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**THE FAILURE OF THE FREEDOM OF INFORMATION ACT:
ADDRESSING THE NEED FOR STATUTORY CHANGE**

A Dissertation in

Mass Communications

by

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ABSTRACT

The Freedom of Information Act, passed in 1966, created the first enforceable right of access to federal agency records. This right challenged prevailing standards of bureaucratic secrecy and established that individuals have a legal right to government transparency. In the nearly fifty years since the FOIA was passed, the ability of the statute to provide the public with access to agency records has decreased considerably. Despite strong evidence that Congress intended for the FOIA to establish a level of government transparency, the federal courts, particularly the Supreme Court, have contravened the letter and spirit of the law.

This research addresses four questions. First, what role does government transparency play in fostering and maintaining democratic principles in a free and open society? Second, what is the legislative intent of the FOIA? In order to address how the FOIA is an inadequate route for transparency, this dissertation establishes what parameters Congress planned for the statute. The next step is to examine how the federal agencies and the Supreme Court define the FOIA's parameters, which leads to the third question. What is the trend of Supreme Court rulings on FOIA cases involving agency decisions to withhold requested records? Finally, the FOIA has been amended several times since 1966 in an attempt to address loopholes in the statute's original language or to nullify anti-disclosure Court opinions. Have the amendments been effective in achieving their objectives?

Decades of executive, legislative, and judicial abuse make clear that the FOIA is no longer an adequate avenue for access to federal agency records. This dissertation presents evidence that Congress intended for the FOIA to provide consistent and reliable access to government information. The federal agencies and Supreme Court have actively countered this effort at government transparency. The federal agencies continue to buck disclosure requirements, using the FOIA's exemptions to withhold records that should otherwise be released. The Supreme

Court publishes judicial opinions that contravene the FOIA's purpose while expanding protections for these FOIA exemptions. Although Congress passed several FOIA amendments in response to these actions, the amendments have not successfully addressed the problems at the heart of the FOIA. The end conclusion of this dissertation is that the FOIA, in its present form, is irrevocably broken.

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|Chapter 1: Introducing Access to Federal Agency Records

The right of public access to government-controlled information contained in federal agency records is a muddled legal right rooted in common law, statutes and administrative law at both state and federal levels. As early as 1787, but before ratification of the U.S. Constitution, James Wilson, one of the Framers, participated in a debate concerning whether Congress had the obligation to publish its proceedings. Wilson said, the “people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.”¹

Eventually, the Constitution adopted Wilson’s view: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”²

Since then, the meaning of the public’s right to know has evolved over time, to clarify exactly *what* the public has a right to know. Other than the inclusion of Wilson’s call for publishing a journal of proceedings, there is no right to know or mandate for government transparency in the Constitution.

In order to provide for government transparency, statutes³ governing open public records have been enacted by Congress and legislatures in all fifty states to control the access to and

¹FreeRepublic.com, Journal of the Federal Convention August 11th 1787, <http://www.freerepublic.com/focus/f-bloggers/2762059/posts> (last visited September 8, 2011). This quote arises directly from the *Journal of the Federal Convention* from August 11, 1787.

² U.S. Const. Art. 1 § 5.

³*See, e.g.,* Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003); Government in the Sunshine Act, 5 U.S.C. § 552b (2011); Federal Advisory Committee Act, 5 U.S.C. App (1972).

dissemination of governmental records.⁴ On the federal level, individuals are granted access to agency records under the Freedom of Information Act (FOIA). The Government in the Sunshine Act provides open agency meetings.⁵

It was not until Congress passed the FOIA in 1966 that a right of public access to information held by the federal government became law. It was grounded on a presumption of openness, and allowed the public to inspect and obtain copies of information in records held by the executive branch's myriad regulatory and administrative agencies, and the cabinet departments. Further, the FOIA requires the government to carry the burden of presenting a rationale supporting non-disclosure, based on nine statutory exemptions Congress included in the law.⁶

Modern jurists and legal scholars have described the meaning of this statutory right as a necessary criterion for free speech, and a means of supporting participatory democracy. The public access to, and government's dissemination of, information is vital for the full functioning

⁴State access laws originated much earlier than similar federal laws. Alabama passed the first comprehensive open meetings law in 1915 and was still the only state in 1950 to have one. ANN TAYLOR SCHWING & CONSTANCE TAYLOR, *OPEN MEETINGS LAWS* 6-7 (1994). A large number of states that had not yet passed open records laws did so in the wake of the Watergate scandal, as concerns about government transparency were high at this time. Aside from Alabama, state open meetings laws were generally passed later. Florida passed the first state open meeting law in 1967. All fifty states have some form of open record and meetings laws. *Id. at 3*.

⁵Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003); Government in the Sunshine Act, 5 U.S.C. § 552b (2011). The FOIA concerns release of federal agencies' records, whereas the Sunshine Act concerns open meetings of the federal agencies. The Sunshine Act is beyond the scope of this dissertation, which focuses on transparency of records.

⁶ See Pub. L. No. 85-619, 72 Stat. 547 (1958); H.R. REP. No. 89-1497, at 23-24 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2419-20. 5 U.S.C.S. § 552 (b) (1)-(9)(1995). Under the FOIA exemptions, the law does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information specifically exempted from FOIA disclosure under another federal statute, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions, and (9) geological and geophysical information.

of citizens, for the advancement of knowledge, and for ensuring a stable and participatory community.⁷

The right to know was first defined, in part, by Congress, as a judicially enforceable device necessary for fostering and maintaining transparent governance.⁸ The FOIA was one of the most valuable tools of inquiry through much of the 20th Century for journalists, historians, scholars, public interest groups and members of the public who want to know what their federal government is doing.⁹ However, its effectiveness has been diminishing since the 1980s as a result of conservative Supreme Court appointees who have increasingly prevailed in a series of cases to construe a narrow view of the public interest in disclosure and to broadly interpret the scope of the nine exemptions in an expansive way.

This dissertation thus takes the critical stance that over the last three decades, the ability of the FOIA to provide public access to federal agency records has diminished considerably at the expense of transparency. Despite strong evidence of Congress' legislative intent for the FOIA and a voluminous legislative history, this dissertation will attempt to show how the federal courts, particularly the Supreme Court in key rulings, has contravened the letter and the spirit of the landmark 1966 Act that for the first time sought to make the executive branch more transparent.

⁷ See Pub. L. No. 85-619, 72 Stat. 547 (1958); see also H.R. REP. No. 89-1497, at 23-24 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2419-20.

⁸Department of the Air Force v. Rose (1976) is a case involving Air Force cadets' disciplinary records that were redacted under the FOIA's exemption for personnel records (i.e.: privacy concerns). The Supreme Court ruled that federal agencies had a duty to redact personal information, within reason, from files, but allowed the release of files to the public in an edited form. Justice Brennan, in writing for the majority, stated that the FOIA was broadly conceived to "create a judicially enforceable public right to secure such information from possibly unwilling official hands." Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

⁹ H.R. REP. No. 795, 104th Cong. 2d Sess. Sec. 2(a)(3)&(4)(1996). For instance, investigations by journalists using the FOIA have exposed FBI harassment of Dr. Martin Luther King, safety hazards at nuclear power plants, unsanitary conditions at food processing plants, the presence of harmful wastes in drinking water and the increased incidence of cancer among Plutonium workers.

Although Congress has passed several amendments to the original 1966 FOIA legislation to nullify court rulings, the actions of lawmakers typical did too little and too late, leaving the FOIA a broken tool.

Why and How the FOIA was Created

In the 1950s, the press began to demand a right to access federal agency records as a special privilege for the press.¹⁰ This thrust for a special privilege arose to counter the then prevailing bureaucratic culture and presumptive notion that secrecy concerning federal records was entirely in the hands of bureaucrats and politicians.¹¹ The press won its first victory for transparency with the passage of the FOIA in 1966, which provided access for the public to records generated by federal agencies.¹²

The press was the most influential force motivating grassroots movements to create federal protection for the release of government records.¹³ And Harold L. Cross, a New York newspaper attorney is the legal scholar credited with creating the language adopted for federal FOI. He wrote a seminal press study, in 1953, which thrust him into the role of unofficial

¹⁰JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:7-8 (1990); DAVID O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 3 (1981).

¹¹Several states had already instituted statutes for open records law well before the federal agenda. TAYLOR, *supra* note 4, at 6-7.

¹²O'BRIEN, *supra* note 10, at 3. The FOIA, of course, deals with access to federal records. The Government in the Sunshine Act, passed in 1976, allows access to federal meetings. Government in the Sunshine Act, 5 U.S.C. § 552b (2011).

¹³Again, states had, in many cases, been writing laws providing for citizens' access to state government information for some time before 1966 and the enactment of the FOIA. See O'REILLY, *supra* note 10, at 27:1-27:21.

representative of the press concerning relationships with the government.¹⁴ Cross' study identified many of the flaws in the existing systems for dissemination of information¹⁵

Congressional action that ultimately led to enactment of the FOIA has its origins in a series of meetings between Cross and a reform minded U.S. Representative from California, John Moss of Sacramento, in 1955. Moss' interest was in remedying the absence of "access rights of the public to federal agencies' information."¹⁶ Representative Moss' interest in creating government transparency was a marked change in the prevailing attitude concerning government-information dissemination. The generally accepted notion was that the federal government delegated handling of agencies' information to the heads of the agencies, resulting in very little disclosure.¹⁷

After meeting with Cross, Moss formed a Subcommittee to respond to the concerns outlined both by Cross' study and prominent newspaper journalists such as Herb Brucker, James Wiggins, James S. Pope and Kent Cooper whose efforts are discussed later. Cross' research led to findings of widespread secrecy among federal agencies.¹⁸ Moss' investigation established a clear record of consciously secrecy-as-policy by the federal agencies, which typically cited executive privilege as the justification for nondisclosure. The efforts of Moss and Cross, beginning with

¹⁴Cross' work exhaustively detailed extensive government secrecy in the face of increasing pleas for transparency and access. *See generally* HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953).

¹⁵*See generally Id.*

¹⁶JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:1 (1990).

¹⁷*Id.* at 2:1.

¹⁸*Id.* at 2:2.

Subcommittee hearings in 1955, laid the groundwork for the Freedom of Information Act of 1966.¹⁹

By 1958, Congress made some progress by identifying loopholes and ending agency obstructions that existed in a previous statute.²⁰ These efforts established Cross as a key leader of the press' drive for enactment of a Freedom of Information Act; Moss became the leader of the campaign in Congress.

In 1949, Herb Brucker, a former newspaper reporter and pioneering FOI scholar, popularized the phrase "freedom of information,"²¹ with his book of the same name.²² Brucker crusaded on behalf of a free, uncensored, world-press and articulated the now widely accepted notion that "truth emerges only from the sum total of reports, after all facts and all shades of opinion have been aired in the process of free reporting and free discussion."²³ Since a single statement from a single press conference rarely contains all the pertinent information by which to arrive at a semblance of truth, Brucker asserted the essential necessity for *more* information to be available, overall, to allow more known truth. This fundamental argument favors a general right to know, through avenues like federal access laws, news reports and other channels of getting to

¹⁹*Id.* at 2:3.

²⁰*See* Pub. L. No. 85-619, 72 Stat. 547 (1958); *see also* H.R. REP. No. 89-1497, at 23-24 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2419-20. Agencies, prior to this time, used loopholes in the Housekeeping Statute to withhold records from the public. *Id.*

²¹Brucker popularized the phrase in reference to free press but the actual, first articulation is that of the dean of the Columbia University Graduate School of Journalism, Carl V. Ackerman, in 1934. Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 519 (2006).

²²HERB BRUCKER, FREEDOM OF INFORMATION (1949).

²³*Id.* at 253.

what contemporary *Washington Post* journalist and author Carl Woodward characterizes as the best available version of the truth.²⁴

In 1953 Cross suggested the more targeted idea that *all individuals* should have an enforceable legal right to access governmental information—not just the press—which the government could limit only by explicitly enumerated exceptions.²⁵ “[The] press is only an agent of the people,”²⁶ observed, James S. Pope, the first chairman of ASNE’s domestic Committee on Freedom of Information, who commissioned Cross to do what became Cross’ seminal 1950 study on government secrecy.²⁷ Pope, former managing editor of the *Louisville Courier*, is credited with being the driving force to initiate the movement that ultimately led to enactment of the FOIA.²⁸ It was this study that drew California Representative Moss’ attention to Cross.

In 1956, James Russell Wiggins, managing editor of *The Washington Post* and later United Nations Ambassador, said the effects of secrecy have the same results regardless of the reason for the secrecy—an ignorant and uninformed citizenry who lack the knowledge to make

²⁴The idea that *more* information can equal a comprehensive picture has had application for as a movement *against* government transparency. In the wake of 9/11 the Bush Administration confronted the challenge of predicting the movements and plans of independently operating terrorist cells. In response to this predicament, the Bush Administration curtailed dissemination of information in general, on the basis of the Mosaic Theory, which refers to the idea that “disparate items of information,” which, by themselves appear unimportant or problematic, assembled pose a national security threat. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115(3) YALE L.J. 630 (2005).

²⁵HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* xiiiv (1953).

²⁶*Id.* at vii. Cross is clearly of the mindset that while the press should be entitled to the *same* routes of access as the average citizen, “the news function can rise no higher than its source—the right of the people to know.” *Id.* at xiv.

²⁷*Id.* at 2.

²⁸H. REP. NO. 89-1497, at 5-6 (1966).

informed decisions at the polls.²⁹ From this logic, Wiggins argued for the necessity for a legally enforceable right to know with five features: (1) a basic right to obtain information;³⁰ (2) a right for the press to publish without prior restraint; (3) the ability for the press to publish without legal reprisal; (4) access to facilities and materials essential for an informed citizenry; and 5) and a right to distribute information³¹ without government's interference.³²

Most of the nongovernment leaders in the government transparency movement were journalists who stressed that an enforceable right to know law would allow the press to more effectively fulfill in constitutionally designated role as a check on government, the so-called watchdog function.³³ In the late 1940s and early 1950s, a conventional notion of journalists in general was that exporting U.S. democratic values to other nations, particularly free speech and a free press, would create a safer world. Media historian and First Amendment scholar, Margaret Blanchard, in *Exporting the First Amendment*, wrote extensively during the World Wars of exportation of the First Amendment³⁴ freedoms, including the right of access by journalists to

²⁹RUSSELL WIGGINS, *FREEDOM OR SECRECY* xi (1956). Russell Wiggins clarified this position stating, “[e]ach added measure of secrecy, however, measurably diminishes our freedom. If we proceed with more and more secrecy we shall one day reach a place where we have made the choice between freedom and secrecy.” *Id.* at xii.

³⁰Wiggins in this instance is referring to information in general, not any kind of specific information, such as federal records. *Id.* at 3-4.

³¹Again, information in this context is general. *Id.*

³²*Id.*

³³Over time the press's role has evolved into a more presumptively active “watchdog” role; the idea that the press in the United States has a specific place and mandate to report on government activities is generally referred to as the “watchdog role of the press.” TIMOTHY W. GLEASON, *WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA* 4-5 (1990).

³⁴MARGARET BLANCHARD, *EXPORTING THE FIRST AMENDMENT* 1 (1986).

government officials. “[T]he free-press crusade is basically a story of newspaper journalists’ efforts to establish worldview freedom of the press,”³⁵ she said.

Despite strong First Amendment protections for the press,³⁶ the immediate postwar years were a time when U.S. journalists, with the support of Pope, Cross, Wiggins and Brucker argued for special journalistic protections for a right to know. Supreme Court opinions during that era supported journalists’ and scholars’ efforts for access to government information on general terms, based on the crucial role of journalism in the U.S model for a free democratic society. The 1950s were generally a time of bureaucratic policies that assumed government was entitled to engage in secrecy even if government opacity undermined the press’ ability to gather information of high—sometimes crucial—public interest.³⁷ The solution was passage of the FOIA, which applied equally to journalists and the public in general.

The FOIA, for the first time, created a “judicially enforceable public right of access to the wide variety of information compiled by the executive branch agencies” for individuals.³⁸ This right challenged governmental presumptions for secrecy to a presumption of “full disclosure.”³⁹ The bill that would become the Freedom of Information Act (FOIA), S. 1160, passed several

³⁵*Id.* at 3.

³⁶Newspapers are the only institution that gets explicit protection under the Constitution. HERB BRUCKER, FREEDOM OF INFORMATION 24 (1949).

³⁷DAVID O’BRIEN, THE PUBLIC’S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 3 (1981).

³⁸5 U.S.C. § 552 (2005). Prior to the FOIA, the public had no avenue for obtaining governmental information, previously denied for any reason. HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW 197 (1953).

³⁹*See generally* S. REP. No. 813–89 (1965); H.R. REP. 1497–89 (1966). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978); U.S. Dep’t of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973).

iterations before it was approved by the Senate in 1965 and House in 1966.⁴⁰ In fact, President Johnson opposed the FOIA and only reluctantly⁴¹ signed the bill into a law that held nearly one hundred governmental agencies and departments accountable to public demands for information.⁴²

Arguments

The perception that the FOIA remains a sufficient mechanism to guarantee governmental transparency discounts profound changes since the 1980s when an increasingly conservative Supreme Court began to tip the scales of balance in favor of secrecy over the public interest in disclosure. In incremental steps, as this dissertation will attempt to demonstrate, enforcement of the FOIA has been inconsistent at best, negligent at worst.⁴³

⁴⁰JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:4 (1990).

⁴¹President Johnson's signed the bill after noting that, "[t]his bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern." *Id.* at 2:5. President Johnson obviously believed that the FOIA would have no real impact on the current state of government transparency.

⁴²Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003). Notably, the FOIA does not apply to records held by Congress, state and local governments, the courts, private individuals and entities, the President and the President's personal staff or advisors. Nine exemptions address certain categories of information that agencies may withhold from public disclosure: (1) classified and national security information; (2) internal agency personnel information; (3) information exempted by statutes; (4) trade secrets and confidential business information; (5) agency memoranda; (6) disclosures of personal privacy; (7) records of law enforcement and investigations; (8) some reports of financial institutions; (9) geological and geophysical information. *Id.*

⁴³For a historical perspective, see HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953). See generally MAARTEN BOTTERMAN ET AL., *PUBLIC INFORMATION PROVISION IN THE DIGITAL AGE: IMPLEMENTATION AND EFFECTS OF THE U.S. FREEDOM OF INFORMATION ACT* (2001); PHILIP H. MELANSON, *SECRECY WARS : NATIONAL SECURITY, PRIVACY, AND THE PUBLIC'S RIGHT TO KNOW* (2002).

On paper, the FOIA may still appear to be a useful and predictable tool to ensure government transparency. However, the overarching purpose of this dissertation is to demonstrate how the FOIA is no longer an effective mechanism for the needs and realities of government transparency in the 20th Century. The findings of this research project will attempt to show that Supreme Court has handed down nondisclosure FOIA opinions—grounded on overly broad and unfounded interpretations of the exemptions—that conflict with the law’s congressional intent and legislative history.

This dissertation proposes several arguments, based on the relationship between government transparency and a democracy, to support its view. The first argument is, according to deliberative democratic theory, information is a fundamental component for a democracy to be successful. For example, one of the primary democratic tenets that support access to government-controlled information is that, individuals must discover and promote truth for the good of society.⁴⁴ Under the system of self-government the “public, as sovereign, must have all information available in order to instruct its servants, the government.”⁴⁵ Over time in the United States, self-government evolved into placing significance on maintaining informed political discourses.⁴⁶ This first argument explores the theory behind the assumption that information and government transparency are necessary for the operation of a functional democracy.

⁴⁴See JOHN MILTON, *AREOPAGITICA* (1819). Additionally, John Stuart Mill in the seminal work *On Liberty* argued that suppressing speech is the equivalent of suppressing truth. Even if the idea that is being communicated is not truth, its existence will lead to revealing truth. JOHN STUART MILL, *ON LIBERTY*, IN *SELECTED WRITINGS OF JOHN STUART MILL* 121 (M. Cowling ed. 1968).

⁴⁵Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 14 (1976). Here, Emerson is drawing from Alexander Meiklejohn. *Id.*

⁴⁶RICHARD D. BROWN, *THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650-1870* 66-67 (1996).

The second argument follows that if information is a fundamental component for a successful democracy, an individual's right to know via government transparency requires protection. Any disruption to the flow of information about the government threatens the stability of a democratic nation. Although there can be exceptions to this policy, such as withholding information for the sake of national security, the presumption should be transparency.

The third argument states that the existing statutory right for access to federal records via the FOIA is imperfect and flawed. At stake in this debate is one of the most profound roles of governmental transparency in a free and open society: the right of the public to examine and obtain copies of governmental records. This critique argues that the federal open records law should be reexamined so that more successful policies can be implemented.

Existing research has examined aspects of the issues that have plagued the FOIA since its inception in the 1960s. This research is limited in that it focused on components of a larger problem: legislative loopholes, problematic Supreme Court decisions, and misguided interpretations of the FOIA's statutory exemptions. This dissertation adds to the body of existing research in two ways. First, it comprehensively addresses the problems facing the existing statute. Second, it provides original research by exploring the inability of the usual legislative process to fix these issues. The FOIA has been amended several times in an attempt to correct and improve its use. As this research seeks to show, there is an insurmountable rift between Congress's attempts to craft a functional open records law and the interpretation of that law by the Supreme Court.

To shed light on the transparency inadequacies of the FOIA, this dissertation will explore four research questions. The first question is what role does government transparency play in fostering and maintaining democratic principles in a free and open society? This discussion will contend that there is a need for individuals to have access to federal agency records. For example, if a FOIA request is refused, the requestor may go to court to challenge the agency's

nondisclosure decision. Such a process requires financial resources and time that simply is not available to individuals or even many if not most public interest groups.

Second, what is the legislative intent of the FOIA? In order to have a complete discussion of how the FOIA is not working, this dissertation establishes what parameters Congress planned for the federal legislation.

After outlining the legislative intent for the FOIA, the next step is to examine how the federal agencies and the Supreme Court define the FOIA's purpose, which leads to the third question. What is the trend of Supreme Court rulings on FOIA cases involving agency decisions to withhold requested information?

The FOIA has been amended several times since 1966 in an attempt to plug loopholes in the statute's original language or to nullify anti-disclosure Court opinions. The fourth question thus concerns the history of the implementation of FOIA amendments intended to bolster the statute's transparency mandate. In other words, have the amendments been effective in achieving their objectives?

Research Theory and Methods

Education, other than in law schools, limits legal research to a relatively small number of academics; methodology for legal research primarily occurs from the more general perspective of qualitative research.⁴⁷ In this sense, legal research, like the critical/cultural approach in

⁴⁷Dr. Bill Chamberlin, well-respected for teaching scholars of mass communications methodology for legal research and in-depth First Amendment theory, taught graduate classes at the University of Florida, cross-listed with the College of Communications and the Levin College of Law. The introduction to his MMC 6666/LAW 6936 class, Seminar in Research in Mass Communications Law/ Advanced Media Law Research begins with a section on qualitative research.

communications research, often assumes the position of a subset of qualitative research.⁴⁸ This somewhat simplified view of legal research does not only integrate qualitative principles but also defines structural requirements for exposition from a legal perspective.

Legal research in mass communications often concerns a variety of topics. In most cases the focus is relationships with politics and the political state, such as citizens' participation, foreign policy, and the policies influencing elections and war.⁴⁹ Additionally, research of legal communications involves more normative questions such as those relating to freedom of speech and expression, policy and regulation.⁵⁰ In general, legal research's close association with qualitative studies makes sense. One of the uniting characteristics of the critical/cultural approach and legal research of mass communications is the concern for a "shared sense of political struggles" that link to broader policy issues.⁵¹ Although legal research in mass communications

⁴⁸Current trends increase emphasis on integrating certain quantitative techniques into legal research, especially methods like content analysis, helpful for analyzing large amounts of data. Using content analysis in a purely quantitative manner yields results like the number of times a word appears in a statute, or court opinion, etc. See Bertram Scheufele, *Qualitative Content Analysis*, in THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (W. Donsback, ed., 2008).

⁴⁹DENIS MCQUAIL, MCQUAIL'S MASS COMMUNICATION THEORY 9 (5th ed. 2005). The historical approach often closely associates with legal research in many fields, intuitively, a logical consequence, since both approaches involve using records (both primary and secondary) to discover unexamined or under-examined gaps in knowledge. Historical research includes the use of contemporary records, public reports, etc. while legal research includes the use of statutes, committee reports, etc. Many of the same weaknesses also apply: possibility for incorrect interpretation of words/phrases of meaning, errors in the records being examined, etc. For a discussion of the historical approach, see CATHERINE MARSHALL & GRETCHEN B. ROSSMAN, DESIGNING QUALITATIVE RESEARCH 95-96 (1989).

⁵⁰MCQUAIL, *supra* note 49 at 9-10.

⁵¹John Nguyet Erni, *Media Studies and Cultural Studies: A Symbiotic Convergence*, in A COMPANION TO CULTURAL STUDIES 199 (Toby Miller ed., 2001).

has acceptance for the broader field of communications,⁵² the specifics often remain contested.⁵³

For clarity, contextualization of the current study places the discussion within broader and interrelated bodies of research.

Legal research is not the same as qualitative research completed from a critical/cultural approach.⁵⁴ One of the defining differences between legal research and other approaches is the focus on the weight of authority, which influences the veracity of different sources.⁵⁵ Other methodological approaches assess the quality of accumulated information from primary and secondary sources. Legal researchers though must weigh the value of different legal sources. For example, weight of authority varies among judicial levels, with decisions of the Supreme Court, in general, the most authoritative. Additionally, since case law in the United States is reactive and based on precedent,⁵⁶ examination of primary records and secondary sources must be exhaustive to establish a clear understanding for future rulings.

⁵²The Association for Education in Journalism and Mass Communication, one of the most prominent associations for educators in communications, recognized since the 1970s, Media Law & Policy as a division of scholarship. AEJMC, *Law and Policy*, (2012), <http://aejmc.net/law/>.

⁵³For example, while the major associations such as International Communication Association and the Association for Education in Journalism and Mass Communication have law and policy divisions and journals, media law scholars continually must battle with two fundamental questions: “Which framework should prevail- law or communication?” and “Are the disciplines of legal studies and communication, as a field grounded in social science, compatible?” Amy Reynolds, *Communication and Law*, in THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (W. Donsback ed., 2008).

⁵⁴It might help to draw upon the rhombus and square metaphor, though this would apply only in a general sense. A square is a type of rhombus because it is a shape that has four equal sides, but a rhombus is not a square because the corners of the shape are not a 90 degree angle. Legal research is qualitative because it draws upon the flexibility and types of analysis common to qualitative methods (research questions instead of quantitative research’s hypotheses, a researcher’s interpretation of a group of texts that consist of primary and secondary sources), but qualitative methods are not legal research.

⁵⁵AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 4-9 (3d ed. 2006).

⁵⁶The predicate for the United States’ judicial system is *stare decisis*, or “let the decision stand,” a phrase that expresses a reliance on precedent. According to precedent, a judge interprets current

The researcher's role is also much less prominent in legal research. The emphasis is on legal accuracy, not authorial perspective. While many studies perpetuate claims for law in research, openly injecting personality into legal research is unusual, unlike critical/cultural research. Legal research requires an objective review of the law; presentation "evidence" from exhaustive research on cases and/or statutes is by rhetorical means." While generally considering evidence to be objective, the legal researcher conducts exhaustive search and analysis of the evidence, rendering an often unacknowledged element of authorial intent, often disguised as legal expertise and providing the appearance of objectivity to subjective statements.

The current study conducts original research through a close textual examination of several sources of law. The areas of law include historical, legal artifacts such as original state constitutions, federal statutes for access such as the FOIA, legislative records, and Supreme Court cases that interpret the FOIA.

Chapter Summaries

This initial chapter provides an overview of the topic of transparency of federal agency records under the FOIA. The purpose of this dissertation is to elucidate evidence of disparities between existing democratic theories and the reality of inadequate federal laws regarding access. This chapter covers the major points concerning theory and research methods, detailing qualitative components and methodology for legal research when analyzing FOIA oriented Supreme Court cases. Finally, this chapter outlines the issues that guide subsequent research.

problems by reflecting upon interpretations of past problems. Precedent does not bind judges' decisions, since the judiciary has the latitude to reevaluate decisions based on new circumstances or a need mediate previous errors, but precedent remains an integral aspect of the judicial process. DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 3-5 (17th ed. 2011).

Chapter 2 examines theories of deliberative governance that provide justification *for* a citizen's right to know. In particular, it focuses on the origin and expression of democratic practices in government.

Chapter 3 provides a detailed legislative history of the circumstances leading up to the enactment of the FOIA. This chapter also reviews the literature that focuses on government transparency following the passage of the FOIA.

The next three chapters examine Supreme Court cases dealing with FOIA to demonstrate that there is a disparity between congressional intent for the statute and the Court's interpretation of the statute. In particular, the Supreme Court has broadly interpreted several FOIA exemptions to increase nondisclosure of agency records.⁵⁷ Chapter 4 examines Exemption 3, which allows information to be withheld if it is allowed by statutes that existed prior to the FOIA's enactment. In particular, this chapter examines the use of Exemption 3 by the CIA to withhold the vast majority of their files. Chapter 5 addresses Exemption 5, which allows inter-agency and intra-agency files to be withheld from disclosure. Often referred to as the executive privilege exemption, Exemption 5 includes a provision known as "deliberative process." This provision is the most often used rationale, under the general rubric of executive privilege, to justify nondisclosure of a requested record.

Chapter 6 analyzes Exemptions 6 and 7(C), the personal privacy exceptions to disclosure. It attempts to show how an activist Supreme Court overreached its authority when it created its own definition of the FOIA's purpose. The resulting definition was structured in a way to expand the ambit of privacy protections while dramatically reducing the categories of information available under the FOIA.

⁵⁷The Supreme Court has, at times, ruled in ways that positively reinforced the application of the FOIA, but these cases are outweighed by the ones that narrowed the application of the FOIA, resulting in some instances with direct action from Congress.

Chapter 7 provides original analysis by pulling together the legislative intent of the FOIA and the Supreme Court's statutory interpretation of FOIA exemptions. This chapter will detail how the conflict between Congress and the Judiciary led to several FOIA amendments being passed so that Congress could nullify the Supreme Court's rulings on the FOIA. This chapter will also discuss the futility of using amendments to fix this current iteration of the FOIA and encourage that different steps be taken to ensure individual access to agency records.

The last chapter, Chapter 8, summarizes the research performed by this dissertation. The chapter also offers concluding commentary for future research and efforts needed to ensure increased government transparency.

Chapter 2: Providing a Theoretical Justification for Government Transparency

Typically any discussions of the FOIA involve an analysis of the historical context of the role of governmental transparency. Chapter 1 presents an overview of this dissertation, specifically, the intent to argue that the FOIA is an ineffective tool. Chapter 2 examines the democratic theories that support a need for government transparency. This chapter presents a theoretical justification for why individuals need access to government information and answers the first research question posed by this dissertation: what role does government transparency play in fostering and maintaining democratic principles in a free and open society?

The Role of Government Transparency in a Deliberative Democracy

In a democracy, self-appointed rulers are absent and replaced by self-governing people who periodically elect representatives from within their populations.⁵⁸ Most current first-world nations have embraced this governmental model, and it has emerged as the normative ideal for non-democratic nations to pursue.⁵⁹

Although democracy's roots trace to classical Athens (circa the 5th century BCE), monarchy was the predominant model for government until the 19th century. In monarchies, kings established authority through various doctrines, such as the *divine right* of kings, which

⁵⁸ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 6 (2001).

⁵⁹Wayne Le Cheminant & John M. Parrish, Introduction- Manipulating Democracy: A Reappraisal, in *MANIPULATING DEMOCRACY: DEMOCRATIC THEORY, POLITICAL PSYCHOLOGY, AND MASS MEDIA* 18 (Wayne Le Cheminant & John M. Parrish ed., Routledge) (2010).

assumed that a king's enthronement was due to the intervention of the Christian God.⁶⁰

Consequently, monarchies created two definite classes of people: the rulers and the ruled.

In contrast, a democracy creates only one definite population-- self-governed citizens who use a mutually agreed system to appoint temporary rulers.⁶¹ Democracy is not devoid of contradictions, such as embracing and limiting the power of majorities.⁶² Majorities may determine the so-called will of the people, but defining the will of the people in this way excludes minority voices that, taken as a whole rather than splintered, may provide valuable critiques and alternatives.

There are several central scholars of political thought who have shaped modern notions concerning democratic theory that should be considered: Aristotle, John Milton, John Locke, and John Stuart Mill, illuminates the evolution of ideas concerning democracies. In addition to historical authorities, contemporary commentators such as Leonard Levy, Alexander Meiklejohn, and C. Edwin Baker, provide modern insights.

