# "SUSCEPTIBLE OF A VERY BROAD INTERPRETATION:"[1] NOTIONS OF ACCOUNTABILITY AND FREE-FLOW-OF-INFORMATION IN AMERICAN VIEWS ON THE FREEDOM OF INFORMATION ACT, 1929-1989

by

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# Abstract

In 1989, the United States Supreme Court formulated the central purposes doctrine of the Freedom of Information Act (FOIA) by ruling that the law was designed to grant citizens a right of access to records reflecting on the activities of government officials. This decision immediately generated controversy. The majority of parties interested in FOIA jurisprudence claimed that the judgement misconstrued the congressional intent by denying that legislators had hoped to create a right of access to all government-held information, regardless of its content. The contrast between the Court's doctrine and the majority interpretation, or the free-flow-of-information view, is the main topic of this thesis.

In exploring this matter, it becomes evident that the intellectual history of access legislation in the United States is marked by considerable diversity: from the 1920s through to the present era, various FOIA constituencies have espoused distinctive views on how an access-to-records statute should be understood. Most of these interpretations have focussed on the need for access as a measure to help citizens oversee the conduct of government personnel, and only the free-flow supporters have broken from this pattern. The philosophy they offer in its place suggests that oversight interpretations, particularly the central purposes doctrine, are illegitimate. These orthodox commentators argue instead that because the FOIA was designed to serve the same goals as the First Amendment, it must be read as mandating disclosure as "an end for its own sake."

The principal contention here is that free-flow supporters have dismissed the government-oversight views far too quickly. To illustrate this point, the thesis focuses on the central purposes doctrine, and articulates it in the form of an "accountability view" to establish that the Court's decision was not as arbitrary as is often claimed. Second, the argument inquires

whether one of these two predominant views can be said to have a stronger rationale than the other. The ultimate conclusion of this line of inquiry is that, because of serious logical flaws in the first-amendment argument supporting the free-flow theory, the central purposes doctrine actually represents the more reasonable interpretation of the statutory purpose of the act.

[1] Harold Cross, letter to Thomas Hennings, April 22, 1958, quoted in George Penn Kennedy, "Advocates of Openness: The Freedom of Information Movement" (Ph. D. diss., University of Missouri, Columbia, 1978), 95. Cross was commenting on the term "national security," and advocating its replacement with "national defense," in S. 2148, one of the early freedom of information bills.

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# Introduction

In March 1989, the United States Supreme Court formulated the "central purposes doctrine" of the Freedom of Information Act (FOIA) by ruling that the "basic purpose" of the law "is to open agency action to the light of public scrutiny." At issue in this case, *Department of Justice v. Reporters Committee for Freedom of the Press*, was a FOIA request by CBS News correspondent Robert Schakne for the "rap sheets," or criminal identification records, of Philadelphia businessman Charles Medico. The principal dispute between the plaintiff and the government concerned whether or not release of these records would violate Medico's privacy. For complicated reasons, however, the question on which the ruling turned pertained mainly to statutory purpose. Deciding on this latter issue, the Court determined that the 1966 Congress which passed the law had not intended to grant citizens a right of access to all government-held information, but had set out instead to create a mechanism that would help members of the public monitor activities of the federal agencies. Accordingly, Schakne's appeal was denied on the basis of logic explained by Justice John Paul Stevens in his opinion:

> The basic policy of [the FOIA] focuses on the citizens' right to be informed about "what their government is up to." That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. ... Indeed, response to [Schakne's] request would not shed any light on the conduct of any Government agency or official.[1]

This decision immediately generated controversy. Some commentators supported the Court's view, contending that "this dramatic interpretation of [the act's] purpose is an important step toward limiting misuse of the FOIA." On the other hand, though, the majority of interested parties claimed that the judgement "undermined the essential philosophy of FOIA—that public access to government[-held] information should be as broad as possible."[2] The fact that these two conceptions of the law are in conflict with each other may already be clear. On one hand, those

supporting the doctrine contend that the statutory purpose is directed toward informing citizens on government activities. Opposing this faction is a constituency that advocates the free-flow-of-information view of the act. These commentators hold that the doctrine is illegitimate because the law contains no specific provisions privileging those requestors interested in "what their government is up to" over other users. Moreover, they believe that the clear and demonstrable intent of the legislature was to mandate disclosure of information as an end in itself, not merely to allow insight into government operations. The contrasts between these views, and questions concerning which is more viable, are the main topics of this thesis.

To understand these major opposing perspectives, and thereby to appreciate the character of the contemporary debate over the FOIA, it is necessary to acknowledge that neither interpretation was born in a vacuum. At the outset, in the 1930s and 1940s, sponsors of a statute to regulate public access to government records had in mind a legal regime that would, as its main function, prevent agencies from taking arbitrary regulatory action. Within this administrative-law conception, prevalent in the era prior to the development of the popular notion of "freedom of information," access rights were indeed granted to citizens—but only on a need-to-know basis, and only guaranteed to those involved in an adjudication proceeding of a federal agency. By the 1950s, however, a more liberal idea of access laws came into circulation. First, the newsgathering community in America began discussing and advocating "the right to know" as a public policy goal that should be enacted in order to protect freedom of the press. Shortly afterward a new generation in Washington began to reassess the administrative-law paradigm, some hoping to pass laws that would force executive officials to be more open in dealings with Congress, and others emphasizing citizen access rights and the constitutional status of a freedom-of-information statute. In the years that followed, representatives of the executive branch began to propose yet another alternate conception in response to proliferating suspicions among congressional

representatives that the executive agencies were imbued with a culture of secrecy. Once the law was passed, academic researchers developed their own understanding of its meaning, the federal judiciary began to formulate the precursors to the central purposes doctrine, and the free-flow-of-information paradigm began to dominate the literature on the FOIA, particularly after legal scholars adopted it *en masse*.

This thesis characterizes each of these interpretations, assesses them in comparison, and presents two basic arguments. First, it contends that FOIA commentators have generally dismissed the Supreme Court's reading of the statute far too quickly. Granted, supporters of the free-flow orthodoxy may be correct in their contention that Justice Stevens' ruling misconstrued the intent of the legislature. However, this work attempts to demonstrate that his decision has a legal and logical foundation that is much more substantial than orthodox commentators are willing to concede, and, to illustrate this point, the thesis articulates the central purposes doctrine in the form of an "accountability view." Second, the argument inquires whether one of these two conceptions can be said to have a stronger rationale than the other. The ultimate conclusion of this line of inquiry is that the central purposes doctrine actually represents the more viable interpretation.[3]

The work is organized into five chapters. Chapter 1 discusses the years between 1929 and 1959, treating the history of what is often purported to be America's first access law, the Administrative Procedure Act (APA). It also presents a discussion of two of the early conceptions of access regulations in the United States: the administrative-law view and the congressional-oversight view. The second chapter explores another set of themes in the intellectual history of the FOIA during the 1940s and 1950s, as well as the legislative era from 1960 to 1966. Conceptions discussed here include those held by journalists, and by representatives of the executive branch. Chapter 3 presents a brief survey of the history of the act in operation, from

1967 to the 1980s, and introduces views held by academics, members of the general public, and those espousing the free-flow theory.

Chapter 4 takes up the question of whether or not the central purposes doctrine is in fact illegitimate, and argues that it is not. This is done by way of presenting the history and theory behind the doctrine, with a concentration on FOIA case law in the 1970s and 1980s; by establishing the precise definition of "accountability;" and by explaining the manner in which records serve accountability purposes within organizations. The suggestion is that the legitimacy of the Supreme Court's reading can be more readily identified when it is translated into an accountability view. Chapter 5 pulls together the various fragments of the argument introduced throughout the text by considering the free-flow and accountability views in broader context, and in comparison. The argument closes by demonstrating how and why the accountability view, and thereby the central purposes doctrine, may be seen as providing an understanding of the act which is actually more satisfactory than that derived from the orthodoxy.

## Endnotes

[1] *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 772 (1989).

[2] Fred H. Cate, D., Annette Fields, and James K. McBain, "The Right to Privacy and the Public's Right to Know: The 'Central Purpose' of the Freedom of Information Act," *Administrative Law Review* 46 (Winter 1994): 45-6; Christopher P. Beall, "The Exaltation of Privacy Doctrines over Public Information Law," *Duke Law Journal* 45 (April 1996): 1276.

[3] Note that the discussion of the FOIA presented here is actually a discussion of paragraph (c) of the act, and readers will find that those aspects dealing with publication of agency rules in the *Federal Register* and public access to statements of policy, staff manuals, and so on, are neglected. These categories of information are indeed covered under the FOIA—in paragraphs (a) and (b), respectively. However, following the standard approach employed by other commentators, this treatment refers to "the Freedom of Information Act" as if it was comprised only by the section establishing public rights to request access to records.

# Chapter 1

# The Sponsors: Conceptions of an Access Law, 1929-1959

## 1.1 From Indifference to Preoccupation: Early Congressional Interest in Regulating Government Information

That citizens possess an inalienable right of access to government records is now considered to be a fundamental axiom of American politics and society. Indeed, access rights have become entrenched to the extent that some commentators have identified them in the legal history of the republic as far back as 1776 and beyond. Senator Thomas Hennings, for example, has argued that the right of access was "so much taken for granted by the founding fathers that it was not deemed necessary to include it in the original constitution." Despite his best assurances on this point, Hennings' logic was not necessarily correct. Far from being so fundamental and engrained that they did not need to be expressed, it is more likely that access rights were not spoken of in the colonial era because they were not conceived until the twentieth century. As recently as the 1930s, in fact, few if any Americans thought about access to government records as a matter of rights, or even as a matter of public policy. It was at this time, when congressional representatives began to see the need for what would eventually become the Administrative Procedure Act of 1946, that the precursors to modern views on "freedom of information" were conceived.[1]

The need for administrative reform in the United States was first recognized in the late-1920s by a small group of congressional representatives who had observed, and become concerned about, a recently developing phenomenon known as the "administrative state." Traditionally, prior to the late-nineteenth century, the structure of American government at the federal level had conformed reasonably closely to the strict separation of powers outlined in the Constitution. The legislature made laws, the judiciary settled disputes by applying and

interpreting them, and the executive administered statutes and the programs they created, while for the most part avoiding encroachment on the responsibilities of the other branches. Eventually, however, as social, political, and economic circumstances changed, the system was forced to evolve. During the mid- and late-1800s, the great era of growth in territory, industry, and population in the United States, American leaders began to see that a system based on strict separation of powers imposed unreasonable constraints on governance. They recognized, in other words, that the increasing complexity of the society required an increasingly complex administrative apparatus.[2]

The principal characteristic of the administrative state was centralization of power within the executive branch. This was manifested in two ways. First, the American legal system was transformed during this period from one heavily reliant on statute law to one reliant in more equal measure on statutes and executive regulation. Secondary law had always been a part of the U.S. legal system from its earliest days. Until the federal government became extensively involved in so many sectors of American life, though, its importance and pervasiveness was minimal. Gradually, as Washington began supervising interstate commerce, ensuring purity of food and drugs, protecting wildlife and public lands, and monitoring various other "previously private activities," more and more rulemaking by the executive agencies became necessary. This legal means of facilitating the expansion of government services was largely an *ad hoc* response to the demands of a growing society. Executive regulations were valued because they could provide "the technical detail so often missing in statutes," as well as the "capacity for adaptation to changing circumstances that the letter of the law alone would lack."[3]

The second component of the administrative state, intimately related to the first, was the assumption of dispute-resolution responsibilities by the executive branch. Prior to the proliferation of rulemaking, the common route of recourse for citizen-government disputes was

the judicial system. There being very few regulations on the books, most charges against citizens, and citizen grievances against government, pertained to statute law, and thereby the courts were the proper venue for the hearing of most cases. As secondary law grew in volume and importance, on the other hand, the situation changed. More and more frequently, charges and grievances related to regulations rather than statutes, and as a result citizens involved in certain disputes would now have their entire matter dealt with by personnel within a particular agency. For example, ranchers suspected of violating wildlife or watershed protection rules would be investigated by regulators from the Department of the Interior rather than by police, indicted by a prosecutor from Interior rather than Justice, and tried before an agency tribunal or hearing officer as opposed to a judge.[4]

On one hand, the phenomenon of the administrative state served the society well because an enhanced executive was able to provide much more in the way of public programs, for instance, as seen especially during the New Deal. On the other hand, a potential problem arose in that regulation and dispute resolution, arguably, should have been reserved for the other branches. This was particularly the case as pertains to adjudication, as it has traditionally been recognized that administration of justice must be insulated from all other functions of government. Senator George Norris proposed a solution in 1929, bringing a bill before Congress to establish an administrative court. Three years later, a Special Committee of the American Bar Association (ABA) advocated a similar redistribution of power to remove adjudicative responsibilities from the hands of agencies. Several bills based on this conception were introduced annually, in either the House or Senate, throughout the subsequent years. This initial analysis of the problems raised by the growth of the administrative state, however, was hurried and superficial. Instead of identifying the problem as one related to citizen-state relationships, it only recognized the potential threat to the prevailing constitutional order. Supporters of an administrative court were

motivated solely by the fear that "the judicial branch of the federal government is being rapidly and seriously undermined and, if the tendencies are permitted to develop unchecked, is in danger of meeting a measure of the fate of the Merovingian Kings."[5]

The ABA Special Committee, Senator Norris, and sponsors of bills that followed his up to 1938 had reasonable basis for believing that adjudication by the agencies would upset the constitutional order because it did represent a potential violation of the separation of powers doctrine. As time passed, though, and as congressional representatives developed a more thorough understanding of the administrative state, they came to see that the fundamental dilemma involved citizen-state relationships rather than institutional structures. The real question, in other words, was not whether the executive was encroaching on the judiciary, but instead whether citizens could get a fair hearing if adjudication was carried out by an executive agency: whether it was equitable to force citizens with grievances to argue their case before a hearing officer employed in the same agency as the regulators who had created the rule at issue, and the investigators and prosecutors who had brought the citizen to adjudication. Having come to the realization that principles of justice might be compromised, lawmakers concerned with the problem began to formulate a new approach to its solution by abandoning the idea of an administrative court and advocating instead a set of quasi-judicial procedures to regulate agency hearings. The Bar Association adopted this new view in 1937, as did principal administrative reform advocates in Congress. Yet, for the time being the executive branch was opposed to legislative action. In December of 1940 President Franklin Roosevelt vetoed the Walter-Logan Bill on procedural reform that had passed through Congress, insisting on waiting until a Special Committee convened on the matter by the Attorney General reported its findings before consenting to an administrative procedure law.[6]

With the American entry into the Second World War in 1941, a short hiatus on legislative action ensued. As the war began to approach its conclusion, though, it became evident that interest in administrative reform had proliferated. In fact, over a dozen bills on administrative procedure were brought before Congress in 1944 and 1945 alone, including the McCarran-Summers Bill, which President Truman eventually signed into law in June of 1946. Ironically, it was as a result of Roosevelt's decision to delay action on administrative procedure that the APA included a section on access rights once it was passed. None among the laws proposed prior to the wartime hiatus contained "more than a hint of the public information provisions" of the APA. However, the Attorney General's Special Committee had reported that "where public regulation is not adequately expressed in rules [and] where the process of decision is not clearly outlined, charges of 'star-chamber proceedings' may be anticipated. ... All these types of information should be made available, in orderly and readily accessible form, to the public." Lawmakers espoused this philosophy immediately, and afterward all administrative procedure bills featured provisions to enact it. In its final form the public records section of the APA, which would eventually be amended into the Freedom of Information Act, determined that

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency ... (c) Public records [unless otherwise required by statute] shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.[7]

Enactment of these provisions represented a highly significant development, as section 3 of the APA was the first U.S. law granting citizens a right of access to government records. Free access was qualified, of course, since the stipulations were formulated on a need-to-know basis. Nevertheless, for the time being and for some time afterward, access rights on a need-to-know basis were regarded as quite sufficient by congressional representatives and the general public. In fact, during the following 10 years support for extending further guarantees of access was

concentrated in one single sector of society: the media. Initially provoked to action by the "World Press Movement," American journalists began speaking out on the issue through the late-1940s. By the early-1950s such prominent industry figures as *Washington Post* editor J.R. Wiggins and *Hartford Courant* editor Herbert Brucker had convened a Freedom of Information Committee within the American Society of Newspaper Editors (ASNE), a body committed to agitation on behalf of what ASNE General Counsel Harold Cross had referred to in the title of his 1953 book on the topic, "*The People's Right to Know.*"[8]

As the 1950s progressed, support for the idea of "the right to know" spread within press circles, this in part due to the rising level of concern throughout the society with matters related to government information. The incipient public consciousness of the growing importance of information in the post-war world had already reached an apex immediately after the war when citizens learned of new information security measures contained in the 1946 Atomic Energy Act and in President Truman's federal loyalty program. Within a few years, when Senator Joseph McCarthy began to make accusations that executive branch officials were involved in a concerted effort to employ communists within the federal government, previous heights of general consciousness of the issue were surpassed. In this instance security issues were accompanied by the looming possibility that McCarthy might be correct—that perhaps the government was keeping secrets from the public. Despite all this, however, it was not until the mid-1950s that congressional interest in government information was rekindled. There is no prevailing consensus regarding how this development came about. Yet, by the time that John Moss' House Special Subcommittee on Government Information was constituted in the summer of 1955, it was apparent that at least certain figures in Congress had begun to confront the same set of problems as the press had been warning of for a decade.[9]

The immediate background against which this development took place involved a Pentagon controversy in which President Eisenhower's Secretary of Defense Charles Wilson had ordered Department officials to "tighten up the flow of military information" by limiting themselves to the release of only that information that "would constitute a constructive contribution to the primary mission of the Department of Defense." Members of the newsgathering community were outraged, as was William Dawson, chair of the House Committee on Government Operations. On June 9, Dawson wrote to Moss, explaining that "charges have been made that Government agencies have denied or withheld pertinent and timely information from those who are entitled to receive it," and, providing Moss with the charter for his Special Committee, requested that he investigate to "verify or refute these charges."[10]

Substantive work of the subcommittee began with research. Throughout the Summer of 1955, Moss and his colleagues undertook an extensive survey of the federal agencies to study the kinds of internal rules and procedures that existed to govern records and information, to gauge the extent to which agency personnel understood the applicable statutes, to determine if there was a prevailing culture of secrecy within the agencies, and so forth. Eventually this led to the next stage of the proceedings, a set of Subcommittee hearings held in November 1955 that was designed to gather information and opinion from journalists, agency representatives, and legal specialists. Results of these research activities were highly contradictory, or at least open to interpretation, as they regarded the extent and significance of problems related to secrecy and access to information. Representatives of ASNE, commenting on the 550 page report on the survey sent to all agencies, noted that "the Subcommittee succeeded in establishing that some federal agencies do regard that Section [3] of the Administrative Procedure Act does amount to ... a 'public records law' which is a positive legal basis for disclosure of information." On the other hand, it was also found through the survey that agency withholding of records had been

justified on the basis of "the Constitution, 19 statutes, five Supreme Court decisions, five executive orders, four White House letters and directives, two attorney general's opinions, two attorney general's letters, and 23 departmental manuals, memoranda, regulations or orders." Among the 19 statutes cited were the APA, section 3, and a 1787 law entitled the Housekeeping Statute that granted each cabinet member power to "prescribe regulations for the government of his department, [to] set up filing systems, and [to] keep records."[11]

While the early Subcommittee activities placed a priority on research, they were transformed following its first year of operation. In one respect, Moss' team evolved into what has been described as a "watchdog" body, devoting a considerable portion of its resources to intervention in cases where agencies were actively attempting to withhold information. Their tactics involved use of coercion, in the form of threats of unfavorable publicity, to persuade executive bodies to release information and records requested by constituents. In addition, however, the committee also began to function as a legislative body. Moss adopted modest aims at the outset, targeting the Housekeeping Statute rather than the APA. After two years of internal wrangling and bill-drafting, committee members finally formulated an amendment that proved reasonable in the view of the legislature as a whole, appending to the statute a simple stipulation dictating that "this section does not authorize withholding information from the public or limiting the availability of records to the public." The law passed both houses of Congress unanimously, although executive resistance was evident. President Eisenhower remarked, upon signing the bill into law, that

> the purpose of this legislation is to make clear the intent of Congress that [the Housekeeping statute] shall not be cited as a justification for failing to disclose information which should be made public. ... It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the executive branch is inherent under the Constitution.[12]

### 1.2 Conceptions of an Access Law I: The Administrative-Law View

Those supporting orthodox views of the intellectual history of access rights in the United States contend that the sponsors of the Administrative Procedure Act were attempting to create a statutory freedom-of-information regime. Within this paradigm, the legislative intent behind section 3 of the APA was in essence the same as that purportedly behind the FOIA as it developed decades later. According to this theory, both laws were designed for the broad purpose of increasing the amount of government-held information legally accessible to citizens in general. Furthermore, it is also argued that executive branch resistance weakened the APA access provisions to the extent that further reform efforts of the Moss-committee era were necessary. As explained by a pair of legal scholars writing on the topic, the dream of a public information law granting access rights to all Americans was dashed as a result of legislative failings and executive malevolence:

> One of the indispensable ingredients of a successful representative government is an informed electorate [and] a necessary corollary to the individual's right to participate in governmental affairs is the public's right to know. ... The first attempt ... to guarantee the public's access to information came in 1946 with passage of the Administrative Procedure Act. ... However, after the Act took effect, it became readily apparent that section 3 was too narrow in its requirements and that agencies could and would successfully evade compliance with its provisions.[13]

This conventional interpretation has little to sustain it. Through the first 10 years of the legislative activity that ended with passage of the APA in 1946, the issue of government information and access to public records was not on the table: members of Congress, representatives of the American Bar Association, and other advocates of administrative reform were engaged in an effort to regulate rulemaking and adjudication within the executive branch. In retrospect it seems natural that they would want to establish access rights as an integral part of the changes they were hoping to effect. Still, it is untrue that Norris, McCarran, Summers, and their colleagues embarked with the intent of creating access rights. Not until the release of the Attorney

General's report, in fact, did any of the concerned parties devote any real attention to the matter. Subsequently, after 1941, the issue was opened for discussion. Even from this time forward, though, there was no talk of establishing access rights as an end in themselves.[14]

Through this time, the administrative-law conception was not merely predominant, but in actuality it was the only one in general circulation among members of Congress. To illustrate this distinctive perspective—a vision in which access rights were a functional component within an institutional reform program, and little more than this—it is necessary to examine the purpose of the APA as a whole, and to come to an integrated understanding of the function section 3 was designed to play within it. Particular attention must be paid to the purpose for which subsection 3(c) was designed, as this was the passage that dealt with access to government records.

In the form it was passed in 1946 the APA regulated federal agencies in three ways. First, it imposed measures to limit the freedom of executive bodies to create rules and regulations. This was executed principally in the form of requirements for public notice of proposed rules and rule changes, and for procedures that would "afford interested persons an opportunity to participate in the rule making." The "notice and comment" system created hereby was designed to limit arbitrariness in regulation, and it was reinforced by a provision holding that new rules would become effective not when agencies approved them, but instead only after the final approved version was published in the *Federal Register*. Second, the APA introduced equitable procedures for agency adjudication by drawing clear lines between the functional units of executive bodies such that hearing officers gained a significant measure of independence and autonomy. Specifically, although adjudicators were still employed within a particular agency, they were insulated from the influence of other units by ensuring that their superiors in the chain of command did not include rulemakers, investigators, or prosecutors. According to the theory, this meant that citizens would no longer be forced to argue their cases before officials whose

impartiality was in substantial doubt. Finally, the third major provision of the APA was enacted to recognize that even with the separation of functions and reform of the chain of command, citizens could still have some cause for complaint in that regulators, enforcement officers, and those with authority to decide cases would still all be employed within the executive branch, and indeed all within the same agency. For this reason, the APA established the citizen's right to judicial review of agency decisions.[15]

Section 3 of the APA also contained three principal components. First, subsection (a) dictated that agencies must publish in the *Federal Register* all substantive rules in effect, as well as descriptions of its central and field organization and "statements of the general course and method by which its functions are channeled and determined." This clause, in effect, reinforced the government's obligation to ensure that all citizens could inform themselves on the content of federal regulations. Subsection (b) provided that "opinions and orders" must be published or otherwise "ma[de] available to public inspection." Again, all citizens gained a right of access: in this case access to previous decisions on adjudicative matters. Subsection (b) would be most useful to citizens who were preparing to present a case before an hearing officer, and who would need to inform themselves on an agency's precedent rulings in order to do so. However, this right was extended to all Americans nevertheless. Finally, subsection (c) was unlike the clauses that precede it because it established information rights that were dependent on the citizen's need to know, ordering that "Public Records" must be "made available to persons properly and directly concerned." This was a significant departure from the terms of subsections (a) and (b). Whereas all citizens gained a right of access to rules and precedents, there were no blanket rights created pertaining to public records. Instead, as indicated in the "properly and directly concerned" qualification, access to records was granted only to those involved in an adjudicative proceeding.[16]

The important matter is that section 3 was designed to serve the overall goals of the APA as a whole, and particularly to create rules governing citizen access to different categories of information in order to support that aspect of the law dealing with reform of adjudication procedures. The way in which legislators approached this task was by modeling section 3 on the legal and conventional authorities that governed citizen rights in the broader legal system as it already existed. In the first place, subsection (a) required publication of rules, the quasi-legislative material relevant to affairs regulated and programs administered by a given agency. Thereby, this passage introduced in the microcosm of agency-citizen relationships one of the basic precepts of government-citizen relationships in the broader sense: just as citizens already possessed a right to know the content of statutes passed by Congress, they would now be entitled to consult the text of executive regulations. Under subsection (b), which required that citizens be allowed to inspect orders and opinions, the APA enacted another parallel, or microcosmic, right which gave citizens a right to know the outcomes of concluded adjudication. This plank of the law replicated principles that regulate fair execution of justice in the courts, specifically, the doctrine that judges must issue written opinions that will belong in the public domain. Finally, subsection (c) granted those involved in adjudication a right of access to records that would bear on their case. In most instances, this involved the citizen obtaining records of the program administrators, regulators, and investigators of the agency handling their grievance, and this last provision was also based on established governmental principles. In this instance the principle the sponsors adapted is the right of litigants to obtain information—including depositions and, more relevant, records and documents—from the opposing party in order to prepare a case for trial. Thus, just as citizens going to court with the federal government had access rights to certain material through the pre-trial discovery provisions of the *Federal Rules of Civil Procedure*, so too under the APA would they be allowed to obtain records related to cases at issue in agency adjudication.[17]

Notwithstanding claims to the contrary, section 3(c) was not designed to create a general right of access to government records. Admittedly, there is no conclusive evidence to refute the conventional view. Nowhere in the legislative history, that is, is there a direct statement which establishes that the authors of section 3(c) did not consciously draft it in order to create a proto-Freedom of Information Act. At the same time, though, proponents of the traditional interpretation do not cite any legislative materials confirming that such was the case. Moreover, the most conclusive statement of purpose available is that offered by the Attorney General's Committee which initially proposed that section 3 be written into the act. "Before adverse action is to be taken by an agency," the final report of the Committee argued, "the individual concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them." [18]

Bearing this in mind, it appears that the clause granting "concerned parties" a right to inspect "public records" was designed to ensure that no agency could order a citizen to appear before an adjudicative tribunal, and surprise him or her at the hearing with "evidence and contentions" of the sort the Committee described. The principle they were hoping to implement in the context of executive branch administration of justice was the same as that enacted when the *Federal Rules of Civil Procedure* first established discovery rights for litigants in court. The drafters of the *Federal Rules*, according to scholars in civil procedure, came to recognize that "secrecy and surprise [were no longer] appropriate in determining the outcome of a case." Instead, in 1938—just three years prior to the creation of APA section 3(c)—they came to believe what then was a novel idea: that "the search for truth would be better served by a full development of all the facts [through the discovery process] prior to presentation at trial." This was a significant development in judicial procedure. Given the timing, and given the

resemblances between the Committee's comments and this explanation of the genesis of discovery rights, it is difficult to conclude that the provisions of 3(c) were not modeled on the 1938 revisions to the *Federal Rules*.[19]

