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2010

## Sovereignty in the Age of Twitter

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### Recommended Citation

Donald L. Doernberg, Sovereignty in the Age of Twitter, 55 Vill. L. Rev. 833 (2010), <http://digitalcommons.pace.edu/lawfaculty/776/>.

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## SOVEREIGNTY IN THE AGE OF TWITTER

DONALD L. DOERNBERG\*

*Secrecy begets tyranny.*<sup>1</sup>*[N]am et ipsa scientia potestas est.*<sup>2</sup>*Power tends to corrupt; absolute power corrupts absolutely.*<sup>3</sup>

## I. INTRODUCTION

THE “assignment” given to symposium participants was simply to examine some aspect of sovereignty. My colleagues focused their presentations on various aspects of Native American tribal sovereignty interacting with that asserted by the federal government and on aspects of government sovereignty, such as sovereign immunity, more generally, and I have learned a great deal from them. I decided to take a different approach because I think the nature of sovereignty itself is changing. My thesis is that this is happening as a direct result of advances in technology,<sup>4</sup> specifically communicative technology. To a degree unimaginable even as recently as twenty-five years ago, people all over the world can communicate with each other easily, cheaply, and frequently, with the concomitant result that people learn more about what is happening elsewhere in the world and even in their own countries. Governments can no longer control information flow nearly to the extent that was once possible, and that has enabled people outside of government to know much more about what government is doing and to know it considerably sooner than might otherwise have been the case. That availability of information is changing the nature of sovereignty before our eyes.

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1. ROBERT HEINLEIN, *STRANGER IN A STRANGE LAND* 26 (Penguin Books 1987) (1961).

2. For knowledge itself is power. XIV THE WORDS OF FRANCIS BACON 79 (James Spedding, Robert Leslie Ellis & Douglas Denon Heath eds., 1856) (1597). The idea, however, considerably antedates Bacon. See, e.g., Proverbs 24:5 (King James) (“A wise man is strong; yea, a man of knowledge increaseth strength.”).

3. JOHN EMERICH EDWARD DAHLBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (Gertrude Himmelfarb ed., 1949).

4. “‘Technology,’ computer pioneer Alan Kay once said, ‘is anything that was invented after you were born.’” Steven Levy, *The Future of Reading*, NEWSWEEK, Nov. 26, 2007, at 57, available at <http://www.newsweek.com/id/70983>.

Part II of this Article explores some of the difficulty of even defining sovereignty. Part III discusses the history and manifestations of the concept and offers some consideration of the true locus of sovereignty in democracies such as the United States. Part III also briefly considers the implications of sovereign immunity in democracies, such as ours, founded on basic ideas of popular sovereignty. Part IV addresses how recent advances in communicative technology are affecting the power of governments vis-à-vis their own citizens, using Iran and Myanmar as examples of how technology makes it more difficult to “keep a lid on things.” Part IV also discusses why advances in communications technology are necessarily double-edged, presenting problems stemming from governments’ technological abilities to track sources of information (and therefore to retaliate against those distributing information that governments prefer kept secret) and from the sheer volume of information accompanied often by it being unverifiable. Further, Part IV examines how the free availability of information and citizens’ ability to communicate among themselves without effective restriction by government tends to make government more accountable to the people. Lastly, Part IV addresses some problems inherent in the onslaught of communication that modern communicative technology has made possible. Part V concludes that the combination of those forces may be shifting the locus of sovereignty from government to populace.

## II. DEFINITIONS

Sovereignty is not an easy topic. For starters, it is difficult to define. Not until the sixteenth century did political philosophers even begin to discuss the concept, led by Jean Bodin,<sup>5</sup> and followed by (among others) Thomas Hobbes,<sup>6</sup> Samuel Pufendorf,<sup>7</sup> Robert Filmer,<sup>8</sup> and John Locke.<sup>9</sup> The reporters for the American Law Institute’s *Restatement of Foreign Relations Law* noted: “‘Sovereignty’ is a term used in many senses and is much abused.”<sup>10</sup> Professors Michael Ross Fowler and Julie Marie Bunck were a bit more direct. “The concept of sovereignty has been used not only in different senses by different people, or in different senses at different

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5. See JEAN BODIN, ON SOVEREIGNTY (J. Franklin ed., Cambridge Univ. Press 1992) (1576).

6. See THOMAS HOBBS, LEVIATHAN (Michael Oakeshott ed., Collier Books 1962) (1651).

7. See SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN (James Tully ed., Cambridge Univ. Press 1991) (1673).

8. See ROBERT FILMER, PATRIARCHA AND OTHER WRITINGS (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

9. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed., Cambridge Univ. Press 1963) (1690).

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. b (1987).

times by the same people, but [also] in different senses by the same person in rapid succession.”<sup>11</sup>

*Black’s Law Dictionary* once defined sovereignty as:

The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.

The power to do everything in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

Sovereignty in government is that public authority which directs or orders what is to be done by each member associated in relation to the end of the association. It is the supreme power by which any citizen is governed and is the person or body of persons in the state to whom there is politically no superior. The necessary existence of the state and that right and power which necessarily follow is “sovereignty.” By “sovereignty” in its largest sense is meant supreme, absolute, uncontrollable power, the absolute right to govern. The word which by itself comes nearest to being the definition of “sovereignty” is will or volition as applied to political affairs.<sup>12</sup>

Subsequent editions have retreated to a shorter version: “[s]upreme dominion, authority or rule.”<sup>13</sup> In light of the issues that the first definition raises, particularly in the context of United States political theory,<sup>14</sup> perhaps the more limited restatement is not surprising, but even that more cautious treatment inevitably raises questions about where the supreme governmental power actually lies.

### III. A BRIEF HISTORY OF THE CONCEPT OF SOVEREIGNTY

#### A. *Origins of the Concept*

It may be a bit surprising that no one wrote about sovereignty before Bodin. Surely something like what we would call sovereignty today ante-

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11. MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* 4 (1995).

12. *BLACK’S LAW DICTIONARY* 1396 (6th ed. 1990).

13. *BLACK’S LAW DICTIONARY* 1524 (9th ed. 2009).

14. See *infra* Part III.B.

dated his writings by many centuries. The original sovereigns may have been the persons in any independent community with the biggest muscles or largest clubs. In later millennia, sovereignty seemed to align with concentrations of military power.<sup>15</sup> English kings may have ruled by divine right, but, as the War of the Roses demonstrated, divine right had a peculiar way of descending on the person who could command the most powerful forces—or perhaps I have it backwards, and the victor had the most powerful forces because divine right had descended on him. After thirty years of intermittent civil war, divinity seemed to smile on the House of York, but it was not to be. It turned out that the gods actually favored the House of Tudor, because Henry VII came to power and the Houses of Lancaster and York were not heard from again on the national level. Henry VIII solidified the idea of the monarchy resting on divine right in England; his particular contribution was changing the nature of the divinity by resigning from the Holy See and establishing the Church of England. James I announced what still is the definitive treatment on the divine right of kings.<sup>16</sup>

Not that England invented the idea—the idea of sovereignty conferred by gods goes back at least to ancient Greece,<sup>17</sup> and it is well known that the gods smiled on Octavian at Actium. Following his death, the Senate declared him a god.<sup>18</sup> Caligula took the relationship between divinity and sovereignty to an entirely new level; he consolidated authority by simply becoming a god during his lifetime,<sup>19</sup> which solved all those messy communication problems. In Asia, a scholar named Dong Zhòngshu, an official of the Han dynasty almost two centuries before Caligula, unveiled the idea that the Chinese emperor served through the mandate of heaven, which might remonstrate if the emperor performed poorly.<sup>20</sup>

### B. *Sovereignty in the United States*

What is one to make of sovereignty in a democracy such as ours? The government of the United States did not spring Minerva-like full grown from Jupiter's brow. Following the Revolution, the new nation underwent a relatively brief false start under the Articles of Confederation. The Articles did not last long, because the national government was unable to

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15. Jonathan Schell notes the continuation of this pattern well into the twentieth century. "The morality of Yalta is simple: those who have the bombs and tanks decide the social and political system." JONATHAN SCHELL, *THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE* 192 (2003) (quoting GYÖRGY KONRÁD, *ANTI-POLITICS 2* (Richard E. Allen trans., 1984)).

