AFTER WATERGATE

The study of law in American society is certain to be affected by the momentous events that have followed the discovery of the Watergate incident. This Association, devoted to the understanding of legal systems and to the application of such knowledge to legal policy, must surely respond in an appropriate way. Whether that response should be limited to scholarly study or whether it ought also to include some active effort to affect policy is an issue that might well help us to decide the proper nature of our Association. At all events, scholarship will necessarily be an important part of the response. Many of us will want to reflect on the issues which have emerged. At this point, I would like to give some preliminary personal views on the matter.

To my way of thinking, the Watergate affair has revealed the profound vulnerability of democratic government to the threat of governmental control of information. In the course of gathering, processing, and disseminating information — much of it needed for legitimate purposes — government officials wield powers which, if unregulated, can become a principal instrument for eliminating opposition and destroying free political choice. Under contemporary conditions, the control of information can be as powerful an instrument as the control of means of production was ever thought to be. If we observe the attention p a i d to information control by all totalitarian governments of this century, we must recognize that they have surely been aware of the power inherent in the control of information. By contrast, the scant attention hitherto paid to this problem in democratic societies is striking. In the United States, we have relied on the negative protections of the First Amendment to avoid the growth of informational power. We have assumed that the established means of information circulation — Congress, the press, mass media, universities, associations, and word-of-mouth — would suffice to offset the monopolization of information. Relying on this assumption, we have permitted the gathering and use of information, particularly by government, for special purposes which were thought to be legitimate. And now Watergate has revealed that these informational techniques may be used to attack, if not destroy, the very heart of the democratic process, *i.e.*, the ability to make a

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fully informed choice of governmental leadership and to appraise objectively the relative merits of candidates for office.

Consider from this point of view some of the activities alleged or established in consequence of the Watergate investigation.

1. The Watergate burglary was undertaken with government support to obtain politically valuable information through wiretapping regarding the plans of the opposition party.
2. The Central Intelligence Agency, charged with gathering information concerning foreign governments, was asked to attest to its involvement in the affair, in order to justify the legitimacy of the break-in or to prevent its revelation altogether.
3. A psychiatrist's office was burglarized to obtain information concerning a potential defendant in a case involving release of secret government reports.
4. Telegrams were manufactured for insertion in government files or for publication which were intended to implicate a dead president in the murder of a foreign political leader.
5. Executive privilege was broadly invoked to block the obtaining of evidence sought for numerous criminal investigations.

The chronicle could go on, and does go on, with each current news story from Washington, but these items should suffice as illustrations of the danger that governmental use of information control can threaten freedom of choice in the political process.

It is not necessary to conclude that these and comparable activities were coordinated by one person. The pattern of gathering, control, and use of information by government for political purposes is, in some ways, even more impressively dangerous if carried forward, with some degree of independence, by many in government. Parallel use of such techniques, like parallel inventions, suggest a readiness in the organizational and cultural base that makes these activities virtually inevitable. If ably coordinated, their power might well prove irresistible to a democracy which was inadequately defended against the danger.

What, then, would constitute proper defenses against the power of monopolistic control and use of information for

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political purposes? That, I believe, is a worthy issue for serious scholarship. We have already benefited from relevant studies by such scholars as Arthur S. Miller, Stanton Wheeler, Herman Schwartz, and Alan Westin. We need much more research focused on the principal problem of political uses of information control and its remedies. As a start, I suggest that such research be aimed at implementing the following principle:

> *That all governmental information be required to be made available to the public as a matter of course, unless a good reason to the contrary can be presented to an appropriate independent agency, such as a court or ombudsman, which shall affirmatively find the need for confidentiality in terms of a limited, explicitly stated set of purposes.*

The foregoing proposition is a long way from a statute, nor is it intended as proposed legislation. Its purpose, rather, is to suggest a new stance. Before Watergate, it seemed to be widely assumed that governmental information should be kept confidential unless there was good reason to make it public. We now need to reverse that stance: governmental information should be made available unless there is a good, specified reason for keeping it secret. And we need to embrace this principle not just as a matter of statutory formulation, but as one of the mores of our public life. If, after Watergate, we can adopt such presumption of openness, the whole affair may prove to be a great triumph for democratic government. To contribute to that end would seem to me a worthy task for this Association.

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President

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