Major Scholars of Democratic Theories

Key scholars who have written on democracies put forth idealized models for these democracies. As such, functioning democracies seek to satisfy the standards set forth by these scholars, despite

⁶⁰The so-called divine right of kings combines religious and political doctrine aimed to affirming the political legitimacy of monarchs. This doctrine generally does not accept the monarch's being subordinate to any earthly authority because the adopted authority for rule originates directly from God. See generally JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* (1914). This theory had its roots in older civilizations, where tribal societies believed that their ruler was a deity. *Id.* at 18.

⁶¹MEIKLEJOHN, *supra* note 58.

⁶²ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 35 (2006).

often failing to do so completely. The different standards for democratic models are very contentious, leading to disagreements about which ideals should be sought in a democracy.

In the 4th century B.C.E., Aristotle offered an eloquent analysis of the nature of the state. His work *Politics*, divided into eight books, was the first to describe politics as an organic entity that was both natural, and in need of citizens' maintenance and cooperation.⁶³ Aristotle defined the polis, *the city*, as a natural political community. Consequently, his discussion excluded larger political formations, such as empires. For Aristotle, democracy is a distinct system, differing from oligarchy, "the rule of the few,"⁶⁴ by involving free citizens. Free citizenship arises not from residency, but through agency that allows citizens to directly participate, vote, and otherwise take part in the deliberative or judicial administration of a state.⁶⁵ In other words, free citizens rule in a democracy. Rich and politically powerful or politically connected citizens rule in an oligarchy, and a large number of other citizens are only incidentally free citizens without any real political power.⁶⁶

Modern discussions of democracy have mostly surpassed Aristotle's model due to evolution of a larger, more densely inhabited, definition of "state."⁶⁷ Indeed, bigger democracies

⁶³Aristotle, *Politics*, Internet Classics Archive Book I, Part II, <http://classics.mit.edu/Aristotle/politics.1.one.html>.

⁶⁴*Id.* at Book IV, Part III.

⁶⁵CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 1-2 (2009); Aristotle, *Politics*, Internet Classics Archive Book III, Part I, V, <http://classics.mit.edu/Aristotle/politics.1.one.html>. Granted, Aristotle's limited view of citizenship excluded children and slaves. When speaking of citizenship, Aristotle meant men. *Id.* at Part 1.

⁶⁶Aristotle, *supra* note 63, at Book III, Part VIII-IX. Aristotle used oligarchy to refer to rule by the rich, which is technically a plutocracy. An oligarchy outside of Aristotle's more precise meaning is a governing model in which ruling people are a small number, distinguished by wealth or some other attribute such as genealogy, education, or military control. William A. Darity, *Oligarchy*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (2008).

⁶⁷Supreme Court Justice Oliver Wendell Holmes and Alexander Meiklejohn are two notable exceptions; both had an immeasurable impact upon democratic theories in the modern state but

cannot be direct democracies, since many do not require every citizen to participate. Furthermore, these bigger democracies encounter physical limitation to the ability to fully incorporate citizens' participation.⁶⁸

The concept of democracy evolved further during the Enlightenment, an intellectual movement that originated in the 17th and 18th centuries in Europe and sparked revolution and change for centuries to come. American democracy can trace its roots to representative rule to early Enlightenment ideas like the social contract theory, which contends that the consent of the governed limits the extent of governmental authority,⁶⁹ through a created social contract. John Locke, a key proponent of this view, described the social contract as implicit, embodied in the formation and maintenance of a government.⁷⁰ Social contract theory was significantly influential

wrote conceptualizations of smaller communities. Holmes is credited for articulating the "marketplace of ideas" rationale for free speech in a Supreme Court case in 1919, *Abrams v. United States*, 250 U.S. 616, 630 (1919). The Holmes concept of the marketplace of ideas in a liberal democracy contends that, truth arises from competing ideas, but criticism of this rationale includes impracticality in more populous settings, especially when competing opinions do not enjoy a level playing field. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 12-24 (1989). Meiklejohn is particularly well-known for his metaphor of free speech as applied to a town hall meeting, a metaphor that, in particular, ignores the concerns that come with dealing with the larger modern state. *See* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: CONSTITUTIONAL POWERS OF A PEOPLE* (1960).

⁶⁸CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 1-2 (2009). Modern discussions also challenged the distinction between an oligarchy and a democracy. One preeminent example is Robert Michaels, a German sociologist who argued that almost any modern political system will eventually evolve into an oligarchy, a position he defines as the *iron law of oligarchy*. In doing so, Michaels acknowledged an inherent problem in modern democracies: Most average individuals will never have the economic means to realistically attain national public office. *See generally* ROBERT MICHAELS, *POLITICAL PARTIES* (1911). Michaels' *Political Parties* contains the original description of the iron law of oligarchy, in response to the socialist parties of Europe at the end of the 19th and beginning of the 20th centuries.

⁶⁹Three thinkers can generally be attributed with the development of social contract theory during the Enlightenment period: Thomas Hobbes, John Locke, and Jean-Jaques Rousseau. *See generally* THOMAS HOBBS, *LEVIATHAN* (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1690); JEAN-JAQUES ROUSSEAU, *DU CONTRACT SOCIAL* (1762).

⁷⁰*See* John Locke, *Second Treatise of Government*, CONSTITUTION.ORG (2012), <http://www.constitution.org/jl/2ndtreat.htm>.

for the Framers of the United States. James Madison, for example, argued that a constitution, from the authority of the people is the “only legitimate fountain of power.”⁷¹

Discussions on limits of governmental power have continued since Locke’s time. John Stuart Mill, for example, elaborated on the legitimate limits of governmental power⁷² by noting that the people in a democratic system are “not always the same people with those over whom it [power] is exercised; and the ‘self-government’ spoken of, is not the government of each by himself, but of each by all the rest.”⁷³ In other words, even within a democracy a great disparity exists in terms of distribution of power. Factors such as race, class, and gender have resulted in noticeable trends in the political process in the United States. Specifically, people of color, of lower socioeconomic standing, and women are disproportionately excluded from power.⁷⁴

Another aspect of the relationship between government and individuals is the role of information. John Milton’s work, particularly *Aeropagitica*, is often cited by academics and legal professionals in defense of the First Amendment.⁷⁵ Milton argued that a democratic government should be transparent to its citizens, “[l]et her [Truth] and falsehood grapple; who ever knew

⁷¹James Madison, *The Federalist No. 49*, reprinted in BENJAMIN F. WRIGHT, ED., THE FEDERALIST 348 (1961).

⁷²JOHN STUART MILL, ON LIBERTY 73 (2003 ed.). Mill stated that the subject of his essay, *On Liberty*, is to explore the “limits of the power which can be legitimately exercised by society over the individual.” *Id.* Additionally, Mill expressed concern about the possibility of the tyranny of the majority. *Id.* at 76. Tyranny of the majority is one of the main criticisms of democracy, and is discussed more in-depth later in this chapter.

⁷³*Id.* at 75.

⁷⁴These factors are a modern distinction made by the author and were not specifically cited by Mill.

⁷⁵Oliver Wendell Holmes based his market place of ideas theory on Milton’s writing. *See* *Abrahams v. United States*, 250 U.S. 616 (1919).

Truth put her to the worse, in a free and open encounter.”⁷⁶ Although application of the ideas of *Aeropagitica* adhere to its historical rejection of censorship, the work also has had a significant impact on modern understandings of freedom of speech and expression.

Turning to more contemporary commentary, Meiklejohn, a philosopher, educator, and free speech advocate, profoundly influenced the legal conceptualization of free speech in the early 20th century. Meiklejohn linked free speech, which is constitutionally protected in the United States, to the functioning of a democratic state⁷⁷ by arguing that the successful functioning of self-government through democracy requires a well-informed citizenry.⁷⁸ To demonstrate the role of individuals in this self-government model, Meiklejohn remarked that governmental officials do not control, “our governing.” However, “over their governing we have sovereign power.”⁷⁹ By linking free speech to the functionality of democracy Meiklejohn emphasized the need to focus on conditions required for free speech to exist, such as the need for information about the government.

In the late 1980s, Baker, a leading scholar of constitutional law who was deeply influenced by Mill,⁸⁰ refined the marketplace of ideas theory to shift the focus to individual liberty. According to Baker, societal truth does not matter as much as the individual’s expression and exploration of truth.⁸¹ Baker updated Mill by emphasizing that self-realization of the

⁷⁶JOHN MILTON, *AEROPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* 47 (2008).

⁷⁷ALEXANDER MEILKEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 16-17 (1948).

⁷⁸*Id.*

⁷⁹Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

⁸⁰C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 4 (1989).

⁸¹*Id.* at 5.

individual is a component of a completely developed participatory citizenry. While these various perspectives may seem particularly theoretical and at times disparate, some general characteristics ascribe to a democratic state by distilling the various contributions by these scholars and others.

General Characteristics of a Modern Democracy

In general, decision-making in democracies should be a collective endeavor, “authorized by citizens as a body.”⁸² This idea of collective authorization, or *consent*, is the crucial feature of contemporary democratic systems.⁸³ For this decision-making to be legitimate, it must flow from individuals who are part of a community and who are equal under the law.⁸⁴ Other defining features of most democracies include: fair elections, positive participatory rights for voting and elections, and a set of freedoms necessary for elections and related participatory rights.⁸⁵ Fair elections allow each individual in the democracy an opportunity to hold elected office and adopt a prominent role in the political system. Despite most citizens never holding public office in the United States, individuals have the legal option to try to be elected and hold office.

⁸²JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY* 223 (2009).

⁸³JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 4 (1996).

⁸⁴COHEN, *supra* note 82. Public discourse, in this sense, is “a dialogical process of exchanging reasons for the purpose of resolving problematic situations that cannot be settled without interpersonal communication and coordination.” JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 27 (1996). This discourse has a specific goal, and does not just consist of meaningless discussion. *Id.* at 57. The focus on goal-driven discourse requires a necessary level of compromise from individuals in the group. These compromises should not be at the cost of moral concessions from various sides in the discourse, but should instead attempt to shift the common framework of the deliberation taking place. *Id.* at 91. Addressing the issue of compromise maintains the power dynamics of a public discussion.

⁸⁵Guillermo O’Donnell, *DEMOCRACY, AGENCY AND THE STATE: THEORY WITH COMPARATIVE INTENT* 23 (2010).

Positive participatory rights for voting and electing governmental officials ensures that even if individuals are not vying for a position in a fair election, the guaranteed right to vote for representatives in those elections remains. The third feature, freedoms necessary for elections and related participatory rights, is a general, all-encompassing aspect, meant to guarantee that individuals have access to the resources needed for involvement in the political process.⁸⁶ These resources include access to governmental information because this access provides resources essential for participating in the deliberative democratic process.

Challenges to Democratic Theories

While democracies are idealized as a political system across most of the world, significant criticism concerning the actual implementation of democratic systems remains. Meiklejohn, for instance, asserted that America, epitomizing Western democracy, is not as self-governing as its citizens would like to believe.⁸⁷ Instead, institutions such as the Electoral College distance individuals from the actual process of democratic rule. Robert Dahl, on the other hand, remarked that democracy is essentially a political model, not necessarily a political reality.⁸⁸ In particular, some criticisms center on the roles of majorities, participation, and polarization of viewpoints.

⁸⁶*Id.*

⁸⁷ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 3 (2001). The United States is a liberal democracy, known more commonly in the current discussion as a deliberative democracy. Theoretical approaches to democracy can be rather fluid and often adopting various forms in practice. For example, the United States is a constitutional republic, while Japan, also a liberal democracy, has a constitutional monarchy.

⁸⁸ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 35 (2006).

Majorities

Supreme Court Justice Breyer offered a sound critique of the early notions of direct democracy. Under a direct democracy, a vote by individuals resulted in rule by the simple majority. Rule by a simple majority, arising from merely totaling votes, can transform into a tyranny of the majority, since the concerns of groups that do not vote in line with the majority remain disregarded.⁸⁹ James Madison, for example, expressed particular concern for the possibility of maligned minority views in Federalist #10.⁹⁰

Countering the critique of the majority's role in the democratic process, Dahl contended that majorities are not set, discrete groups,⁹¹ but represent people's shifting from majority to minority and back *depending on the issue* guiding votes.⁹² Dahl identified this characteristic as Qualified Minority Rule in which a small minority expends sufficient effort toward an outcome to actually sway the majority to accept the minority's outcome.⁹³ Recognizing this potential for fluidity of power renders the prominent role of majorities, theoretically, much less problematic.

Participation

In most modern democracies, the size and complexity of the political structures adds difficulty to true deliberation. Modern interpretations of democracy create freedom from the

⁸⁹STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 4 (2006).

⁹⁰James Madison, *The Federalist #10*, Const.org (2011), <http://www.constitution.org/fed/federa10.htm>.

⁹¹ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 133 (2006).

⁹²*Id.*

⁹³*Id.* at 50.

simple majority but limits direct involvement of citizens.⁹⁴ In the place of direct involvement is the proliferation of institutions, such as the media, that function as communicative channels between the government and the people.

The prevalence of institutions is both necessary for the rule of physically bigger governments but also represents limits in terms of discouraging diversity of individual perspectives.⁹⁵ Lack of diversity is a prevalent problem in modern democracies, and social inequalities create difficulties for minorities trying to participate equally in discourses concerning race, class, and gender.⁹⁶ For example, the digital divide, often cited as impairment for people of lower socioeconomic status, limits garnering governmental benefits, accessing governmental information, etc.⁹⁷

The limited direct involvement of individuals in public deliberation indicates several problems. Most obvious are the issues of pluralism and complexity. At the very least it is impractical, and at the very most, impossible, to achieve actual consent through the participation of individual members of a democracy.⁹⁸ Sheer physical logistics make total involvement difficult, if not impossible. In modern societies such as the United States, institutions can also limit diversity through agenda-setting processes, whereby viewpoints do not necessarily emerge from an individual person's organic developmental process.⁹⁹

⁹⁴STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2006).

⁹⁵JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 82 (1996).

⁹⁶*Id.* at 105.

⁹⁷*See generally* PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* (2001).

⁹⁸BOHMAN, *supra* note 95, at 2.

⁹⁹*Id.* at 82.

Of additional concern is the previously identified issue of elitism, characterized by economic inequality of individuals within the group.¹⁰⁰ The disparity of wealth leads to concerns for access to the process of deliberation. Wealthy individuals have better access to education, increased access to channels of information via media sources,¹⁰¹ and in general improved opportunities to interact politically.¹⁰² Importantly, an uncertain ability to participate in discourse may force minorities to accept an unequal balance of power. Inequalities in discourse can perpetuate and even render permanent the minority status of certain groups.¹⁰³ For example, Native Americans have historically held a fixed and unequal status in American society because of a variety of historic economic factors.¹⁰⁴

¹⁰⁰*Id.* at 2.

¹⁰¹See P.J. Tichenor, G.A. Donohue, & C.N. Olien, Mass Media Flow and Differential Growth in Knowledge, 34 PUBLIC OPINION QUARTERLY 159-170 (1970).

¹⁰²While being independently wealthy is by no means a requirement to seek public office, many higher ranking public officials *are* independently wealthy. Mitt Romney, who was a candidate for the GOP for the 2012 Presidential race, had an income of \$21 million in 2011. Liz Davidson, *How to Pay Taxes Like Mitt Romney*, Forbes (Jan. 25, 2012), <http://www.forbes.com/sites/financialfinesse/2012/01/25/how-to-pay-taxes-like-mitt-romney/>. Considering the costs of running for public office, in the 2008 presidential race, President Obama raised and spent approximately \$750 million. G.W. Bush spent approximately \$270 million in the 2004 presidential race. Presidential Campaign Receipts, Federal Election Committee (2008), http://fec.gov/press/bkgnd/pres_cf/2008PresCamp/1_OverviewPresFinActivity1996-2008.pdf. The sheer amount of capital for campaigns necessarily excludes the majority of U.S. citizens from participating in the political process. Only the upper, upper class is likely to participate in politics on the national stage.

¹⁰³BOHMAN, *supra* note 95, at 95.

¹⁰⁴Socioeconomic status, or SES, is a combined measure of education, income, and occupation used to assess the social standing of a group. American Psychological Association, *Ethnic and Racial Minorities and Socioeconomic Status*, APA, <http://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx>. Prior research demonstrated that a low SES leads to a web of interconnected problems: systematic discrimination and marginalization, poor education and access to educational resources, lower levels of physical health, and poorer psychological health. *Id.*

Polarizing Perspectives

Finally, current democracies tend to be much bigger in terms of territory and population than ancient democracies, encouraging polarization in the latter more so than the former.¹⁰⁵

Polarization has a variety of origins, most obviously from political parties and often along class lines, characterized by divisions between elites in a society and the public.¹⁰⁶ The problem arising from polarization in a democracy is that individuals aligned along polarized sides, tend to ignore alternative perspectives.¹⁰⁷

The major challenges the current study identifies for a democratic model of government are: the role of majorities, the lack of meaningful participation, and polarizing perspectives. While many criticisms have sound bases that require consideration when implementing public policy, a scrutiny of various democratic theories offers positive and negative implications for policy considerations. In particular, deliberative democracy, while not a complete solution, addresses many of the challenges to democracy discussed in this section.

Democratic Theories: Aggregative and Deliberative

While many democratic theories have been addressed since Aristotle first articulated the idea of democracies, the current study considers two particular models of democracy. The first model, the aggregate, embraces democracy as a way to gather individuals' preferences and

¹⁰⁵JOHN S. DRYZEK, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE 161-162 (2010).

¹⁰⁶*Id.* at 162.

¹⁰⁷*Id.* at 161-162.

aggregate them.¹⁰⁸ The second model, deliberative democracy, maintains governing should be conducted by discussion.¹⁰⁹

Both models emphasize elements that, taken as a whole, characterize broad aspects of a democratic state. Emphasizing one model over another establishes priorities in terms of public policy and addressing certain criticisms of the democratic model. The current study focuses on the deliberative model of democracy and, more specifically, argues that deliberative democracy is the appropriate lens for analyzing democratic states.

Aggregative Model of Democracy

The aggregative model of democracy focuses closely on the voting process. This model has early roots in Rousseau's 18th century social contract theory, which emphasizes submission to the general will of the people.¹¹⁰ The assumption is that general will mirrors common good. Yale professor, Ian Shapiro, argued, "[the] aggregative tradition has bequeathed a view of democracy in which competing for the majority's vote is the essence of the exercise."¹¹¹ Part of the legitimacy of the aggregative model rests on counting individuals through polling or voting,¹¹² but results in over-reliance on simple numbers, which do not reflect minorities and avoids ignoring emergence of the voice of a true majority.

¹⁰⁸ AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13-15 (2004).

¹⁰⁹ *Id.* at 3-5.

¹¹⁰ IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3 (2003).

¹¹¹ *Id.*

¹¹² DRYZEK, *supra* note 105, at 30. Dryzek argued that democratic theory should move beyond the simplicity of the aggregative model. *Id.*

One of the benefits of the deliberative model over the aggregative model is the emphasis on discourse. According to Aristotle, “deliberation can be used to alter preferences so as to facilitate the search for common good. For them [deliberative theorists], the general will has to be manufactured, not just discovered.”¹¹³ The process of discovery is a major interest of the current study, due to the need for individuals’ right to know in order to accomplish the discussion required of the deliberative model.

Deliberative Model of Democracy

The deliberative model of democracy shifts emphasis away from counting votes and towards the process of citizens discussing and being involved in the voting process. The focus in the deliberative model is not the outcome so much as the processes by which individuals engage in matters of governance. Unlike the aggregative model, which highlights *voting* as the decision-making potential of individuals, *discourse* is the highlight in the participatory model and is the foundation of the system’s legitimacy.¹¹⁴ Political theorist and professor, John Dryzek, distinguished the deliberative model by stating, “[d]emocracy, in other words, is not just about the making of decisions through the aggregation of preferences. Instead, it is also about processes of judgment and preference formation and transformation within informed, respectful, and competent dialogue.”¹¹⁵

Several aspects distinguish between deliberative and participatory democracies, both of which fall under the deliberative model. While these distinctions may seem minor, they are

¹¹³IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3 (2003).

¹¹⁴JOHN S. DRYZEK, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE 21-22 (2010).

¹¹⁵*Id.* at 3.

invaluable when discussing governmental transparency. For example, participatory democracy emphasizes broad involvement of citizens in the political process¹¹⁶ and encourages individual citizens to participate meaningfully. Logistics stifle encouragement to participate in large, modern societies. The role of technology is often touted as a potential antidote to the issue of logistics, allowing a larger percentage of the population's involvement despite physical challenges, such as geography.¹¹⁷ For example, the Occupy Wall Street Movement was a grassroots effort that recently revived interest in participatory democracy in the United States and was largely organized via social media and other online tools.¹¹⁸

Deliberative democracy emphasizes the role of individuals' discussions of political decisions rather than solely their political participation through activities like voting. Deliberative democracy better legitimizes political decisions through its focus on both individual members' ability to participate and discourse.¹¹⁹ Individuals of a deliberative group do not just have the opportunity to express opinions; they have the opportunity to change personal opinions or opinions of others in the group.¹²⁰ The ability to shift and change public opinion is a crucial

¹¹⁶JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 76 (2011).

¹¹⁷*See generally* BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* (2010); DANIEL LATHROP & LAUREL RUMA, *OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE* (2010).

¹¹⁸*See* Michael Hardt & Antonio Negri, *The Fight for 'Real Democracy' at the Heart of Occupy Wall Street: The Encampment in Lower Manhattan Speaks to a Failure of Representation*, *FOREIGN AFFAIRS* (2011), <http://www.foreignaffairs.com/print/98542>.

¹¹⁹JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY* 264-266 (2009). Deliberation is a "form of discussion intended to change the preferences on the bases of which people decide how to act. Deliberation is 'political' when it leads to a decision binding on a community." Adam Przeworski, *Deliberation and Ideological Domination*, in *DELIBERATIVE DEMOCRACY* 140 (Jon Elster ed., 1998).

¹²⁰*Id.*

aspect of deliberative democracy, which avoids discounting minority perspectives and acknowledges their vital role in the public sphere.

Deliberative Democratic Theory

The term “deliberative democracy,” used by Joseph M. Bessette in 1980, refers specifically to governance by in-depth discussion and reasoning among citizens.¹²¹ In a deliberative democracy management of the government occurs by deliberation performed publicly by the members of that democracy.¹²² The focus of deliberative democracy is more than simple discussion, but rather relies upon *public reasoning*.¹²³ This approach contrasts directly with aggregative democracy; rather than totaling votes to represent preferences of individuals, deliberative democracy requires individuals deliberate to reach a common good.¹²⁴ Deliberative democracies remain legitimized through iterations of discourses by major institutions, such as governmental assemblies and agencies.¹²⁵

¹²¹See generally Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102-116 (Robert A. Goldwin & William A. Schambra eds., 1980).

¹²²JOSHUA COHEN, PHILOSOPHY, POLITICS, DEMOCRACY 16 (2009). This kind of democracy, if performed properly, involves “public deliberation focused on the common good, requires some form of manifest deliberation focused on the common good, requires some form of manifest equality among citizens, and shapes the identity and interests of citizens” in ways intended to benefit the country. *Id.* at 19.

¹²³*Id.* at 232. According to Joshua Cohen, an ethics and law professor, “democracy is a system of social and political arrangement [sic] that institutionally ties the exercise of power to free reasoning among equals.” *Id.* Public reasoning enjoys a differentiated and elevated position above a mere discussion.

¹²⁴See generally JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY (1996). JOHN S. DRYZEK, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE (2010).

¹²⁵JOHN CHRISTMAN, THE POLITICS OF PERSONS 225 (2009).

A sound deliberative process has particular, integral characteristics. First, deliberation in groups should be ongoing and independent of outside influences.¹²⁶ Second, members of the group should share in the deliberations.¹²⁷ Third, deliberative democracy is pluralistic, promoting groups' members' sharing deliberation toward resolving collective and divergent goals.¹²⁸ Fourth, clear connections exist between deliberation among the groups' members and outcomes achieved by the group.¹²⁹ Finally, members of the group should recognize each other's deliberative capacities.¹³⁰ The deliberation ought to be free, reasoned, and the parties involved in the deliberation should be equal; the deliberation should work toward a consensus.¹³¹

An accepted notion is that deliberative democracy has better outcomes than other democratic theories:¹³² Specifically, deliberative democracy, at least partially, counters the main criticism of democratic systems in general. First, while majority and minority viewpoints emerge in deliberative discussions, chances for a shared consensus emerging from these discussions increases, leading to majorities that incorporate improved diversity of individuals' opinions. Second, empirical studies have linked a rise in public interest to increased encouragement for

¹²⁶JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY* 22-23 (2009).

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.* at 23-24.

¹³²See Susan C. Strokes, *Pathologies of Deliberation*, in *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); JAMES S. FISHKIN, *THE DIALOGUE OF JUSTICE: TOWARD A SELF-REFLECTIVE SOCIETY* (1996).

participation in political deliberations.¹³³ The current research identifies an increase in meaningful participation through deliberation, addressing a lack of involvement found in other forms of democracy. Finally, due to emphasis on public reasoning, the tendency for partisanship declines with active deliberations and decreases development of polarized perspectives.

Another major benefit of deliberative democracy is the ability to establish autonomy.¹³⁴ Only a deliberative framework can demonstrate democracy's functioning as collective self-government, mirroring individual self-government. According to Cohen, a deliberative democracy is "morally legitimate" while also respecting the "dignity of its free members by ensuring their full autonomy."¹³⁵ This autonomy, predicated on a system of equality, entails every citizen having the same rights.¹³⁶ The benefit of using a deliberative democracy lens to examine decisions of public policy is that deliberative democracy thrusts governmental information to the forefront of importance. Under deliberative democracy, information *is* the sphere for deliberation that should be most accessible to individuals.

This dissertation is specifically focused on the use of information in a deliberative democracy to maintain a healthy democracy. In particular, what rights individuals should have to government information in a deliberative democracy.

¹³³See JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 106-150 (2011).

¹³⁴The inclusion of autonomy comes from Rousseau, who argued that individuals achieve autonomy through mutual and equal cooperation for the "common good." JOSHUA COHEN, *ROUSSEAU: A FREE COMMUNITY OF EQUALS*, 98 (2010).

¹³⁵*Id.* at 12.

¹³⁶*Id.* at 18.

Deliberative Democracy and Access to Information

The reference to a *right to know* applies, in this study, to an individual's right to know versus an institution's or group's right to know.¹³⁷ The U.S. Constitution bestows rights upon individuals, not institutions or groups.¹³⁸ While granting some groups the same rights as individuals, these rights derive from the original rights granted to individuals.¹³⁹

In a deliberative society, individuals must be able to access government-controlled information and disseminate and discuss that information.¹⁴⁰ The individual's right to know, in this dissertation, refers to access to governmental information in the form of official records only—and not the information gleaned from meetings of officials or official bodies. The extent of access to governmental information remains controversial as a general legal topic. David O'Brien, in discussing a right to know in the 1980s, claimed that “an individual's need to know is

¹³⁷Baker, a leading constitutional law scholar, in referencing John Stuart Mill, noted that free speech does not protect the proverbial marketplace, but instead protects an arena for individuals to collaborate in a democracy. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 5 (1989). Baker intended to emphasize the role of an individual in a democracy, rather than a system of free speech, found in the traditional marketplace metaphor.

¹³⁸DAVID O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 106 (1981). Some arguments contend that the Constitution specifically identifies the press and lobbyists. The Supreme Court has largely discredited special rights, outside individual rights, for the press. *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). Although the Constitution does not explicitly name lobbying, many view the profession as specifically protected by the First Amendment's clause allowing individuals to “petition the government for a redress of grievances.” RONALD J. HREBENAR & BEYSON B. MORGAN, *LOBBYING IN AMERICA* 2-6 (2009). The historical support for lobbying can be found in James Madison's concerns for the “dangers of factions” that he identified in the *Federalist Papers*, prior to the Constitution's ratification. *Id.* Additionally, this study argues that the Constitution should not create *classes* of citizens by giving special rights to groups based on race, class, gender, or professional occupation.

¹³⁹For example, in *Branzburg v. Hayes* (1972) the Supreme Court declined to approve federal protections for reporters that regular individuals do not have. *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

¹⁴⁰DAVID SADOFSKY, *KNOWLEDGE AND POWER* 26 (1990).

sufficiently meritorious only when demonstrated by a personal or proprietary interest in claiming access to government information” and that “there remains the further task of determining the legitimacy of those claims with regard to competing legal, moral, and political considerations.”¹⁴¹

O’Brien’s perspective is fairly narrow for access to government-controlled information and is not supported by either deliberative theory *or* current federal statutes governing access. The FOIA allows undifferentiated access to government-controlled information, regardless of any personal or proprietary interests. There is the argument that basic rights such as free speech and press, freedom of association and religion, and *access to political resources* predicates the ability to participate in politics.¹⁴² Without an unobstructed right to access government information, individuals could not perform their discursive duties.

The current focus is individuals’ access to government-controlled information in a democracy as perceived through the lens of the deliberative model. While individuals theoretically need access to a variety of privately-held information, from medical to environmental, these needs do not represent provisions within the scope of the federal government. The FOIA addresses a right to know in terms of government-held information, and while this dissertation argues that the statute is fundamentally flawed in application, that limitation is sound. Logically then, prioritizing governmental information requires reexamining routes of access to government-controlled information.

Both of these factors, the focus on *individuals* and the restriction to *governmental* information, derive from the roles and features of deliberative democracy in the United States.

¹⁴¹O’BRIEN, *supra* note 138, at 14. O’Brien of course considered a right to know to be a concrete right as opposed to an abstract right. In this usage, an abstract right is one that is unconditional and unqualified while a concrete right must be qualified by competing interests. *Id.* at 21. One example according to O’Brien’s argument would be a right to know demonstrating a need for free speech, where a right to know is a right only when qualified by free speech.

¹⁴²JOHN CHRISTMAN, *THE POLITICS OF PERSONS* 243 (2009).

According to James Bohman, a professor and political philosopher, the “success of a deliberative form of democracy depends on creating social conditions and institutional arrangements that foster the public use of reason.”¹⁴³ This success relies on individuals’ access to government-controlled information as demonstrated in this chapter.

To fully answer the research question posed at the beginning of this chapter, government transparency is a necessary prerequisite to maintaining the democratic principles used in the founding of the United States. As a democratic nation, arguably a deliberative democracy, the United States emphasizes the need for an informed citizenry. For citizens to be informed, they *must* have access to information about the government. This information should be authoritative and therefore come from an official source. In the United States, the main source of access to federal records is, again, the FOIA.

Chapter 3 will trace the legislative history of the FOIA. It will also outline the constraints in which the FOIA operates with regards to who can request records, what is considered a record under the statute, requirements for requesting information, and other relevant information. In addition this chapter will address some relevant literature concerning government transparency.

¹⁴³JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 238 (1996).

Chapter 3: Legislative History and Intent of the FOIA

Prior to the 1940s, there was no way for individuals to officially and reliably access government information. As discussed in Chapter Two, this lack of government transparency was in direct violation of the tenets of a deliberative democracy. Individuals cannot function as informed individuals without reliable information concerning their government.

This issue was partially resolved with the passage of a series of federal statutes guaranteeing access to government-controlled information beginning in the 1940s. The most prominent of these statutes is the Freedom of Information Act, which still dominates the legal landscape of government transparency today. This chapter assesses the legislative scope and intent of the FOIA. This focus allows later chapters to address both the inconsistent fit of FOIA in addressing the need for government transparency as well as explore ways that government transparency might be better addressed. This chapter will conclude with some relevant scholarship on government transparency.

Federal Access Statutes from the 1940s-1970s

During the 19th and early 20th centuries, citizens had no legal method for receiving government-controlled information of any sort. Instead a wide-ranging tendency toward bureaucratic secrecy prevailed, especially during the 1930s and World War II.¹⁴⁴ These attitudes

¹⁴⁴ Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 517 (2006). In the 1930s, agencies had "absolute authority over their records." *Id.* Beginning in 1941 during World War II, additional agencies like the Office of Censorship, enforced restrictions on publications by the press, and used censorship by European powers to block the press' access, leading to simmering tensions with the press, domestically. JAMES RUSSELL WIGGINS, FREEDOM OR SECRECY 96-98 (1954); JEFFREY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER 151 (1999).

began to change along with other social mores in the aftermath of World War II. Many reporters felt stifled by the secretive governmental atmosphere during the war and began demanding changes in the government's system.¹⁴⁵ The argument that individuals must have the *right to know* about government activities became dominant.¹⁴⁶ The press' concern during this time encompassed government's opacity on matters such as nuclear weapons research, the expansion of Communism overseas, and mounting tensions eventually leading to the Cold War.¹⁴⁷

Initial attempts to grant statutory access to government-controlled information were largely unsuccessful. The Administrative Procedures Act (APA), of 1946, ostensibly established avenues for public access by clarifying agencies' record keeping procedures.¹⁴⁸ The APA eventually led to the passage of the Freedom of Information Act in 1966, which granted access to

¹⁴⁵ MARGARET BLANCHARD, *EXPORTING THE FIRST AMENDMENT* 3 (1986). This secrecy also came from European powers, allies of the United States during WWII.

