THE RIGHT TO KNOW IN A CONTEMPORARY SOCIETY : A PUBLIC LECTURE DELIVERED AT THE INSTITUTE OF COMPARATIVE LAW AT WASEDA UNIVERSITY ON NOVEMBER 14TH, 1974

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I am very happy to be here, at Waseda University, and to have the chance to talk with you about these important problems we have before us today.

The question of the right to know has been much discussed in the United States in recent years. This is partly due to the fact that the Watergate affair has substantially increased the interest in the right to know. But much more is involved than just that particular series of events. Everyone is beginning to realize, I think, that the problem of how the ordinary citizen participates in the government of his country has come to assume more and more importance.

I. Background and Context.

The right to know is vital to any democratic society. In the first place, a right to know is essential to a system of freedom of expression. There is not much use in having the right to speak unless one has something to communicate. And, therefore, it is important to obtain information as the basis for exercising the right to freedom of speech.

The right to know is also essential to the right of citizens to participate in the process of making decisions. This is true in any democratic society, but, I think, it is even more true as a society grows complex and technological. When the decisions become very difficult to make, when they depend upon having a larger and larger amount of information, and even when many of the decisions that a society must make depend upon information possessed only by experts, by those who know the very minute details of the problem, it nevertheless remains important for the citizen to have the information. An expert tends to become very narrow and very technical in his approach, and to lose contact with reality. It is crucial that the citizens, who are the main body of people and who are affected by the decision, have the information on which to determine the broad policy decisions, that is, the broad lines of policy that the expert must follow.

The right to know is also essential in order to have a government that responds to the needs of its citizens. Any government must have some sort of feedback, some sort of response to its policy determinations from those who are affected by the decisions. Otherwise it tends to operate in an atmosphere of a complete isolation, and, as a result, make some very bad judgments. For instance, President Kennedy, when he decided to launch the Bay of Pigs invasion, had very little advice from his colleagues; but more than that there was no discussion of that question in the country at large. The same is true of President Lyndon Johnson and the Viet-Nam War. President Johnson carried on the Viet-Nam War without fully informing the American public what he was doing or why he was doing it. And, I think, the same atmosphere prevailed in connection with President Nixon's actions in the Watergate affair. He was cut off from public response and consequently seemed to feel that it would be all right to engage in activities such as burglary, wire-tapping and forgery. If there had been knowledge on the part

of people of the country about any of these activities in advance, probably they would not have occurred.

For these reasons one must always keep in mind the dangers of government secrecy. I think it is not too much to say that the bad things that the government does, most of the evil things the government participates in, are done in secret. They probably would not happen if they had been known to the body of citizens, and had been discussed by them. Consequently one must start off with the proposition that there is a presumption against government secrecy. One must start with the proposition that everything should be open and not secret. Then it may be necessary to make some exceptions. But the starting point should be one of openness, not one of secrecy.

The problem I want to discuss this afternoon is the question whether or not it is possible to develop legal rules, legal principles and legal practices which will protect and advance the right to know. Democratic societies have always known how important the right to know is. But so far we have not made very much progress in providing a constitutional basis or legal basis for protecting the right of citizens to know. And I regret to say the progress in the United States has been very slow to this point.

If one looks at the problem in legal terms, and attempts to translate it into legal analysis, I think one finds there are two aspects of the right to know, at least as it has developed in American law. One is the right to listen, that is the right to hear, to read, to look at something, to receive communications from someone else. The second is the right to obtain information for purposes of communicating it to others. Each of these aspects of the right to know I will discuss briefly in terms of what the present law in the United States is, and what measures I think should be taken to improve the situation.

II. The Right to Listen.

I will discuss the right to listen first. The right to listen is the other side of the coin from the right to speak. If one fully protects the right to speak, then the right to listen would to some extent also be protected. But I think the problem goes further than that, because the right to listen is important in itself. The interests of the speaker may be different from the interests of the listener. The speaker may not care too much about making his communication, but the listener may want very much to hear what he has to say. So that, in addition to protecting the right of the speaker, it becomes important also to protect the right of the listener, and not have his rights depend solely on what action the speaker takes to protect the speaker's right. Therefore I think it is important to develop separate legal principles that will focus on the rights of the listener and protect and advance those rights.