### 1.3 Conceptions of an Access Law II: The Congressional-Oversight View

Passage of the Administrative Procedure Act, coming concurrent with the end of the war, was also concurrent with the beginning of the "freedom of information movement" within press circles. The perspective of journalists on the issue would eventually have considerable influence over congressional attitudes once legislators took a renewed interest in regulating government information practices during the 1950s. Despite this, however, members of the legislature were by no means merely followers. Instead, two distinctive new views developed during the era of the Moss committee's foundation and early activities: the congressional-oversight view, and a perspective emphasizing the constitutional basis of access rights, which was the direct predecessor of the more contemporary free-flow-of-information view. These interpretations developed simultaneously, and in fact there was a good deal of overlap between them. Nevertheless, it is important to treat each individually. The former is addressed here, while the latter comes under detailed discussion in Chapter 4.[20]

For certain congressional representatives in the 1950s, the access issue was one that had very little to do with citizens, but instead focussed on the right of the legislature to supervise the executive. In modern times, this practice has come to be known as the oversight function of the Congress, and the theory behind it holds that the people's rights will be protected if the actions of the president and vice president, and their appointed administrators, are subject to hearings and investigations by the branch closest to the electorate. Constitutional basis for oversight has been

recognized as deriving from the clause granting "all legislative powers" to the Congress. Oversight, in other words, is a legislative power due to the fact that its purpose is to ensure that the executive is administering the laws properly.[21]

Following World War II, many congressional representatives began to fear that effective oversight was becoming impossible. During the war, the agencies and the White House had expanded their respective spheres of activity, and due to the extraordinary circumstances Congress had voluntarily allowed them to do so with unprecedented latitude. After 1945, with the end of bipartizanship between Republicans and Democrats, representatives in Congress felt that it was in the interest of good government to restore the customary tension and mutual resistance between Capitol Hill and the White House. Nonetheless, successive presidents believed that the exigencies of the Cold War required preservation of a certain measure of the wartime independence in executive action. Harry Truman, unable to persuade the legislature to comply, was known to take drastic action by asserting his role as Commander in Chief. For instance, he launched the Korean War without consulting Congress, and independently deployed troops to Europe shortly thereafter. Beginning in 1953 Dwight Eisenhower used similar tactics, but in addition the new president also made a policy of denying the legislature access to the resources and information they needed in order to conduct oversight. One scholar has written that "executive privilege," the legal authority for executive withholding from Congress, "was unveiled in its modern form" at this time. Subsequently, supporters of congressional oversight and proponents of executive privilege in the White House and the agencies became embroiled in a dispute over which of these two conflicting doctrines was paramount.[22]

When Eisenhower first took office, Senator McCarthy was at the apex of his career. Some believed that with a fellow Republican in the White House his attacks on the executive branch would cease; it would hardly be sensible to continue accusing the president of harboring

communists in government when the individual he was attacking was the top official in his own party. On the contrary, however, McCarthy's crusade continued through the initial phase of the new president's term, and, in fact, expanded, as the Senator began investigating the military services for disloyal personnel in the summer of 1953. The president, having initially responded by remaining aloof from the controversy, was provoked to action at this juncture, motivated in large part by loyalty to the institution where he had made his career before entering politics. His problem, though, was that no matter how hysterical, inaccurate, and potentially slanderous the Senator's accusations were, McCarthy was delivering them through legitimate channels. Technically speaking, his attack was mounted by way of executing the oversight function. Eisenhower's response was to undercut McCarthy by directing executive branch officials, including Army officers, to refuse McCarthy's requests for testimony. In retort to the claim that congressional oversight was a legitimate function of the legislature, the president justified his strategy by claiming executive privilege.[23]

The crucial event in the Eisenhower-McCarthy showdown came in 1954 when the president wrote a letter to Secretary of Defense Charles Wilson instructing him to deny the McCarthy Committee's request for testimony from Army counsel John Adams. In the letter, Eisenhower claimed that he had the right to withhold information if, in his view, "what was sought was confidential or [if] its disclosure would be incompatible with the public interest or jeopardize the safety of the nation." Furthermore, the president also asserted that executive branch officials in general must "be in a position to be completely candid in advising with each other on official matters," and that "candid interchange" of this sort required an extensive measure of government confidentiality. General reaction to this move on Eisenhower's part was positive, especially in the press where he was praised for maneuvering McCarthy into an untenable position. The *New York Times*, for instance, took the president's side by "endors[ing]

the withholding" and by castigating the senator for acting "in complete disregard of the basic historical and Constitutional division of powers that is basic to the American system of government."[24]

As Eisenhower's first term progressed it became apparent that the executive branch had taken a turn toward vastly increased security and secrecy measures, and that despite the admirable uses to which he put executive privilege in the McCarthy episode, the president was more and more running the government as a closed institution. First, almost as soon as the "Wilson letter" had been delivered, it was given an expansive interpretation. Executive officials treated it not as a circumstance-specific order concerning the testimony of John Adams, but instead as a statement of policy on any and all congressional requests for testimony, information, or records. This meant that any oversight activities requiring cooperation from the president or his officials could be blocked from fully-informed proceedings because Eisenhower had claimed that the only relevant criterion for disclosure was the president's evaluation of public interest and national security. Second, the discussion in the Wilson letter claiming a need to protect confidentiality of advising among executive branch officials was read in a similarly broad fashion. This became known as the "candid interchange doctrine," and, as far as executive officials were concerned, it could be legitimately invoked under almost any circumstances. This meant, in effect, that executive privilege was now considered as applying to all government personnel, not just the White House as had traditionally been the case.[25]

Couple these developments with the establishment of the Office of Strategic Information in November of 1954, an agency created to restrict the flow of non-classified information, and the 1955 order to "tighten up the flow of military information" from Secretary Wilson, and it is not difficult to see why many in Congress were growing concerned. Among them were William Dawson and John Moss. Eventually, the Moss committee turned its attention toward access to

information in all its respects—including allegations of agency evasion of the terms of the APA, public rights to obtain records and information, and other questions. At the outset, though, he and many others among the concerned parties were primarily interested in the issue of executive privilege and its subordinate doctrines, like the candid interchange privilege: the rationales used to defend executive denial of information to the Congress itself.[26]

The constitutional issues involved with executive privilege were many and complicated. On one hand, the republic was established on the philosophy that no branch of government could encroach on the powers of the other, and for proponents of executive privilege this separation of powers doctrine meant that Congress could not demand information, testimony, or records from the president or those responsible to him. If a request was deemed appropriate, it could be granted. However, within this philosophy there was no obligation for the executive to assist in the process of congressional oversight. On the other hand, opponents of the privilege made two arguments: contending that oversight had constitutional basis in the principle of checks and balances, a necessary corollary to the separation of powers doctrine; and asserting that claims of executive privilege in fact represented a violation of separation of powers because the agencies, having been created by statutory authorization of the legislature, were as much creatures of the Congress as they were of the president. Under this logic, Congressional authority to obtain information outweighed executive independence, and cooperation in oversight activities thereby became a binding duty on the executive branch. Clearly, each side in the debate had a forceful rationale for its position. As a result, the question in the 1950s was not whether to legitimize or abolish executive privilege, but rather it involved defining an appropriate set of parameters for its acceptable use. Clark Mollenhoff, a journalist and lawyer who worked closely with the Moss committee for a time, recalled later that

> most of the congressmen and senators didn't want to get into a fight with the administration. They didn't want to be up there fronting for it. But when the

> chips were down they understood that their right of oversight was being jeopardized. And this is something that silly-assed editorial writers didn't understand. They saw the initial use of executive privilege against Joe McCarthy as something that was laudable.[27]

Moss, Mollenhoff, and others involved in exposing and opposing executive privilege raised three points in arguing that its usage should be restrained. First, they claimed that the privilege was simply being invoked too much. Although they recognized that the circumstances of the Cold War demanded a certain measure of confidentiality in government, it was no longer satisfactory, they believed, for the legislature to grant the executive unrestrained latitude of action as had been the case during the Second World War. Second, there was the issue of delegation of power to invoke executive privilege, and, specifically, the executive branch interpretation of the Wilson letter. Members of Congress felt that this was not only a departure from traditional uses of the privilege, in that previously it had been understood as applying to the White House alone, but also a great danger: "If President Eisenhower's directive were applied generally in line with its literal sweeping language," said one commentator, "congressional committees would frequently be shut off from access to documents to which they are clearly entitled by tradition, common sense, and good government practice." Third, and most egregious, there was the question of whether the government was relying on executive privilege to assist in disseminating "managed news." Opponents conceded that withholding could be justified if records or testimony would reveal legitimately sensitive or confidential information. Many, though, felt that something else was taking place. Moss himself, singling out the Pentagon in particular, speculated that recent withholding was "actually aimed at manipulating information to create a specific impression (favorable, of course) regarding the Department's activities at home and abroad."[28]

Ultimately, then, the case against executive privilege did not invoke constitutional or theoretical arguments to any extent beyond using them to show that the privilege could be challenged with legal authority. Instead, it was a public policy matter that was at the heart of the

anti-executive privilege campaign: opponents believed that the interests of the nation would be served better if Congress were allowed all possible tools in its attempt to check the activities of the executive on behalf of the people. Senator Frank Moss, for one, expressed his analysis in terms of the hazards represented by the privilege:

> No historical evidence exists that executive privilege has ever been intended to mean a check on the legislative power of inquiry. ... We must not assume that the power of Congress to investigate, established several times during the first century of our history in civil as well as military actions of the Executive Office, has been relinquished either willingly or unwillingly. ... Executive privilege is damaging to the Nation because important information that will aid the legislative process is withheld from the Congress. ... Invoking executive privilege is also damaging to the Executive. It insulates him from important questions concerning issues that can be raised by some 535 inquisitive Congressmen.

John Moss was more succinct, claiming that use of executive privilege beyond certain boundaries was "against all common sense, [contrary to] all existing law, and would make congressional oversight meaningless."[29]

In brief, then, the congressional-oversight view of access rights shared certain elements in common with the administrative-law view: specifically, the belief that access rights did not constitute an issue on their own, but instead represented one aspect of a larger issue—in this case, the authority of the legislature to act as a check on the executive. On the other hand, the two conceptions diverged because access rights within the earlier view accrued to the public directly, although, as pertained to records, only to those members of the public involved in agency adjudication. Under the congressional-oversight conception, by contrast, the point at issue was congressional access. It might seem, then, that the replacement of the administrative-law view by the congressional-oversight view was a retreat from rights already established, this in the sense that at least supporters of the APA had seen fit to grant information rights directly to citizens. Looking closer, though, it becomes apparent that this assessment is somewhat oversimplified. In one sense, at least, supporters of the congressional-oversight view were in fact advocating access

rights for citizens, this due to the fact that the core element of their philosophy was to allow legislators access to records, along with executive testimony, in order to facilitate their efforts to represent constituents. Thus, the idea of direct access for some citizens, those persons "properly and directly concerned," was replaced by the principle of indirect or mediated access for all. Perhaps it is fair to say, then, that congressional-oversight theorists took one step toward the modern notion of access rights by removing the principle of privileged access, while nevertheless retreating one step from it by emphasizing that congressional oversight should be the conduit of information from the executive branch to the public.[30]

Of all those representatives who held the congressional-oversight view, the most prominent was John Moss himself. As time passed, the Chairman eventually advocated free access rights for citizens and journalists as well. Nevertheless, Moss' original interest in information and access policies was stimulated by his experience on the Post Office and Civil Service Committee as a freshman in the House. Eager to make a strong start in his new career and enthusiastic about holding the Republican administration on a short leash, Moss took congressional oversight very seriously. His first involvement took place in 1953, still during the height of the McCarthy era, when the committee was assigned to investigate charges that the Civil Service Commission was violating the rights of "unsuitables—alcoholics, homosexuals, and incompetents"—by labeling them as communists and dismissing them summarily. Moss' interest, though, lay neither in the communists-in-government question, nor in protecting the civil rights of the federal employees who had registered complaints. Instead, it was the evasion and obstructionism offered by the Chair of the Civil Service Commission during testimony that drew his attention. A colleague from the era of the Subcommittee later recalled how "that experience interested Moss in government information problems, although he was bothered more by executive branch refusals to provide the Congress with requested information than he was by

government information access problems [for citizens]." Moss himself explained later that "it was a case of a freshman member being somewhat outraged by Executive arrogance. ... I have strong convictions that, as a representative of the people, I had a right to know what goes on in government."[31]

### 1.4 Chapter Conclusion

During the thirty years between Senator Norris' bill proposing an administrative court and President Eisenhower's approval of amendments to the Housekeeping statute, the views and conceptions of access-to-records laws held by members of the United States Congress evolved dramatically. At the outset, from 1929 through 1941, advocates of administrative procedural reform discussed their pet project without showing any concern for access to records. Subsequently, after the Attorney General's report was issued, certain citizen rights in this area were created in all bills that came to the floor. However, even though members of Congress were by this time demonstrating concern on the topic, the statutory rights granted under the Administrative Procedure Act were limited in their coverage. Citizens gained a blanket right of access to government information in the form of agency rules, opinions, and orders, but only privileged access to records. This need-to-know legal regime did not represent a failed attempt to create a broader set of rights. Instead, the parameters of the law were dictated by the parameters of the conception held by adherents to the administrative-law view. They were concerned with access only insofar as it related to the introduction of equitable procedures for agency adjudication.

From the time that the APA was passed until the events that served as immediate impetus for the creation of the House Special Subcommittee on Government Information, there is little

indication that any members of Congress even paused to consider whether executive policy on information and records should be monitored at all. Then, following the McCarthy era and President Eisenhower's attempts during and after it at disseminating "managed news" wherever possible, certain figures like John Moss grew concerned. If the administration was not opposed in its proclaimed authority to block requests for testimony and documents, they believed, effective congressional oversight would become impossible. This was an issue of preserving checks and balances of the Constitution as much as it was a question of information flow and access, and the legislators concerned with the issue placed priority on the former over the latter. Like those espousing the administrative-law view, then, Moss and his supporters placed access rights within a larger issue. However, they did make one fundamental departure by rejecting the need-to-know, or privileged-access, foundation of the APA. Granted, the rights under discussion were rights of the legislature. Nevertheless, since congressional oversight had been created on the principle that the legislature oversees on behalf of the public, the principles Moss espoused, at least in a certain sense, acknowledged citizen rights more so than did those underlying the 1941 Attorney General's report and the APA.

## Endnotes

[1] Thomas C. Hennings Jr., "Constitutional Law: The People's Right to Know," *American Bar Association Journal* 45 (July 1959): 669.
[2] Walter Gellhorn, "The Administrative Procedure Act: The Beginnings," *Virginia Law Review* 72 (March 1986): 220. Generally, see Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (Washington: CQ Press, 1994), 7-20.
[3] Kerwin, *Rulemaking*, 8-9.
[4] Bernard Schwartz, "Past and Prologue: Adjudication and the Administrative Procedure Act," *Tulsa Law Journal* 32 (Winter 1996): 206-7.
[5] Arthur T. Vanderbilt, "Legislative Background of the Federal Administrative Procedure Act," in *The Federal Administrative Procedure Act and the Administrative Agencies: Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947*, ed. George Warren (New York: New York University School of Law, 1947), 10; Gellhorn, "The Beginnings," 219-20; Report of the Special Committee of the American Bar Association, quoted in Gellhorn, "The Beginnings," 220.
[6] Vanderbilt, "Legislative Background," 10-3; Gellhorn, "The Beginnings," 220-1.
[7] Jim Smith, "The Freedom of Information Act of 1966: A Legislative History Analysis," *Law Library Journal* 74 (Spring 1981): 236; United States, Attorney General's Committee on Administrative Procedure, *Final Report of the Attorney General's Committee on Administrative Procedure* (Washington: United States Government Printing Office, 1941), 25-6; *Administrative Procedure Act*, 5 USC § 1002 (1947).
[8] Harold Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Morningside Heights, NY: Columbia University Press, 1953). On the world press movement, see Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (New York: Farrar, Straus and Cudahy, 1956), especially 166-74.
[9] George Penn Kennedy, "Advocates of Openness: The Freedom of Information Movement" (Ph.D. diss., University of Missouri, Columbia, 1978), 20-1. On the McCarthy era, see Fred I. Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader* (Baltimore and London: The Johns Hopkins University Press, 1982); and Edward A. Shils, *The Torment of Secrecy: The Background and Consequences of American Security Policies* (Melbourne: William Heinemann Ltd., 1956).
[10] Philip Potter, "'Usefulness' Urged for Censorship Test," *Baltimore Sun*, June 17, 1955, quoted in Robert Okie Blanchard, "The Moss Committee and a Federal Public Records Law, 1955-1965" (Ph.D. diss., Syracuse University, 1966), 41; Dawson quoted in Paul E. Kostyu, "The Moss Connection: The Freedom of Information Movement, Influence and John E. Moss Jr." (Ph.D. diss., Bowling Green State University, 1990), 25.
[11] *ANSE Bulletin*, undated, quoted in Blanchard, "The Moss Committee," 87, 96; *Housekeeping Statute*, 5 U.S.C § 22. For more on the work process of the committee in general, see below, section 2.1.
[12] Robert Okie Blanchard, "A Watchdog in Decline," *Columbia Journalism Review* (Summer 1966): 17-21; Kennedy, "Advocates of Openness," 90-2; Eisenhower quoted in Hennings, "People's Right to Know," 667.
[13] Robert S. Krause and Francis M. Gregory Jr., "Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill," *Notre Dame Lawyer* 40 (June 1965): 417-8. Authors who argue that the intent of the framers of the APA was to create an access law include the following: Mark S. Adler, "National Security Information Under the Amended Freedom of Information Act: Historical Perspectives and Analysis," *Hofstra Law Review* 4 (Spring 1976): 760; Charles P. Bennett, "The Freedom of Information Act, Is It a Clear Public Records Law?" *Brooklyn Law Review* 34 (Fall 1967):72-3; Gregory Brooker, "FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy," *Minnesota Law Review* 68 (June 1984): 1231; Tamara M. Burke, "Freedom of Information Act, Exemption 7D," *Seton Hall Law Review* 24 (1994): 1610; Jennifer A. Clemens, "Freedom of Information Act Exemption Seven is Broadened in *John Doe Agency v. John Doe Corp*," *Journal of Corporation Law* 16 (Summer 1991): 966-7; Patrick E. Cole, "The Freedom of Information Act and the Central Intelligence Agency's Paper Chase: A Need for Congressional Action to Maintain Essential

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[14] Smith, "A Legislative History Analysis," 236.

[15] *Administrative Procedure Act*, 5 USC § 1002 (1947). For further explanation of the APA, see Richard J. Pierce Jr., "Rulemaking and the Administrative Procedure Act," *Tulsa Law Journal* 32 (Winter 1996): 185-201; and Schwartz, "Past and Prologue," 203-219.

[16] *Administrative Procedure Act*, 5 USC § 1002 (1947), paragraph (c).

[17] Discovery rules for civil matters are found in Fed. R. Civ. P. 26-37. For criminal discovery rules, see Fed. R. Crim. P. 16.

[18] Attorney General's Committee, *Final Report*, 62. For a list of scholars who assert the traditional interpretation, but who fail to back it with evidence, see above, note 13.

[19] Paul R. Connolly, Edith A. Holleman, and Michael J. Kuhlman, *Judicial Controls and the Civil Legislative Process: Discovery* (N.p.: Federal Judicial Center, 1978), 8; United States, Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*, Reprint ed. (Holmes Beach, Florida: Wm. W. Gaunt & Sons, Inc., 1947, 1973), 17.

[20] Views of journalists are treated in Chapter 2.

[21] Karen O'Connor and Larry J. Sabato, *American Government: Roots and Reform*, Brief ed. (New York: Macmillan Publishing Company, 1994), 215-7; US Const, Art I, § 1.

[22] Kennedy, "Advocates of Openness," 198. On wartime bipartizanship, and congressional realization that some measure of secrecy would be required following the return to peace, see David H. Morrissey, "Interpreting the Freedom of Information Act in the Age of Electronic Government" (Ph.D. diss., Indiana University, 1994), 52-62. On President Truman's independent action, see Douglass Cater, *The Fourth Branch of Government* (Boston: Houghton Mifflin Company, 1959), 8-9. On Eisenhower's unique ability to escape blame for his unauthorized or secretive activities, see Greenstein, *The Hidden-Hand Presidency*; and Miles Beardsley Johnson, *The Government Secrecy Controversy* (New York: Vantage Press, 1967), 58-8.

[23] Greenstein, *The Hidden-Hand Presidency*, 162, 182. The theory of executive privilege is discussed below, in Chapter 2.

[24] Quoted in Kennedy, "Advocates of Openness," 53-4; Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: Harvard University Press, 1974), 213-4; Kennedy, "Advocates of Openness," 55-6.

[25] Johnson, *Government Secrecy Controversy*, 28-9, 35-7.

[26] Philip Potter quoted in Blanchard, "The Moss Committee and a Federal Public Records Law," 41. On the Office of Strategic Information, see for instance Cater, *Fourth Branch of Government*, 120-1.

[27] Quoted in Kostyu, "The Moss Connection," 216. For further discussion of the constitutionality of executive privilege, see Berger, *Executive Privilege*; and Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Baltimore and London: The Johns Hopkins University Press, 1994).

[28] Kennedy, "Advocates of Openness," 204-5; Telford Taylor, quoted in Kennedy, "Advocates of Openness," 205; quoted in Johnson, *Government Secrecy Controversy*, 40.

[29] Testimony of Senator Frank Moss in United States, Congress, Senate, Committee on the Judiciary, Subcommittee on Intergovernmental Relations, *Freedom of Information, Executive Privilege, Secrecy in Government, Volume 2* (Washington: U.S. G.P.O., 1973), 4; quoted in Kennedy, "Advocates of Openness," 229.

[30] *Administrative Procedure Act*, 5 USC § 1002 (1947).

[31] Samuel J. Archibald, "The Freedom of Information Act Revisited," in Harold C. Relyea, ed., "Symposium: The Freedom of Information Act a Decade Later," *Public Administration Review* 39 (July-August 1979) 312; quoted in Blanchard, "The Moss Committee and a Federal Public Records Law," 54.

# Chapter 2

# Supporters and Skeptics: Views from Outside Congress, 1945-1966

## 2.1 Views from Outside Congress, 1945-1966

During the Second World War the United States federal government imposed harsh restrictions on the domestic press. These measures were a response to the exigencies of the foreign threat and the mobilization effort, and they were administered by a pair of new agencies established to control public awareness about the war by filtering the news at its source: the Office of Censorship, a body directed by Byron Price and charged with responsibility to suppress information that might be of value to the enemy; and the Office of Wartime Information, a propaganda body directed by Elmer Davis. Neither censorship nor propaganda was unprecedented in American history. The former had been implemented during all the wars of the nineteenth century, and its peacetime use dates back to the Sedition Act of 1798. The latter, as well, was a familiar tool. One commentator has even suggested that the American Revolution might not have been successful if it were not for propaganda use by the founding fathers. What was novel in the context of the Second World War, though, was voluntary compliance on the part of the press. Herbert Brucker, editor of the *Hartford Courant*, explained the attitude that journalists held toward wartime restrictions by remarking that "we favor the soldier, as against the Fourth Estate, and cheerfully allow the news to be suppressed; for, as Mr. Price himself put it, our basic consideration is 'that none of us shall provide the enemy, by design or inadvertence, with information which will help him kill Americans.'"[1]

Despite this compliance, prominent American editors and publishers began to plan for the post-war world almost as soon as the war commenced. The leader of the movement at this early

date was Kent Cooper, Executive Director of Associated Press (AP). Some 25 years earlier, in 1919, Cooper had attempted to persuade the peacemakers at Versailles to include a press-freedom plank in the treaty that concluded World War I. Specifically, he lobbied for international measures to protect free flow of information across national borders. Perhaps due to his lack of success at Versailles, Cooper resolved to begin similar efforts early when the next war arrived: "Fifteen months after America declared war, I asked American newspapers to sponsor a movement to advance the idea of other countries establishing press freedom and taking news agency control away from governments."[2]

Putting this plan into action, Cooper and his colleagues in ASNE began by sponsoring a survey on the status of press freedom in countries across the globe, and lobbying for inclusion of a plank in the United Nations Charter resembling the First Amendment to the American Constitution. The official ASNE policy on the matter held that true press freedom in the post-war world would require "reciprocal declarations by the United States government and all other governments, press, radio and other media of information, embracing the right of the people to read and hear news without censorship." Cooper conceived of the issues similarly, coining the phrase "the right to know" in January of 1945. He defined this idea as "the citizen['s] entitl[ment] to have access to the news, fully and accurately presented," although within a decade it came into popular usage as a convenient manner by which to refer to a wide range of concepts and principles, including freedom of the press, first-amendment speech and expression rights, opposition to censorship, and "freedom of information."[3]

While the 1940s freedom-of-the-press movement had little success at first, failing to obtain protective measures in the UN Charter, its popular appeal within the industry spread during the immediate post-war years. In 1948 two major press organizations—ASNE and Sigma Delta Chi (SDC), the journalistic fraternity—formed committees to support the cause. The

Associated Press Managing Editors Association (APME) soon followed, constituting a similar body. At this point, and for the following two years, those participating in the movement still conceived of the issues in the same way Cooper did when he explained that his efforts were "meant to be an exposition of the evils of government news suppression and propaganda ... The plea of all peoples should be that their governments stand aside from th[ese] activit[ies] ... Let truthful mutual news exchange bring acquaintance and understanding, peoples to peoples." In 1950, however, when J.S. Pope became chair of the ASNE freedom-of-information committee, the focus began to change. Almost immediately after taking charge Pope commissioned Harold Cross, a retired attorney who had long experience with issues of media law, to undertake a study of the legal bases for suppression of information. Cross' *The People's Right to Know* was published three years later, and it soon became the "bible of the freedom of information movement." Right from the time he joined the campaign, though, Cross' influence transformed the issue from one of international flow of information to the question of the U.S. government's efforts to restrict news source material.[4]

How and why Harold Cross was able to divert the focus of the movement is open to question. Since he was working independently, it may have been that he simply lacked the resources to conduct a study covering foreign press conditions. Or, the reason may be that in the absence of any significant international law on the matter, he selected to direct his research toward domestic legal regimes. In any event, Cross found ample source material for his 405 page study. Indeed, the text is a mammoth work, covering access laws applicable to executive, legislative, and judicial records in federal, state, and municipal jurisdictions. Most notable of all, Cross adopted a distinct perspective by defining his study as one devoted to access-to-records laws. He emphasized the question of government denial of journalistic sources, certainly, but Cross nevertheless rejected the manner in which press representatives in the movement had

framed the issue in terms of censorship, or news suppression, and propaganda. This angle was novel to James Pope, Kent Cooper, and their colleagues. Pope wrote in the Foreword to *The People's Right to Know* that "Harold Cross caught a vision clearer than ours" due to his recognition that the issue centered around "the people's right of access" rather than the effort of the press to "fight back against news suppression."[5]

During the period between 1950 and 1955, the movement struggled. Cross' influence cut deep, reaching members of the movement in a profound way, but it did not win many new converts to the cause. Throughout this time, in fact, those speaking out for more government openness did not even constitute a majority among the press. Moreover, the movement was hampered by significant differences of opinion among leaders as to the appropriate tactics they should adopt. For instance, the SDC committee, at least for a time, opposed the ASNE policy of lobbying for statutory reform, claiming that the movement should target government secrecy in the broad sense rather than allying with legislators in hopes of reining-in the executive branch. The SDC leadership feared that an alliance would lead to press complicity in secretive practices of the Congress that were no less pernicious than those of the White House and the federal agencies. Eventually, however, the pragmatic approach prevailed. This was due in large part to the emergence of a congressman whose concerns on the topic appeared fully genuine. Convinced that John Moss was not interested in shielding the legislative process from public view, journalists quickly and eagerly joined efforts with him.[6]

The first contact between Moss and the existing freedom-of-information movement occurred in the summer of 1955, soon after the formation of the subcommittee, when James Pope sent Moss a letter of encouragement and a copy of Cross' book. A few months later, Cross was given the opportunity to brief committee staff in person as a preparatory measure in anticipation of the first set of hearings scheduled for November. Pope and Cross, at least at this initial stage,

seem to have offered similar advice. Pope explained that "if the people of the country are to be fully informed, they should not be dependent on voluntary releases" of information by the government. Cross was somewhat more direct in advocating access rights, calling for early action on "positive legislation directing that records are to be open to the public." He also offered a vision for a freedom-of-information statute, suggesting that "general legislation might state that all records should be open except as otherwise provided by law."[7]

The November committee hearings featured one full day of testimony from press representatives. The roster of witnesses was impressive: former ASNE committee chairs J.S. Pope and J.R. Wiggins; former Sigma Delta Chi committee chair V.M. Newton; Pulitzer Prize winning reporter Clark Mollenhoff; prominent columnists James Reston and Joseph Alsop; and author of the freedom-of-information bible, Harold Cross. During the morning hearings, successive witnesses offered commentary on their foremost individual concerns, and in the afternoon members of the Moss committee took the opportunity to ask questions of the panel. According to one scholar "the heart of the press case against secrecy in government was laid bare" for the legislators through the course of the day. Principal complaints of the witnesses pertained to abuse of the security classification system, investigations of journalists aimed at discouraging critique of government policies, dissemination of managed news through denial of access rights and selective release of information, and prior restraint measures to prevent publication of news that might embarrass the administration. The discussion centered, then, on present conditions more so than on possible legal remedies. Only Pope, it appears, remarked on legislation at all: "I think you [the committee] will be able to change some laws and give us some legal rights we think we have as a matter of principle."[8]

While Pope and his colleagues saw the issue as a straightforward matter of principle, representatives of the federal agencies sketched a much more complex and ambiguous scenario.