¹⁴⁶ HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* xiiiv (1953). Commentators often credit Kent Cooper, then director of the Associated Press, for coining the term "right to know" in a 1945 speech and in a 1945 New York Times opinion column about press access to government information and officials. This delineation of recent articulation of the public's right to know versus older understandings is not clear. For example, when exploring the etymology of the phrase, Kiyul Uhm (2008), a mass communication faculty member at Daegu University, credits Harold L. Cross, freedom of information scholar, legal counsel for the New York Herald Tribune, and faculty member at Columbia University, with popularizing the contemporary term as early as 1936 and, more widely, with the 1953 publication of the book, *Legal Access to the Public*. This argument discredits the notion that Cooper originated the term. Kiyul Uhm, *The Founders and the Revolutionary Underpinning of the Concept of the Right to Know*, 85(2) J&MC QUARTERLY 393, 405 (2008).

¹⁴⁷ Halstuk & Chamberlin, *supra* note 144, at 520.

¹⁴⁸ Arthur T. Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act, THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* iii-v (1947). This access was never granted, due to poorly crafted parts of the APA. Section 3, specifically, was used to *deny* rather than *grant* access to agencies' information. S. REP. NO. 813, 89th Cong., 1st Sess. (1965), *reprinted in* THE FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 38 (1974).

records of federal agencies and departments¹⁴⁹ while the Government in the Sunshine Act (1976), granted access to meetings of federal agencies.¹⁵⁰ The APA, the original effort at government transparency, was quite inadequate and actually further decreased access to federal agency records though.

Administrative Procedures Act

After World War II, renewed interest emerged for establishing a guaranteed legal avenue for individuals to access governmental records as the government itself grew exponentially.¹⁵¹ During President Franklin D. Roosevelt's administration, for example, the federal bureaucracy expanded significantly from New Deal programs.¹⁵² Additionally, the Roosevelt Administration, which remained cloaked in bureaucratic secrecy, refused to divulge information on issues of domestic and international concern.¹⁵³ In 1940, President Roosevelt's Executive Order, the first of its kind, prevented the release of national security information and allowed agencies to define

¹⁴⁹ Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003).

¹⁵⁰ Government in the Sunshine Act, 5 U.S.C. § 552b (1976). Although the Sunshine Act is an important component of governmental transparency, discussion of open meetings is beyond the scope of the current study which focuses on agency records.

¹⁵¹ Halstuk & Chamberlin, *supra* note 144, at 518-19.

¹⁵² ALFRED H. KELLY, WINFRED A. HARBISON AND HERMAN BELZ, *THE AMERICAN CONSTITUTION: IT'S ORIGINS AND DEVELOPMENT* 470 (1991). Cass R. Sunstein, constitutional legal scholar and law professor, argued that the New Deal represented a pivotal time which ignored the original intent of constitutional checks and balances between branches in favor of expansion of independent and often insulated regulatory agencies. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 (2) *HARVARD LAW REV.* 421 (1987).

¹⁵³ Halstuk & Chamberlin, *supra* note 144, at 520.

“national security.”¹⁵⁴ This expansion of executive authority, combined with various efforts during WWII, helped spur demands for governmental transparency.

The first official response of the government to the public’s and press’ outcry resulted in congressional approval of Section 3 of the APA in 1946.¹⁵⁵ The APA set procedural standards for governmental records of federal agencies, which previously crafted their own rules and regulations concerning disclosure.¹⁵⁶ Section 3 specifically intended to provide access for the press and public to federal governmental records and foster greater transparency.¹⁵⁷

Several gaps remained in the poorly crafted Section 3 though, resulting in loopholes advantageous for agencies that further minimized governmental transparency rather than increasing transparency.¹⁵⁸ In particular, the agencies gained from vague guidelines for disclosure that granted leeway for agencies in determining what information to withhold. Additionally, individuals requesting information needed a direct connection with the information requested.¹⁵⁹ This policy allowed withholding all information not specifically pertaining to the person submitting the request. Finally, judicial remedies were lacking for those receiving denied requests.¹⁶⁰ Individuals were unable to successfully challenge any agency decisions to withhold information under the APA.

¹⁵⁴ See Exec. Order No. 8,381, 3 C.F.R. 634 (1940).

¹⁵⁵ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

¹⁵⁶ Arthur T. Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES iii-v (1947).

¹⁵⁷ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

¹⁵⁸ S. REP. NO. 813, 89th Cong., 1st Sess. (1965), *reprinted in* THE FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 38 (1974).

¹⁵⁹ 5 U.S.C. § 1002.

¹⁶⁰ HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW 197 (1953).

These policies rendered the APA worse than useless; under the APA *more* information was withheld from release. Harold Cross, pioneering FOI advocate and author, argued that the APA had little impact on the existing tradition of bureaucratic secrecy practiced by agencies.¹⁶¹

Secrecy also accelerated after President Harry Truman's 1951 unprecedented Executive Order,¹⁶² which allowed nonmilitary civilian agency members to classify information.¹⁶³ This move greatly increased the number of people legally allowed to withhold records due to a classified status. Truman claimed that these new powers of classification were necessary to protect American interests overseas; he once famously stated that the press had already divulged 95 percent of what he considered information of national security.¹⁶⁴

Truman's Executive Order resulted in a legal discussion concerning classification of a power enumerated by the Constitution.¹⁶⁵ Prior to Truman's Executive Order, it was assumed that the legal authority to classify information came from statutes, not the Constitution. President Truman claimed authority to determine classification status from Article II¹⁶⁶ of the Constitution, a practice adopted by subsequent presidents for establishing pervasive policies of secrecy in the

¹⁶¹ JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:2 (1990).

¹⁶² Executive Order No. 10,290 (1951).

¹⁶³ *Id.*

¹⁶⁴ When Mr. Truman Sounded off on Responsibilities of the Press, *EDITOR & PUBLISHER*, Oct. 13, 1951, at 62-64.

¹⁶⁵ Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 ILL. L. REV. 881, 890 (2008).

¹⁶⁶ Specifically, Article II, Section 1, Clause 1 and Article II, Section 3, Clause 4 are the basis of Constitutional support. Clause 1 states, the "executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows." U.S. Const. art. II, § 1. This clause gives the President the power to execute instructions from Congress. Clause 4 states that the President must "take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

executive branch.¹⁶⁷ For example, President George W. Bush's Executive Order in 2001 limited the release of records of previous presidents.¹⁶⁸

To recap, during President Franklin D. Roosevelt's administration, the federal bureaucracy grew larger from the institution of New Deal programs. Roosevelt's presidency often kept domestic and international issues from public disclosure and discourse.¹⁶⁹ Additionally, President Roosevelt wrote Executive Order 8,381, which prevented release of information deemed harmful to national security.¹⁷⁰ Specifically, the President "shall define certain vital military and naval installations or equipment or requiring protection against the general dissemination of information" without permission from relevant officers.¹⁷¹

President Truman continued this policy, with an unprecedented Executive Order that allowed *nonmilitary civilian agencies* to classify additional information as national security issues which forestalled their release.¹⁷² President Truman said he expanded censorship authority to civilians to "strengthen our safeguards against divulging to potential enemies information harmful to the security of the United States."¹⁷³ Similarly, President Dwight D. Eisenhower, in 1953,

¹⁶⁷ Kitrosser, *supra* note 165. President Franklin D. Roosevelt claimed statutory authority for his Executive Order concerning classification of information, but Truman was the first to successfully establish legal authority via the Constitution. *Id.*

¹⁶⁸ Executive Order No. 13233, *Further Implementation of the Presidential Records Act*, 66 F.R. 56025 (November 5, 2001).

¹⁶⁹ JAMES RUSSELL WIGGINS, *FREEDOM OR SECRECY* 96-98 (1954).

¹⁷⁰ Exec. Order No. 8,381, 3 C.F.R. 634 (1940).

¹⁷¹ *Id.*

¹⁷² Exec. Order No. 10,290, 16 Fed. Reg. 188 (Sept. 27, 1951).

¹⁷³ Harry Truman, *Statement by the President upon Signing Executive Order Prescribing Regulations for Classifying and Protecting Security Information*, THE AMERICAN PRESIDENCY PROJECT (Sept. 25, 1951), <http://www.presidency.uscb.edu/ws/?pid=13925>.

declared the need for more “effective controls on classification and protection of that official information which must be safeguarded for national defense purposes.”¹⁷⁴

Historically, the Housekeeping Statute of 1789, and the Administrative Procedures Act of 1946 (APA) justified withholding governmental records from the public. The Housekeeping Statute became the basis for rejecting requests for government-controlled information¹⁷⁵ by providing the heads of agencies the ability to regulate the “custody, use, and preservation of records, papers, and property.”¹⁷⁶ The APA theoretically established access to governmental information for citizens.¹⁷⁷ In reality, Section 3 of the APA contained several loopholes that agencies exploited to further restrict access to government-controlled information.¹⁷⁸ The APA’s vague guidelines allowed agencies to ignore requests for information. The most egregious loophole in the APA required citizens to have a direct connection to the information sought, allowing agencies to further withhold information.¹⁷⁹

The failure of the APA and the increase of secrecy arising from President Truman’s Executive Order led to widespread condemnation on the pervasive lack of transparency at the federal level. The media were very critical of the situation, and Cross’s 1953 seminal report, *The*

¹⁷⁴ Dwight D. Eisenhower, *Statement by the President on a Proposed Executive Order Entitled “Safeguarding Official Information in the Interest of the Defense of the United States,”* THE AMERICAN PRESIDENCY PROJECT (June 17, 1953), <http://www.presidency.uscb.edu/ws/?pid=9613>.

¹⁷⁵ SPC. HAROLD C. RELYEA, ON ACCESS TO GOVERNMENT INFORMATION IN THE UNITED STATES, CRS REPORT FOR CONG. (2005).

¹⁷⁶ *Id.*

¹⁷⁷ Arthur T. Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES iii-v (1947).

¹⁷⁸ S. REP. NO. 813, 89th Cong., 1st Sess. (1965), *reprinted in* THE FREEDOM OF INFORMATION SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 38 (1974).

¹⁷⁹ 5 U.S.C. § 1002. *See supra* pp. 42-46 for a more detailed discussion of the flaws of the APA.

People's Right to Know, emboldened the media's criticisms.¹⁸⁰ By 1955 the government confronted policy changes with long-lasting effects for the availability of federal records in the United States. It wasn't until 1966 though, with the passage of the FOIA, that Congress finally guaranteed individuals actual access to government information in the form of executive agency records.

Legislative History of the Freedom of Information Act

In 1955, U.S. Representative John E. Moss of California, the reform-minded Chair for the Special Government Information Subcommittee mentioned in Chapter 1, launched congressional hearings on the APA.¹⁸¹ Hearings on issues of governmental transparency lasted for ten years and involved hundreds of witnesses prior to eventual enactment of the Freedom of Information Act.¹⁸² Not a single agency supported the proposed law during this ten year timespan.¹⁸³ Representative Moss enlisted Harry Cross, the aforementioned expert on the right to know, and Jacob Scher, a lawyer and journalism professor from Northwestern University, to craft the initial drafts of the FOIA.¹⁸⁴

¹⁸⁰ See generally HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953).

¹⁸¹ JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:02, 2-5 (1994). Congressman Moss was instrumental in establishing the groundwork necessary to document systematic manipulation of governmental transparency by the executive branch. *Id.* at 11.

¹⁸² *Id.* Of all the witnesses representing agencies, none supported the FOIA. *Id.* at 3-8, 3-9.

¹⁸³ *Id.* at 3-8-9.

¹⁸⁴ *Freedom of Information: Hearings Before the Subcomm. On Administrative Procedure of the Senate Judiciary Comm., 88th Cong., 1st Sess. (1963).* Jacob Scher served as an occasional counsel to the Moss Committee, unlike Cross who was more involved. Scher and Cross deserve credit for developing the idea that individuals should have a judicially enforceable right to examine government-controlled information. *Id.*

There were a slew of proposed bills to either correct or replace the problematic sections of the APA and Housekeeping Statute in the interim. During the 85th Congress in 1958, for example, Representative Moss proposed an amendment to the 1789¹⁸⁵ Housekeeping Statute,¹⁸⁶ which had been exploited over the years in conjunction with the APA to reject requests for government-controlled information. The original statute allowed heads of agencies to “prescribe regulations regarding the custody, use, and preservation of the records, papers, and property of their entity[sic].”¹⁸⁷ The Moss amendment to the Housekeeping Statute forced federal agencies to establish filing systems to maintain records concerning agencies’ activities.¹⁸⁸ The amendment also closed the loophole that allowed federal agencies to deny many requests for information.

During the 84th Congress, Senators Alexander Wiley and Joseph McCarthy proposed S. 2504 and S. 2541.¹⁸⁹ These proposals came from recommendations made by the Hoover Commission Task Force once it was clear that the problems with the APA were nearly insurmountable.¹⁹⁰ Following that, during the 85th Congress, Senators Sam Ervin and John Butler proposed S. 2148 and S. 4094, which was incorporated as part of the proposed Code of Federal Administrative Procedure.¹⁹¹ S. 4094 was brought back during the 86th Congress by Senator Thomas Hennings as S. 186, which was revised again and renumbered S. 2780 during the second

¹⁸⁵ 5 U.S.C. § 301.

¹⁸⁶ H.R. REP. NO. 2767, 85th Cong., 2d Sess. (1958).

¹⁸⁷ *Access to Government Information in the United States* (2005) (CRS report by Harold C. Relyea, Specialist in American National Government, Government Division).

¹⁸⁸ *See* 5 U.S.C. § 301.; H.R. REP. NO. 1419, 92d Cong., 2d Sess. 2 (1972).

¹⁸⁹ 89 CONG. REC. S. 1160, 26821 (daily ed. Oct. 13, 1965).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

session of the 86th Congress.¹⁹² Senators Ervin and Butler also reintroduced S. 4094 as S. 1070 during this Congress as well.¹⁹³ Although there was “considerable interest” generated by these bills, which continued to attempt to address the problems evidenced by current transparency efforts, no actual legislation was passed.¹⁹⁴

By the 87th Congress there were concentrated efforts to pass legislation that promoted increased government transparency. Senator John Carroll introduced S. 1567, S. 1907 was introduced by Senator William Proxmire, and S. 3401 by Senators Everett Dirksen and Carroll.¹⁹⁵ Senator Ervin’s continuing efforts, this Congress as S. 188, and in the House as H.R. 9926 were also introduced.¹⁹⁶

Senator Edward V. Long of Missouri introduced a Senate bill in 1963 that became the precursor of the actual FOIA.¹⁹⁷ This bill, S. 1666, passed the Senate in 1964 but not the House, which adjourned before voting on it.¹⁹⁸ In an interesting turn of events, the Senate considered the text of S. 1666, essentially the FOIA as it was signed, again during the 89th Congress in 1965, S. 1160. This bill was passed and became Pub. L. 89-467, 80 Stat. 250, which President Johnson signed on July 4, 1966.¹⁹⁹

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ 89 CONG. REC. S. 1160, 26822 (daily ed. Oct. 13, 1965).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ S. 1666, 88th Cong. 1st Sess. (1963).

¹⁹⁸ *See* 110 CONG. REC. 17668 (1964).

¹⁹⁹ Act of July 4, 1967, Pub. L. 89-467, 80 Stat. 250.

The effective date of this statute was set for a year after its enactment, which would have had it go into effect on July 4, 1967.²⁰⁰ Between the enactment and effective date of the FOIA though, Title 5 of the USC was enacted into law,²⁰¹ which led to the *original* FOIA to be replaced with what was essentially an identical act. The *new* FOIA began as H.R. 5357 in the 90th Congress, and was signed on June 5, 1967, and put into effect on the original date of July 4, 1967.²⁰²

As evidenced by this history, the passage of the FOIA was not easy. President Johnson even threatened to veto the law as originally written.²⁰³ Before passage, Congress had to rewrite the FOIA's exemptions to include broader interpretations, which afforded additional opportunities to avoid releasing information.²⁰⁴ Johnson was particularly concerned with barring the release of sensitive government information under the new law.

Scope of the Freedom of Information Act

The FOIA,²⁰⁵ which has been revised significantly several times since its enactment in 1966,²⁰⁶ applies to records held by federal agencies and departments, including the Executive

²⁰⁰ *Id.*

²⁰¹ Act of Sept. 6, 1966, Pub.L. 89-554, 80 Stat. 378.

²⁰² Act of June 5, 1967, Pub.L. 90-23, 81 Stat. 54.

²⁰³ H.R. REP. NO. 1497, 89th Cong. 2d Sess. Even after passing the FOIA, President Johnson took a dim view on the statute's impact on executive power. President Johnson believed that the FOIA would not prevent the president from protecting confidentiality in the national interest. JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 2:5 (1990).

²⁰⁴ *See Id.*

²⁰⁵ Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003).

Office of the President. The FOIA also covers records of independent regulatory agencies, such as the Federal Communications Commission, the Securities and Exchange Commission, etc.²⁰⁷ Government-controlled corporations such as the U.S. Postal Service are also subject to the requirements of the FOIA.²⁰⁸ It does not apply to the President and his/her staff, the Vice President and his/her staff, Congress, the judiciary, private corporations that contract with the government, or private companies and citizens.²⁰⁹

The agencies and other entities subject to the FOIA are required to make available to the public descriptions of its organization, particularly where individuals are able to retrieve information and submit FOIA requests.²¹⁰ In addition, there must be published descriptions and instructions so that individuals making FOIA requests understand the process for individual agencies.²¹¹

Under the FOIA, federal agencies must make final agency opinions available, statements and policy interpretations not necessarily published in the Federal Register, administrative staff materials that impact the public, and records.²¹² A record is defined as any information under agency control that does not fall under a category of FOIA exemption.²¹³ This includes paper

²⁰⁶ The FOIA underwent significant revisions in 1974, 1976, 1986, and 1996. Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat 3048 (1996).

²⁰⁷ Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003).

²⁰⁸ *Id.*

²⁰⁹ *Id.* The FOIA does not apply to state or local governments, although all 50 states have some kind of state records law on the books. *Id.*

²¹⁰ Freedom of Information Act, 5 U.S.C. § 552 a(1)(A) (2014).

²¹¹ *Id.* at a(1)(C).

²¹² *Id.* at a(1)(A-D).

²¹³ Freedom of Information Act, 5 U.S.C. § 552 a(1)(D) (2014).

documents, electronic records, emails, films, even objects if they are utilized as a record by an agency.²¹⁴

According to the statute, agency records are available to *any* person,²¹⁵ requested for any reason, and without personal connection to the information requested.²¹⁶ This includes U.S. citizens and non U.S. citizens. Also, businesses along with foreign governments can request records under the FOIA.²¹⁷ The only two requirements are that requesters must “reasonably describe” the records desired and must follow procedures detailed by the agencies.²¹⁸

Agencies can charge judicious fees to produce records. These fees are not intended to totally compensate agencies for the effort and materials required to respond to FOIA requests. Responding to FOIA requests is part of a public service that the federal government is engaged in to ensure a more democratic state. Fees are used to help offset costs to agencies but also to keep requestors from making extensive frivolous requests for information.²¹⁹

²¹⁴ Electronic files were not covered by the FOIA until the Electronic-Freedom of Information Act was passed in 1996, compelling federal agencies to provide electronic records as well. *See* Pub. L. 104-231, 110 Stat. 3048, §§ 1-2 (1996) (amending sections of 5 U.S.C. § 552).

²¹⁵ Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003). The term “any person” means individuals, foreign nationals, partnerships, corporations, and foreign or domestic governments. 5 U.S.C. § 551(2)(1994).

²¹⁶ *Id.*

²¹⁷ There are exceptions made for agencies that are a part of intelligence community, as defined by the National Security Act (1947). These intelligence agencies will not make any security records available to entities other than the U.S. government. Freedom of Information Act, 5 U.S.C. § 552 a(1)(E)(i)(ii) (2014).

²¹⁸ Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A)&(B).

²¹⁹ Agencies have long struggled with balancing the requirements that FOIA requests be answered quickly against staffing restraints due to budgets. In a document published by the Department of Justice back in 1990, the DOJ explains that FOIA activities are generally not given a separate line item in agency budgets but are instead rolled into general administrative activities. This leaves FOIA requests competing with other administrative functions for the same resources. Additionally, FOIA requests can fluctuate wildly from year to year, making it difficult for

Although there is no fee to file a FOIA request, agencies can assess fees based on the time and resources spent searching, copying, and reviewing information. Commercial requestors, such as private companies, are charged for all three functions- searching, copying and reviewing.²²⁰ Requestors with educational institutions or the press are only charged for copying while other requestors are charged for searching and copying records.²²¹ Agencies officially have twenty working days to respond to a FOIA request, though many agencies have outstanding requests that have been backlogged for years.²²²

Once a FOIA request is made, agencies must either respond to the request by providing the requested information in whole, in part, or by refusing to furnish the records. Any denial of records, in part or full, means that the requested information fell under one of the nine FOIA exemptions. Upon denial of release, the burden of proving nondisclosure becomes the government's responsibility.²²³

Records may be withheld from the public if they fall under one of the following exemptions. First, under Exemption 1 records must be withheld if they implicate national security interests.²²⁴ Exemption 2 exempts records that relate "solely to the internal personnel rules and

agencies to predict how many resources to set aside for requests. As a result, agencies can quickly become backlogged in answering requests. Department of Justice, *FOIA Affected by Budget Constraints*, Vol. XI (1) (1990), http://www.justice.gov/oip/foia_updates/Vol_XI_1/page1.html.

²²⁰ Freedom of Information Act, 5 U.S.C. § 552 a(4)(A)(ii) (2014).

²²¹ *Id.*

²²² *Id. at* a(6)(A). The Department of Defense's National Security Agency, for example, has a FOIA request that has been outstanding for 3,921 days, or just under 11 years. FOIA.Gov, *Data* (2014), <http://www.foia.gov/data.html#foiaReportsTable>.

²²³ Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003).

²²⁴ Freedom of Information Act, 5 U.S.C. § 552 b(1) (2014). Specifically, records that are "authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." *Id.*

practices of an agency.”²²⁵ Exemption 3 allows agencies to withhold records exempted by other statutes.²²⁶ Exemption 4 protects trade secrets and companies’ financial information from being made publicly available via the FOIA,²²⁷ while Exemption 5 protects privileged or confidential inter and intra-agency memorandums that under law would not be available to anyone outside of a legal setting (ex: lawsuit with the agency in question).²²⁸ Exemption 6 protects the privacy of individuals whose personal information is contained in federal agency records.²²⁹ Exemption 7 deals with records that concern law enforcement efforts, particularly records that involve an ongoing investigation or that might lead to an invasion of privacy, or implicate the identity of a confidential source.²³⁰ Exemption 8 exempts records relating to financial institutions.²³¹ Finally, Exemption 9 allows federal agencies to withhold records involving geological data.²³²

Agencies have flexibility in determining whether to withhold information under a FOIA exemption for Exemptions 2-9. If a record falls under Exemption 1, national security, agencies are required to withhold that record. Because Exemption 1 is the only exemption whose criteria are established not by Congress but by the President, federal agencies do not have the ability to make determinations concerning classified documents. If a document is classified or considered

²²⁵ *Id.* at b(2).

²²⁶ *Id.* at b(3). The other statutes must (1) “require[s] that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (2) establish[es] particular criteria for withholding or refers to particular types of matters to be withheld; and (3) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.” *Id.*

²²⁷ Freedom of Information Act, 5 U.S.C. § 552 b(4) (2014).

²²⁸ *Id.* at b(5).

²²⁹ *Id.* at b(6).

²³⁰ *Id.* at b(7).

²³¹ *Id.* at b(8).

²³² *Id.* at b(9).

to include national security information, those records must be withheld.²³³ If a record *could* fall under Exemption 2-9, agencies *may* withhold the record but are not required to.

This flexibility leads to a situation where the agencies often have a very uneven application of the FOIA Exemptions. One of the main determining factors is the stated preferences of the current presidential administration. Under the FOIA, the Department of Justice is the agency charged with FOIA compliance. Identifying policies of the executive branch became easier once Attorneys General began publishing FOIA oriented memoranda. Attorneys General FOIA memoranda set the tone for how the FOIA is implemented and also lets the federal agencies know what the new administration's overall policy is toward FOI.²³⁴

Executive Orders, Attorney Generals Memoranda, and the FOIA

The practice of Attorney General FOIA memoranda began during President Jimmy Carter's presidency. In 1977, then-Attorney General Griffin B. Bell wrote the first Attorney General's FOIA Memorandum, which established a pro-disclosure standard, encouraging agencies to embrace governmental transparency.²³⁵ In a related Executive Order, President Carter stated, "[The] public is entitled to know as much as possible about the Government's activities. Classification should be used only to protect legitimate national security secrets and never to

²³³ *Id.* at c(3).

²³⁴ *Collaboration on Government Secrecy ("CGS")*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2012), <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#agfoiam>.

²³⁵ *Id.*

cover up mistakes or improper activities.”²³⁶ According to President Carter, experience demonstrated that strong oversight of the government is necessary for governments to function.²³⁷

In contrast, the next Attorney General FOIA Memorandum, issued in 1981 by William French Smith during President Reagan’s administration, encouraged a conservative approach to the release of government-controlled information.²³⁸ This anti-disclosure standard was also used by George H.W. Bush’s administration.

President Clinton’s administration generally favored governmental transparency more than previous Republican administrations. In 1993, then-Attorney General Janet Reno established an extremely strong pro-requester standard.²³⁹ Specifically, the Department of Justice will “no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.”²⁴⁰ This memorandum replaced the anti-transparency policies of Reno’s predecessor, Attorney General Smith.²⁴¹

²³⁶ Jimmy Carter, *National Security Information Statement on Issues Executive Order 12065*, THE AMERICAN PRESIDENCY PROJECT (June 29, 1978), <http://www.presidency.uscb.edu/ws/>?

²³⁷ *Id.*

²³⁸ *Collaboration on Government Secrecy (“CGS”)*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2012), <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#agfoiam>.

²³⁹ *Id.*

²⁴⁰ Janet Reno, *Attorney General Reno’s FOIA Memorandum*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (1993), http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page3.htm.

²⁴¹ *Collaboration on Government Secrecy (“CGS”)*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2012), <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#agfoiam>.

President George W. Bush's tenure was the "most secretive in recent history," with the trend leaning towards dismissal of the established standard of democratic openness.²⁴² The attacks of September 11, 2001 on the World Trade Towers in New York became a rationale for denying access to government-controlled information during both terms of George W. Bush's presidency.²⁴³

In the post-9/11 world, the executive branch under President Bush *actively* encouraged a reduction in the release of government information. Then-Attorney General John D. Ashcroft issued a FOIA memorandum in 2001 that encouraged agencies to avoid accountability with regard to disclosure decisions.²⁴⁴ Ashcroft stated that while it is "only through a well-informed citizenry that the leaders of our nation remain accountable to the governed."²⁴⁵ Despite this, agencies should "carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA" and implicitly err on the side of withholding information.²⁴⁶

This memo established the "sound legal basis" standard, where the federal government promised to protect agencies' decisions to retain information. Jane Kirtley, professor of media law at the University of Minnesota and the former Executive Director of the Reporter's Committee

²⁴² Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671, 671 (2002-03).

²⁴³ Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11(4) COMM. LAW & POL'Y 479, 495 (2006).

²⁴⁴ U.S. Department of Justice, *Chief Freedom of Information Act Officer Report for 2012* (2012), <http://www.justice.gov/oip/docs/cfo-report-fy2012.pdf>.

²⁴⁵ John Ashcroft, *Memorandum on the Freedom of Information Act*, GEORGE WASHINGTON UNIVERSITY (2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf>.

²⁴⁶ *Id.*

for the Freedom of the Press, testified that the “message [of the Bush Administration] is that refusals to disclose information will be defended as long as they have ‘a sound legal basis.’ . . . It means delay, obfuscation, and frivolous denials will be commonplace.”²⁴⁷ Ashcroft’s memo replaced the standard that Attorney General Reno set in 1993.²⁴⁸

In terms of secrecy, President Bush also encouraged an increase in the classification and re-classification of government information pertaining to homeland security.²⁴⁹ Across less than 30 federal agencies, more than 4,000 individuals possessed “original classification authority,” which allowed them to decide which documents were exempted from disclosure under federal access laws.²⁵⁰ Under the process of re-classification, documents that were once openly available for the public were made unavailable for future access.²⁵¹ The Department of Energy, for example, re-classified over 9,000 documents in 2001 alone.²⁵²

²⁴⁷ U.S. House of Rep., Comm. On Govt. Reform: Secrecy in the Bush Administration 4 (2004).

²⁴⁸ *Collaboration on Government Secrecy (“CGS”)*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2012), <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#agfoiam>.

²⁴⁹ Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL’Y 671, 671 (2002-03).

²⁵⁰ *Id.* at 673. White House Chief of Staff Andrew Card’s memo highlighted three different ways sensitive information should be dealt with by federal agencies. If information was classified, it slowed the process of declassification. If information was previously unclassified *or* declassified information about weapons of mass destruction, then it should be immediately redacted. If information was sensitive but unclassified, it should be considered for a FOIA exemption so that it could still be withheld. *Id.* at 675-76.

²⁵¹ *Id.*

²⁵² *Id.* In 2006, the *New York Times* broke a story that included more updated numbers on the trend of re-classification. The article documented over 55,000 previously declassified documents being reclassified. This process began in 1999 but increased after 2001. Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, N.Y. TIMES, Feb. 21, 2006, at A1.

Most of the documents pertained to homeland security information and were pulled from agency websites in the wake of 9/11.²⁵³ Agencies involved included the Department of Energy, Department of Transportation, Environmental Protection Agency, and Internal Revenue Service, among others.²⁵⁴ The redacted documents covered a broad range of information, but examples could include blue prints for a dam, or city planning maps.²⁵⁵

President Barack Obama, who has spoken openly of a desire to correct President Bush's policies, represents a more conflicted execution concerning access to government-controlled information. President Obama's treatment of government transparency was lauded at the beginning of his presidency upon issuing an Executive Order and two presidential memoranda on the FOIA, transparency, and open government.²⁵⁶ In these, President Obama directed federal agencies to more closely adhere to disclosure requirements under the existing federal access laws.²⁵⁷ Obama's Attorney General, Eric Holder, issued a memorandum in 2009, requesting agencies implement an "effective system for responding to requests."²⁵⁸ This ultimately led to

²⁵³ SUZANNE J. PIOTROWSKI, *GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM* 102 (2007).

²⁵⁴ *Id.*

²⁵⁵ For a list of documents removed from agency websites, see Center for Effective Government, *Access to Government Information Post September 11th* (2005), <http://www.foreffectivegov.org/node/182> (last visited July 27, 2013).

²⁵⁶ Exec. Order No. 13,489, 3 DAILY COMP. PRES. DOC. 1-2 (Jan. 21, 2009); Memorandum on the Freedom of Information Act, 9 DAILY COMP. PRES. DOC. 1-2 (Jan. 21, 2009); Memorandum on Transparency and Open Government, 10 DAILY COMP. PRES. DOC. 1-2 (Jan. 21, 2009).

²⁵⁷ *Id.*

²⁵⁸ U.S. Department of Justice, *Chief Freedom of Information Act Officer Report for 2012* (2012), <http://www.justice.gov/oip/docs/cfo-report-fy2012.pdf>. This memorandum was a return to the standard of transparency set by Attorney General Reno in 1993. *Collaboration on Government Secrecy ("CGS")*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2012), <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#agfoiam>.

annual reports from the chief FOIA officers for each agency.²⁵⁹ At the time these directives represented welcome change for advocates of transparency who had sharply criticized President Bush.²⁶⁰

Despite this pledge of greater transparency, President Obama, like President G.W. Bush, has been criticized for his administration's lack of concrete progress in establishing freedom of information. A 2010 report by the National Security Archive, a private research group affiliated with George Washington University, found that despite President Obama's attempts to encourage increased transparency by agencies, progress has been slow and uneven.²⁶¹ Of critical importance is that four years after President Obama took office, statistics show that federal access statutes have no better enforcement than the previous administration. In 2010 the Associated Press concluded that "Obama was using FOIA exemptions to withhold from requesters *more* [emphasis added] than Bush did in his final year, despite receiving fewer overall requests."²⁶²

In looking at denial rates under FOIA exemptions in a recent study, it is clear that President Obama has not dramatically improved federal agency response to FOIA requests. For example, under Exemption 6, which deals with personal privacy, denial rates from the Department of Defense were 65% from 2006-2008 under President Bush. The denial rate was 70% from 2009-2011 under President Obama.