16. See King James I, Speech to Parliament: On the Divine Right of Kings (Mar. 21, 1609).

17. See, e.g., AESCHYLUS, *AGAMEMNON* (H.W. Smyth trans., The Modern Library 1942) (458 B.C.).

18. See *Augustus Caesar*, in 14 *THE NEW ENCYCLOPEDIA BRITANNICA* 404 (15th ed. 2002).

19. See *Caligula*, in 2 *THE NEW ENCYCLOPEDIA BRITANNICA* 744 (15th ed. 2002).

20. See XINGHONG YAO, *AN INTRODUCTION TO CONFUCIANISM* 83-84 (2000).

function effectively under that structure. And so, it is old learning that leaders from each of the former colonies met in Philadelphia to build a new government. The Constitution is their product, and it begins differently from the Articles of Confederation. The latter declared itself the product of the “Delegates of the United States in Congress assembled . . . .”<sup>21</sup> The Constitution, on the other hand, comes from “We the People of the United States”<sup>22</sup>—not from the states and certainly not from Congress, which the Framers were busy re-creating in Article I. This suggests that what *Black’s* called “[t]he power to do everything in a state without accountability”<sup>23</sup> rested not with the government, but rather with the people. The former colonists deliberately relied upon the political theory of John Locke, who viewed government as the people’s trustee—an agent, authoritative only because the people had delegated powers to it while retaining ultimate control.<sup>24</sup> The United States Constitution flows from the experience of men who had had their fill of unaccountable power under George III. The system of checks and balances, lauded from *The Federalist* to the present, exists precisely to prevent power on the national level from being unaccountable, because the Framers recognized the more concentrated government power is, the less accountable it is.<sup>25</sup>

But of all the intellectual problems the colonists faced, one was absolutely crucial: in the last analysis it was over this issue that the Revolution was fought. On the pivotal question of sovereignty, which is the question of the nature and location of the ultimate power in the state, American thinkers attempted to depart sharply from one of the most firmly fixed points in eighteenth-century political thought; and though they failed to gain acceptance for their strange and awkward views, they succeeded nevertheless in opening this fundamental issue to critical discussion,

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21. ARTICLES OF CONFEDERATION pmbl.

22. U.S. CONST. pmbl.

23. See *supra* note 12 and accompanying text.

24. See LOCKE, *supra* note 9, at 413, 460. See generally DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM’S CHOICE 63-70 (2005).

25. As unlikely a source as George W. Bush’s Secretary of Defense Donald Rumsfeld confirmed this view in 2004: “Our republic was founded on the notion that an unchecked government is a major obstacle to human freedom and to progress, and that our leaders need to be challenged, internally through the complex constitutional system of checks and balances, and externally by a free and energetic press.” Donald Rumsfeld, Address to American Society of Newspaper Editors (Apr. 22, 2004), *quoted in* ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 51 (2006). On the other hand, as Professor Roberts noted, “Secretary Rumsfeld’s commitment to transparency was, at that moment, open to question,”—referring to the then-developing controversy over American treatment of Iraqi prisoners at Abu Ghraib. *Id.*

preparing the way for a new departure in the organization of power.<sup>26</sup>

*The Federalist* demonstrates repeatedly the centrality of this idea. James Madison noted that throughout history those who established republics had laid themselves open to criticism because they focused so intently on

the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.<sup>27</sup>

There are many other examples, but the point is so well established that it suffices merely to quote one of Madison's best known statements: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>28</sup>

On the other hand, this separation of the Constitution's theory from that of the Articles of Confederation may not have been as complete as one might think looking only at the preambles. Under the Constitution's amendment process,<sup>29</sup> forces outside the federal government can change its nature, add to or diminish its powers, or, presumably, abolish it entirely. But in whom does *that* power reside? It does not lie directly in the people, but rather in Congress, as the first mentioned proposer of amendments, or in the state legislatures, which can by a two-thirds vote demand a new constitutional convention. Ratification of amendments lies with the state legislatures, not a popular vote. In some sense, of course, all of this is subject to control through the franchise, but it is a control notably difficult to exercise.

Nonetheless, the American experiment embodied a different approach to sovereignty from the predominantly monarchical model that had held sway since time immemorial. Justice Anthony Kennedy once observed that:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one

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26. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198 (1992).

27. *THE FEDERALIST* NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

28. *THE FEDERALIST* NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

29. *See* U.S. CONST. art. V.

federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.<sup>30</sup>

One might dispute Justice Kennedy's characterization, because neither level of government is entirely unaccountable; the legislative and executive branches (and, in many states, the judicial branch as well) are accountable to the electorate.<sup>31</sup> To be sure, electoral membership was far from universal until at least the mid-twentieth century, but whatever electorate existed made the majoritarian branches of government accountable. If one searches for a locus of unaccountable power in the governments of the United States, the electorates are the closest things to it. In terms of Locke's political theory, the "atom of sovereignty" was not split; it was relocated outside of governmental entities.<sup>32</sup>

### C. *Law as Binding on the Government: Sovereignty and Immunity*

Part of the lore in the United States has always been that it is a government of laws, not men—that the government itself is subject to the law.<sup>33</sup> John Adams typically receives the credit for the first expression of that idea *in haec verba*,<sup>34</sup> but Chief Justice John Marshall echoed it most famously in *Marbury v. Madison*.<sup>35</sup> Regrettably, in the United States reality often does not reflect that sentiment. There are many circumstances in which the Supreme Court has exempted governments or government officials from application of the law. With respect to governments, two areas stand out. First, there is the long-standing battle over the amenability of government to suits at the hands of individuals, often called sovereign im-

30. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

31. In some states, the judiciary is also politically accountable through periodic elections. Federal judges appointed under Article III are emphatically not politically accountable, since they serve for life "during good Behaviour . . ." U.S. CONST. art. III, § 1. Congress can impeach members of the federal judiciary, but it is a rare occurrence, and it would be a considerable overstatement to say that the impeachment process represents any real political accountability. Article I judges, who serve on legislative courts, serve for fixed terms, so there may be somewhat greater political accountability although there is no particular evidence that anyone is paying much attention to them. In any event, the judiciary is reactive only; it does not initiate political action.

32. One might speculate that any government that we would recognize as democratic in form (rather than only in name) would reflect, even if unconsciously, the same theory of sovereignty.

33. See, e.g., Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, at 4, available at, <http://www.nybooks.com/articles/archives/2004/jul/15/making-torture-legal/>.

34. See PAGE SMITH, 1 JOHN ADAMS 246 (1962).

35. See 5 U.S. (1 Cranch) 137, 165 (1803).



munity.<sup>36</sup> Second, the Supreme Court enforces a forum immunity specified in the Eleventh Amendment, which (grossly oversimplified) basically says that individuals may not sue states in the federal courts.<sup>37</sup> Although the scope of the forum prohibition is hotly disputed—some arguing that it applies only to actions sounding in diversity, not to federal question cases<sup>38</sup>—no one disputes that its words clearly close the federal forum to some cases. In 1999, the Supreme Court went a step further, reading a substantive state sovereign immunity into Article I of the Constitution.<sup>39</sup>

Since the 1970s, the Court has also declared that state officials are immune from damage actions by individuals in a wide variety of circumstances. In 1974, the Court announced that a damage action nominally against state officials would not lie when payment of the damages would come from the state treasury.<sup>40</sup> The Court has established personal immunity standards for officials over the past thirty-five years, even when the judgment debtor would be personally obligated to pay a judgment.<sup>41</sup>

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36. In the United States, this is a particularly troublesome concept from the perspective of political philosophy, since the Framers constructed the nation leaning most heavily on the political theory of John Locke, who viewed the people as sovereign and the government as mere trustee of the power possessed by the sovereign people. See *supra* notes 21-24 and accompanying text. See generally DOERNBERG, *supra* note 24.

37. See U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). I have often suggested to my classes that one cannot simplify the Eleventh Amendment; one can only oversimplify it. There is a large body of intricate decisions defining and exploring what the Eleventh Amendment means. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908); *Hans v. Louisiana*, 134 U.S. 1 (1890). Each of the listed cases modifies the interpretation of the Eleventh Amendment set out in the chronologically preceding case.

38. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting) (asserting that Eleventh Amendment addresses only diversity jurisdiction); *Union Gas Co.*, 491 U.S. 1 (Brennan, J., plurality opinion) (taking position that Amendment reflects only common law immunity that Congress may nullify in exercise of its Article I powers), overruled by *Seminole Tribe*, 517 U.S. 44. Both dissenters in *Seminole Tribe* took the position that the Eleventh Amendment precludes only diversity jurisdiction in actions by individuals against states. See *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting). For a further discussion, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

39. See *Alden v. Maine*, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.").

40. See *Jordan*, 415 U.S. at 663.

41. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (establishing sliding scale immunity according to public official's level of discretion), *abrogated by Harlow v.*

The upshot of these two branches of Supreme Court decisions is that there are many circumstances in which a state or its officials have violated an individual's constitutional rights, but there is nonetheless no redress for the violation through damages.<sup>42</sup> As a practical matter, those responsible for the constitutional violation are unaccountable.<sup>43</sup> The victim of the constitutional violation bears the unrelieved burden.

Two noted philosophers, four hundred years apart, commented on this phenomenon. Niccolò Machiavelli observed "that there can be no worse example in a republic than to make a law and not to observe it; the more so when it is disregarded by the very parties who made it."<sup>44</sup> Justice Louis Brandeis was equally direct:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.<sup>45</sup>

Doctrines of sovereign or official immunity do exactly the reverse. They not only cast government as a lawbreaker; they make clear that the government is above the law, a difficult concept to reconcile with a "government of laws."

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Fitzgerald, 457 U.S. 800, 818 (1982) (establishing qualified immunity for officials if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). A further line of cases elaborates what it takes for a right to be "clearly established" within the meaning of *Harlow*. See, e.g., *Hope v. Pelzer*, 536 U.S. 730 (2002); *United States v. Lanier*, 520 U.S. 259 (1997).

