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The Northern Ireland Broadcasting Ban: Some Reflections on Judicial Review

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ABSTRACT

This Essay initially examines the British government's ban on its broadcasting networks that restricts coverage of Northern Ireland organizations, and concludes by making some reflections on the system of judicial review in the United States. Professors Weaver and Bennett note that a comparable ban in the United States probably would be held unconstitutional. In Great Britain, however, the courts lack a similar power of judicial review, leaving the question of the Ban's legitimacy to the political process. While Great Britain enjoys a relatively free society, the authors conclude that government control over the British media poses troubling problems and suggests that the system of judicial review in the United States cannot be said to be unnecessary.

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I. INTRODUCTION

Marbury v. Madison,[1] which established the United States judiciary's right to review the constitutionality of legislative and executive action,[2] has stirred controversy for nearly two centuries.[3] *Marbury*'s critics ask whether in a representative democracy, the judiciary, which is unelected and therefore less politically accountable than either the President or Congress in the United States, should invalidate legislative or executive action.[4] The debate invites comparison with other countries that lack a comparable judicial review system. In Britain, in particular, it is unthinkable for a court to strike down an act on the ground that Parliament had exceeded its authority.[5] Some commentators have asked

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1. 5 U.S. (1 Cranch) 137 (1803).

2. For an introduction to the United States system of judicial review, see 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW §§ 1.1-1.6 (1986) [hereinafter NOWAK] and L. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-208 (2d. ed. 1988).

3. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

4. *See* L. HAND, THE BILL OF RIGHTS 11-18 (1958); Wechsler, *supra* note 3, at 2-10.

5. *See* S.A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 27 (5th ed. 1985) ("Parliament as a legislative body can enact any law whatsoever on any subject whatsoever in the eyes of United Kingdom courts, according to the generally held view. Changes in rules of constitutional law can be effected by ordinary legislation"). *See also* Cappalletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 STAN. L. REV. 651, 654-55 (1973). Invariably, attempts to challenge the validity of statutes have failed. In Pickin v. British Railways Board 1974 App. Cas. 765, the House of Lords rejected an allegation that Parliament had been misled by fraudulent misrepresentations into passing a statute, thus making the Act invalid. Lord Reid stated:

> For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them. Any such investigations as the respondent seeks could easily lead to such a conflict . . . . [T]he whole trend of authority for over a century is clearly against permitting any such investigation.

whether the experience in other countries demonstrates that judicial review is unnecessary.[6]

How well do other systems function without judicial review? Britain provides an interesting example. One asserted advantage of judicial review is that it restricts governmental power and helps guarantee individual liberties. Even without judicial review, Britain is a relatively free society. Britian, in various levels of protection, recognizes most rights that are deemed fundamental in the United States, including freedom of the press,[7] freedom of religion,[8] freedom of speech,[9] and the right to due process of law.[10] Britain also recognizes many criminal rights protected in the United States, including the privilege against self-incrimination[11] and the right to be free from unreasonable searches and seizures.[12] But, notwithstanding these protections, Britain is a more restrictive society than the United States. For example, although the British Government recognizes freedom of expression and freedom of the press, it can and does place more serious restrictions on public debate than permitted in the United States.[13] In addition, although Britain also recognizes the

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Id. at 788. Neither is an assertion that a statute is contrary to international law a ground for impugning the statute. *See* Mortensen v. Peters, 14 Scots L. Times Rep. 227 (H.C.J. 1906); Cheney v. Conn [1968] 1 W.L.R. 242, 245. Ultra vires arguments have been no more successful. *See infra* notes 40-49 and accompanying text.

6. *See* NOWAK, *supra* note 2, §§ 1.2, 1.4; L. TRIBE, *supra* note 2, § 3.2, at 25 n.10. ("The fact that the people established a government of limited powers does not of necessity mean that they established a single document to control the action of their own democratic process. It is at least possible that the legislature was to be guided by these principles, while it was free to interpret them for itself and to have its acts respected by the other branches of government. Marshall, [in *Marbury v. Madison*], however, sought to shore up the argument by finding that the essence of a written Constitution is that it is to be a fundamental and binding document. Once again, this conclusion is not necessarily true; other nations have employed written Constitutions as general principles for government which are not enforced by the judicial departments against acts of other branches of the government." (Comparison with Canada)).

7. *See* S.A. DE SMITH, *supra* note 5, at 482-89.

8. *Id.* at 481-82.

9. *Id.* at 481-504.

10. *Id.* at 582-97.

11. *See* C. EMMINS, CRIMINAL PROCEDURE 397-407 (4th ed. 1988); C. HAMPTON, CRIMINAL PROCEDURE AND EVIDENCE 181-89 (1973).

12. *See* Police and Criminal Evidence Act 1984, ch. 60, § 8. *See also* S.A. DE SMITH, *supra* note 5, at 476-80.

13. *See infra* notes 15-30, 75-101, 130-56 and accompanying text. *See also* Bevan, *The Recent Decline and Fall of Freedom of the Press in English Law*, 16 VAND. J. TRANSNAT'L L. 31 (1983).

right to silence, it has substantially curtailed that right.[14]

This Essay initially focuses on how the British system of government functions without judicial review; specifically how does it curb governmental power and preserve individual and press freedom? The Essay examines these issues in the context of the British Government's decision to prohibit radio and television networks from airing interviews or statements by members of certain Northern Ireland organizations, or by allies and sympathizers of such organizations (the Broadcasting Ban or Ban). From an analysis of that Ban, some conclusions are drawn about the system of judicial review as it exists in the United States.

II. THE BROADCASTING BAN

A. *The Home Secretary's Orders*

The Broadcasting Ban was imposed on October 19, 1988.[15] It took the form of two virtually identical orders issued, respectively, to Britain's two broadcasting networks—the British Broadcasting Corporation (BBC) and the Independent Broadcast Authority (IBA).[16] The orders prohibit both organizations from airing any words spoken by a person who is a member of a restricted organization, or who solicits or invites

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14. On October 19, 1988, Britain's Home Secretary announced that he intended to restrict the right to remain silent and that he was restricting that right in Northern Ireland effective immediately. Jenkins & Hutchings, *88 Ways to Lose Your Liberty*, NEW STATESMAN & SOCIETY, Dec. 2, 1988, at 34. In any of several enumerated situations, silence may be treated as an admission of guilt, and even the failure to offer a believable explanation upon leaving a crime scene may be used by the prosecution to show guilt. ECONOMIST, Oct. 22, 1988, at 63. The Home Secretary also announced that he planned to ask Parliament to extend these restrictions to the United Kingdom as a whole. Times (London), Oct. 21, 1988, at 1, cols. 3-5; *id.* at 24, cols. 7-8.

The legal position of Northern Ireland is somewhat anomalous. It is subject to direct rule under the Northern Ireland Act 1974 as a result of the failure of various constitutional initiatives taken after the collapse of the Stormont Parliament, which had been dominated by Protestant unionists. Thus, although Northern Ireland returns members of Parliament to Westminster, its system of government differs radically from that of the rest of the United Kingdom. It would not be possible for a government minister to impose these restrictions elsewhere in the same manner or with the same speed with which they were imposed in Northern Ireland.

15. Int'l Herald Tribune, Oct. 20, 1988, at 2, cols. 1-5.

16. The IBA, separate from the BBC, has the duty to "provide . . . television and local sound broadcasting services." Broadcasting Act 1981, ch. 68, § 2. It governs the independent channels, which include channel three (ITV) and channel four. *See id.* § 10 (providing authority for channel 4). The total effect of the orders, therefore, covers all television broadcasting in the United Kingdom.

support for a restricted organization.[17] The list of restricted organizations includes the Irish Republican Army (IRA), the Irish National Liberation Army (INLA), Cumann na mBann (the women's movement), Fianna Eireann (the youth movement), Saor Eire (Free Ireland), Ulster Freedom Fighters (UFF), Red Hand Commando, Ulster Volunteer Force (UVF), Sinn Fein, Republican Sinn Fein, and the Ulster Defense Association (UDA).[18]

The Government offered two justifications for the Ban. First, it believed that members and supporters of restricted organizations were making offensive statements on the air. Home Secretary Douglas Hurd, in explaining the Ban, noted:

> When you had a bomb outrage, and there are pictures of bodies to distressed and weeping relatives, and the next thing that happens on the screen, in people's living rooms, is somebody saying, "I support the armed struggle" or "They deserved it"—that I think is not only offensive, but it's

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17. The IBA order stated that:

1. In pursuance of section 29(3) of the Broadcasting Act 1981, I hereby require the Independent Broadcasting Authority to refrain from broadcasting any matter which consists of or includes -
   any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where -
   (a) the person speaking the words represents or purports to represent an organization specified in paragraph 2 below, or
   (b) the words support or solicit or invite support for such an organization, other than any matter specified in paragraph 3 below.
2. The organizations referred to in paragraph 1 above are -
   (a) any organization which is for the time being a proscribed organization for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and
   (b) Sinn Fein, Republican Sinn Fein and the Ulster Defense Association.
3. The matter excluded from paragraph 1 above is any words spoken -
   (a) in the course of proceedings in Parliament, or,
   (b) by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election.

IBA Order (Oct. 19, 1988) [hereinafter IBA Order] (available from the British Home Office Ministry. 50 Queen Anne's Gate London, SW1H 9AT, (01) 273-4635). The BBC order was substantially identical except that it did not contain the exemption for "proceedings in Parliament." BBC Order (Oct. 19, 1988) [hereinafter BBC Order] (also available from the British Home Office Ministry). The BBC interpreted its order as including that exemption. BBC Guidelines, 2 (1982) (issued in light of a Home office letter clarifying the original orders; available from BBC) [hereinafter BBC Guidelines].

18. *See* BBC and IBA Orders, *supra* note 17, para. 2. BBC and IBA guidelines interpreted the Orders to include the groups listed above. *See, e.g.*, BBC Guidelines, *supra* note 17, at 2.

wrong and it's perfectly reasonable to remove that.[19]

The Government felt that the public should be insulated from such statements.[20] The other reason, which did not emerge until a few weeks later, was that the Government wanted to deprive the restricted speakers of 'stature'.[21] The Government believed that those who are allowed to speak on radio or television gain an aura of authority by their appearance. When terrorists are allowed to appear, and to gain this stature, the "ripple of fear" increases in the community.[22]

The orders provided for certain exemptions. The Ban did not apply to words spoken "by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election."[23] In addition, it did not apply to words spoken "in the course of proceedings in Parliament."[24] But the Ban did extend to statements made in other legislative bodies in the United Kingdom, as well as to statements made in the European Parliament or in the legislative body of any foreign country.[25] The Ban also extended to statements made in judicial proceedings

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19. Int'l Herald Tribune, Oct. 20, 1988, at 2, col. 3.

20. Times (London), Oct. 19, 1988, at 1, col. 1. In a recently released report on broadcasting, the Government argued that statements by members and supporters of restricted organizations had "caused offense to many viewers and listeners." Secretary of State for the Home Department, *Broadcasting in the '90s: Competition, Choice and Quality* 36 (1988) [hereinafter Broadcasting White Paper] (presentation to Parliament). *See also* 139 PARL. DEB. H.C. (6th ser.) 1081-82 (1988).

21. 139 PARL. DEB. H.C. (6th ser.) 1082 (1988).

22. In the House of Commons debate concerning the Ban, Home Secretary Douglas Hurd argued that "direct access gives those who use it an air and appearance of authority which spreads further outward the ripple of fear that terrorist acts create in the community." 139 PARL. DEB. H.C. (6th ser.) 1082 (1988).

23. BBC and IBA Orders, *supra* note 17, para. 3.

24. This exemption was expressly stated in the order issued to the IBA, but not in the order issued to the BBC. IBA Order, *supra* note 17, para. 3. Nevertheless, BBC guidelines interpreted the order as including this exemption of the Westminster Parliament. BBC Guidelines, *supra* note 17, at 3. The Home Secretary similarly interpreted the order. House of Commons, 139 PARL. DEB. H.C. (6th ser.) 1076 (1988).