Ten of 12 agencies have similar numbers, where the denial rate under Exemption 6 was greater under President Obama. Under the often-abused Exemption 7, which deals with law

²⁵⁹ *Id.* These reports demonstrate that despite strides towards increased transparency, little has improved.

²⁶⁰ Editorial, *The President Orders Transparency*, N.Y. TIMES, Jan. 23, 2009, at A26.

²⁶¹ Eric Lichtblau, *Report Faults U.S.'s Efforts at Transparency*, N.Y. Times, Mar 14, 2010, at A12.

²⁶² Trevor Tim, *Under Obama, the Freedom of Information Act is Still in Shackles*, INFORMATION LIBERATION (Feb. 1, 2012), <http://www.informationliberation.com/?id=38204>.

enforcement records, 6 out of 12 agencies had higher denial rates under President Obama during the same time spans.²⁶³ Despite President Obama's stated interest in government transparency, his administration's actual record produced decidedly mixed results.

This uneven application of federal transparency laws is alarming when compared to the congressional intent behind the passage of the FOIA. The FOIA was supposed to ensure access to government-controlled information. Instead, in the last nearly five decades, the FOIA has been misconstrued far outside of the scope intended by the legislature.

The FOIA's Legislative Intent

The philosophy of the FOIA is "full disclosure of records held by federal agencies."²⁶⁴ The FOIA's legislative history offers ample evidence that Congress purposefully intended, in 1966, to create a statute that embodies a strong presumption of disclosure²⁶⁵ based on the democratic principle that the "public as a whole has the right-to-know what government is doing."²⁶⁶ Congress repeatedly emphasized this robust assumption of governmental openness in a

²⁶³ Martin E. Halstuk, Benjamin W. Cramer & Michael D. Todd, in TRANSPARENCY 2.0: ACCESS AND PRIVACY IN A WIRED WORLD, eds., DAVID CUILLIER & CHARLES N. DAVIS (2014).

²⁶⁴ See S. REP. No. 813-89 (1965); H.R. REP. 1497-89 (1966); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978); U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973), cited in Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 515(2006).

²⁶⁵ S. REP. No. 89-813, at 3 (1965).

²⁶⁶ *Id.* at 5.

series of FOIA amendments that sought to strengthen and enhance the people's right-to-know regarding its government's activities.²⁶⁷

Congressional reports on the FOIA stress that American democratic political theory is the foundation for the statute: In an open and democratic society, citizens must have a right of access to government-held information to allow for government accountability and to render informed political decisions.²⁶⁸ During a congressional debate on the FOIA, Representative Moss shared a quote that emphasized the national issue of transparency:

The problem I have dealt with is one which has been with us since the very first administration. It is not partisan, it is political only in the sense that any activity of government is, of necessity, political... No one party started the trend to secrecy in the Federal Government. This is a problem which will go with you and the American people as long as we have a representative government.²⁶⁹

Moss went on to emphasize that despite years of hearings and discussions, that there were few dramatic instances of the government withholding information.²⁷⁰ Instead, the "barriers to access, the instances of arbitrary and capricious withholding of are dramatic only in their totality."²⁷¹

The FOIA is not necessary because it corrects individual abuses made by government officials. After reading the congressional debate on the FOIA, it is clear that the FOIA is

²⁶⁷ The FOIA was amended in 1974, 1976, 1986, and 1996. Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat 3048 (1996).

²⁶⁸ *See, generally*, S. REP. No. 89-813 (1965) and H.R. REP. No. 89-1497 (1966). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

²⁶⁹ 89 CONG. REC. S. 1160, 13641 (daily ed. June 20, 1966) (statement of Congressman Moss). This quote originated from a speech Congressman Moss gave to the American Society of Newspaper Editors about a decade before this congressional hearing. *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 13642.

necessary because it indicates an overarching change in culture, one where secrecy should be replaced with transparency.

The Senate echoed many of these sentiments. “[G]overnment by secrecy benefits no one,” declared Senate Report No. 813, 89th Congress, 1st Session, 1965, which accompanied the original FOIA bill through Congress. “[S]ecrecy injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”²⁷²

Prior to the 1980s, the Supreme Courts often cited the 1965 Senate report as the primary indicator of the FOIA’s legislative intent. The report further observed the “theory of an informed electorate is so vital to the proper operation of a democracy” that passing a statute is “absolutely necessary” and “affirmatively provides for a policy of disclosure.”²⁷³ Congress further noted that when considering the “hundreds of departments, branches, and agencies [that] are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.”²⁷⁴

Early Supreme Courts enforced this perspective. In a 1973 FOIA majority opinion for example, Justice Byron White wrote, “Without question, the Act [the FOIA] is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to secure such information from possibly unwilling official hands.”²⁷⁵

Likewise, in 1976, Justice William J. Brennan expressed a strong preference for disclosure in a majority opinion, explicitly instructing the lower courts that the FOIA’s

²⁷²S. REP. No. 89-813, at 10.

²⁷³*Id.* at 3.

²⁷⁴*Id.*

²⁷⁵*EPA v. Mink*, 410 U.S. 73, 80 (1973), *citing* S. REP. No. 813, 89th Cong., 1st Sess. (1965).

exemptions are to be narrowly construed and that full disclosure is the dominant purpose of the act.²⁷⁶ The FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure'" unless information falls under one of the nine exemptions, Brennan said.²⁷⁷ He stressed the limitation of these exemptions and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the act."²⁷⁸

In the years following enactment of the FOIA, agencies' compliance was deficient,²⁷⁹ essentially disregarding the new law in favor of previous patterns of opacity. Lack of compliance resulted from the vague language in the statute,²⁸⁰ agencies' officials using ploys to avoid releasing information--high fees for copying documents, long delays before release, and claims of an inability to locate requested information.²⁸¹ Significantly, the Johnson Administration's Justice Department asserted that executive privilege superseded the new law, and therefore, deferred to the president's will.²⁸² Congressman Moss, for example, related an edited version of an obscenity-laced meeting between President Johnson and Democratic leaders, in which Johnson said, "What

²⁷⁶ *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

²⁷⁷ *Id.* (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 3)(1965)).

²⁷⁸ *Id.*

²⁷⁹ Association of the Bar of the City of New York, Committee on Federal Legislation, *Amendments to the Freedom of Information Act*, FEDERAL LEGISLATION REP. NO. 74-1, at 7 (1974).

²⁸⁰ JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 2:02, 3-2 (1994).

²⁸¹ H.R. REP. NO. 1419, 92d Cong., 2d Sess. 8-10 (1972).

²⁸² O'REILLY, *supra* note 280, at 15. The press, oddly enough, was also reluctant to use the FOIA for two main reasons: looming deadlines made the paperwork and delays from the new law cumbersome, and the press had concerns for missing exclusive news scoops due to universal access from the FOIA. *Id.* at 24.

is Moss trying to do, screw me? I thought he was one of our boys, but the Justice Department tells me his goddamn bill will screw the Johnson Administration."²⁸³

The legislative history of the FOIA indicates that positive attitudes towards government transparency took some time to develop. It wasn't until after WWII that the press put enough pressure on Congress to begin looking at statutory solutions to guaranteeing individuals access to government-controlled information. This led to the passage of the FOIA, which was supported by Congress, though contested by the President and executive agencies. The chapter will now turn to some of the academic literature on a right to know to demonstrate scholarly attitudes towards the need for government transparency.

Relevant Literature on the Right to Know and the FOIA

To understand the evolution of the right to know, a review of the most recent academic discussions on the topic is helpful. In the 1970s, the press began to promote the concept of constitutional recognition for the right to know, instead of merely statutory protection.²⁸⁴ In general, the politicians' responses to the press' argument for constitutional recognition was that the FOIA ensured adequate access to government information, specifically agencies' records. Although this is true in theory, in practice the FOIA often provides inconsistent access to these records.

²⁸³ George Kennedy, *How Americans Got Their Right to Know*, JOHN MOSS FOUNDATION (1996), <http://www.johnmossfoundation.org/foi/kennedy.htm://>.

²⁸⁴ DAVID O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 8* (1981). Post WWII but prior to the 1960s, the focus was on information dissemination, post-WW II. The 1960s and 1970s focused attention on an enforceable right to know, which ultimately led to the FOIA and the Government in the Sunshine Act. *Id.* at 60.

Lillian BeVier, a constitutional law professor, wrote a law review article in 1980 examining whether a right of access to government-held information can be inferred from democratic principles.²⁸⁵ BeVier looked at the criteria for constitutional protection and the nature of a democratic government, and ultimately concluded that the right to know cannot be sustained by the Constitution.²⁸⁶ BeVier found that the “first amendment does not in principle guarantee that a well-informed citizenry with the press as its constitutionally appointed information gathering agent are values of affirmative, independent constitutional significance.”²⁸⁷

BeVier focused on defining the boundaries of the First Amendment. For example, according to BeVier, lack of government transparency poses a risk not necessarily to free speech as articulated explicitly by the free speech clause, but *well-informed speech*.²⁸⁸ This dissertation takes a different argument than BeVier on the impact of this less well-informed arena of speech. For BeVier, the central crux of the right to know is whether or not the Constitution guarantees a well-informed public.²⁸⁹ BeVier concluded that it does not. This dissertation draws on democratic theory to argue for a central, though not explicitly constitutional, protection for “well-informed” speech.

While BeVier promoted a somewhat messy resolution to the question of how much government information should be available to the public,²⁹⁰ this dissertation argues that in the three and a half decades since BeVier’s article was published, the political, legal, and information

²⁸⁵ Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, CALIF. L. REV 482-517, 482 (1980).

²⁸⁶ *Id.* at 484-85.

²⁸⁷ *Id.* at 517.

²⁸⁸ *Id.* at 499.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 514.

landscapes have all changed. In particular, the FOIA has left an unfulfilled promise of access to federal agency records that can, and should, be remedied.

David O'Brien, a political science professor and author of a 1981 book, *The Public's Right to Know*, also wrote a detailed analysis on the constitution and government transparency. The book reviewed the history of First Amendment cases involving citizen access through the 1970s²⁹¹ and explored judicial intent behind Supreme Court judges' rulings that mentioned a right to know. In addressing the future of maintaining the public's right of access to government-controlled information, O'Brien, like BeVier, concluded that government implementation of existing federal access statutes was effective and, therefore, precluded need for further protection.²⁹²

Although BeVier and O'Brien argued that there should *not* be constitutional recognition of a right to know, political circumstances have distinctly shifted since both scholars wrote thirty years ago. Most importantly, the FOIA has been manipulated and abused in significant ways since the mid-1980s, and as subsequent chapters will attempt to demonstrate, the Supreme Court has been complicit in this process.²⁹³ There is currently not a route for individuals to reliably gain access to federal records. This dissertation is also arguing for all individuals to have access to government-controlled information, not for special press privileges. In the decades prior to the 1980s, most right to know discourse focused on the right of the press to act as representatives of

²⁹¹ See generally DAVID O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* (1981).

²⁹² *Id.* at 166-167. O'Brien, specifically, stated that the "public's right to know nevertheless appear[s] neither defensible nor salutary in terms of constitutional history, developing constitutional law, or considerations of public policy. A directly enforceable public's right to know has no basis in the text or historical background of either the Constitution or the First Amendment." *Id.* at 166.

²⁹³ See Chapters 4-6.

individuals.²⁹⁴ *Every* individual should have protected access to government-controlled information. There should be no special, and constitutionally problematic, protections for the press.

Particularly since 9/11 and the subsequent War on Terror, existing federal statutes, particularly the FOIA, do not provide adequate protection for the right to know. Sporadic law review and journal articles published discussions of the right to know in the interim between the early 1980s and late 1990s. Interest in government transparency has increased as the public recognizes continuing issues concerning individuals' right to access government-controlled information.²⁹⁵

Current FOIA scholars typically identify specific criteria that comprise a comprehensive and effective FOI law that could serve not only as a FOIA model domestically, but also as a model for international FOI laws.²⁹⁶ Chief among these criteria is that public record laws should, first, explicitly state that the law is grounded in a *presumption* of openness; all records are presumed to be open to the public, and the *government* carries the burden of proof to withhold information. Second, all records should be available to "any person" and for "any purpose." The

²⁹⁴ See HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953).

²⁹⁵ While this chapter examines recent research, additional research on the topic discusses contexts differing from the focus of the current study. For example, "the right to know" is a phrase often appearing in environmental law to invoke citizens' rights, in various countries, to access to information pertaining to health and well-being, but this different body of law lies outside the scope of this study.

²⁹⁶ See generally David Banisar, *Freedom of Information Around the World: 2006*, PRIVACY INTERNATIONAL (2006), http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/intl/global_foi_survey_2006.pdf; Martin E. Halstuk, *Freedom of Information*, in INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATIONS (2014); TOBY MENDEL, ET. AL, GLOBAL SURVEY ON INTERNET PRIVACY AND FREEDOM OF EXPRESSION (2013); ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006). All eight components are explained in-depth below. Because this publication is forthcoming, pages numbers are not currently provided on a line by line basis.

reason for a request should be irrelevant. Third, FOI laws should apply to information in any form or format used by the government, including all digital formats, computer records and databases.

Fourth, it is essential that records laws make clear that the government *may* refuse disclosure only if the requested information falls under clearly-stated and narrowly-drawn exemptions that limit the discretion of officials to withhold information. Exemptions vary widely, but the most common exceptions to disclosure in roughly 80 FOI laws globally pertain to matters that fall under the categories of national defense; personal privacy; law enforcement investigations; deliberative process, executive privilege; information, which if disclosed, may jeopardize an individual's safety or life; and proprietary business interests and trade secrets.

Fifth, there must be an independent review of nondisclosure decisions when the government raises an exemption as a bar to disclosure. The review should come from a panel outside the agency or from the office of an ombudsman created for this purpose. This is a vital step because the other alternative, suing for access, is not a financially available alternative except for the largest corporate media organizations, which increasingly tend to ignore all but centrist-spectrum political issues and controversies.

Sixth, records laws should declare an affirmative duty to publish certain information on the Internet *without* the need for a request. Such information would include, but is not limited to, agency organizational plans, rules and regulations, annual reports, agency objectives and policies, and, finally, instructions in plain language on how to use the open records law. Such a requirement is crucial because it helps guard against the development of agency “secret law”—rules and regulations known only to agency officials but not to members of the general public. Depending on the nation, this information must be made available in each country’s dominant languages.

Seventh, access laws must establish computerized tracking procedures and deadlines: All requests should be assigned a tracking number by which the record requestor can follow the

compliance process online. And, all laws must establish deadlines—in terms of weeks, not months—by which agencies are required to comply with record requests.

Finally, FOI laws have an obligation to provide for low-cost record-copying fees; otherwise, information would be accessible only to those who can afford it (e.g., for-profit media corporations). This criterion helps fulfill the key transparency objective that records are available to “any person.”²⁹⁷

The majority of these laws are embodied in individual nations’ statutes *and* constitutions. It is thus noteworthy that although the American FOIA remains the model for the vast majority of the more than eighty international FOI public records laws, the U.S. Supreme Court has rejected constitutional protection in favor of statutory protection. That being said, although U.S. law provides the model, many of the components discussed by FOIA experts are not enforced consistently. In particular, FOIA exemptions are mismanaged and interpreted broadly by the Supreme Court.

Chapters Four, Five, and Six look at exemptions that have been misconstrued by the Supreme Court. These chapters show discrete examples of times when The Court contradicted the legislative intent outlined by Congress in decisions on the scope and application of FOIA’s exemptions. In particular, agencies have employed four FOIA statutory exemptions to justify cloaking records from public view: Exemption 3 (existing secrecy statutes)—addressed by Chapter Four,²⁹⁸ Exemption 5 (executive privilege, specifically deliberative processes)—addressed by Chapter Five,²⁹⁹ and Exemptions 6 (personal privacy)³⁰⁰ and 7(C) (law enforcement investigation confidentiality)—Chapter Six³⁰¹.

²⁹⁷ *Id.*

²⁹⁸ 5 U.S.C. § 552(b)(3)(B).

²⁹⁹ *Id.* at (5).

Chapter 4: Exemption 3- Prior Statutes

Under the FOIA, Exemption 3 protects disclosure of information considered confidential under any other existing statutes,³⁰² such as the Homeland Security Act of 2002³⁰³ or the National Security Act of 1947.³⁰⁴ The original language of Exemption 3 is very broad and reads that records “specifically exempted from disclosure by statute” could be withheld under the FOIA.³⁰⁵ This language was amended with additional requirements in 1976 when the Government passed the Sunshine Act, the federal open meetings statute for executive branch agencies. Under the 1976 FOIA amendments, records are exempted under Exemption 3 only if the existing statute “(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”³⁰⁶ In 2009, the FOIA was amended again, clarifying that any

³⁰⁰ *Id.* at (6).

³⁰¹ *Id.* at (7)(C).

³⁰² Freedom of Information Act, 5 U.S.C. § 552 b(3) (2014). The other statutes must (1) “require[s] that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (2) establish[es] particular criteria for withholding or refers to particular types of matters to be withheld; and (3) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.” *Id.*

³⁰³ Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

³⁰⁴ Pub. L. 80-253, 61 Stat. 495 (July 26, 1947).

³⁰⁵ Pub. L. 89-487, 80 Stat. 250 (July 4, 1966).

³⁰⁶ Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976). Exemption 3 was further narrowed under the Electronic Freedom of Information Act of 1996, which amended Exemption 3 by requiring federal agencies to list the statutes they relied upon for non-disclosure. 5 U.S.C. § 552(e)(1)(A)(ii) (requiring annual FOIA reports beginning with Fiscal Year 1998).

statute passed after 2009 may allow an agency to trigger Exemption 3 only if the statute specifically cited Exemption 3.³⁰⁷

The government, as in all exemption disputes, bears the burden of demonstrating that any requested records are withheld according to the boundaries of Exemption 3.³⁰⁸ As such, federal agencies are required to clearly show that the documents withheld are covered under the exemption.³⁰⁹ Agencies are also required to segregate and provide any portions of a requested document that are not specifically exempted by Exemption 3.³¹⁰

This chapter focuses mostly on the use of Exemption 3 in reference to national security information. National security is an area where some of the most egregious judicial abuses of Exemption have occurred. Exemption 3 has also been used to withhold a variety of categories of information. For example, statutes relating to foreign policy, tax returns, law enforcement records, commerce, consumer protection, commercial information, transportation, privacy and confidentiality also qualify under Exemption 3.³¹¹

Requested information, which the government asserts falls under Exemption 3, often could be withheld by one of the other FOIA exemptions.³¹² However, agencies prefer to use Exemption 3 because the Court's broad interpretation for withholding records, as outlined by this exemption, makes disclosure particularly difficult to challenge in court.³¹³ This exemption allows

³⁰⁷ Pub. L. No. 111-83, 123 Stat. 2142, 2184 (2009).

³⁰⁸ HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 92 (25 ed. 2010).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 98-104.

³¹² *Id.* at 91.

³¹³ HAMMITT ET AL., *supra* note 308, at 91.

agencies more latitude to withhold certain records and has been used quite extensively by organizations, especially the CIA, to maintain operational opacity.

In 1975, the Supreme Court broadly interpreted Exemption 3 for the first time to facilitate nondisclosure.³¹⁴ In *FAA v. Robertson*, a case involving a request for records that analyzed the maintenance and performance of commercial airlines,³¹⁵ the Supreme Court gave the FAA administrator sweeping discretion to withhold information under Exemption 3.³¹⁶ Section 1104 of the previously existing Federal Aviation Act (1958) allows the FAA Administrator to decide whether to disclose records regarding complaints filed with the FAA.³¹⁷ In *Robertson*, the administrator, citing Exemption 3 and the 1958 FAA Act, declined to disclose performance reports after the Air Transportation Association's complaint.³¹⁸ Although a District Court upheld the FOIA requester's petition for disclosure, arguing that the FOIA legislative history does not support wide discretion on the part of the agencies in an Exemption 3 dispute, the Supreme Court reversed the District Court's ruling and accepted the FAA's position.³¹⁹ Lower court decisions in the early and mid 1970s thus consistently held that the 1966 Act's purpose was disclosure of records and limited discretion for agencies to withhold information.

The *Robinson* Court's ruling outraged Congress, which prompted lawmakers to amend Exemption 3 in its 1976 amendments. Congress clarified that agencies had limited discretion to withhold requested records, in keeping with the plain language and legislative history of the

³¹⁴ *FAA v. Robertson*, 422 U.S. 255 (1975).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

FOIA in general, and pertaining to Exemption 3 in particular. Congress thereby nullified the Court's *Robertson* holding.

The Supreme Court, taking a narrower stance to circumvent the 1976 amendments, decided in 1982 exactly what information could be withheld under the Census Act via Exemption 3.³²⁰ In *Baldrige v. Shapiro*, the Court held that information gathered for the census should be used for its intended statistical generalizations.³²¹ The Court confirmed that any information that implicated personal privacy could be withheld pursuant to the guidelines outlined by the Census Act.³²²

However, a new and more conservative Supreme Court in 1985 succeeded in giving the CIA *carte blanche* precedent to this day to use Exemption 3³²³ to justify withholding information in a case concerning illegal CIA activities on U.S. soil; the CIA charter is limited to nondomestic intelligence activities and operations. The *Sims* Court held that under the previously existing 1947 National Security Act, the CIA director has full authority to withhold CIA information³²⁴— including unclassified as well as declassified information. *Sims* involved experiments subcontracted and conducted by U.S. research institutions and universities. This program was intended on unwitting Americans in order to counter asserted Soviet and Chinese brainwashing and interrogation programs during the Cold War era.³²⁵ Exception 3 thus provided far more CIA

³²⁰HAMMITT ET AL., *supra* note 308, at 104.

³²¹ *Baldrige v. Shapiro*, 455 U.S. 345 (1982).

³²² *Id.*

³²³ *CIA v. Sims*, 471 U.S. 159, 159 (1985).

³²⁴ THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 433 (2 ed. 1999). Exemption 3, referred to as the “Catch-All” exemption, provides a broad basis for withholding significant amounts of information. *Id.*

³²⁵ *CIA v. Sims*, 471 U.S. 159, 159 (1985).

discretion than National Security Exemption 1, which pertains only to classified information as defined by the President, according to his criteria for Top Secret, Secret and Confidential information.

Although amendments to the FOIA attempted to clarify and limit the impact of Exemption 3, the Supreme Court ignored these guidelines by further expanding the boundaries with regards to what the CIA could withhold from disclosure in the 1980s.³²⁶ These changes would substantially change the implementation of the FOIA, to the point that Congress again had to intervene. Before discussing the Supreme Court's broadened interpretation of Exemption 3, it is useful to contextualize the role of the CIA.

Origins of the CIA

Post-WWII, in 1947, the National Security Act (NSA), tried to "reorganize the nation's military and intelligence establishments and to mandate changes in foreign policy."³²⁷ To this end, the NSA officially created the National Security Council and the CIA,³²⁸ and gave the CIA sole discretion to collect and evaluate foreign intelligence information.³²⁹ The NSA gave the CIA the unique responsibility of maintaining all documents pertaining to United States' involvement in foreign intelligence. The National Security Act also established the position of Director of

³²⁶ *Id.*

³²⁷ S. REP. NO. 80-239, at 2-3 (1947).

³²⁸ H.R. REP. NO. 80-961, at 2-3 The CIA is a "descendant" of the Office of Strategic Services, which was created in World War II after declining to have the FBI fill the role of managing foreign intelligence information. THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH 123 (2011).

³²⁹ H.R. REP. NO. 80-961, at 2-3.

Central Intelligence (DCI). The CIA has no power to police or otherwise enforce the law. This led to long-term tensions between the CIA and the FBI, which held this power domestically.³³⁰

Several interrelated statutes govern the CIA's disclosure policy. The 1947 National Security Act, for instance, provides a legal basis for the agency to withhold information.³³¹ In 1984, the Intelligence Agency Information Act exempted the CIA from most procedures for disclosure otherwise required by the FOIA.³³² Finally, the Intelligence Agency Information Act allows the CIA to withhold "operational files" from release under Exemption 3.³³³

The 9/11 Commission Report, assembled in the aftermath of 9/11 to analyze how the terrorist attacks were able to succeed on U.S. soil, noted that "secrecy, while necessary, can also harm oversight."³³⁴ Although the CIA reports to congressional committees, these records cannot be released to the public, meaning, "Intelligence committees cannot take advantage of democracy's best oversight mechanism: public disclosure."³³⁵

³³⁰ THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH 123 (2011).

³³¹ S. REP. NO. 80-239, at 2-3 (1947).

³³² See Pub. L. No. 98-477, 98 Stat. 2209-2212 (1984).

³³³ *Id.* Operational files are a fairly broad category, and cover details about the CIA's organizational structure, the number of personnel, names and titles of personnel, and salaries of personnel. According to a House report, this was done to relieve the CIA of the burden of "time-consuming bureaucratic requirements" for FOIA requests that would likely be rejected anyway. Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27(1) COMM/ENT 79, 102 (2004).

³³⁴ THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH 143 (2011).

³³⁵ *Id.*

CIA v. Sims (1985)

It was in this atmosphere of agency opacity that the Supreme Court decided to hear the 1985 *CIA v. Sims* case. This case demonstrably shows a judicial trend towards secrecy as the Supreme Court weighed in heavily in favor of non-disclosure for the CIA. *Sims* addressed a request for records detailing a series of CIA-directed, illegal psychological experiments, during which uninformed subjects received doses of LSD.³³⁶

The Public Citizen, an organization headed by Ralph Nader, filed a FOIA request seeking the names of the research facilities involved, the identities of the researchers, and details of the contracts and grants involved.³³⁷ Although the CIA eventually provided the names of 59 facilities, the agency withheld names of 21 facilities and the identities of all researchers.³³⁸

The Supreme Court dealt with two related issues in the *Sims* case: First, the Court addressed whether or not Section 102(d)(3) of the National Security Act qualified as a withholding statute under Exemption 3 of the FOIA.³³⁹ Second, the Court looked at whether or not the researchers qualified as “intelligence sources” under Section 102(d)(3), allowing related records to be withheld.³⁴⁰ After an eight-year legal battle, the Court ruled that the CIA was well within its authority to withhold information according to the NSA,³⁴¹ establishing Section

³³⁶ *CIA v. Sims*, 471 U.S. 159, 159 (1985).

³³⁷ *Id.*

³³⁸ *Id.* Originally, Director of the CIA, Richard Helms had ordered all of these records destroyed. A CIA staff member found over 8,000 pages of documents that escaped destruction, leading to the FOIA request. Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA*, 17(2) *Stan. L. & Pol'y Rev.* 353, 366 (2006).

³³⁹ *CIA v. Sims*, 471 U.S. 159, 160 (1985).

³⁴⁰ *Id.*

³⁴¹ *Id.*

102(d)(3) as a statute permitted under Exemption 3 of the FOIA.³⁴² The Supreme Court also decided that the CIA researchers were protected “intelligence sources” since they “provided, or were engaged to provide, information that the CIA needed to fulfill its statutory obligations with respect to foreign intelligence.”³⁴³ This confirmed that records about the intelligence sources could be withheld.

In *Sims* the Supreme Court also upheld an earlier decision by bestowing “great deference” upon the CIA.³⁴⁴ Under great deference, future courts should assume that the CIA has the best understanding over which CIA records should or should not be released. In relation to this, judges should not have the ability to provide de novo review for CIA information requests.³⁴⁵ According to the Supreme Court, there is a real danger in allowing judges who have very little background in national security to make decisions against the recommendations of the CIA.³⁴⁶

This perspective directly countermands the legislative history of the 1974 FOIA amendments from eleven years prior. John Moss made the argument that judges did have the ability to review sensitive national security issues and that they provided a necessary check on agencies like the CIA. Specifically, Moss remarked during a House debate that “I do not think we have to make dummies out of [judges] by insisting they accept without question an affidavit from some bureaucrat—anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret.”³⁴⁷

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA*, 17(2) *Stan. L. & Pol'y Rev.* 353, 371 (2006).

Even in a concurrence in *Sims*, Supreme Court Justice Marshall asserted that by allowing the CIA to avoid a de novo review by judges, the *Sims* majority “enabled the CIA to sidestep requirements carefully crafted by Congress to limit the Agency’s discretion.”³⁴⁸

Sims resulted in the CIA being able to operate outside of the strict procedures for classification required for other federal agencies.³⁴⁹ Under this decision, the CIA could withhold unclassified and declassified information on the mere assertion that the agency was protecting “intelligence sources,” regardless of the reason, and without a judicial review by a judge *in camera*.³⁵⁰ Because of the Supreme Court ruling, the CIA had no obligation to assert that information could damage or even impact national security,³⁵¹ nor to demonstrate protection of an “intelligence source” in order to deny an informational request.³⁵²

Sims essentially granted the Director of Central Intelligence “broad and unreviewable authority to protect intelligence sources and methods from unauthorized disclosure.”³⁵³ This case is representative of the unchecked ability of the CIA to operate while cloaked in secrecy from the American public. In the conflict between democratic disclosure and the practical need for governmental secrecy, the Supreme Court affirmed and strengthened support for secrecy in the CIA. This is an example of judicial overreach, since the court’s interpretation improperly broadened the application of Exemption 3 beyond the FOIA’s legislative intent.

³⁴⁸ CIA v. Sims, 471 U.S. 159, 189 (1985).

³⁴⁹ Halstuk & Easton, *supra* note 347, at 374.

³⁵⁰ *Id.*

³⁵¹ CIA v. Sims, 471 U.S. 159, 183 (1985).

³⁵² *Id.*

³⁵³ Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27(1) COMM/ENT 79, 83 (2004).

In the years following *Sims*, lower courts struggled with balancing the legislative intent of the FOIA with the restrictions imposed by the Supreme Court. Several courts specifically disagreed with *Sims* in *dicta*, even while acquiescing in their rulings because they were bound by the *Sims* precedent.³⁵⁴ In general, circuit courts have continued to deny challenges for information following *Sims*.³⁵⁵ In 2004, for example, the Supreme Court let stand a lower court's decision to deny a request for information regarding people detained post-9/11.³⁵⁶

The CIA, Exemption 3 and 9/11

The 9/11 catastrophe is perhaps the most tragic legacy of the *Sims* Court's decision to exempt the CIA from the FOIA. The ruling—which contravened the plain language and legislative intent of the FOIA—allowed the Agency to conceal its illegal activities in connection with 9/11, i.e., domestic spying and the withholding of information gleaned by the Agency from the FBI, which is charged with domestic terrorist activities.³⁵⁷ Thus the greatest abuse of Exemption 3 can be blamed on the Court's misguided ruling in *Sims*, which remarkably remains the controlling precedent regarding CIA disclosure obligations.

Indeed, the culture of government secrecy that the CIA and *Sims* fostered was one of the factors that directly contributed to the success of terrorist attacks in the United States on 9/11,

³⁵⁴ See *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992); *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir. 1989).

³⁵⁵ See *Maynard v. CIA*, 986 F.2d 547 (1st Cir. 1993); *Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992); *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990); *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989).

³⁵⁶ See *Center for National Security Studies v. Dep't of Justice*, 331 F.3d 918 (2004). In this case, the D.C. Circuit court upheld the secret detention of unidentified aliens, mostly on immigration charges. Many of these immigrants, although possibly terror suspects, were not charged. *Id.*

³⁵⁷ PHILLIP ZELIKOW, *THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH* 487 (2011).

according to the two principal investigations, conducted by the government after 9/11: The 9/11 Commission,³⁵⁸ and a joint panel of the Senate and House intelligence committees,³⁵⁹ both of which were harshly critical of the CIA, the FBI, and the Pentagon's intelligence services for failing to share and publicize crucial information concerning terrorist threats. In particular, the reports singled out the CIA, as "the lead agency confronting al Qaeda,"³⁶⁰ for withholding vital information that could have averted a series of blunders and missteps in the critical weeks and months before the assaults on New York City and Washington, D.C.³⁶¹

Prior to 9/11, budget cuts led to some decisions that made it more difficult for law enforcement to run proper counter-intelligence against terrorism. Louis J. Freeh, Director of the FBI from 1993 until June of 2001, cut a lot of headquarters' staff and focused on decentralizing operations to emphasize local field offices.³⁶² In the CIA, cost-cutting measures in the aftermath of the Cold War meant that, beginning in 1992, "some parts of the world and some collection

³⁵⁸ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004). The 567-page 9/11 Commission report, released July 22, 2004, was prepared by a ten-member nonpartisan panel headed by Thomas Keane, former governor of New Jersey.

