

COMMUNICATIONS
FORUM

**THE FIRST AMENDMENT:
A PROTECTION THAT NEEDS PROTECTION ?**

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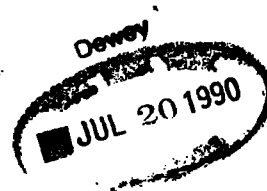
Seminar Notes

MASSACHUSETTS INSTITUTE OF TECHNOLOGY
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This session of the Communications Forum was dedicated to the debate of an important theme underlying the basis of communications: the First Amendment. Jay Lucker, MIT Libraries opened the session by reminding the audience the text of the First Amendment, first article of the Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridgement in the freedom of speech or of the press, or of the right of the people peaceably assemble and petition the government for redress of grievances."

Lucker remarked that the First Amendment has become a rallying point for a variety of issues regarding free speech, free expression, and free press. Some of these ramifications range widely in public and private sectors including flag burning, the Salmon Rushdie case, the issue of arts and public funding (National Endowment for the Arts imbroglio with the Corcoran Gallery Mapplethorpe exhibit), National Endowment for the Humanities revision of final recipients of its grants, and labelling of rock videos.

The first speaker was Professor Louis Menand III, former member of the Department of Political Science, MIT, and Board Member, Massachusetts Civil Liberties Union. Menand started by noting the sparse and concise quality of the Bill of Rights 18th century language. Next, he stated that in his view the First Amendment, on a global scale, is alive, but it is not completely well, albeit improving. In 1989, steps were taken towards an implementation of many of the parts of the first amendment. The prime issue of 1989 is certainly the attempt of Chinese young people to wrest some control of Chinese political affairs from the rigid, totalitarian Chinese government. What happened in Tianmen square is instructive. The question, as raised by Vaclav Havel, is where did they learn about civil disobedience and passive resistance to authority? It may well be that the ideas enshrined in the Bill of Rights, in the US Constitution, in the French Declaration of Human Rights have found their way into very repressive regimes.

Menand then reminded that much of what is taking place in Eastern Europe is linked to the last two provisions of the First Amendment: the right of the people to assemble and to petition the government for redressing grievances. And in Eastern Europe these rights have been denied for forty years. Perhaps, an answer to the above question is to be found in Havel's speech to Congress in which he said that the US Constitution and the Bill of Rights are the symbols all have looked to.

Next Menand went through the series of occasions since the Second World War when the world addressed the French Declaration of Human Rights and the US Bill of Rights. These range from the 1948 United Nations adoption of the Universal Declaration of Human Rights to the 1952 European Community adoption of the Treaty of Rome and its Code of Human Rights to the 1956 United Nations Convention on Civil and Political Rights to, finally, the 1975 Helsinki Conference's third basket dealing with human rights- right of speech, right of publication, right of people to move across borders, right of worship, and of many others. It was this basket that attracted a lot of attention in Eastern Europe, notably in Czechoslovakia, where the Charter of 77 had Havel among its leaders. Additionally, in 1978 there was an Inter-American Convention on Human Rights.

On the good side in the United States, after several years of relapse since the passing of 1952 when the McCarthy Act provided for the opportunity for the government to prohibit people entering the United States whose ideas might be subversive. Under the leadership of Barney Frank Congress passed and the president has assigned a bill that repeals those provisions of the McCarthy Act. **Menand** believes that with this kind of movement things in the United States are looking better.

Shifting the focus of his presentation, **Menand** commented that it is instructive to make an analogy with of the Bill of Rights with the title of a book by a Yale professor, "The System of Freedom of Expression." It is instructive to think of the Bill of Rights as part of a system of government in the United States, all of whose parts tend to fit together. This system requires among other things that an opportunity to respond to what it is that people feel. In 1800 the party system came into being, and we looked historically at it as a major way by which the people's view would be made known. In addition to those mechanisms, the capacity to speak and the capacity to write were crucial. And in our day even more crucial. New modes of communication brought about the electronic revolution are crucial to democracy. Citing Orwell's 1946 essay on "Politics and the English language," **Menand** made the point that the decline of a language may ultimately political and economic causes, reinforcing the original causes. In connection to that, **Menad** referred to another speech by Havel where he started with "In the beginning was the word." Putting Havel's comments in 1989, we realize that words, language, writing are crucial for a democracy functioning.