25. Although the Home Secretary's Orders of October 19 did not expressly set forth this limitation, it seems to be implicit. Moreover, the BBC Guidelines interpreted the Ban in that way. The Guidelines stated that:

> Actuality from the European Parliament is *not exempt* from the restrictions. If [a Member of the Eurpean Parliament] speaks in support of say the UDA during Parliamentary business our programmes cannot use the actuality of those comments . . . . The same restriction applies to Parliaments in any foreign country.

BBC Guidelines, *supra* note 17, at 3. *See also* IBA Guidelines, 2 (Oct. 21, 1988) [hereinafter IBA Guidelines].

in the United Kingdom, or in any foreign country.[26]

B. *Subsequent Interpretations*

After the Ban took effect, the British media struggled to determine its meaning. The orders put the media in a difficult position because they were worded very broadly. In addition, many of the restricted organizations were legal organizations, and some members of those organizations were elected officials. Could elected officials who belonged to restricted organizations be interviewed on matters within the scope of their elected duties? Could elected officials speak out on the issues generally? In one instance, a local elected official who was a member of Sinn Fein wanted to comment on the Ban's impact. She wished to state that the Ban was preventing her from speaking out on important public issues (for example, should a hospital be closed). The IBA concluded that it should not air the statement.[27]

On October 25, a week after the Ban was imposed, the Home Secretary issued a letter clarifying the Ban's meaning and scope.[28] Although

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26. Once again, the orders did not expressly prohibit the airing of such statements. The BBC Guidelines stated that:

> Court proceedings should there be actuality of them are not exempt . . . . [A]ctuality from a court in the United States, for instance, would be restricted if it included someone speaking in support of one of the affected organizations.

BBC Guidelines, *supra* note 17, at 3. *See also* IBA, Broadcasting and Terrorism: Home Secretary's Direction 2 (Oct. 25, 1988) [hereinafter IBA Revised Guidelines.].

27. Interview with Mr. David Glencross, IBA's Director of Television, (Nov. 23, 1988) [hereinafter Glencross Interview]. *See also* 139 PARL. DEB. H.C. (6th ser.) 1084 (1988).

28. A copy of the October 25 clarification could not be obtained; however, a second clarification letter, issued November 9, 1988, provided:

> Thank you for your letter of 1 November about the application to archive material of the Notice issued under section 29(3) of the Broadcasting Act.
>
> As my officials have indicated, the Notice does apply to radio and television material recorded before the Notice was issued. Having decided to impose restrictions on personal appearances by representatives of the organizations and their supporters, it would not have been sensible to distinguish between such appearances made before the cameras last year and those that might take place in the future. Not all archive material will, of course, be caught by the restrictions, and programme-makers will have to use their editorial judgment in excluding any that is. Any statements that are so excluded can still be reported and drawn upon in the course of the programme.
>
> Now that the Notice has been issued and a full explanation of its intention and effect provided by my officials, I think for the time being it must be for the

the letter was not made public and the Home Office refused to release a copy of the clarification, some insight into the letter's content can be gleaned from BBC and IBA statements issued after, and in light of, the clarification.[29] Both the BBC and IBA believed that the Home Office would allow broadcasters to show some statements made by elected officials, whether or not those officials were members or supporters of a restricted organization, provided that the statements did not proclaim support for one of the restricted organizations.[30] But confusion remained over exactly which statements were exempt. The IBA believed that a statement by an elected official who ran for office on the ticket of a restricted organization would be precluded. It reasoned that one who was elected on a Sinn Fein ticket would be presumed to be speaking on behalf of Sinn Fein when discussing public issues.[31] The BBC interpreted the Ban more narrowly. Its position was that a councillor could express opinions on local matters so long as the concillor did not express support for a restricted organization or its aims.[32] The IBA and BBC agreed that a Sinn Fein councillor who appeared on behalf of a council to explain the council's decision would be allowed to speak.[33]

Authority to proceed to apply it in practice and gain first-hand experience of its operation. I have, as you know, given an undertaking to the House of Commons that we shall keep the operation of the Notice under careful review.

Letter from Home Secretary Douglas Hurd to The Rt. Hon. Lord Thomson of Monifieth, Kt., Chairman, IBA (Nov. 9, 1988) [hereinafter Hurd Letter].

29. *See, e.g.*, BBC Guidelines, *supra* note 17; IBA Revised Guidelines, *supra* note 26.

30. Broadcasting and Terrorism: Home Secretary's Direction (Oct. 25, 1988). (IBA internal document, prepared by Mr. R. Hargreaves, the IBA's Chief Assistant for Television.) Telephone conversation with Anonymous BBC Official [hereinafter Anonymous Interview].

31. Glencross Interview, *supra* note 27. Home Secretary Douglas Hurd made this point in the House of Commons debate on the Ban:

One . . . issue concerns the question whether a person is representing a named organisation at the time he appears on a programme. It is true that members of an organisation cannot be held to represent it in all his daily activities . . . . The key to the issue is the word "represent." When a councillor is speaking in Northern Ireland, it is not the subject about which he is talking that will decide whether his speech can be broadcast directly, but whether he is talking on behalf of one of the named organizations . . . .

As the director of Radio 4 made clear this morning — although he did not like it — a Sinn Fein councillor speaking about council matters on behalf of his group will not be allowed direct access.

139 PARL. DEB. H.C. (6th ser.) 1078 (1988).

32. Anonymous Interview, *supra* note 30.

33. The BBC Guidelines provided that:

The clarification letter also provided greater insight into the Home Office's objectives. Both sets of guidelines suggested that the Home Office was principally concerned about giving members or supporters of restricted organizations direct access to television or radio. In other words, the Government did not want such individuals actually being shown making statements on television or on radio. Indirect access, however, was permissible. Broadcasters could quote verbatim from statements so long as they did not show the statements actually being made. In addition, broadcasters could show a picture of a person and provide a summary of what was said.[34]

Whether the clarification letter dealt with the question of who would be deemed a "supporter" of a restricted organization is unclear. Under a literal interpretation of the orders, broadcasters could not directly air

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There is one other main aspect of the changed interpretation which will affect programmes, especially in Northern Ireland. It concerns the possibility of appearances by Sinn Fein councillors and other people who at times represent one of the affected organizations. To take an example: the Chairman of Strabane Council, who is Sinn Fein, can appear in programmes *to represent the Council.* He can speak about Council business, decisions made, problems faced, so long as he does not proclaim Sinn Fein. It is accepted that such people are not always representing their organisation even when speaking about their public duties. They cannot be held to represent their organisation in all their daily activities. Some will be regarded as private. There will be difficult borderline cases to be decided case by case depending on the context and the words spoken. Don't hesitate to consult.

BBC Guidelines, *supra* note 17, at 3. IBA Revised Guidelines, *supra* note 26, at 1-2.

34. The BBC interpreted the order, and clarification, in the following way:

[O]ne of the main changes in this guidance note is that reported speech in programmes is not now restricted. Programmes can quote Gerry Adams and people like him *whatever they say.* They can be quoted verbatim or in paraphrase regardless of whether their words support, invite support or urge support for an organisation affected by the order. This means that our newsreaders, presenters, correspondents, reporters and any other like editorial people in programmes can freely be allowed to quote and refer to what the restricted organisations and their people say (subject of course to normal legal restraints, like defamation). Comments of support for any of the organisations from any source can be quoted.

This eased interpretation applies also to contributors such as political commentators from outside, MPs [Members of Parliament], academic experts, foreign figures and others. While none of these can be allowed to speak words of support of their own they can quote any of the organisations or any other source for purposes of explanation and argument.

The central restriction applies in full force therefore only to the organisations and people who made the supportive comments in the first place. As before, pictures showing someone speaking but with the words given in voice-over are permitted.

BBC Guidelines, *supra* note 17, at 2. The IBA agreed. IBA Revised Guidelines, *supra* note 26, at 1.

any statement of support for any of the restricted organizations. The identity of the speaker would not matter unless the statement fit within one of the exceptions enumerated above. Thus, if President Bush chose to denounce the Ban as having an undue impact on free speech, and as repression of the restricted organizations, the statement could not be directly aired. The same would be true if an academic issued a similar denunciation. The BBC and the IBA, however, did not interpret the Ban this literally or broadly. The BBC and IBA ultimately interpreted the Ban as applying only to statements explicitly supporting restricted organizations.[35]

Questions remained, however, about what would happen if a world leader went further and actually did express some support for a restricted organization's objectives. For example, suppose that a prominent United States senator, in the context of a criticism of the Ban and its impact on free speech, proclaimed that Sinn Fein had a legitimate cause and objectives, and that it should be given direct access to radio and television to express those views. An IBA official unhesitatingly stated that the senator's statements could be directly aired.[36] A BBC official was not so sure.[37]

Even after the clarification, the BBC and IBA interpreted the Ban as extending to statements made in documentaries. The BBC would not directly air a statement by a member of a restricted organization even as part of a documentary on Northern Ireland. The Ban applied whether or not the speaker was dead, and even though he may have been dead for some time.[38] Moreover, the BBC was concerned that the Ban might even prevent it from directly airing a program showing a group singing Irish protest songs. The BBC believed that direct access might be prohibited if the songs were sung by demonstrators.[39]

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35. Anonymous Interview, *supra* note 30; Glencross Interview, *supra* note 27.

36. Glencross Interview, *supra* note 27.

37. Anonymous Interview, *supra* note 30.

38. The BBC's position was that even "[l]ibrary material is covered. Comments which offend the order do not have to have been recently made." BBC Guidelines, *supra* note 17, at 4. *See also* IBA Revised Guidelines, *supra* note 26, at 2; Hurd Letter, *supra* note 28.

39. The BBC interpreted the order to mean that "Irish rebel songs in genuine performances will be all right. In certain circumstances though they could be restricted, for instance, if sung by demonstrators." BBC Guidelines, *supra* note 17, at 4.

III. LEGALITY OF THE BROADCASTING BAN

Under United States law, one could challenge the Ban as an unconstitutional infringement of the rights of freedom of speech and of the press under the first amendment.[40] The British legal system functions much differently than the United States system, however, and differences transcend the mere presence or absence of judicial review. Under British law, no constitutional challenges are possible; there is no written constitution and no bill of rights.[41] Thus, if the judiciary wants to strike the Ban down, it will have to find some other basis.

Britain does have limited forms of review. British courts review administrative action, as opposed to Parliamentary action, and can and do declare such action invalid on occasion.[42] But they do not do so on constitutional grounds. Rather, they strike actions down as ultra vires.[43]

The ultra vires doctrine states that a public authority, the Home Secretary in the case of the Broadcasting Act, may not act outside the powers conferred on it by statute. This conclusion follows naturally from the fundamental proposition of English law that administrative authority is derived solely from statutes enacted by Parliament. If an administrative agency acts in excess of the authority granted it by statute, the action is invalid, that is, ultra vires.[44]

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40. U.S. CONST., amend. I.

41. For an analysis of the British system, see Lee, *Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights*?, 49 U. PITT. L. REV. 777, 781-87 (1988). For discussion of the differences between the British and United States legal systems, see P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987); *see also* Partlett, Book Review, 43 VAND. L. REV. ____ (forthcoming May, 1990) (reviewing Atiyah & Summers).

42. *See* Anisminic Ltd. v. Foreign Compensation Comm'n [1969] 2 App. Cas. 147 (administrative tribunal's decision a nullity if it misunderstood the law and therefore took account of wrong factors); Ridge v. Baldwin 1964 App. Cas. 40 (dismissal of chief constable vitiated by failure to give a fair hearing); Short v. Poole Corp. 1926 Ch. 66; Hall & Co. v. Shoreham-by-Sea Urban District Council [1964] 1 W.L.R. 240 (C.A.) Chertsey Urban District Council v. Mixnam's Properties, Ltd. 1965 App. Cas. 735 (cases holding administrative action ultra vires on principle that Parliament cannot have intended to authorize unreasonable action); Eckersley v. Secretary of State for the Environment [1977] 34 P. & C.R. 124; Prest v. Secretary of State for Wales [1982] 81 L.J.R. 193 (C.A.) (agency's failure to take into account relevant considerations makes agency action ultra vires).