³⁵⁹ Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Sen. Select Comm. on Intelligence and U.S. House Permanent Select Comm. on Intelligence [hereinafter Senate and House Select Comm. Report], S. REP. No. 107-351 & H. REP. No. 107-792, Dec. 2002. The nearly 900-page Senate and House joint report, prepared by a panel of the Senate and House intelligence committees, was released July 24, 2003.

³⁶⁰ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 400 (2004).

³⁶¹ *Id.* at 353, 355-56, 400-03; Senate and House Select Comm. Report, *supra* note 359, at xi, xvii.

³⁶² THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH 104 (2011). Freeh did create a Counterterrorism Division to complement the CIA's Counterterrorism Center, but the 9/11 Commission noted that the division did not translate into any kind of positive measures. *Id.* at 104.

targets were not fully covered.”³⁶³ Additionally, “the wall”-- policies governing what information could be shared between agencies like the FBI and CIA-- contributed to crippling misunderstandings regarding the exchange of information between law enforcement agencies which delayed information about terrorist organizations.³⁶⁴

Many in U.S. intelligence and politics were also lulled into a false sense of security due to the effectiveness of these policies in prior terrorist situations. For example, in 1993 the World Trade Center was bombed in one of the first large-scale terrorist actions on U.S. soil.³⁶⁵ It did not take the FBI long to make an arrest in this case, something that the 9/11 Commission noted led to the “impression that the law enforcement system was well-equipped to cope with terrorism.”³⁶⁶ Additionally, the law enforcement mentality at this time, even for counter-intelligence, stressed local priorities with quantifiable results instead of long-running counter-intelligence work that served national priorities.³⁶⁷ As a result, the terrorists were able to exploit “deep institutional failings within our [the United States] government.”³⁶⁸

In retrospect, the 9/11 Commission pointed to a conflation of factors that allowed the September 11 attacks to happen. One of the biggest critiques stemmed directly from *CIA v. Sims*, which confirmed that the CIA had the power to withhold almost all records under Exemption 3 of

³⁶³ THE 9/11 COMMISSION REPORT: THE ATTACK FROM PLANNING TO AFTERMATH 124 (2011).

³⁶⁴ *Id.* at 108. The wall originated in formal procedures issued by then-Attorney General Janet Reno in 1995. The wall was misapplied almost immediately; far less information was shared than what was legally allowed. Eventually, the wall evolved even more, so that the FBI operated under the misunderstanding that *no* intelligence information could be shared in a variety of circumstances, even between agents serving on the same squad. *Id.* at 108-109.

³⁶⁵ *Id.* at 97.

³⁶⁶ *Id.* at 99.

³⁶⁷ *Id.* at 101.

³⁶⁸ *Id.* at 368.

the FOIA. Prior to 9/11, “no agency had more responsibility-- or did more-- to attack al Qaeda, working day and night, than the CIA.”³⁶⁹

Critical Infrastructure and Exemption 3 Post-9/11

After 9/11 and the government investigations that followed, the public and the media, along with federal and state officials, raised questions about the cloak of secrecy sanctioned by the Court. Of special concern was the absence of CIA oversight by Congress and the Department of Justice.³⁷⁰

Some lower courts in particular cited the government for a lack of leadership in its practice of nearly always showing “great deference” to the Agency whenever the CIA refused to disclose requested information.³⁷¹ A D.C. District Court judge, for example, accused the CIA of

³⁶⁹ *Id.* at 482.

³⁷⁰ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004); JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, REPORT OF THE U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE AND U.S. HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, S. REP. No. 107-351 & H.R. REP. No. 107-92, (2002), *cited in* Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public’s Right to Know About the CIA*, 17(2) *Stan. L. & Pol’y Rev.* 353, 354 (2006).

³⁷¹ Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27(1) *COMM/ENT* 79, 121 (2004). Great deference is still a concept that is adhered to by many in the judiciary. For example, in 2006, a judge for the United States District Court for the District of Columbia ruled that the NSA could withhold records about its terrorist surveillance program. When questioned on the very legality of the surveillance program, the judge held that “whether or not the [surveillance program], one of the NSA’s many [signal intelligence] programs involving the collection of electronic communications, is ultimately determined to be unlawful, its potential illegality cannot be used in this case” to compel records from the NSA. HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 97 (25 ed. 2010). This reaction demonstrates the continued attitude of giving almost absolute deference to U.S. intelligence agencies despite the failures of the CIA in relation to 9/11. *See* People for the American Way Foundation v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21 (D.D.C. 2006).

operational failures when analyzing information and withholding information, thus contributing to 9/11 to occur, and subsequently facilitating a public blackout of these failures.³⁷² Even Congress had to subpoena the CIA in order to obtain documents in its probe into 9/11. The resulting outcries by some lower court judges, the public and the press led to demands for a new paradigm for dissemination of national security information.³⁷³ Congress's response to the revelations of reports on the CIA's secrecy was the passage of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRA).³⁷⁴

The stated "impetus behind the Intelligence Reform Act, which amended the National Security Act of 1947, was to prevent another terrorist attack on American soil."³⁷⁵ The IRA led to several changes for the CIA: increased dissemination of intelligence information, enhanced ability to declassify, and greater official recognition of the role of civil liberties.³⁷⁶ From the IRA, clearly Congress considered that the "carte blanche CIA Secrecy has been outmoded"³⁷⁷ and "explicitly declined to endorse the *Sims* interpretation of that language."³⁷⁸ One important aspect of the IRA is the creation of a new position for Director of National Intelligence, designed to

³⁷² See NATIONAL COMMISSION, *supra* note 370.

³⁷³ Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA*, 17(2) Stan. L. & Pol'y Rev. 353, 384 (2006).

³⁷⁴ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872.

³⁷⁵ Halstuk & Easton, *supra* note 373, at 354.

³⁷⁶ *Id.* at 355.

³⁷⁷ *Id.* at 356.

³⁷⁸ H.R. CONF. REP. NO. 102-963, at 88 (1992), as reprinted in 1992 U.S.C.C.A.N. 2605, 2614, quoted in Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA*, 17(2) Stan. L. & Pol'y Rev. 353, 376 (2006).

release rather than protect information maintained by the CIA.³⁷⁹ Yet *CIA v. Sims* has not been nullified by Congress, so is technically still precedent for the application of Exemption 3.

The Homeland Security Act, enacted by Congress and signed by President George W. Bush in 2002 in reaction to 9/11, created the Department of Homeland Security and an accompanying cabinet-level position.³⁸⁰ Not only was this the largest restructuring of the federal government since the creation of the Department of the Defense, in 1947, but also it included the Critical Infrastructure Act of 2002 (CIAA).³⁸¹

In effect, the Critical Infrastructure provision of the Homeland Security Act created another category of information protected as a part of Exemption 3.³⁸² Section 214 of the CIAA, titled “Protection of Voluntarily Shared Critical Infrastructure Information” allows critical infrastructure information that is voluntarily submitted to be withheld from disclosure.³⁸³ Loosely defined by the individual submitting the definition, critical infrastructure information includes categories of information like agriculture and food, water, public health, telecommunications, banking and finance, etc.³⁸⁴ As a result, information commonly protected under the CIAA might be embarrassing or harmful, *not* to the country, but *to the person or company submitting the*

³⁷⁹ 50 U.S.C. § 403-1 (i)(2) (2005), *cited in* Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public’s Right to Know About the CIA*, 17(2) *Stan. L. & Pol’y Rev.* 353, 377 (2006).

³⁸⁰ Department of Homeland Security of 2002, Pub. L. 107-296 (2002). Specifically, the statute created the position of Secretary of Homeland Security.

³⁸¹ Protection of Voluntarily Shared Critical Infrastructure Information, 6 U.S.C. § 133 (2002).

³⁸² *Id.*

³⁸³ HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 95 (25 ed. 2010).

³⁸⁴ Protection of Voluntarily Shared Critical Infrastructure Information, 6 U.S.C. § 133 (2002).

information.³⁸⁵ CIAA is particularly problematic because “it shields corporate America from accountability and limits citizens’ access to information.”³⁸⁶

Although Congress has expended significant effort to mitigate the damage to transparency accomplished by *Sims* in the post-9/11 climate, *Sims* is not an aberration, but serves as a strong example of problems with the FOIA. More recent updates to Exemption 3, such as the Critical Infrastructure Exemption, demonstrate continued concerns with the use of these exemptions to exclude categories of government information from the public.

While Exemption 3 exempts disclosure permitted in existing statutes, the next chapter examines the improper application and abuses of Exemption 5, which pertains to information gathered by the executive branch agencies during the deliberative process that establishes national policies of vital importance to the public.

³⁸⁵ *Id.*

³⁸⁶ Bradley Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 AZ. L. REV. 815, 866 (2004).

|Chapter 5: Exemption 5- Deliberative Processes

Exemption 5 shields” inter-agency” or “intra-agency” records that are part of federal agencies’ deliberative process.³⁸⁷ In other words, the federal executive branch agencies and cabinet departments may refuse to disclose reports, recommendations, memoranda, letters or any other documents generated during the *process* of making or changing national policies.

Federal agencies and departments—for example, the Environmental Protection Agency (EPA), the Securities and Exchange Commission (SEC), the Department of the Commerce—are continually involved in policy-making procedures. The information they generate—be it inter-agency or intra agency (i.e., within an agency or between agencies) can come from agency personnel who are experts in certain policy areas, and also from private sector sources that the government brings in as paid consultants in the preparation of proposed policy. Under Exemption 5, it is all subject to withholding if the government chooses to raise the exemption.

In order to exempt this kind of record under the FOIA, the information must be “pre-decisional.” Pre-decisional is a category of records that covers information that is produced to assist agency decision makers, and often the Office of the President, in advance of determining whether proposed policies should be modified, adopted or rejected.³⁸⁸ The records must also be “deliberative”—the result of deliberations—and relate directly to the agencies’ *methods* for arriving at decisions;³⁸⁹ deliberative information does not

³⁸⁷ “This section does not apply to matters that are— (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Freedom of Information Act, 5 U.S.C. § 552 b(5) (2014).

³⁸⁸ Hopkins v. HUD, 929 F.2d 81, 84 (2d Cir. 1991).

include factual information or raw data, which does not reveal the inner workings of how the agencies come to their conclusions.

The intent for this confidentiality is to insure that the federal executive agencies and the Office of the President receive candid and frank advice. The rationale is that potential of public disclosure of pre-decisional and deliberative information may have a chilling effect on the candor, veracity, dependability and quality of the information conveyed. The perceived problem, from the government's perspective, is that regardless whether advice and recommendations are refused or accepted, individuals or private consulting companies might be reluctant to be publically identified in connection with policy, which may be valid but unpopular or turn out to be misguided or wrong. Hence, their confidentiality is protected to ensure candor.

The legal ground for Exemption 5 derives from the government's right to invoke the settled common law privilege from discovery in litigation.³⁹⁰ The exemption therefore recognizes the three major common law privileges from discovery: the attorney work-product privilege, the attorney-client privilege, and the deliberative-process privilege, collectively regarded under the rubric of executive privilege.³⁹¹ Executive privilege represents the idea that records relied upon by

³⁸⁹ *Id.* Deliberative information does not include factual information which does not reveal the machinations of the agencies' deliberative processes. THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 439 (2 ed. 1999).

³⁹⁰ HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 143 (25 ed. 2010).

³⁹¹ H.R. REP. No. 89-1497, at 10; S. REP. No. 89-813, at 29; S. REP. No. 88-1219, at 6-7, 13-14 (1964). This is the definition of executive privilege within the confines of the FOIA. Executive privilege is also a broader power claimed by the executive branch to withhold certain records, resist subpoenas, and not be subject to the intervention of the legislature or judiciary in certain delineated circumstances. Although executive privilege is not mentioned explicitly in the Constitution, the Supreme Court has ruled that it is implied as part of the separation of powers doctrine. *See United States v. Nixon*, 418 U.S. 683 (1974).

the President, Vice President and his/her advisors are exempt from disclosure under Exemption 5.³⁹²

Besides documents ordinarily covered by the deliberative-process privilege—pre-decisional advisory opinions, pre-decisional recommendations, and deliberations reflecting the decision-making process—Exemption 5 also applies to drafts of final reports that represent another category of exempt documents³⁹³ and e-mails that are part of the agency deliberative process.³⁹⁴ Typically, these records tend to include staff recommendations, drafts of various agency-centric records, proposals, and any other materials that reflect the personal opinions of agencies' employees or paid consultants.³⁹⁵ Exemption 5 makes records *used* by the President, Vice President, and advisors for any kind of deliberative processes exempt from disclosure as well.³⁹⁶

The problem with Exemption 5 is that agencies and courts can broadly construe the exemption because of its "somewhat opaque [statutory] language" and "it's sometimes confusing threshold requirement."³⁹⁷ Critics, including transparency advocates inside and outside

³⁹² HAMMITT ET AL., *supra* note 390, at 161.

³⁹³ U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 392, May 2004. The FOIA GUIDE is the Department of Justice's official 1,113-page guide explaining the provisions of the FOIA and Privacy Act and summarizing the case law pertaining to these two statutes.

³⁹⁴ *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999).

³⁹⁵ THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 438 (2 ed. 1999).

³⁹⁶ The Presidential Records Act (1978) was first passed to preserve presidential records. Under the Presidential Records Act (PRA), records of the President and Vice President changed ownership those personal records to public ownership. Presidential Records Act, 44 U.S.C. §§ 2201–2207 (1978).

³⁹⁷ U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 360, May 2004.

government as well as some lower courts, consider Exemption 5 to be the “least clear” of all of FOIA’s exemptions.³⁹⁸

Consequently, this exemption, most especially its deliberative process provision, frequently is defined on an *ad hoc* basis by the Supreme Court and other federal courts,³⁹⁹ hindering transparency and obfuscating predictability when it comes to what kinds of materials are or are not protected by the protections embodied in FOIA Exemption 5.⁴⁰⁰ This chapter examines several court cases that highlight the judiciary’s inexact, and often broad interpretation of Exemption 5, focusing on deliberative process—the most often cited and problematic provision in the area of executive privilege.

Executive Privilege and the Judiciary

An examination of court cases invoking Exemption 5 to withhold records requested under the FOIA suggests that the judiciary has routinely taken a central and activist role in reshaping Exemption 5. The judiciary has expanded protections for Exemption 5 at the expense of transparency and the public’s right to gain access to government held information concerning the activities of the federal agencies and departments.

Many problematic cases never reach the Supreme Court but are resolved in the lower federal courts, including but not limited to the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit.

³⁹⁸ HAMMITT ET AL., *supra* note 390, at 143.

³⁹⁹ *Id.* at 144.

⁴⁰⁰ *See* Fla. House of Reps. v. Dep’t of Commerce, 961 F.2d 941 (11th Cir. 1992); Assembly of the State of Calif. v. Dep’t of Commerce, 968 F.2d 916 (9th Cir. 1992).

For example, D.C. Circuit Court examined the question of whether all records related to Presidential pardons could be withheld under Exemption 5.⁴⁰¹ In a notable case, the D.C. Circuit Court upheld the Department of Justice's decision to rely on Exemption 5 to withhold recommendations in connection with controversial Presidential pardons—including one for fugitive financier and Democratic contributor Marc Rich—granted by Bill Clinton in his final days as President.⁴⁰² The court reasoned that communications to the President or to the Office of the President constituted inter-agency documents and were, therefore, shielded from disclosure.⁴⁰³

The district court took a broad interpretation of Exemption 5's deliberative process provision and ruled that *any* records relating to the pardon determination process could be withheld.⁴⁰⁴ These records may not have been part of the President's deliberative process, but their proximity to the deliberative process exempted them from disclosure.

Despite “great public interest” in the pardon process, the court supported the agency's right to withhold these documents, citing *U.S. v. Nixon* (1974) to establish the expansive standard used in this case: “The President's need for complete candor and objectivity from advisers calls

⁴⁰¹ The D.C. District Court ended up narrowing this broad application of Exemption 5 in 2004. The court stated that instead of all records pertaining to the President's pardon ability being exempted from disclosure that only records *sent* to the President were exempted. The justices argued that executive privilege “applies only to those pardon documents ‘solicited and received’ by the President or his immediate White House advisers.” *Judicial Watch v. Dep't of Justice*, 365 F. 3d 1108, 1117 (D.C. Cir. 2004). In 2008, the issue of threshold-- how documents qualify under executive privilege-- was revisited again, returning the standard to the more broadly applied version of Exemption 5. *See Citizens for Responsibility and Ethics in Wash. V. Dep't of Homeland Sec.*, 2008 WL 2872183 (D.D.C. July 22, 2008).

⁴⁰² *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

⁴⁰³ *Id.* *See also* Neil A. Lewis, *Clinton and Barak Discuss Rich Pardon in a Transcript*, N.Y. TIMES, Aug. 21, 2001, at A-15; William A. Orme Jr., *Marc Rich Aided Israeli Official*, N.Y. TIMES, Feb. 22, 2001, at A-21.

⁴⁰⁴ *Judicial Watch, Inc. v. United States DOJ*, 259 F. Supp. 2d 86, 86 2003 U.S. Dist. LEXIS 4996 (D.D.C. 2003).

for great deference from the courts."⁴⁰⁵ Under this case's standard, pretty much any record that could be related to the deliberative process of the President, Vice President, or advisor is legally exempt from disclosure thanks to Exemption 5. This is a large category of records with a very low threshold of qualification.

This low threshold for exemption was reaffirmed in a 2008 D.C. District Court ruling when a nonprofit organization sued to get access to records about the government's response to Hurricane Katrina.⁴⁰⁶ The Department of Homeland Security withheld documents that addressed the communications between the Federal Emergency Management Agency and the White House.⁴⁰⁷

A nonprofit organization argued unsuccessfully that only documents seen by the President, Vice President, or their advisors should be withheld under Exemption 5.⁴⁰⁸ The courts upheld the Department of Homeland Security's contention that any records pertaining to the communication between the two entities about Hurricane Katrina could be withheld.⁴⁰⁹ The D.C. District Court held that executive privilege is "*not* being claimed over the documents themselves, but rather the communications memorialized in them."⁴¹⁰

These two examples illustrate how in using Exemption 5's deliberative process privilege judges go beyond just protecting records used by qualifying members of the executive branch.

⁴⁰⁵ *Id.* This dissertation has addressed the concept of judicial deference to the executive branch in other sections of this dissertation. *See supra* pg. 122.

⁴⁰⁶ HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 161 (25 ed. 2010).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 162.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

The D.C. lower federal courts—where presidential office cases are adjudicated—raise the deliberate process privilege as a rationale to withhold any records that *could* be requested by the President, Vice President, or his/her advisors in connection with a deliberative process. In this sense, many records that do not compromise the deliberations of the executive branch are withheld from public disclosure.

By contrast, the D.C. District Court ruled in favor of disclosure in a series of cases involving the general exercise of executive privilege embodied in Exemption 5 when considering access to White House visitor logs. Three cases held that it did not violate executive privilege to require the White House to supply visitor logs to the public. These logs only need to consist of a visitor's name, date, and time of visit, and in some instances the name of the person who requested the visitor or the name of the person visited.⁴¹¹

In the first case, *The Washington Post v. Department of Homeland Security* (2006), *The Washington Post* requested the visitor logs for members of the Secret Service who visited then Vice President Dick Cheney at the White House or his private residence.⁴¹² The D.C. District Court examined whether *The Washington Post* had a right to those documents or whether the Vice President's executive privilege shielded those visitor logs from disclosure.

The court sided against the government. *The Washington Post* was not asking that all visitor logs be disclosed; only that federal agencies properly process and respond to FOIA requests.⁴¹³ The district court pointed out that the Department of Homeland Security has “neither demonstrated nor argued that simply processing the plaintiff's FOIA request will do injury to the

⁴¹¹ *Id.*

⁴¹² *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 61 (D.D.C. 2006).

⁴¹³ *Id.* at 80.

Vice President's abilities to discharge the duties of his office."⁴¹⁴ In large part because the Department of Homeland Security was unable to cogently argue that release of the records could cause harm, the district court did not see any reason for the records to be withheld.

In two extremely similar cases, the D.C. District Court focused on the content of the visitor logs. In *Citizens for Responsibility and Ethics in Washington v. Department of Homeland Security* (2007)⁴¹⁵ and *Citizens for Responsibility and Ethics in Washington v. Department of Homeland Security* (2009),⁴¹⁶ the court pointed out in both cases that the visitor logs do not amount to a detailed form of communication that might reveal the deliberative process of the President, Vice President, or advisors. In particular, that "knowledge of these visitors would not disclose presidential communications or shine a light on the President's or Vice-President's policy deliberations."⁴¹⁷

However, these three cases on White House visitor logs stand in sharp relief from the previous cases which are more demonstrative of the judicial trend of applying a very broad standard for what records are covered under the executive privilege deliberative process provision in the FOIA's Exemption 5.

This broad protective standard can be found in U.S. district and circuit court cases around the country. The construction of what constitutes deliberative process not only gives the government sweeping authority under Exemption 5, but it also results in conflicting outcomes on the same issue—simply depending on which appeals courts hear the disputes. The next two cases illustrate this problem, which arose when two different circuit courts of appeal disagreed on a

⁴¹⁴ *Id.*

⁴¹⁵ *See Citizens for Responsibility and Ethics in Wash. v. Dep't of Homeland Sec.*, 527 F. Supp. 2d 76 (D.D.C. 2007).

⁴¹⁶ *See Id.* at 127.

⁴¹⁷ *Id.* at 199.

virtually identical issue involving the disclosure of statistical data compiled in an official U.S. Census report.

In 1992, the Ninth Circuit Court and the Eleventh Circuit Court came to two different conclusions over whether census statistics can be disclosed under the FOIA. At the heart of this dispute are two key determinants for disclosure under the Exemption's 5 executive privilege provision. First, a determination must be made as to whether the requested information constitutes fact or opinion; under deliberative process protection, opinions can be protected but facts are not. Second, it must be determined whether the information contained in a pre-decisional report or a post-decision report; pre-decisional records are shielded but the latter must be disclosed.

In the census data disputes, state legislatures in California and Florida sought data used by the federal government to compile the official 1990 census. In both instances the government withheld the information, arguing that the data was shielded under Exemption 5's deliberative process provision. The states sought the statistical methodology, which the federal government uses to arrive at "adjusted" census results, because some forms of federal aid are based on census figures. The Eleventh Circuit Court held that "adjusted" census data were protected deliberative "opinions" and not factual information, because the information was in the form of a compilation created by a census researcher.⁴¹⁸ The court reasoned that the raw numerical data had been organized, which requires judgment, and it was issued before a final report was released.

Meanwhile, the Ninth Circuit Court held that computer analyses containing "adjusted" numerical data for the census were not protected because the data were neither pre-decisional nor deliberative, even though the data was prepared before a final report on the census. The Ninth Circuit Court's rationale was that the data were prepared for the purpose of post-decision use and

⁴¹⁸ Fla. House of Reps. v. Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992).

dissemination. The Ninth Circuit further held that the data did not reveal anything about Commerce Department deliberations on how to adopt adjusted data in determining the official U.S. census.⁴¹⁹ The Ninth Circuit also arrived at a similar conclusion over a request for data contained in the 2000 census.⁴²⁰

There is an additional case that highlights the contentious nature of Exemption 5's deliberative process as a political issue of separation of powers and government transparency. This case involves not only the FOIA but also a companion transparency statute to the FOIA: the Federal Advisory Committee Act (FACA), and the Vice President.

Richard B. Cheney et al. v. U.S. District Court for the District of Columbia

FACA controls disclosure requests on information gathered and records maintained by executive branch advisory committees—opposed government information held by federal agencies and departments.⁴²¹

In a highly controversial case involving then Vice President Dick Cheney and FACA, the D.C. District Court had the final word in 2005, dismissing a lawsuit trying to access records from Cheney's Energy Task Committee. Materials covered by FACA include "records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents

⁴¹⁹ *Assembly of the State of Calif. v. Dep't of Commerce*, 968 F.2d 916 (9th Cir. 1992).

⁴²⁰ *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002); *Fla. House of Reps. v. Dep't of Commerce*, 961 F.2d 941 (11th Cir. 1992).

⁴²¹ 5 U.S.C. App. II § 10. Under the FACA, advisory committee records should be made available to the public without a formal request as a routine matter. Only if a committee contends that a record would fall under one of the FOIA exemptions can information be withheld. *See James L. Dean, Public Access to Records (FACA)*, U.S. General Services Administration (March 14, 2000), <http://www.gsa.gov/portal/content/100785>.

which were made available to or prepared for or by each advisory committee.⁴²² Materials for public access include not only the actual documents, but also detailed minutes, a list attending personnel, descriptions of items discussed, and copies of any reports distributed.⁴²³

Vice President Cheney was the Chair of the National Energy Policy Development Group (Energy Task Force), a mostly secret task force created by President Bush in 2001.⁴²⁴ The requested information held by the task force seems to fall directly under FACA's disclosure rule.

Considerable concern arose from the ethics involved in the task force. Despite its stated environmental aim, most of the policies and members had pro-oil associations, as reported in 2005 by *The Washington Post*, which acquired the documents.⁴²⁵ These meetings occurred despite a 2001 hearing revealing the same oil executives claimed their firms' non-participation in the Energy Task Force.⁴²⁶ More information leaked to *The Washington Post* identified oil executives who collaborated on earlier speculation of the Energy Task Force' nature.⁴²⁷

However, there were no representatives from any governmental agencies or departments on the Energy Task Force. Additionally, the task force lacked any environmentally linked voices from the private sector, such as the Sierra Club. It would not be a far stretch to claim that the

⁴²² *Id.*

⁴²³ THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 459 (2 ed. 1999).

⁴²⁴ SUZANNE J. PIOTROWSKI, *GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM* 101 (2007).

⁴²⁵ Dana Milbank & Justin Blum, *Document Says Oil Chiefs Met With Cheney Task Force*, THE WASHINGTON POST (Nov. 16, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501842_pf.html.

⁴²⁶ *Id.*

⁴²⁷ Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, THE WASHINGTON POST (July 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.html?hpid=topnews>.

Energy Task Force, of which Vice President Cheney was chairman, targeted the interests of the energy lobby.

The first in a series of cases that eventually decided whether the Energy Task Force had to comply with FACA disclosure requirements began as a FOIA case, *Judicial Watch v. U.S. Department of Energy* (2004). Judicial Watch, a government watch-group, filed a FOIA records request concerning the Energy Task Force.⁴²⁸ Judicial Watch argued that it was a violation of the FOIA to withhold records under Exemption 5.⁴²⁹

The U.S. Court of Appeals for the D.C. Circuit focused on whether records pertaining to the Energy Task Force could be withheld and whether records about Energy Task Force members counted as agency records.⁴³⁰ Ultimately, the D.C. Circuit held that recommendations made by the Environmental Protection Agency and Department of Interior to the Energy Task Force could be shielded from disclosure under Exemption 5.⁴³¹ The task force did not qualify as an "agency" under the FOIA because its sole function was to advise the President, shielding it from disclosure requirements.⁴³² Additionally, any employee records held by federal agencies on Energy Task Force members did not count as agency records.⁴³³

⁴²⁸ *Judicial Watch, Inc. v. U.S. Dep't of Energy, et al.*, 310 F.Supp. 2d 271 (D.D.C. Mar. 31, 2004).

⁴²⁹ *Judicial Watch v. U.S. Dep't of Energy*, 413 F.3d 1, 2 (D.C. Cir. 2005).

⁴³⁰ *Id.* at 4.

⁴³¹ *See Judicial Watch, Inc. v. U.S. Dep't of Energy, et al.*, 310 F.Supp. 2d 271 (D.D.C. Mar. 31, 2004).

⁴³² *Judicial Watch v. U.S. Dep't of Energy*, 413 F.3d 1, 9 (D.C. Cir. 2005).

⁴³³ *Id.* at 20.

The decision from the D.C. Circuit caused Judicial Watch and the Sierra Club to change tactics. Instead, these organizations filed another lawsuit, arguing that the Energy Task Force should make their records available under the FACA.⁴³⁴

In 2002, a D.C. district judge ruled in favor of Judicial Watch and the Sierra Club, compelling Cheney to reveal records concerning the Task Force.⁴³⁵ The Vice President appealed to the D.C. Circuit and lost again. Cheney then appealed to the Supreme Court, which heard the case in 2004.⁴³⁶ The Supreme Court did not rule substantively on the issue of whether the Energy Task Force was required to comply with the FACA. Instead, the Court focused on the process of the lower courts. In ruling that the appeals court had acted presumptively, the Supreme Court remanded the case to the D.C. Circuit again.⁴³⁷

⁴³⁴ Association of Research Libraries, Court Cases Related to the FOIA, <http://www.arl.org/focus-areas/public-access-policies/foia/2438-court-cases-related-to-foia>. Four years earlier, Congress had requested the General Accounting Office (GAO) obtain information regarding the formation of the Energy Task Force. Cheney was reluctant to provide this information and after several months of obstruction, David Walker, the Comptroller General acting on behalf of the GAO, issued a “demand letter.” Walker’s issued statement noted, “This matter involves important transparency and accountability issues that are essential in a democracy.” SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 101-02 (2007). The Court of Appeals for the District of Columbia ultimately dismissed the suit that Walker brought in 2002, granting the Vice President’s motion. *Walker v. Cheney*, 230 F. Supp. 2d 51, 74-75 (D.C. Cir. 2002). The GAO did not appeal this court ruling, although Walker did release a statement indicating disappointment regarding transparency: “We hope the GAO is never again put in the position of having to resort to the court to obtain information that Congress needs to perform its constitutional duties.” SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 102 (2007). An environmental group, the National Resources Defense Council, also sued The Energy Task Force asserting improper denial of a FOIA request. The group eventually won the release of the majority of the records from the original FOIA request. *Id.*

⁴³⁵ *Id.*

⁴³⁶ *See Cheney v. U.S. D.C.*, 542 U.S. 367 (2004).

⁴³⁷ *Id.* The Supreme Court did urge deference for the executive branch, noting that “all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government.” *Id.* at 388. This statement from the Supreme

On remand, in 2005 the D.C. Circuit held that Vice President Cheney's Energy Task Force did not have to comply with FACA disclosure requirements.⁴³⁸ The court found fault with the evidence that the Sierra Club and Judicial Watch brought to demonstrate that the executives from oil and gas were actual members of the Task Force. Without this evidence, any records pertaining to these executives' involvement with the Energy Task Force were ruled as outside the legal bounds of the FACA.⁴³⁹ This ruling, while not specific only to the FOIA, illustrates the ways that judicial interpretation can lead to overreaching and judicial activism thus allowing far less federal agency transparency than Congress intended.

Overall, this chapter demonstrates how vaguely framed and imprecise language, along with political objectives, can interfere with determining an Exemption 5 deliberative process dispute and result in biased and an uneven application of the statute. These problems result in allowing the judiciary to take an activist—and arguably a legislative—role in determining transparency law.

Chapter Six will look at a series of the most egregious judicial activism of two related FOIA exemptions, Exemption 6 and 7(C), which deal with records that implicate privacy concerns.

Court seems to confirm that judicial deference is still a valued concept and likely greatly impacted the outcome of the case when it was remanded back to the Court of Appeals.

⁴³⁸ Association of Research Libraries, Court Cases Related to the FOIA, <http://www.arl.org/focus-areas/public-access-policies/foia/2438-court-cases-related-to-foia>.

⁴³⁹ *Id.*

Chapter 6: Expanding Exemption 6 and 7 (C)

One of the fundamental arguments about the FOIA is the statute's legislative intent. Although the public's interest in disclosure of governmental information should be the focus of any access statute, in reality, challenges inhibit the proper function of that law. The judiciary has facilitated narrowed understandings of the FOIA, prioritizing privacy over access to federal agency records.

Exemptions 6 and 7(C) weigh government transparency against privacy. According to Exemption 6, agencies may withhold information regarding "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴⁴⁰ Congress firmly established this exemption "from the very beginning of the legislative development process."⁴⁴¹ This exemption, designed to protect personal privacy of individuals named in federal agency records,⁴⁴² means that agencies are specifically concerned about records that release names and addresses, any financial information, and potential use of the information for solicitations.⁴⁴³

⁴⁴⁰ 5 U.S.C. § 552 (b)(6).

⁴⁴¹ JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 16:2, 5 (2000). In the Senate's original draft of the FOIA there was no exemption for personal privacy. In Senate hearings, several witnesses called for this to be changed. For example, Assistant Attorney General Schlei argued for protection for military personnel and stated that there was "no reason to make those years of the life of each one of them [military personnel] an open book by opening his or her individual file to anyone, no matter how private or insidious his [the requestor's] motives may be in seeking the information." *Id.* at 6.

