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Barry Sullivan

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Articles

FOIA AND THE FIRST AMENDMENT: REPRESENTATIVE DEMOCRACY AND THE PEOPLE'S ELUSIVE "RIGHT TO KNOW"

BARRY SULLIVAN*

*He . . . succeeded thoroughly in making the House understand
that he was very angry;—but he succeeded in nothing else. . . . He*

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* Cooney & Conway Chair in Advocacy and Professor of Law, Loyola University Chicago; Fulbright Canada Visiting Research Chair in Legal Studies, University of Alberta, Fall 2011; Visitor, Law and Public Affairs Program, Woodrow Wilson School of Public and International Affairs, Princeton University, Spring 2011. The author is grateful to Randall P. Bezanson, Murray Dry, Mark Grunewald, Stanley N. Katz, Alfred S. Konefsky, Matthew Lewans, Janet McLean, Robert M. O'Neil, Winnifred Fallers Sullivan, and Michael Zimmer for helpful comments on an earlier draft, and to Allison Creekmur, Anthony Ivone, and Hyeng Kim for excellent research assistance. The author also wishes to acknowledge the support of Dean David Yellen, the Loyola University Chicago School of Law Faculty Research Fund, the Cooney & Conway Chair Fund, and Fulbright Canada. In addition, he would like to thank Dean Philip Bryden, Vice-Dean John M. Law, and the faculty and staff of the University of Alberta Faculty of Law, Patricia Paradis of the University of Alberta Centre for Constitutional Studies, Rev. Edward Kennedy, C.Ss.R., of Ligouri House, Edmonton, and Kim Lane Scheppele and Leslie E. Gerwin of the Woodrow Wilson School, for their hospitality and support. An earlier version of this essay was presented as the Alberta Fulbright Lecture in American Studies at the University of Alberta in November 2011.

*could not explain his idea that the people out of the House had as much right to express their opinion in favour of the ballot as members in the House had to express theirs against it*¹

*“The only person in Washington who cares less about his public image than David Addington is Dick Cheney,” said a former White House ally. “What both of them miss is that . . . in times of war, a prerequisite for success is people having confidence in their leadership. This is the great failure of the administration—a complete and total indifference to public opinion.”*²

[Justice] Sotomayor compared the issue [of Wikileaks’ publication of the “War Logs”] with the debate over allowing publication of the Pentagon Papers

*“That was not the beginning of that question, but an issue that keeps arising from generation to generation, of how far we will permit government restriction on freedom of speech in favor of protection of the country,” Sotomayor said. “There’s no black-and-white line.”*³

I. INTRODUCTION

Do the citizens of a representative democracy have a “right to know”? What is the basis for asserting the existence of such a right? If citizens do have such a right, what is its purpose? What does it entail, and what are its limits? To what extent, if any, does it entail an obligation on the part of the government to remove barriers to the flow of information or to provide citizens with information within the government’s control? To what extent should the government’s reasons for nondisclosure be subject to scrutiny, and by whom? How should the “right to know” be enforced or given effect?

Some answers to these questions can be found in positive law: what the specific provisions of a particular constitution, laws, judicial decisions, and international obligations of a particular state require it

1. ANTHONY TROLLOPE, PHINEAS FINN, *THE IRISH MEMBER* 277 (Penguin Books 1977) (1869).

2. Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST (June 25, 2007), http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.

3. David Batty, *WikiLeaks War Logs Posting ‘Will Lead to Free Speech Ruling’*, GUARDIAN (Aug. 26, 2010), <http://www.guardian.co.uk/media/2010/aug/27/wikileaks-war-logs-free-speech-supreme-court>.

to do or refrain from doing with respect to citizen access to information. But answers to these questions also depend on a particular culture's broader understandings of citizenship and of the citizen's proper role in a representative democracy—understandings that may or may not be fully or consistently reflected in such formal sources of law.

One understanding of citizenship limits the role of citizens “to obey[ing] law and perhaps, in periodic elections, to confirm[ing] the choice of leaders whose election gives them the power to enact into law whatever policies they see fit.”⁴ Some of the American founders undoubtedly held this view as a normative matter.⁵ Moreover, since World War II, this view has come to represent the lived reality of citizenship for many in the United States and in other representative democracies. Many citizens feel far removed from the workings of government and from the decisions that government makes on their

4. See ROGER COTTERRELL, *LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 149 (1st ed. 1995) (describing Max Weber's understanding of bureaucratic citizenship). In a memorial to Vaclav Havel, Paul Wilson recently contrasted Havel's view of citizenship with that of his rival, Vaclav Klaus:

Freedom, in Klaus's view, was something bestowed upon the people by their governors and guaranteed by their elected representatives. Citizenship meant voting once every four years and then leaving civic and economic matters for government and the marketplace to sort out. It was a view that to many, including Havel, seemed suspiciously like the old centrist regime dressed up in new, market-minded, quasi-populist rhetoric.

Paul Wilson, *Vaclav Havel (1936-2011)*, N.Y. REV. BOOKS, Feb. 9, 2012, available at [http://www.nybooks.com/articles/archives/2012/feb/09/vaclav-havel-1936-](http://www.nybooks.com/articles/archives/2012/feb/09/vaclav-havel-1936-2011/?pagination=false)

2011/?pagination=false. In recent years, some scholars have even suggested that voting cannot be rationally justified because the costs of voting generally exceed the benefits of voting, there being little likelihood, if any, that any single vote will affect the outcome of a race. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 22–27 (1991) (examining different theories of voting behavior). But see Aaron Edlin et al., *Voting as a Rational Choice: Why and How People Vote to Improve the Well-Being of Others*, 19 *RATIONALITY & SOC'Y* 293, 293–94 (2007) (arguing that voting is a rational activity even in large elections if voters have social preferences and are concerned about social welfare because, even though the probability of a single vote making a difference may be slight, the social benefits at stake in the election are large).

5. See RICHARD BROOKHISER, *JAMES MADISON* 9 (2011) (“[I]n the early 1790s, regularly consulting public opinion was a new concept. Many of Madison's colleagues, including Washington and Hamilton, had little use for it.”).

behalf.⁶ Indeed, the emergence and consolidation of the national security state, especially as reflected in the events of the past decade, has

6. In the United States, for example, World War II and the Cold War gave birth to the “National Security State,” in which even top government officials were sometimes denied access to important information. *See generally* GARY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010); John Gorham Palfrey, *The Problem of Secrecy*, 290 *ANNALS AM. ACAD. POL. & SOC. SCI.* 90 (1953); *see also* Steve Coll, *Our Secret American Security State*, *N.Y. REV. BOOKS*, Feb. 9, 2012. As a practical matter, the executive branch often has superior (if not always exclusive) access to massive amounts of information, and it has great discretion to decide whether to withhold or disclose that information. The executive sometimes chooses, for its purposes, to classify information and then selectively disclose some of the information that has been classified. *See, e.g.*, Scott Shane, *Renewing a Debate over Secrecy, and its Costs*, *N.Y. TIMES*, June 6, 2012, at A1 (discussing the government’s selective disclosure of information regarding covert drone attacks in Pakistan). Such practices create serious anomalies, to say the least. *See id.* (“‘There’s something wrong with [an administration’s] aggressive leaking and winking and nodding about the drone program, but saying in response to Freedom of Information requests that they can’t comment because the program is covert,’ [Harvard Law School professor and George W. Bush Administration official Jack] Goldsmith said.”). In addition to simply withholding information, or disseminating it on a selective basis, the executive has often provided the people and their representatives with information that was false or misleading. *See, e.g.*, JOHN J. MEARSHEIMER, *WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS* 46–55 (2011) (describing instances in which the executive branch disseminated false or misleading information to advance its goals in World War II, the Vietnam War, and the war in Iraq). In those ways, the executive can use its information monopoly to direct and control public opinion, at least for the short term. *Id.* Groups in many countries have sought to overcome this condition by pressing for the adoption of access-to-information laws. *See, e.g.*, PATRICK BIRKINSHAW, *FREEDOM OF INFORMATION: THE LAW, THE PRACTICE, AND THE IDEAL* 458–95 (4th ed. 2010) (collecting access-to-information statutes from common-law jurisdictions). Unnecessary secrecy not only distorts public debate, but may also lead to alienation and distrust of government, which is exacerbated when many already believe that politicians are overly dependent on (and responsive to) special interest groups, especially those with access to large concentrations of surplus wealth. As Justice Stevens wrote in dissent in *Citizens United v. FEC*, “[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold.” 130 S. Ct. 876, 964 (2010) (Stevens, J., concurring in part and dissenting in part); *see also id.* at 963 n.64 (“The majority declares by fiat that the appearance of undue influence by high-spending corporations ‘will not cause the electorate to lose faith in our democracy.’ The electorate itself has consistently indicated otherwise, both in opinion polls and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.” (citations omitted)).

created substantial distinctions in status and authority even among leaders and has generally diminished the status and authority of the legislative branch.⁷

At the opposite end of the spectrum is the view taken by James Madison in the early 1790s, namely, that citizens should be “consulted between elections continually,” and treated as “partners in government,”⁸ even when the immediate responsibility for decision-making

7. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) (noting the “enormous power [of the executive] in the related areas of national defense and international relations,” which has been “pressed to the very hilt since the advent of the nuclear missile age”); see also ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 209 (2010) (arguing that “it is pointless to bewail” the fact that “[t]he center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states,” and “futile to argue that Madisonian structures should be reinvigorated”); PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 55, 175 (2009) [hereinafter SHANE, *MADISON’S NIGHTMARE*] (arguing that “a presidency unfettered by congressional accountability and judicial oversight” does not “actually serve the public interest better than a concededly robust presidency . . . subject to meaningful checks and balances,” and further arguing that “[t]he most dangerous of the threats to checks and balances have appeared when the aggressive, norm-breaching tendencies of the Republican Right have joined with a trend toward increased executive power that has been notable since the New Deal”); Barry Sullivan, *The Irish Constitution: Some Reflections From Abroad*, in *THE IRISH CONSTITUTION: GOVERNANCE AND VALUES* 27–32 (Oran Doyle & Eoin Carolan eds., 2008) (discussing the challenges of executive accountability and effectiveness); Rodney Austin, *Freedom of Information: The Constitutional Impact*, in *THE CHANGING CONSTITUTION* 334–35 (Jeffrey Jowell & Dawn Oliver, eds., 1985) (discussing the irony that parliamentary power to extract information from the executive in England declined just as the role of government and the volume of official information both increased).

