City Attorneys Department
League of California Cities
Annual Conference
October 2002

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Open Government & Security:
In Time of War the Laws are Silent

The United States is in a new battle to combat the threats of international terrorism. Terrorism attacks both the physical and emotional welfare of a society. The emotional component of terrorism demands attention from lawyers because it can influence the law by altering social standards and normative values. Indeed, our national leaders have drawn an analogy between war and the threat of terrorism. Our generation has fought wars on poverty, illiteracy, drugs, and gangs. In each instance our leaders have conjured the evocative imagery of war.[1]

As public lawyers and public officials with a duty to act in the interest of justice, our duty is to disclaim the sound bites of politics and fervor of fear, and let our minds lead the analysis. The maxim runs *Fiat Justicia*, not *Caveat Justicia.* On the other hand, "The life of the law has not been logic, it has been experience."[2]

Thus, the courts have not been, and perhaps should not be, immune to the emotions of war. The courts have a history of reactive deference to congressional and executive authority during times of war. Individual civil liberties logically yield to the needs of national survival. Nonetheless, the American premise of individual freedom and liberty tends to resurface when the fighting is done. As Chief Justice William H. Rehnquist noted a few years ago, "The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over."[3]

This history illustrates the pendular nature of the legal balance between *open government*, defined as a derivative civil liberty that protects citizen participation in government, and *security*, defined as a societal interest in avoiding the hostile circumvention of civil authority. This paper briefly examines the legal structure of the open government and security dichotomy, as well as the resultant implications for the role of the city attorney.

California's notion of municipal open government is largely defined in the Ralph M. Brown Act (public meetings) and California Public Records Act (access to government records).[4] The California Public Records Act is, in turn, modeled on the federal Freedom of Information Act.[5] This paper will also look at how these laws will work in the face of security threats.

In Time of War?

The post "9-11" context of this analysis illustrates the first issue. The courts have premised each temporary reduction in the protection of civil liberties upon the existence of an emergency condition or state of war. For example, when Justice Holmes wrote for the Supreme Court in upholding the criminal convictions of Socialists who violated World War I's Espionage Act of 1917, he commented:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[6]

The "espionage" was publishing a leaflet that on one side recited the first section of the Thirteenth Amendment, and on the other exhorted the reader to assert his rights to oppose the draft (military conscription), analogizing the draft to slavery. The courts have since clearly repudiated so restrictive a reading of First Amendment rights.

Likewise, World War II brought Supreme Court acceptance of military confinement of all persons of Japanese ancestry, without any finding of probable cause of espionage or even consideration U.S. citizenship.[7] Justice Black's opinion shows the Court was keenly aware of the constitutional stakes, but nonetheless the exigencies of war prevailed. Referring to the congressionally authorized military curfew and exclusion orders, the Court indeed set a high wartime standard:

> "Nothing short of apprehension by the proper military authorities of the ***gravest imminent danger*** to the public safety can constitutionally justify either."[8]

What the Court would not do, however, was engage in an evidentiary second-guessing of military authority.[9] The Court appeared to give some guidance about the requisite level of war or emergency, though the guidance is buried in a rationalized apology:

> "All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, ***the power to protect must be commensurate with the threatened danger***."[10]

With the United Nations' Korean "police action," the Supreme Court began to set some limits on how far it would go in allowing the exigencies of "war" to excuse infringement of civil liberties.[11] When President Truman ordered seizure and federal operation of most of the nation's steel mills in order to avert the war impacts of a United Steelworkers strike, Justice Black's lead opinion[12] rejected a broad assertion of the President's wartime powers:

> "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."[13]

Justice Frankfurter's concurring opinion, resting more heavily upon separation of powers, commented on the difficulty of sorting the issues at hand:

> "Before the cares of the White House were his own, President Harding is reported to have said

> that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims."[14]

The point here is that the Courts have shown both deference to wartime authority and a willingness to question the fact of an emergency in limited circumstances.

The Laws are Silent: Statutory Security Exceptions to Open Government

Impairment of open government rights may be legally justifiable when security threats are present. The Brown Act, for example, authorizes both emergency situation meetings without prior public notice and security threat closed sessions. ***Emergency situation*** meetings with only 1-hour prior telephone notice to the press are permitted when "prompt action is necessary due to the disruption or threatened disruption of public facilities."[15] The phrase "emergency situation" means either:

> "(a) Work stoppage or other activity which severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body.
> (b) Crippling disaster which severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body."[16]

Public security concerns would virtually always fit within these definitions.