42. Equitable relief against continuing wrongs may be available. See, e.g., *Jordan*, 415 U.S. 651; *Ex parte Young*, 209 U.S. 123. But as Justice Harlan noted, for some people, "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

43. One supposes that there is always the possibility of discipline of the offending officials within their departments or electoral retaliation against such officials or their superiors. If either has occurred with any frequency, examples of it escape detection.

44. NICCOLÒ MACHIAVELLI, *THE PRINCE* 129 (The Modern Library 1950) (1513).

45. *Olmstead v. United States*, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting).

D. *Sovereignty's Relation to Information*

Although sovereignty may have rested exclusively on might in the early days of nation-states, it came to rest in part on unequal access to information. As populations within nation-states grew, government's power often depended on the people having only the information that the government wanted them to have. To the extent that communication among members of the populace is not easy and widespread, government tends to have a monopoly on information, and that operates as a tool to control the populace. Perhaps the best testimony to these relationships is the seemingly universal tendency of governments to limit the outflow of information of what is happening within the government and what effect it is having on the people governed.

One may most easily observe this tendency in totalitarian governments, such as the Third Reich or the Soviet Union, but governments of all descriptions exhibit it. In United States history, witness the government's herculean attempt, ultimately unsuccessful, to suppress the Pentagon Papers,<sup>46</sup> to prevent information about the infamous Tuskegee experiment<sup>47</sup> from coming to light, or to prohibit photographs of military coffins returning from the combat zones in Iraq or Afghanistan.<sup>48</sup> In-

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46. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

47. In 1932, the United States Public Health Service began what became a forty-year study of untreated syphilis in African-American males in a rural Alabama county. The subjects of the study were unwitting participants. See Allan M. Brandt, *Racism and Research: The Case of the Tuskegee Syphilis Experiment*, in *TUSKEGEE'S TRUTHS: RETHINKING THE TUSKEGEE SYPHILIS STUDY* 15, 21-22 (Susan M. Reverby ed., 2000) ("The USPHS did not tell the men that they were participants in an experiment; on the contrary, the subjects believed they were being treated for "bad blood" I—the rural South's colloquialism for syphilis."); Susan M. Reverby, *More Than a Metaphor: An Overview of the Scholarship of the Study*, in *TUSKEGEE'S TRUTHS: RETHINKING THE TUSKEGEE SYPHILIS STUDY*, *supra*, at 1. However, there were periodic published reports every five years or so. *Id.* at 15. Nonetheless, "Only in 1972, when accounts of the study first appeared in the national press, did the Department of Health, Education and Welfare halt the experiment." *Id.* (emphasis added). See also JAMES H. JONES, *BAD BLOOD* (1981). As President Bill Clinton expressed it, "Men who were poor and African American, without resources and with few alternatives, they believed they had found hope when they were offered free medical care by the United States Public Health Service. They were betrayed." Bill Clinton, President of the United States, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>.

48. See, e.g., Dana Milbank, *Curtains Ordered for Media Coverage of Returning Coffins*, WASH. POST, Oct. 21, 2003, at A23. Some have characterized the Bush Administration of 2001-09 as being extraordinarily secretive. See, e.g., Bill Moyers, *In the Kingdom of the Half-Blind*, Address Before the National Security Archive (Dec. 15, 2005), available at <http://www.commondreams.org/views05/1215-35.htm> ("It has to be said: there has been nothing in our time like the Bush Administration's obsession with secrecy."). Hugh Urban has described the extent of the Bush Administration's secrecy:

After six years of the Bush White House, we find that secrecy is at work at every level of this administration; it surrounds virtually all its activities, large or small, from the misuse of intelligence to justify a pre-emp-

deed, over the years there has been criticism of the United States government's tendency to characterize as "classified" documents of which all of the contents are public knowledge and available in most libraries.<sup>49</sup> Knowledge is power, and governments have long tacitly recognized that by paying close attention to what the public may know about government operations. Hence, one finds things like the Official Secrets Acts<sup>50</sup> that the United Kingdom adopted in 1911, 1920, and 1989, and the USA Patriot Act of 2001,<sup>51</sup> with its vastly enhanced authorizations of government surveillance of citizens and access to their records.<sup>52</sup>

#### IV. THE IMPACT OF TECHNOLOGY ON SOVEREIGNTY

##### A. *Information, Communicative Technology, and Sovereignty*

That is all well and good, but what has it to do with technology? I propose that technology is changing the nature of sovereignty precisely because of its effect on the availability of information about government and national affairs to the citizenry. The best current example is Iran.

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tive war to the vice president's shooting of his hunting companion. . . .  
[S]ecrecy is one of this administration's basic articles of faith.

[T]his is also by many accounts the most secretive administration in U.S. history, displaying an intense preoccupation with information control.

HUGH B. URBAN, *THE SECRETS OF THE KINGDOM: RELIGION AND CONCEALMENT IN THE BUSH ADMINISTRATION* x, 1 (2007).

49. See, e.g., PHILLIP KNIGHTLEY, *THE SECOND OLDEST PROFESSION: SPIES AND SPYING IN THE TWENTIETH CENTURY* (1986). As Phillip Knightley explained:

Admiral Stansfield Turner, head of the [CIA] under President Carter, spent years making his book innocuous enough to satisfy the new CIA. The agency insisted on deleting general references to covert actions against Nicaragua—while the operations were being described in detail on the front pages of American newspapers—and refused to allow Turner to quote from his own public speeches.

*Id.* at 367 (footnote omitted). See ROBERTS *supra* note 25, at 37 ("Americans also saw a new form of secrecy emerging after September 11, as organizations not typically counted within the security establishment began to restrict access to information already in the public domain."); see also Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (authorizing reclassification of declassified documents). See generally Steve Weinberg, *For Their Eyes Only*, (Center for Public Integrity, Wash., D.C.), 1992, at 35-39, available at [http://www.publicintegrity.org/assets/pdf/FORTHEIR\\_EYESONLY.pdf](http://www.publicintegrity.org/assets/pdf/FORTHEIR_EYESONLY.pdf).

50. See Official Secrets Act 1911, 1 & 2 Geo. 5, c. 28 (U.K.); Official Secrets Act 1920, 10 & 11 Geo. 5, c. 75; Official Secrets Act 1989, c. 6.

51. Pub. L. No. 107-56, 115 Stat. 272.

52. Governments often conceal things from persons working within them as well. As Bill Moyers pointed out,

Because of the Freedom of Information Act and the relentless fight by the Archive to defend and exercise it, some of us have learned more since leaving the White House about what happened on our watch than we knew when we were there. Funny, isn't it, how the farther one gets from power, the closer one often gets to the truth?

Moyers, *supra* note 48.

Part of the reason we know about the turmoil in Iran is the proliferation of technologically based methods of communication only recently extant, such as cell phones, the Internet, text messaging, and the now-ubiquitous Twitter. Even before those relatively new forms of technology, older forms played critical roles. Discussing the Polish uprising of 1980, which a decade later led to Poland's emergence as a democratic state, Timothy Ash makes clear that it is not just what information comes to light, but also the speed with which it is disseminated that contributes to the march of events.

What confounded the government was the speed with which information about the strikes spread around the country, despite the complete silence of all the government-controlled mass media. . . . It is hardly an exaggeration to say that most of this information came from one telephone in one small Warsaw flat, where Jacek Kuron, assisted by a student of English from the Kraków Student Solidarity group, kept a round-the-clock strike watch. From here, and from a score of other telephones, the latest news was assembled and passed on to . . . contacts all over Poland, to western correspondents, and to western radio stations (Radio Free Europe in Munich, the BBC in London) which broadcast it back to the country, in Polish, within hours. Millions of workers were thus informed.<sup>53</sup>

If the lowly land-line telephone could accomplish all of that, imagine the impact of technologies developed within the last thirty years. Iran is a perfect example.

Part of the reason there is turmoil in Iran over the recent election is the inter- and intra-national sharing of information through new technology that the Iranian government seems unable to control fully. To the extent that unavailability of information about what is happening in a country—particularly about what government is doing—facilitates both the concentration and exercise of unaccountable government power, technology has a powerful impact. It seems safe to speculate that events in Iran would not be unfolding as they are without technology's enabling both widespread citizen communication within the country and widespread dissemination outside the country of day-to-day internal developments. Misbehaving governments, like misbehaving individuals, are anxious that unpleasant or embarrassing facts never come to light. Technology seems clearly to be making it harder to keep a lid on things, but it does far more than that. It focuses the power of determining what is misbehavior in a relatively uncontrolled and increasingly uncontrollable citi-

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53. TIMOTHY GARTON ASH, *POLISH REVOLUTION: SOLIDARITY* 33-34 (1983). "By the summer of 1981 the lie had been dispersed, and when it was dispersed the communist system could no longer function without the open use of force." *Id.* at 283.

zenry. Free availability of information fosters accountability.<sup>54</sup> Professor Alasdair Roberts characterizes one aspect of this phenomenon as an “archetypal narrative”:

Powerful officials abuse their authority and injure innocent people. They attempt to hide their abuses. Tenacious outsiders struggle to reveal the facts, but are thwarted by official indifference and outright obstruction. Ultimately, however, the truth comes out. The citizenry is outraged, and officials are brought to account. Reforms are introduced to prevent future abuses. The story comes to a satisfying conclusion.<sup>55</sup>

Thus, the more public information about government activities is, the more its availability tends to shift the locus of true sovereignty outside of government. A Myanmar journalist for RadioNetherlands also emphasized this interplay:

[T]here are more mobile phones in the towns and cities of this closed country than its army led government would like. And mobile phones were key instruments in the organisation and news dissemination of last September’s pro democracy protests led by monks—illustrating exactly why the leading Junta fear [sic] the access to the outside world that technology offers.