8. BROOKHISER, *supra* note 5, at 103, 107; J.R. POLE, *THE GIFT OF GOVERNMENT: POLITICAL RESPONSIBILITY FROM THE ENGLISH RESTORATION TO AMERICAN INDEPENDENCE* 140 (1983) (“Neither political representation nor popular government was a new idea at the time of the American Revolution. What was new in the politics of the time was the use of representation as a clearly defined institutional bridge between people and government. The two-way traffic over this bridge was a traffic in knowledge. The men who devised the Constitution and the men who wrote the *Federalist Papers* had not anticipated that the principle of accountability would assume forms that would subject it to such intimate, yet public, investigation and control. A politics of trust was replaced by a politics of vigilance. . . . Only through knowledge of the government of America could the people confide to it their confidence and trust.”); *Hitherto Unpublished Correspondence Between Chief Jus-*

rests with the people's representatives, rather than with the people themselves.⁹ As a theoretical matter, Madison's view could command widespread adherence today. Reality may be quite different. The extent to which government recognizes the right of access to information depends on society's view of citizenship and on the strength of its commitment to that view.

The problem of access to information arises in various forms. One concerns the extent of the government's authority to impose restrictions on an audience's right to hear what a willing speaker wishes to communicate.¹⁰ Another concerns the extent of the government's authority to restrict the secondary distribution of government information by a willing speaker who has acquired the information without

tice Cushing and John Adams in 1789, 28 MASS. L.Q., Oct. 1942, at 16 ("Our chief magistrates and Senators are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in ignorance we had much better have [those offices] hereditary. I therefore, am very clear that . . . it would be safest to admit evidence to the jury of the Truth of accusations, and if the jury found them true and that they were published for the Public good, they would readily acquit.") (letter from John Adams to William Cushing dated March 7, 1789).

9. See also GORDON S. WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION 28–29 (rev. ed. 2008) ("Since actual representation was based on the people's mistrust of those they elected, Americans tended to push for the most explicit and broadest kind of consent, which generally meant voting. The mutuality of interests that made virtual representation meaningful in England was in America so weak and tenuous that the representatives could not be trusted to speak for the interests of their constituents unless they actually voted for them.").

10. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (upholding the First Amendment rights of consumers to receive commercial information, while recognizing that some state regulation of commercial speech is permissible); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (upholding the Attorney General's exclusion from the United States of a Marxist scholar invited to attend an academic conference and present university lectures, but acknowledging that citizens have a First Amendment right to receive non-commercial information). The extent to which the Court has increased protection for commercial speech in recent years is well demonstrated by *Sorrell v. IMS Health, Inc.*, in which the Court applied a heightened level of scrutiny to strike down, on First Amendment grounds, a Vermont statute that restricted the sale, disclosure, and use of retail pharmacy records that revealed the prescribing practices of individual physicians and were therefore commercially valuable to pharmaceutical companies in their marketing efforts. 131 S. Ct. 2653, 2672 (2011).

the government's consent.¹¹ A third involves the extent of the government's affirmative obligation to provide the public with information that either relates to the activities and conduct of government or bears on important questions of public policy, but which the government—or individual government officials with control over the information—would like to keep secret.¹²

Government officials keep secrets for a variety of reasons, to varying degrees, for varying periods of time, with varying degrees of success, and with varying degrees of public awareness that secrets are being kept. Sometimes government officials keep secrets from the general public; sometimes they keep secrets from all but a small circle of officials or other confidants. Sometimes they keep secrets because they believe, rightly or not, that secrecy will promote the public interest. Sometimes they do so for political advantage or to hide their own mistakes or crimes. Sometimes they do so mindlessly or because of bureaucratic habit. Sometimes they do so simply to conserve scarce resources. Sometimes the government will have a monopoly over relevant information. Sometimes the information will be available from other sources.¹³ In any event, governments create or control vast

11. *See N.Y. Times Co.*, 403 U.S. at 714 (per curiam) (addressing the question whether certain newspapers could be enjoined from publishing classified materials that were given to them by a third party who was authorized to have custody of the materials, but was not authorized to disseminate them).

12. *See Globe Newspaper Co. v. Superior Court for Cnty. of Norfolk*, 457 U.S. 596, 604–05, 610–11 (1982) (holding that a Massachusetts statute that permitted the exclusion of the public and the press from criminal trials involving juvenile victims of certain sex crimes violated the First Amendment because the historic right of access to criminal trials ensured that the constitutionally protected right to discuss governmental affairs “is an informed one”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586–87 (1980) (Brennan, J., concurring) (explaining the constitutional right to attend criminal trials in terms of the right of access to government information, which plays a structural role in securing “our republican system of self-government”).

13. Of course, the government's dominion over information is neither absolute nor permanent. Sometimes other sources exist; sometimes some officials have an incentive to disclose information when others wish to withhold it. The government probably cannot succeed in keeping information secret indefinitely, but it may be able to do so until the need for that information has passed. When the government has a monopoly, even temporarily, on information relating to the most important matters affecting the public welfare—questions of war and peace, significant threats to the national economy or the public order, or massive and possibly cataclysmic environmental damage—the consequences of withholding it from the public can be extremely serious. *See* RICHARD MULGAN, HOLDING

amounts of information. In the United States, many government officials are authorized to classify information, and a great deal of government information is classified.¹⁴ Much more government information is not actually classified but is thought by government officials to be “sensitive” for one reason or another, and it is therefore deemed to be inappropriate for dissemination to the public. Thus, for example, government officials intent on avoiding disclosure often give creative interpretations to laws that permit—but do not require—the withholding of government information.¹⁵ While secrecy may some-

POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 13 (2003) (noting that individuals have a right to hold the government accountable for “extensive coercive powers which can adversely affect the interests of its citizens”); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 286 (2010) (explaining that government “secrecy reduces the ability of the people and their representatives to monitor [government] activities and to identify and debate relevant issues in an informed manner”).

14. See generally JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK (2011) (briefly detailing the history of classification and the legal framework under which it currently operates in the United States). Several recent studies have called attention to the problem of overclassification. See, e.g., MIKE GERMAN & JAY STANLEY, ACLU, DRASTIC MEASURES REQUIRED: CONGRESS NEEDS TO OVERHAUL U.S. SECRECY LAWS AND INCREASE OVERSIGHT OF THE SECRET SECURITY ESTABLISHMENT 5–7 (July 2011) (concluding that the federal government engages in excessive government secrecy); ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 4–6 (2011) (discussing the over-classification of documents that pose no threat to national security).

15. For example, the exemptions set forth in the Freedom of Information Act (“FOIA”) are generally framed in permissive rather than mandatory terms, but have sometimes been construed by administrators to justify virtually automatic withholding. See *infra* Part IV. Administrators who wish to avoid disclosure have an arsenal of weapons at their disposal. Simple delay is one; putting requesters through the expense and inconvenience of having to invoke further administrative and judicial remedies is another. See Matthew L. Wald, *Slow Responses Cloud a Window into Washington*, N.Y. TIMES, Jan. 29, 2012, at A17 (discussing the non-compliance of various federal agencies with the mandates of FOIA). Students of administrative behavior have long recognized that “the most awesome discretionary power is the omnipresent power to do nothing.” Kenneth F. Warren, *Administrative Discretion*, in 1 ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 35, 36 (Jack Rabin ed., 2003).

times be necessary to the work of government, secrecy in a democratic society always comes at a price.¹⁶

Legal recognition of the people's "right to know" serves two separate democratic values: governmental accountability and citizen participation.¹⁷ In some countries, largely because of developments in constitutional theory and human rights law since World War II, an individually enforceable "right to know" has been recognized explicitly in constitutional texts and jurisprudence.¹⁸ That is true with respect to certain international rights instruments as well. In addition, statutory rights of access to information have been enacted in many coun-

16. Some degree of secrecy will always be necessary because no government can function entirely in the round. Thus, the basic question in this area is whether secrecy or disclosure should provide the default rule and, in either case, what showing should be required to overcome the presumption created by the default rule. Almost fifty years ago, Donald C. Rowat, a Canadian political scientist, urged us to "face the fact that any large measure of governmental secrecy is incompatible with democracy." Donald C. Rowat, *The Problem of Administrative Secrecy*, 32 INT'L REV. ADMIN. SCI. 99, 100 (1966). Rowat pointed out that, "[t]he principle followed almost everywhere [has been] that all administrative activities and documents shall be secret unless and until the Government chooses to reveal them. The public has no right to know the manner in which the Government is carrying out its trust." *Id.* at 99. For a long time after the emergence of representative democracy, little attention was paid to the problem of secrecy or to the "right" of the people to know what their government was doing. That was the case, Rowat suggested, because few questioned the strong tradition of discretionary secrecy that developed in the age of absolute monarchies and was passed on, almost imperceptibly, to the popular governments that took their place. Donald C. Rowat, *How Much Administrative Secrecy?*, 31 CAN. J. ECON. & POL. SCI. 479, 491 (1965); Donald C. Rowat, *The Right to Government Information in Democracies*, 48 INT'L REV. ADMIN. SCI. 59, 59 (1982). The theoretical basis for state sovereignty and legitimacy may have changed, but important state practices have not.

17. The literature on accountability and participation is voluminous. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." (citations omitted)); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005) (arguing that governmental accountability is "one of several ways in which power can be constrained"); *see also* Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW. & PHIL. 451, 482–83 (2003) (arguing that participation value does not displace "instrumental condition of good government"); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1361 (2006) (arguing for priority of participation value in democratic government).

18. TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* 20–21, 43–126 (2d ed. 2008), *available at* <http://www.fas.org/sgp/foia/comparative.pdf>.

tries.¹⁹ Most important, though, some foreign and international courts have understood the people's "right to know" to entail an affirmative governmental duty to remove barriers to the free flow of information and, in some circumstances, to provide the public with access to information within the government's control.²⁰

In the post-war years, but particularly during the 1960s and the 1970s, some scholars and litigants in the United States pressed the Supreme Court to give a broad interpretation to the First Amendment, and thus situate a similar right of access to government information within the constitutional protection afforded to freedom of speech,²¹ just as the Court had discerned an implicit constitutional

19. *Id.*

20. *See, e.g.,* Társaság a Szabadságjogokért v. Hungary, No. 37374/05, at 10 (Eur. Ct. H.R. 2009) [hereinafter *HCLU v. Hungary*], available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i-001-92171> (concluding that the government, in some cases, has an affirmative duty to remove obstacles that hinder the ability of citizens to access information of public interest); *Claude-Reyes v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 151, ¶¶ 163, 174 (Sept. 19, 2006) [hereinafter *Claude-Reyes*] (finding an affirmative governmental obligation to provide information to the public).

21. *See, e.g.,* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25, 88 (1948) [hereinafter MEIKLEJOHN, FREE SPEECH] ("What is essential [to freedom of speech] is . . . that everything worth saying shall be said," so that "every voting member of the body politic [has] the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal"); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 ("It is clear . . . that the right to know fits readily into the [F]irst [A]mendment and the whole system of freedom of expression."); Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 471-72, 479 (1953) [hereinafter Meiklejohn, *Mean?*] (noting that the First Amendment protects political freedom, and that the "progress of political freedom gives better assurance of national security than does any program of political repression and enslavement"). Meiklejohn also wrote:

[T]he people need free speech because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities may require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression. Moreover, . . . I believe, as a teacher, that the people do need novels and dramas and paintings and poems, because they will be called upon to vote.

right to freedom of association during that period.²² Some argued that the First Amendment is centrally concerned with accountability and meaningful participation in self-government, and that such a right is therefore implicit in the First Amendment.²³ Others opposed recognition of such a right on the grounds that it was both unnecessary and contrary to the limited role contemplated for citizens in a representative democracy.²⁴ Some acknowledged the public's "right to know" as an important constitutional value, but found no basis for inferring an individually actionable legal right predicated on that value.²⁵ Finally, some interposed practical objections because they be-

Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 [hereinafter Meiklejohn, *Absolute*] (internal quotation marks omitted).

22. See, e.g., NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (citations omitted)). The Court would later emphasize that the freedom of association "plainly presupposes a freedom not to associate." Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). Significantly, opposition to *Brown v. Board of Education*, 347 U.S. 483 (1954), as well as to the mandates contained in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to h-6 (2006), were often framed in terms of freedom of association. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) ("But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . ?").

23. See *supra* note 21.

24. See, e.g., Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 503–05 (1980) (arguing that the role of citizens in a representative democracy is much more attenuated than that described by Meiklejohn, and that public issues generally are decided, not by the people themselves, but by the representatives the people elect to make those decisions for them); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971) ("A 'right of the people to know' may indeed have been a principal rationale for the freedom of the Press, but, in the law at least, the people's right to know was derivative, the obverse of the right of the Press to publish, and coextensive with it."); Edward H. Levi, *Confidentiality and Democratic Government*, 30 REC. ASS'N B. CITY N.Y. 323, 326 (1975) (discussing both sides of the debate).

25. See, e.g., David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 588–89 (1980) (acknowledging the public's right to know as an "abstract right").

lieved that the administration of such a right would present problems that were intractable, inherently political, and beyond the competence of the judiciary.²⁶ The practical objections were serious, but the climate of opinion and the general trend of constitutional law also were unfavorable for the recognition of a general, individually enforceable, constitutional right.²⁷

26. See BeVier, *supra* note 24, at 507–10; Henkin, *supra* note 24, at 278–80.

27. To understand the climate of opinion, one must begin with *Brown v. Board of Education*, which recently has been recognized as an “icon” of American constitutional law. Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 1 (Jack Balkin ed., 2001). Initial reaction to the decision, however, was mixed at best. Southern politicians, not unexpectedly, reacted angrily to *Brown*. See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 752 (1976) (describing the so-called “Southern Manifesto,” a condemnation of *Brown* issued by 101 Southern Congressmen and Senators, including all but three of the Senators who represented the states of the “old Confederacy”). Mainstream legal scholars, many of whom found segregation to be morally repugnant, also questioned the Court’s use of its power and the legitimacy of its reasoning. See, e.g., LEARNED HAND, THE BILL OF RIGHTS 54–55 (1958) (criticizing the decision as “wrong” and an illegitimate “coup de main”); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955) (criticizing the Court’s reliance on social science research); Wechsler, *supra* note 22, at 22–23, 31–34 (criticizing the Court’s failure to articulate a neutral principle, and its failure to justify the later extension of its holding to cases outside the area of education). Alexander Bickel brilliantly defended the decision, but his coining of the phrase “the counter-majoritarian difficulty” set the stage for further criticism of the legitimacy of judicial review. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23, 245 (1962) (“[A]nnouncement of the principle in the *School Segregation Cases* was in itself an action of great moment . . .”). Later decisions of the Warren Court in a broad range of areas, although frequently accepted without question today, also proved controversial at the time. See BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 3 (1979) (“The Warren Court had often plunged the country into bitter controversy as it decreed an end to publicly supported racial discrimination, banned prayer in the public schools, and extended constitutional guarantees to blacks, poor people, those who were questioned, arrested or charged by the police.”). Justice Rehnquist, who served as one of Justice Jackson’s law clerks while *Brown* was pending, prepared a predecisional memorandum to Justice Jackson opposing the outcome in *Brown*; as early as 1955, Rehnquist had begun denouncing the opinion to third parties. Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 647–48 (2012) (“Rehnquist’s 1955 letter to Frankfurter . . . began a pat-

tern of hostility to the Warren Court's individual rights agenda . . ."). Many of the Court's controversial decisions were rooted, as Charles R. Epp has noted, in law that had been developed long before Chief Justice Warren's appointment to the Court: "The Warren Court's reputation for creative judicial leadership is well deserved. Nonetheless, at least half of the total growth in judicial attention to the new rights that eventually occurred between 1917 and the mid-sixties . . . had already occurred by the time Earl Warren joined the Court." CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 39 (1998). Nonetheless, opposition to the decisions of the Warren Court, and the "activism" those opinions were thought to represent, became an important feature of the political landscape. See Archibald Cox, *The Role of the Supreme Court in American Society*, 50 MARQ. L. REV. 575, 577 (1967) ("It is the character of the Court's business which catches it up in public debate and makes individual justices the subjects of bitter criticism. This is nothing new. John Marshall was reviled in terms more virulent than even the present Chief Justice."). In 1968, one theme of Richard Nixon's campaign for the presidency was that the decisions of the Warren Court had simply "gone too far." Jesse H. Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767, 767 (1979). Academic concern with "judicial activism" also gave rise to new schools of legal scholarship, which included such figures as Robert Bork, who insisted on the primacy of "originalism" in constitutional interpretation. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4-9 (1971) (advocating originalist interpretative approach and criticizing the Warren Court's lack of principled decision-making in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1968), which he compared to "a miracle of transubstantiation"). If anything, criticism of the Court intensified following the Chief Justice's retirement because of controversies over court-ordered busing and as a result of the Burger Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). See Barry Sullivan, *Constitutional Interpretation and Republican Government*, 28 DUBLIN U. L.J. 221, 225-28 (2006) (describing the growing conservative frustration with the Supreme Court occasioned by *Roe v. Wade* and the political use made of that frustration). Between 1969 and 1981, three Republican presidents appointed six members of the Court (Justices Burger, Blackmun, O'Connor, Powell, Rehnquist, and Stevens), while Jimmy Carter, the only Democratic president during that period, had no occasion to appoint a single justice to the Court. Many observers expected the Burger Court to stage a "counterrevolution" in constitutional law. As Mark Tushnet observed in 1984, however, the counter-revolution did not occur as scheduled. Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257, 1257 (1984) (reviewing *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983)). What actually happened may be open to dispute, but two points may be made with some degree of confidence: (1) there was no wholesale repudiation of Warren Court jurisprudence, and (2) there was little appetite for boldly expanding that jurisprudence. As Kenneth Karst has recently argued, however, six Republican appointees (Justices Blackmun, Kennedy, O'Connor, Powell, Souter, and Stevens) "act[ed] to save rights of inclusion from serious threats of abandon-

In the end, the Court gave effect to some aspects of the “right to know,” but rejected the idea that the United States Constitution creates any general, legally enforceable obligation on the part of government to provide information to the public. In 1971, in *New York Times Co. v. United States*,²⁸ the Court held, on First Amendment grounds, that the federal courts could not enjoin the *New York Times* and the *Washington Post* from publishing classified government documents concerning the history of United States involvement in Vietnam that had come into their possession.²⁹ Then, in 1972, in *Kleindienst v. Mandel*,³⁰ the Court upheld the U.S. Attorney General’s broad discretion to exclude aliens from the United States, but acknowledged that the First Amendment prevents the government from unreasonably interfering with a willing speaker’s communication with a willing audience in a non-commercial context.³¹ Four years later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³² the Court upheld the First Amendment right of consumers to receive commercial communications from willing speakers.³³ The Court said: “Freedom of speech presupposes a willing

ment or radical restriction.” Kenneth L. Karst, *Through Streets Broad and Narrow: Six “Centrist” Justices on the Path to Inclusion*, 2010 SUP. CT. REV. 1, 32. If the development of the law generally depends, as Justice Cardozo suggested, on two countervailing forces—“[t]he tendency of a principle to expand itself to the limit of its logic,” on the one hand, and the tendency of a principle “to confine itself within the limits of its history,” on the other hand, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (30th prtg. 1971) (1921), the climate of opinion in the late 1970s and the early 1980s generally favored the latter force. O’Brien’s analysis strongly reflects that trend. O’Brien, *supra* note 25.

