf of foreign principals, agents are required to disclose their status and identify their principal. It also provided injunctive remedy for the first time in the case of violations. The amendment also authorizes the Attorney General to disseminate the filed information to the Secretary of State and to other agencies, branches, and officials, as well as to Congressional Committees, for use as appropriate.

A sensitive control point for dissemination of information could be the use of the Federal mail system. The Supreme Court recently decided that certain provisions limiting distribution of communist propaganda are unconstitutional and should not be enforced. Under these provisions the post office department had been required to detain and destroy unsealed mail from foreign countries determined to be communist propaganda, unless the addressee returns a card indicating his desire to receive such mail. The Court ruled that the request for the return of a card

III. Limitations upon the exercise of freedom of information:

(a) Those relating to the protection of rights or reputations of others.

The problem of balancing competing rights in the information field is best exemplified by the approach that the Courts have taken in decisions involving libel and slander.

In the last three years the courts have continued to liberalize interpretation of the law of libel and slander. In Rosenblatt v. Baer 383 U.S. 75 (1966) the United States Supreme Court broadened the category of "public officials". It held that the plaintiff, an employee of a ski lodge operated as a public facility, must show actual malice in order to collect damages for a statement questioning his competence in carrying out his official duties. At the same time the United States District Court in Kentucky brought within the ambit of the rule that any person involved in areas of public debate or who has become involved in matters of public concern must show actual malice in a suit involving statements about his official duties or his competence Walker v. Courier Journal and Louisville Times Co., 246 F. Supp. 231 (1965).

These decisions strengthened earlier court rulings recognizing a protected area of comment with regard to persons who have voluntarily become involved in matters of public concern. In such cases the complainant who has suffered from such comment must show actual malice in order to obtain damages. However, a person who has been involuntarily thrust into the public forum in a manner not within his control may nevertheless be the subject of a higher degree of protection if, as in Time Inc. v. Hill, 87 Sup. Ct. 534 (1967), there is unrestrained publicity.

(b) The protection of national security or of public order (ordre public) or of public health or morals

Questions continued regarding literary censorship

In Ginzburg v. US, 383 U.S. 463 (1966) the Supreme Court decided that the courts could consider the modes of advertising used in promoting the publication in order to reach a determination of whether the primary purpose was to appeal to prurient interests of the reader. In an earlier decision the Supreme Court had held that all ideas "having even the slightest redeeming social importance" are protected by constitutional guarantees of free expression. The problem remained

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of how to determine whether a publication had any redeeming social importance. In the Ginzburg case the Court held that the offending material could be found obscene if it found evidence that it was "commercially exploited for the sake of prurient appeal, to the exclusion of all other values". Thus in the Ginzburg decision an apparently new element was introduced into the determination of whether a publication was to be considered obscene, and thus not entitled to the protection of the First Amendment. However, in the very recent opinion of Redrup v. New York 386 U.S. 767 (1967) the Court in per curiam decision held that ten "girlie" magazines and two books were not obscene. The Court thus appeared to limit the impact of the earlier Ginzburg decision by stating that before branding a publication obscene it would have to find that its dominant theme appealed to a prurient interest, and that it was utterly without redeeming social importance.

The courts have been disinclined to make exceptions to the general standards for judging something obscene even when a statute refers specifically to minors. In another case, the New York Court of Appeals held unconstitutional a state law prohibiting the sale to minors under eighteen of any book the cover or contents of which exploited, was devoted to, or was principally made up of, descriptions of illicit sex or sexual immorality. The Court stated that the constitutionality of the statute could not be saved by the fact that the prohibition related only to minors under the age of eighteen, where the statute involved was too vague and too sweeping. People v. Bookcase, Inc. 252 NYSUPP. 2d 433, 14 NY 2d 409, 201 N.E. 2d 14 (1964). Also, a United States Court of Appeals for the Fifth Circuit held that though society has an interest in protecting children a child's freedom of speech is too precious to be subjected to the whims of censors, and the classifications of material prohibited to children must be restricted to the control of obscenity. Interstate Circuit, Inc. v. City of Dallas, 366 F. 2d 590 (1966).