Focusing on a more local level, **Menand** picked on Justice Holmes statement in the later part of the 19th century, that we live by symbols. That is clear. The problem is that sometimes the symbols take stand for the thought, they are shortcircuited ways for understanding rather complex phenomena. Three examples of symbols that may hide more than they reveal. First, the 1960s "war on poverty". It is a little disturbing that we employ military metaphors to describe social phenomena. More recently, there was Nixon's "war on cancer" and just now Benett's "war on drugs." Second, during the 1988 campaign codes again came to the fore, codes which were powerful because of the way in which television was able to address those codes. These were: ACLU, which suggested something no very good; Willy Horton, a code covered in a complex body of penological code but short circuited in a sleazy manner on television; and finally "welfare magnet", a very powerful symbol.

The granddaddy of them all in the 1988 campaign was the flag. Bush found the flag a convenient symbol that could be extended through the extent of his campaign. However, there are words, there are symbols and there is also the question the depth of thoughts behind it. Flag salute for schoolchildren cases have a long history dating back to the New York's state 1898 law. Important developments took place in the 1930s, following the passage of flag salute acts in several states. A 1940 Supreme Court decision led to a spread of vigilante violence against Jehovah Witness. The decision was overturned in 1943, led by Justice Jackson, ensuring that you do not loose your civil liberties when you enter a school hall. After that decision things on the flag front were quiet until the Vietnam era, when some litigation appeared. In general, the courts approved of what came to be known as symbolic free speech. Until in 1977, the Commonwealth of Massachusetts passed a bill which required teachers to administer the oath of allegiance to the flag at the beginning of

each school day. However the bill was never signed by the governor Michael Dukakis, upon recommendation from his legal advisors. In 1987, the Bush crowd used this refusal to sign a bill for the flag, accusing Dukakis of lack of fidelity to the needs of people to have a sense of patriotism and national unity.

Behind these cases, **Menand** noted there is an incredible amount of political theory which people have to try to understand even if they don't accept with respect to images, to acquisition of beliefs, and to the usage of language. The 1988 Supreme Court decision on the Texas case on the burning of the flag protected the rights of expression of the individual. Curiously, immediately after this decision and for the first time ever in American history the President suggested a constitutional amendment to avoid this type of things to happen. In the end Congress was able to prevail and fashioned a bill that did not deal with the question of intent but prohibited desecration of the flag by burning. Within hours of the bill's signing by the President a new case erupted in Wisconsin, and about it, just recently the Supreme court said that the bill was unconstitutional.

Concluding, **Menand** stated that First Amendment situations bring about a lot of emotion, sloppy thinking, a lot of patriotism, a dose of religious fervor as well as disbelief. It is thus necessary to think more clearly about what it is the first amendment, what does it mean, and how citizens relate to it.

The following speaker was **John Shattuck**, vice-president for Government, Community and Public Affairs at Harvard University, senior research associate at the Kennedy School of Government, and lecturer at the Harvard Law School.

Shattuck began by commenting on the dynamics of Congress and the Presidency in relation to the flag burning issue. What is curious is the stampede of Congress members around the issue without caring much about the serious damage on the Constitution knowing that the courts would bail them out. Unfortunately, that is not always the case.