43. *See, e.g.*, Laker Airways, Ltd. v. Department of Trade, 1977 Q.B. 643 (C.A.) (holding that the Secretary of State for Trade had acted outside his authority in issuing a direction to revoke a license to the Civil Aviation Authority). For a discussion of how the ultra vires concept works under British law, see S.A. DE SMITH, *supra* note 5, at 573-80.

44. The use of the ultra vires doctrine is the only means of judicial control over agency action because judges have no constitution or bill of rights upon which to base

Making an ultra vires argument for the Broadcasting Ban is difficult. The Home Secretary has broad authority to control radio and television networks. The 1981 Act governing broadcasting provides that "the Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice."[45] The broadcasters' licensing agreements contain similar provisions. At the time of the Ban, the Home Office took the view that these provisions gave the Minister broad authority to ban any broadcast. In a newspaper interview, a Home Office spokesperson stated that the Act does not limit its application "to times of crisis or national emergency. It is quite casually worded in fact."[46]

A court, however, could conceivably construe the Act more narrowly.[47] In *R v. Home Secretary*[48] a challenge by a group of journalists to the Broadcasting Ban, the counsel for the Home Office conceded that the power conferred upon the Minister by the Broadcasting Act was not limitless or unreviewable by the courts. Nevertheless, the Divisional Court unanimously rejected the claim that the Home Secretary had acted unlawfully in the exercise of his powers.[49] Much of the argument in the

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their decisions. As Wade explains, the judge "in every case . . . must be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power." H.R.W. WADE, ADMINISTRATIVE LAW 42 (6th ed. 1988).

A judge can declare an agency action ultra vires when the agency acts inconsistently with the statute, either by failing to follow expressly prescribed procedures or by acting outside its jurisdictional grant. Similarly, and somewhat more ingeniously, the courts can declare an act ultra vires if it is unreasonable, takes into account irrelevant considerations, fails to conform to the implicit policy of the parlimentary act, or fails to give a fair hearing to anyone prejudicially affected. *Id.*

45. Broadcasting Act, 1981, ch. 68, § 29(3).

46. Independent (London), Oct. 21, 1988, at 2, col. 2.

47. Courts in recent years have shown a willingness to disregard the clear wording of a statute in order to find the action ultra vires. *See, e.g.*, Anisimic v. Foreign Compensation Comm'n, [1969] 2 App. Cas. 147. The relevant statute provided that "[t]he determination by the commission of any application made to them under this Act shall not be called into question in any court of law." Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12 § 4(4). The court assumed jurisdiction over the Commission's determination on an application, reviewed the decision, and struck it down as ultra vires.

48. *Home Secretary*, 139 NEW L.J.R. 1229 (Div. Ct.).

49. *Id. See also* 139 NEW L.J.R. 1751 (Ct. App.).

> A decision whether or not to give directives under S 29(3) of the [1981] Act and under cl. 13(4) of the [BBC] license and agreement and, if so, in what terms . . . is a judgment to be made by the Home Secretary and not by the courts, whose right and duty to interevene only arises in the event that the Home Secretary . . . can be shown to have taken account of matters which are relevant or in which the deci-

case concerned the assertion that the Ban contravened article 10 of the European Convention on Human Rights.[50] Although the litigants might not have expected to succeed with this argument, in the British courts, they may have been laying the groundwork for a later application to the European Court of Human Rights.

Although at the end of the day the British court decided in favor of the Home Secretary, the case nevertheless supports the notion that in a sufficiently strong case the courts could intervene. What is not so clear is the threshold at which intervention would take place. Suppose the Home Secretary purported to issue a ban on all broadcasting of party conferences held by Britain's opposition parties. Or, to employ a less farfetched example, suppose he banned television broadcasts by the Labour Party unless its leaders made statements condemning organizations such as Sinn Fein. The latter, though distinguishable, is perhaps not so far removed in principle from the present Ban. In both cases, affected parties could test the legality of such orders by the ultra vires doctrine.[51]

Judicial review of both Parliamentary and administrative action could be available also under the European Convention on Human Rights of 1950. That Convention, to which Britain is a party, provides for freedom of expression,[52] and Britain has agreed to be bound by European

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sion is manifestly wrong as falling outside the wide spectrum of rational conclusions . . . .

Id. at 1753.

50. The Divisional Court noted that it was proper to consider the provisions of article 10 of the convention, 139 New L.J.R. 1229, 1230, but the Court of Appeals held that "the Home Secretary . . . is free to take account of the terms of the convention . . . he [is] under no obligation to do so. It also follows that the terms of the convention are quite irrelevant to our decision and that the Divisional Court erred in considering them . . . ." 139 New. L.J.R. at 1752.

51. A court could also limit the Act by requiring that the Home Secretary use his power "reasonably." The reasonableness argument has well established roots in English law. In Westminister Corp. v. L & N.W. Ry. 1905 App. Cas. 426, Lord McNaughten said:

> It is well-settled that a public body invested with statutory powers . . . must take care not to abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably.

Id. at 430.

52. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. The relevant provision states that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema

Court rulings under the Convention.[53] Nevertheless, it is unlikely that the Ban can be successfully challenged on this basis. The Convention contains gaping exceptions that significantly restrict its effectiveness.[54] Further, even if the European Court ruled adversely to the Government, the ruling would have no immediate effect on English domestic law.[55] The conventional view is that Parliament should implement the European Court decision by passing relevant legislation.[56] This may take some time to effect, and the Government may even seek to derogate from its obligations under the international treaty and decline to act. Such a possibility has been canvassed in the context of police procedures in Northern Ireland, which the European Court has held to be invalid.[57]

Moreover, even if the courts did strike down the Ban, Parliament might be able to reimpose the Ban by its own act. The only possible challenge then would be under the European Convention. Under Britain's internal law, Parliament can do as it wishes. It is supreme,[58] and is

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enterprises.

Id. art. 10, para. 1, 213 U.N.T.S. at 230.

53. S.A. DE SMITH, *supra* note 5, at 112.

54. The exceptions:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention, *supra* note 52, art. 10, para. 2, 213 U.N.T.S. at 230.

55. A. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 178 (1983).

56. *Id.* The European Convention did not require implementing legislation. The Government believed that domestic law complied with the convention. *Id.*

57. *See, e.g.*, Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] 3 Common Mkt. L. Rep. 240 (Eng.); *but see* Bevan, *supra* note 13, at 61 ("The European Court has already seen fit to correct one House of Lords decision on freedom of speech, and that correction prompted the government to pass amending legislation to comply with the Convention's obligations.").

58.

> The Queen in Parliament is competent according to United Kingdom law, to make or unmake any law whatsoever on any matter whatsoever; and no United Kingdom court is competent to question the validity of an Act of Parliament. Every other law-making body within the realm either derives its authority from Parliament or exercises it at the sufferance of Parliament; it cannot be superior to or even coordinate with, but must be subordinate to Parliament.

S.A. DE SMITH, *supra* note 5, at 75, 81-84.

not subject to the ultra vires doctrine.[59] At most, the courts would construe the Broadcasting Act restrictively to limit its impact.[60] But Parliament could override the restrictive construction by passing a new act,[61] which the judiciary could not, of course, declare unconstitutional. Parliament could also pass a new act broadening the Home Secretary's authority and authorizing him to impose the Ban.

Parliament's supremacy over the courts stems from historical events that give Parliament supremacy over every other part of Britain's Government. The long and often bitter rivalry between the Crown and Parliament, which reached its peak in the defeat of Charles I in the English Civil War, has left Parliament firmly in control. References, for example, to "Her Majesty's Loyal Opposition" as describing the opposition party in Parliament, or to the Prime Minister as "Her Majesty's Foremost Minister" have more form than substance.[62]

Parliament's supremacy is so complete that there is little concept of "checks" or "balances" against Parliament's authority. Moreover, very little separation of powers—a fundamental component of a checks and balances system—exists.[63] At present, the Conservative Party holds executive power. But the Conservatives govern because they have majority support in Parliament. The Prime Minister, Britain's equivalent of a chief executive,[64] is and must be a member of Parliament. Moreover, all cabinet members are also Members of Parliament. This blending of power is not limited to the legislative and executive branches of the Gov-

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59. *See* S.A. DE SMITH, *supra* note 5, at 27.

60. The most notable example has been in the administrative area. Courts have been quite resistant to Parliament's attempts to deprive them of the right to review administrative action. Courts repeatedly find ways to interpret their way around statutes precluding review. *See* S.A. DE SMITH, *supra* note 5, at 600-05.

61. Of course, the new act may likewise be restrictively construed so as to nullify Parliament's intent. *See* S.A. DE SMITH, *supra* note 5, at 604-05. S.A. de Smith has pointed out that one case, Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 App. Cas. 147, "established the basic principle that if an authority or tribunal exceeds its jurisdiction then its decision is regarded by the courts as invalid and beyond the protection of any exclusionary formula yet devised by Parliamentary draftsmen." S.A. DE SMITH, *supra* note 5, at 606.

62. *See* S.A. DE SMITH, *supra* note 5, at 132-33.

63. O.H. PHILLIPS & P. JACKSON, CONSTITUTIONAL AND ADMINISTRATIVE LAW 30 (7th ed. 1987) [hereinafter O.H. PHILLIPS]. *See also* S.A. DE SMITH, *supra* note 5, at 30-34.

64. "The primary functions of the Prime Minister are to form a government, and to choose and preside over the Cabinet. He gives advice to his ministerial colleagues on matters before they come to the Cabinet, and he is the main channel of communication between the Cabinet and the Sovereign, with whom he has a weekly audience." O.H. PHILLIPS, *supra* note 63, at 317.

ernment; it also extends to the judicial branch.[65] The Lord Chancellor is head of the judiciary but also serves as a member of the House of Lords in his legislative capacity and is a member of the Cabinet. Indeed, he is a judge *because* of his position as Lord Chancellor. The House of Lords, in which resides the highest court in Britain, is part of Parliament.[66]

The British are not completely insensitive, however, to the need for separation of powers.[67] The Lord Chancellor may be entitled to sit as a judge, but he usually excuses himself in cases challenging governmental action. Law Lords usually refrain from taking part in party political debates in the House of Lords. If they speak, they usually do so on matters involving judicial or legal reform.[68] Nevertheless, there remains a high degree of blending between all three branches of government.

Even though Britain does not formally separate its three branches of Government, nominal checks on Parliament's power, and on the Government's power, do exist. When Parliament passes a bill (which was not the case with the Ban), both the Queen and the House of Lords must assent before the bill becomes law. The House of Lords can withhold assent and even refer a matter back to the House of Commons for further consideration. In practice, these checks are more formal than real. For the Queen to refuse her assent would be unthinkable,[69] and if the Commons ultimately insists on passage, the Lords are expected to yield.[70]

The real checks on Parliamentary or governmental power in Britain

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65. *See* O.H. PHILLIPS, *supra* note 63, at 29-31; S.A. DE SMITH, *supra* note 5, at 30-34.

66. It is necessary for the House of Lords to be a part of Parliament in order to provide some check on the power of the House of Commons. "As [Britain] has no written constitution, if we had a unicameral legislature our governmental system and laws would be at the mercy of a majority of one in the House of Commons, and moreover the House of Commons could prolong its own life indefinitely." O.H. PHILLIPS, *supra* note 63, at 164.

67. *See, e.g.*, *supra* note 51 (Lord McNaughton).

68. For a more thorough discussion the structure and operations of British government, see S.A. DE SMITH, *supra* note 5; O.H. PHILLIPS, *supra* note 63.

69. The last denial of Royal assent occurred in 1707, when Queen Anne refused to assent to the Militia Bill. G. MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 21-22 (1984). Constitutionally, the monarch may not refuse to agree to any piece of legislation that has passed both Houses of Parliament. M. ZANDER, A MATTER OF JUSTICE 260 (1988).