28. 403 U.S. 713 (1971) (per curiam).

29. *Id.* at 714; *see also* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[T]ruthful information sought to be published must have been lawfully acquired.”). In dissent, Justice Souter noted that “freedom of the press is ultimately founded on the value of enhancing . . . discourse for the sake of a citizenry better informed and thus more prudently self-governed” and that “[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.” *Id.* at 677 (Souter, J., dissenting) (citations omitted).

30. 408 U.S. 753 (1972).

31. *Id.* at 769–70.

32. 425 U.S. 748 (1976).

33. *Id.* at 773.

speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.”³⁴

In 1978, however, in *Houchins v. KQED, Inc.*,³⁵ the Court rejected the idea that the public or the press has an individually enforceable First Amendment right of access to government information.³⁶ In doing so, the Court approved the government’s decision to deny a broadcasting company access to a jail where the conditions of confinement had been held to violate the Eighth Amendment. Justice Stewart, who provided the critical vote in that four-to-three decision, stated unequivocally that the Constitution does “not guarantee the public a right of access to information generated or controlled by government.”³⁷ Access to information in such a case depends entirely

34. *Id.* at 756. The Court held that prescription drug customers are constitutionally entitled, notwithstanding state laws to the contrary, “to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.” *Id.* at 754. In an opinion by Justice Blackmun, the Court made clear that commercial speech was not “wholly outside the protection of the First Amendment,” and that the state may not “completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.” *Id.* at 761, 773. In a concurring opinion, Justice Stewart underscored that the Court’s phrasing properly recognized the “important differences between commercial price and product advertising, on the one hand, and ideological communication on the other.” *Id.* at 779 (Stewart, J., concurring). Justice Rehnquist dissented, decrying the Court’s elevation of the “commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas.” *Id.* at 781 (Rehnquist, J., dissenting). In subsequent cases, the Court has greatly expanded the protection afforded to commercial speech. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (using heightened scrutiny to strike down, on First Amendment grounds, a Vermont statute that prohibited retail pharmacies from selling, without the consent of the prescribing physician, records that reflected the physician’s individual prescribing patterns, which pharmaceutical companies found useful in their marketing efforts).

35. 438 U.S. 1 (1978).

36. *Id.* at 15–16.

37. *Id.* at 16 (Stewart, J., concurring); *see, e.g., Pell v. Procunier*, 417 U.S. 817, 822 (1974) (noting that, once the requirements of prison security have been satisfied, “a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,” but rejecting the idea that newspapers had an absolute right to conduct face-to-face interviews with prisoners, at least where prisoners had “alternative means of communicat[ing] with the press”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (holding that the prohibi-

on whether the government is a willing speaker. Justice Stevens was equally forceful in dissent, where he observed: "It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."³⁸

In sum, the Court's jurisprudence from that period established that the "right to know" precludes the government from enjoining publication of classified documents and from unreasonably interfering with an audience's right to receive information from a willing speaker, but imposes no individually enforceable obligation on the part of government to provide members of the public with information within the government's control. Thereafter, the Court would decide a series of cases upholding an individually enforceable right of

tion of face-to-face interviews with prisoners did not abridge the freedom of the press under the First Amendment, at least where the press had alternative means of access to prisoners); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36–37 (1984) (upholding a protective order that restricted a newspaper's use of information gained through pretrial civil discovery in an action in which the newspaper was a party, but allowed the newspaper to publish the same information if it could show that it was obtained from another source."). One commentator has noted that, "restricting the media's access to the battlefield or to information pertaining to ongoing military operations is the most effective and elusive restriction on press freedom not yet addressed by the Supreme Court or Congress." Karen C. Sinai, Note, *Shock and Awe: Does the First Amendment Protect a Media Right of Access to Military Operations?*, 22 CARDOZO ARTS & ENT. L.J. 179, 184 (2004). Supreme Court jurisprudence suggests that the Court would view its consideration of that issue to raise serious separation of powers issues. See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (noting that the executive branch is best equipped to determine who should have access to sensitive information); *Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (noting that foreign policy decisions are the domain of the executive branch, which "has available intelligence services whose reports are not and ought not to be published to the world").

38. *Houchins*, 438 U.S. at 32 (Stevens, J., dissenting); see also *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting) ("At some point official restraints on access to news sources . . . may so undermine the function of the First Amendment that it is . . . necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience."); *Pell*, 417 U.S. at 839–40 (Douglas, J., dissenting) (noting that Judge Gesell, by requiring that the press be given access to inmates, "did not vindicate any right of the Washington Post, but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner").

access to judicial proceedings and records,³⁹ but it did not revisit the more general question. In the end, the Court continued to acknowledge the “right to know” as a core constitutional value, but declined to recognize any general, individually enforceable right of access to government information.⁴⁰

At least in part, the Court’s failure to revisit Justice Stewart’s conclusion in *Houchins* is attributable to Congress’s enactment of the Freedom of Information Act (“FOIA” or “the Act”).⁴¹ When Congress

39. See, e.g., *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.*, 478 U.S. 1, 15 (1986) (recognizing a First Amendment right to preliminary hearing transcripts); *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.*, 464 U.S. 501, 505 (1984) (recognizing a First Amendment right to attend voir dire); *Globe Newspaper Co. v. Superior Court for the Cnty. of Norfolk*, 457 U.S. 596, 611–12 (1982) (invalidating a statute that permitted the exclusion of the public from judicial hearings involving testimony of minor victims of sex crimes); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (recognizing a First Amendment right to attend criminal trials). In *Gannett Co., Inc. v. DePasquale*, the Court upheld the exclusion of the press from a suppression hearing, but the continued vitality of that ruling is questionable in light of the foregoing authorities. 443 U.S. 368, 393 (1979). But see *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding that the First Amendment does not trump a reporter’s obligation to testify in connection with a criminal investigation). The issue of public access to trials also arises in the context of a criminal defendant’s Sixth Amendment rights to a fair and public trial. See *Presley v. Georgia*, 130 S. Ct. 721, 724 (2010) (holding that the exclusion of a defendant’s uncle during voir dire, notwithstanding the defendant’s objection, violated the defendant’s right to a public trial); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (holding that the closure of a suppression hearing over the defendant’s objection violated his right to a public trial). The question of access to “special interest” deportation proceedings has been raised recently in the lower federal courts. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692–93, 710 (6th Cir. 2002) (requiring case-by-case decision-making); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (upholding a closed hearings policy).

40. See, e.g., O’Brien, *supra* note 25, at 579 & n.3 (listing Supreme Court cases that rejected the “right to know”). In his concurrence in *Richmond Newspapers*, Justice Stevens seemingly overestimated the significance of that case. He wrote that, “[t]his is a watershed case. . . . [F]or the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.” *Richmond Newspapers*, 448 U.S. at 582–83 (Stevens, J., concurring). In fact, that holding would be given a relatively narrow reach.

41. 5 U.S.C. § 552 (2006). The Freedom of Information Act was signed by President Lyndon B. Johnson on July 4, 1966. President Johnson was notably unenthusiastic about the law. *Freedom of Information at 40: LBJ Refused Ceremony, Undercut Bill with Signing Statement*, NAT’L SEC. ARCHIVE ELECTRONIC BRIEFING BOOK NO. 194 (July 4, 2006),

enacted FOIA in 1966, it acted on the same conviction that animated the *Houchins* dissenters, namely, that access to information is essential to citizenship in a representative democracy and that ordinary political processes do not necessarily produce an adequate flow of information to the people or their representatives.⁴² The enactment of FOIA also shifted the focus of litigation, and thus the focus of the Court's attention, from constitutional to statutory grounds. The Act relieved courts from having to explore some of the difficult questions connected with the recognition of a general, individually enforceable constitutional "right to know;"⁴³ it also caused courts to focus on narrow statutory issues, while overlooking the significance of FOIA's First Amendment foundations and its quasi-constitutional character.⁴⁴ The

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm>. Many state and local governments, however, soon enacted similar statutes. *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COALITION, <http://www.nfoic.org/state-freedom-of-information-laws>; *State Freedom of Information Act Map*, PBS (Dec. 12, 2003), <http://www.pbs.org/now/politics/foiamap.html>. Other nations did so as well. See BIRKINSHAW, *supra* note 6, at 480–95 (discussing statutes in common-law jurisdictions). In some countries, such statutes do not stand alone, but supplement constitutional provisions, which may generate greater respect and are often more difficult to amend. But law is part of culture, and the practical difference between statutory and constitutional status may be less important in some cultures than in others. Law may command more or less respect for reasons independent of the particular form that law takes.

42. See HAROLD C. RELYEA, CONG. RESEARCH SERV., RL 32780, FREEDOM OF INFORMATION ACT (FOIA) AMENDMENTS: 110TH CONGRESS 1–3 (2008) (explaining that FOIA increased public access to government in light of "the people's right to know" about the activities and operations of government"). Significantly, the first FOIA case to reach the Supreme Court was one brought by thirty-three members of Congress, who had sought and been denied access to reports prepared for the president concerning the possible effects of certain underground nuclear tests that the government planned to conduct in Alaska. *EPA v. Mink*, 410 U.S. 73, 75–76 (1973).

43. As previously noted, some commentators opposed recognition of such a right on the ground that it would require courts to perform functions that were both theoretically and practically beyond their competence. O'Brien, *supra* note 25, at 613–14. Judicial enforcement of FOIA is subject to some of the same objections. The Act did not save the judiciary from the burden of judgment with respect to seemingly intractable issues, and it may not have provided courts with much specific guidance for resolving those issues.

44. See *Houchins v. KQED, Inc.*, 436 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); see also William N. Eskridge, Jr.

rich conversation about access to information and its connection to democratic citizenship was largely eclipsed by FOIA, giving way to technical discussions about the Act and its exemptions. As the FOIA case law developed, little more than lip service was paid to FOIA's central purpose, let alone to the need for the three branches of government to respect that purpose in their encounters with FOIA.⁴⁵ As

& John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1227 (2001) (noting that statutes have the potential to shift fundamental, common, and constitutional law alike).