Movie censorship is another area where firm standards have been hard to achieve. However, in Freedman v. Maryland, 380 U.S. 51 (1965), the Supreme Court invalidated a state movie censorship law and laid down guidelines for establishing constitutional standards for prior restraint. The court stated that the burden of proof must be on the censor, that within a specified brief

period of time the censor must either issue a licence or go to court to restrain the showing and that there must be assurance of a prompt final judicial determination on the merits. Of course it remains true that any system of prior restraint must be the subject of a strong presumption of unconstitutionality.

The cause of freedom of information was significantly advanced by the mandatory requirements that manufacturers comply with certain standards in their advertising so as to better inform the public. In the past the Government had not gone further than to prohibit fallacious, deceptive or misleading information. However, in 1966, the United States Congress adopted the "Truth in Packaging Bill" in order to eliminate inconsistencies and ambiguities in retail packaging. The bill empowers the Federal Trade Commission to promulgate regulations that would require: (1) name and adequate identification of the manufacturer on all labels; (2) a separate and unambiguous statement of the net quantity of the contents of the package expressed in ounces, or larger whole measurements; (3) the establishment and definition of standards for designating the relative size of packages and the relative size of servings; (4) the development of standards regulating such selling gimmicks as "cents off the regular price" and giant economy package, etc; and (5) disclosure of relevant ingredient information. The Act also authorized the Federal Trade Commission to establish reasonable weights and quantities for retail distribution where it determines that the consumers ability to make price/unit comparisons is substantially impaired by diverse and odd-quantity packaging (Fair Packaging and Labelling Act - Public Law 89-755, 80 Stat. 1296, 15 U.S.C. 1453).

Another development of particular interest is in the area of cigarette advertising, which was regulated for the first time after the United States Surgeon General's report connecting smoking and health. Regulations under the Act provide that all packaged cigarettes sold in the United States shall carry a conspicuous and legible statement: "Caution: Cigarette Smoking May be Hazardous to Your Health". It also provides that the Secretary of Health, Education, and Welfare shall submit yearly reports to Congress on the latest information on cigarette smoking and health, and make recommendations for legislation that he deems appropriate. Furthermore the Federal Trade Commission is required to submit yearly

reports on the effectiveness of the labelling, current practices and methods of advertising and promotion, and recommendations for legislation. It is specifically stated in the Act that no statement is required in the advertisements for labelled cigarettes. Fines of not more than $10,000 may be imposed for misdemeanours in violation of the act.

The courts have tended to extend the scope of the freedoms protected by the First Amendment to the United States Constitution in certain areas. For example, a New York Court stated that it was an unconstitutional restriction of the right of free speech and assembly for a local school board to revoke a permit to use school facilities on a specified date on the grounds that the performer was a controversial figure: East Meadow Community Concerts Association v. Board of Education of Union Free School District No. 3, Nassau County, 269 N.Y.S. 2d 542 (1966). The Supreme Court in a very important case ruled that the Georgia House of Representatives could not exclude a duly elected Representative from membership because of certain statements he made regarding the policy of the Federal Government in Viet-Nam and the operation of the Selective Service System. The Court stated that such exclusion violated his right of free expression under the First Amendment. Bond v. Floyd, 87 Sp. Ct. 339 (1966). In another instance the Supreme Court of California ruled that a law outlawing pay or subscription television was an unconstitutional abridgement of free expression.

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Note by the Secretary-General

1. The Secretary-General has the honour to forward to the Commission on Human Rights the report on freedom of information, covering the period from 1 July 1964 to 30 June 1967, received from the Government of the United States of America, under Economic and Social Council resolution 1074 C (XXXIX). The report is also forwarded to the Commission on the Status of Women and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

2. In accordance with paragraph 14 of the Council resolution, the report is reproduced in full.