Shattuck's presentation explored the issue of freedom of information, in its broadest context first, and then particularly in relation to universities and centers of research. First, **Shattuck** talked about where it all began and how freedom of information became a constitutional tradition in the United States. The tradition of public access to the government precedes the Constitutional Convention. Constitutional critics would contend that the Constitutional Convention itself was closed, but what emerged out of it was a document that it was only adopted after exhaustive public debate unparalleled up to that point in history. Within a year of the Constitutional Convention, twelve of the states had held ratifying conventions and conducted public discussions about principles of freedom of speech and the constitutional underpinnings of the government. However, before the constitution was ultimately ratified there were a number of clear statements by states that an obligation should be imposed on Congress in two very significant areas: 1- publish information on taxing and spending activities; 2- adoption of a Bill of Rights with the First amendment at its heart. For the early part of the country's history all of that remained a lively historical debate but not of great expression at the time. Towards the end of the nineteenth century two important developments occurred. First, the creation of a Bureau of Labor Statistics to collect economic and social welfare data and to provide regular information from the

agencies to the public about the " material, social, intellectual and moral prosperity of the work force." Second major late nineteenth century development was the creation of the federal depository library system to provide a regular flow of information free of charge to the public. That has grown today to a network of over 1,400 public and academic libraries all over the country which are a crucial part of the government's freedom of information apparatus.

At the time of the New Deal and the enormous growth of government in all its aspects we also see a proliferation of government records. At the time, Congress twice rejected efforts to impose an official secrecy policy on the freedom of information apparatus, rejecting the notorious British-style official secrecy act.

Then, during World War II and in the post-war period, the whole national security apparatus began to develop, running counter to the tradition described above. A system of classification of government documents relating to national security emerges, loyalty security programs of the McCarthy period appear, and the information collected through these means becomes the basis through the Cold War of large-scale surveillance of citizens by the FBI and the CIA. There is also the largest expansion of the Executive war making and foreign policy powers and the creation of the national security agency.

Despite all of that, or because of it, as the 1970s arrive and political crisis of the Watergate era call into question much of this apparatus, there is renewed interest in a powerful movement for freedom of information. Some of these developments are the results of the Freedom of Information Act and its 1974 amendments, the government sunshine laws, narrowing of the classification system, enormous pressure from the press and public for all kinds of government information which is generally made available through the FOIA in the late seventies, civil rights enforcement, labor-business regulations, economic planning, environmental protection, consumer protection, monitoring of government ethics, safety regulations, etc.

Finally, paralleling to all of these developments in the late seventies there is the great technological revolution in information processing which makes it feasible to produce and circulate more information. It appeared that at the end of seventies and early eighties the principles of freedom of information were working fine.

Shattuck, however argued that this is not entirely so, particularly in some critical respects. During the last decade, there has been a very strong regression. To sustain his point, Shattuck focused on freedom of information at universities.

We often take this topic for granted. But there are many outside pressures, particularly in name of national security, to limit all kinds of scientific and technical information that is important to any academic enterprise. Not a new issue for universities. It goes back at least to Harvard's president James Bryant Conant's decision some 40 years ago to ban classified research at Harvard after World War II. There were three aspects to this decision: 1- some secrecy might be appropriate for governments but not for universities; 2- secret research undermined the basic values of scholarship ; 3- the most controversial, total ban on classified research on campus was so important that it outweighed freedom of individual scholars to conduct classified research.

MIT has not proceeded in the same way. It has set up Lincoln Lab to conduct classified research. It is widely agreed that more secrecy on campus is not good. However, secrecy on campus is on the rise as pressures mount on universities to accept even more restrictions on the communication of science and technology. Practical considerations often cited are: S&T can create unprecedented and intangible dangers, the gap between pure science and applied technology is shrinking everyday and most technology has a clear and immediate economic or even military utility; scientific discoveries are often produced with the direct involvement of the government as the sponsor, therefore some degree of restriction is appropriate.

Some examples resulting from this climate are: FBI surveillance of scientific and technical libraries (Library awareness program); restrictions on unclassified papers at scientific and technical meetings (dramatic one being the Society of Photo-Optical Engineers 1985 conference); instances of scholars and universities having to obtain license under export-control laws to share unclassified technical information with foreign nationals; debate over foreign nationals access to supercomputers.

All of these developments have been occurring under a theory put forward by the government called the mosaic theory of information. This theory says that there are all kinds of bits and pieces of technical data that in and of themselves may not be particularly damaging to national security, but when put together in the aggregate can be very damaging. The most dramatic example of that is the publication of the blueprints for the H bomb in The Progressive Magazine.