Security threat closed sessions are permitted "on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities."[17] The Brown Act authorization lacks a meaningful verb describing the conduct permitted in such sessions (*e.g., discuss, consider, hear, vote*), but it is clear that a criminal law enforcement official must be present in the form of the Attorney General, district attorney, sheriff, police chief, or any of their respective deputies.[18] The courts will have

to infer permission for some conduct in order to make sense of the closed session authorization. In the meantime, caution is warranted with respect to any effort to take action in security threat closed sessions.

The California Public Records Act (CPRA) requires disclosure of public records unless one of several express exemptions applies.[19] And, while interpretations of the CPRA need not conform to the federal Freedom of Information Act (FOIA), upon which the CPRA was modeled, FOIA authority does "illuminate" construction of the CPRA, particularly when the CPRA is silent.[20] Because federal law and federal agencies largely dominate terrorism security jurisdiction, FOIA takes on an unusually important role.[21]

The most important and direct security-related CPRA exemption is the so-called "law enforcement investigatory" exemption.[22] It requires disclosure of certain parts of these records, but explicitly exempts from disclosure the following:

> "Records of complaints to, or investigations conducted by, or records of ***intelligence information or security procedures*** of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, ..."[23]

The California Attorney General has opined that law enforcement intelligence information and security procedures involved with gang reporting, evaluation and tracking are exempt from disclosure.[24] Similar terrorist information should likewise be exempt.

California has taken a relatively practical approach to exempting infrastructure records, though the precedents are few. For example, the Attorney General has approved use of the Government Code section 6255 "balancing test" to withhold plans and specifications of local detention facilities which:

> ". . . detail the security locking system operations, the communication and surveillance

systems, and the strength of the construction materials used throughout the jails."[25]

Efforts to exempt other information upon the basis of security concerns could well be problematic, but conceivable and indeed rational in limited circumstances. Given the fact that terrorist actions have and will target a variety of public facilities, great concern has been expressed about protecting public infrastructure from attack. Federal legislation is pending to create a new Department of Homeland Security.[26] The department would be required to:

". . . plan, coordinate, and integrate those United States Government activities relating to border security, ***critical infrastructure protection*** and emergency preparedness. . . ."[27]

Concerns about information security are a major part of the federal effort. On October 12, 2001, Attorney General John Ashcroft issued a new FOIA "statement of administration policy" superseding Attorney General Reno's October 1993 memorandum (attached).[28] There is a marked shift in the tone of the policy, perhaps not surprisingly, away from Reno's presumption of "maximum responsible disclosure of information."[29] Instead, Ashcroft balances FOIA's purposes with the need for "safeguarding our national security."[30] Ashcroft offers to defend agency decisions to withhold information unless they lack "a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[31] In other words, the U.S. Attorney General will not support *over-disclosure* of information in response to a FOIA request.

Likewise, on March 21, 2002, the Bush administration launched a massive redaction process aimed at removing "sensitive records related to homeland security" from publicly accessible sources, including federal websites (attached).[32] OMB Watch, a Washington, D.C.-based watchdog organization, lists dozens of previously publicly accessible federal information sources that have been removed from disclosure.[33] This information includes data from private corporations that has been deemed sensitive post 9-11, including hazardous materials and environmental records.

The source of legal authority for this redaction and non-disclosure lies largely in the so-called FOIA "Exemption 2."[34] Exemption 2 reads somewhat like a blend of the CPRA's internal correspondence and personnel exemptions in that it exempts records "related solely to the internal personnel rules and practices of an agency."[35] The May 2002 Department of Justice FOIA Guide explains, however, that the exemption actually allows non-disclosure of *internal practices* when disclosure "would risk circumvention of a legal requirement."[36] Thus:

> "In light of recent terrorism events and heightened security awareness, and in recognition of the concomitant need to protect the nation's critical infrastructure (both its elements and records about them), the second category of information protection afforded by ***Exemption 2 is of fundamental importance to homeland security***."[37]

The DOJ Guide goes on to suggest an expansive application of Exemption 2, relying upon the courts "robust measure of deference" to law enforcement.[38] The Guide does acknowledge that the issue has "generated considerable controversy over the years."[39]

The practical problem remains, however, that much of the information now deemed relevant to homeland security has heretofore been public. Five minutes on the Internet yields the construction diagrams and engineering statistics for the Golden Gate Bridge[40] and Hoover Dam[41].