The November 8 session was illustrative, as Moss had the opportunity to learn about views prevalent within the executive branch during a showdown with his old nemeses, the Post Office and the Civil Service Commission. The specific topic of this confrontation concerned charges that the two agencies had erred in interpreting government policy by refusing to disclose names of applicants for regional and local Post Master positions. Philip Young, chair of the CSC, explained that "the public policy reason [for withholding] is that many times people who want to apply for a Civil Service examination do not want it known. ... His employer may not know that he wants to change jobs." The General Counsel to the CSC elaborated further, offering a legal basis to supplement Young's policy interpretation: "Of course we do have legal authority. ... There is not any section of the [Civil Service Act] which speaks about publication or withholding information. It would be inherent within the act. ... The inherent power, the same as the inherent powers of any other agency, to protect itself."[9]

Executive resistance to the activities of the Moss committee, as well as those of Thomas Hennings' parallel committee in the Senate, was consistent throughout the duration of Eisenhower's tenure. Even before hearings, when Moss distributed his questionnaire, it was no secret that agency personnel had little sympathy for, or understanding of, the assumptions and goals of the freedom-of-information movement. The self-protective impulse alluded to by the CSC counsel—the perceived imperative on the part of the agencies to resist what were seen as unwarranted incursions on their spheres of responsibility—was one major factor accounting for the confrontational response of the executive. It should not be overlooked, though, that antagonism was fueled by the fact that the Democrats controlled both houses of Congress, thereby controlling the Moss and Hennings committees, from 1955 to the end of the Republican administration in 1961.

At this point, when John F. Kennedy took office, along with a Democratic House and Senate once again, the situation changed: both the committees were bodies which almost by definition occupied an antagonistic position vis-à-vis the executive, and Democratic members of them were now faced with the dilemma of how to handle a president belonging to their own party. Kennedy and Moss had established a working relationship as early as 1958, when both were in Congress and both were interested in combating the right to withhold claimed by the Republicans. Subsequently, in 1961 and 1962, the president took steps to demonstrate his genuine commitment to the cause, for instance, granting Moss' request that he rescind the Eisenhower era policy that allowed officers other than the president himself to invoke executive privilege. While the president appears to have been acting on genuine motives, Moss' conduct during the Kennedy years raised some questions as to whether he had initially taken interest in the movement due to the partisan value of the issues it raised. A Sigma Delta Chi member, observing that the subcommittee had almost entirely suspended hearings after 1961, reported that "it was a gentle Moss who chided the Democratic bureaucrats for their secrecy instead of the old fire-eating Moss of 1955-60." The committee chair defended himself by claiming he had not lost interest in access rights, but merely adopted a lower profile because he now had the opportunity to lobby the administration through party channels and no longer needed to engage in public confrontation. Moss also believed that any decline in committee activities was attributable to a decline in the need for them. In other words he claimed that he had less to do because the Kennedy administration had a superior, more open, information policy than its predecessor.[10]

In 1963 Lyndon Johnson became president, and during the same year Moss' special subcommittee was given permanent status as the Subcommittee on Foreign Operations and Government Information. Johnson, like Kennedy, had been a supporter of the movement while in Congress up to 1961. As president, however, the almost inevitable imperative of institutional self-

interest changed his view. Now charged with running the executive branch, Johnson began to see very clearly the difficulties presented to him by a movement for access to government records. Prior to the new president's inauguration, since 1958, there had been some congressional interest in further legislative steps to block executive secrecy, specifically, in the form of proposals to amend section 3 of the Administrative Procedure Act. While none of the early bills survived beyond the stage of committee hearings, one did reach the floor of Congress for debate in the summer of 1964, just six months after Johnson took office. This was S. [Senate bill] 1666, which would eventually be passed by the legislature and signed into law by President Johnson.[11]

This initial Senate bill had three major sections, each covering categories of government records and information parallel to those governed by the APA. Paragraphs (a) and (b) of the new statute were clearly recognizable as amended versions of subsections 3(a) and 3(b) of the original act. The first passage, like 3(a), dealt with material to be published in the *Federal Register*, stipulating that rules of procedure and amendments to rules must now be published along with substantive rules and descriptions of structure and function that were already covered in the APA. The second passage, a revised version of 3(b), covered agency opinions and orders, but now granted public access to statements of policy and administrative staff manuals as well. In addition, this paragraph added copying rights to the existing inspection rights for this category of materials, and required agencies to issue indexes that would help citizens locate the materials they sought to inspect or copy.[12]

Paragraph (c) of S. 1666 was also a revision of the parallel subsection formerly belonging within the APA, although the old law was vastly expanded in this respect. Whereas APA 3(c) had constituted no more than a single sentence granting access to public records for those properly and directly concerned, the new public records paragraph now featured a set of procedural rules and a list of three specific exemptions. The procedures in this section, specifically, related to

judicial review. The passage established several matters in this area, including the citizen's right to seek redress in court when denied a request for records, the parameters of the court's authority to review agency decisions, and the complainant's right to recoup "cost and reasonable attorneys' fees" from agencies found to have withheld unjustifiably. The exemptive clauses allowed agencies to withhold

> particular records or parts thereof which are (1) specifically exempt from disclosure by statute; (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums [*sic*] of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters.[13]

The press was fully supportive of the congressional interest in amending the APA. Moss' committee and the Senate committee, chaired by Edward Long after Hennings' death, heard from journalists on several occasions between 1963 and 1966. By and large these witnesses articulated views nearly identical to those expressed by their predecessors in the 1950s, however what had changed was that they now devoted more emphasis toward the need for legislation. Specifically, press witnesses were concerned with the extent to which section 3 was being used as a justification for denying access. Creed Black, editor of the *Wilmington Morning News and Evening Journal* explained that

> an amendment to the Administrative Procedure Act is overdue, for there is no reason any American citizen should have to dig for months to uncover information about his government that should have been available to him as a matter of course. ... No one in this room—or anywhere else outside the agencies involved—has any way of knowing how much information has been so thoroughly buried under the authority of the Administrative Procedure Act that not even a clue to its existence has come to the surface.

Howard Bell, Vice President of the National Association of Broadcasters, concurred:

> While it is recognized that one of the basic purposes of the Administrative Procedure Act is to require agencies to keep the public informed about agency proceedings, there has been legitimate concern over the years that the exceptions and qualifications in the public information section of the act have served in some cases to suppress information in which the public has a legitimate interest, rather than to make it available. ... It is hoped that the current proposal will

> receive favorable consideration by the Congress. We do not believe that any information which is of legitimate public-interest concern should be withheld by a governmental department behind a cloak of secrecy or privilege. The democratic process is strongly dependent upon unhampered availability and dissemination of information to the public.[14]

While journalists were represented at almost every set of hearings in the era of proposed reform to the APA, so too were delegates of the federal agencies. In this instance as well, the body of opinion offered in testimony before the Moss and Long committees produced a relatively unanimous and homogenous theory of the proper legal status of access to records—a theory vindicating constrained public rights. The March 30, 1965 testimony of Norbert Schlei, an Assistant Attorney General during the Johnson years, provides an illustrative example. To begin, Schlei made a number of concessions, remarking on the administration's concurrence with committee members and press witnesses in valuing open access: "A genuine democracy is governed by the composite judgements of its people. Unless those judgements are informed judgements, of necessity the system will ultimately fail, and until such a time as it does, it cannot be a real democracy without an informed public. Therefore, where the press and other observers of public events may be wrongfully shut off from sources of information, democracy suffers." While he offered concurrence in the basic values associated with freedom of information movement, Schlei's next comments took issue with one basic precept held by those working toward legislation: that the Johnson administration had been guilty of excessive withholding. "The considerable frequency with which the president discusses developments ... with representatives of the news media," he explained, "evidences his earnest desire to keep the public as fully informed as possible [and] in general, I am sure that no group more fully appreciates the need for public understanding of the functions and operations of government than the relatively small group of individuals who are the heads of the federal departments and agencies."[15]

After this point, the balance of Schlei's formal statement was occupied with a series of arguments, falling into three categories, for restricting the parameters of free access. First, the Assistant Attorney General expressed his concern that the bill under consideration "would eliminate any application of judgement to questions of disclosure or non-disclosure, and ... substitute, therefor, a simple, self-executing legislative rule." Schlei was proposing the idea that to legislate in the area would be to attempt imposing arbitrary standards. Continuing, he explained that public policy was not a science, and thus could not be implemented according to prefabricated formulas. This was especially the case, Schlei believed, when contending interests—such as the interest in disclosure, as against the interest in protecting national security, personal privacy, and so on—needed to be balanced against one another on a case-by-case basis. This he introduced as the "basic thesis" of the Johnson administration: "there is no form of words that can protect the public interest well enough to justify substituting that form of words for 'executive judgement' and 'discretion.' ... The fault is not with the draftsmanship of [the bill] but with its approach."[16]

Schlei's second major assertion was also grounded in the notion that it was necessary to strike a reasonable balance between openness and confidentiality in order to protect important interests. He began by conceding that the democratic system does require disclosure in order to work. Yet at the same time, he insisted that "if our system is to surmount its challenges, disclosure must always accord with the public interest." To this point, most of the members of the committee would have agreed. The crux of this argument, though, held that only executive personnel were qualified to make the public interest evaluation. Having granted that "no group" was more supportive of access to information than the agency heads, Schlei asserted here that, likewise, "no one quite so fully appreciates the necessity for non disclosure as the public official who is charged with the custody of the records involved and the administration of the program to

which they relate." Needless to say, few committee members agreed with the proposition that expertise rested solely in the executive, and its implication that Congress should forego the legislative effort and trust the judgement of the agency personnel.[17]

Finally, Schlei presented the argument that was at the heart of executive views on freedom-of-information legislation from the beginning of the Moss-committee era. The Assistant Attorney General avoided referring to "executive privilege" by name, but this is nevertheless what he described in discussing H.R. [House bill] 5012, the House counterpart to S. 1666:

> [The proposed legislation] cannot impinge on the constitutionally derived authority of the Executive to withhold documents of the executive branch where, in his discretion, he determines that the public interest requires that they be withheld ... Since H.R. 5012, by its terms, seeks to limit the Executive in the exercise of his constitutional authority to determine whether executive documents are to be disclosed, ... [it] would contravene the separation of powers doctrine and would be unconstitutional.[18]

What Schlei may or may not have known at this time is that President Johnson had already taken steps to ensure that the legislature would be unable to pass any bill he considered unacceptable for these various reasons. By late- 1964 or early-1965, evidently, it had become clear to the president that congressional approval of a freedom-of-information law amending the APA was inevitable. His most obvious course of resistance in this situation would have been to veto the bill after its initial passage. This would have been an effective tactic in the short term, since there was not sufficient support to override a veto in the House. On the other hand, doing so would have involved unacceptable political risks in that killing a law so dear to the press community would have alienated journalistic and editorial opinion. Instead of risking adverse press coverage, then, Johnson fell back on the bargaining skills he had learned during his career in Congress, and mounted quiet pressure on Democrats in Congress. Relying on two of his most loyal supporters to execute his plan, House Speaker John McCormack and House Majority Leader Carl Albert, the president forced Moss to accept a deal: Johnson pledged not to veto

whichever bill eventually passed the legislature, but in return the House committee would allow Justice Department lawyers to participate in the drafting of the official report on the bill. In effect this meant that one of the basic documents that the courts would need to rely upon in interpreting the statute would reflect the executive branch's reading of it. As it turned out, the House report placed strong emphasis on executive judgement and discretion of the kind Schlei had spoken during his March 1965 testimony.[19]

The final stages of the legislative process were a drawn out affair involving hearings by the parent committees to which Moss and Long reported, and floor debates in both houses of Congress. Eventually, Senate bill 1160—an amended version of S. 1666—was passed by the Senate in October 1965 and assented to by the House of Representatives in June 1966. The bill was then signed by the President in July, although it did not come into force until the following year. As a result of the fact that the basic structure of 1666 was retained in bill 1160, the new Freedom of Information Act was clearly identifiable as an amended version of section 3 of the APA. However, the act featured significant revisions to the terms of the previous bill dealing with access to records, judicial review, and exemptions. On procedural provisions, first, Congress granted precedence on the docket for FOIA cases, and replaced the reimbursement-of-costs clause with one allowing the courts to sanction agency personnel with contempt if found "noncompliant" with the law. Second, six new exemptions to mandatory disclosure were added. In addition to records already designated as confidential by statute, executive order, or their status as internal memoranda, agencies could now withhold records if they contained information related to trade secrets, law enforcement, geological and geophysical wells, or financial institutions; if they established internal agency personnel rules; or if release would violate a citizen's personal privacy. Finally, and perhaps most important, the introduction to paragraph (c) was altered to specify that agencies could not discriminate between requests, granting some and

denying others, on the basis of who had applied for access. The old clause had specified that "every agency shall ... make its records promptly available" if they did not fall into exempt categories. After final amendment, the Freedom of Information Act determined that "each agency, upon request for identifiable records ... shall make the records promptly available *to any person.*"[20]

More generally, speaking in terms of principles rather than legislative provisions, the most noteworthy feature of the Freedom of Information Act was that it introduced an entirely new legal philosophy for access to records. Under the old statute, access rights were granted to citizens engaged in agency adjudication, and their purpose was to ensure that members of the public would be able to present their case in front of a hearing officer in a fully informed state. Sponsors of the APA had no inkling of what would become the FOIA request system after 1967. Through the years between 1955 and 1966, on the other hand, legislators developed the idea of letting the public inspect government records regardless of their status as "properly and directly concerned" or otherwise. The individual submitting a request for records might be a citizen involved in agency adjudication, or a reporter preparing a news item; they might be an academic researcher, a voter attempting to be an informed member of the electorate, or simply a citizen curious about government operations. The point is that, for the first time, agencies were obligated to disclose records without regard to the reasons for which they were requested. The new philosophy was embodied in the "any-person rule," and this, along with the creation of a formal request procedure, meant that a much wider range of materials would thereafter be available to citizens.

## 2.2 Conceptions of an Access Law III: The Views of Journalists[21]

American journalists were not just leaders of the freedom-of-information movement in the 1950s and 1960s; they were, in fact, its founders. Of course, it cannot be overlooked that the movement would not likely have been successful without the support of a committed and vocal faction in Congress. Moreover, it should not be forgotten that representatives of the press and federal legislators often differed on the meaning of "freedom of information." Most significant among these divergences was that the original journalistic views were based on the idea that the press constituted "the fourth branch of government," and that thereby all issues of information flow were inherently concerned with the extent to which the government formally and informally regulated newspapers, radio, and the new medium of television. To put it differently, journalistic views held that "freedom of information" was synonymous with freedom of the press.

Representatives of the press in America have traditionally thought of their institution as the "fourth branch of government." This does not imply an understanding of the press as an official organ of the state apparatus. Instead, it involves a vision of democratic governance in which an external institution is required in order to monitor government activities on behalf of the people. Functionally speaking, then, the press is a kind of quasi-governmental body, at least in the sense that it is expected to check and balance the three formal branches by bringing the news to the public. Moreover, in order to fulfill this role the liberty of the press must not be restricted by government regulation. Herbert Brucker explained that

> every American schoolboy ... has learned [of] the division of the United States Government into these three basic parts. ... As one man, the American nation seems to regard it as fixed for all time that the checks and balances among legislature, executive, and judiciary are all there is to our government. But are they? How can one legislate, or execute, or judge, if one does not know what is going on? How indeed can the people choose their representatives in government without a bedrock of information on which to base their votes? In sum, upon what meat doth this our democracy feed? It feeds upon facts brought into the minds of its citizens by the press, the radio, and the supplementary media of

> information. This information system of our democracy constitutes a little recognized but indispensable fourth branch of the United States government.[22]

Within the fourth branch of government theory, a certain degree of tension between public officials and the press is presupposed: like the loyal opposition in a parliamentary system of democracy, the American press functions as a check and balance by bringing the decisions and motives of government into question. It is hardly surprising, then, that throughout American history there has been conflict between the press and the government, most often the executive branch, over the extent of liberties possessed by journalists. The battle over freedom of the press in the Western Hemisphere began in 1735 when *New York Weekly Journal* publisher John Peter Zenger was charged with libel after expressing his political opposition to the rule of Colonial Governor William Cosby. In 1798, not a decade after the First Amendment was ratified, the U.S. government passed a statute prescribing criminal sanctions for any published "seditious writings against the President or Congress." Not until the Great-Depression era did the federal judiciary rule decisively against state laws establishing prior restraint—that is, laws which decree what can and cannot be published, as opposed to those, like libel, that impose penalties for publishers after the fact if printed materials can be shown in court as defamatory. In 1917 the Espionage Act banned "false statements" that would "promote the success" of U.S. enemies in wartime, and in 1918 this law was amended to protect the nation against "those who would say anything detrimental to the sale of government bonds [or] who uttered anything that would subject to scorn or disrepute the American form of government, the Constitution, the flag, or the military uniform." In 1971, President Nixon initiated what is by now the most famous prior restraint battle, if not the most famous press-freedom battle, in all of American history by petitioning the Supreme Court for an injunction to block publication of the Pentagon Papers by the *New York Times* and the *Washington Post*.[23]

In 1945, when Kent Cooper coined the term "the right to know," the battle over freedom of the press had been on hiatus. Journalists had supported wartime secrecy and censorship measures, either actively or passively, for the simple reason that they were integral to the war effort. After the peace, however, as the 1940s drew to a close, many in the newsgathering community began to identify a pernicious trend. They felt that the federal government, having grown accustomed to the comforts of confidentiality, was hesitating to revoke the special wartime measures:

> When America embarked upon imperialistic military and political world conflict in two world wars [the previous] forthright policy on news availability met adversity. The change was increasingly evident in peacetime after the Second World War. ... In our new role of world defender of democracy, evidence of the change became official when the government [began] suppression [of the news.] War practice had shown how war censorship and suppression easily and conveniently could be applied to news in peacetime.[24]

The suppression and censorship Kent Cooper refers to took two major forms. First, members of the press felt that government agencies had become far too fond of public relations programs, and far too willing to rely on "managed news." Bureaucrats and elected officials expected reporters to abandon aggressive questioning and requests for government documents. Instead they were expected to content themselves with the facts—and more important, the interpretations—of public affairs that were deemed appropriate for release by government officials. In the second place, there was the security classification system, first applied to non-military secrets by executive order of President Truman in 1951. This, according to journalists, was as bad or worse than suppression through managed news: it was tantamount to outright censorship. What journalists wanted, then, was a way to get the full story. They believed that far too much government information was being censored, and felt that classification requirements should be loosened. They did not trust the veracity or the completeness of news voluntarily released by government, and they supported reforms that would allow journalists to report an

objective story rather than merely reproducing the official interpretation. So, one aspect of what they were agitating for in fighting censorship and suppression was the right of journalists to inspect government records and documents. James S. Pope commented in 1955 that "if the people of the country are to be fully informed they should not be dependent on voluntary releases. ... We are concerned ... with the attitude of officialdom, not only toward 'releases' but toward inquiries." An editorial in the *New York Daily News* remarked not long afterward that "we hope Rep. Moss' committee can smoke out numerous bureaucrats who cover their mistakes by classifying them as secret, and can do something toward making them open up."[25]

While access to records and documents was among the major concerns of the press, there were other worries as well. In 1956, J.R. Wiggins explained that all five of the first-amendment rights possessed by journalists could be threatened by government action: "(1) the right to get information from the government, (2) the right to print it without prior restraint, (3) the right to print without fear of reprisal for publication that does not offend the laws, (4) the right to have access to printing materials, and (5) the right to distribute." Other concerns included the dissemination of propaganda through bodies like the Voice of America radio network, the government practice of off-the-record interviews which make attribution of sources impossible, and leakage of news to reporters in good favor with the administration. Some media figures even feared that regulation of transmission bandwidth threatened radio and television news in the 1940s as licensing of newspapers had in seventeenth-century England, and saw the Post Office's authority to interrupt distribution of printed matter as a question of state censorship. None of these additional concerns, though, none beyond the right to get information from government in Wiggins' description, had anything to do with access to records.[26]

Beyond this distinguishing characteristic, the views of journalists were also based on the principle that members of the press deserved special consideration. Frequently, almost

consistently, advocates claimed the contrary by disavowing any self-interest and pledging support for the citizen's "right to know." J.S. Pope argued that "this is not primarily a newspaper fight. It should never so be considered. The right to know is the right of the people." Yet, the belief that the press had a special role to play was entailed in this. In other words, the special consideration deserved by the press was not a matter of self-interest because journalists acted "not in their own behalf, but in behalf of the people who depend upon them for their information about their own government;" but, regardless of the character of the fight, journalists nevertheless saw themselves as being in its vanguard at a functional or operational level as a result of their belief, to borrow Cooper's words, that the press is *the* information system of a democracy. In this respect journalists failed to truly grasp Harold Cross' main point in *The People's Right to Know*: that, citizen access would provide an alternative route for information flow. It does not appear that anyone espousing the journalistic view in the 1940s and 1950s paused to seriously consider the possibility of a direct government-citizen channel of information through a mechanism like the FOIA request system.[27]

In sum, then, there were three distinct characteristics of the journalistic view. First, it was an oversight-of-government view. In specific terms this notion differed from the congressional-oversight interpretation, given its basic tenet that it is the news media, not the legislature, which is the proper conduit of information from Washington to the nation at large. However, both groups concurred, to one extent or another, in the view that access laws must be reformed for the purpose of facilitating the process whereby the appropriate intermediary could deliver information to citizens so they can monitor their representatives. Second, this was in effect an argument based on constitutional grounds because the proposed theory of access rights was derived from the free-press clause of the First Amendment. Finally, not only did the journalistic view occupy itself with access rights for the press, it also situated the issue of access rights within a constellation of other

questions related to press freedom. Herbert Brucker explained that "a convenient substitute [for the term 'freedom of the press'] that has gained some currency is 'freedom of information.' This term is used loosely to mean a number of different things," including

> an end to censorship; independence of the media of information from government; free access to the news at its source; removal of barriers against importing printed matter, written matter, and pictures; removal of barriers against listening to foreign broadcasts; equality as among native and foreign reporters; unhindered travel anywhere by accredited correspondents; and cheap, nondiscriminating tele-communication rates.[28]

**2.3 Conceptions of an Access Law IV: The Executive Branch View**

Views on the theory and implementation of an access law held by executive branch officials have always diverged somewhat from those prevalent inside Congress and outside government. The distinguishing feature of the executive perspective is that it was, and continues to be, predicated on the idea that no right of access held by the public, press, or legislature could ever be absolute. Throughout the period between 1955 and 1966, and beyond, successive administrations were wary of legal reforms, claiming, as Norbert Schlei did for instance, that "a successful democracy will never be built upon freedom of information achieved simply by affording to any and all persons unrestricted access to official information." While it is necessary to acknowledge this distinctive feature of the executive view, at the same time it is also important to recognize that no administration made a genuine attempt to defeat the freedom-of-information movement. This is because even though executive officials uniformly insisted on circumscribed access rights, they nevertheless accepted the basic premise that a society without access to information is not a true democracy.[29]

During the entire legislative era, from the first proposition of amending the Housekeeping Statute through to the passage of the FOIA, the executive branch fought for certain limits to

reform. This campaign produced a massive body of documentation that reveals the arguments used by successive presidents and the agency officials that were sent to testify before the Moss, Hennings, and Long committees on their behalves. The most concise expression of the executive view, however, is not to be found in records of presidential press conferences or in published committee hearings, but instead in two articles written by William P. Rogers—Deputy Attorney General, and subsequently Attorney General, under President Eisenhower. To an extent, Rogers' articles reflected his own particular view, and the official policy of the administration he served. Still, the works he produced were comprehensive and representative: the beliefs and arguments offered by Johnson and his officials in the 1960s did not differ significantly from those expressed by Eisenhower and his in the previous decade, and thereby Rogers' articles provide a reliable portrait of executive views on the matter of "freedom of information" in general.