⁴⁴² THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 440 (2 ed. 1999). This exemption is unusual in that protects external interests, maintaining the privacy of individuals outside of the agency, not the workings of the agency itself. JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 16:2, 5 (2000).

⁴⁴³ DIENES, *supra* note 442, at 441.

Certain categories of records *could* be considered a violation of an individual's personal privacy if disclosed. These records include arrest records, discipline records, political affiliation records, physical measurements, visa numbers, Social Security numbers, some home addresses, and job performance records such as employee evaluations.⁴⁴⁴

Exemption 7 broadly protects the “untimely disclosure [of] documents that would jeopardize criminal or civil investigations to cause harm to individuals who assist law enforcement.”⁴⁴⁵ The third part of this exemption, Exemption 7(C), is particularly problematic by allowing greater protection of privacy interests in the context of law enforcement.⁴⁴⁶ Exemption 7(C) balances privacy interests against interests in public disclosure, but allows for *heightened* privacy protections for law enforcement records.⁴⁴⁷ These records include protection for agencies' records that contain informants' information,⁴⁴⁸ interviewees' information,⁴⁴⁹ and witnesses' information,⁴⁵⁰ and personal information in rap sheets.⁴⁵¹

⁴⁴⁴ JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 16:16, 21 (2000).

⁴⁴⁵ DIENES, *supra* note 442, at 443.

⁴⁴⁶ *Id.* at 446. The text of Exemption 7(C) protects records that: “Freedom of Information Act, 5 U.S.C. § 552 b(7)(C) (2014).

⁴⁴⁷ *Id.* at 447. Originally there were no explicit provisions to protect law enforcement records. Congress indicated that law enforcement records were protected from unnecessary disclosure by existing statutes and other FOIA exemptions. After agency complaints, Exemption 7(C) was added. When President Lyndon B. Johnson signed the FOIA into law he emphasized the need to protect investigatory files covered by the law enforcement exemption. JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 17:2, 90-2 (2000).

⁴⁴⁸ *See* Epps v. Dep't of Justice, 801 F. Supp. 787, 793 (D.D.C. 1992), *modified*, 995 F. 2d 305 (D.C. Cir. 1993); Nadler v. Department of Justice, 955 F. 2d 1479, 1490 (11th Cir. 1992).

⁴⁴⁹ *See* KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990).

⁴⁵⁰ *See* Farese v. Dep't of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987); Friedman v. FBI, 605 F. Supp. 306,321 (N.D. Ga. 1981).

⁴⁵¹ *See* Dep't of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S. 749, 775-75 (1989).

There is a close legal relationship between Exemption 6 and 7(C). Originally, Exemption 7 was written to make clear that “protections in [Exemption] 6 for personal privacy also apply to disclosure under [Exemption] 7.”⁴⁵² As of the 1986 FOIA amendment, some differences began to develop. Although the language for Exemption 6 has not changed since the 1966 enactment, the language for Exemption 7(C) has.⁴⁵³ For example, post 1986, Exemption 7(C) gave more protection to agencies against compelled disclosure.⁴⁵⁴ Exemption 7(C) allows agencies to withhold information if there is a reasonable expectation of invasion of privacy, while Exemption 6 requires agencies to give evidence that releasing the agency files would cause an invasion of privacy.⁴⁵⁵

The Supreme Court has had a clear hand in shaping the application of Exemption 6 and 7(C). In particular, the Court has broadened the intended use of these exemptions. This chapter looks at cases where the Supreme Court expanded protections for personal privacy at the expense of government transparency.

Minimal Privacy-Interest

Three cases have fundamentally impacted the Supreme Court’s interpretation of the FIOA with regard to exemptions for privacy. First, in 1982 in *U.S. Department of State v. Washington Post* the Supreme Court ruled, for the first time, that privacy concerns surrounding Exemption 6

⁴⁵² HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2010 213 (25 ed. 2010).

⁴⁵³ *Id.* at 213-14.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

could trigger nondisclosure *even* if the information requested was *not* highly personal or intimate.⁴⁵⁶

In 1979 a newspaper submitted a FOIA request to confirm information that two anti-American Iranian revolutionary officials held U.S. passports.⁴⁵⁷ Citing Exemption 6, the State Department denied the FOIA request because disclosure would be a “clearly unwarranted” invasion of privacy for the two Iranians.⁴⁵⁸ Although the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit both disagreed with this claim, the Supreme Court upheld the State Department’s position.⁴⁵⁹

In a unanimous decision, Chief Justice William Rehnquist held that the information in citizenship and passport documents constituted sufficient privacy interests to be considered part of Exemption 6’s “similar files” language. Despite Justice Rehnquist’s acknowledging that most passport information⁴⁶⁰ would not normally be deemed highly personal, disclosure of that information could still invade privacy in certain circumstances.⁴⁶¹

The Washington Post case is indicative of judicial overreach because the Supreme Court inappropriately inferred legislative intent in this case: “[t]he Court reasoned that Congress intended a broader construction of the ‘similar files’ clause in Exemption 6 than had been applied

⁴⁵⁶ Martin E. Halstuk & Bill Chamberlin, *The Freedom of Information Act 1996-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 542 (2006).

⁴⁵⁷ U.S. Dep’t of State v. Wash. Post, 456 U.S. 595, 595 (1982).

⁴⁵⁸ *Id.* In plain language, Exemption 6 protects “personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Exemption 6 was part of the original FOIA. 5 U.S.C. § 552 (b)(6).

⁴⁵⁹ U.S. Dep’t of State v. Washington Post, 456 U.S. 595, 595 (1982).

⁴⁶⁰ Specifically, information like birth date, marriage anniversary, employment history, etc. U.S. Dep’t of State v. Wash. Post, 456 U.S. 595, 600 (1982).

⁴⁶¹ *Id.*

by the lower court.”⁴⁶² This interpretation of the intent of the FOIA is incorrect; not a single instance in the legislative history of the FOIA indicates that a minimal privacy interest is sufficient to trigger Exemption 6.⁴⁶³ The Department of Justice agreed that *The Washington Post* decision broadened the meaning of “similar files” as well.⁴⁶⁴

The extension of Exemption 6 in *The Washington Post* case is also wholly unnecessary because the Supreme Court could have protected the personal information of these Iranian officials other ways. For example, the executive branch could have filed a denial of the FOIA request using Exemption 1, under national security.⁴⁶⁵ An Exemption 1 rejection would have categorically shielded the Iranians without broadening the judicial interpretation of personal privacy. Ultimately, *The Washington Post* case extended personal privacy protections while a subsequent case, *Reporter’s Committee*, narrowed the purpose of the FOIA.

⁴⁶² Martin E. Halstuk & Bill Chamberlin, *The Freedom of Information Act 1996-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 543 (2006).

⁴⁶³ *Id.* at 553. In the 1965 Senate Report, Congress held that “Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet *places emphasis on the fullest responsible disclosure.*” In considering privacy interests, the phrase “clearly unwarranted” establishes the balance between “protection of an individual’s private affairs [...] and the preservation of the public’s right to governmental information.”” *Id.* at 554. In *The Washington Post* case, Justice Rehnquist has a different interpretation of legislative record. According to the Supreme Court, “Congress’ primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *U.S. Dep’t of State v. Wash. Post*, 456 U.S. 595, 599 (1982).

⁴⁶⁴ *Id.* at 600-01.

⁴⁶⁵ Halstuk & Chamberlin, *supra* note 462, at 554.

Central Purpose and Practical Obscurity

The central purpose concept, which essentially narrows the impact of the FOIA through judicial overreach, originated in the *United States Department of Justice v. Reporter's Committee for the Freedom of the Press (1989)*.⁴⁶⁶ This case involved an 11 year court fight to release records concerning a business man, Charles Medico, who was linked to organized crime.⁴⁶⁷ This case is significant for broadly limiting the release of information sought through the FOIA and prioritizing privacy above disclosure. The case also introduced the controversial notion of practical obscurity, which promotes scattering governmental information to obstruct construction of complete records.⁴⁶⁸

In the *Reporter's Committee* case, journalists requested that the FBI release any criminal records relating to four brothers who allegedly received defense contracts through association with a corrupt Congressman.⁴⁶⁹ In response, the FBI released only a single rap sheet of the deceased brother.⁴⁷⁰ During the 11 year litigation to release the remaining records, two of the other brothers died, leading to their records being released.⁴⁷¹ The FBI indicated willingness to release the living brother, Charles Medico's, financial information despite not having any on file. However the FBI refused to release any rap sheets or criminal records.⁴⁷²

⁴⁶⁶ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

⁴⁶⁷ *Id.*

⁴⁶⁸ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

The Supreme Court held that the privacy exemption for law enforcement applied to Medico's information.⁴⁷³ Since Medico's criminal record did not directly involve operations of a government agency, the FBI's records could contain no material of public interest concerning Representative Flood.⁴⁷⁴ Citing the lack of a direct link between the requested records and the stated purpose of governmental oversight, the Court ruled in favor of personal privacy and refused to release the records.

This case did more than just privilege personal privacy; the *Reporter's Committee* case actually narrowed the overall interpretation of the FOIA.⁴⁷⁵ In the opinion, the Supreme Court stated that the FOIA's *central* purpose was 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."⁴⁷⁶ If the records requested did not directly deal with governmental activities, withholding was proper.⁴⁷⁷ This narrowed approach showed that the Supreme Court was concerned with using FOIA requests for inappropriate purposes, such as substituting or supplementing the discovery process in civil and criminal litigation.⁴⁷⁸

⁴⁷³ *Id.* The law enforcement exemption specifically is Exemption 7(C). *Id.*

⁴⁷⁴ *Id.* at 774.

⁴⁷⁵ Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 990 (2002).

⁴⁷⁶ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989).

⁴⁷⁷ Prior to this case, any reason a citizen had for requesting government records did not matter. Any records included in the FOIA's definition could be requested, for any reason. The central purpose reformulation, however, means a "FOIA request for disclosure that may implicate privacy is almost always automatically rejected unless the requester can establish that the desired information is an official record that *directly sheds light on government activities and operations* [emphasis added]." Halstuk & Davis, *supra* note 475, at 1022.

⁴⁷⁸ *Id.* at 992.

The resulting change in the stated purpose of the FOIA met with criticism; for example, Senator Patrick Leahy argued that the *Reporter's Committee* decision overreached. Leahy stated that the decision “distorts the broader import of the Act [FOIA] in effectuating Government openness.”⁴⁷⁹ A 1998 report, prepared for the House Subcommittee on Government Management, Information, and Technology, reflects Senator Leahy’s arguments. The report notes that the *Reporter's Committee* decision leads to an overbalance in favor of personal privacy.⁴⁸⁰ Subsequent case law seems to support these concerns when lower courts expanded the central purpose doctrine and withheld even more agency records.⁴⁸¹

Subsequent to the *Reporter's Committee* case, lower courts almost immediately began to restrict available information, such as in *Sweetland v. Walters* (1995),⁴⁸² *Baizer v. United States*

⁴⁷⁹ S. REP. NO. 104-272, at 26-27 (1996) (statement by Se. Leahy), *quoted in* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee “Central Purpose” Reformulation*, 54:3 AD. L. REV. 984, 987 (2002).

⁴⁸⁰ Reporters Comm. For Freedom of the Press, *Report on Responses and Non-Response of the Executive and Judicial Branches to Congress’ Finding that the FOI Act Serves ‘Any Purpose’ 2* (July 2, 1998) (prepared by request of Rep. Steven Horn, Chairman, Subcomm. On Gov’t Mgmt., Info. And Tech., of the House Comm. On Gov’t Reform and Oversight), *cited in* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee “Central Purpose” Reformulation*, 54:3 AD. L. REV. 984, 995 (2002). Specifically, the report also noted that the reformulation of the central purpose was a “narrow and crabbed interpretation” of the FOIA’s congressional intent.” *Id.* at 996.

⁴⁸¹ *See Sweetland v. Walters*, 60 F.3d 852, 853 (D.C. Cir. 1995) (per curiam); *Baizer v. U.S. Dep’t of the Air Force*, 887 F. Supp. 225 (N.C. Cal. 1995); *Vasquez-Gonzalez v. Shalala*, 1995 U.S. Dist. LEXIS 5671, *6 (D.P.R. Feb. 13, 1995).

⁴⁸² In *Sweetland v. Walters* (1995), the D.C. Circuit Court upheld the denial of a FOIA request concerning information from the Executive Residence staff of the White House. *Sweetland v. Walters*, 60 F.3d 852, 853 (D.C. Cir. 1995) (per curiam). The majority opinion rested on not defining the Executive Residence as an agency under the FOIA, thereby exempting records from disclosure. Another component of that decision was that the information request fell outside the “central purpose” of the FOIA. *Id.* at 855. Although the D.C. Circuit Court cited no privacy concerns, the D.C. Circuit Court also argued that congressional intent did not seem to indicate the need to release records concerning the management of the President’s home. *Id.*

Department of the Air Force (1995),⁴⁸³ and *Vasquez-Gonzales v. Shalala (1995)*.⁴⁸⁴ Some courts even chose to expand the reformulation of the central purpose beyond Exemption 6 and 7(C), choosing to withhold information for a variety of reasons beyond the considerable leeway of personal privacy.⁴⁸⁵

A few federal courts did choose to interpret the reformulation of the central purpose in favor of disclosure according to two rather specific circumstances.⁴⁸⁶ The first class of cases involves government records that address revelations of the government's potential misconduct.⁴⁸⁷ In this section of cases, the public interest outweighs concerns for personal privacy. The second class of cases involves facts where personal interests outweigh privacy

⁴⁸³ In *Bazier v. United States Department of the Air Force (1995)*, the Northern District Court of California ruled that an Air Force database of U.S. Supreme Court opinions did not constitute an agency record. *Bazier v. U.S. Dep't of the Air Force*, 887 F. Supp. 225 (N.C. Cal. 1995). The decision did not consider precedent, but used the test of central purpose to determine that the database did not reveal the workings of an agency's governance, therefore did not represent an "agency record" according to the FOIA. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 1004 (2002).

⁴⁸⁴ The *Vasquez-Gonzalez* case dealt with a lawsuit filed to recoup fees incurred during an extended FOIA request. *Vasquez-Gonzalez v. Shalala*, 1995 U.S. Dist. LEXIS 5671, *6 (D.P.R. Feb. 13, 1995). One component of the court's analysis was the nature of the original FOIA request. Because the request concerned commercial interests it was held to not advance the public's interests, falling outside of the central purpose of the FOIA. Therefore, the requestor could not recoup attorney's fees for the request. *Id.* at *6-7. See *Sweetland v. Walters*, 60 F.3d 852, 853 (D.C. Cir. 1995) (per curiam); *Bazier v. U.S. Dep't of the Air Force*, 887 F. Supp. 225 (N.C. Cal. 1995); *Vasquez-Gonzalez v. Shalala*, 1995 U.S. Dist. LEXIS 5671, *6 (D.P.R. Feb. 13, 1995).

⁴⁸⁵ Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 997 (2002).

⁴⁸⁶ *Id.* at 1006.

⁴⁸⁷ See *Bennett v. DEA*, 55 F. Supp. 2d 36, 42 (D.D.C. 1999).

interests.⁴⁸⁸ In these situations, people mentioned in the records could have an interest in knowing the personal information governmental records reveal but the records are generally released.

Beyond judicial considerations, the doctrine of the central purpose impacts broader approaches to policies for disclosing information, such as with the executive branch. In 2001 Attorney General John Ashcroft, released his secrecy memo, which essentially lowered the threshold for federal agencies' withholding governmental information unless a "sound legal basis" existed for disclosure.⁴⁸⁹

The Reporter's Committee case outlined another idea, practical obscurity, which supports an individual's right to privacy by emphasizing that obscurity in government records is a positive aspect of decentralized records. According to the Supreme Court, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."⁴⁹⁰ Decentralization of documents may afford better protection for the personal privacy of people mentioned. Obviously the endorsement of the Supreme Court decreased the likelihood of records implicating privacy and demonstrates a significant shift from prior understandings of the scope of the FOIA.⁴⁹¹

The discussion of the doctrine of central purpose, and, more troubling, the notion of practical obscurity, demonstrates that the judiciary clearly contributed to the mutable meanings of

⁴⁸⁸ See *Lepelletier v. FDIC*, 164 F. 3d 37 (D.C. Cir. 1999).

⁴⁸⁹ Presumably this sound legal basis would abide by the central purpose reformulation; release of information should only occur if it implicated governmental oversight in some meaningful way. Halstuk & Davis, *supra* note 475, at 987. Ashcroft's memo expanded recommendations for secrecy; President Reagan's Attorney General William French Smith only asked requestors for a "substantial legal basis." *Id.*

⁴⁹⁰ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989).

⁴⁹¹ See *supra* pp. 61-64.

the FOIA and the application of FOIA exemptions. *The Reporter's Committee* litigation, a single Supreme Court case where the Justices interpreted the FOIA, fundamentally changed the scope and extent to which individuals could expect to access federal agency records. The final case in this section, *Favish*, echoes *The Washington Post* case in terms of expanding personal privacy.

Presumption of Legitimacy

Prior Supreme Court cases established a clear history of the Justices ruling in favor of privacy and subordinating governmental transparency.⁴⁹² More recently, the Supreme Court further complicated the process for accessing federal records. The case of *National Archives and Record Administration v. Favish* (2004) broadens privacy exemptions under the FOIA.

The *Favish* case concerns the suicide in 1993, of White House Deputy Counsel for then President Bill Clinton, Vincent Foster Jr.⁴⁹³ At the time of Foster's suicide, he was implicated in the Whitewater scandal which included the Clinton family in fraud.⁴⁹⁴ Although two separate governmental investigations ruled the death a suicide, Allan Favish, a Los Angeles lawyer, was skeptical⁴⁹⁵ and filed a FOIA request for records pertaining to Foster's death so that he could pursue an independent investigation.⁴⁹⁶ Specifically, Favish's interest was obtaining death scene and autopsy photos.⁴⁹⁷

⁴⁹² See U.S. Dep't v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

⁴⁹³ Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 157 (2004).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

Foster's family protested that this request violated the privacy of the surviving family.⁴⁹⁸ While the traditional assumption is that personal rights expire upon death,⁴⁹⁹ the Supreme Court chose to extend Foster's right to privacy beyond death to protect the family.⁵⁰⁰ The Supreme Court, when ruling in favor of Foster's privacy interests ten years after his death,⁵⁰¹ created a significant new test for "unwarranted" invasion of privacy.⁵⁰² The *Favish* case also represents the first time that explicit criteria outlining an invasion of privacy were detailed.⁵⁰³

Favish implicitly addressed Exemption 6 and explicitly addressed 7(C) of the FOIA. According to the former, the government must demonstrate that any disclosure would "constitute a clearly unwarranted invasion of privacy;"⁵⁰⁴ the latter only requires that disclosure could "reasonably be expected" to invade privacy.⁵⁰⁵ Therefore, Exemption 7(C) establishes a lower standard in terms of invasion of privacy than Exemption 6; Exemption 7(C) was the focus of the *Favish* decision.

⁴⁹⁸ *Id.*

⁴⁹⁹ Family members cannot sue for libel of a deceased relative, for example. Since libel encompasses an individual's reputation in the community, all legal concerns for that individual's reputation expire upon death. DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 142-43 (17th ed. 2011).

⁵⁰⁰ *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 157 (2004).

⁵⁰¹ *Id.*

⁵⁰² Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court's "Sufficient Reason" and "Presumption of Legitimacy" Standards*, 16(3) U.F. J. LAW & PUB. POL'Y 361, 363 (2005).

⁵⁰³ *Id.* at 391.

⁵⁰⁴ *FBI v. Abramson*, 456 U.S. 615, 622 (1982).

⁵⁰⁵ *Id.* Exemption 7(C) was not originally part of the FOIA. It was added in during the 1974 amendments.

The Supreme Court also used the *Favish* opinion to advance a doctrine of “presumption of legitimacy,” which assumes that public officials have the best interests of the nation in mind when agencies withhold information.⁵⁰⁶ Obviously, this interpretation contradicts the long-standing legislative intent of the FOIA, which presumes transparency.⁵⁰⁷ Accompanying the doctrine of the “presumption of legitimacy,” the Supreme Court broadened interpretations of the *Reporter’s Committee* decision to expand protections for personal privacy.⁵⁰⁸ The Justices asserted that this test would give lower courts’ decisions regarding FOIA requests clearer guidance.⁵⁰⁹

The test in question is two-pronged; when an agency withholds information by citing Exemption 7(C), the requester must demonstrate “sufficient reason for the disclosure.”⁵¹⁰ This means that the FOIA requester must have proof of significant public interest for release of information,⁵¹¹ and the information requested must satisfy that particular public interest.⁵¹² Although these two requirements address privacy concerns inherent in FOIA requests by denying the release of personally sensitive information, these requirements for requesters also overreach original legislative intent.

In the original language of the FOIA, requesters do not need to establish a reason or justification for requesting information.⁵¹³ The requirement that requesters bear the burden of

⁵⁰⁶ Nat’l Archives and Records Admin. v. *Favish*, 541 U.S. 157, 175 (2004).

⁵⁰⁷ See S. REP. No. 89-813, at 3.

⁵⁰⁸ Halstuk, *supra* note 502, at 377. *The Reporter’s Committee* decision is, arguably, the “most controversial FOIA decision ever decided by the U.S. Supreme Court.” *Id.* at 390.

⁵⁰⁹ Nat’l Archives and Records Admin. v. *Favish*, 541 U.S. 157, 173 (2004).

⁵¹⁰ *Id.* at 172.

⁵¹¹ Nat’l Archives and Records Admin. v. *Favish*, 541 U.S. 157, 172 (2004).

⁵¹² *Id.*

⁵¹³ See *supra* pp. 50-55.

proving information not yet accessible to them has important public interest is paradoxical and clearly contradicts legislative intent. In addition, exploitation of the second prong of the test, as a loophole, is possible. If a federal agency released similar information through previous FOIA requests, the agency might deny a later request because there is a diminished public interest in that information.⁵¹⁴

According to the Supreme Court, the *Favish* decision is an update of the *Reporter's Committee* decision and reflects the increased concern for privacy directly related to changes in technology.⁵¹⁵ Specifically, the “tremendous impact of communication and information technology on privacy explains the *Favish* Court’s rationale in compelling a FOIA requester to demonstrate a significant public interest in the records sought.”⁵¹⁶ On one hand, the expansion of technology in society led to the EFOIA amendments in 1996, but obviously has not transitioned equally and universally to more protections for government transparency. Instead, the 2004 *Favish* decision promotes increased protections for privacy.

The *Favish* case accomplished several expansions of privacy and decreased possibilities for disclosure for individuals under the FOIA. The “presumption of legitimacy” represents circular reasoning.⁵¹⁷ Using the new standard for privacy, a FOIA requester must justify their access to agency records by showing that the records will reveal governmental wrongdoing *before* being granted access to that information.⁵¹⁸ The standard from *Favish* is “extraordinarily

⁵¹⁴ Halstuk, *supra* note 502, at 394-95.

⁵¹⁵ Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 174 (2004).

⁵¹⁶ Halstuk, *supra* note 502, at 394.

⁵¹⁷ *Id.* at 396. Scholar Martin E. Halstuk in particular points out the discrepancy in this logic. *Id.*

⁵¹⁸ *Id.*

restrictive,” and furthermore, “creates a presumption of non-disclosure that plainly contravenes the FOIA’s statutory language and its congressional intent.”⁵¹⁹

The last case involving Exemption 6 and personal privacy is *Department of State v. Ray* (1991). It is analyzed separately due to the discussion of derivative uses, a theory which fundamentally changed the handling of FOIA requests. Prior to *Ray* no foundation existed for considering *why* requesters wanted certain information; *Ray* changed the standard to allow consideration of the purpose, or the derivative use of agency records.

Derivative Uses

The application of the theory of derivative uses exacerbates the conflict between the tenets of democratic disclosure and personal privacy interests of those mentioned in records.⁵²⁰ Under derivative-use theory the purpose of the information requested is considered.⁵²¹ In some cases, this derivative-use may include consideration by the agencies *before* disclosure, especially if there are implications for personal privacy. For example, records containing official correspondences by email might provide the contact information of people involved in governmental operations. In this hypothetical example, under derivative-use theory courts should consider exposure of personal information when weighing disclosure of an official email.

The Supreme Court approached the doctrine of derivative uses on several occasions, most significantly, in *Department of State v. Ray* (1991), in which the justices specifically considered

⁵¹⁹ *Id.* at 397.

⁵²⁰ Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, WILL. & MARY, BILL OF RIGHTS JOUR. 12(1), 3-4 (2003).

⁵²¹ *Id.*

the impact of derivative use and secondary effects.⁵²² In this case, a lawyer representing undocumented Haitian immigrants in Florida seeking political asylum,⁵²³ claimed that his clients' deportation would lead to the Haitian government's reprisals.⁵²⁴ The U.S. State Department disagreed with the lawyer's assessment, arguing that the Haitian government promised not to retaliate, and that the State Department had reports proving the validity of this promise.⁵²⁵ When the lawyer requested the reports, the documents he received had redacted names and addresses of the Haitian immigrants.⁵²⁶ The lawyer requested the names to verify the accuracy of the reports.⁵²⁷ The issue litigated before the Supreme Court was if FOIA Exemption 6 allowed redaction of this information.⁵²⁸

A lower court declared any privacy concerns "de minimis" in the presence of safety concerns for Haitian immigrants awaiting deportation.⁵²⁹ The Eleventh Circuit Court of Appeals also agreed that the public interest in this case was greater than the privacy interests of the Haitian immigrants listed in the reports.⁵³⁰ The Supreme Court eventually disagreed, citing specifically that the interviews conducted by the State Department were accomplished with "assurances of

⁵²² Dep't of State v. Ray, 502 U.S. 164 (1991).

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 166. Specifically, 25 documents were provided, with personally identifiable information redacted in 17 of those documents. *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 170.

⁵³⁰ *Id.* The Eleventh Circuit did specify that the privacy interests involved were more significant than the District Court originally ruled, but still affirmed in favor of public disclosure. *Id.*

confidentiality.”⁵³¹ The disclosure of redacted information would “publicly identify interviewees as people who cooperated with a State Department investigation of the Haitian Government’s compliance with its promise to the United States Government,”⁵³² potentially endangering the immigrants’ safety in Haiti. The promise of confidentiality imposed increased gravitas for privacy interests,⁵³³ and the Justices determined releasing redacted reports satisfied public interest for disclosure while protecting the personal privacy of those involved.⁵³⁴

The *Ray* case has three important outcomes.⁵³⁵ First, it reaffirmed a strong commitment to a preferential position for personal privacy. Second, *Ray* emphasized the central role of derivative uses. Finally, the case asserted in an unprecedented manner the legitimacy of FOIA claims involving personal privacy. According to this case, the burden for overcoming implications for privacy presumably rests with requestor. The lawyer for the undocumented Haitian immigrants criticized the Supreme Court’s decision by arguing that the ruling created a categorical standard that presumed nondisclosure in cases with aspects of derivative use and secondary effects.⁵³⁶

In *United States Department of Defense v. Federal Labor Relations Authority* (1994) the Supreme Court affirmed the perspective of derivative uses with regard to privacy exemptions and the FOIA.⁵³⁷ The case dealt with the disclosure of federal employees’ home addresses to labor

⁵³¹ *Id.* at 172.

⁵³² *Id.* at 176.

⁵³³ *Id.* at 177.

⁵³⁴ *Id.* at 178.

⁵³⁵ As identified by Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, WILL. & MARY, BILL OF RIGHTS JOUR. 12(1), 32 (2003).

⁵³⁶ *Id.* at 31.

⁵³⁷ U.S. Dep’t of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994).

unions.⁵³⁸ The labor unions planned to use these addresses for direct mailing in the union's collective-bargaining purposes.⁵³⁹ While admitting that the FOIA reflects a "general philosophy of full agency disclosure unless information is exempted,"⁵⁴⁰ the Supreme Court held that the public's interest in disclosure was negligible in this case.⁵⁴¹ Disclosure of federal employees' addresses would ease communications for the labor union but would not further interests in government transparency.⁵⁴²

Since public interest in disclosure was "very slight," privacy interests outweighed disclosure interests.⁵⁴³ The Court asserted that one of the secondary effects to consider is that "other parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions" rendering actual individual privacy interests "far from insignificant."⁵⁴⁴ The implication from this ruling is that all possible scenarios should be considered by the agencies before releasing any records that implicate privacy concerns. If the records could be used for applications other than illuminating the governmental process, then the records could be withheld under FOIA exemptions.

The Ninth Circuit Court of Appeals originally considered the effects of derivative uses in favor of democratic disclosure in *Bibles, Oregon Bureau of Land Management v. Oregon Natural*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 494.

⁵⁴¹ *Id.* at 497.

⁵⁴² *Id.*

⁵⁴³ *Id.* at 500.

⁵⁴⁴ *Id.* at 501.

Desert Association (1997).⁵⁴⁵ In this case the courts examined the disclosure of a mailing list used by the Oregon Office of U.S. Bureau of Land Management (BLM). Although the Ninth Circuit tried to apply derivative uses to support disclosure of information, the Supreme Court rejected this argument, explicitly stating in a very short opinion that the “purposes for which the request for information is made have no bearing on whether information must be disclosed under FOIA.”⁵⁴⁶

The cited cases demonstrate a noticeable double standard for uses and effects⁵⁴⁷ when applying the doctrine of derivative uses. According to the rendered opinions, considering possible secondary effects from disclosure of information should only occur when personal privacy is an issue. The Supreme Court, when considering derivative uses, rules in favor of personal privacy upon encountering a question of privacy vs. disclosure.⁵⁴⁸ The double standard is evident because the doctrine of derivative uses could also be the lens for viewing secondary effects of disclosure. Ultimately, the *FLRA* and *Bibles* cases continue the “Supreme Court’s trend of broadly skewing derivative uses and secondary effects toward privacy’s side of the balance.”⁵⁴⁹

⁵⁴⁵ *Bibles*, Oregon Bureau of Land Mgmt. v. Oregon Nat’l Desert Ass’n, 519 U.S. 355 (1997).

⁵⁴⁶ *Id.* at 356.

⁵⁴⁷ Dr. Martin Halstuk coined the phrase “uses and effects double standard” in: Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, WILL. & MARY, BILL OF RIGHTS JOUR. 12(1) (2003).

⁵⁴⁸ Hoefges, Halstuk & Chamberlin, *supra* note 547, at 25. The Supreme Court tends to favor individual privacy over public access to agency records, even when the issue of derivative uses is not raised. This preference for personal privacy is known as the central purpose doctrine. *See* Dep’t of the Air Force v. Rose, 425 U.S. 352 (1976); Dep’t of State v. Wash. Post Co., 456 U.S. 595 (1982); U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

⁵⁴⁹ Hoefges, Halstuk & Chamberlin, *supra* note 547, at 39.

Despite this preferential balancing, the Supreme Court has not reached a clear and cohesive position for “weighing personal privacy against public access interests under FOIA.”⁵⁵⁰ Some scholars suggest that Congress should create more restrictive privacy exemptions on the basis that FOIA’s legislative history demonstrates the “intent for a broad policy of full disclosure based on democratic political theory.”⁵⁵¹

Chapters Four, Five, and Six demonstrate areas where the Supreme Court ruled in a way where the outcome of a FOIA case seemed contradictory to the legislative intent of the FOIA. These chapters seek to establish a pattern in FOIA jurisprudence; the Supreme Court generally sided with the agencies in favor of withholding records that Congress otherwise intended to release.

Chapter Seven adds to the field of FOIA studies by breaking down these judicial efforts at narrowing the legislative intent of the FOIA and Congress’s backlash. After many of these Supreme Court cases Congress reacted by passing amendments to the FOIA meant to clarify and expand the stated legislative purpose in favor of increased government transparency. By providing this timeline, this dissertation argues that the FOIA is irrevocably broken. Amendments to the original legislation have only patched, not fixed, the issues highlighted by the Supreme Court cases.

⁵⁵⁰ *Id.* at 6.

⁵⁵¹ S. REP. NO. 89-813, at 3.

Chapter 7: Congressional Response to Judicial Overreach

Congress was very clear in stating the legislative intent of the FOIA. The FOIA was originally passed in 1966 to provide individuals access to federal agency records. Agencies should presume “full disclosure of records” as the standard to maintain under the FOIA.⁵⁵² In a 1965 Senate report, Congress noted that when understanding the scope of the “hundreds of departments, branches, and agencies [that] are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.”⁵⁵³

Although the Supreme Court has demonstrated understanding of Congress’s intentions to increase government transparency by making agency records available,⁵⁵⁴ the Supreme Court’s rulings have done much to stymie access to agency records. Consistently, the most problematic area for the judiciary has been the application of the FOIA exemptions. The courts have applied these nine exemptions in very uneven ways. Some courts have narrowed the exemptions to increase transparency while other courts have expanded the FOIA exemptions to the point that many more documents are withheld than Congress intended.