The September protests were caught by the countless mobile phones of ordinary people or shot at great risk by the hidden video cameras of undercover reporters and sent out of the country within minutes through the internet. Smuggled video tapes found their way to mainstream media around the world.

For a few days Burmese monks led civilian protesters on the streets of Yangon, and the international community watched, electrified by the unprecedented images of a country that had remained behind its own bamboo curtain for years.<sup>56</sup>

It is no exaggeration to say that governmental accountability and citizens’ ability to communicate vary directly with each other. Zbigniew Brzezinski credits “the loss of Communist monopoly over mass communications [as] the key to the breakdown of Communist totalitarianism.”<sup>57</sup> On the other

54. Alasdair Roberts, canvassing what he characterizes as a global trend toward enacting government transparency laws (including in Third World countries), notes that “the governments and citizens of these countries expect their new right-to-information laws to do great things—to legitimize rulers, reduce corruption, and heighten popular participation in governance.” ROBERTS, *supra* note 25, at 20.

55. *Id.* at 231.

56. Dheera Sujana, *Technology and Protest in Myanmar*, RADIO NETHERLANDS, May 12, 2008, <http://static.rnw.nl/migratie/www.radionetherlands.nl/thestatewherein/otherstates/tswi-081206-internet-myanmar-redirec>.

57. ZBIGNIEW BRZEZINSKI, *THE GRAND FAILURE: THE BIRTH AND DEATH OF COMMUNISM IN THE TWENTIETH CENTURY* 254 (1989).

hand, Professor Roberts also sounds a cautionary note, at least with respect to the United States, because of the citizenry's increasing sense that government today is too complex to understand, which fosters "a growing sense of discontinuity between voters of all political stripes and the institutions of government."<sup>58</sup>

B. *Policy Preferences for Governments that Would Be Unaccountable*

For those who would exercise governmental power without accountability, the relationship between information and power suggests certain policy preferences. Obviously, control of information sources is a critical one. As Alvin Snyder has said, "The whole Communist system was held up by a total control of information from the very top and would only survive if it was sealed off from the rest of the world."<sup>59</sup> That is why the advent of geosynchronous television satellites was so threatening to the Soviet government.<sup>60</sup> Snyder also observed that "[A]ll governments, including our own, lie when it suits their purposes. The key is to lie first."<sup>61</sup> Voice of America, Radio Free Europe, and similar programs testify to governments'—both broadcasting sources and unwilling recipients—recognition of the importance of such control. Axis Sally<sup>62</sup> and Tokyo Rose<sup>63</sup> are examples from other nations.<sup>64</sup> Years of Soviet efforts to block communica-

58. ROBERTS, *supra* note 25, at 235-36. *See generally id.* at 235-38.

59. ALVIN A. SNYDER, *WARRIORS OF DISINFORMATION: AMERICAN PROPAGANDA, SOVIET LIES, AND THE WINNING OF THE COLD WAR* 24 (1995).

60. *Id.* at 23.

61. SNYDER, *supra* note 59, at 71. Machiavelli commented on the political necessity of deception by the ruler. *See* MACHIAVELLI, *supra* note 44, at 63-66. Shakespeare may have said it best:

For when my outward action doth demonstrate  
The native act and figure of my heart  
In compliment extern, 'tis not long after  
But I will wear my heart upon my sleeve  
For daws to peck at: I am not what I am.

WILLIAM SHAKESPEARE, *OTHELLO* act 1, sc. 1.

62. "Axis Sally" was an American citizen (Mildred Gillars) who broadcast pro-German propaganda to United States servicemen during the Second World War. *See Gillars, Mildred*, in 5 *THE NEW ENCYCLOPEDIA BRITANNICA* 267 (15th ed. 2002).

63. "Tokyo Rose" refers to a group of thirteen female announcers who, as native English speakers, broadcast Japanese propaganda to American troops during World War II. *See D'Aquino, Iva Tojuri*, in 3 *THE NEW ENCYCLOPEDIA BRITANNICA* 882 (15th ed. 2002).

64. Some may protest that there are clear distinctions between VoA, Radio Free Europe, and the latter two broadcasters. The United States labeled the "three" women as propagandists, but certainly characterized VoA and Radio Free Europe as a "news and information" rather than a propaganda source. Perhaps so, but I respectfully suggest that propaganda, like beauty, is often in the eye of the beholder. Twentieth-century China, Cuba, North Korea, and the Soviet Union might have agreed that these are the relevant adjectival expressions, regrettably reversed by U.S. propaganda.

tion from the West are well documented.<sup>65</sup> And, in 2007, the government of Myanmar made a discovery.

It used to be easier: Close the borders, set up roadblocks, stop the trains, cut telephone lines, and then crack down on your people with impunity. This is what the military in the former Burma did when it crushed a pro-democracy uprising in 1988.

Last week, when the generals began attacking Buddhist monks and their supporters in the streets of Myanmar, they discovered that the world had changed. People were watching.

The junta had come face to face with a revolution in the technology of resistance in which a guerrilla army of citizen reporters was transmitting videos, photographs and news reports over the Internet even as events were unfolding.

The images made their way on to television screens and into newspapers and the world was flooded with scenes of tens of thousands of red-robed monks in the streets and of chaos and violence as the junta stamped out the biggest popular uprising in two decades.

The old technology of guns and clubs had been ensnared by the immediacy of electronic communication in a way the world had never seen.<sup>66</sup>

The government also made a decision.

And then, on Friday, the flow of images stopped.

"Burma is blacked out!" wrote a blogger called Dathana, who had been one source of information for the outside world. It was the last message he sent.

Using technology in as heavy-handed a way as it had used truncheons, the junta simply closed down the nation's two Internet providers. In keeping with the country's self-imposed isolation over the past half-century, it cut itself off from the virtual world just as it had from the world at large.

Most overseas cellphone communications and land lines were severed or hampered as well, and soldiers on the streets confiscated cameras and video-telephones.

"Finally they realized that this was their biggest enemy, and they took it down," said Aung Zaw, editor of an exile magazine called Irrawaddy whose Web site has been a leading source of news over the past weeks.

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65. See generally, SNYDER, *supra* note 59, at 22-30.

66. Seth Mydans, *Myanmar Comes Face to Face with a Technology Revolution*, N.Y. TIMES, Oct. 3, 2007, available at <http://www.nytimes.com/2007/10/03/world/asia/03iht-info.html>.



His Web site has been attacked by a virus whose timing raises the possibility that the military government has a few skilled hackers in its ranks.

At the same time, the junta turned to the oldest tactic of all to shut off information—fear. Local journalists and people caught transmitting information or using cameras are being threatened and arrested, exile organizations said.<sup>67</sup>

Consider also the Chinese government's well-known and continuing attempts to control access to certain Internet sites,<sup>68</sup> which, among other things, drew international attention as the Beijing Olympic Games approached in 2008.<sup>69</sup> At the same time, it is difficult—virtually impossible—to live in the modern world without the Internet and like services to support tourism, investment by foreign interests, and business generally.<sup>70</sup> And so, at some point, the cost of electronic isolation becomes too great, and the channels become open again.

Second, and intimately connected with limiting available information, governmental unaccountability demands limits on citizens' ability to communicate among themselves, as recently evidenced all too well by recent events in Iran and Myanmar. The government must restrict or entirely prohibit citizen gatherings.<sup>71</sup> Speech, particularly speech widely distributed by technology, must be punishable.<sup>72</sup> In pre-Solidarity Poland, for example, "Unauthorized gatherings of more than three people were pro-

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67. *Id.*

68. See *infra* note 92 and accompanying text.

69. See, e.g., China "Breaking Promises" on Olympic Web Censorship, NEWS SCIENTIST, July 29, 2008, <http://www.newscientist.com/article/dn14421-china-breaking-promises-on-olympic-web-censorship.html>; Guy Dixon, *China Lifts Olympics Internet Censorship*, SC MAGAZINE, Aug. 4, 2008, <http://www.securecomputing.net.au/News/118607,china-lifts-olympics-internet-censorship.aspx>; Steve Musil, *Internet Censorship Plagues Journalists at Olympics*, CNET NEWS, July 29, 2008, [http://news.cnet.com/8301-1023\\_3-10002097-93.html](http://news.cnet.com/8301-1023_3-10002097-93.html).