The United States Supreme Court has recognized the right to listen in three important cases. In the first one, *Lamont v. Postmaster General,* 381 U. S. 301 (1965), the Supreme Court had before it a statute which provided that if any person received mail from abroad which the Secretary of the Treasury declared to be foreign communist propaganda, the mail would not be delivered to the person unless he sent a postcard to the postal authorities asking specifically that the mail be delivered. The effect of sending a postcard, of course, was that the card might immediately be passed on the F.B.I., and the person would be listed as a citizen receiving communist propaganda. The law therefore acted as a brake, as a restraint, as an inhibition and deterrent to persons who wanted to receive materials from abroad. The Court held that this constituted an invalid infringement of the First Amendment by inhibiting the receiver, and invalidated the statute.

The second case is the case of *Stanley v. Georgia,* 394 U. S. 557

(1969). The State of Georgia had a statute which provided a criminal penalty for having pornography in one's possession. The law not only made it a crime to sell pornography but simply to have it in your possession. Stanley was arrested in his home for looking at what are called in the United States blue movies—I don't know what they are called in Japan. The Supreme Court said that it was a violation of the First Amendment as well as the right of privacy to prevent a person from reading or seeing or observing whatever he wanted in his own home, even though it was pornography that would otherwise have been prohibited. The Court said: "It is now well estabilised that the Constitution protects the right to receive information and ideas."

The third case is *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U. S. 367 (1969). In the United States, as you know, the radio and television broadcasting stations are owned by private companies which are licensed to operate by the Federal Communications Commission. The regulations of the Federal Communications Commission provide that each broadcaster must include in its programs some discussion of issues that are of public importance, and furthermore that, in the process of that discussion, the various sides of the question must be presented fairly. This is called the "fairness doctrine." It was challenged on the ground that it interfered with the First Amendment rights of the broadcasters. In the *Red Lion* case, the Supreme Court upheld the validity of that F. C. C. regulation and the fairness doctrine. It did so in large part on the grounds that not only was the right of broadcasters involved, but also those of the listeners. And the Court said, "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount."

There was also one further case which I want to mention. This is not a decision of the United States Supreme Court but of the Federal Court of Appeals for the District of Columbia Circuit:

United Church of Christ v. Federal Communications Commission, 359 F. 2d 994 (1966). That case involved a broadcasting station in one of our southern states. The station was highly prejudiced against Negroes. Not only did it not broadcast programs they were interested in, but it broadcast programs in a discriminatory fashion. When the license of the broadcasting station came up for renewal, several organizations—one was the United Church of Christ—asked the Federal Communications Commission to be represented at the license renewal hearing, so that they could object to the renewal of the license. The Federal Communications Commission denied them the right to appear in the hearing. They appealed, and the Court of Appeals held that they did have a right to participate in that hearing because their interest as listeners was involved.

The cases I have mentioned all dealt with specific subjects, but I think the ideas embodied in those decisions can be translated into broader legal principles. I would suggest the following: First of all, the right of a person to read, hear, watch, observe, in other words, the right to listen, should be absolute, that is to say, it should be fully protected against any kind of government interference. This is true even though the material which the person wants to listen to or hear could otherwise be forbidden. This rule is based on the *Stanley* case where, even though the material might be subject to prosecution if it was sold as pornography, the Court nevertheless held that the right to listen to it or see it was protected under the First Amendment. The reason for this rule is that the government does not have any substantial interest in preventing a person from reading materials. No immediate harm comes to government or to society from merely reading something or looking at something. If any harm comes, it comes later in the form of action, and the government has a right to prevent that, but it does not have a right to step in at the early stage and to prevent a person from acquiring information.

The second rule, I would suggest, applies where the facilities for communication are limited, as in the broadcasting situation, and the government must therefore allocate scarce facilities between different speakers. In that situation, members of the listening public have a right to participate in those allocation proceedings. That is the doctrine of the *United Church of Christ* decision. Furthermore, in such a case, the interest of the listeners must be given serious weight in determining whether to allocate the facilities to this speaker or to that one. That is the doctrine of the *Red Lion* case. I think the implication of this last rule of giving weight to the listeners is that the government in allocating licenses must provide for a certain amount of diversity or difference in the broadcasting programs. The government cannot under the First Amendment say anything about the content of programs, but it can rule, and I think it should rule, about the general nature of the programs and the requirement that they present more than one side of the particular issue.