The benign and prevailing view of all these restrictions is that they are just minor adjustments to the first amendment that we should be able to accept in the interest of protecting national security. These incursions come out in four major areas:

1- Extraordinary growth of the classification system since 1982. New executive order reverses the trend of four previous administrations of limiting classification. Since 1982 there has been an average 10 percent annual increase in number of classified decisions and documents. A larger number of people authorized to classify, close to 4 million people, or 2 percent of the publication.

2- Export control laws. Increasingly applicable to larger categories. The most recent list of Military Critical Technology includes things like information systems and network technology.

3- Increase in use of pre-publication review requirements. Since 1981 all government employees with security clearance have to sign a form requiring them to submit all publications for review, even after leaving the government. As of 1989, 375,000 people had signed that form. In 1985, last year of data available, there were 22,000 books and articles reviewed by government agencies to check for classified information.

4- Narrowing of freedom of information act even after 1986 Congressional vote on broadening of access to public information, by requiring agencies to publish their schedule

of fees, including a policy of waiving fees when disclosures in the public interest arise. Reagan and Bush administrations have taken a very narrow view of those people and institutions engaged in public interest research. Educational institutions are defined to exclude independent and public libraries, vocational schools, etc.

Next Shattuck raised the question: What is the likely long term effect of all this? First, too many restrictions can lead to a stagnation of basic science, e.g. Soviet Union research on solid state electronics example. Second, negative impacts on the economy. National Academy of Sciences report estimated in 1987 that the cost for the US of the current regime of export controls on technical information is 188 thousand jobs and \$ 9 billion a year. Third, ironically, there is a negative effect on the area of national security itself. Most experts agree (including Edward Teller) that long term US security needs depend on rapid scientific and technological developments, which are unlikely to occur if broad secrecy restrictions remain in place.

Shattuck then gave an illustration of the kind of scientific communication that will be curtailed if we continue down this path: the race to low temperature superconductors. As competition among scientists heated, it was a team of physicists from the University of Houston that led the pack. The curious thing is that all researchers there were foreign nationals. One group of countries left out of this race is the Eastern European countries. Ironically, in 1988 as result of a White House decision the US came very close to emulating these countries in the restriction of scientific communication by proposing an amendment to the freedom of information act to bar the release of information about superconductivity developed by federally-supported research.

Shattuck concluded by describing some positive signs. The momentous developments taking place in the world today call into question a range of national security policies, proposing that they be reviewed. Secondly, the growing concern about U.S. competitiveness has created pressures to unleash science to better serve the economy. On the other hand, he fears that pressures will continue to mount to restrict the export of technology in the name of economic security. Overall, Shattuck believes that after a decade of restrictive policies regarding scientific communication there is little evidence that the policies are achieving any particularly useful purpose and a fair amount of evidence that they appear to be harmful.

In this spirit it would be appropriate for the Bush administration and Congress to overhaul U.S. information policy by curtailing the classification system, reviewing the whole set of export controls and military critical technologies in order to narrow the categories that truly need protection; developing new guidelines to protect against efforts by the government to control the conclusions and the content of federally-sponsored basic research; and by taking another look at the Freedom of Information Act to make sure that it provides for broader rather than more restrictive access

Finally, Shattuck concluded that in this area there is a simple question that has to put up front. That question is that while national security policies are developed to protect us

from our adversaries, the first amendment to the institution is presumably what distinguishes us from our adversaries. As the identification of our adversaries becomes more blurred, and as our adversaries seek to do a good job in emulating our first amendment principles, truly we in the U.S. can respond by taking a very hard look at our own practices in light of the principles that underlie our democracy. And practically speaking, underlie our system of science and technology.

Next, **Jay Lucker** added a few comments about freedom of information in the library. This issue goes to the heart of what libraries are all about. Libraries are operated under a very strong set of requirements of the privacy of the patron information. Providing information about who has borrowed what, who reads what, who asks what violates the basic tenets of libraries. With the growth of technology, the ability to find out what people are using in the way of information becomes easier, and therefore the pressure on libraries becomes higher. One of the principles of libraries is that information on borrowers is not provided except under a court order. The FBI is bothered by that and claims that the libraries are uncooperative in providing this information.