70. Mydans, *supra* note 66.

71. See, e.g., John Darnton, *Poland Restricts Civil and Union Rights; Solidarity Activists Urge General Strike*, N.Y. TIMES, Dec. 14, 1981, at A1 ("Poland's new military leaders issued a decree of martial law today, drastically restricting civil rights and . . . banned all kinds of public gatherings and demonstrations. . . ."); Seth Mydans, *Burmese Junta Sets Curfew to Combat Protests*, N.Y. TIMES, Sept. 25, 2007, available at <http://www.nytimes.com/2007/09/25/world/asia/25cnd-myanmar.html> (discussing government reaction to "eighth day of peaceful antigovernment protests" with explicit warning that "'People are not to follow, encourage or take part in these marches,' the announcements said. 'Action will be taken against those who violate this order.'"); Seth Mydans, *The Monks Are Cut Off, and Burmese Clashes Ebb*, N.Y. TIMES, Sept. 29, 2007, available at <http://www.nytimes.com/2007/09/29/world/asia/29myanmar.html?fta=y>; U.S. Urges the Kremlin to Lift Ban on Protests, N.Y. TIMES, Mar. 29, 1991, at A8; Robert F. Worth, *Details Emerge on Prison Abuse After Iran Vote*, N.Y. TIMES, July 29, 2009, at A7 (discussing Interior Ministry's refusal of permission for a gathering); Robert F. Worth & Nazila Fathi, *Tehran Combines Clemency and Toughness*, N.Y. TIMES, July 30, 2009, at A8 (same).

72. See *infra* note 88 and accompanying text.

hibited [even in private homes], and the Militia (the urban police) had the right to come in and 'disperse the assembly.'"<sup>73</sup> Modern technology makes it more difficult for government to interfere with "assemblies," not least because it permits "virtual meetings"—communication in real time among large numbers of people not in the same location. Thus, governments must be ever more vigilant in cyberspace. If all this sounds like a recipe for despotic government, it is. Interestingly, definitions of despotism<sup>74</sup> correspond quite closely to the traditional definitions of sovereign as one exercising unrestrained and unrestrainable governing power, whether gleaned from Bodin,<sup>75</sup> Hobbes,<sup>76</sup> or *Black's*.<sup>77</sup>

Finally, it is also important for those who wish for unaccountability to limit education. In large part, education involves people learning what to do with information when they do have it. This should strike a responsive chord with the legal academy, given that we spend so much of our teaching time drumming into students that merely being able to recite legal principles in the abstract is fundamentally useless. It is not an accident that one witnesses attempts to limit education by keeping large parts of the population out of the schools—notably African-Americans<sup>78</sup> and wo-

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73. LECH WALESA, *THE STRUGGLE AND THE TRIUMPH* 9 (1991).

74. See, e.g., IV *THE OXFORD ENGLISH DICTIONARY* 533 (2d ed. 1989) ("1. [T]he exercise of absolute authority . . . 3. Absolute power or control . . ."); see also *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 392 (unabr. ed. 1969) ("1. . . the exercise of absolute authority, 2. absolute power or control; tyranny. 3. an absolute or autocratic government . . .").

75. BODIN, *supra* note 5, at 23 ("[T]he main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent."). Throughout the first book of this work, Bodin emphasizes the critical aspect of sovereignty as lack of accountability. He did not insist that sovereignty reside in a single individual, and in fact recognized quite explicitly that the people might have sovereignty, with the head of state being merely a custodian for a limited period of the exercise of power. *Id.* at 4. Such a figure was not, in Bodin's view a prince or a sovereign in any sense. On the other hand, he also recognized the people's ability not merely to delegate power to a ruler, but rather to alienate it completely, in which case the ruler was sovereign. *Id.* at 6.

76. See HOBBS, *supra* note 6.

77. See *supra* note 12 and accompanying text.

78. We are, after all, the nation of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which relied in part on a Massachusetts decision almost half a century earlier, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), that, in the face of a state statute mandating that children attend the public school nearest their homes, nonetheless ruled that an African-American child could not attend the (all-white) school nearest her home. One should not overlook as well decisions such as *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding imposition of segregated education on child of Chinese ancestry) and *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (upholding state fines imposed on private college for having interracial classes). *Brown v. Board of Education*, 347 U.S. 483 (1954), did not by any means end racial segregation in United States public schools; it merely ignited a new phase of the conflict between integrationists and segregationists that has continued in the decades since. See, e.g., *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Cooper v. Aaron*, 358 U.S. 1 (1958).

men<sup>79</sup> in the United States and women in other societies<sup>80</sup>—coinciding with the political powerlessness of the disfavored groups. “A society is undemocratic—it cannot engage in conscious social reproduction—if it restricts rational deliberation or excludes some educable citizens from an adequate education.”<sup>81</sup>

### C. *The Inseparable Blessing and Threat of Technology*

Technology, however, is a two-edged sword. Lech Walesa discusses at length the Polish government’s telephone wiretaps in the years that he helped organize Solidarity.<sup>82</sup> There are recent reports that the Iranian government is using modern technology acquired from the West to track and pinpoint the sources of unwelcome public information in order to take action against them.

The Iranian regime has developed, with the assistance of European telecommunications companies, one of the world’s most sophisticated mechanisms for controlling and censoring the Internet, allowing it to examine the content of individual online communications on a massive scale.

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All eyes have been in the Internet amid the crisis in Iran, [*sic*] and government attempts to crack down on information. The infiltration of Iranian online traffic could explain why the government has allowed the Internet to continue to function—

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79. See, e.g., DISCRIMINATION AGAINST WOMEN: CONGRESSIONAL HEARINGS ON EQUAL RIGHTS IN EDUCATION AND EMPLOYMENT (Catharine R. Stimpson ed., 1973). One of the best examples of the exclusion of women from education, particularly a type of education closely linked to exercising power in society, comes from Harvard Law School.

The Dean [Erwin Griswold] stated his view to the effect that the present number of applicants for admission was so great that it was necessary each year to deny admission to well-qualified men students. He hazarded a guess that one in ten women who study law remains a practitioner for any significant length of time so that, in his opinion, as long as the first year class was limited in numbers, every woman admitted would keep out a man and thereby reduce the number of graduates who would follow careers as lawyers.

Minutes of Harvard Law School Faculty Meeting, January 11, 1949, *quoted in* JUDITH RICHARDS HOPE, *PINSTRIPES AND PEARLS* 8 (2003).

80. See, e.g., Barry Bearak, *Education in Afghanistan: A Harrowing Choice*, N.Y. TIMES, Jul. 9, 2007, available at <http://www.nytimes.com/2007/07/09/world/asia/09iht-afghan.4.6571860.html> (“Historically, girls’ education has been undervalued in Afghan culture. Females were forbidden from school altogether during the Taliban rule.”); Shafiqulla Waak, *Education for Girls: The Key to Afghanistan’s Development*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, Mar. 3, 2009, <http://unama.unmissions.org/Default.aspx?tabid=1783&ctl=Details&mid=1882&ItemID=2324> (describing Taliban efforts to prevent education of women).

81. AMY GUTMANN, *DEMOCRATIC EDUCATION* 95 (1987).

82. WALESA, *supra* note 73, at 88-107.

and also why it has been running at such slow speeds in the days since the results of the presidential vote spurred unrest.<sup>83</sup>

The Internet is abuzz today with accounts of the battle of the technologies now going on in Iran,<sup>84</sup> and it may be only a slight exaggeration to suggest that the real struggle going on is electronic, with those unhappy with the results of an election they claim was rigged pitted against a government determined to preserve itself (and, perhaps, the Iranian revolution of 1979) in no small part through technological means.

A recent Associated Press article by Rebecca Santana highlights the two sides' efforts. She reports that:

The tweets still fly and the videos hit YouTube whenever protesters take to the streets in Iran—even as the Internet battle there turns more grueling.

Authorities appear to be intensifying their campaign to block Web sites and chase down the opposition online, and the activists search for new ways to elude them.

Sites such as Facebook, Twitter and YouTube remain blocked, as they have been since Iran's political turmoil began following the disputed June 12 presidential election. Internet experts believe the government is going further—including tracking down computers from which images and videos of Iran's protests are sent out to the rest of the world. Activists fear their every move online is watched.<sup>85</sup>

A report from Myanmar confirms the technological basis for the Iranian activists' fears.

But there is also a hidden message in the single-minded way people who sent images of human rights violations out of the country have been hunted down: that the government too can use technology to its own benefit. People have been traced through their email and mobile phones and internet servers have been examined for "improper use."

. . . .

The government has even mined the very same images of the violent put-down of the demonstrators to locate the shops,

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83. See, e.g., Christopher Rhoads & Loretta Chao, *Iran's Web Spying Aided by Western Technology*, WALL ST. J., June 22, 2009, at A1.

84. See, e.g., MORGAN SENNAUSER, *THE STATE OF IRANIAN COMMUNICATION: MANIPULATION AND CIRCUMVENTION* (2009), available at [http://athens.indymedia.org/local/webcast/uploads/the\\_state\\_of\\_iranian\\_communication.pdf](http://athens.indymedia.org/local/webcast/uploads/the_state_of_iranian_communication.pdf).