70. For a more thorough discussion of how the process works, see S.A. DE SMITH, *supra* note 5, at 123-63, 316-20.

are political.[71] Parliament may be supreme, and Conservatives may hold a majority in Parliament, but the presence of opposition parties prevents the Conservatives from merely doing as they wish. The Ban, even though it was not enacted by Parliament, was fully debated in the House of Commons. At that time, opposition parties had the chance to state their concerns and objections.[72] Moreover, Conservative Members of Parliament concerned about the Ban could have spoken as well. Objections by members of the majority party are rare, however, because Members of Parliament rarely advance in party ranks and rarely obtain major ministerial posts if they are dissident.[73] Yet, objections do occur.

If opposition parties fail to halt governmental action, the ultimate check under the British system comes from public opinion.[74] Opposition parties, in fact, have an interest in stirring up public opposition to measures with which they disagree. In doing so, they may be able to embarrass the Government. If public feeling against the Ban is strong enough, the Government might be forced to revoke it. Moreover, Conservative Members of Parliament might refuse to support their party. Ultimately, the Government might fall through a vote of no confidence. Even if these events did not transpire, the British people might retaliate against the

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71. "The government's legislative proposals must stand up to debate, the debates will be reported in the press or be available in *Hansard*, and the government must remember that within a few years at most it will have to face another general election." O.H. PHILLIPS, *supra* note 63, at 56.

72. Mr. Michael Foot, Member of Parliament, made the following argument:

> Those who believe in the right to free speech and in the power of free debate to solve problems will consider the measure an insult to the people of the United Kingdom, as well as to the people of Northern Ireland, because it means that they cannot judge for themselves about the programmes that they see. If argument continues and the possibility of putting a case remains, we have the strongest benefit and safeguard for the country.

139 PARL. DEB. H.C. (6th ser.) 1097 (1988). Mr. Roy Hattersley, the shadow Home Secretary, argued that:

> I do not doubt for a moment that the sight of a supporter of the IRA justifying a bomb outrage is offensive to most British people. It is offensive to me. The bogus apologies and hypocritical statements of regret are more offensive still. But the question we must answer is not whether that causes offence—undoubtedly it does—but whether in a free society causing gross and justifiable offence is sufficient reason for limiting the broadcasters' right to broadcast.

Id. at 1084.

73. *See* S.A. DE SMITH, *supra* note 5, at 271. The system of parliamentary sovereignty has been dubbed an "elective dictatorship" by some critics, since power is concentrated in the hands of a small group of powerful, albeit elected, officials. *See* Q.H. HAILSHAM, THE DILEMMA OF DEMOCRACY 125 (1978), Lee, *supra* note 41, at 783-84.

74. *See* O.H. PHILLIPS, *supra* note 63, at 56.

Government at the next election, driving the majority party from power.[75]

IV. TRADEOFFS

Does the British system function well? Does it adequately limit governmental abuse and protect fundamental liberties? It is interesting to contemplate what would have happened if the President or Congress had imposed a similar ban in the United States. The judiciary has not decided a comparable case. However, it is likely that the Ban would have been struck down as an impermissible restraint on freedom of speech and freedom of the press under the first amendment.[76]

The fact that the Ban would have been struck down in the United States does not, by itself, suggest much about the impact of a judicial review system. It is quite possible that, even if Britain had a system identical to the United States system, including a written constitution

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75. "British people must, in the end, carry the responsibility for the policy their government pursues: they pay the piper and could, if they wished, call an end to the tune." L. CURTIS, IRELAND: THE PROPAGANDA WAR, THE BRITISH MEDIA AND THE BATTLE FOR HEARTS AND MINDS 278 (1984). Of course, by means of the Broadcasting Ban, the British Government is trying to prevent the public from being fully aware of just what tune the piper is playing. *See id.* at 1.

76. The Ban suffers from numerous constitutional defects. For example, it is arguably overbroad. *See* L. TRIBE, *supra* note 2, at 1022-39 (on the overbreadth doctrine in constitutional interpretation). Even if the Ban could be supported on the basis that Northern Ireland is beset by terrorism and the Ban is needed to help suppress the terrorism, the Ban goes too far because it is not limited to speech by terrorists. It extends even to statements by legal political parties and by elected officials whether or not they are speaking about terrorism or terrorist incidents. It also extends to statements made by world leaders, academics, and others. *See supra* notes 23-26. The Ban is also vague. *See* L. TRIBE, *supra* note 2, at 684 (on vagueness and due process). The media has had great difficulty determining its meaning and application. *See supra* notes 27-39 and accompanying text. Indeed, in the House of Commons debate on the Ban, Mr. Foot, Member of Parliament, pointed out how much difficulty the broadcasters were having trying to figure out what the orders meant:

> As my right hon. Friend the Member for Sparbrook has explained, there is already complete confusion in the BBC and IBA, as well as elsewhere, about what can and cannot be reported. If they ask how to resolve the confusion, the absurd answer is that they must apply to the government.

139 PARL. DEB. H.C. (6th ser.) 1096 (1988). In the United States, therefore, the Ban would probably be invalid. *See* NAACP v. Sutton, 371 U.S. 415 (1963). Moreover, it is doubtful whether the Ban's means or ends are legitimate or sufficiently compelling. The speech being suppressed is political speech, which in the United States is subject to the highest level of judicial scrutiny. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). As noted above, the justifications given for the suppression are inadequate, and thus the need for the restriction is not sufficiently compelling.

and separation of powers, it might uphold the Ban. A constitution, like any written document, must be interpreted.[77] Even if they had to apply a first amendment, British courts might interpret it differently than United States courts. That would not be surprising, as United States judges differ among themselves about how the Constitution, including the first amendment, ought to be interpreted.

It would be difficult to argue, however, that judicial review does not at least partially influence the United States position on the interview Ban. Britain leaves many issues regarding individual freedoms to the political process. The European Convention does provide some restraint,[78] but, assuming that government action can fit within one of the Convention's exceptions, as it probably can in the case of the Broadcasting Ban, that restraint disappears.[79] Parliament can then restrict any freedom, including freedom of speech or of the press, without judicial intervention. It is quite possible that many rights suffer at the hands of political expediency. Confronted by a difficult problem, such as terrorism in Northern Ireland, politicians may believe that one solution is to restrict civil liberties. Even if the politicians generally agree that freedom of speech and of the press are important freedoms, they might view the benefits of those rights as relatively amorphous compared to the concrete danger presented by terrorism.[80]

In the United States, judicial review has served as a check on the political process. The checking function, however, cannot be attributed merely to the existence of judicial review. Judicial review is effective because a written constitution provides express protection for free speech and a free press and provides that the judiciary is not regarded as subordinate to either Congress or the President. Each branch of government is regarded as separate and equal.[81] Congress does have primary

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77. In the ongoing debate in Britain over whether that country should adopt a written bill of rights, opponents emphasize precisely this fact. Both the Conservative and Labour parties are reluctant to enact a bill of rights, because the British judiciary would then have the power to interpret the Constitution. Political parties now wield the power of interpretation, by virtue of Parliament's supremacy and its political nature, and the parties are unwilling to part with this power. *See* Lee, *supra* note 41, at 784-87.

78. *See supra* notes 52-57 and accompanying text.

79. *See supra* note 54 and accompanying text.

80. The fourth amendment guarantee against unreasonable searches and seizures has recently eroded, evidently to facilitate the "war on drugs." *See* United States v. Leon, 468 U.S. 897 (1984) (evidence seized under a defective search warrant is admissible if police relied in good faith on the warrant's validity); LaFave, *"The Seductive Call of Expediency," Its Rationales and Ramifications*, 1984 U. ILL. L. REV. 895.

81. *See* L. TRIBE, *supra* note 2, at 18-400.

lawmaking authority, and the courts are expected to respect that authority, but no branch of government is above the Constitution. If Congress passes a law that conflicts with the Constitution, the judiciary is expected to give effect to the Constitution rather than the law.[82] Moreover, the judiciary has reserved to itself final authority to say what the Constitution means, and to decide whether a law conflicts with it.[83]

The judiciary's independence is rooted in the Constitution itself, which grants federal judges life tenure and guarantees against diminution in salary.[84] The resulting situation allows and encourages United States judges to take a more independent and detached view than either the President or Congress. Moreover, judges are not enmeshed in the day-to-day problems of government. Their duty is to give effect to the Constitution's language and values, and to decide whether the Government's action unduly impinges upon those values. From this vantage point, the judiciary might disagree with the Government's conclusion that some governmental action, like the imposition of an interview ban, was necessary and that it does not unduly impinge constitutional limitations. In the United States the judiciary has disagreed with and overturned a politician's assessment of a situation on many occasions.[85]

Courts cannot entirely divorce themselves from political realities. Indeed, as one analyzes United States constitutional decisions, it is clear that judges take those realities into account. Few constitutional rights are absolute; most rights can be abridged by a sufficiently compelling governmental interest. Thus, in order to decide whether the political branches have acted properly, the judiciary must weigh the need for the restriction against the degree of burden it imposes.[86] United States courts deciding constitutional cases frequently engage in such analysis. But judges, perhaps because of their more neutral and detached position, frequently reach different results than politicians as they weigh the competing interests.[87]

A judicial review system, like that existing in the United States, will not always succeed in limiting governmental abuse. It is easy to argue that instances have occurred in which the United States judicial review

82. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

83. *Id.* at 177.

84. U.S. CONST., art. III, § 1.

85. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

86. *See Brandenburg*, 395 U.S. 444; Shelton v. Tucker, 364 U.S. 479 (1960).

87. *See supra* note 86.

system has failed to check constitutional violations.[88] The reason for these perceived failures is obvious. A constitution, like any written instrument, can suffer from vagueness or ambiguity.[89] This is particularly true of the United States Bill of Rights. Most of its provisions are framed in the most general of terms,[90] and so must be interpreted.

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88. The authors repeatedly heard comments from British academics expressing concern about the decision in Bowers v. Hardwick, 478 U.S. 186 (1986). They might question how a system that purports to protect individual freedoms could allow prosecution for homosexual conduct between consenting adults in a private bedroom. They also cannot understand how the United States Supreme Court could refuse to extend the right of privacy to this situation. United States academics point to early freedom of speech decisions that were similarly restrictive as evidence that the United States may eventually reform its position on homosexuality and privacy. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919) (upholding a conviction for publications that advocated strikes in ammunition factories during the First World War).

89. This is true of any written document. Justice Frankfurter made this point in an incisive article on statutory interpretation:

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947). *See also* Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 301 (1936).

90. The fifth amendment guarantees citizens the right to due process of law. But there is no precise standard by which to judge whether some particular procedure or protection is required. For example, does the fifth amendment require a "hearing" for a legislative determination? Does it require a hearing for an adjudicative determination? If so, what kind? Must an agency provide someone with a full trial hearing, or may it provide only a limited hearing? These questions have vexed the courts. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970); Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).

The first amendment provision on free speech is equally imprecise. Although the amendment is phrased in absolute terms ("Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST., amend. I), the Supreme Court has held that it is not absolute. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-51 (1961). Freedom of speech may be overcome by a sufficiently compelling governmental interest. *Id.* The first amendment does not, however, indicate how important the governmental interests must be or how the right to free speech will be weighed against such interests. The courts must resolve these issues themselves relying only on general principles such as the purposes and policies underlying the first amendment. Of course, there is disagreement over how to define the purposes and policies. *See, e.g.*, L. TRIBE, *supra* note 2, at 670-71, 1164-66, 1307-08, 1478 (evidencing interpretations of the Constitution); J.H. ELY, DE-

Judges can disagree about what the Constitution means, and how it should be interpreted.[91] That is precisely why such controversy has arisen in recent years over nominations to the United States Supreme Court.[92] Many correctly perceive that judicial results are heavily affected by who is doing the judging and who has done the appointing[93] and question how much protection the Constitution really provides.