45. Administrations have adopted various interpretations of FOIA. Some administrations have been more willing than others to approve the withholding of information whenever it *can* be withheld under the Act, rather than requiring officials to determine whether information that *could* be withheld *should* be withheld. For example, in 1981, the Reagan Administration announced that it would defend any denial that was supported by a "substantial legal basis." Christopher M. Mason, Comment, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423, 423–25. In 1982, President Reagan issued an executive order that called for increased classification and encouraged agencies to err on the side of non-disclosure. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982). It remained in force until 1993, when the Clinton Administration announced a "presumption of disclosure" and agreed to defend withholding only if it was "reasonably foreseeable" that disclosure would be harmful to an interest protected by [a specific] exemption." Memorandum from Janet Reno, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies (Oct. 4, 1993), *available at* <http://www.fas.org/sgp/clinton/reo.html>. The directive counseled that items which "might technically or arguably fall within an exemption . . . ought not to be withheld . . . unless [they] need be." *Id.* In 2001, the George W. Bush Administration directed agencies to consider whether "institutional, commercial, and personal privacy interests . . . could be implicated by disclosure," and promised to defend decisions to withhold "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Memorandum from John Ashcroft, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001), *available at* <http://www.justice.gov/archive/oip/011012.htm>. The George W. Bush Administration "consistently withheld information from members of Congress and from investigative bodies, [and] subjected FOIA users to long delays." Pozen, *supra* note 13, at 259 (citations omitted). President Obama, however, promised "an unprecedented level of openness." *See* Memorandum from Barack Obama, U.S. President to Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/. He also directed the development of a new FOIA policy statement clearly establishing a presumption in favor of disclosure. Memorandum from Barack Obama, U.S. President to Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/. In March 2009, the Attorney General announced that an agency denial would be defended only when withholding was required

Justice Scalia observed in *John Doe Agency v. John Doe Corp.*,⁴⁶ for example, the principle that FOIA's exemptions should be "narrowly construed" became "a formula to be recited rather than a principle to be followed."⁴⁷

One commentator has noted that "a presumption in favour of disclosure as a fundamental right of citizenship" lies "at the heart"⁴⁸ of the United Kingdom's Freedom of Information Act.⁴⁹ The same presumption is also a fundamental aspect of American citizenship and rests at the heart of FOIA. But that truth often has been obscured by government's failure to acknowledge that the First Amendment "right to know" is a foundational value of our form of government, the central animating value of FOIA, and the key to interpreting FOIA. Courts often talk about FOIA as embodying competing, yet presumably co-equal, values of disclosure and secrecy,⁵⁰ but that narrative is

(as opposed to permitted) by law or when an agency "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions." See Memorandum from Eric Holder, U.S. Att'y Gen. to Heads of Exec. Dep'ts & Agencies (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. But see Wald, *supra* note 14 (discussing the Obama Administration's slowness in responding to FOIA requests in light of its position that "government should operate under the presumption that documents should be released, unless there [is] a reason not to do so"); Scott Shane, *Obama Steps Up Prosecution of Leaks to the News Media*, N.Y. TIMES, June 12, 2010, at A1; Joshua Keating, *Is the Obama Administration Abusing the Espionage Act?*, FOREIGN POL'Y BLOG (Feb. 27, 2012, 3:26 PM), http://blog.foreignpolicy.com/posts/2012/02/27/is_the_obama_administration_abusing_the_espionage_act#.T71igj_h2uk.email.

46. 493 U.S. 146 (1989).

47. *Id.* at 161 (Scalia, J., dissenting).

48. Claire McDougall, *An Introduction to the Data Protection Act 1998 and the Freedom of Information Act 2000: Part II*, 7 JUD. REV. 253, 255 (2002).

49. Freedom of Information Act, 2000, c. 36 (Eng.).

50. See, e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981) ("[The] FOIA was intended by Congress to balance the public's need for access to official information with the Government's need for confidentiality."); *EPA v. Mink*, 410 U.S. 73, 80 (1973) ("It is in the context of the Act's attempt to provide a 'workable formula' that 'balances, and protects all interests,' that the conflicting claims over the documents in this case must be considered."); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("[The] FOIA represents a carefully balanced scheme of public rights and agency obligations . . ."). Another example can be found in *FAA v. Robertson*, in which the Court stated:

The Act has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential

not an accurate one. At the time FOIA was enacted, there was a surfeit of secrecy and an information drought. The Freedom of Information Act was a remedial statute, and it was not intended to preserve light and dark in equal measure. Instead, it was intended to enforce the constitutional “right to know” by creating a presumption in favor of disclosure.

To ignore FOIA’s constitutional underpinnings ill serves the ideal of transparency as an essential feature of representative democracy, particularly where transparency may be challenged by other weighty considerations, such as national security concerns.⁵¹ That is particularly true now, when the balance of power has shifted so strongly in favor of the executive as a general matter⁵² and our public life has become increasingly dominated by concerns about national security, including the felt demands of a “war on terror” that has no foreseeable end, a seemingly strategic use of fear in the conduct of domestic politics, and a perhaps unprecedented willingness on the part of government to embark on wars of choice that may involve immense fiscal and human costs. In this new world, the executive has successfully claimed broad new substantive powers, including the purported authority to assassinate those suspected of terrorism—including United

in certain areas of Government operations. It is axiomatic that all parts of an Act if at all possible, are to be given effect. . . . In *Mink*, the Court set out the general nature and purpose of the Act, recognizing, as did the Senate committee report, that it is not an easy task to balance the opposing interests . . . and provid[e] a workable formula which encompasses, balances, and protects all interests.

422 U.S. 255, 261–62 (1975) (citations omitted) (internal quotation marks omitted).

51. Chief Justice Burger observed that, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (“The national security, after all, is the primary responsibility and purpose of the Federal Government.”). National security has been broadly defined to mean “the national defense, foreign relations, or economic interests of the United States.” 8 U.S.C. § 1189(d)(2) (2006). Meiklejohn argued for the priority of political freedom, noting that “the progress of political freedom gives better assurance of national security than does any program of political oppression and enslavement.” Meiklejohn, *Mean?*, *supra* note 21, at 479.

52. *See* Barry Sullivan, *Methods and Materials in Constitutional Law: Some Thoughts on Access to Government Information as a Problem for Constitutional Theory and Socio-Legal Studies*, 13 EUR. J.L. REFORM 4, 11–14 (2011) [hereinafter Sullivan, *Methods*] (discussing the growth of executive power).

States citizens—anywhere in the world.⁵³ In these circumstances, only an interpretation of FOIA that is informed by its quasi-constitutional status and the First Amendment values that underlie it can possibly keep demands for secrecy from swamping the legitimate needs of transparency.

Part II of this Article will begin by briefly reviewing the intellectual background of the “right-to-know” problem. Part II also will consider the relationship between notions of citizenship and access to government information. It will discuss the relevant insights of James Madison, Benjamin Constant, and Jacques Maritain, among others. It will also consider some of the supranational texts that gave rise to the recognition of an individually enforceable right of access to information, as well as the text of the First Amendment and related jurisprudence. Finally, Part II will emphasize constitutional change and the dynamic development of representative democracy in America, as well as the twentieth-century contributions of scholars, such as Alexander Meiklejohn and Thomas I. Emerson, who found a “right to know” in the First Amendment.

Part III will discuss the *Pentagon Papers* and *Houchins* cases, as well as the scholarly work of those who opposed the recognition of any constitutional obligation on the part of the government to make information available to the public. That opposition was based on grounds of textualism, practicability, and theoretical understandings about the proper role of citizens. With the possible exception of Lillian BeVier, who argued that citizens have only a passive role to play in representative government, all of the scholars surveyed recognized that access to government information is a core constitutional value, regardless of whether it is an independently enforceable constitutional right. Part III will also discuss case law that similarly acknowledges the centrality of this constitutional value. Part III will conclude

53. See Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A1 (discussing the presidentially authorized use of an unmanned drone to kill a U.S. citizen). The Administration has refused to release the legal memorandum that allegedly justifies the president’s authority to undertake such unilateral actions. Scott Horton, *The Drone Secrecy Farce*, HARPER’S MAG. (Mar. 13, 2012), <http://harpers.org/archive/2012/03/hbc-90008485>. At the same time, Administration officials gave speeches in which they argued that the president has the constitutional power to authorize such actions. See Carrie Johnson, *Holder Spells Out Why Drones Target U.S. Citizens*, NPR (Mar. 6, 2012), <http://www.npr.org/2012/03/06/148000630/holder-gives-rationale-for-drone-strikes-on-citizens>.

by suggesting that this constitutional value is at the heart of FOIA, which must be encountered and interpreted in that light.⁵⁴

Finally, Part IV will consider the Supreme Court's FOIA jurisprudence and its insufficient attention to the central purpose of FOIA, as well as some lower court cases that reflect an extreme deference to government assertions of possible harm to national security, whether real or imagined, immediate or remote. Part IV will also suggest that a clear understanding of the constitutional value underlying FOIA—the people's right to the fullest responsible disclosure—can assist the judiciary in the essential but challenging task of holding the executive to account when it argues against disclosure by invoking grounds such as national security or foreign affairs interests, grounds that are weighty indeed, but also easy to assert and difficult to test.⁵⁵ Finally, this Part will suggest that the political branches must seriously consid-

54. The focus of this Article is the courts' failure to interpret FOIA in light of the First Amendment values that animate it. The Article does not aim to prove that the Court necessarily erred in rejecting the "right to know" as an individually enforceable right. Nonetheless, one can easily imagine an exceptional case in which FOIA does not mandate disclosure of materials that the government wishes to keep secret, but disclosure is nonetheless essential to informed public debate about matters of surpassing public importance. That is the possibility left open by the Supreme Court of Canada's decision in *Ontario (Pub. Safety & Sec.) v. Criminal Lawyers' Ass'n*, [2010] S.C.R. 815 (Can.).