85. Rebecca Santana, *Iran Activists Work to Elude Crackdown on Internet*, NEWS-DAY, July 25, 2009, <http://www.newsday.com/iran-activists-work-to-elude-crackdown-on-internet-1.1325109>.

doorways and homes where people may have taken the footage and then made group arrests to find the photographers.<sup>86</sup>

Thus, the same technology that brings government actions and public response to them to light can also reveal the people against whom the government can retaliate. In conjunction with that, it is a great advantage to have a system of informants to enhance the deterrent effect of sanctions for disfavored speech by increasing at least the perception of the likelihood of apprehension and the resultant disincentive to communicate freely with other citizens.<sup>87</sup>

Those outside of government, however, are not without their own resources. Internet experts from around the world have provided technical assistance to Iranians to facilitate their ability to communicate safely, without government detection.

The Internet has been a key tool for Iran's opposition on two fronts. One is internal—to organize protests and exchange information. The other is external—to let the world know what is going on amid severe government restrictions that bar foreign media from reporting and taking pictures and video on the streets. The government has been actively trying to block online activists on both fronts.<sup>88</sup>

Thus, technology constantly draws and redraws the battle lines. The battle is over information. Knowledge is power.<sup>89</sup>

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86. Sujan, *supra* note 56.

87. See, e.g., LOUISE I. SHELLEY, *POLICING SOVIET SOCIETY: THE EVOLUTION OF STATE CONTROL 114-15* (1996) ("An elaborate system was used to develop information in the USSR. . . . The security agency [KGB] tended to recruit 'respectable' citizens to help it promote its objectives of enforcing political conformity and maintaining Soviet power."); Adrienne Wilmoth Lerner, *Gestapo*, in 2 *ENCYCLOPEDIA OF ESPIONAGE, INTELLIGENCE AND SECURITY* 63 (2004) ("Gestapo agents were charged with rooting out foreign agents and resistance fighters, but they also expanded their role as an internal police force. Gestapo agents and informants concentrated on finding suspected political dissidents of the Third Reich. Spying on citizens became pervasive, and the Gestapo encouraged people to turn in 'suspect persons' to local authorities."); see also *The Gestapo is Born*, THE HISTORY PLACE (2001), <http://www.historyplace.com/worldwar2/triumph/tr-gestapo.htm> ("But each Gestapo agent operated at the center of a large web of spies and informants. The problem for the average citizen was that no one ever knew for sure just who those informants were. It could be anyone, your milkman, the old lady across the street, a quiet co-worker, even a schoolboy. As a result, fear ruled the day. Most people realized the necessity of self-censorship and generally kept their mouths shut politically, unless they had something positive to say."). See also ROBERTS, *supra* note 25, at 27 (estimating that 173,000 East Germans "collaborated as Stasi informers").

88. Santana, *supra* note 85.

89. I have not found any evidence that governments are directly offering such assistance, but on at least one occasion, the United States has offered it indirectly. "[T]he US State Department . . . asked Twitter to delay maintenance of the site that would have shut it down in the middle of the day in Iran." Murad Ahmed, *Iran Dissidents Organise Protests and Talk to the World on Twitter*, THE TIMES, June 18,

One should not fall into the trap of thinking that such methods are limited to governments of any particular description. Certainly they are typical of governments that, from the Western perspective, one might characterize as “repressive.” “China’s vaunted ‘Great Firewall,’ . . . is widely considered the most advanced and extensive Internet censoring in the world . . . .”<sup>90</sup> Not only that: China also now requires that all computers offered for sale in China be equipped with filtering software<sup>91</sup> and has recently implemented a rule requiring Web users to provide their names and identification numbers when they go online.<sup>92</sup>

China and Iran are by no means alone, however, in seeking to keep track of and control what their citizens can see on the Internet.

Britain has a list of blocked sites, and the German government is considering similar measures. In the U.S., the National Security Agency has such capability, which was employed as part of the Bush administration’s “Terrorist Surveillance Program.” A White House official wouldn’t comment on if or how this is being used under the Obama administration.

The Australian government is experimenting with Web-site filtering to protect its youth from online pornography, an undertaking that has triggered criticism that it amounts to government-backed censorship.

Content inspection and filtering technology are already common among corporations, schools and other institutions, as part of efforts to block spam and viruses, as well as to ensure that employees and students comply with computer-use guidelines. Families use filtering on their home computers to protect their children from undesirable sites, such as pornography and gambling.<sup>93</sup>

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2009, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article6524127.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article6524127.ece).

90. Rhoads & Chao, *supra* note 83, at A6.

91. *Id.*

92. See Jonathan Ansfield, *China Web Sites Seeking Users’ Names*, N.Y. TIMES, Sept. 6, 2009, at A4, available at <http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html>.

93. Rhoads & Chao, *supra* note 83, at A6. Yet, many people find some degree of content monitoring by others desirable or even essential. E-mail services regularly advertise in terms of how effectively they are able to filter out spam. For example, AOL Security Central: *Spam-Discover* AOL explains:

AOL’s mail controls let you decide what kind of email you receive and don’t receive. You can:

- Block junk mail by keyword or sender
- Report spam in your mailbox
- Manage your spam folder

Your email is protected by the same spam controls no matter where you get your AOL email, including the AOL.com Web site.

AOL Security Central: *Spam-Discover* AOL, <http://daol.aol.com/security/spam> (last visited Sept. 24, 2010); see also Road Runner Spam Control Policy, <http://post>

One scholar recently chronicled the United States government's routine warrantless electronic surveillance<sup>94</sup> of three different sorts. First, the government regularly monitors by pen register not only the digits the caller dials to reach another telephone (which *Smith v. Maryland*<sup>95</sup> permitted without a warrant), but also any digits the caller dials after the connection is complete.<sup>96</sup> Those digits do contain content, which may include social security numbers, credit card numbers, bank account numbers, or other information. Second, federal law enforcement agencies routinely track the location of cellular telephones without warrants, whether the telephone is in public view or not.<sup>97</sup> Third, the government engages in warrantless interception of information sent over the Internet.<sup>98</sup>

#### D. *Knowledge and Accountability*

Think back for a moment to the definitions of sovereignty.<sup>99</sup> All of them speak in one form or another of "[t]he power to do everything in a state without accountability . . . ."<sup>100</sup> Information—knowledge—creates

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master.rr.com/spam (last visited Sept. 24, 2010) ("Like all other ISPs, Road Runner is interested in making sure that its customers receive all of the email that they want, while minimizing the amount of unsolicited email that gets to their mailboxes.") (detailing anti-spam efforts and policies). Some web browsers offer advertisement blocking as an add-on, and judging from the available figures, many users approve. See Mozilla/Firefox Web Browser & Thunderbird Email Clients, <http://www.mozilla.com/en-US/> (last visited Sept. 24, 2010). Its add-on, Adblock Plus, is downloaded at a rate exceeding 700,000 times per week, for a total thus far exceeding 1 billion. See Add-ons on Firefox, <https://addons.mozilla.org/en-US/firefox> (last visited Sept. 24, 2010). The question will always be how aggressive the content editing is, who is doing it, and what standards should limit its scope. In one sense, the question loops back around and almost merges with one of the principal issues of sovereignty: who watches the watchers, or, who or what governs the government.

94. See Kevin S. Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. REV. 589 (2007).

95. 442 U.S. 735 (1979), *superseded by statute*, 18 U.S.C. § 3121(a). The Court distinguished sharply between interception of dialed digits, which at the time contained no call content, and interception of the content of telephone calls.

96. "In the world of electronic surveillance, those digits you dial after you have dialed a phone number and the phone company has connected your call are known as 'Post-Cut-Through Dialed Digits' ('PCTDDs')." Bankston, *supra* note 94, at 591 (citing U.S. Telecom Ass'n v. FCC, 227 F.3d 450, 462 (D.C. Cir. 2000)).

97. See *United States v. Karo*, 468 U.S. 705, 713 n.3 (1984) (holding that use of beeper tracking device became search for Fourth Amendment purposes when container containing beeper was out of public view).

98. See Bankston, *supra* note 94, at 623-26. Mr. Bankston notes that the government's technology device that permits such interception goes under "the not-very-reassuring name of 'Carnivore.'" *Id.* at 622 (citing The Fourth Amendment and the Internet: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. (2000) (statement of Robert Corn-Revere, Hogan & Hartson LLP)), available at <http://judiciary.house.gov/legacy/corn0406.htm>.

99. See *supra* notes 5-13, 74-77 and accompanying text.

100. BLACK'S LAW DICTIONARY, *supra* note 12, at 1396.

accountability. One does not have to be too cynical to surmise that one of the reasons governments are at such pains to maintain information monopolies is to avoid precisely the sort of public accountability that they often find uncomfortable. "Damage control" is all too familiar a phrase.<sup>101</sup> Yet all of this activity tells us something about sovereignty. If the availability of information to the citizenry connotes government accountability, then when information is freely available it also connotes that "sovereignty"—true unaccountability—does not lie in government but rather in the people who make the government accountable, whether in a democracy with formally structured accountability or a fundamentalist state verging on a theocracy. The modern world offers substantial evidence that true sovereignty resides in government in only one of two circumstances. First, the populace may elect to be uninformed, thus ceding the power of accountability to government. Second, government may successfully prevent the populace from being informed. Iran's recent election and its aftermath show how communicative technology tends to undercut both of those conditions. It has created a focal point of public concern that now appears to absorb the government's attention almost completely.