Despite these flaws, and despite perceived failures, the United States judicial review system has limited the power of government and has protected individual rights in many instances.[94] Moreover, even if the courts

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MOCRACY AND DISTRUST (1980); A. BICKEL, *supra* note 2.

The general nature of most constitutional provisions, and the need for interpretation, is amply revealed in the way United States professors teach courses in constitutional law and criminal procedure. Students do not spend long hours poring over the Constitution and contemplating the intricacies of its language and structure. Instead, they purchase massive casebooks filled with judicial decisions interpreting the Constitution. In many instances, students contemplate questions that have evolved so far away from the Constitution's language that the language seems almost superfluous.

91. The United States Supreme Court has, for example, completely reversed its interpretation of: the tenth amendment—*compare* National League of Cities v. Usery, 426 U.S. 833 (1976) *with* Garcia v. San Antonio Metro, Transit Auth., 469 U.S. 528 (1985); the commerce clause—*compare* Hammer v. Dagenhart, 247 U.S. 251 (1918) *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); and the fourth amendment—*compare* Wolf v. Colorado, 338 U.S. 25 (1949) *with* Mapp v. Ohio, 367 U.S. 643 (1961). Moreover, sometimes the Court is more protective of rights than at other times. *Compare* Mapp v. Ohio, 367 U.S. 643 *with* United States v. Leon, 468 U.S. 897 (1984).

92. The nomination of Judge Robert Bork to the United States Supreme Court stirred the most controversy. Bork publicly indicated his disagreement with the holding in Roe v. Wade, 410 U.S. 113 (1973). Supporters of that decision feared that he would help overturn it if he were confirmed.

President Nixon's appointments to the United States Supreme Court also demonstrated that who is judging has an important impact on the Constitution's meaning. During the 1950s and 1960s, the Supreme Court was oriented toward expanding civil rights. It was quite concerned about protecting the rights of defendants and suspects in the criminal justice process. President Nixon, concerned about the perceived "liberal bent" of the Court appointed justices whom he believed would be more conservative on so-called "law and order" issues. Lamb, *Judicial Restraint on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 7 (S. Halpern & C. Lamb eds. 1982) [hereinafter ACTIVISM AND RESTRAINT]. *Cf.* Graglia, *In Defense of Judicial Restraint in Supreme Court Activism and Restraint* in ACTIVISM AND RESTRAINT, *supra*, at 182-83. In subsequent years, the Supreme Court moved to restrict many of the earlier criminal decisions.

93. *See* L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985); *see also* Lee, *supra* note 41, at 794.

94. *See generally* L. TRIBE, *supra* note 2, at 785-1435 (covering rights of communication, expression, political participation, privacy, and personhood).

have failed to vindicate individual rights in a given case, as some might argue, United States citizens are no worse off than British citizens are under their system. When a failure occurs in the United States and government is allowed to assume power it should not have, the political process check remains. In Britain, by contrast, there are few limits *except* the political process.

Even if one could conclude that systemic differences produce the differing positions of the United States and Britain on the Broadcasting Ban, that fact alone does not demonstrate that judicial review is either necessary or desirable. If one's objective is to give citizens greater individual rights and to place restrictions on governmental power, then the United States system seems preferable. But are there tradeoffs? Does Britain derive any compensating benefits from its system?

In the United States, the judicial review system can function in a very undemocratic manner.[95] Unelected judges invalidate actions by democratically-elected officials, sometimes in the face of public opposition. In Britain, judges would not take such a step vis-a-vis Parliament. They would allow that democratically-elected institution to impose its will.[96] They might strike down an order by the Home Secretary, but only if he exceeded his delegated authority. But is the more limited role of the British courts necessarily bad? Even if British citizens receive fewer rights under their system, cannot that result be justified as simply a permissible trade-off that occurs in allowing the democratic process to function?[97]

One interesting aspect of the Ban is that it produced little public reaction.[98] On the day the Ban was announced, opposition party members expressed concern about the wisdom of the action and about the way it would affect fundamental liberties.[99] British journalists were particularly

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95. *See* L. HAND, *supra* note 4, at 11-18; Wechsler, *supra* note 3, at 3-5.

96. *See* S.A. DE SMITH, *supra* note 5, at 73-104.

97. *But cf.* J.H. ELY, *supra* note 90 (Legal process theorists argue that certain rights are necessary to allow democracy to function.).

98. Int'l Herald Tribune, Nov. 13, 1988, at 5 ("Proposals by the government to limit freedom of the press and restrict the right of criminal defendants' to remain silent have brought little public outcry in Britain, although the government may yet face opposition.").

99. *The Times* reported much criticism the day after the Ban was announced:

> Mr Roy Hattersley, the shadow Home Secretary, warned MPs that the move would have an [sic] damaging effect at home and abroad, particularly in the United States, and had handed a propaganda coup to the IRA.
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> . . . .
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> Mr Paddy Ashdown, the leader of the Democrats and his party's spokesman on Northern Ireland, condemned Mr Hurd's decision as "ill-conceived, ill-judged and counter-productive."

upset.[100] BBC employees contemplated a one-day strike.[101] But the level of media and newspaper criticism abated fairly quickly. Our discussions with British citizens, admittedly an unscientific poll, produced some interesting reactions. University lecturers, particularly those knowledgeable about the United States system, were upset by the Ban, as were media personnel, but average citizens were apathetic, or even supportive of the Ban. Many thought that the restrictions were sensible and necessary in light of the situation in Northern Ireland. If the British Government and the British people do not find the Ban objectionable, then is it an unreasonable or undue restriction on fundamental liberties?[102] Some additional controversy erupted when the Ban was debated in the House of Commons,[103] but the pressure was not great enough to force the Government to revoke the Ban.

Times (London), Oct. 20, 1988, at 24, cols. 3-4.

100. The Ban was heavily criticized in both the press and media. *The Times* reported that:

> [B]roadcasters were united in their disapproval of the ban, but said that they would abide by the Government's decision. Mr Marmaduke Hussey, chairman of the BBC, and Mr Michael Checkland, the corporation's director-general, said it set a "damaging precedent." Mr David Nicholas, editor and chief executive of Independent Television News, said the distinction between broadcasters and newspapers was not justified.
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> The most scathing criticism came from the National Union of Journalists, which said British broadcasters were now operating under much the same conditions that applied in South Africa. Opposition MPs also condemned the move, saying it provided Sinn Fein and its military wing, the IRA, with a "propaganda coup."
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> . . . .
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> Mr Hussey and Mr Checkland said the BBC had always operated under stringent guidelines when interviewing representatives of organizations linked to terrorism.
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> "This new instruction sets a damaging precedent and will make our reporting of Northern Ireland affairs incomplete," they said . . . .
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> . . . .
>
> ITN said in a statement: "It has always been ITN policy to observe the law. We have always regarded it as our prime obligation to report the range of opinions allowed under a parliamentary democracy."
>
> "The Government still accords legal status to Sinn Fein and the UDA. These restrictions would have been easier to understand if they had been made illegal. Public opinion is more resolute than ever in its determination to defeat terrorism. This owes a lot to the full and free reporting of Northern Ireland, which has exposed terrorism for what it is."

Id. at 1, cols. 2, 3. *Id.* at 2, col. 3.

101. Times (London), Nov. 3, 1988, at 1, cols. 2, 3.

102. *But see infra* note 118 and accompanying text.

103. 139 PARL. DEB. H.C. (6th ser.) 1075-77 (1988).

V. MINORITY RIGHTS

One must, of course, question whether Britain adequately protects minorities. One of the most often asserted justifications for judical review is that it is needed to protect minorities against oppression.[104] The concern is that the majority, if allowed to have its way, will tend to oppress minority groups. In the United States the courts have protected minorities in many instances.[105]

This justification for judicial review makes a troubling statement about United States attitudes towards the democratic process. In Britain, the democractic process is supposed to provide the ultimate check on governmental abuse. In the United States, the courts are supposed to check that process.

Is judicial review really needed to protect minorities? In Britain, Parliament has shown some sensitivity to the needs of minorities. Britain has anti-discrimination laws relating to housing,[106] employment,[107] education,[108] access to goods and services,[109] clubs,[110] advertising,[111] and charities.[112] Britain also has laws against incitement to racial hatred.[113]

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104. THE FEDERALIST No. 78 (A. Hamilton); 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 103 (Henry Reeve text, P. Bradley ed. 1945) ("[T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."); J.H. ELY, *supra* note 90 (Advancing the legal process theory of judicial review based on ensuring that minorities are included in the political process); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). The central concern of United States courts' strict scrutiny analysis in fourteenth amendment equal protection cases is to root out governmental action tainted by "prejudice against discrete and insular minorities . . . which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" in our society. United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938) (Stone, J., concurring).

105. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (overturning a state law prohibiting interracial marriages); Brown v. Board of Education, 347 U.S. 483 (1954) (holding that racial discrimination in public education violates the equal protection clause); Shelley v. Kraemer, 334 U.S. 1 (1948)(prohibiting the use of restrictive covenants among property owners to exclude persons of designated races).

106. Race Relations Act 1976, ch. 74, § 21.

107. *Id.* §§ 4-9.

108. *Id.* §§ 17-19.

109. *Id.* § 20.

110. *Id.* § 25.

111. *Id.* § 29.

112. *Id.* § 34.

113. *Id.*; Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, § 5A. Of course, laws

Moreover, Britain's channel four has a special obligation to cater to interests not targeted by other channels.[114]

However, many question whether these acts have resulted in tangible gains for the minorities they were intended to benefit.[115] They assert that enforcement mechanisms[116] are inadequate, and that there have been restrictive judicial interpretations. Non-whites have had difficulty rectifying these problems, as they accounted for only 4.4 percent of Britain's population in 1985.[117] Thus, in Britain, minorities must rely on the benevolence of other groups within the democratic process to provide the ultimate check on governmental abuse.

Significant differences do exist between the United States and Britain with respect to the protection of minorities. But it is difficult to argue that the British system is necessarily worse. They provide fewer protections to minorities, but they do so to promote a competing value—allowing the democractic process to function. Can the differences between the United States and British systems be justified as within per-

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such as these tend to restrict other liberties. *See* Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161 (1987).

114. The Broadcasting Act 1981, ch. 68, § 11 provides that the IBA is required to ensure that Channel Four's programs "contain a suitable proportion of matter calculated to appeal to tastes and interests not generally catered for by ITV." *Id.*; Broadcasting White Paper, *supra* note 20, at 11, 12, 24. The government views Channel Four as a success. *Id.* at 24-26.

115. As early as 1971, critics of the Race Relations Act of 1968, focusing on the Act's weak enforcement provisions, noted that the British government had learned little from its North American counterparts about drafting effective legislation against discrimination. Kushnick, *British Anti-Discrimination Legislation*, in THE PREVENTION OF RACIAL DISCRIMINATION IN BRITAIN 233, 264-68 (S. Abbot ed. 1971). Similar frustrations have been voiced about the 1976 Act; patterns of discrimination found in 1985 were much like those of 1974, and private employers have done little to eliminate direct or indirect discrimination. See Ohri & Faruqi, *Racism, Employment, and Unemployment*, in BRITAIN'S BLACK POPULATION 61, 82-87, 91 (A. Bhot, R. Carr-Hill & S. Ohri 2d ed. 1988). Broadcasting White Paper, *supra* note 20, at 24-26. For a discussion of the protection of civil rights in Britain, see Abernathy, *Should the United Kingdom Adopt a Bill of Rights?*, 31 AM. J. COMP. L. 431 (1983).

Other parliamentary systems are not necessarily as protective of individual liberties as Great Britain. *See* J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 35 (1978). If public opinion is the ultimate check on governmental abuse, it is perhaps interesting to note the difficulties experienced by the British media detailed in this Essay. The media has unparalleled power to shape public opinion, yet, as noted above, the average citizen cares little about the Ban. If a powerful entity such as the media cannot generate sympathy for its concerns, imagine the problems faced by insular and perhaps unpopular minorities.

116. *See* Kushnick, *supra* note 115.