Thirdly, the right to listen, as a constitutional right, must be taken into account in considering the validity of governmental controls which are intended to protect other governmental interests but which interfere with the right to listen. In such situations the government must show compelling reasons for abridging the right to listen and must demonstrate that the measures used have the least drastic effect upon the right to listen.

The Supreme Court, unfortunately in my opinion, has not always followed these three principles that I have just suggested. There have been no cases that conflict with the first principle, that is, the absolute right of persons to listen, free from governmental interference. But the Court has not followed the doctrines of the second and the third principles in two cases which were recently decided. In one, the Columbia Broadcasting System refused the request of the Democratic National Committee, a political group, to broadcast

paid political advertisements, that is, one minute spot announcements. The Court held that was not a violation of the fairness doctrine. *Columbia Broadcasting System v. Democratic National Committee,* 412 U. S. 94 (1973). I think that was an infringement on the right of people to know in a situation where there were scarce facilities available.

The other case involved a Belgian Marxist economist, named Mandel, who was invited to lecture in the United States by group of scholars from various universities. *Kleindienst v. Mandel,* 408 U. S. 753 (1972). The United States Government denied Mandel a visa, so he could not appear. On appeal to the United States Supreme Court, it was argued that the interest of the scholars in listening to Mandel was such that it should override the interest of the Attorney-General in excluding him, or at least that the interest of the listeners should be balanced against the government interest in considering the validity of the exclusion. The Court rejected the argument and said, in effect, that it would not give any weight whatsoever to the right of the scholars to listen to the lecturer they had invited. I think that was in violation of the third principle I have mentioned.

The right to know deserves protection not only by the courts but also by the legislative branch. However, because of the shortness of the time available, I will not go into that. I will now move on to the second aspect of the right to know, which is the right to obtain information.

III. The Right to Obtain Information.

The starting point is that the law should protect a full, unencumbered right to obtain information. Nevertheless, it is clear that, at some points, the right to obtain information will conflict with other interests of the government or of society or of individuals.

So far three main areas of conflict have developed: (1) the interest of the government in withholding information that it has in its possession; this is the problem of government secrecy; (2) the government interest in requiring information from an individual under circumstances that interfere with the ability of that person to obtain the information; this includes such questions as reporter's privilege, that is, compelling a reporter to disclose information which he has received in confidence; and (3) there may be a conflict with the interest of individuals or groups in withholding private information; this is a conflict with the right of privacy.

I will discuss the third conflict, dealing with the right of privacy, very briefly in the interest of time. For reasons which I will not go into here, my conclusion is that where there is a conflict between the right of privacy and the right to know, the right of privacy should prevail. On the other hand, I think that the concept of privacy must be rather narrowly defined. It applies primarily to protection aginst physical intrusion, or other types of intrusion into one's home, or publication of the intimate details of one's life that are not necessary for public decision-making. For instance, I would not think that President Nixon could invoke the right of privacy as a reason for not making public his income tax returns, or his financial dealings in real property. On the other hand, Mrs. Jacqueline Kennedy was protected by the court against harassment by a newspaper reporter who followed her and her children very closely, constantly taking pictures. The court ordered the reporter to stay a certain distance away. I think that the intrusion on her physical privacy was a justifiable exception to the right to know.

On the question of reporter's privilege, there is no doubt that the obtaining of information by a reporter, on the basis that he will hold the source of information confidential, is an essential aspect of reporting, particularly what is now called investigative reporting. It would be very hard to expose corruption in government or

dominance of government by certain groups, gangster groups, or even doubtful decisions in government unless the reporter could hold his sources of information confidential. On the other hand, the information that a reporter obtains may be of significance for other purposes. It may be of importance to the government in investigating a criminal offense, or it may be that the evidence is necessary for the government in proving a criminal case, or it may be that the information would be important to the accused in a criminal prosecution. So there are some circumstances in which the reporter may be called upon to reveal the sources of his information. This poses a rather difficult conflict.

In 1972 the Supreme Court, in *Branzburg v. Hayes,* 408 U. S. 665 (1972), rejected the claim of a reporter to reporter's privilege. Actually in that case there were three reporters involved. One had made an investigation of the drug scene, and had obtained information about the failure to enforce the drug laws. Two others had been reporting on the activities of the Black Panther Party, and had received information in that connection which they had promised to keep confidential. They were all, in various parts of the country, called before grand juries and asked to testify about what they had discovered from these confidential sources. The Supreme Court ruled that they had to give the testimony. The Court said that news gathering was protected by the First Amendment, that it did "qualify for First Amendment protection." But it ruled that "the public interest in law enforcement" overrode the First Amendment right.