55. Dramatic reversals of doctrine may be difficult to achieve, not only because of the practical difficulties inherent in evaluating the government's assertions, but also because of the natural inclination of judges to tread lightly in such areas. See David Dyzenhaus, *Cycles of Legality in Emergency Times*, 18 PUB. L. REV. 165, 169–70 (2007). That attitude is doubtless attributable in part to the judiciary's lack of confidence in its ability to assess for itself the truth and sufficiency of the government's arguments in this context. Keith D. Ewing, *The Futility of the Human Rights Act*, 2004 PUB. L. 829; Conor Gearty, *The Cost of Human Rights*, in 47(2) LEGAL PROBLEMS 19, 40 (1994); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452 (2005). It may be that new procedures, such as special advocates or specialized courts, would further enhance the courts' ability to safeguard the proper balance between legitimate security concerns and democratic values, but such solutions are themselves problematic. The limits ordinarily placed on special advocates have raised due process concerns, while specialized tribunals are problematic because of concerns about democratic legitimacy as well as practical recruitment issues, given the need to have decisions rendered by persons who are both expert and impartial. Those questions are best left for another day. See, e.g., TOM BINGHAM, *THE RULE OF LAW* 103–09 (2010) (discussing the procedures that English courts have followed in an effort to ensure fair trials).

er the importance of these constitutional values in their own encounters with FOIA.

At the very least, basic democratic values must be given their due, and government assertions with respect to the need for secrecy must be subjected to a more rigorous scrutiny.

II. CITIZENSHIP, THE DUTY OF INFORMED PUBLIC DISCUSSION, AND THE DEVELOPING “RIGHT TO KNOW”

The evolution of American thought and jurisprudence about the “right to know” in the second half of the twentieth century can best be understood in connection with developing understandings about the relationship between the citizen and the state in a representative democracy. While the conversation about the nature of that relationship began long ago, it became intense in the post-war period.

One understanding of the relationship between citizenship and the “right to know,” which reflects a strong notion of active citizenship, may be found in the national and supranational rights instruments that were adopted during the second half of the twentieth century: in the aftermath of the World War II, after the fall of Communism in Central and Eastern Europe, and at the end of the apartheid regime in South Africa. Jacques Maritain, the French philosopher whose thought is reflected in some of those instruments,⁵⁶

56. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 53–54, 64–65 (2010). Maritain was a Thomist philosopher, democratic theorist, and public intellectual; he was criticized by some mainstream Catholic leaders for his liberal political positions, such as his refusal to join other Catholic intellectuals in supporting the Franco regime. JAY P. CORRIN, *CATHOLIC INTELLECTUALS AND THE CHALLENGE OF DEMOCRACY* 371–72 (2002). As Corrin notes:

Many influential Catholic leaders passionately defended authoritarian forms of governance. The Vatican’s official response to modern democratic governance was dilatory and was not clarified until Pope John XXIII’s 1963 encyclical *Pacem in Terris*. Yet the arguments it made for constitutional democracy had already been set down by the liberal Catholics of the Sturzo-Maritain persuasion.

Id. at 386. It is difficult to exaggerate Maritain’s influence on Catholic thinking about democracy. As Paul Sigmund has observed:

Maritain was responsible for a new development in Catholic political thought . . . the argument that democracy was not simply one of several forms of government, all of which were acceptable provided that they promoted the ‘common good,’ but was the one . . . most in keeping with the nature of man and with Christian values.

viewed active participation in government as a privilege and a duty of democratic citizenship. Like Alexis de Tocqueville and Benjamin Constant, Maritain did not believe that the citizen's role properly could be confined to participating in periodic elections and obeying the law.⁵⁷ Maritain wrote:

Perhaps it is easier for men to renounce active participation in political life; in certain cases it may even have happened that they felt happier and freer from care while dwelling in the commonwealth as political slaves, or while passively handing over to their leaders all the care of the management of the community. But in this case they gave up a privilege proper to their nature, one of these privileges which, in a sense, make life more difficult and which bring with them a greater or lesser amount of labor, strain and suffering, but which correspond to human dignity.⁵⁸

Maritain attributed great importance to freedom of the press, observing that "the people obey a sound political reflex when they stick

Paul E. Sigmund, *The Catholic Tradition and Modern Democracy*, 49 REV. POL. 530, 540 (1987). The influence of Maritain and others, such as John Courtney Murray, S.J., the American Jesuit and public intellectual, in pushing the Catholic Church leadership away from a hierarchical view of society antagonistic towards democracy is well-illustrated by the fact that, as late as 1943, Monsignor John A. Ryan, who was widely considered to be America's "foremost Catholic liberal," was able to observe, in conformity with Catholic social teaching, that "legal segregation was morally wrong," but that equal access to the franchise could not be urged on moral grounds because "[t]he only moral right possessed by the citizen in the political field is the right to have a government that promotes the common good," which is an "end [that] can be obtained without universal suffrage." JOHN T. MCCREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 298 (2003) (internal quotation marks omitted). That orthodoxy, which had prevailed for centuries, was exploded by the Council documents. See MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 47-54 (2012) (describing the dramatic change in Catholic teaching about democracy).

57. JACQUES MARITAIN, *MAN AND THE STATE* 67 (1951) [hereinafter MARITAIN, *MAN AND THE STATE*] (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 341-42 (1862)). Accord Benjamin Constant, *The Liberty of the Ancients Compared to That of the Moderns*, in BENJAMIN CONSTANT, *POLITICAL WRITINGS* 325-26 (Biancamaria Fontana ed., 1988) (arguing that protection of the "liberty of the ancients" requires citizens to exercise "an active and constant surveillance over their representatives.").

58. JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 84 (1971) [hereinafter MARITAIN, *THE RIGHTS OF MAN*]. Maritain notes that a representative democracy should be understood as "an advance towards justice and law and towards the liberation of the human being." *Id.* at 53.

to the freedom of the press as to a sacred good and protection.”⁵⁹ He also thought that “freedom of speech and expression” was too narrow a phrase to cabin the essence of the concept it was meant to express; he proposed the alternative phrase “freedom of investigation and discussion.”⁶⁰ That freedom “has a strictly political value,” Maritain argued, “because it is necessary to the common effort to augment and diffuse the true and the good,” and it is in “man’s very nature . . . to seek the truth.”⁶¹ Maritain’s influence is reflected in the Universal Declaration of Human Rights (“Universal Declaration”),⁶² which he helped draft, and in other instruments that were modeled on it.⁶³

The Universal Declaration proclaims that “[e]veryone has the right to freedom of opinion and expression . . . includ[ing the] freedom . . . to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁴ The European Convention on Human Rights builds on that idea, providing that, “[e]veryone has the right to freedom of expression [including the right] to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁶⁵ Similar provisions appear in other national and supranational instruments.⁶⁶ They reflect the sense of urgency and idealism of post-war Europe. Because of the on-

59. MARITAIN, *MAN AND THE STATE*, *supra* note 57, at 66.

60. MARITAIN, *THE RIGHTS OF MAN*, *supra* note 58, at 89. As Wil Waluchow has noted, the language of the First Amendment, being limited to “speech,” has required a certain amount of interpretive virtuosity. Wil Waluchow, *Constitutions as Living Trees: An Idiot Defends*, 18 CAN. J.L. & JURISPRUDENCE 207, 233–34 (2005).

61. MARITAIN, *THE RIGHTS OF MAN*, *supra* note 58, at 89. Maritain also gives specific attention to freedom of association. *Id.*

62. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 71 (Dec. 12, 1948).

63. See MOYN, *supra* note 56, at 54; MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 51, 230 (2001). In negotiating the Universal Declaration, Maritain and others believed that consensus could be reached only by focusing on practical grounds, rather than on abstract or underlying principles. See *id.*, at 77–78.

64. G.A. Res. 217 (111) A, *supra* note 62, ¶ 19.

65. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 231 [hereinafter *European Convention*].

66. See, e.g., American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 123; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at 1–2 (Ger.); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 54 (Pol.); S. AFR. CONST., 1996 art. 16.

set of the Cold War, however, those instruments often failed to have the immediate impact that some of their proponents intended.⁶⁷ The provisions relating to access to information were no exception, but, like other such freedom of expression provisions, they were written in broad language that afforded ample room for future interpretation.⁶⁸ Indeed, at least two transnational courts have interpreted such provisions to mandate government disclosure of information that would not otherwise be disclosed.⁶⁹ In one case, the European Court of

67. See MOYN, *supra* note 56, at 2 (describing the Cold War's displacement of the post-war human rights agenda). Eric Muller makes a similar point:

The perpetrators [of German atrocities] whose convictions stuck were mostly the low-ranking thugs with blood on their hands; the mid- and upper-level functionaries who set up and ran the machinery of repression from their desks were most often exonerated. Scholars debate the reasons, but the continued presence of former Nazis in the West German judiciary surely played a role, as did the geopolitical need of the United States to bolster West Germany in the fight against Soviet communism. For this latter reason, American pressure on the West Germans to root out and punish their Nazi malefactors largely evaporated in the late 1940s. With no external pressure to keep their gaze on their uncomfortable past, most West Germans preferred to look away.

Eric L. Muller, *Of Nazis, Americans, and Educating Against Catastrophe*, 60 BUFF. L. REV. 323, 355 (2012) (citations omitted).

68. See, e.g., David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1736 (2003) ("The genius of the Constitution is that it is specific where specificity is valuable, general where generality is valuable—and that it does not put us in unacceptable situations that we can't plausibly interpret our way out of."); *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring) ("Most constitutional issues derive from the broad standards of fairness written into the Constitution . . . and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment.").