The previous three chapters focused on the judiciary’s role in destabilizing the FOIA through inconsistent rulings. Chapter Four looked at the CIA’s use of Exemption 3 to obscure,

⁵⁵²See S. REP. No. 813-89 (1965); H.R. REP. 1497-89 (1966); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978); U.S. Dep’t of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973), *cited in* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 515(2006).

⁵⁵³S. REP. No. 89-813, at 3.

⁵⁵⁴See EPA v. Mink, 410 U.S. 73, 80 (1973), *cited in* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 515(2006).

and in many cases withhold, all agency documents. Chapter Five examined the judiciary's use of Exemption 5 to expand upon the concept of executive privilege to keep records concerning deliberative processes from being disclosed. Chapter Six looked at the use of Exemption 6 and Exemption 7(C) and focused especially on the way the Supreme Court widened those exemptions to protect personal privacy.

One of possible explanations for the judiciary's actions towards the FOIA is the theory of great deference.⁵⁵⁵ Under this theory, the judiciary defers to the judgment of the executive branch. Often this is in matters of national security, but the deference can and has been extended to other areas, such as the court siding with the federal agencies on issues of disclosure. This results in the courts essentially rubber stamping claims by the agencies that the release of certain records could negatively impact government operations. Although oftentimes there is no proof offered by the agencies, the courts accede and withhold records.

Congress has not been passive in the face of the judiciary's skewed interpretation on the FOIA. Instead, Congress has attempted to correct and reinforce the legislative intent of the FOIA by passing amendments that invalidate various court opinions. This chapter explores the relationship between FOIA amendments and judicial decisions.⁵⁵⁶

This chapter addresses the final research question of this dissertation: what is the history of the implementation of the FOIA amendments? The FOIA has been amended several times in an attempt to fix vague language in the exemptions and improper interpretations made by the Supreme Court. Although these amendments were written to patch the original legislation, this chapter will demonstrate that they have not proven effective over time.

⁵⁵⁵CIA v. Sims, 471 U.S. 159, 176 (1985).

⁵⁵⁶The goal of this chapter is not to address every subsequent change to the text of the FOIA, but instead to trace the relationship between the three branches of government (cause and effect), from the legislature, to the executive branch, to the judiciary. As such, only FOIA amendments with a clear "story" will be addressed in-depth.

The 1974 FOIA Amendments

In 1972 a report by the House Committee on Government Operations discussed the inexpert use of the FOIA:

The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure from appointed officials at the policy making level and in some other agencies through public hearings and other oversight activities by the Congress.⁵⁵⁷

A year later the House held a series of meetings to identify some of the categorical failures of the 1966 version of the FOIA,⁵⁵⁸ resulting in identifying four problematic areas.

First, agencies were using exemptions to refuse almost all requests.⁵⁵⁹ Second, requesters often waited unreasonably long for any information because agencies did not provide service in a timely manner.⁵⁶⁰ Third, the agencies used various delaying tactics to extend deadlines and increase costs for fulfilling requests.⁵⁶¹ Fourth, agencies often interpreted the technical requirements of the FOIA in ways that led to noncompliance and refusal to supply records.⁵⁶²

⁵⁵⁷*House Committee on Government Operations: Administration of the Freedom of Information Act, House Report, 92nd Cong. 8-9 (1972).*

⁵⁵⁸JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 2:02, 3-26 (1994).

⁵⁵⁹*Id.*

⁵⁶⁰*Id.*

⁵⁶¹*Id.*

⁵⁶²*Id.*

These problems are highlighted by several congressional reports, where the House and Senate sought to clarify the purpose of the 1974 amendments.⁵⁶³ In the House report for the Committee on Oversight Government Reform, the document opened with the statement that the amendments should “strengthen the procedural aspects of the Freedom of Information Act [...] seek to overcome certain major deficiencies in the administration of the Freedom of Information Act.”⁵⁶⁴

In particular, the House report cited a long history with “information policies and practices of the executive branch of the Federal Government.”⁵⁶⁵ The 1974 amendments were designed to address Supreme Court decisions which placed unintended emphasis on the decision-making power of the executive branch with regards to the release of agency records.

Congress addressed this idea of “bad” precedent in the House report. The report cited a recent Supreme Court case, *Environmental Protection Agency v. Mink* (1973), where the Supreme Court interpreted the FOIA in such a way that the Court refused to review the documents in question. Instead, the Supreme Court decided that the FOIA limited judicial inquiry to whether or not the withheld documents were indeed classified, a “determination that was satisfied by an affidavit from the agency controlling the information.”⁵⁶⁶

The majority opinion held that “Exemption 5 does not require that otherwise confidential documents be made available for a district court’s *in camera* inspection regardless of how little, if any, purely factual material they contain.”⁵⁶⁷ The Supreme Court outright rejected the idea that

⁵⁶³A later House report detailing the FOIA’s legislative history noted that these 1974 amendments were categorically *not* written as a response to Watergate. H.R. REP. No.104-175 (1995).

⁵⁶⁴H. R. REP. No. 93-876, 122 (1974).

⁵⁶⁵*Id.*

⁵⁶⁶*Id.* at 127.

⁵⁶⁷*Env’t Protection Agency v. Mink*, 410 U.S. 73, 73 (1973).

Congress intended for the FOIA to allow the judiciary to review the classification decisions of the executive branch.⁵⁶⁸

In a concurring opinion in *EPA v. Mink* (1973), Justice Potter Stewart asked Congress to clarify the intended role of the judiciary in these FOIA cases. In response, Congress stated that the 1974 amendments were “aimed at increasing the authority of the courts to engage in a full review agency action with respect to information classified by the Department of Defense and other agencies under Executive order authority.”⁵⁶⁹

In the Senate report from the Committee on the Judiciary, which followed the House report, Congress further clarified that the amendments should “strengthen the citizen’s remedy against agencies and officials who violate the [FOIA] Act, and to provide for closer congressional oversight of agency performance under the Act.”⁵⁷⁰ That being said, the Senate report did not seem to find as much fault with the judiciary as the House report.

For example, the Senate report pointed out that the FOIA exemptions created the risk for increased confusion about the applications of the FOIA.⁵⁷¹ The judiciary though, had been vital in “resolving ambiguities and settling upon interpretations generally consistent with the spirit of disclosure reflected by the passage of the FOIA.”⁵⁷² Instead of substantial changes made to

⁵⁶⁸*Id.* at 84.

⁵⁶⁹H. R. REP. No. 93-876, 127 (1974).

⁵⁷⁰S. REP. No. 93-854, 153 (1974).

⁵⁷¹*Id.* at 159.

⁵⁷²*Id.* The Senate report did not completely ignore the potential for issues with the executive branch. One section of the report applauded the judiciary’s treatment and emphasized the minimal impact of the amendments. The same section also reiterated that the executive branch “uniformly opposed the Administrative Procedure Act in the 1940s and the Freedom of Information Act in the 1960s.” *Id.* Clearly, while the Senate was supportive of judicial decisions on the FOIA at this stage, that support did not extend to the executive branch’s approach towards government transparency.

correct the application of FOIA exemptions, the Senate report identified the proposed FOIA amendments as procedural.⁵⁷³

In 1974, Congress passed two separate FOIA amendments and overrode President Gerald Ford's veto of those amendments.⁵⁷⁴ In his veto, President Ford expressed particular dissatisfaction with the issue of classification. Although he admitted that the judiciary should have a more active role in reviewing challenged FOIA requests, he was concerned about the judiciary's lack of expertise in classified documents.⁵⁷⁵

The amendments addressed and remedied many of the main concerns that arose with the original 1966 version. The amendments made searching and copying fees uniform among the federal agencies,⁵⁷⁶ limited response time for requests to ten days,⁵⁷⁷ required only generally identifiable (not specific) descriptions of records,⁵⁷⁸ and federal district judges gained the

⁵⁷³S. REP. NO. 93-854, 159 (1974). For example, this report also addresses *EPA v. Mink* (1973) but in much less critical tones than the House report. *Id.* at 166-169.

⁵⁷⁴PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD (1974) 374-376, 1975. The House rejected and the Senate overrode the presidential veto. The amendments took effect on February 19, 1975. *See* 120 CONG. REC. H10, 875 (Nov. 20, 1974) and S19, 823 (Nov. 21, 1974). *See also* H.R. REP. 795, 104th Cong., 2d Sess. 9 (1996).

⁵⁷⁵“I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. However, the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise.” H. DOC. 93-383, 484 (Nov. 18, 1974) (Statement of Pres. Ford).

⁵⁷⁶The Library of Congress has a CRS record, summarizing the 1974 amendments. *See* CRS Summary, *Bill Summary and Status*, S. 4172, LIBRARY OF CONGRESS (1974), <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:SN04172:@@@D&summ2=m&>.

⁵⁷⁷U.S.C. § 552(a)(6)(A)(i).

⁵⁷⁸U.S.C. § 552(a)(3)(A). H.R. REP. NO. 1380, 93d Cong., 2d Sess., 7 (1974).

privilege to review top-secret information to determine compliance with guidelines for classification established by a Presidential Executive Order.⁵⁷⁹

These two congressional accounts of the judiciary's role in the 1974 amendments seem to present a conflicted legislative record. Exemption 5 remained particularly problematic even after these amendments because Congress—whether it intended to do so or not—tacitly left it up to the courts to shape the specific contours of Exemption 5. As a result, the lower federal courts did so with inconsistent and often conflicting opinions, which ultimately were reversed by the Supreme Court.

For example, the pre-decisional and post-decisional distinction under Exemption 5 remained unclear due to the multi-step approval processes that often take place in policy- and decision-making. Congress failed to take any initiative to settle this thorny question, again allowing the courts to make policy. Indeed, a draft proposal that is “final” at one level may change as the proposal moves through the pipeline of necessary approvals.⁵⁸⁰

In addition, it remained unsettled whether agencies could withhold pre-decisional documents that reflect facts or law that agencies apply. Although facts and law are protected from withholding because fact and law, in and of themselves, do not implicate personal opinions or personal recommendations, the interests that the deliberative process provision are intended to protect. Still, some courts have upheld agency nondisclosure under these circumstances in plain conflict with one of the FOIA's core principles—to prevent agencies from administering “secret law,” rules and regulations known only to bureaucrats, agency officials and attorneys who special in federal information dissemination policy.

Congress offered no clear guidance on how to separate law and fact from opinion, again leaving the courts free to define such matters on an *ad hoc* (i.e., case-by-case) basis. Releasing

⁵⁷⁹*Id.*

⁵⁸⁰ JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE 2:02, 786-87 (1994).

factual information contained in a pre-decisional, deliberative document is explicitly required by the FOIA. However, without specific criteria, how exactly should a court determine if the requested facts were so intertwined and inextricably linked with opinion that it is impossible to separate and release the facts without harming an agency's deliberative process? D.C. District Court Judge Emmet, who presided in the FOIA Cheney Energy Task Force case, wryly remarked: "What is most clear is that the law in this Circuit . . . is unclear"⁵⁸¹ even thirty years later.

Looking at Supreme Court cases after the 1974 amendments better illustrates some of these ongoing tensions between Congress and the Supreme Court with regards to the FOIA.

Expanding Exemption 5

The Supreme Court examined Exemption 5-- inter and intra-agency materials-- in light of the 1974 amendments in several cases after 1974.⁵⁸² In the aftermath of *EPA v. Mink* (1973) and the FOIA amendments, the Court was at first careful to conservatively interpret the exemption in *National Labor Relations Board v. Sears* (1975). First, Exemption 5 was affirmed to *never* apply to "final opinions" and "final dispositions."⁵⁸³ Second, recent changes to the legislative record made it clear that Congress intended to "limit application of Exemption 7 [investigatory law

⁵⁸¹ ACCESS REPORTS, *Court Rules Segregation Applies to Work-Product Privilege*, Vol. 30, No. 20, Oct. 20, 2004, at 2.

⁵⁸² See *Nat'l Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). In a closely related case, argued and decided on the same day, the Supreme Court narrowly interpreted Exemption 5 again. See *The Renegotiation Board v. Grumman Aircraft Engineering Corporation*, 95 U.S. 1491 (1975).

⁵⁸³ *Nat'l Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

enforcement records] to agency records” that would interfere with an investigation or invade an individual’s personal privacy, etc.⁵⁸⁴

Federal Open Market Committee v. Merrill (1979) examined whether certain agency records-- monetary policy directives-- could be withheld from the public for a month while they were in effect.⁵⁸⁵ In an analysis of the FOIA’s legislative intent, the Supreme Court noted that interpreting Exemption 5 as allowing agencies to delay disclosure “would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy.”⁵⁸⁶ Subsequently, the Court held that withholding monetary policy directives for a month could not be done under Exemption 5 because it would make the exemption unnecessarily broad.⁵⁸⁷

That being said, by 1979, the Supreme Court was willing to expand Exemption 5 in certain circumstances though. For example, the same case, *Federal Open Market Committee v. Merrill* (1979) also extended Exemption 5’s general concept of inter and intra-agency records to include a “qualified privilege” for confidential information held by commercial interests. According to the Court, there is a qualified privilege *if* the records were generated by a government agency “in the process leading up to awarding a contract.”⁵⁸⁸ These records would likely fall outside of a strict interpretation of inter or intra-agency records as outlined by Congress, creating a loophole for records completely outside the bounds of the FOIA.

⁵⁸⁴*Id.* at 164.

⁵⁸⁵*See* *Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979).

⁵⁸⁶*Id.* at 354.

⁵⁸⁷*Id.*

⁵⁸⁸*Id.* at 360.

The continuing expansion of Exemption 5 was very evident by 1984. The Court, in assessing whether Air Force safety records could be withheld as inter or intra-agency documents, held that “because of the difficulty inherent in compiling an exhaustive list of evidentiary privileges, it would be impractical to treat Exemption 5 as containing a comprehensive list of all privileges.”⁵⁸⁹ Instead, Exemption 5 represented “rough analogies”⁵⁹⁰ where the Congress, as interpreted by the Supreme Court, extended ill-defined protections for nondisclosure of agency records. The implication of this case was that more records should be withheld from disclosure when drawing a rough analogy.

The Supreme Court’s decisions *EPA v. Mink* (1973) was one of the main motivating factors in the 1974 amendments. Congress was careful with the amendments to correct the idea that the executive branch should be able to make FOIA determinations without any review from the courts. Two years later, in 1976, Congress amended Exemption 3 in response to another Supreme Court case, *FAA v. Robertson* (1975).

The 1976 FOIA Amendment

In 1976, Congress amended the FOIA again to clarify Exemption 3, which stated that the FOIA did not apply to information exempted by certain statutes previously.⁵⁹¹ The new amendment revised Exemption 3 so that the executives of agencies had *limited* discretion to withhold information requested under the FOIA.⁵⁹²

⁵⁸⁹U.S. v. Weber Aircraft Corp., 465 U.S. 792, 802 (1984).

⁵⁹⁰*Id.*

⁵⁹¹5 U.S.C. § 552(b)(3).

⁵⁹²H.R. REP. NO. 880, 94th Cong., 2d Sess. Pt. 1, 23, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2204-05. This amendment’s ultimate significance was that it affirmed congressional intent

Congress amended Exemption 3 explicitly to overturn *FAA v. Robertson* (1975). This case, which dealt with records that analyzed the maintenance and performance of commercial airlines,⁵⁹³ resulted in the Supreme Court giving the FAA almost unlimited discretion to withhold records from the public.⁵⁹⁴ The congressional report for the 1976 amendments stated that *FAA v. Robertson* (1975) “misconceives the intent of exemption (3).”⁵⁹⁵ The report went on to “recommend[s] that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information.”⁵⁹⁶

Although Congress amended Exemption 3 to overturn *FAA v. Robertson* (1975), the judiciary only maintained the 1976 amendment’s narrowed application of Exemption 3 until 1985. In 1985 of course, the Supreme Court gave the CIA blanket support to withhold almost all agency records from the public in *CIA v. Sims* (1985).

Under the *CIA v. Sims* (1985), the CIA could exempt unclassified and declassified information on the mere assertion that the agency was protecting “intelligence sources.”⁵⁹⁷ After the Supreme Court ruling, the CIA did not even have to assert that exempted records could

behind the FOIA’s promotion of governmental transparency. Despite no longer storing records as hardcopies, new electronic records would not remain exempt. By passing the EFOIA thirty years later, Congress demonstrated concern for remaining current with new technologies, attempting to guarantee a basic level of government transparency. *Id.*

⁵⁹³*FAA v. Robertson*, 422 U.S. 255, 255 (1975).

⁵⁹⁴*See Id.*

⁵⁹⁵H.R. REP. No. 94-880, 2205 (1975).

⁵⁹⁶*Id.*

⁵⁹⁷Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public’s Right to Know About the CIA*, 17(2) *Stan. L. & Pol’y Rev.* 353, 374 (2006).

damage or even impact national security.⁵⁹⁸ This broad rendering of Exemption 3 still stands intact as judicial precedent. As recently as 2004, the Supreme Court let stand a lower court's decision to deny a request for information regarding persons detained post-9/11.⁵⁹⁹

The 1974 and 1976 amendments show a cause and effect relationship between overly broad Supreme Court interpretations of FOIA exemptions and Congress. Supreme Court decisions during the late 1970s and early 1980s displayed continued unease with the disclosures of government information that the FOIA made routine. For example, in a 1979 decision Justice Rehnquist focused on the tension between FOIA requestors and private individuals and corporations who interacted with the government:

The Freedom of Information Act (herein FOIA) was a response to this concern [demands for information about the activities of private individuals/corporations], but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For, under the FOIA, third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.⁶⁰⁰

Although the judiciary obviously plays a crucial balancing role in ensuring that the FOIA is applied correctly, Congress has a vested interest in seeing that legislative intent is maintained. Sometimes when the Court oversteps, changes like the 1974 and '76 amendments happen. Sometimes, the Court goes on to extend boundaries that Congress did not even begin to address with the original or amended statutory language.

⁵⁹⁸CIA v. Sims, 471 U.S. 159, 183 (1985).

⁵⁹⁹See *Center for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918 (2004). In this case, the D.C. Circuit court upheld the secret detention of unidentified aliens, mostly on immigration charges. Many of these immigrants, although possibly terror suspects, were not charged. *Id.*

⁶⁰⁰*Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979).

The FOIA as a Reactive Statute

During the 1970s and 80s, the Supreme Court also focused on the *reactive* aspect of the FOIA. According to the Court, the FOIA “does not compel agencies to write opinions in cases which they would not otherwise be required to do so” but instead “only requires disclosure of certain documents which the law requires the agency to prepare.”⁶⁰¹ This is an important aspect of the statutory construction process, where the judiciary should delineate the boundaries of the statute when Congress left vague. In this instance, the Supreme Court articulated what Congress left unspecified- that agencies could not be compelled to create records, only provide records created in the management of federal executive agencies.

In 1980, the Supreme Court elaborated on this concept of the FOIA as a reactive statute when examining the issue of records that were transferred outside of an agency.⁶⁰² The Court held that the judiciary had no authority to order records “wrongfully removed from Government custody” to be disclosed.⁶⁰³ The Justices argued that they were “unable to read the FOIA as supplying that congressional intent.”⁶⁰⁴ The opinion in *Kissinger v. Reporter’s Committee* (1980) was careful to incorporate the 1974 amendments into the holding that it was outside of the bounds of the FOIA to retrieve records improperly taken outside of agency control.

In the opinion, the Court noted that the 1974 amendments “emphasized that agencies are not obligated to provide extensive services in fulfilling the FOIA.”⁶⁰⁵ Based on this statutory interpretation and the previous case’s holding that agencies are not compelled to create records,

⁶⁰¹Nat’l Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975).

⁶⁰²See *Kissinger v. Reporter’s Comm.*, 445 U.S. 136 (1980).

⁶⁰³*Id.* at 137.

⁶⁰⁴*Id.* at 150.

⁶⁰⁵*Id.* at 154.

the Court argued that “if the document is of so little interest to the agency that it does not believe the retrieval effort to be justified, the effect of this judgment on a FOIA request seems little different from the effect of an agency determination that a record should never be created.”⁶⁰⁶

The Supreme Court confirmed this line of precedent even more in *Forsham v. Harris* (1980), when it ruled that data generated by a private company that received government funds could not be considered agency records.⁶⁰⁷ These records lay outside the reach of the FOIA unless they had at some time been part of a federal executive agency.⁶⁰⁸ Per the Court, government funding does not make a private entity an agency under the definition of an agency.

During the early 1980s, several cases were brought before the Supreme Court testing the boundaries of Exemption 7. These cases mostly came about in response to law enforcement agencies expressing concerns about the disclosure requirements they faced under the FOIA.

The 1986 FOIA Amendments

Law enforcement agencies in particular chafed under the disclosure requirements mandated by the FOIA. While the Supreme Court did not drastically change the application of Exemption 7 in these opinions, the cases demonstrate continued dissatisfaction on the part of executive agencies.

For example, in 1982 the Supreme Court looked at whether or not records originally compiled for law enforcement purposes could still be withheld under Exemption 7 if the same

⁶⁰⁶*Id.* at 152-53. The Court went further to affirm that, in the Supreme Court’s view, “it is doubtful that Congress intended that a “search” include legal efforts to retrieve wrongfully removed documents, since such an intent would authorize agency assessments to the private requestor of its litigation costs in such an endeavor.” *Id.* at 154.

⁶⁰⁷*See* *Forsham v. Harris*, 445 U.S. 169 (1980).

⁶⁰⁸*Id.* at 178.

information was reproduced or summarized elsewhere.⁶⁰⁹ The Court clarified that “we are not asked in this case to expand Exemption 7 to agencies or material not envisioned by Congress.”⁶¹⁰ Instead, this case focused on the reproduction of materials that were exempt under Exemption 7. As such, the Supreme Court held that “information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements for Exemption 7 where that recorded information is reproduced.”⁶¹¹

The Supreme Court also ruled that privacy concerns surrounding Exemption 6 could trigger nondisclosure *even* if the information requested was *not* highly personal or intimate in *U.S. Department of State v. Washington Post* (1982).⁶¹² This set the minimal-privacy interest standard, which allowed information that might not otherwise be very revealing to still be considered private under the FOIA.⁶¹³

In 1986, Congress amended the FOIA for the third time in response to pressure from law enforcement agencies. This amendment, the Freedom of Information Reform Act of 1986, broadened restrictions for disclosure to allow law enforcement to exclude more records under Exemption 7.⁶¹⁴ Although Exemption 7 was expanded in 1986, Congress also confirmed its dedication to an overall policy of disclosure by reducing the costs of fulfilling FOIA requests.⁶¹⁵

⁶⁰⁹FBI v. Abramson, 456 U.S. 615, 615 (1982).

⁶¹⁰*Id.* at 631.

⁶¹¹*Id.* at 631-32.

⁶¹²Martin E. Halstuk & Bill Chamberlin, *The Freedom of Information Act 1996-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 542 (2006).

⁶¹³For a more in-depth discussion of the minimal-privacy interest *see supra* pp. 104-07.

⁶¹⁴5 U.S.C. § 552(b)(7). The amendments were part of the Anti-Drug Abuse Act of 1986. Although this dissertation focuses on the changes made to Exemption 7, another part of the amendments addressed the fees charged by different types of FOIA requestors. George

The 1986 amendments were not referred to in any of the congressional reports. The changes were addressed by statements made on the floor of the House and Senate, which could serve as indicators of congressional intent. Senator Leahy, for example, noted that the amendments “modify the scope of the exemption for law enforcement records, codify certain explanatory case law, and clarify congressional intent with respect to the agency’s burden in demonstrating the probability of harm from disclosure.”⁶¹⁶

With regards to Exemption 7, the changes were made for two main reasons. First, law enforcement agencies had noted a chilling effect on their informants.⁶¹⁷ Informants were increasingly fearful that FOIA records would disclose their identity.⁶¹⁸ This chilling effect hampered law enforcement investigations and as a result, Exemption 7 was expanded particularly to protect informants. Second, the law enforcement agencies argued that even *responding* to a FOIA request could alert “hostile intelligence services that an investigation is under way or has taken place.”⁶¹⁹ Although Congress responded to law enforcement concerns by amending Exemption 7, Representative English was fast to point out that the “very modest provisions [FOIA amendments] will solve the problems confronting law enforcement agencies.”⁶²⁰

Washington University, FOIA Legislative History (2008),
<http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm>.

⁶¹⁵ 5 U.S.C. §§ 552(a)(4)(A)(i-vii). These cost reductions made it so that the government only regained a small amount of the costs associated with fulfilling FOIA requests. *Id.*

⁶¹⁶ 132 CONG. REC. S14295-300 (1986) (statement Sen. Leahy).

⁶¹⁷ 132 CONG. REC. S14252 (1986) (statement Sen. Denton).

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ 132 CONG. REC. H9462 (1986) (statement Sen. English & Sen. Kindness).

Exemption 7 was broadened by the 1986 amendment, but this expansion was not meant to significantly change the application of the exemption. Instead the “small scope of the reform confirms [...] that the broad complaints from law enforcement community about the negative effects of the FOIA were greatly exaggerated.”⁶²¹ Unlike the 1974 and 1976 amendments, where Congress reacted to the Supreme Court by narrowing FOIA exemptions, in the 1986 amendment Congress chose to expand the scope of privacy protections to respond to law enforcement complaints.

Expanding Exemption 7

Although Congress supported limited expansions of Exemption 7, the Supreme Court was not willing to let those modest changes stand. In 1989, the Supreme Court issued one its most damaging opinions to transparency in *United States Department of Justice v. Reporter’s Committee for the Freedom of the Press* (1989).⁶²² This case was significant because it broadly limited the release of law enforcement information in the name of personal privacy. The case also introduced the concept of practical obscurity, which promoted decentralizing agency records to make it more difficult for information to be compiled.⁶²³

Aside from just impacting Exemption 7, the *Reporter’s Committee* case actually narrowed the *purpose* of the FOIA because the Supreme Court inaccurately represented the

⁶²¹*Id.*

⁶²²U.S. Dep’t of Defense of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

⁶²³*Id.* at 764.

legislative intent of the statute.⁶²⁴ The Supreme Court argued that the FOIA's purpose was 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."⁶²⁵

The Court even went so far as to allow agencies to consider the possible intended use of a record once it was disclosed. For example, in *United States Department of Defense v. Federal Labor Relations Authority* (1994) the Supreme Court looked at whether federal employees' home addresses could be disclosed to labor unions.⁶²⁶ The Court argued that public interest in that information was so slight that privacy interests trumped disclosure interests.⁶²⁷ In ruling on this issue, the Court also established the controversial idea of secondary effects-- whether the intended use of the records should be considered-- a concept well outside the established parameters of the FOIA.⁶²⁸

Under secondary effects, if a requestor could use disclosed agency records for a purpose other than simply illuminating the government process, the agency could consider that use as relevant to whether or not a record was disclosed. For instance, labor unions were interested in the home addresses of federal employees so that they could be contacted for labor union purposes, not so the labor unions could have a better understanding of the running of federal agencies. This judicial interpretation runs counter to the actual text of the FOIA, where agency

⁶²⁴Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 990 (2002).

⁶²⁵U.S. Dep't of Defense of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774 (1989).

⁶²⁶U.S. Dep't of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 487 (1994).

⁶²⁷*Id.* at 500.

⁶²⁸*Id.* at 501.

records must be available to any person,⁶²⁹ requested for any reason, and without personal connection to the information requested.⁶³⁰ The only requirements for a requestor are to “reasonably describe” the records desired and follow procedures detailed by the agencies.⁶³¹

Congress did not ignore these changes that the judiciary made to Exemption 7. Although the 1996 FOIA amendment did not specifically address these judicial decisions in the text of the new Electronic Freedom of Information Act (EFOIA), the legislative record makes this link clearer.

Addressing the Expansion of Exemption 7

In 1994, two years prior to the EFOIA, Supreme Court Justice Ginsburg reflected on the doctrine of the central purpose and existing FOI law. In a concurring Supreme Court opinion Justice Ginsburg noted that the doctrine was not a part of the FOIA’s language and criticized the narrowed interpretation disclosure to the public according to statutes for federal access.⁶³²

In a Senate report in 1996, Senator Patrick Leahy, the driving force behind the EFOIA legislation, clarified that the new FOI amendment would narrow and correct the judicial interpretation of central purpose case law, which began with *DOJ v. Reporter’s Committee*

⁶²⁹Freedom of Information Act, 5 U.S.C. § 552 (1991 & Supp. 2003). The term “any person” means individuals, foreign nationals, partnerships, corporations, and foreign or domestic governments. 5 U.S.C. § 551(2)(1994).

⁶³⁰*Id.*

⁶³¹Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A)&(B).

⁶³²*See* U.S. Dep’t of Defense v. FLRA, 510 U.S. 487, 509 (1994) (Ginsburg, J., concurring).

(1989).⁶³³ Jane Kirtley, then director of the Reporter's Committee for Freedom of the Press, even argued that the EFOIA entirely nullified the *Reporter's Committee* case.⁶³⁴

The EFOIA indirectly addressed the limited role practical obscurity should serve for applying FOI law. According to practical obscurity, specifically the *Reporter's Committee* case, records should remain decentralized, making it difficult for citizens to compile a complete account using agency records, protecting the government from unnecessary intrusion and of the privacy of anyone named in those named in records.

The EFOIA centralized records, first by defining electronic records as records subject to FOIA purview. Second, the EFOIA made electronic records easily accessible to citizens without undue burdens. While databases could have provided an excuse to further isolate or even delete "records" in the tradition of practical obscurity, the 1996 amendment clarified that such actions would counter more modern interpretations of FOI law.

The FOIA's crafters understood that citizens in a democracy must have access to government information in order to make informed decisions.⁶³⁵ One of the fundamental

⁶³³S. REP. NO. 104-272, at 23-32 (1996). Unfortunately, Senator Leahy's remarks did not unequivocally establish the purpose of the EFOIA. Leahy's remarks appeared in the Senate version of the bill, but the House version became law. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 1016 (2002). Despite this, the Senator's continued support and involvement in FOI issues are a useful barometer for the general political climate surrounding passage of the EFOIA.

⁶³⁴HEARING ON THE IMPLEMENTATION OF THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996: IS ACCESS TO GOVERNMENT INFORMATION IMPROVING?, SUBCOMTM. ON GOV'T MANAGEMENT, INFORM. AND TECH, OF THE HOUSE COMM. ON GOV'T REFORM AND OVERSIGHT, JUNE 9, 1998, 105TH CONG. 197 (1998) (testimony of Jane E. Kirtley, Executive Director, Reporters Committee for Freedom of the Press), *cited in* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporter's Committee "Central Purpose" Reformulation*, 54:3 AD. L. REV. 984, 1015 (2002). Despite claims that the EFOIA more accurately reflects the intentions of FOI law in the United States, judicially, the *Reporter's Committee* case remains the final word for the efficacy of the doctrine of central purpose. *Id.* at 1017. The courts have also interpreted the EFOIA amendments as clarification that electronic records are indeed subject to the FOIA. *See O'Kane v. United States Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999).

principles behind the statute's agency disclosure mandate is to protect against the development of "secret law," e.g., an "obscure and hidden order or opinion," known only to administrative and regulatory agency officials, but not to the general public who use the FOIA and must deal with agencies when appealing a nondisclosure decision.⁶³⁶

In fact, part of Congress' intent behind the 1996 amendment was to guard against the concealing of procedural rules and "secret law." The EFOIA imposes the affirmative duty on all agencies and departments to publish their policies and rules on all government agency Internet sites, without the need for a request for this information.

Such information would include, but is not limited to: agency organizational plans, substantive agency rules and regulations, annual reports, agency functions, procedures, objectives, and also instructions in plain language on how to use the open records law.⁶³⁷

The 1996 FOIA Amendment

In 1996, the Electronic Freedom of Information Act (EFOIA) amended and updated the FOIA by integrating electronic information.⁶³⁸ Specifically, this amendment defined agency

⁶³⁵ See, e.g., H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles (1974), at 33 (stating that a "democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. ... [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.") The Source Book of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, is a primary source for the legislative history of the FOIA.

⁶³⁶ 5 U.S.C. § 552(a)(3), (a)(4)(A) & (a)(6)(A). See S. Rep. No. 813, 89th Cong., 1st Sess. (1965). See also U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & POLICY OVERVIEW 6-7 & 20, MAY 2002.