117. D. MURPHY, TALES FROM TWO CITIES 2 (1987).

missible bounds in the functioning of a democratic society?

VI. Concerns about the British System: The Effectiveness of Political Checks

In theory, public opinion can provide an important check on governmental abuse.[118] The reality may be something different. In the absence of a written constitution and judicial review, the British Government retains a good deal of power over the British media and press.[119] The extent to which the Government uses this power is unknown, but the mere existence of the power is troubling. To what extent does the Government use its power to limit the effectiveness of the press and media, to blunt their criticisms, and to shape public opinion? To what extent does this undermine the effectiveness of Britain's political checks?

A. *The Broadcasting Ban*

The Broadcasting Ban provides a good example of governmental media control. The Government prohibited the media from giving certain speakers direct access, offering two justifications. First, it argued that media interviews give an appearance of authority to the speaker, and that members and supporters of restricted organizations have used this status to heighten the fear associated with terrorism.[120] This justification can hardly sustain the Ban. Many of the restricted organizations are legal organizations, and some of their members are democratically elected officials. These officials might speak out on many issues that have nothing to do with terrorism, and with no intent to frighten the population. They may, for example, want to voice an opinion on some local issue (such as whether a hospital ought to be closed), or on some political matter (such as the Northern Ireland problem generally) without encouraging or promoting terrorism. Moreover, why should these officials,

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118. *See, e.g.*, M. Cappellitti, Judicial Review in the Contemporary World § 1 (1971) ("[I]n a given country political facts may provide a better check than the courts on attempts to establish majoritarian tyranny."). *See also supra* notes 73-77 and accompanying text.

119. *See* Wallach, *Executive Powers of Prior Restraint Over Publication of National Security Information: The U.K. and U.S. Compared*, 32 I.C.L.Q. 424, 451 (1983) ("The British Government has and exercises prior restraint powers against the press with no meaningful limitations . . . [T]hrough pressures, threats, and prosecutions which, taken as a whole, can only reveal a coherent Government policy for over sixty years, there has been in Britain Government censorship on defence matters and a great deal more.").

120. 139 Parl. Deb. H.C. (6th ser.) 1082 (1988) (statement of Home Secretary Douglas Hurd).

or any speaker for that matter, not have the status of the media behind them when they speak out on an issue? Why should the media not be able to use direct statements as part of documentaries on the Northern Ireland problem?

The inadequacy of the offered justification is troubling. A cynic might argue that the Government was not as worried about frightening statements as it was about controlling public opinion on the Northern Ireland issue.[121] After the Ban, the Government's views continued to receive full coverage by the media, but members or supporters of restricted groups will be covered in a more limited way. If the Government is correct in concluding that those who have direct access are accorded more respect and authority, then the Government has created for itself an advantage in its efforts to influence public opinion.[122]

The second justification offered by the Government was that members of restricted groups sometimes made offensive statements.[123] In one instance, a member of Sinn Fein appeared on television after a bombing incident. He stated that the victims "had it coming" and that the cause of Sinn Fein was just. But were these statements really in bad taste and offensive, or were they part of legitimate public debate? Moreover, who should resolve that issue? If the statements had been truly offensive, the media could have declined to show them. Furthermore, the statements if shown should have had an adverse effect on public opinion. On the other hand, if the public did not view the statements as offensive, but rather as legitimate political debate, then what was the Government trying to accomplish by banning them? Might it have been trying to manipulate public opinion by squelching dissent? The second justification would, in any event, fail to sustain such a far-reaching Ban. The Government could simply have prohibited the airing of "offensive" statements and

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121. Secretary Hurd has implicitly agreed with this statement, noting that "[t]errorists themselves draw support and sustenance from having access to radio and television, and from addressing their views more directly to the population than is possible through the press." Michael, *Attacking the Easy Platform*, 138 NEW L.J. 786 (1988). Mr. Hurd also declared that the Ban was designed to "deny this easy platform to those who use it to propagate terrorism." *Id.*

122. In addition to the Government's influence being greater because it has limited other sources of information, the voice of government, generally perceived as speaking for the populace, is a powerful means of shaping public opinion. Welch, *The State as a Purveyor of Morality*, 50 GEO. WASH. L. REV. 540 (1988); M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA 193 (1983).

123. Broadcasting White Paper, *supra* note 20, at 36.

given some guidance as to what was deemed offensive.[124]

Whether this second justification was the real reason for the Ban is questionable. Both the BBC and IBA decided, after the Home Office's letter of clarification, that broadcasting statements about terrorist incidents was permissible.[125] They could be broadcast verbatim provided they were read by someone other than the speaker, or they could be paraphrased. Broadcasters were prohibited only from allowing "direct access" or allowing a person to be shown or heard making his own statement. If the allegedly offensive statements could still be aired, then does it matter how the message is transmitted? The offensive statements still get onto the air. Perhaps statements are somewhat less offensive if the actual person making the statement is not heard.[126]

The Government might argue that the Ban's impact is mitigated by the fact that individuals are given indirect access to television and radio.[127] But, if indirect access is equivalent to direct access, why was the Ban necessary? The Government's own statements have acknowledged that the right to direct access is important.[128]

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124. For example, the United States Government has the right to prohibit certain types of obscenity. On the other hand, providing guidance as to what constitutes obscenity can be difficult. *See* Miller v. California, 413 U.S. 15 (1973)(setting out Constitutional guidelines for obscenity statutes). On offensiveness, see Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (offensiveness must be assessed under the standards of the community). Certain bans on speech deemed offensive, however, have been struck down by the United States courts. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

125. *See supra* note 34 and accompanying text.

126. The Home Secretary made this point in the House of Commons debate:

> When there is a terrorist attack and television screens carry to mourning people pictures of tears and bloodshed, it is hard for us on this side of the water to understand the outrage that is felt when, soon afterwards, there can appear on the same screens, particularly in Northern Ireland, people who, just keeping on the right side of the law, justify and glory in what has been done and threaten more of it. That is the difference between direct access and the report. It is not suprising that a member of the Royal Ulster Constabulary, a member of the UDR, or any law-abiding citizen of the Province finds it hard to understand how we can be wholly serious in our efforts against terrorism if that kind of triumphalism is acceptable.

139 PARL. DEB. H.C. (6th ser.) 1081-82 (1988).

127. Home Secretary Douglas Hurd made exactly this point when the Ban was debated in the House of Commons:

> Opposition Members continue to claim that this is a major incursion upon the right of freedom of expression. As I have made clear tonight, that cannot be so because broadcasters remain free to report the activities of those organizations and the actual words used by their representatives.

Id. at 1079, col. 1.

128. *See supra* note 22.

The Ban did not affect the print media.[129] Television and radio, however, probably have a far greater impact on public opinion than the print media because more people watch television and listen to radio than read the newspaper. In addition, television and radio can have a far greater impact because they allow the viewer or listener actually to see or hear the speaker. Indeed, that was the Government's concern.

B. *Other Media Controls*

The Broadcasting Ban might be less troubling if it were an isolated incident, but strong evidence exists that the Government has manipulated the media before.[130] Given the limited effectiveness of judicial checks, the Government has many opportunities to do so.

The BBC, which includes both television and radio broadcasting, is in theory independent. It has an independent Board of Governors, but the Government advises the Queen on, and therefore effectively controls, who should be appointed as BBC Governors. It also sets the BBC's license fee, from which the BBC derives its revenue. The IBA is similarly situated. It operates under statutory authority, and the Government appoints its members.[131]

Governmental control of the media is possible also because Britain does not have a large media. At present, only four television stations exist, and these four stations operate under a duopoly. The BBC controls channels one and two, and the IBA controls channels three and four.[132] Because of this duopoly, the Government can exercise much greater influence over the media than would be possible in the United States. Under the Broadcasting Act, it can do so directly, as it did in the case of the Ban. Moreover, the Broadcasting Act permits the Government to compel broadcasters to refrain from airing material,[133] as well as to compel them to air matter the Government wishes to have aired.[134] The Government can enforce its orders in several ways. The ultimate sanction for failure to comply with a valid direction is revocation of the license to broadcast.[135] In addition, the Government has a less drastic,

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129. The orders were directed at the BBC and IBA. *See supra* note 16 (quoting a copy of the order). The government has no authority to regulate the press. Of course, Parliament could give it that authority.

130. *See infra* notes 140-56 and accompanying text.

131. Broadcasting Act 1981, ch. 68, § 1.

132. *See supra* note 16. On proposed changes, *see infra* note 157.

133. Broadcasting Act, 1981, ch. 68, § 29(3).

134. *Id.* § 29(1).

135. *See id.* § 3(7); Telecommunications Act, 1984, ch. 12, § 7(2).

though still very potent remedy—it may ask the Crown to dismiss the BBC's Governors,[136] or it may dismiss the IBA's board members itself.[137]

The Government also exercises more subtle influence. The best example involves BBC coverage of Northern Ireland. Commentators state that the BBC has a "reference up" system whereby reporting on political violence must receive clearance at the highest level.[138] Some have asserted that Government pressures have resulted in editorial policies that do not even attempt to maintain impartiality. Reporting is expected to show "sympathy" for the official spokesman,[139] resulting in "stunted" broadcast coverage.[140] The BBC, however, denies the existence of any such system.[141]

At times the Government engages in outright intimidation. In 1985 the BBC was planning to air, in a series called "Real Lives," a program entitled "At The Edge of The Union." The program would show how two political activists of extreme and opposing views, one Catholic and one Protestant, justified their positions and how they and their families conducted their lives. The Prime Minister and the Home Secretary denounced the planned airing and pressured the BBC into temporarily withdrawing it.[142]

Britain also exercises some control over the press. A so-called "D" Notice system exists[143] under which government departments advise broadcasters and newspapers on matters that might affect national security. Technically, the system is non-statutory and voluntary, although disclosure of the information may lead to a breach of the Official Secret

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136. *See* S.A. DE SMITH, *supra* note 5, at 486.

137. Broadcasting Act, 1981, ch. 68, sched. 1. Experience in the Irish Republic suggests that such a course is not unthinkable. In November 1972 the Government dismissed en bloc the board of RTE, the equivalent of the Board of Governors of the BBC, for refusal to comply with a ministerial direction. *See* S.A. de Smith, *supra* note 5, at 486.

138. *See* G. HOGAN & C. WALKER, POLITICAL VIOLENCE AND THE LAW IN NORTHERN IRELAND 158 (1989).

139. *Id.*

140. *Id.*

141. The Britsh government also undertook a great deal of censorship during the Second World War. *See id.* at 157. *See also* Taylor, *Censorship in Britain in the Second World War: An Overview, reprinted in* A.C. DUKE & C.A. TAMSE, TOO MIGHTY TO BE FREE (1987).

142. *See* C. WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW, xi (1986).

143. For a description of how the "D" Notice System operates, *see* Wallach, *supra* note 119, at 445-59.

Acts[144] in an appropriate case.[145] More subtly, even if no offense occurs, an editor who defies the system may find that confidential information formerly supplied to him by official sources ceases to become available.[146]

Some people, including those in high places, might not view Government manipulation of the media as necessarily bad. There are those who believe that the press and media have an obligation to support Government policies. Lord Annan, Chairman of the Committee on the Future of Broadcasting, has argued that the media owes an obligation to the state.[147] He believes that when the press reports on issues concerning the state, such as Northern Ireland, the Falklands War, or the security services, it should support the state. He criticizes those who disagree by questioning whether they "ever thought about what the first initial of the BBC stands for . . . ."[148] It must be emphasized that Lord Annan's views are not universally shared. Others have soundly criticized them,[149]

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144. Official Secrets Act 1911 to 1939, 2 & 3 Geo. 6, ch. 121, § 2. *See, e.g.*, Official Secrets Act 1920, 10 & 11, Geo. 5, ch. 75, § 3 (interfering with officers of the police).

145. Wallach, *supra* note 119, at 448 & n.241, 250.

146. *Id.* at 449.