Rogers' first article, published in 1956 and entitled "The Right to Know Government Business from the Viewpoint of the Government Official," addressed the question of public and press access rights. Like Norbert Schlei did ten years later, the Deputy Attorney General began by conceding the basic right of the American people to be informed about their government: "Full knowledge of the facts makes for an intelligent electorate; it also provides the basis for an informed public opinion to guide elected representatives and others in the legislative process ... The people are entitled to the fullest disclosure." While granting the broader point, though, Rogers insisted, again like Schlei, that unrestricted access would be detrimental to important interests shared in common by all members of the society. The balance of his article, then, confronted one simple question: "Upon what grounds may the withholding of information, sometimes information of vital concern, be justified?"[30]

In Rogers' view, this question had a relatively straightforward answer. "Disclosure," he believed, "must always be consistent with national security and the public interest." In the first

instance, continued Rogers, there were three categories of information that must be kept secret in order for the government to discharge its responsibility for protecting national security. These were established and defined in President Eisenhower's Executive Order 10501, an amendment to Truman's security classification system, issued in 1953:

> "Top Secret" is applicable only to information where the defense aspect is paramount and where unauthorized disclosure could, for example, result in an armed attack against the United States. The designation "Secret" is applicable to those disclosures which could compromise important defense plans. The authority to classify information as "Confidential" is applicable only to "information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.".[31]

As for information requiring secrecy in order to protect the public interest, here Rogers outlined several scenarios in which public access would compromise the interests or rights of individuals, or of the society as a whole. His explanation of the kinds of information that could potentially require confidentiality in this respect included six broad categories. First, "matters pending in court" would often need to be kept secret because disclosure could potentially jeopardize an accused criminal's due process rights under the Fifth and Sixth Amendments. Second, the executive branch required a degree of secrecy in order to execute law enforcement. Consequently, Rogers recommended that records containing information received in confidence, names of informants, and other sensitive data, be guarded from disclosure, and he based his argument on the thesis that the safety of the community as a whole must take precedence over open access to police records. In order to protect the free enterprise system, Rogers also felt that trade secrets and financial statements submitted by businesses to government should be considered closed to the public. Records containing information on the "private business of private citizens" must also be sequestered, again to protect constitutional rights of citizens, and information relating to "internal governmental affairs" should be treated similarly in the interest of allowing for efficient and effective administration in government. Finally, Rogers felt that a

freedom-of-information law could not override other statutes requiring that specific information or categories of information be kept confidential.[32]

As Rogers was quite aware, supporters of reform were suspicious that executive officials privately believed the public would be better served if they were kept in the dark: "No one who has had the privilege of serving in any official capacity in Government for any length of time can escape the fact that there is a body of opinion which sincerely believes that Government officials are antagonistic to the idea that the people have a right to know what they are doing." However, the Deputy Attorney General insisted that he was not advocating a draconian government secrecy regime, nor facilitating efforts of public servants to "cover mistakes [and] avoid embarrassment." By contrast, his hope was to establish that since protection of national security and public interest was no less legitimate a public policy goal than disclosure, it was absolutely necessary to ensure the safety of the former as well as the latter. As in all other areas of public policy, Rogers argued, no single interest could be privileged over others that are equally legitimate. Instead, balancing among contending interests was required:

> While the people are entitled to the fullest disclosure, this right, like freedom of speech or press, is not absolute or without limitations. ... In recognizing a right to withhold information, the approach must be not how much can be legitimately withheld, but rather how much must necessarily be withheld. ... A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying non-disclosure no longer pertain.[33]

Two years after his first article, Rogers published a second piece devoted to the issue of congressional rights to obtain executive information. This, involved the question of executive privilege, and Rogers' commentary argued that the doctrine was a legitimate executive right under the Constitution. His reasoning drew upon two lines of logic. First, the Attorney General explained that executive privilege was a fundamental principle of U.S. constitutional law in that it derived clearly from the separation of powers doctrine. In the course of establishing his position,

he invoked the conventional interpretation of the original intent motivating the framers to impose strict separation on the powers of the three branches of government. This paradigm was so well established, in fact, that it would have been difficult for even the most devoted freedom-of-information advocate to disagree:

> We are dealing in this field with one of the most difficult, delicate and significant problems arising under our system. The doctrine of separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no one of the three elements could become pre-eminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry.[34]

By way of further explication, Rogers adduced a long series of precedent cases involving use of executive privilege since the earliest days of the republic. For example, he explained how George Washington had invoked it in the eighteenth century to block an investigation of a failed military campaign against native peoples, and to deny congressional access to the working papers that Ambassador John Jay produced in negotiating the 1794 treaty with Britain. Only a few years later, he continued, Thomas Jefferson refused to turn over certain information related to the investigation of his former Vice President Aaron Burr for treason, and in 1843 President Tyler invoked the privilege, in this case again to block an investigation related to United States-native relations. From here, Rogers continued by detailing further examples drawn from more recent times, making a point of citing use of the privilege by the most recent Democratic president, Harry Truman. Thus far, there would be little risk that Rogers' opponents could disagree: each case he cited is well documented, and, again, even the staunchest advocate of access to information would not deny the occurrence of the events in question. On the other hand, the Attorney General may have been less persuasive in addressing his intended audience when he continued with his interpretation of the meaning of these assorted precedent cases. In his view, one rejected by most FOIA supporters, the fact that successive presidents invoked the doctrine,

combined with the fact that none was ever successfully challenged in doing so, represented the assent of the legislature and the judiciary to the proposition that executive privilege is protected by the Constitution.[35]

To this point, Rogers has presented the basic essence of executive views on congressional access rights commonly articulated throughout the post-World War II era: the Constitution creates executive privilege through establishing the separation of powers doctrine, and affirmation can be found in precedents dating back to Washington's administration. To digress momentarily, it is worthwhile to make note of an additional theme that was unique to Rogers' treatment of the topic, his successful identification of instances in which Congress or members of Congress have expressed or implied support for the privilege. Most damaging, he made reference to a resolution passed by a Democratic House of Representatives during the Truman years claiming that "no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission." His point, clearly, was that the legislature could not demand the records of another branch if its members had pledged to bar other branches from impounding their own.[36]

Finally, just as he made concessions in treating public and press rights, so too did Rogers acknowledge in his second article that the basic assumption of those advocating the contrary position was one he in fact agreed with: "Congress must be well informed if it is to do its legislative job realistically and effectively. The vast majority of requests by Congress for information from the Executive Branch, as you know, are honored quickly and complied with fully. The furnishing of such information is beneficial to Congress, the Executive Branch and to the people themselves." Also echoing his previous article, the Attorney General made sure that

any concession he extended was accompanied by insistence on balancing the contending interests at stake:

> I recognize, of course, that Congress has broad powers of inquiry and investigation as an "attribute of the power to legislate." I have had some years of personal experience as counsel to legislative investigations. [However,] I recognized then and do now that the power to legislate is itself subject to constitutional limitations. So too, is the power to investigate. ... This is not mere doctrine. It was regarded by the Founders as necessary to prevent the tyranny and dictatorships that result from the undue concentration of governmental powers in the same hands.[37]

Rogers' arguments have provoked reaction and refutation in the FOIA literature that has been enthusiastic to say the least. Raoul Berger, for one, has contended that the Attorney General actually rejected the premise that American society required open access in order to function as a working democracy, and claims that executive officials in general who profess support for access rights are in fact only making a cynical attempt to conceal their secretive designs. Whether or not such an interpretation is defensible is open to question. But on the other hand, Rogers' claim to believe that "[since] we live in a democracy, ... an informed public is absolutely essential to the survival of our nation," places the burden of proof on his critics, who, significantly, have adduced no evidence that he was being duplicitous in adopting this position. Given this absence of evidence, there is little reason to believe that Rogers or other executive branch representatives held a philosophy significantly different from that of the FOIA supporters. The only fair conclusion, then, is that the FOIA dispute involved specific questions related to its implementation: questions on the status of executive privilege in relation to the Congressional power of oversight, and, deriving from these, questions over the extent of rights that should be created by the FOIA.[38]

## 2.4 Chapter Conclusion

Prevalent views on open access among the major interested parties outside Congress during the period from the Second World War to 1966 were unique to a greater or lesser degree. The journalistic perspective was notably similar to contemporary views held by members of the legislature: like John Moss and his supporters, representatives of the press believed that a new access law would serve to facilitate oversight of the government. Due to concurrence on these points, the alliance between the press and the freedom-of-information movement within the government itself was a natural one. On the other hand, though, this should not diminish the distinctive notion of reporters that the press was *the* proper conduit for information between the government and the people. This tenet was the basis upon which members of the media made their equation between freedom of the press and "freedom of information." It was also what divided them from congressional representatives, who generally believed either that the legislature itself should be the instrument for informing the citizenry about the executive branch, or, as will be introduced in connection with the free-flow-of-information view, that citizens should be granted direct access rights in order that they could inform themselves.

As for the views expressed by members of the executive branch, these are often portrayed as anti-FOIA philosophies which, when articulated in public, were masked by disingenuous assertions of support for access to information. Interpretations of this sort generally overstate the case. Executive representatives repeatedly pledged themselves to the necessity of openness in government. Certainly, there is the possibility they were being insincere. However, neither Eisenhower's nor Johnson's administration attempted to veto the bills that came before them in 1958 and 1966. This is a concrete indication that executive branch officials, or at least these two presidents, were in fact actively supportive of access laws—as long as their specific terms were constrained within certain parameters. All in all, executive views were not nearly so divergent

from those held by congressional representatives as it might seem from the standard portrayal in the literature. The dispute was technical, relating to the exemption of certain categories of information from access, and to the relationship between the FOIA and executive privilege. There was no difference on principle involved, though, as all parties joined in supporting government, and government information, for, by, and of the people.

## Endnotes

[1] Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (New York: Farrar, Straus and Cudahy, 1956), 101-2, 118-9, 164; Herbert Brucker, *Freedom of Information* (New York: The Macmillan Company, 1951), 169, 174, 171.
[2] Cooper, *The Right to Know*, 164.
[3] Cooper, *The Right to Know*, 164, xiii; George Penn Kennedy, "Advocates of Openness: The Freedom of Information Movement" (Ph.D. diss., University of Missouri, Columbia, 1978), 18; see also Brucker, *Freedom of Information*, 200-20.
[4] Kennedy, "Advocates of Openness," 31. See also Cooper, *The Right to Know*, 166-74; Kennedy, "Advocates of Openness," 23-4, 45, 315-6.
[5] Harold Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Morningside Heights, NY: Columbia University Press, 1953), vii.
[6] Kennedy, "Advocates of Openness," 38-9.
[7] Kennedy, "Advocates of Openness," 69. The account of the hearings that follows is based primarily on Kennedy's work, 63-77. For a different interpretation, and in fact a different version of the chronology of events, see Robert Okie Blanchard, "The Moss Committee and a Federal Public Records Law, 1955-1965" (Ph.D. diss., Syracuse University, 1966), 83-98.
[8] Kennedy, "Advocates of Openness," 72-3.
[9] Kennedy, "Advocates of Openness," 75-6.
[10] Kennedy, "Advocates of Openness," 102. In general on the early-1960s, see Kennedy, "Advocates of Openness," 99-105. For Moss' view, see John E. Moss, "Public Information Policies, the APA, and Executive Privilege," *Administrative Law Review* 15 (Winter-Spring 1963): 119-21.
[11] Miles Beardsley Johnson, *The Government Secrecy Controversy* (New York: Vantage Press, 1967), 97-109.
[12] Senate Bill 1666, reproduced in United States, Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information: Hearings on S. 1666 to Amend Section 3 of the Administrative Procedure Act* (Washington: U.S. G.P.O., 1964), 1-2.
[13] Senate Bill 1666, in *Freedom of Information: Hearings on S.* 1666, 2.
[14] "Statement of Eugene S. Pulliam, accompanied by Creed C. Black," and "Statement of Howard Bell," in *Freedom of Information: Hearings on S.* 1666, 60, 88-9.
[15] "Statement of Norbert A. Schlei, accompanied by Webster P. Maxon," United States, Congress, House of Representatives, Committee on Government Operations, Foreign Operations and Government Information Subcommittee, *Federal Public Records Law: Part I* (Washington: U.S. G.P.O., 1965), 4.
[16] "Statement of Norbert Schlei," *Federal Public Records Law: Part I*, 5.
[17] "Statement of Norbert Schlei," *Federal Public Records Law: Part I*, 5, 6.
[18] "Statement of Norbert Schlei," *Federal Public Records Law: Part I*, 6.
[19] Samuel J. Archibald, "The Freedom of Information Act Revisited," in Harold C. Relyea, ed., "Symposium: The Freedom of Information Act a Decade Later," *Public Administration Review* 39 (July-August 1979) 312. See also testimony of Benny Kass in United States, Congress, Senate, Committee on the Judiciary, Subcommittee on Intergovernmental Relations, *Freedom of Information, Executive Privilege, Secrecy in Government, Volume 2* (Washington: U.S. G.P.O., 1973), 122-9.
[20] Senate Bill 1666, in *Freedom of Information: Hearings on S.* 1666, 1-2; *Freedom of Information Act,* 5 USC § 552 (1996).
[21] Here and throughout the text, references to "journalists" or "the press" are used as a shorthand to refer to all members of the newsgathering community, whether working in print or broadcast media: reporters, editors, publishers, correspondents, columnists, bureau chiefs, and so on.
[22] Brucker, *Freedom of Information*, 9-10. See also Douglass Cater, *The Fourth Branch of Government* (Boston: Houghton Mifflin Company, 1959) for further elaboration of the fourth-branch theory.
[23] William H. Marnell, *The Right to Know: Media and the Common Good* (New York: The Seabury Press, 1973), 10. Generally on these topics, see Brucker, *Freedom of Information*, 35-6; Joseph Carter, *Freedom*

*to Know* (New York: Parents' Magazine Press, 1974), 13-4; Robert A. Liston, *The Right to Know: Censorship in America* (New York: Franklin Watts, Inc., 1973), 109-10; Marnell, *The Right to Know*, 8-12, 19-23.

[24] Cooper, *The Right to Know*, 311. See also Cooper, *The Right to Know*, 164-6.

[25] Quoted in Kennedy, "Advocates of Openness," 67, 86. For general background on managed news, see Cater, *Fourth Branch of Government*, 118-21; and Johnson, *Government Secrecy Controversy*.

[26] James Russell Wiggins, "The Role of the Press in Safeguarding the People's Right to Know Government Business," *Marquette Law Review* 40 (1956-1957): 74, 81; Cooper, *The Right to Know*, 257-71, 276-85; Cater, *Fourth Branch of Government*, 132-41.

[27] Pope quoted in Kennedy, "Advocates of Openness," 71-2; Wiggins, "The Role of the Press," 77.

[28] Brucker, *Freedom of Information*, 276, 213.

[29] "Statement of Norbert Schlei," *Federal Public Records Law: Part I*, 5.

[30] William P. Rogers, "The Right to Know Government Business from the Viewpoint of the Government Official," *Marquette Law Review* 40 (1956-1957): 83, 85.

[31] Rogers, "The Right to Know Government Business," 87.

[32] Rogers, "The Right to Know Government Business," 88-9.

[33] Rogers, "The Right to Know Government Business," 83, 85-7.

[34] William P. Rogers, "The Papers of the Executive Branch," *American Bar Association Journal* 44 (October 1958): 1012. This article was originally a Department of Justice statement delivered by Rogers on 8 March 1958 to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee.

[35] Rogers, "The Papers of the Executive Branch," 943-4; 1007. Note that the term "executive privilege" was first coined approximately concurrent with the Rogers article in 1958, but that the Deputy Attorney General did not use it in this piece. See Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: Harvard University Press, 1974), 1, *n.* 3.

[36] Rogers, "The Papers of the Executive Branch," 1011-2.

[37] Rogers, "The Papers of the Executive Branch," 941, 1010-1011.

[38] Rogers, "The Papers of the Executive Branch," 941. For Berger's opposition to Rogers, and his suspicion of executive officials in general, see *Executive Privilege*, particularly 167-208. In one instance, focusing on Rogers' use of precedent-based arguments, Berger explains that "continued adherence by high-ranking members of the executive branch to these 'precedents' exhibits, in this light, cynical reliance on the modern propaganda tenet: repeat it often enough and it will be believed." He continues by comparing Rogers to Patrick Buchanan, a speech-writer on Nixon's staff at the time Berger was drafting his book in the early-1970s: "Buchanan ... was asked 'whether it is really that easy to change public opinion,' and 'replied Yes. Drip by drip by drip. It wears them down.'" See Berger, 208, *n.* 48.

# Chapter 3

# Conceptions of an Access Law During the Freedom-of-Information Era, 1967-1989

## 3.1 Legislative Amendments, Executive Policy, and FOIA History, 1967-1989

A new era in information policy began in the United States on July 4, 1967 when the amendments to section 3 of the Administrative Procedure Act went into force. The law was not innovative in all its respects. Readers of the *Federal Register* and those citizens wishing to inspect agency opinions and orders gained some new rights, although the clauses covering these matters remained much as they had been previously. On the other hand, some aspects of the FOIA were entirely original, particularly the provisions granting all U.S. citizens—not to mention corporations, American residents, and even foreign nationals—a right to request and obtain any and all government records not covered in the exemptive clauses.

During the initial years of the freedom-of-information era, it appeared that the major supporters of the law had lost interest in the cause they had espoused so passionately for so long. Between 1967 and 1971, congressional representatives who had been active in the movement turned their backs on it. According to one scholar,

> the record—or, more precisely, the absence of any record—shows clearly a drop-off in congressional action on the freedom of information front. The House subcommittee that had spearheaded the movement since 1955 held no hearings and released no formal reports until 1971. Then, under a new Chairman, it revitalized. Similar inattention characterized the Senate subcommittee after its' [*sic*] ten months review, published in 1968.

Through this same period, journalists, who had been expected to be the principal users of the law, accounted for only 6% of FOIA requests submitted. Representative William Moorhead, Moss' replacement as chair of the subcommittee, expressed his dismay at this development:

> I am surprised ... that the reporters, editors, and broadcasters whose job it is to inform the American people have made so little use of the Freedom of Information Act. They were the major supporters of those in Congress who created the law. The free and responsible press ... should be the major users of the law designed to guarantee the people's right to know.[1]

The turning point arrived in 1974, when Congress amended the act in hopes of promoting FOIA use. The impetus for this first effort toward reform came primarily from the congressional reaction to the Supreme Court's January 1973 decision in the most prominent freedom-of-information litigation to date, *EPA v. Mink*. This case had been initiated by a July 1971 FOIA application by Congresswoman Patsy Mink, requesting copies of a report by an interdepartmental committee that called into doubt the safety of a set of underground nuclear weapons tests scheduled for the following autumn. The Environmental Protection Agency, which had custody of the document, denied Mink's request on the grounds that it was classified, and thereby could not be disclosed under the provisions of exemption 1. The district court upheld the EPA decision by summary judgement, only to have the case remanded after appeal with instructions from the circuit court to review the decision. "If the nonsecret components [of the records] are separate from the secret remainder," ruled the appeals court, "and may be read separately without distortion of meaning, they ... should be [ordered] disclosed" by the district.[2]

*Mink*, however, never arrived back on the district court docket because the government petitioned for a Supreme Court ruling on the case. At issue here were two matters. First, the EPA claimed that although judges were authorized to question whether agencies had correctly interpreted the FOIA exemptions they claimed as basis for withholding, the *de novo* review clause that established this power did not allow them to examine requested records by conducting *in camera* inspection. Accordingly, government attorneys believed that the circuit court had erred in ordering the district to examine the report Mink was seeking. Second, the government contended that if the district court carried out the order to release selected portions of the

requested records, it, again, would be taking action not authorized by the act: since the documents were classified in their entirety, selective release by the court would involve overturning the decisions of the executive officials who had, under proper authority, made the decision to classify. Mink, on the other hand, argued that *in camera* inspection was implied in the *de novo* review clause, and that judges were also within their proper sphere of authority to determine if requested records had been legitimately classified, in whole or in part. Ultimately, the Supreme Court ruled in favor of the government. While leaving the door open for *in camera* inspection of records in some cases, they determined that such action would not be allowed when *Mink* was remanded. As for judicial review of security classification decisions, Justice White's opinion indicated that "any claim that the Act was intended to subject the soundness of executive security classification to judicial review at the insistence of any objecting citizen" was "wholly untenable."[3]

By the time of the Supreme Court's *Mink* decision, the information subcommittees in Congress—now chaired by Moorhead, and Edward Kennedy in the Senate—had already begun the initial steps toward further legislative activity. Moorhead had launched the process with a set of hearings in the summer of 1971. The particular issues under investigation related to charges of evasion of the FOIA by agency officers, and the possibility of procedural reforms to empower requesters. The *Mink* ruling, however, was a serious misconstrual of the law in the eyes of many legislators, who felt that the Congress of 1966 had intended to create judicial review of security classification, and had meant to imply a judge's power of *in camera* inspection when it established *de novo* review.[4]

This sentiment was prevalent enough that it acted as the necessary impetus toward the reforms passed in 1974. Immediately following *Mink*, in fact, in March 1973, bills were introduced in the House and Senate proposing the procedural amendments studied by the

Moorhead committee in 1971, and clarification of *in camera* inspection and judicial review of security classification. Extensive Senate hearings ensued throughout the summer of 1973. By the following summer, two separate House and Senate bills dealing with these matters, and clarifying exemption 7 as well, had been passed, and a conference committee was in session to resolve differences between them. In February of 1975 the amendments went into force, following President Ford's veto of the bill and an overwhelming congressional vote to override the veto in November 1974.[5]

The 1974 amendments altered the FOIA in several respects. First, the language of exemption 1 was clarified, providing that records could only be withheld under this clause if they were "specifically authorized under criteria established by Executive order to be kept secret in the interest of National Defense or foreign policy and are in fact properly classified pursuant to such Executive order." In association with this, the right of judges to inspect requested records *in camera* was granted in clear terms. Exemption 7, which had previously protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency," was modified to cover "investigatory records" compiled for law enforcement purposes if and only if disclosure would create a likely risk to certain important interests. A series of "harm tests" were written into the exemption which allowed agencies to withhold records if their release would interfere with a law enforcement proceeding, jeopardize an individual's right to a fair trial, violate an individual's privacy, or cause damage in other ways. Finally, procedural reforms were introduced to address agency foot-dragging. These included, among other measures, a provision that would ban agencies from charging requesters in excess of actual costs incurred in fulfilling a request, and one that would allow the requester to initiate litigation if the agency failed to process FOIA applications within prescribed time periods. In addition, Congress restored

judicial power to award reimbursement for attorney fees to citizens who prevailed over agencies in court, a stipulation which had been removed when S. 1666 was amended into bill 1160.[6]

Any discussion of the early years of the FOIA would not be complete if it did not raise certain contextual events that exercised great influence on the popular perception of government secrecy and public information policy. First, in 1970, Americans learned that their president had expanded the war in Southeast Asia by initiating a bombing campaign that targeted neutral Cambodia. Nixon's rationale invoked the need to cut communication and transportation lines between the Government of North Vietnam and the insurgent Viet Cong army in South Vietnam. While many Americans regarded the entire operation as unconscionable, there were also those, including some in support of the military decision, who were primarily upset that the bombing had been kept secret. Subsequently, there was the Pentagon Papers court case, Nixon's attempt to suppress from publication a Department of Defense study on the roots and origins of the Vietnam War originally commissioned by the Johnson White House, and later leaked to the press by former government employee Daniel Ellsberg. The president was partly concerned with protecting the content of the study, but just as much so with establishing a hardline policy to discourage leaks by his officials. To do so he was willing to take the controversial step of attempting to impose prior restraint on the news media with his lawsuit to block publication of the leaked study by the *Washington Post* and the *New York Times*.[7]

Finally there was Watergate, a minor scandal at first, involving a crew of White House employees caught breaking-in to the office of Democratic National Committee Chair Lawrence O'Brien during the presidential campaign of 1972. Within months after Nixon's re-election, however, the event came to dominate the headlines. The scandal had elements of a black comedy: a group of inept burglars reporting to, of all people, the U.S. Attorney General; a pair of intrepid young reporters, Bob Woodward and Carl Bernstein, who demonstrated in breaking the story that

they had investigative skills superior to those of the authorities; and a president forced to resign in the face of an impeachment vote for obstruction of justice after having recorded conclusive evidence against himself on an ultra-secret White House taping system. Beyond this, there were also some very disturbing matters of government corruption raised. Beyond the actual break-in itself, evidence eventually emerged of Nixon's attempt to supply the burglars with hush money, and his desire to divert an FBI investigation by directing the CIA to claim that the burglars had been on official Agency business. Evidence of unrelated improprieties—including questionable campaign fundraising methods and extensive use of illegal wiretaps to identify sources of leaks—was also produced in the course of investigation into the affair. In a final irony, Nixon attempted to save his presidency by invoking executive privilege to deny congressional investigators access to the Watergate Tapes.[8]

All in all these incidents inflamed members of the government, journalists, scholars, and large proportions of the general public. The American people have always been suspicious of government. This sentiment is a vital element of the political philosophy upon which the republic is based, and, among other things, the separation of powers and checks and balances doctrines descended directly from it. Nevertheless, the level of suspicion in the early and mid-1970s was far greater than at any previous time. Given all this it is not surprising that the FOIA began to become an institution and an icon of American politics in or around 1974. Indeed, it is quite possible that this would have happened merely as a consequence of these contextual events of the 1970s, even if the amendments had not been enacted contemporaneously.

After the Nixon-Ford years, another new FOIA era appeared to begin. As it turned out this was extremely short-lived, as short as the duration of the Democratic administration that took the White House in 1977. Nevertheless, for as long as President Carter was in office, proponents of access had an important ally in Washington. Most significantly, the new president directed

Attorney General Griffin Bell to inform agencies that henceforth "the government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions of the act." While the new Carter-Bell policy on FOIA litigation was certainly significant, it had little lasting impact on interpretation of the act.[9]

The 1980s were a uniquely conservative time in U.S. information policy. The re-ignition of the Cold War contributed to this in that increased global tension boosted concern in Washington for the security of government information. But more to the point was the inauguration of Ronald Reagan, along with a Republican Senate, in January of 1981. Within its first year, the new administration imposed restrictions on government information of a severity that had not been seen, perhaps, ever before in peacetime. The new measures included revised, restrictive guidelines for security classification, establishment of authority for agencies to reclassify records that had previously been opened, coercion of private repositories aimed at classifying sensitive material that was not government property, and a "gag rule" imposing pre-publication review agreements on all federal employees intending to write and publish material related to their experiences in government. In addition to all this, Attorney General William French Smith began the administration's reconsideration of FOIA policy by ordering in May 1981 that Griffin Bell's litigation guidelines be revoked. Henceforth, the Justice Department would provide legal assistance to agencies in any instance where there was a "substantial legal basis" for denying FOIA requests.[10]

Perhaps most important among all the factors influencing federal information policy in the 1980s was the general ideological climate reflected by Reagan's ascent to the White House.

This is not to deny the significance of the president's policies and particular actions, of course. However, the popular resurgence of social conservatism on the domestic scene had fundamental influence as well, and the general rightward trend is what accounts for the fact that even many Democrats in Congress supported the 1986 amendments initially proposed by Reagan's Justice Department. Although there had been some indication during Carter's last years that further reforms might be on the horizon, formal legislative activity did not begin until October 1981 when Attorney General Smith sent a report to Congress warning that misuse of the act was imposing unacceptable costs on the government. Republican Senator Orrin Hatch initiated parallel action at this time as well, introducing a bill proposing a set of procedural reforms, including recovery of full processing costs by agencies, "closer restriction of information within the ambit of exemptions 2, 4, 6, and 7," and "limit[ing] use of the Act by imprisoned felons and by foreign nationals."[11]

Hatch's bill was introduced too late in the session to come before the Senate floor for a vote, and thus it died before action could be taken, although similar bills were proposed in each subsequent year until the legislature was finally successful in 1986. The terms of the amending act, signed into law on October 27, focused on two areas. First, the fee structure of the act was altered in several respects with the aim of restoring greater fiscal balance to the administration of the FOIA. The Office of Management and Budget was allotted responsibility for overseeing and collecting fees and creating policies for the circumstances under which fee waivers would be granted to requesters. Different fee levels were established for records that were "requested for commercial use; ... requested by an educational ... institution ... or a representative of the news media; [or] sought by any other requesters." Additionally, waivers or reduction of fees were provided "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."[12]

The substantive amendments included in the 1986 act pertained to law enforcement records. Several small changes were made, mostly focusing on exemption 7, aimed at allowing law enforcement agencies more leeway to withhold. For instance, the threshold test for determining what are and are not "law enforcement records" was made less rigorous, and the harm tests created in 1974 were reduced in their stringency: whereas previously it had been necessary to show that release of records "would" result in interference with investigations, violation of personal privacy, or other kinds of harm, subsequently the government was only required to show that disclosure "could reasonably be expected" to result in the kinds of damage specified in the law. These substantive changes were the centerpiece of the 1986 reforms, and in a sense they were driven more by the Reagan administration's "law and order" agenda than by considerations related to information policy. In fact, the entire set of amendments pushed through in 1986 were not contained in their own bill, but rather they were attached as a non-germane rider to an act entitled The Omnibus Anti-Drug Abuse Bill of 1986. That House and Senate Democrats assented to these restrictions on free flow of information in order to support the president's wars on crime and drugs was a testament to the prevalence and force of the unique social ideology of the 1980s.[13]

Due to the fact that there is no formal legislative history of the 1986 amendments, the congressional intent behind the rider remains obscure. Thus the best source indicating the designs of the Reagan administration at the outset is Smith's explanation in his 1981 report that modifications were required because "years of experience have made clear that many persons are employing [the FOIA] in ways the Congress did not intend," and because "the costs of administering the Act and the volume of litigation it spawns" were excessive. Furthermore, one of the bill's sponsors, Representative Glenn English, told members of the House that

> I want to emphasize that H.R. 4862 is strictly a procedures bill. ... Other issues will have to wait for another day. I don't mean to suggest by this that the FOIA

> suffers from any major unaddressed defects. Although sweeping proposals for amending the FOIA have been made over the years, no one should be fooled into thinking that there are any pressing problems that demand immediate legislative attention. In fact, many of the current difficulties with the FOIA require better administration rather than new legislation. The other amendments that were under serious consideration this year were minor adjustments that can wait until later.