⁶³⁷ See MARK A. HAMMITT, DAVID L. SOBEL AND MARK S. ZAID, EDS., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 1 (2002). See also THE FOIA GUIDE, at 41-42.

records to include information archived in any format, including electronic records.⁶³⁹ Prior to this amendment, FOIA's guarantee for access to government information did not explicitly include electronic records.⁶⁴⁰

With the proliferation of computers since 1966, many records were unavailable to the public due to their electronic archiving. The EFOIA included electronic records and established requirements for transparency while mandating that agencies establish electronic reading rooms for citizens.⁶⁴¹ The amended act extended the limit for responses to requests from ten to 20 days due to the immense amount of electronic information requiring searching and sorting to respond adequately.⁶⁴²

In a House report to the Committee on Government Reform and Oversight, the report noted that "FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility."⁶⁴³ The rationale of the EFOIA was continued access to government records, regardless of the format.⁶⁴⁴ Part of this purpose was defined as uniformity among the guidelines for executive agencies, hopefully decreasing uncertainty for FOIA requestors.⁶⁴⁵

⁶³⁸ See Pub. L. 104-231, 110 Stat. 3048, §§ 1-2 (1996) (amending sections of 5 U.S.C. § 552).

⁶³⁹ *Id.*

⁶⁴⁰ Martin Halstuk & Bill Chamberlin, *Open Government in the Digital Age*, 78(1) JOUR. AND MASS COMM. 45, 45 (2001). Prior to 1996, judges determined the appropriateness of access to electronic information on a case-by-case basis. *Id.* at 48.

⁶⁴¹ Pub. L. 104-231, 110 Stat. 3048, §§ 1-2 (1996) (amending sections of 5 U.S.C. § 552).

⁶⁴² *Id.*

⁶⁴³ H.R. REP. No.104-175, 11 (1996).

⁶⁴⁴ *Id.* at 12.

⁶⁴⁵ *Id.*

The EFOIA, more clearly than any other amendment, demonstrated the presence of a frequent gap in accessibility between innovations (specifically technical innovations) and legislative action.⁶⁴⁶ Even afterward, actual implementation can significantly lag the directive. For example, a public-interest group examined 57 agencies in the years after passage of the EFOIA: As of January 1, 1998 not a single agency had complied fully with the provision requiring agencies to publish on the Internet.⁶⁴⁷ Problems with compliance lingered for quite some.⁶⁴⁸

Subsequent FOIA Amendments

There have been several additional amendments since the EFOIA, though these amendments respond much less directly to judicial constructions of the FOIA. In 2002, the Intelligence Authorization Act⁶⁴⁹ amended the FOIA with amendments such as “Prohibition on Compliance with Requests for Information Submitted by Foreign Governments.”⁶⁵⁰ In effect, the changes to the FOIA allowed agencies to deny requests made by foreign governments or international governmental organizations. If agencies even suspected that a request originated

⁶⁴⁶ Halstuk & Chamberlin, *supra* note 640, at 57.

⁶⁴⁷ Jennifer Henderson & Patrice McDermott, *Arming the People “...with the power knowledge gives”*: An OMB Watch Report on the Implementation of the 1996 “EFOIA” Amendments to the Freedom of Information Act, OMB Watch (1998), cited in Martin E. Halstuk, *Speed Bumps on the Information Superhighway: A Study of Federal Agency Compliance with the Electronic Freedom of Information Act of 1996*, 5 COMM. L. & POL’Y 423, 424 (2000).

⁶⁴⁸ See generally Martin E. Halstuk, *Speed Bumps on the Information Superhighway: A Study of Federal Agency Compliance with the Electronic Freedom of Information Act of 1996*, 5 COMM. L. & POL’Y 423 (2000).

⁶⁴⁹ Intelligence Authorization Act for Fiscal Year 2003, Pub.L. 107-306 (2003).

⁶⁵⁰ Intelligence Authorization Act, Pub. L. 107-108 (2001).

with a non-United States entity, agencies could seek further details. This amendment obviously impacted agencies dealing with national security interests. Although the ultimate result was a narrowing of disclosed records, this amendment makes sense in the context of 9/11 and concerns about protecting national security.

In 2007, Congress passed the Openness Promotes Effectiveness in our National Government Act (OPEN Government Act),⁶⁵¹ which changed several aspects of the FOIA. In terms of clarifying existing language, the OPEN Government Act specifically recognized electronic media and attempted to define the *news media* as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”⁶⁵²

This federal definition clarified the identity of the news media,⁶⁵³ and the term *record* expanded to include information held for an agency by a contractor for the government.⁶⁵⁴ The change is notable due to increasing privatization of government, in which agencies hire contractors to perform governmental functions.⁶⁵⁵ Senator Leahy, for example, identified

⁶⁵¹Openness Promotes Effectiveness in our National Government Act of 2007, Pub.L. 110-175 (2007).

⁶⁵²*Id.*

⁶⁵³*Id.*

⁶⁵⁴*Id.*

⁶⁵⁵This component is especially important given the increasingly large role that contractors play in the federal government. *See generally* PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); JODY FREEMAN & MARTHA MINOW, *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (2009). A 2006 CRS report defined privatization as the “use of the private sector in the provision of a good or service, the components of which include financing, operations (supplying, production, delivery), and quality control.” *Privatization and the Federal Government: An Introduction* (2006) (CRS report by Kevin R. Kosar, Analyst in American National Government, Government and Finance Division).

privatization as a “way to escape congressional oversight and a way to escape debate even within the Administration-and most important to escape responsibility.”⁶⁵⁶

Before the OPEN Government Act, one of the loopholes in the FOIA allowed denying release of records retained by the government’s contractors. The OPEN Government Act addressed *FOMC v. Merrill* (1979)’s standard of providing a qualified privilege for inter and intra-agency records that include government contractors.⁶⁵⁷ The Act essentially negated this 1979 Supreme Court case.

The OPEN Government Act also addressed existing issues of accountability, primarily legislation establishing an Office of Government Information Services within the National Archives and Records Administration to assess agency-compliance with the FOIA.⁶⁵⁸ Agencies appointed a FOIA Public Liaison to resolve conflicts between requesters of information and agencies.⁶⁵⁹

The amendment also mandated tracking numbers for outstanding information requests, creating system for requestors to survey the status of outstanding requests.⁶⁶⁰ In addition, agencies had to specify *which* exemption or exemptions they applied for each circumstance of deleted or redacted information.⁶⁶¹ Finally, the OPEN Government Act changed financial policies, such as preventing an agency from collecting fees when not complying with FOIA deadlines.⁶⁶²

⁶⁵⁶DAVID SADOFSKY, KNOWLEDGE AND POWER 88 (1990).

⁶⁵⁷Federal Open Market Comm. v. Merrill, 443 U.S. 340, 360 (1979).

⁶⁵⁸Openness Promotes Effectiveness in our National Government Act of 2007, Pub.L. 110-175 (2007).

⁶⁵⁹*Id.*

⁶⁶⁰*Id.*

⁶⁶¹*Id.*

⁶⁶²*Id.*

Finally, in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.⁶⁶³ This legislation originally contained provisions shielding the Securities and Exchange Commission (SEC) from complying with requests for information according to FOIA standards.⁶⁶⁴ Repeal of these specific modifications to the FOIA occurred in September 2010 and amended legislation dealing with shielding the SEC is pending.⁶⁶⁵ This amendment, along with the OPEN Government Act, also increased government transparency under the FOIA.

Two of the three more recent FOIA amendments contributed to more access to federal agency records. This trend towards transparency is reflected in recent Supreme Court cases that address the FOIA as well.

Recent FOIA Cases

After several rounds of amendments to the FOIA, as well as major changes to the makeup of the Supreme Court, a 2001 case shows a very different interpretation of Exemption 5 from earlier cases. In an opinion by Justice Souter, the Court held that documents concerning water allocations for Indian Tribes that would normally be privileged in civil discovery would *not* be exempt under Exemption 5. Instead, the Court refused to read an “Indian trust” exemption into

⁶⁶³Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010). This act responded to the worldwide economic crisis of the 2000s, and brought the most significant changes to financial regulation since the Great Depression. Securities and Exchange, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC (2012), <http://www.sec.gov/spotlight/dodd-frank.shtml>.

⁶⁶⁴*Id.*

⁶⁶⁵S. 3717, 111th Cong. (2010).

the statute, stating that it was outside the legislative intent defined by Congress.⁶⁶⁶ Although it might be heartening to see a swing towards a pro-transparency interpretation of Exemption 5, the following cases actually serve to demonstrate the instability of the judiciary's application of FOIA exemptions since 1966.

In 2011, the Supreme Court ruled in a pro-transparency case about Navy records. The Court in this case looked at whether the Navy could withhold records concerning maps of a naval base under Exemption 2.⁶⁶⁷ Ultimately, the Supreme Court ruled that Exemption 2 should not stretch that far.⁶⁶⁸

In the majority opinion, Justice Kagan was careful to define the Supreme Court's use of statutory construction: "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."⁶⁶⁹ In adhering to a close statutory construction reading of the FOIA, the Supreme Court declined to "reauthorize the expansive withholding that Congress wanted to halt. Our reading instead gives the exemption the "narrower reach" Congress intended."⁶⁷⁰ As such, the Supreme Court declined to affirm the Navy's withholding of records. Exemption 2 should be narrowly applied and the records should be disclosed.

The Supreme Court tackled the question of whether a private company could have "personal privacy" under Exemption 7 in *FCC v. AT&T* (2011).⁶⁷¹ This is another case where the

⁶⁶⁶See *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S. 1 (2001).

⁶⁶⁷*Milner v. Dep't of Navy*, 562 U.S. ____ (2011).

⁶⁶⁸*Id.*

⁶⁶⁹*Id.*

⁶⁷⁰*Id.*

⁶⁷¹*Federal Commc'n Comm'n v. AT&T*, 526 U.S. ____ (2011).

Court was very protective of the FOIA. The Court ultimately held that imbuing a private corporation with the privacy protections outlined by Exemption 7 was an inaccurate application of the exemption.⁶⁷² Justice Roberts recounted an Attorney General memorandum to executive departments and agencies after the 1974 FOIA amendments.⁶⁷³ The memorandum defined the exemption as pertaining to the privacy interests of individuals.⁶⁷⁴ As such, records about AT&T could not be withheld under the FOIA because of privacy concerns.

Not every recent Supreme Court case demonstrates a pro-transparency perspective. For example, *National Archives and Record Administration v. Favish* (2004) broadens privacy exemptions under the FOIA, specifically for Exemption 7.⁶⁷⁵ According to the Supreme Court, the *Favish* decision is an update of the *Reporter's Committee* ruling.⁶⁷⁶ These more recent Supreme Court decisions show an evident shift in the makeup of the politics of the Court, as well as the mutability of judicial opinion over time.

Chapter 7 attempted to trace relationships between judicial actions and responses made by Congress. Although recent legislative and judicial actions seem to provide solutions to FOIA's problems, in reality they do not absolve the statute's issues. At this writing, nearly a half-century after the FOIA became law; the evidence strongly indicates that the FOIA has not withstood the tests of time. Indeed, it is no longer an adequate legal mechanism to help ensure government transparency in the 21st century. It is, in short, broken. Chapter 8 will synthesize the arguments

⁶⁷²*Id.*

⁶⁷³*Id.*

⁶⁷⁴*Id.*

⁶⁷⁵*Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 157 (2004).

⁶⁷⁶*Id.* at 174; Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court's "Sufficient Reason" and "Presumption of Legitimacy" Standards*, 16(3) U.F. J. LAW & PUB. POL'Y 361, 394 (2005).

made in this dissertation and look forward as this research draws to a close, offering some potential options for further research.

Chapter 8: Conclusion

Supreme Court Justice Louis D. Brandeis famously wrote that “sunlight is said to be the best of disinfectants; electric light the most efficient policemen.”⁶⁷⁷ Justice Brandeis’s words embody the sentiment of countless other politicians and scholars who see governmental openness as an indication of a healthy, functioning democracy.⁶⁷⁸ To this end, Congress enacted the Freedom of Information Act in 1966 to increase government transparency and provide individuals with an enforceable legal mechanism to help guarantee public access for government records.⁶⁷⁹

The FOIA is a profoundly vital tool to ensure a vigorous participatory government, making the Act’s efficacy of central importance. Currently, the reality is that the FOIA is mostly self-enforced by the executive agencies, with little if any oversight for compliance. Such a system often can result in widely varying outcomes in disclosure decisions by the agencies and the courts as well, this study has shown.

This dissertation takes the critical stance that the FOIA as it exists now cannot provide access to federal agency records. Despite tracing a long history of legislative intent that explicitly favors government transparency, this research demonstrates that the FOIA has fundamental flaws that prevent the outcome intended by the Act’s original crafters. Although there have been several

⁶⁷⁷*Harper's Weekly* first published Brandeis’ celebrated statement in a 1913 article, “What Publicity Can Do.” His view of how secrecy undermines public accountability was one he held for many years. In an 1895 letter to his finance, Brandeis wrote a less circulated declaration on the same theme: “If the broad light of day could be let in upon men’s actions, it would purify them as the sun disinfects.” Sunlight Intern, *Brandeis and the History of Transparency*, SUNLIGHT FOUNDATION (2009)<http://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency/>.

⁶⁷⁸S. REP. No. 89-813 (1965); H.R. REP. No. 89-1497 (1966). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), THOMAS C. DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* 418 (2 ed. 1999).

⁶⁷⁹5 U.S.C. § 552.

attempts to fix issues with the FOIA through statutory amendments, these amendments have patched or otherwise inadequately dealt with the issue of the judiciary's application of FOIA exemptions in court cases. These ineffective practices ultimately led to an untenable situation, where access to government information is contingent on many factors that have little or nothing to do with an accurate application of law.

Summary of Research

This dissertation began by introducing government transparency as access to government-controlled information, specifically the records of federal regulatory and administrative agencies, as mandated by the FOIA. Chapter 1 proposed several research questions that guided research. First, what role does government transparency play in fostering and maintaining democratic principles in a free and open society? Second, what is the legislative intent of the FOIA? Third, how has the Supreme Court ruled on cases regarding the FOIA? Finally, what is the history of the implementation of the FOIA amendments? All of these questions have been addressed and answered in this dissertation.

Chapter 2 expanded upon the justifications for having legal access to government-controlled information. At the outset, this chapter examined theories of deliberative governance that provide justification *for* government transparency. From this theoretical foundation, Chapter 2 examined the idea of access to information as a fundamental part of a democratic society. This chapter answered the first research question by demonstrating that government transparency is essential to a democratic society.

Chapter 3 established the legislative intent of the FOIA by providing a detailed legislative history of the FOIA, focusing on congressional reports and floor debates. This chapter also addressed literature that discusses government transparency with regards to the FOIA.

Chapters 4-6 looked at how the Supreme Court ruled on cases regarding the FOIA. These chapters showed that there is disconnect between the legislature and the judiciary with regards to applying FOIA exemptions. Chapter 4 examined Exemption 3, which exempts records from disclosure if that information was withheld under statutes passed prior to the FOIA. In particular, this chapter scrutinized the use of Exemption 3 by the CIA to withhold almost all of that agency's records. Chapter 5 addressed Exemption 5, which allows inter and intra-agency files to be withheld from disclosure. Chapter 6 examined Exemption 6 and 7(C), the personal privacy exemptions. Chapter 6 showed that the Supreme Court went too far in its opinions, resulting in a narrowed interpretation of the purpose of the FOIA, and ultimately contravening the legislative intent of Congress.

Chapter 7 provided original legal analysis by pulling together a timeline that detailed the conflict between Congress and the Supreme Court. This chapter also answered the final research question, what is the history of the implementation of the FOIA amendments? Congress struggled to enforce the FOIA to guarantee government transparency. Chapter 7 highlighted the futility of using statutory amendments to fix the FOIA.

Findings

The findings of this dissertation lead to several conclusions. First, the FOIA as it is written is subject to abuse and manipulation. The federal agencies employ various strategies to disregard the disclosure requirements intended⁶⁸⁰ by Congress. Specifically, the agencies take advantage of

⁶⁸⁰See S. REP. No. 89-813, at 3,5 (1965); Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat 3048 (1996).

varying standards provided by the executive and judiciary branches to withhold more records than Congress intended.⁶⁸¹

Second, the Supreme Court has been complicit in these agency tactics since the 1970s. In fact, many Supreme Court decisions have clearly contravened the FOIA's purpose⁶⁸²-- reducing the categories of information available,⁶⁸³ and preferentially balancing competing interests, such as confidentiality⁶⁸⁴ and privacy.⁶⁸⁵

Congress has introduced several amendments⁶⁸⁶ to the FOIA over the last four decades in an attempt to address these expansive Supreme Court opinions. Ultimately, these amendments have been inadequate to overcome the barriers to disclosure that the agencies and the courts have erected.⁶⁸⁷

⁶⁸¹In particular, agencies have employed four FOIA statutory exemptions to justify cloaking agency records from public view: Exemption 3 (existing secrecy statutes), Exemption 5 (executive privilege, specifically deliberative process), Exemption 6 (personal privacy), and Exemption 7(C) (law enforcement investigation confidentiality). 5 U.S.C. § 552(b)(3)(B); 5 U.S.C. § 552(b)(5)(B); 5 U.S.C. § 552(b)(6)(B); 5 U.S.C. § 552(b)(7(C))(B).

⁶⁸² See U.S. Dep't of State v. Washington Post, 456 U.S. 595 (1982); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 157 (2004).

⁶⁸³ See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

⁶⁸⁴ See CIA v. Sims, 471 U.S. 159 (1985).

⁶⁸⁵ See U.S. Dep't of State v. Washington Post, 456 U.S. 595 (1982); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 157 (2004).

⁶⁸⁶ Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat. 3048 (1996).

⁶⁸⁷ See Jennifer Henderson & Patrice McDermott, *Arming the People "...with the power knowledge gives": An OMB Watch Report on the Implementation of the 1996 "EFOIA" Amendments to the Freedom of Information Act*, OMB Watch (1998).

Government Transparency in a Democracy

This dissertation has sought to construct a careful argument showing that under the deliberative model of democratic government, access to government information is necessary. In a deliberative model of democratic government, political systems are legitimized through a combination of citizen participation and public discourse.⁶⁸⁸

Deliberation is defined here as a “form of discussion intended to change the preferences on the bases of which people decide how to act. Discourse is ‘political’ when it leads to a decision binding on a community.”⁶⁸⁹ In a deliberative society, information is prized. Individuals must be able to access government records.⁶⁹⁰ This access serves the dual purpose of keeping individuals informed and the government open to inspection.

Expansive Interpretations of FOIA Exemptions

Congress passed the FOIA in 1966 to answer this need for government transparency by granting broad, undifferentiated access to federal agency records. The FOIA was written with nine exemptions to protect agencies from disclosing a variety of sensitive materials: records pertaining to national security, personal privacy, business trade secrets, etc. The prevailing presumption though, was disclosure.

These exemptions have proven challenging in their application. Not only have federal agencies inappropriately applied FOIA exemptions to withhold records, the Supreme Court has

⁶⁸⁸JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY* 264-266 (2009).

⁶⁸⁹Adam Przeworski, *Deliberation and Ideological Domination*, in *DELIBERATIVE DEMOCRACY* 140 (Jon Elster ed., 1998).

⁶⁹⁰DAVID SADOFSKY, *KNOWLEDGE AND POWER* 26 (1990).

consistently ruled in favor of the agencies, lessening the amount of information available to the public. In particular, federal agencies have overused four of FOIA's exemptions to keep records from public disclosure: Exemption 3 (existing secrecy statutes),⁶⁹¹ Exemption 5 (executive privilege, specifically deliberative processes),⁶⁹² Exemption 6 (personal privacy)⁶⁹³ and Exemption 7(C) (law enforcement investigation confidentiality).⁶⁹⁴

Beginning in the early 1970s,⁶⁹⁵ the Supreme Court upheld numerous agency secrecy decisions by resorting to judicial overreaching—actions tantamount to historical revisionism of the FOIA's original congressional intent. In reaching its nondisclosure conclusions, the Court overstepped its authority by disregarding the plain text of the FOIA.⁶⁹⁶ In other instances, the Supreme Court was left to construct meaning when questions arose about vague language in the FOIA. In these instances as well, the Supreme Court erred towards nondisclosure.

For example, Exemption 5 has the potential to cause a "chilling effect," which the deliberate process provision is based on. The FOIA and related amendments provide no consistent deliberative process guidelines or definitions in terms of distinguishing facts (which can be segregated from a document and disclosed) from opinion (personal views, which if disclosed can result in "chilling effect" undermining candid and frank advise). The standout example of this problem is the two widely divergent outcomes reached by the Ninth Circuit and the Eleventh Circuit on whether "adjusted" census data could be disclosed.

⁶⁹¹5 U.S.C. § 552(b)(3)(B).

⁶⁹²*Id.* at (5).

⁶⁹³*Id.* at (6).

⁶⁹⁴*Id.* at (7(C)).

⁶⁹⁵*See* U.S. Dep't of State v. Wash. Post, 456 U.S. 595 (1982).

⁶⁹⁶S. REP. No. 89-813, at 3, 5 (1965).

In the absence of clear legislative guidelines for Exemption 5, the central bone of contention in the cases concerning Vice President Cheney's Energy Task Force was the identity of Cheney's advisers. The result was that even the identities of the Vice President's advisers-- not their advice-- were withheld.

One of the fundamental principles supporting the judiciary's read of the "chilling effect" rationale is in itself highly questionable: the public must be protected from confusion that could result from publicizing records before policies and decisions are made final. This is a paternalistic presumption upheld by the judiciary that the general public can be easily misled or voters simply are not smart enough to grasp policy-making processes. This unfounded government justification for secrecy collides with fundamental democratic principles of an open society, and directly conflicts with the First Amendment rights of citizens to debate important national policy issues.

Allowing Exemption 5 to shroud the federal agency decision-making process under a vaguely articulated "chilling effect" theory dangerously fosters group-think. This poses dire consequences when like-minded groups and individuals are insulated from opposing or novel views.⁶⁹⁷ Congress has made it abundantly clear that the burden is on the government to justify withholding a record,⁶⁹⁸ but as FOIA expert Harry Hammitt noted, the Exemption 5 is so broadly construed by the courts that "its routine application threatens to choke off much of what the government actually does on a day-to-day basis."⁶⁹⁹ An activist judiciary has, in effect, legislated

⁶⁹⁷ *See, generally*, IRVING JANIS, *GROUPTHINK* (1982).

⁶⁹⁸ 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action" in rejecting a FOIA request for disclosure). *See also* *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 311 (D.C. Cir. 1988) (noting that the EPA bears the burden of justifying its decision).

⁶⁹⁹ ACCESS REPORTS, *Court Rules Segregation Applies to Work-Product Privilege*, Vol. 30, No. 20, Oct. 20, 2004, at 2-3.

nondisclosure in areas of deliberative processes—a misguided perspective that blatantly stands against the ideals the Congress expressed in 1966 and in subsequent amendments.⁷⁰⁰

One of the most significant issues with the application of FOIA exemptions by the judiciary is the broadening of Exemption 6 and 7(C) in the name of protecting privacy interests. For example, in 1989 the Court significantly broadened Exemption 7(C) and narrowed the interpretation of the FOIA's purpose.⁷⁰¹ This dramatically contracted the understanding of the intent of the FOIA and countermanded Congress's objective in passing this federal access law.⁷⁰²

These cases also show that the Supreme Court has championed broader interpretations of FOIA's exemptions, inappropriately restricting access to government-controlled information. Congress has not ignored these decisions though. In fact, Congress proactively passed FOIA amendments in an attempt to correct erroneous court opinions and clarify the boundaries of government transparency.

Congressional Response to the Supreme Court

Congressional lawmakers amended the FOIA in significant ways in 1974, 1976, 1986, and 1996. These amendments were designed to strengthen the law by requiring *in camera* review

⁷⁰⁰ MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 17 (1994). As Sandra Day O'Connor wrote in a blistering FOIA opinion dissent that criticized the Court majority's nondisclosure holding: "It scarcely needs to be repeated that Congress's objective in requiring such disclosure was to 'ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" *FBI v. Abramson*, 456 U.S. 615, 642 (1982)(O'Connor, J., dissenting (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978))).

⁷⁰¹ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

⁷⁰² Senator Leahy, for example, was openly critical of the Court's ruling: *Reporter's Committee* "distorts the broader import of the Act in effectuating Government openness." S. REP. NO. 104-272, at 26-27 (1996) (statement by Sen. Leahy).

in national security access disputes; reducing agency discretion to withhold documents; mandating the segregation and release of non-exempt information from documents containing exempt materials; and clarifying that computerized information, including government databases, are subject to the FOIA's disclosure requirements just the same as paper records.⁷⁰³

As this research demonstrated, these amendments were written in response to overly broad Court opinions. These amendments attempted to patch over the issues created by the federal agencies and the Supreme Court, but met with only moderate success.

Oftentimes, in the wake of an amendment, the Supreme Court was careful to respond to the implicit critique by Congress. In the years directly after the 1974 amendments, the Supreme Court narrowly interpreted the problematic Exemption 5 so that more agency records could be disclosed.⁷⁰⁴ It was not long though before the Court began to broaden its application of Exemption 5 once again.

During the 1970s and 80s, the Supreme Court ruled in several decisions to limit the FOIA to a *reactive* statute. According to the Court, the FOIA could not compel documents to be created, only released if they already exist.⁷⁰⁵ Even if lawfully created agency records did exist, but were misplaced outside of agency jurisdiction, those records could not be forcefully disclosed.⁷⁰⁶ Finally, records generated by private companies that contracted with the government could not be considered agency records unless those records were held by federal executive agencies.⁷⁰⁷ These

⁷⁰³ See Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); and Pub. L. No. 104-231, 110 Stat 3048 (1996).

⁷⁰⁴ See *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Federal Open Market Comm. v. Merrill*, 443 U.S. 340 (1979).

⁷⁰⁵ *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975).

⁷⁰⁶ *Kissinger v. Reporter's Committee*, 445 U.S. 136, 137 (1980).

⁷⁰⁷ *Forsham v. Harris*, 445 U.S. 169, 178 (1980).

opinions spoke to the Court's role in statutory construction, but did not necessarily accurately reflect the intentions of Congress.

By 1986, Congress was forced to respond to several Supreme Court cases that closely examined the concerns of law enforcement agencies still uncomfortable with disclosure mandates.⁷⁰⁸ Congress, swayed by anxiety over the negative impact of the FOIA on law enforcement investigations, broadened restrictions for disclosure to allow law enforcement to exclude more records according to Exemption 7.⁷⁰⁹

Even though Congress meant the changes to have a “small scope”⁷¹⁰ of impact on the application of Exemption 7, in subsequent years the Supreme Court dramatically expanded the scope of Exemptions 6 and 7(C), making personal privacy an easy excuse for agencies to withhold records.⁷¹¹

Congress eventually responded to these sweeping changes with the 1996 EFOIA. The EFOIA amended and updated the FOIA by integrating electronic information.⁷¹² This amendment also affirmed *Congress's* continued commitment to the intended legislative purpose of the FOIA.⁷¹³

⁷⁰⁸See *FBI v. Abramson*, 456 U.S. 615 (1982); *Department of State v. Washington Post Co.* - 456 U.S. 595 (1982).

⁷⁰⁹5 U.S.C. § 552(b)(7). The amendments were part of the Anti-Drug Abuse Act of 1986. Although this dissertation focuses on the changes made to Exemption 7, another part of the amendments addressed the fees charged by different types of FOIA requestors. George Washington University, *FOIA Legislative History* (2008), <http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm>.

⁷¹⁰132 CONG. REC. H9463 (1986) (statement Sen. English & Sen. Kindness).

⁷¹¹See *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 487 (1994).

⁷¹²See Pub. L. 104-231, 110 Stat. 3048, §§ 1-2 (1996) (amending sections of 5 U.S.C. § 552).

⁷¹³S. REP. NO. 104-272, at 23-32 (1996).

Since 1996, the Supreme Court has ruled on several FOIA-specific cases.⁷¹⁴ These cases have mostly been in favor of transparency. Congress has also passed several additional FOIA amendments.⁷¹⁵ The fact that these amendments have also been mostly pro-transparency show Congress's continued dedication the concept of government transparency.

It could be tempting to read the mostly chronological trajectory of this research and see the recent modest improvements in attitudes towards transparency as a larger indicator of the health of FOI in the United States. This dissertation argues that a different conclusion should be drawn.

Concluding Remarks

Decades of executive, legislative, and judicial abuse make clear that the FOIA, on which many scholars and politicians have relied to ensure federal transparency, is no longer an adequate avenue for access to federal agency records.

This dissertation presents ample evidence that Congress intended for the FOIA to provide consistent and reliable access to federal agency records. The Supreme Court though has actively countered this effort at government transparency. The Court has written judicial opinions that contravened the FOIA's purpose while expanding protections for FOIA exemptions. After many

⁷¹⁴See *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S. 1 (2001); *Milner v. Department of Navy*, 562 U.S. ____ (2011); *Federal Communications Commission v. AT&T*, 526 U.S. ____ (2011). *National Archives and Record Administration v. Favish* (2004) is the exception. This case broadens privacy exemptions under the FOIA, specifically Exemption 7. *National Archives and Records Administration v. Favish*, 541 U.S. 157, 157 (2004).

⁷¹⁵See *Intelligence Authorization Act for Fiscal Year 2003*, Pub.L. 107-306 (2003); *Openness Promotes Effectiveness in our National Government Act of 2007*, Pub.L. 110-175 (2007); *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 (2010).

of these problematic Supreme Court rulings, Congress passed a FOIA amendment in response to the Court in an attempt to reshape the contours of the legal landscape.

This research has contributed to the existing literature in the field by presenting overwhelming evidence that, for a number of reasons laid out in the previous chapters, the FOIA has not withstood the test of time. The exemptions are at the very heart of this study; it is precisely the results of how agencies and the courts interpreted and applied these exemptions that led to breakdown of the FOIA. This dissertation argues that broad interpretations by the government of the exemptions and a narrow interpretation of the Act's public interest values tipped the scales of balance over time in favor of secrecy at the expense of transparency. This directly conflicts with the Act's congressional intent and voluminous legislative history. Although other studies have critiqued specific exemptions, this dissertation takes a broader approach.

Of particular use to the existing literature is the context given to the actions of all three branches of government. Although Congress passed the FOIA, executive agencies are subject to the Act's disclosure mandates, and the judiciary is responsible for deciding any legal questions. The interplay between the branches, especially clear from the examination of Supreme Court opinions and FOIA amendments, offers a clearer understanding of the FOIA's overall health than other research has thus far.

The reality of government transparency in the United States is that despite strong Congressional support for access to government information, there remain many roadblocks to actualized access to agency records. Congress very correctly has passed the FOIA with a clearly stated purpose that has been affirmed by various statutory amendments. The executive branch agencies have expressed loud concerns about adhering to the disclosure requirements set forth in the FOIA. Some of these concerns, such as those surrounding national security, are legitimate. Legitimate concerns should be covered by the FOIA exemptions, giving agencies a way to withhold information from public release. These executive agencies have continually erred on the

side of nondisclosure though, trying to withhold more records from the public than even the FOIA exemptions would allow.

The Supreme Court should offer a balancing agent between Congress's pro-transparency intentions and the executive branch's concern about the potential harm of that transparency (national security, personal privacy, law enforcement investigations, etc.). Instead, this research shows that the Supreme Court has not only erred on the side of nondisclosure with the executive branch, but in some cases has expanded FOIA exemptions far wider than Congress found acceptable.

When evaluating trends in the FOIA's treatment, it is important to focus less on short term trends, such as the recent positive support of the FOIA. Instead, this research outlines the enduring instability of the statute. The amendments that Congress has added have acted like patches, trying to cover areas of weakness emphasized or created by the Supreme Court. One of the obvious conclusions to be drawn is that the current iteration of the FOIA is simply damaged beyond repair. In the face of nearly fifty years of legislative and judicial history, it is evident that the exemptions especially do not work.

Ultimately, this dissertation concludes that the instability of the FOIA shows that a simple statutory amendment cannot fix the decades of issues outlined in the above chapters. While the FOIA exemptions are particular points of contention, the problems with the FOIA are more complex than a simple change of words.

Although it is outside the scope of this research, future scholars should focus on completely revamping the FOIA to ensure more stable access to federal agency records. One possible solution is to examine the state open records laws. Examining fifty different models, some of which have been implemented for decades, could provide guidelines on how to rewrite a more successful federal statute. Even though replacing the FOIA with a new statute sounds

extreme, the overall lack of success of the FOIA as a statute makes this proposal one of central importance to continued government transparency.

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PUBLICATIONS

- "Hobby Lobby and the Affordable Care Act: Implications for Information," in *Media Law Notes: AEJMC Law & Policy Division Newsletter* (Spring 2014)
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