147. Annan, *The BBC: Its Duty to the State*, Sunday Telegraph (London), Nov. 20, 1988, at 25, cols. 1, 2.

148. *Id.* at col. 2.

149. Christopher Dunkley, a journalist, penned the following rebuke to Lord Annan:

> This [Lord Annan's argument], surely, is profoundly and dangerously wrong. Not only can the BBC remain impartial under such circumstances (meaning editorially impartial, and not implying that individual journalists should feel no sorrow or pain at the loss of their countrymen) but it was just such impartiality which gained the BBC its worldwide reputation for honesty and dependability during World War II. Throughout that war the BBC studiously eschewed "our troops," and "our ships," and behaved, as far as humanly possible, like a neutral onlooker.
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> It is precisely those times when "Monarchy, Parliament, Judiciary, Ministries" are most unanimously in agreement on some urgent matter of national policy—opposing a national strike, sending troops into Suez, preparing a South Atlantic task force—that the citizen of a free country is most in need of the journalist who stands aside from the herd, turns his ear from the chorus, and offers a report which is, as nearly as possible, wholly impartial. If the stance necessary to achieve that looks "arrogant," so be it.
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> . . . .
>
> As for the rhetoric over the first initial of BBC, that takes us up some very murky alleys. Should journalists in the SABC endorse apartheid because of their initials? Was it the duty of all German broadcasters to support democratically-elected Adolf Hitler? If British journalists (especially those employed by the non-commercial BBC which is, remember, Britain's primary source of broadcasting) do not take unto themselves the right to adopt a viewpoint outside the boundaries of the State, then the British citizen may easily find himself in the same position as

but, given his position, Lord Annan's views are quite significant.

To the credit of the British press and media, however, they seem to retain a great deal of independence and impartiality. In 1988 the Government tried to pressure the IBA into initially withholding a program entitled "Death on the Rock," a documentary about British soldiers who killed three IRA members on Gibraltar. The IBA rebuffed the Government.[150] For its part, the BBC may be intimidated by the Government on occasion and may be prohibited from showing certain programs, but it is not a propaganda arm of the Government. The BBC, as well as other radio and television networks, do air views critical of the Government and its policies. A notable example involves the BBC's coverage of the Falklands War. Members of the Government criticized the BBC coverage for its failure to take a partisan approach in support of the British government. They chastised the BBC for not referring to troops and ships as "our" troops and ships, but simply as "British" troops and ships.[151] The BBC even raised questions as to whether the Government's account of events was entirely accurate.[152] Moreover, in response to the current Broadcasting Ban, BBC employees threatened to strike for one day. Both the BBC and IBA protested the Ban.[153]

Nevertheless, the British Government's ability to control the media is troubling. A government that can control the press can manipulate public opinion, and a government that can manipulate public opinion can more easily impose its will. This is particularly true in Britain, where the primary check on governmental abuse is political. The fact that Britain has a very entrenched government further compounds the situation. The Conservatives have been in power since 1979, and they now hold a substantial majority in the House of Commons. There is every reason to believe at this time that they will retain power for the foreseeable future. Such a government may be more able to intimidate the media, or to impose outright restrictions like the Broadcasting Ban, than a government with a smaller majority.

Perhaps proposed changes in the British broadcast system will allevi-

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the subjects of totalitarian regimes: supplied only with those bits of information which suit the State. In other words, propaganda.

Dunkley, *Whose State Is It Anyway?*, Financial Times (London), Nov. 23, 1988, at 31, cols. 1 & 2.

150. Glencross Interview, *supra* note 27.

151. *See, e.g.*, Annan, *supra* note 147, at col. 2.

152. *Id.*

153. *Cf.* Clements, *Britain: Main Irish Nationalist Party Banned From Television*, Interpress Service, Oct. 19, 1988.

ate these problems.[154] At present, there are only four television stations in Britain. In November 1988 the Home Office issued a proposal that would dramatically increase the number of stations,[155] some of which would be based outside Britain.[156] The Government will have difficulty maintaining tight control over this larger number of stations and their news coverage, but the Government believes it will be able to maintain its control[157] and to restrict media news coverage as it did in the case of the Broadcasting Ban.[158]

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154. Broadcasting White Paper, *supra* note 20, at 1-2 (The government's proposals include authorization of a new channel, restructuring of ITV, more news coverage on ITV, a new regime for cable and microwave transmissions, more direct satellite broadcasting channels, liberalization of access to funding for all television services, an increased role for independent producers in program making, deregulation and expansion of independent radio, and reform of private sector transmission arrangements. Possibly more restrictive governmental proposals include subjection of all U.K. television and radio services to "taste, decency. and balance" obligations, statutory authorization for the Broadcasting Standards Council and removal of the broadcasting exemption from obscenity legislation.).

155. The Government proposes to create a fifth national channel. *Id.* at 1. It also proposes to develop "a new flexible regime for the development of multi-channel *local services* through both *cable* and *microwave transmission* . . . ." *Id.* (emphasis in original).

156. Actually, British viewers presently receive some signals generated outside of the United Kingdom. However, they must have an expensive satellite dish to do so. The Government proposes to allow this situation to continue. "Viewers will continue to be able to receive *other satellite services* directly, including those from the proposed medium-powered Astra and Eutelsat II satellites . . . ." *Id.* at 1 (emphasis in original). There are British satellite stations as well. *Id.* Technically, the Ban probably does not encompass the satellite television broadcasters and their cable systems. Section 44 of the Broadcasting Act of 1984 incorporates the power to make banning orders to the Satellite Broadcasting Board, but, at the time of the Ban, the Board had not yet been established. Although no equivalent power exists to make banning orders to the Cable Authority, on the day after the Home Office Order, the Authority issued a similar direction to cable licensees. *See* Times (London), Oct. 22, 1988, at 11, col. 3 (Letter to Editor from Chairman of the Cable Authority). The net effect, therefore, is that the Ban potentially covers all broadcasting into the United Kingdom. *See* Michael, *supra* note 121, at 787.

157. The Government concludes that, with respect to stations located outside of Britain, "[s]teps will be taken to ensure that the programme content of all such services is supervised." Broadcasting White Paper, *supra* note 20, at 1.

158. The White Paper provides that:

> It was partly with the power and impact of television and radio in mind that the Government decided in October 1988 to direct the BBC and the IBA not to broadcast direct statements by representatives of terrorist organisations, or their apologists, connected with Northern Ireland. Such appearances had caused offence to many viewers and listeners, and had also provided a public platform to propagate terrorism. It was right that this should be ended. The national interest requires

It is important to emphasize that most examples of governmental media control relate to Northern Ireland. The situation there is unique and difficult. But the instances reveal how the Government can, and does, control the media. It is difficult to know how often or how effectively the Government manipulates media coverage on other issues.

C. *Governmental Restrictions on Information Gathering*

The British Government also controls the media and the press through restrictions on their ability to gather information.[159] In the United States, the press and media can gain fairly easy access to much government information under the Freedom of Information Act.[160] No comparable act exists, however, in Britain; the Government can withhold or release information as it sees fit.[161] Even so, officials can be accomodating, Home Office officials provided us with copies of official documents relating to the Broadcasting Ban without inquiry into our position on the Ban. But it refused to divulge a copy of the clarification letter on the Ban's scope.[162]

The Government can also control the availability of information under the Official Secrets Act of 1911,[163] which makes it a crime to disclose

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that such powers should be provided to the Government and for this reason it is proposed that they should be continued in any future broadcasting legislation. Such arrangements are compatible with the proposals to introduce a less regulated framework for broadcasting.

Id. at 36.

159. *See generally* P. BIRKINSHAW, FREEDOM OF INFORAMTION: THE LAW, THE PRACTICE AND THE IDEAL (1988).

160. 5 U.S.C. § 552 (1982). R. BOYLE, ARTICLE 19: INFORMATION, FREEDOM AND CENSORSHIP (1988).

161. In Britain, getting access to official information is often quite difficult. One recently published book summarized the situation as follows:

> A counterpart of the virtues of impartiality and anonymity is the occupational vice of secrecy, of which the civil service is continually accused despite the vast number of informative publications which it issues. The official reluctance to allow the public to see departmental papers of any kind had serious consequences for the law as to the production of documents in court, and it retarded the valuable reform of publishing the reports of inspectors after public inquiries. It is only on very exceptional occasions that there is any public inquiry into the actions of named officials, as happened in the Crichel Down affair of 1954 and in the inquiry into the Vehicle and General Insurance Company's collapse in 1971. Such inquiries, which necessarily involve breaking the normal rules of anonymity, can only act as a further spur to official reticence.

H.W.R. WADE, *supra* note 44, at 62-63 (footnotes omitted).

162. *See supra* note 28.

163. Official Secrets Act 1911, 1 & 2 Geo. 5, ch. 28, *as amended by* Official Secrets

information from official sources "regardless of the question whether the public interest really demands secrecy."[164] This Act has had only limited effect, however, as the Government has had difficulty obtaining convictions under it.[165]

The Government also imposes "confidentiality" obligations on some employees, and it has tried to use these obligations to stifle the disclosure of information. The most celebrated example involved the book *Spycatcher*.[166] The British Government's efforts to suppress this book began in 1985 and did not conclude until late 1988.[167] The book contained the memoirs of Mr. Peter Wright, who was a member of MI5, Britain's equivalent of the CIA. The Government believed that disclosures made in the book would damage both MI5 and national security.[168] Accordingly, it engaged in extensive efforts to prevent publication and distribution of the book. It first brought suit in Australia but lost.[169] It then contemplated suit in the United States when Wright decided to publish the book there. Advised that the first amendment to the United States Constitution doomed any such suit, the Government abandoned this idea.[170] As a result, the book was published. Indeed, by August 17, 1987, some 215,000 copies had been sold. Thereafter, the book topped the best seller list for some time.[171]

Throughout these events, and even afterward, the British Government went to great lengths to prevent the British people from gaining access to the book. It sought and obtained injunctions against the *Observer* and *Guardian* newspapers to prevent publication of the book's contents.[172] When the *Independent*, *Evening Standard*, and *London Daily News* published some allegations from the book, the Government had them held in contempt under the *Observer/Guardian* injunctions and im-

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Act 1920, 10 & 12 Geo. 5, ch. 75, *and by* Official Secrets Act 1939, 2 & 3 Geo. 6, ch. 121.

164. *See* H.R.W. WADE, *supra* note 44, at 63.

165. *Id.* at 63-65. The Franks Committee reporting in 1972 described section two as a "catch all" and a "mess." DEPARTMENT ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911, 1972, CMND. NO. 5104, §§ 17, 18 (1972)). The Act was said to have created 2314 separate offenses. *Id.* at 254.

166. P. WRIGHT, SPYCATCHER (1987).

167. Attorney Gen. v. Guardian Newspapers, Ltd. [1988] 3 All E.R. 545, 550-58 (1987) (Scott, J., majority opinion for the Chancery Division). The House of Lords adopted this statement of facts [1988] 3 All E.R. 638.

168. M. TURNBULL, THE SPYCATCHER TRIAL 24 (1988).

169. [1988] 3 All E.R. 545.

170. *See* ECONOMIST, Aug. 8, 1987, at 49-50.