69. See, e.g., *HCLU v. Hungary*, *supra* note 20 (recognizing the right of access to official documents); *Claude-Reyes*, *supra* note 20 (upholding the public's right to seek information and finding the government's duty to provide it). In *HCLU v. Hungary*, the Hungarian Constitutional Court had given a contrary interpretation to language contained in the Hungarian Constitution. *HCLU v. Hungary*, *supra* note 20, ¶ 35. That Constitution has since been replaced. Judy Dempsey, *Hungarian Parliament Approves New Constitution*, N.Y.TIMES.COM (Apr. 18, 2011), <http://www.nytimes.com/2011/04/19/world/europe/19iht-hungary19.html> (discussing the enactment of the new constitution). The provisions contained in the new constitution have provoked serious concern and controversy, both within Hungary and within the larger European community. See James Kanter, *European*

Human Rights held that Hungary's "obligations in matters of freedom of the press [obligations which extend to "social watchdogs" performing traditional press functions, as well as to the press itself] include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities."⁷⁰ Similarly, the Inter-American Court of Human Rights has recognized "the right of the individual to receive . . . information and the positive obligation of the State to provide it."⁷¹

The constitutional law of the United States has somewhat different roots and developed along different lines. The Constitution and Bill of Rights were framed at a different constitutional moment, when the very concepts of democracy, representation, and citizenship were under construction, and when the working out of the proper relation-

Body Threatens to Sue Hungary over its Policies, N.Y. TIMES, Jan. 12, 2012, at A9; Palko Karasz & Melissa Eddy, *Opposition Protests Constitution in Hungary*, N.Y. TIMES, Jan. 3, 2012, at A4.

70. *HCLU v. Hungary*, *supra* note 20, ¶ 36. The HCLU argued that "to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts." *Id.* at para. 22. The HCLU further argued that:

The disclosure of public information on request is . . . within the notion of the right "to receive" This provision protects not only those who wish to inform others but also those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be incompatible with the above-mentioned positive obligations.

Id. ¶ 23.

71. *Claude-Reyes*, *supra* note 20, ¶ 77. The court also recognized the government's obligation to provide a justification when limiting access to information "in a specific case" "for any reason permitted by the Convention." *Id.* In a similar vein, the Supreme Court of Canada recently held that Section 2(b) of the Canadian Charter of Rights and Freedoms, which guarantees only "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), does not "entail[] a general constitutional right of access to all information under the control of government," but the Court accepted the proposition that "[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government," leaving open the possibility that relief might be granted where "meaningful public discussion and criticism . . . would [otherwise] be substantially impeded." *Ontario (Pub. Safety & Sec.) v. Criminal Lawyers' Ass'n*, [2010] S.C.R. 815 para. 30, 31, 35, 37 (Can.).

ship between the governors and the governed stood at a different stage.⁷²

The First Amendment contains no explicit guarantee of access to information, whether for the general benefit of the public or for the special benefit of the press, either with respect to information generally or with respect to information created or maintained by the gov-

72. See, e.g., POLE, *supra* note 8, at 133 (noting that the relationship “between ruler and ruled” was still evolving at the time of the Constitutional Convention in 1787); WOOD, *supra* note 9, at 28–29 (explaining that American citizens sought a different kind of relationship with their government than what they had with England). The very idea of representation was under development. In England, thinking about representation emphasized the representative’s independence; his obligation to the nation as a whole, rather than to a particular constituency; and the legitimacy of representation unconnected to popular election. As Edmund Burke famously remarked, the representative owed the country his “unbiased opinion, his mature judgment, [and] his enlightened conscience, [which] he ought not to sacrifice to [anyone].” Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 THE FOUNDERS’ CONSTITUTION 391, 392 (Philip B. Kurland & Ralph Lerner eds., 1987). Neither the concept of virtual representation nor the idea of parliamentary supremacy had the same traction in the American colonies. WOOD, *supra* note 9, at 28–29. But constitutional change came to England as well. As Robert Dahl has pointed out, the government of the United States might well have been created as a parliamentary system if the process of constitution-making had occurred a generation later, when the English parliamentary system had further evolved towards its modern form. See ROBERT A. DAHL, ON DEMOCRACY 123 (1998) (“Although by now parliamentary government is all but unthinkable among Americans, had their Constitutional Convention been held some thirty years later it is altogether possible that the delegates would have proposed a parliamentary system. For what they . . . did not understand was that the British constitutional system was itself undergoing rapid change.”). Another important question, of course, was the extent to which authority was delegated to representatives or retained by the people. John A. Macdonald, one of the fathers of Canadian confederation, strongly believed that even so fundamental a question as confederation was properly left to representatives, with “no need . . . for the people to say what they felt, either in an election or a plebiscite.” RICHARD GWYN, JOHN A.: THE MAN WHO MADE US: THE LIFE AND TIMES OF JOHN A. MACDONALD 346 (2007). The question has not lost its currency. In recent years, much discussion has occurred within the European Union about whether the member states should ratify foundational treaties by popular referendum or parliamentary action. The choice may depend on political considerations as well as constitutional requirements. See, e.g., Gavin Barrett, *A Rough Passage: Lessons from the Experience of the Ratification of the Lisbon Treaty in Ireland*, in THE MAKING OF THE EU’S LISBON TREATY: THE ROLE OF THE MEMBER STATES 273 (Finn Laursen ed., 2012); Carlos Closa, *Why Convene Referendums? Explaining Choices in EU Constitutional Politics*, 14 J. EUR. PUB. POLICY 1311 (2007).

ernment.⁷³ Moreover, courts have not construed the First Amendment to encompass any general “right to know,” in the sense of creating an affirmative, individually enforceable governmental obligation to provide information within its control or to remove barriers that otherwise exist.⁷⁴

The founders were men of their times.⁷⁵ They were content to leave slavery in place as the price of union.⁷⁶ They were not necessari-

73. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The law of the First Amendment has been shaped by the eighteenth century text, but also by modern circumstances, such as the Cold War, in which the values of the First Amendment have been invoked or challenged. HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 301–99 (Jamie Kalven, ed., 1988); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 395–96 (2004). By contrast, the text of the Constitution of the Republic of South Africa contains a broad guarantee of access to information, which apparently applies generally and not simply against the government. See S. AFR. CONST. 1996, art. 16 (protecting the right to receive information). In practice, the right to know has been under serious attack in South Africa. See John Eligon, *South Africa Passes Law to Restrict Reporting of Government Secrets*, N.Y. TIMES, Nov. 23, 2011, at A4 (describing a bill that would restrict the ability of journalists to report secret government information); Tracy McVeigh, *Nobel Laureate Nadine Gordimer Accuses the ANC of Apartheid-Style Censorship*, OBSERVER, Nov. 27, 2011, available at <http://www.guardian.co.uk/world/2011/nov/27/nadine-gordimer-south-africa-anc-secrecy-law-censorship> (last visited July 21, 2012) (same).

74. See STONE, *supra* note 73, at 5–9 (discussing First Amendment case law development).

75. See RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC* 31 (1987) (“[I]t is a safer presumption to treat the past, including our national past, as different or as possibly even strange. In doing so we reduce the likelihood of our unwittingly smoothing away or overlooking whatever might be distinctive in that earlier period.”); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (“[T]he government [the framers] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.”).

76. See Notes on the Debates in the Federal Convention, available at http://avalon.law.yale.edu/subject_menus/debcont.asp. (remarks of Mr. Rutledge, Aug 21) (“Interest alone is the governing principle with nations. The true question at present is whether the Southern States shall or not be parties of the Union.”).

ly committed to universal suffrage.⁷⁷ Despite the entreaties of Abigail Adams, they did not “Remember the Ladies.”⁷⁸ Their notion of “the people” was far less inclusive than that which the Constitution enshrines today. But the founders also were sailing largely uncharted seas with respect to designing a representative government.⁷⁹

In designing “a government which is to be administered by men over men,” James Madison, writing as “Publius,” explained in *Federalist* 51 that “the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.”⁸⁰ He continued: “A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.”⁸¹ Moreover, too great a dependence on the people was also to be guarded against. If a majority could make its will felt too easily, the government’s policies would lack wisdom and stability and be too susceptible to fickle

77. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 23 (2000) (“Perhaps owing to the absence of some of the revolution’s most democratic leaders (including Jefferson, Paine, Samuel Adams, and Patrick Henry), there was no formal debate [at the Constitutional Convention] about the possibility of a national standard more inclusive than the laws already prevailing in the states.”). “By 1790 . . . roughly 60 to 70 percent of adult white men (and very few others) could vote.” *Id.* at 21; see also CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860*, at 19 (1960) (“Confining the vote in colony elections to those who were free, white, twenty-one, native-born Protestant males who were the owners of property, especially the owners of real property, appeared to be the best guarantee of the stability of the commonwealth.”).

78. Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *THE FOUNDERS’ CONSTITUTION*, *supra* note 72, at 518.

79. See *THE FEDERALIST* NO. 1, at 1 (Alexander Hamilton) (Jacob E. Cooke ed., 8th prt. 1977) (“It has been frequently remarked, that it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.”); POLE, *supra* note 8, at 141–42 (comparing the older concept of virtual representation with the newer view, which assumed “a closer and more continuous nexus between legislators and the people,” and concluding that “no linear process of transition can be traced from the earlier to the later”).

80. *THE FEDERALIST* NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 8th prt. 1977).

81. *Id.*

fashion, without a proper regard for the long-term needs and interests of the nation as a whole.⁸²

A pure democracy was thought to be theoretically undesirable as well as practically impossible.⁸³ As Gordon Wood wrote, “[t]hrough the structural devices of the new federal government [the Federalists] sought to perpetuate an elitist conception of representation even though political and social conditions in America were making a continuation of such elite rule difficult if not impossible to sustain.”⁸⁴

82. See THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 8th prtng. 1977) (“This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997) (“The decision to create a single written constitution, and thus depart from a model of parliamentary supremacy, is based on the possibility of varying views about fundamental questions, and the undesirability of leaving their resolution to shifting political fortunes. Moreover, one reason for being suspicious of shifting political fortunes is that they shift so frequently. Without a written constitution as a stabilizing force, there is a risk that too many issues needing at least intermediate term settlement will remain excessively uncertain.”). Maritain also recognized the problem of shifting sentiments in democratic societies; he distinguished between “momentary trends of opinion” and “the real needs of the multitude.” MARITAIN, *MAN AND THE STATE*, *supra* note 57, at 137.