Thus, communications technology may have an inherently democratizing tendency. It tends to prevent governments from keeping secret or at least minimizing things that they do not want bruited about. What would be happening in Iran if all of this communication were not possible?<sup>102</sup> As one commentator noted,

It has come as a surprise to many, not least to Iran's regime, just how effectively the country's young population has been able to articulate and organise opposition protest on the web.

New technologies have turned yesterday's flashmob into today's political rally. With elements of the Iranian mobile phone system disabled, the internet has become the organising medium for the opposition and Facebook and Twitter the tools of choice to communicate and organise dissent.

. . . .

For Iranians, the internet has meant being able to see that the world is watching. Twitter has made them aware that, in their feelings about the election, they are not alone. The revolution may not be televised in Iran, but it may well be tweeted.<sup>103</sup>

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101. See, e.g., STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 212-13, 216-26 (1990) (describing damage control with respect to Watergate scandal).

102. I realize at this point that I am getting dangerously close to the riddle often tossed at unsuspecting children: "If a tree falls in the forest, and no one hears it, does it make a sound?" In one sense, though, the question is quite apt. If no one inside or outside of Iran knew what was happening there, would there be any sound?

103. Ahmed, *supra* note 89.



Suppose the bystander with the video camera had not happened to catch the Los Angeles Police Department's assault on Rodney King?<sup>104</sup> What might have happened in the days of Tiananmen Square if more of the Chinese people had known both about the protests and the Chinese government's reaction to them?<sup>105</sup> What would our own view of United States actions in Iraq be if the abuses of Abu Ghraib had not come to light?<sup>106</sup> Suppose it were not generally known that the United States, under both the Bush and Obama Administrations, routinely asserts entitlement to keep people imprisoned indefinitely without any charges having been filed against them?<sup>107</sup>

At one time, authoritarian regimes could draw a shroud around the events in their countries by simply snipping the long-distance phone lines and restricting a few foreigners. But this is the new arena of censorship in the 21st century, a world where cellphone cameras, Twitter accounts and all the trappings of the World Wide Web have changed the ancient calculus of how much power governments actually have to sequester their nations from the eyes of the world and make it difficult for their own people to gather, dissent and rebel.<sup>108</sup>

It is far too soon, however, to state with certainty that communications technology will continue to have such an effect. Technology itself is simply another form of power, and that makes the struggle between the forces of proliferation and the forces of prevention or minimization critical. If technologies of interception, suppression, and localization outpace (or at least keep pace with) the technologies of communication proliferation, the upper hand will remain with those who control the former, because

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104. See *Los Angeles Jury Widens Inquiry in Police Beating*, N.Y. TIMES, Mar. 10, 1991, available at <http://www.nytimes.com/1991/03/10/us/los-angeles-jury-widens-inquiry-in-police-beating.html> (summarizing contents of privately made videotape of March 3, 1991 beating).

105. Even today, China takes extraordinary measures to prevent its people from knowing about the protests. In fact, as Barbara Demick reported the day before the twenty year anniversary of the Tiananmen Square massacre:

There is no Twittering about Tiananmen Square, or anything else, in China this week.

In a crackdown apparently timed to the 20th anniversary Thursday of the crushing of pro-democracy demonstrations, the Chinese government has pulled the plug on the social networking site Twitter and dozens of other Internet sites and blogs.

See Barbara Demick, *China Battens Down Hatches as Tiananmen Anniversary Nears*, L.A. TIMES, June 3, 2009, available at <http://articles.latimes.com/2009/jun/03/world/fy-china-anniversary>.

106. See Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42-47; see also ROBERTS, *supra* note 25, at 232-33.

107. See William Glaberson, *Obama Faces Court Test Over Detainee*, N.Y. TIMES, July 29, 2009, at A1.

108. Brian Stelter & Brad Stone, *Web Pries Lid of Iranian Censorship*, N.Y. TIMES, June 23, 2009, at A1.

they will be able at least to limit information<sup>109</sup> and perhaps to locate and retaliate against those who distribute it. If the reverse is true, it becomes more difficult for governments to avoid public accountability. One commentator notes that, “‘It’s almost impossible for the censor to win in an Internet world, but they’re [*sic*] putting up a good fight.’”<sup>110</sup>

E. *Inherent Dangers of Unrestricted Communication Enhanced by Technology*

Even if distributive technology outpaces restrictive technology, there are traps and difficulties. The onslaught of information may simply become overwhelming, as forecast most famously by Alvin Toffler<sup>111</sup> and more recently characterized as “data smog.”<sup>112</sup> Human intelligence works in part by being able to: (1) distinguish the significant from the insignificant,<sup>113</sup> (2) take in and benefit from the former, and (3) discard or ignore the latter. Receiving too much information prevents the mind from performing that critical first step and therefore simultaneously from being able to engage in the latter two steps on the basis of anything other than random chance. “[J]ust as there are limits on how much sensory input we can accept, there are built-in constraints on our ability to process information.”<sup>114</sup> Phillip Knightley notes that the intelligence community itself

may have . . . expanded beyond its *own* control. It now produces so much information, such an all-sources glut of words, images and electronic data that the number of intelligence officers who can understand it all, who see the overall picture, is rapidly declining. Soon they, too, may drown in their own intelligence.<sup>115</sup>

Knightley’s prediction has apparently come true, because in January 2010 the *New York Times* reported that the United States military is having con-

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109. One example is the disruption of service from Facebook, Twitter, and LiveJournal on Thursday, August 6, 2009, which apparently came from an organized, targeted, two-prong attack against a prolific blogger, apparently on behalf of Russia. The blogger, known as Cyxymu, was vociferously critical of Russian activities in and with respect to Georgia. The attack disabled Twitter for forty-five million users for several hours and disrupted service at other sites. See Posting of Jenna Wortham to BITS: Business, Innovation, Technology, Society, <http://bits.blogs.nytimes.com/2009/08/07/attack-on-twitter-came-in-two-waves/?hp> (Aug. 8, 2009, 11:45 EST).

110. Stelter & Stone, *supra* note 108 (quoting John Palfrey, Co-Director, Berkman Center for Internet and Society, Harvard University).

111. See ALVIN TOFFLER, *FUTURE SHOCK* (1970); see also KNIGHTLEY, *supra* note 49, at 378 (“American satellites and spy planes produce more photographs than anyone could ever look at, much less analyze.”).

112. See ROBERTS, *supra* note 25, at 18 (citing DAVID SHENK, *DATA SMOG* (1997)).

113. For these purposes, I include in the category of insignificant the vast categories of unreliable “information,” whether it is unreliable because it is incomplete, mistaken, or deliberately deceptive. See *infra* notes 117-132 and accompanying text.

114. TOFFLER, *supra* note 111, at 351.

115. KNIGHTLEY, *supra* note 49, at 7.

siderable difficulty keeping up with all of the video intelligence that drone flights over Afghanistan are producing.<sup>116</sup> This phenomenon certainly should not come as a surprise to the legal academy, particularly those who teach first-year courses. Professors expend great effort trying to help students recognize and cull the relevant from the irrelevant, and few if any of us have failed to warn students about the inutility of the 800-page property outline from *The Paper Chase*.<sup>117</sup>

The preceding paragraph, while recognizing the perils of an information tidal wave, implies an assumption that all of the information is at least accurate. There is no reason, however, to indulge such an assumption. Inaccurate information falls into three rough categories: partial information, misinformation, and disinformation. It may be even more difficult to distinguish accurate from inaccurate information than it is to distinguish relevance. As we all know from receiving spam and phishing solicitations, communications received over the Internet may not be what they seem or from whom they seem. The problem of dealing with what Toffler called information overload thus varies along several axes, and as psychology experiments have repeatedly demonstrated, "the greater the number of alternative courses of action open to the subject, the longer it takes him to reach a decision and carry it out."<sup>118</sup> The ultimate result, when people receive an ever-increasing volume of stimuli and must process them ever more complex tasks, is to reduce them to "blithering ineptitude."<sup>119</sup>

Together with that rather daunting thought, consider that Toffler wrote before the invention of the personal computer, before the Internet, cell phones, Twitter, Facebook, MySpace, and instant messaging. We subject ourselves today to stimulation by incoming information to a far greater degree than Toffler probably could have imagined at the time. He did note that a constantly increasing demand for decision-making in novel circumstances (what Toffler called non-programmed as opposed to programmed decisions), is debilitating. "Pushed to its extreme, the endpoint is psychosis."<sup>120</sup> The current debate about health care in the United States illustrates the problem. Faced with what the American Association of Retired Persons (AARP) characterized as "a tsunami of rumors, myths,

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116. Christopher Drew, *Military Is Awash in Data from Drones*, N.Y. TIMES, Jan. 11, 2010, at A1.