These comments suggest that at least certain legislative and executive officials held a remarkably confident attitude regarding the statutory purpose of the act: Smith contends that there was a great deal of FOIA usage "in ways the Congress did not intend," indicating his belief that the legislative intent could be isolated, identified, and precisely defined; English reveals the same belief in his supposition that only procedural reform was needed. Speaking broadly, it would be safe to say that most parties interested in the Freedom of Information Act felt the same way in 1986. Then, only three years later, such beliefs were challenged by the controversy that followed the Supreme Court's ruling in *Department of Justice v. Reporters Committee for Freedom of the Press.*[14]

### 3.2 Conceptions of an Access Law V: Academic Views

Academic researchers in a variety of fields now represent one of the principal, and most vocal, groups of users of the Freedom of Information Act. This is hardly surprising. Government records are important source materials required for study in several disciplines, and, accordingly, historians, political scientists, economists, sociologists, and scholars in government and public administration, among others, have actively supported the new access regime that began in 1967. However, academic support for the FOIA movement was not always present, and extensive use of the act by scholars did not begin immediately after the statute was passed. It was only in the 1970s that academics, mainly historians, became an access rights constituency. The distinctive

conception of the purpose and meaning of the law held by this group was defined by two major influences. First, the fact that historians were the most numerous and vocal group among the broader scholarly constituency meant that the academic interpretation of the act reflected a particular understanding of history and the historical profession. Second, a strong sense of entitlement on the part of scholars led to the disappointment, disillusion, and bitterness they expressed when it became apparent that the FOIA would not be an effective access tool.

Prior to 1967 the only academics apparently interested in freedom-of-information issues were scientists. This group of researchers were not concerned with access-to-records laws, as such, but instead with the question of free exchange of research and information with foreign colleagues. The position adopted by these advocates involved a defense of traditional principles of the scientific method: in order for the collective body of knowledge in a given research domain to advance, it is necessary for researchers to review the work of others, to examine their data, methods, and conclusions, and to replicate previous experiments in order to validate or invalidate the findings. Scientists in the 1940s and early-1950s, especially, had a certain amount of contact with the early FOIA advocates. The two groups shared a natural connection since this was the era when people like Kent Cooper were still principally concerned with free flow of news across borders. Thus for journalists and scientists alike, the primary issue centered around barriers to international exchange of information. American scientists, though, were fighting a losing battle. This period was the height of the Cold War, and none of the successive administrations during it was willing to allow the U.S. scientific community to participate in any communications that would make research conducted at home available to foreign scholars. The fear was that weapons research, all of which was considered to be highly sensitive, would be transferred to Soviet or East Bloc scientists, and American leaders took preventative measures by silencing their own researchers.[15]

Beyond the scientific connection—a case of the two groups finding common interests more so than their mounting common action—there was virtually no academic involvement in the freedom-of-information movement through its early years. Historians, for instance, were not called to testify and explain to the congressional committees of the 1950s and 1960s how important access to current government records would be as a supplement to research based on inactive records at the National Archives and Records Administration (NARA). Following the enactment of the statute, on the other hand, the FOIA slowly evolved into a popular research tool, especially by those studying U.S. foreign relations. Among those studies written on the basis of records obtained during the early FOIA years were several monographs that are still considered to be classics in their respective subfields. William Shawcross' work on the war in Southeast Asia falls into this category, as do Peter Wyden's research on the Bay of Pigs, and books on the Guatemalan revolution of 1954 by Stephen Schlesinger and Steven Kinzer, and Richard Immerman.[16]

In the eyes of historians, though, the FOIA was more than just a research tool. Above and beyond this, it represented a policy shift promising the defeat of a major barrier that, during recent years, had been preventing professional historians from their mission of informing the American public about their collective past. This barrier, specifically, involved the growing prevalence of "privileged history" since the Second World War. The complaints against privileged history resemble those presented by journalists against "managed news:" both groups believed that the official government view of public affairs was being disseminated through selective release of information, and they saw this as a grave danger in that it allowed the government to determine how citizens would perceive, respectively, history and current events. The methods of disseminating privileged history, again bearing some similarities to managed news, were through publication of studies by scholars in the employ of government departments,

sponsorship of works by historians believed to hold views similar to those of the administration in power, and, less formally, through assistance to memoirists formerly in government service. In all cases, the privileged scholar was allowed access to records not generally available to other, more impartial and potentially critical historians. There was a great deal of concern, then, among the nonprivileged that official versions would be published years before alternative views could be produced, and that as a result the government's version would be accepted as truth before the more objective scholars could even begin their work. Herbert Feis explained that

> the historian of the recent past is dependent on "privileged" records. He yearns for personal revelations and interpretations. But—and this is the big but—what he really wants and yearns for is that the whole unedited public record be not denied him for so long a time. This and this alone would enable him to write his own account, one that he could be reasonably confident was whole and in balance with the truth. ... Has not the time come—in view of the need for full and accurate historical knowledge—to correct the bias in favor of privileged history?[17]

Historians made several recommendations for remedial action. Among the ideas that were widely supported within the community were reforms to liberalize access to classified information, to mandate transfer of an administration's records to NARA at the end of its term or shortly after, to end pre-publication review as a condition of access, to ban granting of preferential access to scholars on the basis of the political slant their writings might reflect, and to establish of strong access rights for all under the FOIA. Thus, what they sought was not to oppose official histories and memoirs as illegitimate contributions to the overall historiography, but to end privileged history by establishing equal access for all scholars. As part of this they wanted to increase the access rights of professional historians—to equalize by opening access to the nonprivileged rather than by locking out the privileged.[18]

The philosophy behind this program involved an interpretation of the FOIA that was reliant on a certain interpretation of the meaning and role of history and the historian in society. First, there was the question of objectivity. Historians readily conceded that journalists were their

colleagues in revering the ideal of objectivity, and concurred that they performed a vital social function by conveying information to the public in the immediate timeframe. Most had similar regard for other scholars as well, such as political scientists. One element of the program, then, was to advocate access rights for all commentators on public affairs because objective study was of benefit to America and Americans regardless of the discipline within which it was produced. However, as historians they also believed that the methods of their chosen field were particularly conducive to producing special insight. In this regard they believed that they served a social function by providing interpretation of public affairs that was objective not only in the sense of being impartial, but also in the sense of being distanced from the events. They contended that an authoritative account could not be produced when the commentator was still in the immediate context; instead, a certain amount of time needed to pass before a scholar could obtain objective understanding. Arthur Schlesinger Jr. explained that "in our time, the historian tends to be a professional. He is a man trained in his craft, a product of methodical discipline, a member of a guild. His is a quasi-priestly vocation, supposed to liberate him from the passions of his day, to assure him a serenity of perspective and to consecrate him to the historian's classic ideal of objectivity."[19]

Second, these historians believed that in order to have any value, information on public affairs must be converted into knowledge. Generally speaking, all were agreed that this process required certain prerequisites: coming to terms with any event or series of events required serious study by several scholars contributing contrasting viewpoints; each historian must have access to the same source materials that previous works were based on in order that the interpretations of colleagues could be evaluated; and no single version could be accepted as authoritative—especially not those by official and favored writers—until subject to review by peers. Henry Steele Commager believed that

> we may be sure ... that the principle of countervailing force will operate: that each disclosure will call forth other disclosures, each interpretation inspire other interpretations, and that, out of all this, something like the truth will eventually emerge. This is the familiar method of history in free countries: the alternative is "official" history. Those who would, directly or indirectly, impose restraints on the [objective] historian are ... basically men of little faith, who do not trust the common sense of their fellow men or the ability of truth to survive the competition in the market place of ideas.[20]

Thus, historians interested in the FOIA supported it because it was a tool that would empower objective history, while at the same time allowing professionals to embark upon the greater, collective historiographical endeavor of building a body of knowledge all that much earlier. Like journalists, they believed that if the government was allowed to distribute the information it selected for public consumption, "truth" would suffer. Also like journalists, they believed that the FOIA was only one dimension within a larger constellation of necessary policy initiatives: it would only be truly effective if accompanied by measures like relaxation of security classification requirements, establishment of an eight- or ten-year rule for access through NARA, and so on. Finally, the views of historians rested upon another variant of the oversight-of-government theory in the sense that their fight against privileged history was, in effect, an argument that public officials must not be allowed to conceal or destroy the materials that allow scholars to judge their conduct and effectiveness in office. Thereby, they agreed with journalists and Moss' supporters that one of the basic functions of the act was to ensure that activities of executive officials could be monitored, and they dissented only in their belief that oversight through historical knowledge was superior to that based on information about current affairs channeled through the Congress or the press.

This distinct historian's view of the FOIA was most common during the 1970s. Since its advocates were looking forward to the future, claiming that the act would be the great equalizer that was required to remedy the dilemma of privileged history, it can be seen as an optimistic conception to an extent. In the 1980s, though, the tone and tenor of historians' commentary on the

FOIA took a turn toward the pessimistic. For one matter, several years having lapsed since the passage of the act, many historians had been through the request procedure by the late-1970s, and had come to see that the law would not necessarily be an effective tool toward their ends. Generally speaking, those who had undergone such an experience grew disillusioned rather quickly. Justifiably frustrated after investing literally years of effort for little or no return, these scholars came to believe that malicious bureaucrats were denying their access rights through delay and other evasion tactics in administration of FOIA requests.[21]

Even more so than this, the new policies introduced by the Reagan administration turned historians' frustration and disillusion into severe bitterness. Again, it deserves to be stressed that during the Reagan years, the administration's FOIA policy was merely one part of a larger issue. At the same time as sponsoring the amendments that would be passed in 1986, and committing the government to litigate all FOIA cases that had substantial legal basis, the president implemented restrictive information policies in several areas, ostensibly to protect national security. Historians speaking out, however, did not agree that these were required for protecting the country, and protested against many of the new measures: banning of foreign speakers, including Mexican novelist Carlos Fuentes, because of their ideology; slashing funding for American students wishing to study abroad for fear that they might bring home foreign, un-American ideas; blocking certain Americans, including Coretta Scott King, from public speaking abroad; authorization of FBI wiretaps without warrants; and many other measures, not even to mention all the secret activities associated with Contragate. Historian Thomas Paterson commented in 1988 that "the American people have witnessed in recent years a series of executive branch decisions that, taken together, have put this country in danger of what we must unabashedly call 'thought control.' No single edict was issued from the highest echelons of

Washington D.C. Rather, a host of seemingly unconnected steps have merged into a discernible trend unbefitting a nation that prides itself on freedom of expression."[22]

Within this larger set of issues, concern for the present and future status of the FOIA was not lost. Historians Blanche Wiesen Cook and Gerald Markowitz, for instance, urged their colleagues to support an organization known as the Fund for Open Information and Accountability in order to express their opposition to Orrin Hatch's bill amending exemption 7. "It soon became apparent" after 1967, they contended, "that the FBI, the CIA, and other government agencies were employing tactics of delay, evasion, and even outright defiance to frustrate users of the Act. ... Given the revelatory potential of the Freedom of Information Act, it is no wonder that efforts to undermine it have been underway for some time." Cook and Markowitz encouraged support of the Fund in order to "organize and protect against this reactionary assault against the basic tenets of this republic." Paterson expressed similar sentiments:

> The scholar's use of the FOIA is now threatened in a variety of ways. Long delays—of sometimes two to three years—set back research, and often what is released is heavily sanitized. The government, moreover, has been stingy in granting fee waivers. ... Government officials believe it necessary and proper to control information, to keep the public ignorant, to prevent historians from writing about the recent past. Vigilant public oversight, including protest essays like this one ... thus become essential to historical scholarship and to the flourishing of a free society.[23]

There are some noteworthy phenomena that become evident in examining the evolution of historians' views. First and most remarkable is how dramatically this group of commentators extended their use of hyperbole after the disillusioning experiences of the 1970s and 1980s. There is no question that Reagan's various policies were highly conservative and indeed quite disturbing. Phrases like "thought control" and "reactionary assault," however, are not ones we expect to see serious scholars using in social and political commentary. Second, it appears that at some point these historians developed a sense of entitlement. The replacement of their initial

historiographical interpretation of the FOIA, based as it was on hopes for resolution of the longstanding privileged history dilemma, with simple complaints and grievances listed one upon another demonstrates the evolution. It appears that at some time historians ceased worrying about privileged history. In their collective evaluation, evidently, the injustice of being denied access under the act came to outweigh the injustice of the government giving special access to favored parties.

Finally, these two phenomena taken together tend to indicate that after a certain point these scholars ceased speaking with the "serenity of perspective" Schlesinger described as characteristic of the historian's view, and began speaking as Americans—angry Americans. Professional discourse was replaced with borderline conspiracy theory and all the vocabulary associated with it. An interpretation of the FOIA based on the meaning and purpose of the historian's calling and service to society was replaced with an interpretation based on citizen rights. This development was tantamount to the abandonment of the earlier, distinctively historiographical view held by scholars like Schlesinger, Feis, and Commager. Paterson, Cook, Markowitz, and their contemporaries, by growing so fond of the subgenre Paterson referred to as the "protest essay," cut their ties with the preceding generation.

### 3.3 Conceptions of an Access Law VI: The Public

The question of how the FOIA has been conceived by the American general public is, for the most part, beyond the scope of this research. It would be possible, of course, to probe this question through public opinion survey techniques, or through research focusing on media coverage of public responses to the act. However, the latter would inevitably reflect journalistic views at least as much as public ideas, and the former would be prone to all the inherent

weaknesses of polling methodologies in application to subjective and qualitative research. Nevertheless, it is worth devoting some attention to citizen attitudes here. This does not purport to present an overall conception of views held by the general public. Instead reason for pursuing the matter is merely to observe two important features of citizen usage patterns, and to extrapolate from these what they might reveal about the largest and most amorphous FOIA constituency.

Statistics complied on FOIA requests have indicated, first, that users of the act have been motivated by many different reasons. Some of these have been covered already: journalists' requests, like Robert Schakne's, directed toward reporting the news; requests by legislators, including Patsy Mink, in pursuance of their duty to oversee the executive branch; and academic use by scholars, most prominently historians. But, as it has turned out, citizens have found many more reasons for requesting access to government records than was ever anticipated. As many in Washington pointed out during the 1980s, one large source of requests was the business community. On the whole, in fact, firms seeking access to data reported to government by competitors have consistently accounted for the largest proportion of requests, compared with other declared reasons, since 1967. Beyond this, public advocacy groups have made extensive use of the act, largely for the purpose of exposing little-known government information. This category of usage can be based on the oversight principle—for instance, when groups like Nader's Raiders, the Sierra Club, and the National Security Archive request records for the purpose of exposing questionable government activities before the public. At the same time, a different kind of public advocacy usage has involved requests made by politically partizan organizations for purposes of policy critique, as opposed to oversight. Attorneys in litigation with the government have used the act for several purposes, including submission of requests to supplement information available through pre-trial discovery. A more crafty technique, sometimes used by defense attorneys on high-profile cases, has involved submitting large

numbers of frivolous FOIA applications in hope that the administration of the resulting flood of requests will force the Justice Department to divert human resources away from preparation for the impending trial. Prison inmates have been known to request records of the law enforcement and other officials involved in their cases. Some, apparently, have done this for harassment purposes, while others have been seeking evidence of violations of their civil rights, or attempting to obtain materials from prosecutors that might help in an appeal. Members of organized crime have used the law in hopes of identifying informants, with the ultimate purpose of seeking retribution. Many citizens, finally, have submitted requests merely out of curiosity, a desire to find out if the FBI or other agencies have a file under their name.[24]

Some of these examples might seem rather far fetched. However, all of the reasons listed here are in fact quite common among the thousands of requests received by the government each year. In any case, this pattern tends to suggest an important conclusion. Given the fact that citizens in diverse walks of life have submitted requests for these diverse reasons, and given the fact that business usage has accounted consistently for the plurality of requests, it appears that those citizens using the act to find out "what the government is up to" have not been the predominant group among requesters. Granted, this pattern does not necessarily suggest that all FOIA requesters regard any and all conceivable uses of the law as legitimate. On the other hand, though, it does seem apparent that each user regards his or her own reasons, whatever they may be, as being in accordance with the statutory intent. So, perhaps the fair conclusion is that the general public as a whole—or at least FOIA requesters as a whole—does not subscribe to the theory that the act privileges certain categories of requests over others. The majority of users, in fact, probably do not subscribe to any theory at all. They appear to be pragmatic above all else: uninterested in esoteric debates about the purpose of the law except insofar as the issue might affect whether or not they will be able to obtain the kinds of material they wish to inspect.

The second pattern of FOIA usage worth remarking on involves the increase of requests since the enactment of the law. At the outset, the number of applications submitted was notably low. Between July 4, 1967 and July 4, 1971, the total number of requests received by the federal government was 1503. This makes for an average of fewer than 400 per year. After 1974, and the first amendments designed to smooth request procedures and promote use, dramatic increases took place. In 1975, 156 000 requests were received, and in 1976, 175 000. Subsequently, further increases continued to take place consistently through the years. The total for 1992, for instance, was 600 000.[25]

These statistics, reflecting such extremely low numbers of requests submitted in the early years and such a dramatic increase in usage afterward, hold the potential to tell a significant story about the history of the FOIA. To make matters even more stark, note that only 36% of the initial 1503 requests, a total of 547, were submitted by persons other than representatives of media, businesses, and special interest groups. This amounts to less than 150 requests per year through the first four years of the freedom-of-information era from the general public. The implication of these statistics is that legislators were probably not motivated to take action by popular support for access rights among citizens. To further corroborate this interpretation of the statistics, consider John Moss' recollection of the public indifference, or even opposition, he observed in the 1950s and 1960s:

> I remember coming home the first time after I started that inquiry ... Sometimes ... someone would ask "John, what the hell are you doing? Are you trying to let everyone know what our secrets are?" The public frequently had a little bit of an emotional response. ... They just assumed that if something is marked secret that it's justified. ... They trust[ed] the government.[26]

According to statistical and anecdotal evidence, then, it seems that citizens were not demanding that the government allow them to inspect records during the legislative era. The likely reason for this is that, for the most part, citizens had probably never paused to ponder why

they or their fellow citizens would want to inspect government records. After all, Americans did not insist on the establishment of a national archives until 1934, more than 150 years after independence, and even then it was not a popular movement based in the citizenry that forced the government to take action. Taking all this into account, there is a reasonable scenario for explaining the extraordinarily low rates of public usage of the FOIA throughout its early years: having never previously conceived of the need for a law like the FOIA, it was necessary for a considerable amount of time to pass after its enactment before citizens could recognize in large numbers that it might have granted them rights they would want to exercise.[27]

### 3.4 Conceptions of an Access Law VII: The Free-Flow-of-Information View

The free-flow-of-information view has roots in the FOIA literature stretching back to the 1950s when, almost immediately upon its first articulation, it began to emerge as the predominant view among members of Congress. By this point in FOIA history, the administrative-law view had already disappeared. This is not to say that legislators who had supported creation of access rights for citizens involved in agency adjudication changed their minds or recanted their positions after their program was enacted. Instead, the dynamic at work was one of simple obsolescence: having had limited aims from the start, and having succeeded in passing the APA in 1946, those like Senator Norris and his supporters no longer had any particular need to engage in further advocacy, and consequently they devoted their attention to other issues.

Subsequently, by the time problems and issues related to section 3 of the APA became apparent, those who were interested in information law consisted of an entirely new group. These were younger representatives for the most part, whose political careers had begun after the Second World War, and who held views on access rights bearing little resemblance to those of

their predecessors. One group among these new legislators were those, like John Moss, who promoted an access act to ensure that Congress could effectively oversee the executive. However, it turned out that the independent life of this congressional-oversight view was rather brief, and the best indicator of this phenomenon is found in the evolution in Moss' own thought on the matter. Initially, the Sacramento congressman's interest in information law had been provoked by his frustration with the refusal of Post Office and Civil Service Commission officials to share documents with the House committee appointed to oversee them. By the early-1960s, on the other hand, he was the lead figure in pressuring for passage of a law to grant access rights directly to citizens. Moss did not by any means turn his back on the fight against executive privilege. Instead, once he was exposed to certain new conceptions of how legislation might be drafted, he came to realize that granting access rights to citizens at large would ensure the ability of congressional representatives to obtain records from the executive, and do much more in addition.

Harold Cross was the first to advocate a direct grant of access rights to the general public, when he argued in *The People's Right to Know* that "public business is the public's business." What Cross meant by this was not that prior advocates had been completely misguided in proposing access rights for journalists and representatives in the legislature. Cross, in fact, was supportive of both these groups, particularly members of the press with whom he worked closely. On the other hand, though, he sincerely believed that it was access rights for the public that mattered most of all. "Citizens of a self-governing society," he contended, "must have the *legal* right to examine and investigate the conduct of its affairs ... Freedom of information is the very foundation of all those freedoms that the First Amendment to our Constitution was intended to guarantee. ... Therefore [the issue is] the state of the law governing the right of the people, not of the press as such, to freedom of information."[28]

Regardless of Cross' instrumental role in promoting an access to information law for citizens, the rise of this idea to prominence resulted only after it was further explicated by two individuals who were well positioned to influence the growing FOIA debate: Thomas Hennings, first Chair of the Senate subcommittee acting in parallel to Moss', and Wallace Parks, who served both as Chief Counsel for Moss' committee and as consultant to Hennings'. Senator Hennings, for his part, made a basic argument very similar to that Cross had presented some five years earlier:

> much has already been said and written about the power of the President and his subordinates in the Executive Branch of the Government to withhold information from the Congress [and the press]. Considerably less attention has been given to the power of the President and his subordinates under the Constitution to withhold information from the public. Yet, it is this latter aspect of the subject which seems to present the more vexing constitutional problems, since any broad "Executive privilege" to withhold information from the public must operate in direct derogation of the people's natural and constitutional right to know.[29]

Beyond this novel citizen-rights orientation, Cross, Parks, and Hennings also proposed a second thesis that was equally significant and original. This was the proposition—already alluded to by both Cross and Hennings—that the citizen's right of access to government information could be derived from the Constitution. In short, these three authors who created the predecessor to the modern free-flow theory felt that a freedom-of-information statute had never been necessary for the purpose of creating access rights as such, but was only to required in order to make those which were contained in the First Amendment enforceable. Wallace Parks, first, presented his case by invoking an original-intent argument. "It is clear," he explained,

> that the primary purpose of the freedom-of-speech and press clause of the First Amendment was to prevent the government from interfering with the communication of facts and views about governmental affairs, in order that all could properly exercise the rights and responsibilities of citizenship in a free society. This clause was intended as one of the guarantees of the people's right to know.

Parks' point was based on a purely legal deduction. He posited that the founders must have presupposed the existence of a "right to know" because without it the First Amendment would be meaningless.[30]

Hennings, by contrast, relied more on assertion than on deduction. In his view,

> when ... the Bill of Rights was added to the Constitution, whatever doubt might otherwise have existed about recognition and protection of the people's right to know under the Constitution was removed. ... Without question the free speech and press clause of the Bill of Rights was intended to serve as a guarantee of the people's right to acquire information about the activities of government. Implicit in its terms is a right to knowledge, including knowledge about what the government is doing.

He then continued with a case-law argument, explaining that "the Supreme Court has yet to recognize explicitly the 'right to know' as a constitutional right, but the Court has given strong indication that it deems such a right to exist." To back his point, the senator quoted the Supreme Court's finding in *Grosjean v. American Press Co.* to the effect that "'the predominant purpose of [the free speech and press clause of the First Amendment] was to preserve an untrammeled press as a vital source of public information.'"[31]

There should be no doubt of the importance of the consensus that resulted after Parks and Hennings persuaded Moss and his supporters to accept their citizen-rights conception. Had no such concurrence developed, it is entirely possible that the legislative process would have become hopelessly tangled with disputes between the two factions, and it is even debatable whether the FOIA would have taken the form that it eventually did. Equally significant, though, was that the publication of Parks' and Hennings' work eventually resulted in a second broadly-based consensus among parties interested in the FOIA. On this occasion, general accord was reached not just among legislators, but among virtually the entire community of American legal commentators: practicing attorneys, law professors, law students, and legislators. The significance of this development lies partly in the fact that the theory gained additional advocates.

In addition, it was crucially important that the principal forum in which the FOIA debate has taken place since 1966 has been law reviews, which are the venue where legal commentators tend to publish. The combined effect of these two factors has been that the free-flow theory became predominant not only within the legal literature, but also within the literature on the FOIA as a whole.

In the form it was articulated by legal commentators, the free-flow view had a focus somewhat different than it did in its first instantiation. For one matter, as a result of dynamics similar to those involved with the demise of the administrative-law view, later proponents of the orthodoxy placed less emphasis on the importance of granting rights directly to citizens. This was not a resurgence of interest in press and congressional access; instead, it was a natural development in the sense that arguments in support of citizen rights were no longer necessary after the FOIA, with its any-person stipulation, was passed. In the second place, members of the orthodoxy in the post-1966 era were less interested than Parks and Hennings had been in establishing links between access rights and the First Amendment. As will be discussed in Chapter 5, the constitutional derivation of the FOIA remained a basic axiom of the free-flow theory even after it was transformed in other ways. However, those articulating the later version of it most often treated the first-amendment connection only in an implicit fashion. This, yet once again, was because rhetorical approaches that had once been popular, and indeed necessary to the freedom-of-information movement, became redundant after the statute was enacted. The original free-flow theorists had pronounced their free speech and press arguments in order to refute executive branch contentions that a freedom-of-information statute would be unconstitutional. Thereby, it should be no surprise that their successors did not feel a need to reiterate the same point once it became clear that the executive would not be challenging the law on constitutional grounds.

There are two principal characteristics that define the views of second-generation free-flow supporters as they exist today. First, those committed to this view argue that the pool of material available under the act is not circumscribed by any qualifications other than the nine exemptions specified in the act. In other words, they contend that the object of the Freedom of Information Act is information. In specific terms, certain authors refer to "government-controlled information,"[32] while others refer to "government-held information,"[33] "information generated by government,"[34] "information compiled by and pertaining to government agencies,"[35] and so forth.[36] This tenet of the free-flow theory is not necessarily in opposition to the beliefs of Parks, Hennings, and the other members of the earlier generation, since these figures claimed at various times that the law they hoped to create would provide access to information, records, or documents. What makes the current free-flow theory unique in this first respect, though, is that its supporters are relatively consistent and almost uniform in describing the FOIA as an information law.