In my judgment, the Supreme Court decision gives insufficient protection to the right to know. At very least, it seems to me, the rule should follow that of Justice Stewart who said in dissent that the government should be made to demonstrate that "the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry," that "it is reasonable to think the witness

in question has that information," and that "there is not any means of obtaining the information less destructive of First Amendment liberties."

Actually I think the Court should go further than that. I would agree with Justice Douglas that the reporter ought to have a complete immunity against revealing confidential information unless he himself has been involved in a crime. This is a difficult judgment to make, but I feel that the ability of reporters to obtain material from governmental sources, from criminal sources who want to reveal information, and from other sources, is so important to the system of freedom of expression that it should override the other types of interest that are involved. It will very seldom happen, I think, that any individual will be seriously prejudiced by this. On the other hand, unless you have an absolute rule, a flat rule which is automatically applicable, the reporter will never know whether or not he can promise confidentiality, because he will never know what the court might rule in balancing the interests. Hence, if one is to have an effective right of reporter's confidentiality, I think it does have to be an absolute one.

Some states in the United States have legislation providing for reporter's privilege, but most of those laws contain rather extensive exceptions. After the *Branzburg* case an effort was made by Congress to pass federal legislation dealing with this subject. Unfortunately, the various groups could not agree on a proposal and no statute has so far been enacted.

In practice, reporters are not frequently called upon to testify. The press is strongly opposed to it, and a confrontation between the court and the press is likely to ensue. While a few reporters have gone to jail rather than give testimony, the press has enough power to protect itself in most circumstances. Nevertheless the possibility of interference with the press exists and could be pressed. Thus the situation is not a very satisfactory one at the present

time.

I come now to the final question of government secrecy, which is perhaps the most important of all. The first aspect of this relates to executive privilege. The question concerns the extent to which the executive department of government can withhold information from the legislative and judicial branches. If a court issues a subpoena or court order to the executive to produce information, or if a legislative committee issues a legislative subpoena to the executive, then the constitutional basis for the executive refusing to produce that information is called "executive privilege." There have been throughout our history a number of occasions, more within the last ten years than previously, in which the President has invoked the doctrine of executive privilege as a reason for not giving information. Most often those controversies have been decided in terms of political power and political strength, rather than in the judicial arena. Congress always has right to cut off appropriations, so the President is inclined to give the information or make some compromise. Recently, however, these issues have come to the courts.

The question was raised because of the refusal of President Nixon to disclose tape recordings and other documents to the Senate Committee investigating the Watergate affair, and also to the grand jury that was investigating criminal offenses in connection with Watergate. In urging the doctrine of executive privilege, President Nixon and his Attorney-General took a very broad and sweeping position. They argued that executive privilege could be invoked whenever it was "in the public interest" to withhold information, a very broad standard. And secondly, that the decision of whether or not it was in the public interest was a decision to be made by the President and not by the courts. In *United States v. Nixon,* 94 Sup. Ct. 3090 (1974), the Supreme Court rejected both those positions. It said that the standard had to be more narrow than

simply " in the public interest ", and it said that the decision as to whether or not executive privilege could be invoked was a decision for the court to make, not for the President to make. Therefore it held that President Nixon could not refuse to produce tape recordings before the grand jury. As a result of that decision, President Nixon was forced to reveal the recordings, and it was these disclosures which led finally to his resignation. The Supreme Court's decision establishes that there is such a thing as executive privilege, that it is not as broad as the standard of " in the public interest ", and that the decision must be made by the courts. But the case does not go very far in explaining exactly what executive privilege should be.

The real function of executive privilege is to allow the President or other executive officials to receive full and frank advice from their subordinates, or from other colleagues. In making decisions, the President has the right to know what the real facts are, and to explore all the different possibilities even though most or all may be ultimately rejected. In order to do that freely he needs to maintain confidentiality in discussion and in receiving advice. This is the only interest that, in my judgment, executive privilege should protect. The result is, I would conclude, that executive privilege cannot be invoked to withhold information relating to the commission of a crime, cannot be invoked to withhold information relevant to an impeachment proceeding, and should only be recognized in unusual circumstances to protect the right of executive officials to engage in frank and full discussion.