The City Attorney's Role

The law will support reasonable limitations on open government rights in order to protect public security. The questions likely to be posed to city attorneys will involve the how's and when's of non-disclosure. The U.S. Supreme Court case law suggests the courts will never accept ***pretextual*** grounds for non-disclosure. In other words, clients should be advised that security based non-disclosure, even post 9-11, requires a factual basis to support the concern. Refusal to disclose the locations of openly visible public facilities, for example, would likely be rejected. On the other hand, security plans and specific facility vulnerabilities would likely be protected from disclosure. In short, the city attorney's role is not to second-guess the importance of the security concern, but

instead to insist upon factual information to back it up. The standard may be as tough as a showing of the "gravest imminent danger."

There is a final wildcard in the analysis. The wars and emergencies presented to the courts have historically been temporary events. It seems impossible to predict when a war on terrorism might end. Courts may well be unsympathetic to protracted civil liberty infringements during a never ending war on an amorphous battlefield.

ENDNOTES

[1] I must begin with a disclaimer. My purpose is not to question the political or social wisdom behind the policies and laws addressing open government and security. Nor will I express any personal political view undefended by legal authority. Rather, my task is to analyze the legal framework involved, cognizant of the right of reasonable minds to differ.

[2] Oliver Wendell Holmes, Jr., *The Common Law* (1881)

[3] Remarks of Supreme Court Chief Justice William Rehnquist at the Director's Forum, Woodrow Wilson International Center for Scholars, November 17, 1999.

[4] Gov. Code, §§ 54950, *et seq.* and §§ 6250, *et seq.*, respectively

[5] 5 U.S.C. § 552, *et seq.*

[6] *Schenk* v. *United States* (1919) 249 U.S. 47, 52.

[7] *Korematsu* v. *United States* (1944) 323 U.S. 214.

[8] *Id.*, at p. 218; emphasis added.

[9] *Id.*, at pp. 218-219.

[10] *Id.*, at pp 219-220; emphasis added.

[11] *Youngstown Co.* v. *Sawyer* (1952) 343 U.S. 579.

[12] In *Youngstown Co.*, there were 5 concurring opinions and a dissent by three justices.

[13] *Youngstown Co., supra*, 343 U.S. at p. 587.

[14] *Id.,* at p. 593.

[15] Gov. Code, § 54956.5.

[16] *Ibid.*

[17] Gov. Code, § 54957.

[18] *Ibid.*

[19] *Williams* v. *Superior Court* (1993) 5 Cal.4th 337, 346.

[20] 66 Ops. Cal. Atty. Gen. 272 (1983); American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 447.
[21] *Williams* v. *Superior Court, supra,* 5 Cal.4th at p. 352 [construing the phrase "intelligence information"].
[22] Gov. Code, § 6254(f).
[23] *Ibid.*
[24] 79 Ops. Cal. Atty. Gen. 206.
[25] 73 Ops. Cal. Atty. Gen. 236.
[26] The House version is H.R. 5005. The Senate version is S. 2452.
[27] S. 2452, § 101(b)(2)(F); emphasis added.
[28] The Ashcroft FOIA memorandum can be found at http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.
[29] *Access to Information after 9/11*, Lee Tien, Staff Attorney at the Electronic Frontier Foundation, presented at CFP 2002 conference (Computers, Freedom and Privacy). See http://www.cfp2002.org/proceedings/proceedings/tien.pdf
[30] *Ashcroft FOIA memorandum*, *supra*, http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm
[31] *Ibid.*
[32] http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm
[33] http://www.ombwatch.org/article/articleview/213/1/104/
[34] 5 U.S.C. 552(b)(2).
[35] *Ibid. cf.* Gov. Code, § 6254(a) & (c).
[36] U.S. DOJ, *Freedom of Information Act Guide, Exemption 2*, (May 2002) http://www.usdoj.gov/oip/exemption2.htm.
[37] *Ibid;* emphasis added.
[38] *Ibid.*
[39] *Ibid.*
[40]http://www.goldengatebridge.org/research/factsGGBDesign.html
[41]http://www.ecommcode.com/hoover/hooveronline/hoover_dam/const/toc.html