The second feature of the theories dominating the contemporary FOIA literature is that free-flow advocates devote their primary attention to the matter of statutory purpose—and, in the process, they depart significantly from one basic principle upon which earlier versions of the orthodoxy had been based. Cross, Parks, and Hennings, despite their innovation in several areas, took a relatively conventional stance on statutory purpose when writing in the 1950s: granted, they did propose the first ever citizen-oversight FOIA theory by deciding to support public access rights over those of legislators and journalists; but, they nevertheless conformed to the general theory of the day, which held that the purpose for creating an access law was to facilitate oversight of the executive branch in one manner or another. Hennings' argument was that "the Bill of Rights was intended to serve as a guarantee of the people's right to acquire information *about the activities of government.*" Parks, likewise, felt that "the distribution of power within our

system of government and the functioning of our political institutions and processes" was dependent on "the accessibility and availability of information *about executive and administrative agencies and their operations.*"[37]

While they concur with Parks and Hennings on most matters, later free-flow theorists have taken a starkly contrary position in this regard by claiming that the FOIA was not designed to place any special emphasis on oversight of government activities. Instead, advocates of the new free-flow conception propose that oversight of government is far from the only legitimate usage of the law. Jeffrey Norgle, for one, argues that the interests of those requestors requiring information in order to compete in global markets should be recognized more widely: "Government information is a valuable commodity and a national resource. Indeed, the federal government is the largest single producer and collector of information in the United States. Therefore, easy, fast access to that resource [through the FOIA] is essential for American competitiveness."[38] Elizabeth Vitell takes an approach somewhat broader, suggesting that the act was designed to serve the needs of those citizens seeking to "acquire knowledge," or even more expansively, to "gain information of general interest:"

> The general purpose of the statute is to allow members of the public to avail themselves of their right to acquire knowledge. FOIA permits individuals to access information about themselves and others that has been compiled and maintained in government agency files. In addition to increasing the availability of information to the public, FOIA also provides the public with the opportunity to ... gain information of general interest.[39]

For Norgle and Vitell, the purpose of the act is significantly more encompassing than it was for those advocating any of the perspectives that came before it, most of which were based on the government-oversight principle. This does not mean that free-flow supporters reject the idea that government oversight is an important goal. Quite the contrary, many embrace it. However, the distinguishing feature of their conception is that it recognizes other forms of usage as legitimate in addition. In practice, then, these commentators recommend a liberal reading of

FOIA rights, and they often do so in particular contexts—for instance, advocating that citizens should be able to use the law to pursue commercial advantage in foreign markets. Even those who take this approach, though, are not primarily interested in specific, contextual questions concerning discrimination against international entrepreneurs, citizens merely seeking to "gain information of general interest," or any others wanting access to materials that do not inform on government activities. Instead, arguments like Norgle's and Vitell's are designed to uphold the basic axiom at the heart of the orthodoxy: that all users, regardless of their reasons for wanting access, should receive equal treatment. Alternately, some free-flow advocates omit discussion of contextual questions, and instead simply express the principle that underlies the equal treatment notion. Christopher Beall, for instance, conveys the essence of the entire free-flow paradigm by asserting that when Congress passed the act, it "intend[ed] for disclosure to be an end for its own sake."[40]

Taking all this into consideration, it seems that the differences between the free-flow-of-information view and other interpretations hold the potential for producing tension among the various constituencies concerned with the Freedom of Information Act. Nevertheless, only in one major instance has this tension become a point of controversy: this was in the aftermath of the Supreme Court's 1989 decision in the *Reporters Committee* case, when free-flow supporters began to express their dissent from and disagreement with the central purposes doctrine. However, the debate that ensued was not merely a matter of difference of interpretation. Instead, it was an acrimonious, even hostile dispute over the question of whether or not the doctrine can be considered a justifiable or legitimate interpretation of the act. The balance of this thesis deals with various aspects of this question.

## Endnotes

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[3] *EPA v Mink* 410 US 83, 84 (1973).

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[12] Relyea, "U.S. Freedom of Information Act Reforms—1986," 7-8; *Omnibus Anti-Drug Abuse Bill of 1986,* 100 Stat. 3207 (1986.)

[13] *Omnibus Anti-Drug Abuse Bill of 1986,* 100 Stat. 3207 (1986); Relyea, "U.S. Freedom of Information Act Reforms—1986," 8.

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[37] Hennings, "People's Right to Know," 669, emphasis added; Parks, "The Open Government Principle," 21, emphasis added.
[38] Norgle, "Revising the Freedom of Information Act," 839.
[39] Vitell, "Toeing the Line," 797-8. See also Adler, "National Security Information," 759; Beall, "The Exaltation of Privacy Doctrines," 1276, 1298; Brooker, "FOIA Exemption 3," 1231; Ian C. Crawford, "*FBI v. Abramson* and the FOIA: Exemption Seven Shields Political Records," *Suffolk University Law Review* 27 (Fall 1993): 748-9; Robert P. Deyling, "Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act," *Villanova Law Review* 37 (1992): 111; "FOIA Exemption 7," *Minnesota Law Review,* 1139; Martin E. Halstuk, "Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases," *Computer & High Technology Law Journal* 15 (January 1999): 77; Richard A. Kaba, "Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act," *Michigan Law Review* 86 (December 1987): 624; Joan M. Katz, "The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act," *Texas Law Review* 48 (June 1970): 1261, 1284; Kennedy, "Is the Pendulum Swinging?" 311; Lewis, "White House Electronic Mail," 811; "National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act," *University of Pennsylvania Law Review* 123 (June 1975): 1442; Magnus, "Judicial Erosion," 1613, 1636; Kristi A. Miles, "The Freedom of Information Act: Shielding Agency Deliberations from FOIA Disclosure," *George Washington Law Review* 57 (May 1989): 1326, 1328; Salomon and Wechsler, "A Critical Review," 150; Catherine F. Sheehan, "Opening the Government's Electronic Mail: Public Access to National Security Council Records," *Boston College Law Review* 35 (September 1994): 1145-6; David Sobel, "The Freedom of Information Act: A Case Against Amendment," *Journal of Contemporary Law* 8 (1982): 47, 60-1; Lori L. Vallone, "A Further Step Toward a New Exemption 7 of the Freedom of

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# Chapter 4

## The Central Purposes Doctrine and the Accountability View of the Freedom of Information Act

Supporters of the free-flow-of-information view have been quick to criticize the central purposes doctrine, and harsh in their assessment. Martin Halstuk, for one, feels that

> the *Reporters Committee* ruling remains a serious threat to the future of public access to information held by federal agencies. ... For access advocates ... a broad application of the central purpose test by the courts might be viewed as a disturbing trend that could further restrict the ambit of the FOIA's statutory purpose as evinced in its plain language and legislative history.[1]

Or, likewise, consider Elizabeth Wilborn's contention that

> the *Reporters Committee* [ruling] is both bad policy and an unwarranted interpretation of the FOIA. Although the Supreme Court's decision protects individual privacy, its narrow interpretation of the public interest fails to ensure that the FOIA will continue to serve its main purpose of providing free and open access to government-held information. ... The Court's answer was preordained to promote protection of privacy over access to information, and thus, to subvert the congressional intent behind the enactment of the FOIA.[2]

These are serious charges. Authors like Halstuk and Wilborn do not merely express their disagreement with the Supreme Court's interpretation of statutory purpose and congressional intent. Nor do they claim that, in their view, a judicious reading of the legislative history would have produced a different result. Instead both authors suggest that the Court was not so much interpreting the FOIA as it was willfully attempting to "subvert" or "restrict" it. Thereby, believing that *Reporters Committee* was so demonstrably misrepresentative of what the Congress of 1966 intended, they argue that the doctrine has no legitimate basis. This chapter, however, takes the contrary position, arguing that the doctrine does have a legitimate basis. For the moment, the argument will not touch on issues of congressional intent, or questions related to which of the two views reflects the statutory purpose more fully and accurately. This is because it

is important to determine before proceeding to such matters whether or not the doctrine can be validated as, at very least, plausible; is there any basis upon which to say that it is a reasonable alternative to the free-flow view?

In attempting to show the doctrine as a plausible alternative, this chapter proposes that Court's interpretation can be understood as an accountability view of the Freedom of Information Act. It begins with an exploration of the history of the central purposes doctrine and the case law upon which it is based, and proceeds by discussing the meaning of accountability and the ways in which government records can serve to hold public officials accountable. The conclusions eventually reached are largely dependent on the proposition that the act, as an access-to-records law, intrinsically functions to serve accountability. This special connection between records, accountability, and access laws is neither a radical, nor a novel idea. Applying it in the context of the federal act in the United States will require further discussion, of course. By way of introduction to these issues, however, consider Terry Eastwood's argument that

> preserving [records] is not first and foremost and in principle about management of corporate information resources ... but rather about preserving an authentic and adequate account of public actions ... Records account to the public for the discharge of the duties of its agent, the agencies, offices, and officers of government. It is this public accountability which is the aim of freedom of information legislation.[3]

### 4.1 Conceptions of an Access Law VIII: The Central Purposes Doctrine

Although it did not have a formal name prior to 1989, the view holding that the Freedom of Information Act exists to allow citizens insight into "what their government is up to" in fact dates back to the 1973 ruling on *EPA v. Mink*. This case, the first FOIA litigation to reach the Supreme Court, dealt mainly with exemption 1, and specifically with the questions of *in camera* inspection and judicial review of security classification. The matter of statutory purpose, though, was raised

by tangent in Justice William Douglas' separate opinion. Douglas' reason for taking an independent stance related to the main questions of the case: he opposed the majority, contending that the district court should be allowed to determine whether the EPA had been warranted in declaring the requested report to be secret. In the course of his explanation, though, he found it relevant to set forth his reading of the original legislative intent behind the act. "My starting point," he wrote,

> is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to."[4]

The passage cited here is drawn from a book review published by historian Henry Steele Commager in 1972, and it should be noted that Justice Douglas' quotation of it was in turn cited by the Supreme Court in *Reporters Committee* fifteen years later. Nevertheless, in 1973 this view represented somewhat of a departure. In two early-1970s cases, for instance, *Bristol-Myers Co. v. FTC* and *Hawkes v. IRS*, the Second Circuit Court of Appeals had ruled that "the legislative history establishes that the primary purpose of the Freedom of Information Act was to increase the citizen's access to government records." These were ambiguous rulings since they did not make clear whether "government records" was intended as a reference to records of government activities, or, more broadly, to records held by government regardless of their content. Moreover, in 1971 the District of Columbia Circuit Court opposed the notion that would eventually develop into the central purposes doctrine when it ruled that "by directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief." Under this interpretation, the act could not have been created to privilege those citizens interested in "what the government was up to" over those making requests for other reasons.[5]

The decision in *Mink* seems to have been a turning point, though, insofar as judicial interpretation of statutory purpose after 1973 grew more and more uniform in support of Douglas' reading. In *Renegotiation Board v. Bannercraft Clothing Co.*, Justice Harry Blackmun wrote that "the act's 'ultimate purpose' [is] 'to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities.'" Subsequently, in *Department of the Air Force v. Rose*, Justice William Brennan determined that "the basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny.'" Similarly, Justice Thurgood Marshall ruled in *NLRB v. Robbins Tire and Rubber Co.* that "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption [of] the governors." By the end of the 1970s, then, when the courts began to turn their attention toward matters other than the statutory purpose, it appeared that the central purposes doctrine, albeit in embryonic form, had already been established.[6]

Then, more than a full decade after *Robbins Tire*, the *Reporters Committee* case reached the courts. Robert Schakne, who initiated the case, had originally submitted his request for rap sheets of several members of the Medico family of Philadelphia in hopes of reporting on their rumored connections with organized crime, and allegations that a "corrupt Congressman" had secured Pentagon contracts for the family business. Schakne's hopes of assembling a full exposé were blocked, though, at the first stage of the FOIA-request procedure. The Department did release rap sheets of three deceased family members, determining that their privacy interests no longer warranted protection, but denied Schakne access to the rap sheets of one family member, Charles Medico. The reporter filed suit in the District Court for the District of Columbia with backing from the Reporters Committee and several other coplaintiffs.[7]

In point of law, Schakne and Reporters Committee contested the Justice Department's claim that Medico's rap sheets were protected from disclosure under exemption (7)(c) of the Freedom of Information Act, a clause stipulating that the government may withhold "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy." Specifically, they argued that no privacy interest should be acknowledged under the circumstances because "'a record of bribery, embezzlement or other financial crime' would potentially be a matter of special public interest." The district court rejected this logic, and granted a summary judgement in favor of the government. Shortly afterward, the decision was reversed on appeal in April of 1987. The circuit court concurred with Reporters Committee, finding that Medico's legitimate privacy interest was "minimal at best," and ordered that Schakne's original FOIA application be fulfilled.[8]

It was at this point that the Justice Department appealed to the Supreme Court. Arguments presented by both sides presumed that the Court would seek to rule on the case by applying a "balancing test" between the public and private interests at stake: the government's appeal maintained that withholding was justified since no information in the requested records would be of sufficient public interest to justify release, while the respondents to the appeal countered with the contention that release of the rap sheets would benefit the community as a whole by exposing serious crime and corruption. The eventual ruling held unanimously for the government, in effect restoring the original decision in favor of withholding. Significantly, though, the Court surprised both the appellants and the respondents in the course of reaching this verdict by refusing to apply the balancing test as the basis for its decision. "Our previous decisions," wrote Justice John Paul Stevens, "establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information was made. ...

Whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act.'"[9]

In accordance with this part of the ruling, the Court now faced the question of how to define the basic, or central, purpose of the FOIA. To do so, they relied on the 1976 *Rose* case, in which a group of law students had requested a set of records from the Air Force Academy related to internal discipline practices of the institution. The decision in *Rose*, written by William Brennan, had cited Douglas' quotation of Henry Steele Commager to the effect that the law "focuses on the citizens' right to be informed about 'what their government is up to.'" In addition, it introduced the "light of public scrutiny" metaphor for the first time. Thirteen years later, the Court reiterated ideas from both *Rose* and *Mink*, and rephrased them only slightly: "Th[e] basic policy of [the FOIA] focuses on the citizens' right to be informed about 'what their government is up to.' ... The FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." Accordingly, the Court determined that since Schakne was not seeking information that would inform on government activities, the district court ruling in favor of the government must be restored.[10]

To recapitulate, the central purposes doctrine represents a formal expression of a long-established view supported by a consistent majority on the Supreme Court since the early-1970s. Granted, only in 1989 was it entrenched by means of a more-or-less fully explicit articulation, and by attribution of a formal name. Regardless, though, a series of Supreme Court decisions prior to that issued in *Reporters Committee* had clearly set forth a uniform body of case law in support of the interpretation holding that the act was created to allow citizens to monitor "what their government is up to."

In sum, then, the central purposes doctrine is constituted by two basic aspects. First, at the operational level it establishes that, on a certain basis, discrimination between requestors is allowed by the act: those who submit FOIA requests for records containing information on government activities may be privileged above those seeking information on private citizens, corporations, or other topics. Or, to phrase the same point in a different manner, this interpretation determines that the law deems certain kinds of records, those pertaining to activities of public officials, to be that body of material Congress had primarily in mind when setting out to create access rights for citizens. Second, on the theoretical level, the doctrine establishes that the legislative intent was to create a way in which citizens could independently monitor the activities of those elected to or employed by the federal government. This last observation is especially significant because it demonstrates how the central purposes doctrine shares an emphasis on oversight of government with interpretations put forward by certain other constituencies. Where the Court's view differs from other oversight views, however, is precisely in that it promotes independent oversight by citizens as distinct from congressional, journalistic, or historical oversight on their behalf. Accordingly, the doctrine can be seen as representing a citizen-oversight view of the Freedom of Information Act not entirely dissimilar to the interpretation offered by Harold Cross, Wallace Parks, and Thomas Hennings in the 1950s.

### 4.2 Setting the Stage I: Defining "Accountability"

According to Jane Parkinson, "there is a difference between the concept of accountability and the various uses of the term ... [A]ccountability is used in a number of academic disciplines with regard to a variety of concerns about relationships, authority and responsibility. ... As a result, the concept is associated with ambiguity and confusion." To judge, at least, from popular usage by

public figures and representatives of the media, it seems that these comments are if anything too generous. To provide but one example, a proponent of education reform in the United States recently argued that

> in [certain] districts [in Michigan] parents would receive a voucher called an opportunity scholarship—worth $3,100 per year—to be used to send their children to the private or parochial school of their choice. The program would also require teacher testing in public schools and in independent schools that accept tuition coupons. This kind of *accountability* would raise school standards. Good teaching would be recognized and rewarded. And bad schools would have to get their act together or face the consequences. [11]

The author of this commentary seems to believe that accountability is a mechanism for improving performance of institutions, particularly schools. He suggested that accountability is implemented, or enforced, through testing employees. He also claimed that accountability rewards high performance, or "good teaching," and punishes ineffective institutions, or "bad schools." As will be seen, this author, Steve Forbes, has missed the mark on all points. Accountability in itself is not equivalent to an incentive-and-sanction program, and it is certainly not implemented by weeding out employees whose performance is lacking. Since Forbes is not alone in his loose usage, it is worthwhile establishing in specific terms the definition and meaning of accountability. While the literature on the topic tends to be contradictory where it exists at all, fortunately Parkinson's work in the area is extensive and authoritative.

Formally speaking, accountability means "'to answer for one's responsibilities, to report, to explain, to give reasons, to respond, to assume obligations, to render a reckoning.'" The term has descended to us from the French verb *conter*, which means "to count as well as to tell," and it must not be confused with other concepts that may appear to resemble it. First, accountability is not synonymous with amenability, a person's state of being subject to the authority of a legal jurisdiction. It is distinct from liability, or the duty "'to restore, to compensate, to recompense'" for acts that have in some way harmed individuals or society as a whole. Accountability is also

distinct from responsibility, which refers to the individual's capacity to act in order to produce consequences, tasks an individual is bound to undertake, or "the need to take care in one's actions." Granted, in certain usages the concept of responsibility is very closely linked to that of accountability: an individual may be held accountable and responsible for the same actions as in, for instance, a case where an employee is required to explain inadequate conduct, and then disciplined for having engaged in it. Conceptually, however, these remain distinct despite the common tendency to conflate them as Forbes does. "Accountability" refers to the right of one party "to know what has been done" and the reciprocal obligation of the accountable party to explain; "responsibility" concerns the entitlement of the former "to judge the action," and the requirement that the latter not only explain but also submit to such judgement.[12]

In the second place, Parkinson quite correctly points out that "the definition of [accountability] is not sufficient to explain the concept because ... it does not say why such an obligation [to render account] should exist." Addressing this matter, she concludes that any situation in which a party is obliged to render account involves the delegation of power. A delegator, or principal, is a person or body with the authority to accomplish an activity or function, but which, for one reason or another, has an interest in causing the activity or function to be executed by another. Examples could include subcontracting of services by one private enterprise firm to another, a municipal government convening a special panel to report on the state of its services to residents, or the board of directors of a charitable organization appointing one of its members to a position of administrative directorship. In each of these cases, the fact of delegation confers certain rights and responsibilities on the respective parties:

> The delegated person is a substitute, charged with tasks, ... who must not act according to his or her personal preference but under some form of discipline. ... A person who has delegated authority to an agent has the right, and usually the interest, to know what has been done with it and to judge the action, because the delegator has caused it and its effects. Only in the delegation relationship is there a bond of accountability, where the authority of the principal creates the

> obligation of the agent to act according to standards, and the entitlement of the principal to judge the action.[13]

Thus, the contractor possesses authority to demand that the subcontractor render account of its performance. The city council and mayor may require their investigative panel to explain why a certain methodology was selected. The board of the charity has a right to require regular or *ad hoc* reporting from the administrator. In all cases, there is a trade-off involved: the delegate acquires discretion to act, while consenting to account to the delegator for decisions made in the course of doing so.

Pursuing the matter one step further, Parkinson suggests that accountability falls into three categories. Administrative accountability, first, is that owed by junior employees within an organization to their superiors in return for delegated powers. Second, public accountability is the obligation of elected leaders to explain their actions to citizens. Finally, historical accountability is an idea supported by many, the notion that present societies have "a need to provide and receive explanation and understanding from one generation to another." Parkinson is quite rightly skeptical of this idea, though, remarking that there is no delegated power involved: "the concept of historical accountability is tied to the idea of a relationship between future and past, which cannot be a relationship of control."[14]

With Parkinson's definitions in mind, it becomes evident that the United States government is an institution pervaded with accountability mechanisms—those providing for administrative and public accountability in particular. Administrative accountability, first, involves the duties and obligations of superior and subordinate persons or bodies within organizations. In certain instances, this will involve straightforward lines of authority, such as the hierarchical chain of command by which an office or officer reports to the body or person directly superior to it, who in turn reports to the next, and so on. For example, an employee in a district office of the U.S Workers' Compensation Programs will report to a Regional Director, who

reports to the head of the Employment Standards Administration. This official, in turn, is accountable to an Assistant Secretary of Labor in the Office of the Secretary of Labor, who is accountable to the Secretary.[15]

In other cases, administrative accountability can involve relationships defined in more ambiguous terms. The case of a contractor and subcontractor, for example, does not involve a permanent hierarchical relationship, but instead a temporary one created by mutual agreement. More to the point, there are also delegative relationships of unconventional character within the United States government, as with cabinet secretaries, who are accountable to two principals. Within the executive branch, each department head has formal accountability obligations to the president, this due to the fact that it is presidents who, by appointing cabinet secretaries, officially delegate their authority and discretion to act. In addition, though, secretaries must also report to the legislature because of the fact that departments are created by statutory authorization of the legislature, not to mention the fact that the Senate participates in executive appointments by its constitutional role in confirming the president's nominees. In both cases delegation is involved: the Congress as a whole is the principal to each department, and consequently has a right to demand account from its senior officer; and the Senate is in fact the president's co-principal in appointing the department head, meaning that the secretary is accountable to both parties.[16]

Second, public accountability involves the necessary obligation of public officials to render account to constituents, an obligation that suggests by corollary that public accountability is a requisite feature of democratic governments. In the United States, this principle is implemented through a set of largely informal accountability mechanisms that are given teeth by a set of formal responsibility mechanisms. First, public officials are pressured to render account by the press, which is free to investigate their activities without interference from government. Additionally, pressure is applied by the convention according to which politicians are expected to

return home to their districts regularly during their term to interact with constituents. Vis-à-vis the president, furthermore, checks and balances of the Constitution provide the legislature a right to impeach the chief executive by indicting him and bringing him to public trial. In none of these cases is the congressional representative or president formally obligated to render account. Press demands may be ignored without legal sanctions, as may the tradition of accountability to constituents. The president in face of impeachment, moreover, is free to invoke executive privilege and refuse to testify at his trial.

Nevertheless, these mechanisms in fact have considerable force in that failure to comply will put a politician at serious risk. Lawmakers and presidents refusing to speak with the press, or refusing to address those they were elected to serve, court disaster because the public will tend to adjudge them as guilty of some form of wrong-doing—either neglect of duties, corruption, cover-up, or, if nothing else, aloofness. As a result they will face sizeable barriers the next time the most formal responsibility mechanism, the electoral process, becomes available to voters. As for presidents invoking executive privilege as a response to impeachment, this tactic may or may not prevail over the will of Congress, not to mention the authority of the Supreme Court to direct the president to testify. If no testimony is forthcoming, though, the Senate has power to ratify the impeachment approved by the House, and hold the chief executive responsible by removing him from office.

To conclude, it is possible to understand accountability in terms of basic precepts of democratic theory. The idea and the practical application of democracy is based on the principle of social contract governance: the theory holding that the legitimacy of the state derives from the consent of the governed, or, from a social contract wherein the individual sacrifices a portion of his or her liberty in return for a say in the process by which leaders are chosen from the group as a whole. Thus, whether republican or parliamentary in form, democracies by definition regard

sovereign power as resting with the people. Elected leaders and those appointed officials reporting to them, for their part, are not rulers but instead are only distinguished from their fellow citizens because they have been chosen to serve as representatives.

The implication of this is that, if sovereignty rests with the people, the exercise of popular sovereignty is by definition a form of delegation. The principal in this instance is the citizenry; voters select their representatives in the executive and legislative branches in the act of voting, the same act by which they periodically renew their assent to the social contract. Public representatives, alternately, are the delegates. They receive what discretion and authority they hold through the act by which members of the public choose them to serve. Thus, seeing accountability theory in light of democratic theory demonstrates the ultimate implication of Parkinson's arguments on the integral role of public accountability within democracy: since democratic governance necessarily involves delegation, and since delegative relationships always imply accountability, public accountability is one of the defining characteristics of democracies. It is true that the theory may or may not always match the reality, as many purportedly democratic governments lack specific mechanisms that make accountability enforceable. Nevertheless, under such circumstances it would be more accurate to conclude that the government in question has lost a measure of its democratic character than it would to suggest that the rule is invalidated by the exception.

### 4.3 Setting the Stage II: Records and Accountability

In order to further clarify the concept of accountability, it is necessary to investigate the ways in which government records can be used to hold public officials accountable—an inquiry that must

begin by looking at precisely what records are under American law. The authoritative source on this matter is the Federal Records Act (FRA), a statute passed in 1950 as an amendment to the Records Disposal Act, which defines "records" of the U.S. government as

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.[17]

According to the section of the *Code of Federal Regulations* that explicates the FRA, this definition specifies at least six necessary attributes that must be present if "documentary materials" are to be considered records. However, two of these clauses are especially important due to their relevance in establishing the connection between records and accountability within the American legal system. These are, first, the stipulation dictating that documents are only records if they are made or received "in connection with the transaction of public business;" and second, the provision indicating that records are only those documents that are "appropriate for preservation ... as evidence" of government activities.[18]

The "transaction of public business" passage of the FRA performs two major functions. In one respect, it provides a guideline for distinguishing government records from personal documents by, for instance, drawing a clear line between a federal employee's official appointment book and an electronic mail message confirming social appointments with a colleague. In another sense, though, it also refers to the circumstances of records creation by stipulating that documents are only records if they are made or received in the course of the particular acts by which an officer executes his or her official duties. T.R. Schellenberg, the author of the definition contained in the FRA, affirmed that the "transaction" clause performs this

latter function in addition to the former by explaining what he had in mind when composing this passage:

> to be [records], materials must have been created or accumulated to accomplish some purpose. In a government agency, this purpose is the accomplishment of its official business. ... How documents came into being is therefore important. If they were produced in the course of purposive and organized activity, if they were created in the process of accomplishing some definite administrative, legal, business, or other social end, then they are [potentially records.][19]

This basic concept of the close, necessary, and intrinsic link between record and act comes into sharper focus when examined in a historical setting. First, why is it that societies began to keep records? Ernst Posner, a scholar of recordkeeping in ancient times, has explained that records in classical Greece were first kept when literacy transformed the role of the "*mnemon* or 'memory man,'" who originally "functioned as an exclusively mental recorder of business affairs transacted in his presence. [However,] when the use of writing became more common, the *mnemon* began to record transactions" in writing, thus initiating the practice of keeping written records of the state. Note that the *mnemon* was not charged with the responsibility of recording information in a general sense, but rather with witnessing actions, or "business affairs transacted in his presence." Similarly, with the spread of literacy beyond the clergy in Medieval England, the role of the "remembrancer" became more akin to that of a modern administrator than to one of a storyteller. William de Brasoe described this development in the mid-twelfth century: "Since memory is frail ... it is necessary that things which are said or done be reinforced by the evidence of letters, so that neither length of time nor the ingenuity of posterity can obscure the notice of past events." Again, the matter at issue was not recollection of facts, data, or information, but "things which are said or done" and "past events."[20]

As literacy spread further and societies became more reliant on records, the forms and purposes of written documentation of acts proliferated. Thus, Medieval charters became distinguishable from writs, letters, deeds, wills, and so forth. Many of these record forms are, of

course, still familiar to us today. Yet, what is not commonly recognized is how documentary forms, and in particular the language we use to refer to documentary forms, derived directly from the acts in the course of which they were created. One example is a will, which was originally a term to refer to the oral expression of a property owner's intentions and wishes for disposition of his effects after death. The testator's desire—his will—was considered valid and binding due to his pronouncement of it in front of witnesses, and not until the thirteenth century did the legal authority of the document recording the act eclipse that of the oral expression, or the act itself. Similarly, a deed was not at first a document proving an owner's title to land, but instead a manner of referring to the act—the deed—of transferring title, which was executed by oral act and the transfer of a symbolic object such as a sample of turf from the territory being exchanged. In both these cases, we still refer to documentary forms by using terms that are plainly derived from the name of the act documented by the record. Indeed, both "will" and "deed" are still used to describe acts, as in "to will" an estate to a relative, or to perform a "deed." Finally, there are also other kinds of records that also have indication of the acts they represent in their names: "purchase orders" issued to procure supplies, a "summons" to appear in court, an "act" of the legislature, or the "registration" for an automobile.[21]

All of which is to say that the FRA acknowledgement of the link between a record and the act that gave rise to it is substantiated by historical factors revealed in an examination of the context in which recordkeeping developed alongside the development of literacy.

The second of the FRA clauses at issue is the one stipulating that in order to be records, documents must be "preserved or appropriate for preservation by [the creating] agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government." This passage, like the one pertaining to transaction of public business, can be read in different contexts. In one sense it sets an appraisal

criterion, establishing that records may be deemed appropriate for preservation on the basis that they contain evidence worthy of retention. At the same time, though, the clause also establishes a criterion for distinguishing records from other documents by dictating that in order to be records, documents must possess an evidential quality. It is this second element that is most important, and, again, there are external sources to corroborate that this is what the FRA means.