There have been instances of government attempts to find out about the reading habits of individuals through the development of profiles from the use of databases (FBI obtained a court order to get information about a foreign graduate student reading habits at Cornell University). There have also been attempts by government to find out what people were searching by requesting this information from databases vendors licensing foreign users. The DOD tried to get both MeadData and Dialog to provide them with this information. Both firms refused.

In addition to the restrictions on scientific communication mentioned above, there are also a couple of other restrictions. One is the Unclassified Control of Nuclear Information (UCNI), in which the Department of Energy tried to require libraries receiving DOE unclassified reports on depository keep records of who borrowed these reports and restrict the access to them to US citizens. Another, was the NASA attempt to restrict access to its database of technical reports only to US nationals. In both cases MIT and other libraries refused to comply. Still another way that information is being restricted is through the paperwork reduction act. The government has limited the number of publications by limiting the budget and promoting the privatization of government information. For example the next 1990 set of data from the US Census will be charged to libraries, which used to receive it free of charge as part of the depository system.

These restrictions on access are not limited to the public sector. Just recently there has been two cases in the private sector. First, the cost of publications is rising dramatically and some private publishing houses have been charging higher prices for higher status journals, on the basis of cost/effectiveness ratio of articles. The bottom line, however, is that a while ago libraries received a questionnaire regarding their practices on the cancellation of journals. In the end, it was found out that the firm putting out the questionnaire was the publishing house involved in litigation with the authors of an article on the cost/effectiveness of journals.

Questions & Answers

The first question asked whether these rights are absolutely free in or is there any permissible limitation. And if there is no limitation of them, do these right also guarantee or include that federal resources will be used to maintain these rights, even though it might work against the government. **Shattuck's** answer was that in the framework of the Freedom of Information there is no general right, but rather a strong constitutional tradition. The First Amendment in this regard has to do with individuals whose own rights are affected by restrictions on publications that they might themselves engage in. An even there the right is not absolute, there are certain categories that can be imposed to restrict their freedom of speech. In the case of national security, that area for restrictions to freedom of information has been defined by justice to be very narrow ("clear and present danger") and it has been dealt with in the Pentagon papers case. **Menand** replied that the there is an absolutist position and remarked that this has been tried in many circumstances, the most famous one of them being the case of the right of nazis to march in Skokie, Illinois. As for the government requirement to provide the resources to protect freedom of information, **Menand** commented that in 1973 the court held that the woman had the right had the right to abortion. Then the question came down to whether Medicaid funds would be available to poor women to exercise these constitutional rights. I 1976, Congress passed an amendment prohibiting funds to be used for abortion, and later the Supreme Court upheld the right of Congress to condition the use of public funds.

The second question requested comments about how the mosaic theory of information tied to the issue of privacy. **Shattuck's** comment was that the privacy rights found in the constitution, no means as clear as the freedom of speech rights found in the First Amendment. Whenever they come into conflict they are often decimated in the process. Freedom of speech tends to prevail over rights of privacy.

The next question had to do with state and local regulations for public access to public records. **Lucker's** answer was that libraries' records privacy are protected by state law in 39 states. Congressional attempts to pass national library privacy act were diluted.

The final question raised the issue of political attacks on the funding of the NEH. Does the First Amendment provide any protection to this kind of encroachment on free speech or is it the case that publicly legislated funds are exempt from such protections? **Menand** initial comment was that court has held generally that Congress may condition the use of its funds in any way that sees fit. **Shattuck** replied that one could take a position that this is an unconstitutional position to regulate position, but that would be a minority, yet respectable, point of view in any court. Adding to his earlier remarks on the dynamics of Congress and courts in the case of legislation to prohibit flag burning, **Shattuck** noted that many members of Congress found comfortable to vote for that legislation for two reasons. First, because it was far less onerous than the proposal that had been made by president Bush. Second, because it is possible to vote for something if you are a member of Congress and you know you will be bailed out by the courts in this area. He concluded that he would rather see Congress feel itself in the driver seat.