171. TIME, Aug. 17, 1987, at 55.

172. [1988] 3 All E.R. 545, 552-53.

posed substantial fines. The Government did likewise when the *Sunday Times* published excerpts from the book at a later time.[173] The Government decided that trying to prevent importation of the book into Britain would be impractical and unfeasible, but it did send letters to booksellers telling them they were precluded from displaying (and, presumably, selling) the book.[174] The Government also tried to prevent public libraries from making the book available.[175]

The matter ultimately worked its way up to the House of Lords, which refused to sustain the Government's position.[176] It held that the *Guardian* and the *Observer* were entitled to report and comment on the substance of the allegations made in *Spycatcher*.[177] It also held that the *Sunday Times* could serialize the book.[178] Lord Keith of Kinkel concluded that, in order to stop publication, the Government had to show that publication would be harmful to the public interest.[179] But, in view of the widespread publication abroad, the Government was unable to meet its burden.[180]

The *Spycatcher* episode offers much insight into the British system. The press, far from being intimidated by the Government, went to great lengths to avoid governmental controls. When the *Sunday Times* published the first part of its serialization of the book, it did so knowing full well that the Government would disapprove. It also knew, in view of the Government's prior efforts to hold the *Independent*, *Evening Standard*, and *London Daily News* in contempt, that it was risking a contempt charge. Nevertheless, the editors decided to publish the excerpts anyway. The editors kept their intentions silent until it was too late for the Government to prevent publication. They even printed the first edition of the paper, which came out on the prior evening and which was likely to be perused by Government officials, without the serialization so that the Government would not be alerted and try to seek an injunction. Accolades go to the other newspapers as well. They all fought the Government in court and produced the legal victory.[181]

It is also important to note that it was the British courts that ultimately refused to prevent publication of the book in Britain. But the

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173. *Id.*
174. *Id.* at 558.
175. *Id.*
176. *Id.* at 638.
177. *Id.* at 643, 647, 654, 665.
178. *Id.* at 643, 647-48, 655, 667.
179. *Id.* at 642.
180. *Id.*
181. *See id.* at 545, 550-58.

British courts, though deserving some praise, also deserve criticism. They prevented publication of the book for many years. The first injunctions were issued in 1985 and were not dissolved until 1988.[182] In the interim, British courts held many newspapers in contempt.[183] Indeed, they held many newspapers in contempt that were not parties to the suit in which the injunction was issued, who were not named in the injunction, and who did not collaborate with the named parties. In addition, it is unlikely that the British courts would have dissolved the injunctions had *Spycatcher* not been published elsewhere first. It was because the Australian courts refused to prevent the publication, and because the British Government assumed that the United States courts would have refused as well, that the British courts permitted the book to be published in Britain.[184]

The decision does not mean that the Government is prevented from acting similarly again, only that since in this case the information had so effectively entered the public domain, a further injunction could serve no valid purpose. Indeed, the *Spycatcher* affair has not deterred the British Government from taking similar actions. After the decision, the Government announced that it was blocking distribution of the December 1988 edition of *Harper's Magazine*.[185] The similarities to the *Spycatcher* episode were uncanny. Like *Spycatcher*, the magazine contained the revelations of a former MI5 agent. Once again, those outside Britain had free access to the information, but the Government wanted to deprive Britons of access.

D. *Defamation Laws*

The effectiveness of both the press and the media may be severely restricted, as well, by Britain's defamation laws. Britain provides only limited protection to the press and media when they criticize government officials. In order to recover in an action, a plaintiff need only show that the press or media made defamatory statements that referred to him.[186] In theory, an additional requirement exists that the statements must have been maliciously published. But this requirement is, in the words of a leading commentator, "purely formal."[187] "Though the word [mali-

182. *Id.*

183. For a list of the various opinions rendered, see *id.* at 545.

184. *Id.* at 638-68.

185. Int'l Herald Tribune, Nov. 24, 1988, at 2, cols. 5 & 6.

186. *See* W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 302-21 (W. Rogers 12th ed. 1984) (essentials of defamation generally) [hereinafter WINFIELD & JOLOWICZ].

187. *Id.* at 315.

ciously] is usually inserted in the plaintiff's statement of claim, no one takes any notice of it at trial except for the purpose of inflating damages where there has been spite or deliberateness."[188]

The media and press do have a privilege of fair comment.[189] But the scope of this right is severely limited; it protects only assertions of opinion, and not assertions of fact.[190] This is an important distinction. Suppose, for example, the press believes that the Government may have been involved in illegal or improper conduct. If the press proceeds cautiously in gathering its evidence and accuses government officials of misconduct, it still might be held liable for defamation. The situation is compounded by the absence of a Freedom of Information Act[191]—this limits the ability of the press and media to gather information and makes confirming the accuracy of information difficult. Britain recognizes privileges other than fair comment, but virtually all of them require that all reporting be fair and accurate.[192]

British politicians have been quite successful in their efforts to bring defamation actions against the press and media. In 1987 a senior conservative politician, Norman Tebbitt, brought suit against the BBC for attributing to him the statement, "Nobody with a conscience votes Conservative."[193] He also brought suit against Mr. Lawrence Knight, President of the National Union of Mineworkers, for making the same statement.[194] Against the BBC, Mr. Tebbit received £2,000 plus costs.[195] In 1986 five Conservative Members of Parliament brought suit against the BBC for allegations made in its *Panorama* program.[196] The allegations linked the Members of Parliament to extreme racist groups that were allegedly trying to infiltrate the Tory party.[197] In the program, the BBC used pictures of the National Front, of Nazi regalia, and of music associated with fascism.[198] The BBC settled the suits. Two Members of Parliament received approximately £300,000 (about $540,000) in damages

188. *Id.*; *Cf.* New York Times v. Sullivan, 376 U.S. 254 (1964) (U.S. treatment of libel outlined).

189. WINFIELD & JOLOWICZ, *supra* note 186, at 324-33.

190. *Id.* at 324-25.

191. *See supra* note 64 and accompanying text.

192. WINFIELD & JOLOWICZ, *supra* note 186, at 333-45.

193. Times (London), Dec. 17, 1987, at 2, col. 2.

194. Times (London), Dec. 18, 1987, at 5, col. 8.

195. Times (London), Dec. 17, 1987, at 2, col. 2.

196. Times (London), July 20, 1986, at 1, col. 4.

197. *Id.*

198. Times (London), Dec. 14, 1986, at 2, cols. 7, 8.

and legal fees and an apology.[199] The other Members of Parliament received undisclosed amounts.[200]

Perhaps the most important defamation action in Britain was a suit by Mr. Jeffrey Archer against *The Star* newspaper. Mr. Archer, a famous author and playwright, was also a Deputy Chairman of the Conservative Party.[201] *The Star* alleged that he had paid a prostitute £70 to have intercourse with him.[202] Mr. Archer sued *The Star* and won £500,000 ($850,000).[203] This amount was a record for a defamation action in Britain.[204]

In addition to being susceptible to a civil action, the press and media may be criminally prosecuted for libel. The elements of the crime differ from that of the tort[205] in certain respects disadvantageous to defendants. For example, whereas truth is a complete defense in tort, the defendant in a criminal prosecution must prove not only that the statement is true but also that the public would benefit from publication.[206] Also, uncertainty exists as to whether the defense of fair comment applies in a criminal trial, although it would be a defense in a tort action.[207] To some extent, the risk of vexatious prosecution under this common law offense is mitigated by the requirement that the leave of a judge is necessary before a newspaper may be prosecuted,[208] but the offense has nonetheless been used in recent years to prosecute the press. For example, in 1976 a well-known public figure initiated a criminal prosecution against a satirical magazine that he alleged had seriously defamed him.[209]

Assessing the impact of these suits and judgments is difficult. It is reasonable to expect that the press and media, faced with the possibility of substantial damage awards, will be somewhat inhibited in their coverage of governmental policies and governmental officials. But there is no way

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199. Times (London), July 20, at 1, col. 4.
200. *Id.*
201. Times (London), Mar. 21, 1987, at 2, col. 1.
202. Times (London), July 25, 1987, at 1, col. 4.
203. *Id.*
204. *Id.*
205. J. SMITH & B. HOGAN, CRIMINAL LAW 822 (6th ed. 1988).
206. *See id.* at 824.
207. This is the effect of section 6 of the Criminal Libel Act 1843. *See id.* at 824.
208. Law of Libel Amendment Act 1888, 51 & 52 Vict., ch. 64, § 8.
209. Goldsmith v. Pressdram Ltd. [1977] 1 Q.B. 83(1976), [1977] 2 All E.R. 557. In modern times, a newspaper has also been successfully prosecuted for the common law offense of blasphemy. Whitehouse v. Gay News Ltd. 1979 App. Cas. 617 (editor was fined £500 and the newspaper £1,000).

to be sure that these suits have had the effect. Many British newspapers are sensationalist and seem to be unaffected by the threat of liability. Perhaps the press regards the possibility of suit as simply a cost of doing business. Perhaps sufficient competition exists between newspapers and media organizations that they feel they must be aggressive, notwithstanding the threat of libel suits, in order to survive. But how many large damage awards can a press or media organization pay out? Expected changes in defamation law designed to limit the size of judgments may alleviate this problem. But at present, British defamation law may pose some constraints on the British media.

VII. CONCLUSION

The fact that the British do not have a system of judicial review raises interesting questions about the need for judicial review in the United States.[210] On first glance, one might conclude that Britain functions quite well without judicial review. Britain is a relatively free society. Britons have most rights that United States citizens deem fundamental. But a closer analysis reveals that Britain constrains individual liberties, and controls the press and media, much more than is done in the United States.[211]

There is no way to know for sure whether the discrepancy between the level of rights provided in Britain and the level of rights provided in the United States is attributable to the absence of judicial review in Britain. No empirical tests have been performed, and it is doubtful whether a valid test could be done. What is clear is that the British system gives politicians broad control over fundamental rights, including freedom of speech and of the press, subject only to political constraints. Politicians may be less protective of individual rights. Faced with difficult problems, politicians may see a solution in the restriction of civil liberties. Moreover, politicians may wish to repress a critical press or media. An independent judiciary, backed up by a written constitution and judicial review authority, might be more protective of individual liberties.[212] This has been the United States experience.

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210. The debate over the need for a British bill of rights has produced a great deal of literature. In particular, see M. ZANDER, *supra* note 69, at 268-79; M. ZANDER, A BILL OF RIGHTS? (2d. ed. 1985); [hereinafter ZANDER, BILL OF RIGHTS]; Lee, *supra* note 41.

211. "Freedom of speech in England is at most a negative concept—the residue of freedom which is left after subtracting the controls of libel, contempt of court, official secrecy legislation, confidentiality, and so on." Bevan, *supra* note 13, at 63.

212. For British concerns over the expanded judicial power that would result from a bill of rights, see ZANDER, BILL OF RIGHTS, *supra* note 210, at 3-4.

Britain's approach, despite its deficiencies, is not without its advantages. Britain limits judicial intervention out of respect for the democratic process. In a representative democracy, this is arguably desirable. In theory, if the people dislike what the Government is doing, they can vent their concerns through the medium of public opinion or at the polls. In the United States, there is a distrust of too much democracy. The Framers built checks into the Constitution to limit the democratic process.

Moreover, the United States judicial review system has its disadvantages. Many believe that the judiciary goes too far; in the guise of protecting constitutional rights and fundamental freedoms, the judiciary imposes its will, thereby displacing legitimate legislative determinations.

In the final analysis the British system does not offer convincing proof that judicial review is unnecessary. The absence of review gives rise to many new and troubling problems. In Britain, the only effective check on governmental abuse is public opinion, with ultimate resort to the ballot box.[213] But whether this check can effectively control governmental abuse or protect individual rights is questionable. The British Government has the means to limit and control the flow of information to the people, and therefore can limit or control the impact of public opinion on important issues. Legitimate questions arise regarding whether the British press and media would develop, or be allowed to develop, the story of a governmental scandal such as Watergate. Newspaper development of that story took place over a long period of time. Early articles were based on anonymous sources as well as on speculation and innuendo. Confidentiality of sources was critical if reporters were to obtain further information. Would British broadcasters have been willing to make allegations based on so little evidence? Would the media and the press have feared civil and criminal defamation actions? Moreover, even if the press and media had come forward with such allegations, would the Government have tried to intervene with "D" notices, injunctions, intimidation, or orders not to report?

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213. This, of course, assumes that the public knows of the governmental abuse, i.e., that the press tells the public when the Government forces it to withhold information and that the public perceives and is able to respond to the threat posed to individual rights. "[T]he defense of press freedom in the United Kingdom must always invariably rely upon self-advertisement from the press itself. This normally takes the form of . . . pious editorial indignation . . . ; such indignation wins few committed allies for reform." Bevan, *supra* note 13, at 68-69.