For one matter, many archivists concur that records, by their nature, constitute evidence of the acts which brought them into being. To paraphrase Luciana Duranti, although only slightly, records "are by-products of activities taking place within juridical systems, [and] because they arise from actions, they are always evidence" of the acts in the course of which they were created. More to the point, though, it seems that senior archivists at NARA have endorsed the evidential view of records by writing it into their official institutional policy. This is revealed by the fact that the institution's current Vision Statement employs the two terms as synonyms:

> The National Archives is ... a public trust on which our democracy depends. It enables people to inspect for themselves the record of what government has done [and] ensures continuing access to essential *evidence* that documents: the rights of American citizens; the actions of federal officials; the national experience.
>
> To be effective, we at NARA must ... determine what *evidence* is essential for such documentation; ensure that government creates such *evidence*; [and] make it easy for users to access that *evidence* regardless of where it is, where they are, for as long as needed.[22]

In the second place, further affirmation that the records-evidence equation is widely accepted is found in legal sources beyond the FRA—in particular, American evidence law. Generally speaking, documents as a generic category are inadmissible in court under rules of evidence because the testimony they provide is a form of hearsay and, therefore, inherently unreliable. The philosophical basis for this rule derives from the principle that testimony brought against a party to a legal action will be prejudicial if the party is not able to conduct cross-examination, and from this it follows that documents must be barred from admission due to the

fact that they constitute testimonial assertions that have not been given under oath and that cannot be cross-examined. However, an exception to this rule is allowed when the "circumstances in which the [document] was made make its probable trustworthiness practically comparable to that of statements tested by cross-examination." In accordance with this, the *United States Code* and the U.S. *Federal Rules of Evidence* stipulate that because records are "representation[s]" of "acts, events, conditions, opinions, or diagnoses," they constitute admissible evidence. [23]

At this point, having established the relevant ideas contained in the FRA, the analysis can now turn to the question that is really at issue: how it is that records enable the American people to hold their government accountable? At the outset, it is necessary to see that there are several mechanisms for pursuing accountability in the United States. Most prominent, perhaps, are those in which public officials are directly questioned by, for instance, journalists in press conferences, citizens in town-hall meetings, or constituents who write letters to congressional representatives. In considering these scenarios, it appears that keeping government accountable involves asking public officials to produce an account of their activities—that is, requesting that they voluntarily step forward and provide explanation. This kind of responsive accountability is largely what Parkinson had in mind when she defined the concept as "answer[ing] for one's responsibilities, ... giv[ing] reasons, [and] render[ing] a reckoning." The very language she used implies that the accountable party has been asked a question or invited to articulate a narrative of whatever events might be at issue.[24]

While this responsive accountability is certainly an important means of keeping tabs on the government, it would nevertheless be mistaken to think that there are not other means by which to pursue the same goal as well. These include, among others, a somewhat less direct method by which citizens neither question delegates, nor invite them to participate in the accountability-enforcement process at all. Instead, this involves inspecting evidence of activities

contained in records. To illustrate the differences between these approaches, consider a citizen interested in holding President Reagan accountable for the role he may or may not have played in the Contragate scandal: the illegal arrangements made by senior White House staff to obtain the liberation of several American hostages by supplying the Iranian government with weapons. In 1986 and 1987, after the story first broke, Reagan's public accounting for his role consisted of denial. At various times he claimed either that he had not been informed, or that he could not recall whether he had been informed, of the activities of his subordinates. Without question, this is an anemic account of his actions, one lacking in both candid explanation and any expression of remorse. Yet, despite its character in these respects, it represents Reagan's version of his role. This was the voluntary, responsive account he produced when pressured to explain his acts by the press and public.[25]

Several years later, however, Special Prosecutor Lawrence Walsh discovered entries in Reagan's diary indicating quite conclusively that he had been informed of what his officials were doing at the time they were violating the law. In one of these, the president described a national security briefing on the topic of "our undercover effort to free our five hostages," and added that "it is a complex undertaking with only a few in on it. I won't even write it up in this diary what we are up to." The upshot of this is that Walsh located contemporaneous evidence of acts on Reagan's part for which he can be held accountable—evidence that he approved or condoned an illegal operation. Given this, and given the evasive character of his public accounting, the conclusion here is that enforcing accountability through inspecting records can not only supplement responsive accountability, but, additionally, that it is potentially a much more effective method as well. There is a disadvantage to records-based accountability in that members of the public will often want to know why public officials did what they did, and often the evidence in records will only confirm whether they did or did not commit certain acts. This is the

case in the Contragate example, where the diary entries confirm Reagan's involvement but do not explain his rationale. On the other hand, the unique value of using records in pursuit of accountability lies in the fact that such a method helps citizens to assess whether or not a responsive account, like Reagan's, was truthful, while also allowing them to obtain account if their delegates in public service not willing to provide a voluntary reckoning at all.[26]

Holding public officials to account by inspecting records, then, is a different animal than requesting that they produce an account: the latter method may appear more harmonious with the notion of "rendering an accounting," because it requires responsiveness, but the former allows citizens to obtain evidence of the acts in question. The distinction is somewhat akin to that between voluntary testimony in a legal action, and evidence gathered by investigators: the defendant's right to make a statement of guilt or innocence is crucial to fairness in administration of justice, but checking for his or her fingerprints on the murder weapon is also required nevertheless. Furthermore, just as testimony and evidence are both necessary in the courtroom, the opportunity to question public officials and the right of access to records are both needed for enforcing accountability. Having said that, though, it is also important to bear in mind that when testimony, or a voluntary accounting, is evasive, unclear, or in doubt for some reason, evidence is what is required in order to corroborate or refute it. In the setting of public administration and government, given its bureaucratic nature, this means that full accountability requires access to records.

### 4.4 The Accountability View and the Central Purposes Doctrine

As suggested by its name, the basic tenet of the accountability view of the Freedom of Information Act holds that the statute intrinsically functions to provide accountability due to the

fact that it grants access to records—to evidence of the activities for which government officials are to be held accountable. To a large extent, this is based on a reading of the act rooted in archival science. Terry Eastwood explains how accountability theory can be seen in direct relation to archival theory, emphasizing evidentiality and the connection between records and acts as he does so:

> The roots of archival theory may be traced to certain ancient legal and administrative principles. In order to conduct affairs, and in the course of conducting affairs, certain documents are created to capture the facts of the matter [or] action for future reference, to extend the memory of deeds and actions of all kinds, to make it enduring. Inherent in this conception of the document's capacity to extend memory, to bear evidence of acts forward in time, is a supposition about the document's relation to the fact and event or act. The matter at hand, the thing being done, produces the document, which then stands as a vehicle or device to access the fact and act. ... Each fund of archival documents then stands as residue and evidence of the transaction of affairs, and provides the means to account for them. This potential for accountability is the intrinsic value of [records], a value bound up in their nature.[27]

Elsewhere, furthermore, Eastwood brings access statutes into the argument by contending that "preservation of public records [in archives] has become one of the chief means by which citizens can learn how they are governed. Freedom of information legislation simply extends and codifies citizens' rights to this knowledge."[28]

Second, beyond archival theory, the accountability conception can also be understood in connection with the history of the FOIA. It has already been established that, aside from members of the APA lobby and the free-flow orthodoxy, the majority of FOIA commentators throughout the years have believed that the purpose of an access law is to serve the goal of government oversight. This equation between access and oversight is intrinsic to the views adopted by those, like John Moss, who opposed executive privilege; by the journalists fighting against restrictions on freedom of the press; by academics, insofar as this group is dominated by historians; and by those who supported the first free-flow-of-information theory. At this point, then, it should not be difficult to recognize that accountability and oversight are in effect the same thing. In fact, the

accountability view is a close variant of the citizen-oversight view that Harold Cross, Wallace Parks, and Thomas Hennings first articulated in the 1950s. Cross himself made this clear when he advocated an access act by claiming, almost in so many words, that accountability is required if the government is to be held responsible:

> in a government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, everything that is done in a public way by their functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability.[29]

Finally, and more to the point, it follows from there that there is a direct link between the accountability interpretation and the central purposes doctrine. Granted, Justice Stevens' pivotal 1989 decision did not contain any explicit statement that the FOIA has an accountability function. Nevertheless, the suggestion that the accountability-central purposes doctrine relationship is a close one may be demonstrated with reference to several passages of the *Reporters Committee* ruling. In particular, Stevens' emphasis on the ability and need of citizens to monitor "what their government is up to" could be read as demonstrating an intuitive grasp of many of the topics and issues discussed here, and, more specifically, his insistence that the law was passed to help "shed light" on "an agency's performance of its statutory duties" reveals an appreciation of the fact that the FOIA is concerned not merely with access to information, but just as much so with access to evidence of activities. Furthermore, his explication of the doctrine consisted of more than a few random references to principles that resemble those discussed by Parkinson, Eastwood, and others. In fact, his comprehensive explanation of the ruling evoked several notions similar to those entailed in accountability theory:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in which one

> private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official. ... We think it relevant to today's inquiry regarding the public interest in release of rap sheets on private citizens that Congress [has] expressed the core purpose of the FOIA as "contribut[ing] significantly to public understanding of the operations or activities of the government."[30]

Bearing in mind the similarities between the Court's interpretation and the accountability view, the orthodox claim that the doctrine is unwarranted, illegitimate, or implausible can be rebutted on the grounds that the doctrine, like the majority of the interpretations that preceded it, emphasizes oversight of government. Of particular importance is the fact that the Court's citizen-oversight reading so closely resembles that which is contained in Parks' and Hennings' works, and in Cross' "freedom of information bible." This pedigree is significant because it suggests that the central purposes doctrine may have evolved directly from the same source as did the modern free-flow theory. Thus, the accountability view appears at least as plausible as the modern free-flow view since, if there was any group that engaged in significant "revisionism" of the theories that were at one time universally accepted, it is not those who continued to uphold government oversight as the basic purpose of the act, but instead those who abandoned it in favor of the idea of disclosure as an end in itself.

To claim that Justice Stevens' ruling is legitimate and plausible does not necessarily mean that an interpretation based on the central purposes doctrine is superior to one deriving from the free-flow-of-information view. Nevertheless, the purpose of this discussion so far has been limited to establishing that the doctrine is not so entirely far fetched, nor so easily dismissed, as advocates of the orthodoxy would have it. For the moment, then, suffice it to say that there is very good reason for taking the doctrine seriously, and regarding it as a legitimate alternative. The following chapter, by contrast, will consider whether one of these interpretations can be said to contain the more accurate reading of the act. Yet, due to inherent difficulties in making such a

determination, the analysis will eventually need to rely on alternative grounds for comparison. Ultimately, that is, while identifying the "correct" interpretation is an elusive task, it will be possible to see which view represents the more viable conception of access rights in the United States.

## Endnotes

[1] Martin E. Halstuk, "Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases," *Computer & High Technology Law Journal* 15 (January 1999): 103-4.

[2] S. Elizabeth Wilborn, "Developments under the Freedom of Information Act—1989," *Duke Law Journal* (November 1990): 1125.

[3] Terry Eastwood, "Should Creating Agencies Keep Electronic Records Indefinitely?" *Archives and Manuscripts* 24 (November 1996): 260, 264.

[4] *EPA v Mink* 410 US 80 (1973).

[5] *Bristol-Myers Co. v FTC* 424 F2d 938 (DC Cir 1970); *Hawkes v IRS* 467 F2d 791 (6th Cir 1972); *Soucie v David* 448 F2d 1077 (DC Cir 1971).

[6] *Renegotiation Board v Bannercraft Clothing Co.* 415 US 1 (1974); *Department of the Air Force v Rose*, 425 US 361 (1976); *NLRB v Robbins Tire and Rubber Co.* 437 US 242 (1978).

[7] *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 757-62 (1989); *Reporters Committee for Freedom of the Press et al. v U.S. Department of Justice et al.* 831 F 2d 1124 (1987).

[8] *Freedom of Information Act,* 5 USC § 552 (1996); *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 757-62 (1989); *Reporters Committee for Freedom of the Press et al. v U.S. Department of Justice et al.* 831 F 2d 1124 (1987); *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 259 U S App DC 426, 816 F 2d 730 (1987), and 265 US App DC 365 (1987).

[9] *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 763, 771-2 (1989); U.S. Department of Justice et al. *v* Reporters Committee for Freedom of the Press et al., Reply Brief for the Petitioners, September 2, 1988; U.S. Department of Justice et al. *v* Reporters Committee for Freedom of the Press et al., Respondents' Brief in Opposition, March 17 1988. The decision was in fact *nearly* unanimous. Justices Harry Blackmun and William Brennan issued a separate opinion that disagreed with the third and final part of the verdict. This aspect, not discussed here, featured the Court's ruling that rap sheets, as a category of records, are protected under (7)(c)—thereby extending the *Reporters Committee* decision to all cases featuring similar requested records. Blackmun and Brennan agreed with the rest of Stevens' opinion, however, meaning that all nine Justices supported both the government's right to withhold Medico's rap sheets, and the central purposes doctrine.

[10] *Department of Air Force v Rose* 425 US 352, quoted in *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 773, 771-5 (1989).

[11] Jane Parkinson, "Accountability in Archival Science" (Master of Archival Studies Thesis, University of British Columbia, 1993), 6-8; Steve Forbes, "Fact and Comment," *Forbes* (1 November 1999): 39. Livia Iacovino quite rightly points out that popular understandings of accountability tend to be "reductionist notion[s]" which conceive it as "essentially a management tool rather than an aid to [governments] or [a tool for] external scrutiny. ... Institutional accountability thus takes on the face of morally and legally acceptable organizational behavior coupled with financial aptitude." See Livia Iacovino, "Accountability for the Disposal of Commonwealth Records and the Preservation of its Archival Resources: Part I, The Context," in *Archival Documents: Providing Accountability through Recordkeeping*, ed. Sue McKemmish and Frank Upward (Melbourne: Ancora Press, 1993), 56.

[12] Parkinson, "Accountability in Archival Science," 14-5.

[13] Parkinson, "Accountability in Archival Science," 12, 14-5.

[14] Parkinson, "Accountability in Archival Science," 84, 83. For further commentary on the kinds of accountability, see Terence M. Eastwood, "Reflections on the Development of Archives in Canada and Australia," in *Archival Documents* ed. McKemmish and Upward, 37; Iacovino, "Accountability for the Disposal of Commonwealth Records," in *Archival Documents* ed. McKemmish and Upward, 56-7.

[15] See United States, Department of Labor, "Organizational Chart," <http://www.dol.gov/dol/aboutdol/orgchart.htm> and United States, Department of Labor, Employment

Standards Administration, "Organization Chart,"
<http://www.dol.gov/dol/esa/public/aboutesa/org/esachart.htm>

[16] Accountability of cabinet members to the president is explicitly mandated in Article II, Section 2 of the Constitution: "he [the president] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." Accountability of department heads to Congress mainly derives from the fact that any agencies not established in the Constitution must be created by legislation. In addition, the clause requiring ratification of cabinet appointments by the Senate further implies accountability to Congress, as does the clause making department secretaries responsible to the legislature through the impeachment process. These provisions are found in Sections 2 and 4 of Article II.

[17] *Federal Records Act*, 44 USC § 330.

[18] 36 CFR § 1222.2.

[19] T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: The University of Chicago Press, 1956), 13.

[20] Ernst Posner, *Archives in the Ancient World* (Cambridge: Harvard University Press, 1972), 94; M.T. Clanchy, *From Memory to Written Record: England, 1066-1307* (Cambridge: Harvard University Press, 1979), 117.

[21] Clanchy, *From Memory to Written Record*, 36-7, 61-71, 203; see also Hugh Taylor, "'My Very Act and Deed': Some Reflections on the Role of Textual Records in the Conduct of Affairs," in *Canadian Archival Studies and the Rediscovery of Provenance*, ed. Tom Nesmith (Metuchen, NJ: Society of American Archivists and Association of Canadian Archivists in association with The Scarecrow Press, Inc., 1993), 253-4.

[22] Luciana Duranti, "So? What Else is New? The Ideology of Appraisal Yesterday and Today," in *Archival Appraisal: Theory and Practice*, ed. Christopher Hives (Vancouver: Archives Association of British Columbia, 1990): 3; United States, National Archives and Records Administration, "Strategic Directions for the National Archives and Records Administration: Vision, Mission, and Values," <http://www.nara.gov/nara/vision/vision.html> October 16, 1997.

[23] Heather MacNeil, *Trusting Records: Legal, Historical and Diplomatic Perspectives* (Dordrecht and London: Kluwer Academic, 2000), 38; *Record Made in Regular Course of Business: Photographic Copies*, 28 USC § 1732; Fed R Ev 803(6).

[24] Parkinson, "Accountability in Archival Science," 14.

[25] Robert Parry, "Reagan: 'Like I Wasn't President at All,'" *Online Journal: Politics and More*
<http://victorian.fortunecity.com/brambles/499/Special_Reports/Reagan/reagan.html>

[26] Reagan quoted in Parry, "Wasn't President at All."

[27] Terry Eastwood, "What is Archival Theory and Why is it Important?" *Archivaria* 37 (Spring 1994): 125-6. See also Luciana Duranti, "Archives as a Place," *Archives and Manuscripts* 24 (November 1996): 251; Howard P. Lowell, "Thoughts on a State Records Program," *The American Archivist* 50 (Summer 1987): 397-9; Susan McClure, "Government Archivists' Perceptions About their Responsibilities to Citizens and Government: 'Simply a Matter of Serving Those Around Us?'" (Master of Archival Studies Thesis, University of British Columbia, 1996), 9; Roy Turnbaugh, "Documentation Strategy and Government Records," in *Archival Appraisal: Theory and Practice*, ed. Christopher Hives, 207-8; Roy Turnbaugh, "Plowing the Sea: Appraising Public Records in an Ahistorical Culture," *The American Archivist* 53 (Fall 1990): 365.

[28] Eastwood, "Should Creating Agencies," 260.

[29] Harold Cross, quoting Benjamin Potts, in *The People's Right to Know: Legal Access to Public Records and Proceedings* (Morningside Heights, NY: Columbia University Press, 1953), 130.

[30] *U.S. Department of Justice et al. v Reporters Committee for Freedom of the Press et al.* 489 US 749, 757-62 (1989).

# Chapter 5

# The Orthodoxy vs. the Accountability View

## 5.1 Accountability, Free Flow of Information, and the Statutory Purpose of the FOIA

Since the central purposes doctrine and the free-flow conception offer mutually exclusive viewpoints, the logical conclusion to this research entails a comparative evaluation directed toward assessing which interpretation represents the statutory purpose more fully and accurately. As it turns out, however, advocates on both sides would have difficulty sustaining their view under full scrutiny due to the simple fact that nowhere on the face of the law, nor in its legislative history, is a singular, unitary statutory purpose expressed. Consequently, neither interpretation can be said to truly and fully reflect the purpose for which members of Congress passed the FOIA.

In 1967, shortly after the act was passed, Charles Bennett wrote that "when it comes to the Freedom of Information Act, one thing is clear—the Freedom of Information Act is not clear." While this may be somewhat of a generalization, it is certainly apt if read with respect to the absence of any declaration within the statute itself of what its intended purpose is. Within the American legal system, laws are frequently drafted with some sort of a preamble or "Purpose" clause indicating the general philosophy or motivating impulse behind its passage. For instance, the introductory passage to the state access law in Delaware establishes that "it is vital in a democratic society that ... our citizens shall have the opportunity to observe the performance of public officials; and further, it is vital that citizens have easy access to public records in order that the society remains free and democratic. Toward these ends, [the access law] is adopted, and shall be construed."[1]

In this case the preamble to the law makes clear what its purpose is. Unfortunately, though, the federal Freedom of Information Act contains no similar statement—a fact that leads naturally to the subsequent question of whether there is some indication of statutory purpose in the substantive text of the act. In this regard, it must be said that there is indeed one passage that might be construed as supporting the orthodoxy. This argument would rely on the central clause of the FOIA, which establishes that access rights accrue to "any person" who wishes to submit a request. On one level this determines that there may be no discrimination among requestors: foreign nationals possess the same rights as American citizens; public interest groups or members of Congress may not be privileged over convicted felons; the most serious scholars have no claim to speedier or broader access than JFK assassination buffs and conspiracy hawks. The playing field is completely level, and agency officials and courts have clear direction to give equal treatment to all. Then, in addition to this, one might also make the case that the any-person rule has a further implication: since all requestors must be treated equally by agencies and the courts, at no stage in the administrative process, nor during litigation, should the requestor's reasons be relevant. Thus, if there is any appropriate doctrine for interpreting the FOIA, perhaps it is what we might call an "any-purpose doctrine," derived from the any-person rule. The conclusion of this argument would be that since a clause in the act itself bars discrimination on the basis of user purposes, the free-flow interpretation represents the statutory purpose more accurately than does the central purposes doctrine.

As conclusive in support of the free-flow view as this argument might sound, its status is actually in doubt because, although the any-person rule has been universally recognized by the judiciary, courts do not currently recognize that it can be broadly interpreted in the form of an any-purpose doctrine. In fact, the argument has been brought before the courts, and, eventually, rejected. In its first appearance, it seems, the D.C. circuit court endorsed such logic, ruling in

*Soucie v. David* that "by directing disclosure to any person, the act precludes consideration of the interests of the party seeking relief." But this 1971 ruling never became widely accepted. The *Mink* case was settled only a few years later, and, in the years that followed this, the Supreme Court endorsed an accountability view on several instances, in the process implicitly overruling the *Soucie* any-purpose interpretation.[2]

At this point, the analysis reaches its first major impasse, and because there is no conclusive indication of statutory purpose on the face of the act, it is necessary to seek insight from other sources. To do so, the discussion turns to the legislative history of the FOIA: the official congressional reports issued by the House and Senate to accompany the original law and the early amendments to it. Ideally, these sources might have potential to resolve the issue, particularly since the basic reason why Congress is required to draft legislative histories is to place on record those details that may not be included in statutes—such as purpose and intent—in order that the courts will have supplementary materials to support their efforts at interpretation.

Free-flow theorists contend that the legislative history of the FOIA endorses their view without qualification. According to several authors, the definitive statement of congressional intent is found in Senate Report 813, which accompanied the bill that was subsequently approved by the House and the president: "It is the purpose of the present bill to ... establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[3] Alternately, some writers feel that House Report 1497, the counterpart to the Senate report, expressed the idea better in stating that

> S. 1160 would revise the [APA] to provide a true Federal public records statute by requiring the availability, to any member of the public, of all the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions. ... [S. 1160] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.[4]

Finally, certain students of the Freedom of Information Act concede that the original legislative intent was not clear. Michael Hughes explains how some observers were left confused by the discrepancies between reports 813 and 1497 that resulted when the Moss committee agreed to allow Lyndon Johnson's Justice Department to participate in drafting the House report:

> While the Senate report generally followed the [bill's] language and reflected a view supporting a broad construction of the statute, the House report took a decidedly more restrictive approach. The uncertainty of legislative intent led to confusion in the courts. ... In the 1974 and 1976 amendments, though, Congress intended to resolve the ambiguities in favor of a broad construction of the disclosure provisions. Any indication that the original House report reflected the legislative intent accurately should have been dispelled by these subsequent congressional actions.

The "Purpose" section of the 1974 report Hughes alludes to in this argument states that the bill "would amend the Freedom of Information Act (FOIA) to facilitate freer and more expeditious access to government information."[5]

In sum, adherents to the orthodoxy point out, and with some good reason, that Congress passed the act in order to provide "availability ... of all the executive branch records," "freer and more expeditious access to government information," "a general philosophy of full agency disclosure," or some other such notion. So, if these representations of congressional intent are accurate, the Supreme Court's decision to place a priority on accountability can be seen as an unwarranted narrowing of the scope of the law. Accordingly, it would be difficult to justify going much further in assessing the central purposes doctrine and its claim to represent the purpose of the act.

However, each of the excerpts from the legislative history cited to support the free-flow theory constitutes a one-sided reading of the documents from which they were taken. In fact, each of the passages cited here can be disputed on the basis of the very same texts from which they were drawn. For instance, while the 1974 Report did indeed claim that the statutory purpose is to provide "freer and more expeditious access to government information," it also indicated that the

act was designed to serve "the people's right to learn what their government is doing." The House Report from 1966, similarly, discussed access to "all the executive branch records." But, at the same time it also proposed that the law focuses on "the right of the individual to be able to find out how his Government is operating." Senate Report 813, finally, in addition to the "philosophy of full agency disclosure" passage, also stated that the FOIA "would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by [acknowledging that] the public as a whole has a right to know what its Government is doing." The supporting documentation accompanying the FOIA and its 1974 amendments provides reasonable basis for the accountability view as well as the free-flow interpretation.[6]

In consideration of all this, it is difficult to reach any meaningful conclusion as to whether it is the free-flow view or the accountability view which captures the statutory purpose more completely and precisely. The only sense in which the legislative history is clear is that it provides definite backing for both perspectives: supporting the free-flow interpretation by stating that disclosure should be as broad as possible, and substantiating an accountability thesis by suggesting that access is qualified by whether the requested material will reveal "what the government is doing" or "how the government is operating." Beyond this, the statutory text provides no further backing either way. The any-person rule might provide theoretical support for the orthodoxy; however, courts seem to have ruled that this argument is not sufficiently strong to override the central purposes doctrine. Overall, then, the two conceptions have claims to represent the congressional intent that are equally strong—or, perhaps, equally weak. Having reached a second impasse, the analysis must now not merely seek alternate sources, but in fact must devise a method of comparison that does not rely on proximity of the respective theories to congressional intent.

### 5.2 The Theoretical Foundation of the Accountability and Free-Flow Views

Having dispensed with the statutory purpose analysis, the most prudent manner in which to proceed is by probing the theories that support the two interpretations at issue. That is, since congressional intent cannot be used as a point of comparison, the wise course of action is to inquire if one or the other conception can be identified as more logically coherent on the basis that its theoretical foundation is stronger. Thus, the focus has shifted from identifying the "correct" interpretation, and instead seeks to locate the one that might be referred to as more viable as a result of the fact that the abstract body of thought underlying it is better suited for application in the FOIA context.[7]

Because of the fact that Chapter 4 has already provided a detailed review of the central purposes doctrine, and, by establishing its plausibility, has demonstrated its theoretical basis, the present discussion focuses mainly on the FOIA orthodoxy. This does not mean that the Court's reading is without flaws. Instead, the suggestion is merely that the doctrine has a relatively high degree of logical coherence because accountability theory is appropriate for application in the FOIA context: both the act and the theory are concerned with records, which by their inherent qualities allow those holding delegated authority to provide account of their activities. Since all this has been covered already, there is no need for reiteration here. Instead, what is necessary at this point is to determine whether the free-flow view has a degree of logical coherence significantly stronger or weaker than that of the central purposes doctrine. The way to do this is by assessing whether its theoretical foundation is also germane to the Freedom of Information Act.

Supporters of the orthodox view invoke first-amendment theory as the rationale for the act, and consequently the logical coherence of the free-flow view will be directly proportionate with the extent to which the Constitution can actually be said to support the FOIA. When Wallace

Parks and Thomas Hennings first introduced the constitutional-rights arguments in the late-1950s, they contended that a citizen's right of access could be derived from the First Amendment. As the years passed, later free-flow supporters shifted the focus of this interpretation. In particular, they rejected the oversight notion that Parks and Hennings had embraced. On the other hand, though, these commentators continued adhering to the constitutional view. Kristi Miles, for one, shows her support for both the free-flow orthodoxy and the first-amendment derivation by claiming that "in enacting the Freedom of Information Act (FOIA) Congress intended to make full disclosure of governmental information the norm rather than the exception ... The legislators believed that increasing the availability of governmental information to the general public served democratic values and was vital to the constitutional guarantees of free speech and press." Roshon Magnus, to take a second example, demonstrates a similar belief in both principles:

> in seeking to increase public access to information generated by federal government agencies, Congress passed the Freedom of Information Act (FOIA) in 1966. ... This premise, in turn springs from the principle clothed in constitutional attire, and embodied in the first amendment, that a free press and informed public are the twin pillars of meaningful public debate.[8]

What Miles and Magnus are arguing differs slightly from what Parks and Hennings contended decades earlier. One distinction has already been acknowledged: that the second generation rejected the government-oversight focus of their predecessors. Additionally, given the respective eras in which the various authors wrote, their perspectives are distinct; Parks and Hennings described what they believed the theoretical foundation of access rights should be, while authors writing after the FOIA was passed refer to what their foundation actually is—or, what they believe it to be. Regardless, the substantive elements of the arguments are basically the same. All contend, in effect, that access rights exist, or should exist, because "availability of governmental information [is] vital to the constitutional guarantees of free speech and press." The problem with this description, though, as with most others, is that it merely posits a conclusion,

and fails to explain the rationale behind it. In order to explore that rationale, the first necessary task is to determine the precise character of free speech and press rights in America, and to assess their constraints.