117. See JOHN J. OSBORN, JR., *THE PAPER CHASE* 171 (Whitston 2003) (1971).

118. TOFFLER, *supra* note 111, at 353.

119. See *id.* As Toffler put it,

We are forcing people to adapt to a new life pace, to confront novel situations and master them in ever shorter intervals. We are forcing them to choose among fast-multiplying options. We are, in other words, forcing them to process information at a far more rapid pace than was necessary in slowly-evolving societies. There can be little doubt that we are subjecting at least some of them to cognitive overstimulation. What consequences this may have for mental health in the techno-societies has yet to be determined.

*Id.* at 355.

120. *Id.* at 356.

fear-mongering and misinformation about the proposals that surges around the internet in nanoseconds,"<sup>121</sup> one reader neatly summarized the problem: "I'm totally confused about what's going on . . . . How do I know who[m] to believe?"<sup>122</sup>

Those seeking to benefit from an ill-informed or misguided populace may use restrictive technology to disrupt non-approved communication and distributive technology to flood the public with their own message.<sup>123</sup> The ability to disseminate vast amounts of communication inexpensively brings to the fore the core problem of epistemology: what conditions justify characterizing a belief as "knowledge." That is, in many ways, a central concern of the law of evidence. As any trial lawyer will recognize, most of what we think we know is hearsay:<sup>124</sup> we have not observed it personally. It may be reliable hearsay, but it is hearsay nonetheless.<sup>125</sup> One might go so far as to suggest that people could not function on a day-to-day basis without it; the ability to learn from and act in accordance with information not personally gathered but rather communicated from others is one of the things that distinguishes humans from many other animals. Were it not for our ready acceptance of hearsay, there could be no general body of knowledge of science, history, and technology, to name just a few. Figuratively speaking, each individual would spend a lifetime reinventing the wheel.

There is concern about disinformation campaigns in Iran. A Twitter account associated with unsuccessful presidential candidate Mir Hossein Moussavi recently warned of two faked websites.<sup>126</sup> There is also evidence of disinformation campaigns in the United States. The drumbeat leading up to the on-going war in Iraq rested on the Bush Administration's re-

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121. Patricia Barry, *Health Care Reform: The Assault on Truth*, AARP BULLETIN TODAY, Aug. 14, 2009, [http://bulletin.aarp.org/yourhealth/policy/articles/health\\_care\\_reform2.html](http://bulletin.aarp.org/yourhealth/policy/articles/health_care_reform2.html).

122. *Id.*

123. I am compelled to observe, in the spirit if not the words of Ambrose Bierce, that when anyone of whom the speaker does not approve puts out its own message, it is called "propaganda." See generally AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* (Dover 1993) (1912). The word's origins are devoid of implication, coming from the Latin "to propagate" or "sow." The term acquired negative connotations after Roman Catholicism's success in spreading the faith to the new world. "[S]ubsequent usage has rendered the term pejorative. To identify a message as propaganda is to suggest something negative and dishonest. Words frequently used as synonyms for propaganda are lies, distortion, deceit, manipulation, mind control, psychological warfare, brainwashing, and palaver." GARTH S. JOWETT & VICTORIA O'DONNELL, *PROPAGANDA AND PERSUASION* 2-3 (3d ed. 1999).

124. See, e.g., FED. R. EVID. 801(c).

125. Nor is hearsay the only category of evidence that concerns itself with this problem. The best-evidence rule, see, e.g., FED. R. EVID. 1001-04, and the whole area of judicial notice, see, e.g., FED. R. EVID. 201, address the same issue.

126. "WARNING: <http://www.mirhoseyn.ir/> & <http://www.mirhoseyn.com> are fake, DON'T join . . . #IranElection11:02 AM Jun 16th from web." Noam Cohen, *Twitter on the Barricades: Six Lessons Learned*, N.Y. TIMES, June 20, 2009, at No. 4.

peated assertions that Iraq had “weapons of mass destruction,” most famously in Secretary of State Colin Powell’s declaration to the United Nations<sup>127</sup> that the evidence was irrefutable. It turned out, of course, that although the United States characterized the evidence as “irrefutable,” it really was not very good at all, and the “weapons” turned out to be invisible; at least no one has located any in what is now the seventh year of occupation. In fairness, it appears that Powell himself was a victim of disinformation.<sup>128</sup> Frank Rich of the *New York Times* notes that the Administration of George W. Bush relied on disinformation as a way of selling the invasion of Iraq to the American people and the world,<sup>129</sup> the latter sale being supplemented by “a covert Office of Strategic Influence (OSI) [at the Pentagon], with a staff of fifteen . . . established to plant helpful ‘news,’ some of it phony, with foreign media.”<sup>130</sup> Soviet disinformation tactics are the subject of many books and articles.<sup>131</sup> The famed Watergate “dirty tricks” are another example from our own history.<sup>132</sup> Nor is disinformation a modern invention. “Benjamin Franklin, considered by many the father of American disinformation, in an effort to embarrass the British Government after the Revolutionary War, once planted a newspa-

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127. Colin Powell, U.S. Sec’y of State, Presentation to the United Nations Security Council (Feb. 5, 2003), *available at* <http://www.informationclearinghouse.info/article3710.htm>.

128. Thus, some officials, if not Secretary Powell, knew he had received unreliable data.

“In fact, Secretary Powell was not told that one of the sources he was given as a source of this information had indeed been flagged by the Defense Intelligence Agency as a liar, a fabricator,” says David Kay, who served as the CIA’s chief weapons inspector in Iraq after the fall of Saddam. That source, an Iraqi defector who had never been debriefed by the CIA, was known within the intelligence community as “Curveball.”

*Former Aide: Powell WMD Speech “Lowest Point in My Life,”* CNN.COM, Aug. 23, 2005, <http://www.cnn.com/2005/WORLD/meast/08/19/powell.un/>.

129. See FRANK RICH, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH IN BUSH’S AMERICA 2* (2006) (“While the controversial policy choices made by the Bush administration are well known, equally important is the way it dramatized its fable to the nation and made it credible to so many, even when it wasn’t remotely true.”). “We know for certain that the reasons sold to the public and the world by the administration were decoys.” *Id.* at 211. Rich also pointed out that disinformation may have significant drawbacks for its disseminators if the audience discovers it. “One hideous consequence of the White House’s biggest lie—conflating Saddam’s regime with the international threat of radical Islam, fusing the war of choice in Iraq with the war of necessity that began on 9/11—is that the public, having turned against one war, automatically rejects the other.” *Id.* at 223.

130. *Id.* at 32.

131. See, e.g., LADISLAV BITTMAN, *THE KGB AND SOVIET DISINFORMATION: AN INSIDER’S VIEW 1* (1985) (noting, inter alia, that “[t]he Soviet apparatus for propaganda and disinformation is undoubtedly the largest and most effective system in the world”); JOWETT & O’DONNELL, *supra* note 123.

132. See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* 146-54 (1974); ROBERTS, *supra* note 25, at 231-32. But they are far from the only example.

per story that American Indians were scalping children who had been 'ripped out of their mothers' bellies,' and sending their scalps to London to impress the government."<sup>133</sup>

## V. CONCLUSION

All of this might be of only limited interest were it not for the emerging critical relationship between information disseminated by communicative technology and sovereignty. What I have called distributive technology tends to make government ultimately accountable to the people, but the nature of that accountability will depend both on the quality and quantity of the information that people receive. But who is to judge the quality, and how much information is too much? To say that the First Amendment (in our society) presumes that such judgment resides in the recipients rather than either the disseminators or governments seems too facile, for it ignores the nature of the problem itself by pasting a legal label on it as a substitute for thinking critically about it. If governments are successful in controlling the volume and content of information available to the people, then sovereignty—true unaccountability of power—rests with those governments. Even if governments are not successful in such endeavors, there remain the problems of information overload and quality to which I have alluded.<sup>134</sup> Technology may end up favoring popular sovereignty, or it may end up promoting informational paralysis, leading ultimately either to anarchy or to *de facto* sovereignty in government as the only entity with the resources to cull, sift, and evaluate massive amounts of information. Neither is a particularly comforting vision. We can be certain of some things, however. First, true accountability of government and accurate, reliable information are inseparable. Heinlein<sup>135</sup> was right: secrecy does lead to tyranny. Bacon<sup>136</sup> was also right: knowledge is power—not least (or perhaps most importantly) the power to check otherwise unaccountable power. Free availability of information to a populace is one of the most important checks on what otherwise may become the absolute power against which Lord Acton warned.<sup>137</sup> Second, sovereignty and accountability are two sides of the same coin. Third, whether we like it or not, communicative technology—both of the types with which we are familiar today and of types we cannot even imagine that are nonetheless hurtling toward us from the future—holds the future of sovereignty firmly in its grasp.

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133. SNYDER, *supra* note 59, at 98 (footnote omitted). Mr. Snyder catalogs various American disinformation campaigns throughout the nation's history.

134. See *supra* notes 111-132 and accompanying text.

135. See *supra* note 1 and accompanying text.

136. See *supra* note 2 and accompanying text.

137. See *supra* note 3 and accompanying text.