The next question concerus the right of the government to withhold information from the general public, the press, and all citizens. All three branches of government claim an inherent power to withhold information from the general public whenever they consider it to be in the public interest to do so. This has been assumed to be the rule. I do not know why one should make this

assumption. One might easily say that public business should be open to the public, and the rule should be that everything should be open rather than secret. But that is not the way in which the right to know has developed.

The courts have never held that there is a constitutional right to obtain information from the government. My view is that there ought to be developed a constitutional right to know which would make it the obligation of the government to disclose information in its possession, with certain limited exceptions, to any citizen or member of the press who requests the information. I will explain the exceptions in a minute. The point I wish to make here is that the presumption should be one of open government, and this should be supported by a new constitutional doctrine of the right to know.

A further question concerns the power of the government to control leaks of information. I will deal with it very briefly, because I want to leave some time for questions. The leaking of information, either deliberately by government officials themselves or by persons without authority to do so, is a common occurrence in the United States Government. One could almost say that the Washington press lives and functions primarily through obtaining information that is not supposed to have been disclosed. So leaks have become very important feature of the process of learning about government conduct. The question is to what extent can the government protect itself legitimately against disclosure of information which it can legitimately withhold, and what are the rights of citizens to publish information which leaks out of the government. As I say, it must be remembered that it is the very common occurrence for informations to leak out in this way.

The law at this point is not very clear. But the constitutional principle which I think should apply is that where government is authorized to withhold information, it may impose sanctions on government employees who illegally disclose information, that is,

government emplyees who disclose information contrary to the rules of the agency. They may be subject to discipline, dismissal, perhaps even a criminal prosecution. But I would stop at that point. I would then say that if the information gets out to the press or to the public, the government may not enjoin publication of that information, as it tried to do in the *Pentagon Papers* case, 403 U. S. 713 (1971); nor may it punish people by criminal process or otherwise who receive and publish the information. Once the information gets into the public domain, then it is lost. As a practical matter, it is very difficult for the government to get it back. Any rule that a person should be prosecuted is likely to be applied in a very discriminatory manner. Moreover, in effect, one would be establishing by such rules an official secrets act, that is, a rule of law that there are certain pieces of information, publication of which by anyone and at any time constitutes violation of law, and that the prohibition against disclosure follows that information, no matter where it may go or who may have it in his possession. An official secrets act of that sort is a very restrictive kind of measure. I do not think it should be introduced. I think that the government should be able to control its own employees, and administer sanctions against them, but that once information gets beyond that point, it becomes public property.

The best possibility for securing reform in this field now is by legislation. There already exists a statute passed in 1966 in the United States called the Freedom of Information Act. But that statute contains so many exceptions that it has not worked very effectively. In my judgment, and summing up what I have said, I think that Congress ought to amend the Freedom of Information Act along the following lines: First, the general requirement that all information must be disclosed on request of any person should remain the starting point. That is provided in the Freedom of Information Act as it now exists. The problem is to frame the

exceptions in such a way that they do not go too far but still protect legitimate government interests. In my judgment, exceptions should only be allowed for five limited categories: Materials relating (1) to tactical military operations; (2) to pending diplomatic negotiations; (3) to the advice privilege, which I have discussed in connection with the executive privilege; (4) to investigatory files compiled for law enforcement purposes; and (5) to personnel and similar files, the disclosure of which would constitute an invasion of privacy. I think those are the only legitimate exceptions, and otherwise information should be open. In addition, a successful statute must provide for an appeal to the courts in the case where the executive department does not disclose information, and give power to the courts to determine whether the agency must or must not disclose the information. A statute of that sort, I think, would be very effective.

IV. Conclusions.

In conclusion, let me say that no legal theories, judicial decisions, or legislative enactment will by themselves create an effective right to know. Ultimately the right must be exercised if it is to be meaningful. This is the task of the press, the scholar, all kinds of organizations, and every individual citizen.

〔附　記〕

本稿は，イエール大学 T. I. エマーソン教授が早稲田大学比較法研究所において，講演された内容（テーマ「現代における知る権利」通訳＝東京大学法学部大学院博士課程　戸松秀典氏）を同教授の校閲を得て資料として掲載したものである。

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