Modern thought on the matter of free speech and press was defined principally by writers of the Enlightenment era. According to the leading figures in this time—people like Locke, Mill, Rousseau, and Voltaire—the citizen's possession of information was vital to a free society. John Milton was one of the first to express this concept in his 1644 *Speech For The Liberty Of Unlicensed Printing*:

> When complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for. ... All opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest. ... Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.[9]

This Enlightenment view is still widely embraced within modern Western societies. There are three ideas to make note of in particular. First, this part of Milton's discussion pertains narrowly to the matter of freedom of conscience and debate. Yet, this aspect of the argument is not fully representative of his beliefs as a whole because, as suggested by the title of the work, his main concern was demonstrating how free conscience and debate cannot be said to exist unless members of the public have access to information through "unlicensed printing." In this sense Milton demonstrates the close link between freedom of thought and speech, on one hand, and freedom of the press on the other. Second, according to this philosophy the existence these liberties performs a concrete social function. A government that allows discussion and criticism of public affairs and policies will be one that governs better in the interests of its citizens because rich public debate on political issues will force leaders to thoroughly examine and assess policy options prior to implementing them. Third, and implicit in all aspects of the theory, is that no society will be a true democracy if it subverts these principles, either denying its citizens the

freedom to exchange opinions by limiting free speech, or limiting their ability to form opinions independently by restricting the press from bringing them information. To an extent this tenet focuses on the liberty to dissent: that is, since popular sovereignty will erode when citizens of a democracy are barred from criticizing their government, free speech and press are requisite features of a free society. However, Milton emphasizes creation of knowledge and "attainment of what is truest" equally with speedy resolution of "complaints" against the government. Thereby, this Enlightenment theory is directed toward free flow of information as an end in itself, not merely toward monitoring "what the government is up to."

Given that the founding fathers were contemporaries of Mill, Locke, and the others who followed Milton, it should not be surprising that the First Amendment is so clearly derived from Enlightenment principles. For one matter, the Constitution establishes freedom of conscience, petition, and assembly within the First Amendment, alongside free speech and press. This suggests that the framers had more than a superficial understanding of the close relationships between the various rights that support the Enlightenment view on the role of information within society. More to the point, it is universally accepted under U.S. constitutional law that although the free speech and press clauses were designed in part to encourage public debate of politics, they cannot be read as pertaining only to information that reveals government activities. This was expressed in the Supreme Court's *Thornhill v. Alabama* ruling, which established that the First Amendment protects the right of citizens to "speak as they think *on matters vital to them.*" What this means, in effect, is that the founding fathers concurred that free flow of information through public debate should be protected for its own sake.[10]

A second fact that should come as no surprise is that case law in the United States has read first-amendment rights broadly. Most important in this connection is that the courts have ruled that the freedom of one individual to speak entails the right of others to hear, and that the

freedom to print the news encompasses the liberty of the citizen to read it. In the case of *Red Lion Broadcasting v. Federal Communications Commission*, pertaining to first-amendment rights of radio broadcasters, Justice White wrote that

> it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged. ... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[11]

The Court made two significant points in this ruling. First, *Red Lion* indicated that the First Amendment exists not only to protect the citizen's right to state their opinions on public affairs, but also to ensure that such rights cannot be constrained by measures which prevent informed communication and dialogue. This, yet again, is an argument based on the notion of meaningfulness: because meaningful debate requires informed opinion, free speech and press must be interpreted as entailing the right to hear. In the second place, *Red Lion* also creates a set of parameters for what is entailed in the right to hear. Predictably, these are wide. The right to hear cannot be restricted to the actual physical act of hearing any more than free speech rights can be read as excluding nonverbal communication. In practice this means that just as freedom of speech is now accepted as entailing freedom of expression in general, the right to hear is commonly acknowledged to include the right to pursue and receive knowledge through, for instance, reading, viewing television and film, and so on.[12]

The orthodox interpretation of the Freedom of Information Act focuses two of the points established here: the judicial tradition of giving a broad construction to the freedom to hear, and the fact that the First Amendment was not designed strictly for government-oversight or accountability purposes. What free-flow advocates believe, in specific terms, can be conveyed with a simple syllogism: the access rights granted by the Freedom of Information Act allow

citizens a way to pursue and receive knowledge; the Supreme Court has mandated that pursuit and reception of knowledge are constitutionally protected under the right to hear, which in turn derives from freedom of speech; therefore, given this close resemblance between the FOIA and the First Amendment, the former must be read as having been designed to serve the same goals as the latter—to create free flow of information in a broad sense, or, to create access rights as an end in themselves, not solely for accountability purposes.[13]

It is, of course, difficult to challenge first-amendment theory and the Enlightenment philosophy upon which it is based because popular sovereignty does indeed begin to erode when democratic governments begin to constrain public debate. Furthermore, since maintaining popular sovereignty and liberty does in fact require that citizens have access to information on all affairs that are "vital to them," not just those administered by public officials, it is reasonable to agree that the First Amendment is a free-flow-of-information instrument. Yet further, it even appears, to an extent, that authors who apply this philosophy to the Freedom of Information Act have justifiable basis for doing so: since requestors consulting records are pursuing and receiving knowledge, it does not appear especially far fetched to conclude that FOIA is a free-flow instrument as well. The trouble with this line of argument, though, is that it is predicated on a faulty equation between two entirely distinct categories of rights.

In its rulings on the right to hear, the Supreme Court has held that the right to receive communication in any form is inherent in the free speech clause. In concrete terms, this means that Americans are free to hear others speak, to read as they please, to choose the forms of video and live performances they wish to view, and so on. By contrast, no passage of Constitution has ever been read as establishing the right of a citizen to compel speech or other communication from another citizen, nor, for that matter, from the government. Even Thomas Hennings admits this, pointing out that there is only one constitutional provision that could potentially be read in

this way: the clause dictating that the president "shall from time to time give to the Congress Information of the State of the Union." As a result of this, it seems that there is at least one major limitation qualifying the first-amendment right to hear: it only grants the right to receive what has been communicated—what has been willingly placed in the public domain by a speaker, writer, performer, or anyone else actively sharing their thoughts and ideas.[14]

The ramifications of this constraint on the right to hear are quite serious as they pertain to the FOIA orthodoxy. To reiterate, the free-flow interpretation contends that the act and the First Amendment closely resemble each other because both are concerned with pursuit and reception of knowledge, or, with the right to hear. Subsequently, the theory builds a conclusion about the fundamental purpose of the statute on the basis of this purportedly close linkage. But a closer examination reveals that the two legal instruments do not concern the same kind of pursuit and reception of knowledge: the Constitution bans measures that would prevent citizens from receiving what has been said or otherwise expressed, while the statute grants a right of access to materials that were not made public, and in fact that were never intended to be made public. Hence, given that the close FOIA-First Amendment connection is based on a mistaken association between two very different kinds of rights, it is difficult not to be skeptical of the orthodox conclusion that is based upon that connection: the conclusion that the FOIA is a free-flow-of-information instrument as a result of the fact that the First Amendment is a free-flow-of-information instrument. Ultimately, in fact, the character of free speech and press rights is irrelevant to an interpretation of the Freedom of Information Act because the close linkage between the two posited in orthodox interpretations is more apparent than real.

### 5.3 Final Evaluation

All in all, a comparative assessment of the central purposes doctrine and the free-flow view yields equivocal results. Supporters of both views, first, can defend their perspective on the basis of the legislative history. Nevertheless, the corollary to this observation is that although both interpretations have equally valid claims to represent the legislative intent, both may be refuted on the basis of the relevant congressional reports as well. Moreover, nothing in the statutory text proves of assistance either. The law lacks an explicit expression of its purpose, and the one passage that could be adduced to settle the question, the clause establishing the any-person rule, has not been read by the courts as pertaining to congressional intent.

Since statutory purpose cannot even be ascertained, let alone used for assessing the orthodoxy and the doctrine, the act itself and its supporting documentation prove to be of little guidance in indicating how we should interpret the law. As an alternative, the analysis must turn to the two opposed philosophies themselves, and inquire if the very candidacy of one view or the other can be challenged for lacking sufficient theoretical and logical basis. On this point, the results are clear. As for the central purposes doctrine, it bears repetition yet one final time that nothing here has established a compelling reason to accept this view as more "correct." However, its viability as a potential interpretation, which derives from the fact that accountability theory is pertinent to the context of the Freedom of Information Act, emerges from scrutiny intact. On the other hand, the same cannot be said of the free-flow-of-information view.

Because orthodox commentators blur the distinction between a right to receive communication and a right to compel it, the arguments they base upon the premise of a close FOIA-First Amendment link must be regarded with suspicion. To be fair, free-flow supporters do invoke a body of theory that stands up to examination in itself. However, they apply this body of thought in a setting for which it is not suited, and, recognizing this, it becomes difficult to accept

the conclusions they offer. To this point, thankfully, the courts have not acknowledged the citizen's right to compel speech from another—neither as an aspect of free speech, nor in any other setting. If they were to do so, though, the ramifications would be very serious indeed because granting this right to the people would potentially imply its application to the government as well. Within this scenario, Washington would acquire an authority to demand information from citizens that would make its current powers in this area appear pale by comparison. A government right to compel communication would jeopardize the fifth-amendment right of an accused criminal to remain silent; the fourth-amendment freedom from unreasonable searches and seizures would be threatened in a similar way; the secret ballot would become obsolete, censorship and prior restraint would become easier to implement, and in general all aspects of personal privacy would be undermined. In other words, such a reading of the Constitution would overturn all first-amendment freedoms by ruling that its centerpiece, freedom of conscience, does not include the liberty to keep one's opinions to oneself. This would represent "thought control" measures of a magnitude never imagined by Thomas Paterson when he used the phrase in protesting the restrictive information policies of the Reagan era.

All of which is to say that there are considerable hazards to implementing an overly broad interpretation of the statute, particularly one based on the Constitution. Free-flow advocates might counter that their intention was to address the matter of citizen rights alone, and that the government's right to procure information from members of society does not necessarily follow from the citizen's right to hear. What they would overlook in doing so is that any identification of implied rights in the Constitution has implications of its own. Certainly, confirmation of a citizen's right to compel government communication would not necessarily result in confirmation of the converse right. Nonetheless, the former would provide substantial backing for a legal argument on behalf of the latter.

Ultimately, though, the point is that a disjuncture between statutory access rights and a constitutional right to hear exists in actuality, that it should be acknowledged, and that true acknowledgement of it will require re-assessing the extent to which we consider the free-flow view to be a justifiable interpretation of the Freedom of Information Act. These propositions are supported by the two related conclusions being drawn here. The first is that, due to the faults of the statutory text and the legislative history, the Freedom of Information Act has no discernible statutory purpose beyond the purpose it serves in creating the citizen's right to request agency records. As a result, it is not possible to determine with any degree of certainty which of the two major conceptions of the FOIA represents the "correct" interpretation. In the second place, the other major conclusion is that an analysis based on theoretical foundation reveals how the free-flow conception has a degree of logical coherence significantly weaker than that supporting the accountability view: the latter applies a coherent body of theory in a context to which that theory is suited, while the former invokes a theory that is sound on its own, but which is nevertheless inapplicable to the United States Freedom of Information Act. Because of this, it seems that the understanding of the act derived from the accountability conception is actually more satisfactory than that derived from the free-flow view. As a result, it is possible to say that the central purposes doctrine is the more viable of the two interpretations.[15]

## Endnotes

[1] Charles P. Bennett, "The Freedom of Information Act, Is It a Clear Public Records Law?" *Brooklyn Law Review* 34 (Fall 1967): 74; Del. Code Ann. 29 § 10001 (1991) quoted in David Allen Weber, "Access to Public Records Legislation in North America: A Content Analysis" (Master of Archival Studies Thesis, University of British Columbia, 1994), 149. For another good example of a statute that declares its purpose to be both accountability and free-flow, see Ill. Ann. Stat. ch. 116, para 201 in Weber, "Access to Public Records Legislation" 150.

[2] *Soucie v David* 448 F2d 1077 (DC Cir 1971); *EPA v Mink* 410 US 80 (1973). The main cases establishing the accepted interpretation of the any-person rule is *Stone v. Export-Import Bank of the United States* 552 F2d 132 (5th Cir 1977); *Doherty v Department of Justice* 596 F Supp 423 (SDNY 1984); and *Cox v Department of Justice* 576 F2d 1302 (8th Cir 1978). Only fugitives from justice are excluded. See *Doyle v Department of Justice* 494 F Supp 842 (DDC 1980).

[3] United States, Congress, Senate, Committee on the Judiciary, "Senate Report 813: Clarifying and Protecting the Right of the Public to Information, and for Other Purposes," 89th Cong., 1st Sess., October 4, 1965, in United States, Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* (Washington: G.P.O., 1975), 38. For authors citing this report see Jennifer A. Clemens, "Freedom of Information Act Exemption Seven is Broadened in *John Doe Agency v. John Doe Corp*," *Journal of Corporation Law* 16 (Summer 1991): 967; Ian C. Crawford, "*FBI v. Abramson* and the FOIA: Exemption Seven Shields Political Records," *Suffolk University Law Review* 27 (Fall 1993): 750-1; Martin E. Halstuk, "Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases," *Computer & High Technology Law Journal* 15 (January 1999): 76; Michael H. Hughes, "*CIA v. Sims*: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3," *Catholic University Law Review* 35 (Fall 1985): 279; "FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations," *Minnesota Law Review* 65 (July 1981): 1139; Michael Allyn Stroud, "Law Enforcement Exemption May Prevent Disclosure of Records Not Compiled for Law Enforcement Purposes," *Tulane Law Review* 57 (June 1983): 1565-6; Lori L. Vallone, "A Further Step Toward a New Exemption 7 of the Freedom of Information Act: *John Doe Agency v. John Doe Corp*," *Creighton Law Review* 24 (1990-1991): 273.

[4] United States, Congress, House of Representatives, Committee on Government Operations, "House Report 1497: Clarifying and Protecting the Right of the Public to Information," 89th Cong., 2d Sess., May 9, 1966, in *Freedom of Information Act Source Book*, 22-33. For authors citing this report see Mark S. Adler, "National Security Information Under the Amended Freedom of Information Act: Historical Perspectives and Analysis," *Hofstra Law Review* 4 (Spring 1976): 769; Crawford, "*FBI v. Abramson*," 748; Joan M. Katz, "The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act," *Texas Law Review* 48 (June 1970): 1265; Kristi A. Miles, "The Freedom of Information Act: Shielding Agency Deliberations from FOIA Disclosure," *George Washington Law Review* 57 (May 1989): 1326, 1339; David Sobel, "The Freedom of Information Act: A Case Against Amendment," *Journal of Contemporary Law* 8 (1982): 48; Elizabeth A. Vitell, "Toeing the Line in the Ninth Circuit: Proper Agency Justifications of FOIA Exemptions Clarified in *Wiener v. FBI*." *De Paul Law Review* (Winter 1992): 797.

[5] Hughes, "*CIA v. Sims*," 286-7. See also Halstuk, "Bits, Bytes, and the Right to Know," 78; Ann H. Wion, "The Definition of 'Agency Records' Under the Freedom of Information Act," *Stanford Law Review* 31 (July 1979): 1095. United States, Congress, Senate, Committee on the Judiciary, "Senate Report 854: Amending the Freedom of Information Act," 93rd Cong., 2d Sess., May 16, 1974, in *Litigation Under the Amended Federal Freedom of Information Act: Conference Handbook*, 3rd ed., ed. Christine Marwick (Washington: Project on National Security and Civil Liberties of the ACLU Foundation, 1977), 153.

[6] "Senate Report 854," 153; "House Report 1497," 26-7; "Senate Report 813," 40.

[7] This approach is adopted as an alternative to one inquiring which interpretation would make for better public policy, which is what many legal commentators prefer to do. The problem with such a methodology is that its results tend to reveal more about a particular author's opinion on what makes for "better" public

policy than it does about the interpretations actually at issue. See for example "FOIA Exemption 7," *Minnesota Law Review*, 1166; Michael M. Lowe, "The Freedom of Information Act in 1993-1994," *Duke Law Journal* 43 (April 1994): 1305; Amy E. Rees, "Recent Developments Regarding the Freedom of Information Act: A 'Prologue To A Farce Or A Tragedy; Or, Perhaps Both,'" *Duke Law Journal* 44 (April 1995): 1212-3; Cathy Seibel, "Fee Awards for *Pro Se* Attorney and Non-Attorney Plaintiffs Under the Freedom of Information Act," *Fordham Law Review* 52 (December 1983): 383.

[8] Miles, "Shielding Agency Deliberations," 1326, 1328; Roshon L. Magnus, "Judicial Erosion of the Standard of Public Disclosure of Investigatory Records Under the FOIA After *FBI v. Abramson*," *Howard Law Journal* 26 (1983): 1613, 1637. See also Edward M. Kennedy, "Foreward: Is the Pendulum Swinging Away From Freedom of Information?" *Harvard Civil Rights-Civil Liberties Law Review* 16 (Fall 1981): 311, 317; James D. Lewis, "White House Electronic Mail and Federal Recordkeeping Law: Press 'D' to Delete History," *Michigan Law Review* 93 (February 1995): 811; John Moon, "The Freedom of Information Act: A Fundamental Contradiction," *American University Law Review* 34 (Summer 1985): 1167-8; "National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act," *University of Pennsylvania Law Review* 123 (June 1975): 1458-9; Catherine F. Sheehan, "Opening the Government's Electronic Mail: Public Access to National Security Council Records," *Boston College Law Review* 35 (September 1994): 1145-6.

[9] John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Project Gutenberg, 1996)
<http://promo.net/cgi-promo/pg/t9.cgi?entry=608&full=yes&ftpsite=ftp://ibiblio.org/pub/docs/books/gutenberg/>

[10] See for instance *Thornhill v. Alabama*, 310 U.S. 88 (1940), emphasis added.

[11] *Red Lion Broadcasting v Federal Communications Commission* 395 US 367 (1969). See also *Columbia Broadcasting System, Inc. v Democratic National Committee* 412 US 94 (1973); *Federal Communications Commission v National Citizens Committee For Broadcasting Et Al.* 436 US 775 (1978).

[12] See *Tinker Et Al. v Des Moines Independent Community School District Et Al.* 393 US 503 (1969).

[13] Note that the discussion following from this point presents a case on behalf of the first-amendment derivation of the FOIA in much further detail than those usually found in the literature. Few authors who touch on this matter, in other words, provide analysis in any greater depth than Parks and Hennings offered; see Chapter 3. It is important to acknowledge, then, the derivation suggested here is my own, and the question of whether or not a free-flow theorist would endorse it is an open one. However, I have attempted, to the greatest extent possible, to make this passage an interpolation of the ideas of people like Parks and Hennings by genuinely striving to make it as strong a constitutional argument as possible.

[14] US Const, Art II, § 3 quoted in Thomas C. Hennings Jr., "Constitutional Law: The People's Right to Know," *American Bar Association Journal* 45 (July 1959): 669.

[15] It should be noted that there is another possible constitutional argument, one based on a "public provenance" or "public ownership" interpretation. In short, this would consist of establishing that the American people are the sovereign power of the nation; that, as such, they own government records; that depriving citizens of access to such records would violate Fourth Amendment declaration that citizens shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and the Fifth Amendment provision dictating that citizens shall not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;" and, finally, establishing that on the basis of this logic, government records must be regarded as being open to public access when compelling reasons for denial of access are not present. This, it seems, would make a fairly strong argument. Certain archivists have presented cases similar to this in the context of records laws in general: see, for instance, J. Frank Cook, "'Private Papers' of Public Officials," *The American Archivist* 38 (July 1975): 321; and Gerald F. Ham, "Public Ownership of the Papers of Public Officials," *The American Archivist* 37 (April 1974): 357. On the other hand, however, this research has uncovered no instances in which such an argument is made specifically in connection with the FOIA.

# Conclusion

Hans Morgenthau once claimed that Richard Nixon projected "the image of the great leader fully informed [and] unfailing in judgement" by taking "crucial question[s]" and "restating [them] in assertive form." Such techniques obviously make for effective and persuasive rhetoric. They gloss over areas of uncertainty in public affairs by enabling speakers or writers to appear forthright in their willingness to face difficult questions, and to appear visionary in their ability to grasp issues that the rest of us have not yet grasped. Morgenthau's point, however, was that it is incumbent upon us to acknowledge this style of argument, and, when we encounter it, to present opposition by insisting that genuine inquiry be re-opened. This work argues that, in the majority of the literature, the question of the of the statutory purpose behind the Freedom of Information Act is treated as a settled matter. Accordingly, this thesis has addressed the topic by challenging those ideas proposed as simple truths by the supporters of the free-flow-of-information view.[1]

In the course of the research that produced this thesis, it became evident that throughout the eras of the formulation and implementation of the FOIA, different constituencies offered distinct conceptions of how a freedom-of-information law should look. Members of the journalistic community hoped that the legislature would pass a bill to protect and extend freedom of the press. Various groups in Congress supported various kinds of legal reform: regimes that would grant discovery rights to citizens involved in agency adjudication; ones that would impose limits on the president's discretion to invoke executive privilege; and ones that would give teeth to the access rights purportedly granted by the Constitution. Executive personnel devised their own interpretations, all of them supporting access rights in principle, but all concerned with circumscribing them within certain parameters. Once the Freedom of Information Act was passed, new constituencies emerged. Scholars, especially historians, believed that the law should

be understood primarily as a mechanism to support the collective efforts of professionals in the discipline to compile a nonprivileged and nonbiased historiography. Members of the public, speaking very generally, seem to have believed that anything goes—that the philosophy of the law was irrelevant as long as it served their information needs. Finally, legal scholars transformed the constitutional-rights theory from a citizen-oversight view into an interpretation based on the notion that access rights were an end in themselves.

This description, of course, creates an unrealistically static portrait. In actuality, individuals concerned with the state of access law at the federal level were consistently interacting with their peers, and thus opinions evolved and alliances were formed. The administrative-law conception disappeared quite early: after the public information provisions advocated by this group of legislators were created by the Administrative Procedure Act in 1946, its existence as a constituency no longer served a purpose. Throughout the late-1950s and the 1960s, there was a considerable level of contact and exchange of opinion between journalists and supporters of the major congressional views. After this time, the free-press and congressional-oversight conceptions continued to exist as distinct concepts, but, due to the persuasiveness of the theories first articulated by Wallace Parks and Thomas Hennings, these constituencies were gradually subsumed within the one advocating the first free-flow-of-information view. After passage of the FOIA most legal scholars joined this camp as well, and, through their dominance of the literature, the formerly predominant interpretation was transformed into a new and unique entity. This development resulted in what is referred to here as the orthodox FOIA interpretation: the belief that the act has constitutional basis, and that, due to this, its purpose must be read as granting a right of access to all information held by the government, regardless of its topic or content.

On the other hand, all of the ideas upon which the orthodoxy is based are open to question. What does the legislative history of the FOIA actually say on the matter of statutory purpose? How is it possible to read the congressional reports without regard to those passages that support the central purposes doctrine and refute the free-flow view? How is "freedom of information," or "the right to know," granted by the Constitution? More specifically, how is the purported constitutional basis of the statute derived from the alleged presence of "the right to know" in the Constitution? Does this derivation make sense in light of the fact that it is based on a purported equivalence between the right to hear and a right to compel speech?

This set of questions leads inevitably to another set of underlying questions. First, given all the doubts that can be raised about the orthodox view, why have so few authors dissented from it? Have orthodox commentators truly analyzed the central purposes doctrine, and rejected it on the basis of a genuine belief that "freedom of information" should be a ceiling-less concept? Or have they dismissed the doctrine without seriously considering whether a middle-ground interpretation might be more appropriate? Deriving from these, the next major questions concern whether or not we can continue to accept the orthodox view. Does an explanation of the central purposes doctrine in the form of an accountability view make the Supreme Court's interpretation more palatable? Is it not the case that an accountability view is just as well founded in the statutory text and legislative history? Could it not be true that the doctrine is in fact a more sensible reading due to the fact that accountability theory is appropriate for application in the FOIA context, while first-amendment theory is not?

Two remarks need to be added by way of conclusion. First, while the foregoing questions have not been addressed neutrally, but instead with favor toward the accountability view, the argument nevertheless should not be construed as implying that access laws cannot be designed to enact a free-flow-of-information agenda. Furthermore, it would be inaccurate to

construe this work as supporting the idea that access statutes in general, or the FOIA in particular, should be designed to serve accountability over free flow of information. In other words, the main contention here has indeed been that the central purposes doctrine should be accepted as the appropriate interpretation of the act; but this position is only taken in view of the particular circumstances. If the law or its legislative history provided a clear and reliable indication that the central purposes doctrine contradicted the congressional intent, this thesis would not have been designed to present the particular argument that it does. Similarly, if the main alternative to the accountability view did not feature such significant flaws, this work might have actually been designed to defend rather than critique the free-flow view. The point is that the topic of this work is the United States federal Freedom of Information Act as it currently exists, and as it has historically existed, and that this work takes no position on public policy questions concerning what kind of a law would serve Americans best.

Having said this, however, the final point to be made is that the implications of this research may be especially relevant for those who do hold a public policy agenda of this sort, particularly those believing in the orthodoxy. Commentators taking this position face a difficult situation in that the realization of their hopes that Americans will one day be granted full access rights based on the principle of free flow of information is dependent on whether or not Congress can be persuaded to undertake reform. Specifically, what would be required to fulfill such hopes is an amendment on the part of the legislature establishing that the federal act, like that in Delaware, for instance, exists to keep society "free and democratic" by establishing access for its own sake, while simultaneously serving accountability purposes by giving citizens "the opportunity to observe the performance of public officials." But the difficulty is that in order for a reform effort to happen, free-flow theorists must recognize that the purpose of the act is an open question, not a settled issue. The reason why it is these parties who must take the lead, in turn, is

because the free-flow constituency may be the only group with influence strong enough to persuade legislators to initiate reform of the sort described above. After all, assuming that lawmakers do support the idea of access rights as an end in themselves, why would they take the initiative required to transform it into a free-flow instrument while they are being constantly assured by the experts that the statutory purpose already clearly establishes that it is one?

Citizens, government officials, and FOIA commentators alike all share one basic interest in common: the interest in achieving an access law that provides the greatest good to the greatest number. For some, this means enactment of an unfettered freedom-of-information statute, while others are more concerned with accountability—or with other issues only touched on here, such as measures to ensure that the FOIA operates on a fiscally sound basis, or restraints on access that prevent the erosion of privacy rights. Absolutely requisite for achieving the ideal access law, however, is discussion and debate that brings forward and examines all possible perspectives. It is of course true that all parties with entrenched views, not just free-flow theorists, need to become more open to alternatives. Most crucial of all, though, is that those in the majority re-examine their own premises. Should they fail to do so, the worthwhile contributions they stand to bring to the debate will be diminished, and the potential they hold for motivating Congress toward reform will be squandered.

## Endnotes

[1] Hans J. Morgenthau, "The Rhetoric of Nixon's Foreign Policy," in *Truth and Power: Essays of a Decade, 1960-70* (London: Pall Mall Press, 1970), 428.

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