83. See THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 8th prtng. 1977) (“A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. . . . The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.”); THE FEDERALIST NO. 63, at 428 (Alexander Hamilton) (Jacob E. Cooke ed., 8th prtng. 1977) (arguing that the government was to be a representative government, rather than a classical democracy).

84. WOOD, *supra* note 9, at 54. The national government was to be a government of limited powers, and the requirements for voting in federal elections were left to the states. See U.S. CONST. art. I, § 2, cl. 1 (providing that “the Electors [in congressional elections] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved

Significantly, neither the president nor the members of the upper house would be elected directly by the people and, while the members of the lower house would be subject to direct election, they would be so few in number that only members of the elite were likely to gain election. Again, as Gordon Wood wrote:

The Anti-Federalists thus came to oppose the new national government for the very reason the Federalists favored it: because its very structure and detachment from the people would work to exclude any kind of actual and local-interest representation and prevent ordinary middling men from exercising political power. It went almost without saying that the awesome president and the exalted Senate would be dangerously far removed from the people. But even the “democratic branch” of the government, the House of Representatives, which presumably should “possess the same interests and opinions that the people themselves would possess, were they all assembled,” was, with its scant sixty-five members, only “a mere shred or rag” of the people’s power, and hardly a match for the monarchical and aristocratic branches of the government. When the number of representatives was “so small,” declared the Anti-Federalists of Pennsylvania, “the office will be highly elevated and distinguished; the style in which the members live will probably be high; circumstances of this kind will render the place of a representative not a desirable one to sensible, substantial

to the States respectively, or to the people”). In addition, the president was to be elected by an electoral college, rather than by the people, and the method for selecting the members of the electoral college also was left to the states. *Id.* art. II, § 1, cl. 2–3. Senators were to be chosen by the state legislatures for six-year terms, while the representatives would be popularly elected for two-year terms. *Id.* art. I, § 2, § 3, cl. 1. Some delegates had even favored the use of an indirect election for choosing members of the House of Representatives, but that view did not prevail. ADRIENNE KOCH, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 38–45 (1966). Moreover, the Executive could negate the work of the legislative branch, subject to reversal by supermajorities in both houses. U.S. CONST. art. I, § 7, cl. 2. Presumably, the existence of a written constitution to be interpreted by judges also would limit the powers of the people. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 151–52 (1803) (noting that the structure of the Constitution is one in which the power of the people runs through an independent judiciary); THE FEDERALIST NO. 78, *supra* note 82 (viewing judges as “faithful guardians of the Constitution”).

men, who have been used to walk in the plain and frugal paths of life.”⁸⁵

Viewed from this perspective, the “auxiliary precautions” must take center stage.⁸⁶ The national government would combine features of representation, federalism, indirect election, separated powers, and bicameralism, so that the influence of factions would be checked and dispersed, the powers of government would be diffused, and “[t]he rule of the people [would] be largely indirect.”⁸⁷ At least at the national level, there was not much work for the people to do.⁸⁸

Although James Madison put great faith in the efficacy of such structural arrangements at the Constitutional Convention and during the ratification debates, he later stressed the importance of a more active sense of citizenship and a greater role for public opinion in a representative government. As Richard Brookhiser has observed:

In 1791, after the Constitution was ratified, Madison sat down to rethink some of the most important debates he had just won. In *The Federalist* he had argued that the very size of the United States and the complexity of its new federal system would buttress liberty, since malign factions would find it hard to seize power. But now he decided that another guarantee was necessary: enlightened public opinion, which would spot threats to liberty and unite “with a holy zeal” to repel them. In a new series of essays . . . he teased out the consequences of this idea. . . . [I]n the early 1790s, regularly consulting public opinion was a new concept. Many of Madison’s colleagues, including Washington and Hamilton, had little use for it. They thought the people should rule when they voted, then let the victors do their best until the next election. But Madison glimpsed our world before it existed.⁸⁹

In 1792, Madison wrote that, “[t]o secure all the advantages of [a federal republic], every good citizen will be at once a sentinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the authorities of the interme-

85. WOOD, *supra* note 9, at 58–59 (footnotes omitted).

86. See FEDERALIST NO. 51, *supra* note 80 (arguing that “auxiliary precautions” are necessary when power is given to the people).

87. Sullivan, *Methods*, *supra* note 52, at 8–9.

88. *Id.* at 9.

89. BROOKHISER, *supra* note 5, at 8–9.

diate governments.”⁹⁰ As Brookhiser noted, “Madison now believed in more than popular choice. He wanted the people to be consulted between elections, continually. They would be his partners in government.”⁹¹

In time, Madison’s “popular Government” would become more “popular.” Indeed, the overall effect of constitutional amendments and judicial interpretations has been transformative. An electoral college continues to choose the president, but senators are now chosen by voters, not by state legislatures, and the federal franchise has been greatly extended, removing barriers based on race, sex, age, and the ability to pay a poll tax.⁹² Judicial decisions and federal legislation have worked similar changes in the states.⁹³ The net effect of these

90. JAMES MADISON, *Government*, in JAMES MADISON: WRITINGS 1772-1836, at 502 (Lib. Am. 1999).

91. BROOKHISER, *supra* note 5, at 106–07. In retirement, Madison would elaborate on that view of citizenship in a much-quoted letter praising Kentucky’s commitment to education:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter to W.T. Barry (Aug. 4, 1822), in MADISON, WRITINGS, *supra* note 90, at 790.

92. See, e.g., U.S. CONST. amend. XIII, § 1 (prohibiting slavery and involuntary servitude); *id.* amend. XIV, § 1 (conferring citizenship on former slaves, prohibiting the states from abridging the privileges and immunities of citizens, and guaranteeing due process and equal protection); *id.* amend. XV, § 1 (prohibiting denial or abridgment of the right to vote based on race, color, or previous condition of servitude); *id.* amend. XVII (providing for popular election of senators); *id.* amend. XIX (extending the vote to women); *id.* amend. XXIII (providing for electors from the District of Columbia); *id.* amend. XXIV (prohibiting the denial or abridgment of the right to vote based on failure to pay poll or other tax); *id.* amend. XXVI (prohibiting the denial or abridgment of the right to vote based on age with respect to anyone eighteen years of age or older). In a formal sense, those provisions constitute the United States as a more democratic nation than that which the framers created. On a practical level, some reservations may be in order, however, because of the increased dominance of the executive and the distortion occasioned by the influence of money in the political process. See SHANE, MADISON’S NIGHTMARE, *supra* note 7, at 199–202 (describing the influence of corporate campaign contributions on elections and the conduct of government); POSNER & VERMEULE, *supra* note 7, at 115 (explaining how money and position influence elections).

93. See Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (1994) (prohibiting states from denying an individual the right to vote “on account of race or color”); *Reynolds v.*

changes has been greater than the sum of their parts. What once was a representative government has since moved closer to being a representative democracy. As these changes have occurred, and as the government has become more democratic (at least in a formal sense), Madison's more robust view of citizenship has gained traction.

By 1927, Justice Brandeis felt justified in attributing such a conception of citizenship to the founding generation. In his concurring opinion in *Whitney v. California*,⁹⁴ Justice Brandeis asserted that:

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁹⁵

Justice Brandeis was not alone. John Dewey, also in 1927, published *The Public and Its Problems*, in which he described the "citizen-voter" as "an officer of the public [who] expresses his will as a representative of the public interest as much so as does a senator or sheriff."⁹⁶ Dewey also recognized the central importance of informed

Sims, 377 U.S. 533, 577-81 (1964) (holding that the principle of "one man, one vote" required legislative districts to be drawn in a way that they are roughly equal in population); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (overruling existing precedent to hold that redistricting issues were not simply political issues, but presented justiciable questions, and that a citizen's right to vote cannot be "arbitrar[ily] impaired" by a state action that dilutes his vote); *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (holding that an Alabama state law that transformed the city of Tuskegee from a geographically square unit to an "uncouth" twenty-eight-sided entity, removing all but a handful of potential African-American voters, violated the Fifteenth Amendment).

94. 274 U.S. 357 (1927).

95. *Id.* at 375 (Brandeis, J., concurring); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936) (discussing "the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests"); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

96. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 75 (Swallow Press Inc. 1954) (1927).

public debate: “The essential need . . . is the improvement of the methods and conditions of debate, discussion and persuasion. That is *the* problem of the public.”⁹⁷ The significance that Dewey attributed to active citizenship was part and parcel of his view of democracy, which he considered to be “more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.”⁹⁸

Alexander Meiklejohn, the philosopher and First Amendment scholar, made the strongest case for the connection between active citizenship and access to information in the years following World War II.⁹⁹ As the World War II era gave way to the Cold War, the task of guarding public safety, while also ensuring the continued vitality of democratic institutions, took on a new urgency. In Meiklejohn’s austere view, the central purpose of the First Amendment was not to protect an individual’s right to self-expression or self-realization, but to ensure the robust public debate necessary for self-government.¹⁰⁰ For

97. *Id.* at 208. Dewey also observed that “this improvement depends essentially upon freeing and perfecting the processes of inquiry and of dissemination of their conclusions.” *Id.* It is not enough, Dewey argued, to assume that “the masses” are incapable of political judgment and should be protected from themselves. *See id.* at 209 (“Until secrecy, prejudice, bias, misrepresentation, and propaganda as well as sheer ignorance are replaced by inquiry and publicity, we have no way of telling how apt for judgment of social policies the existing intelligence of the masses may be.”).

98. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 101 (Mcmillan Co. 1922); *see also* John Dewey, *The Ethics of Democracy*, in 1 THE EARLY WORKS, 1882-1898, at 240–41 (1969) (“Democracy, in a word, is a social, that is to say, an ethical conception, and upon its ethical significance is based its significance as governmental. Democracy is a form of government only because it is a form of moral and spiritual association.”). Matthew Lewans has observed that, “Dewey’s ideas about ‘intelligent social action’ do not involve the subordination of individual interests to the authority of state officials interrupted only periodically by elections, but provides a philosophical framework for sustained and honest democratic discourse; a discourse which requires officials to provide public reasons for their decisions which are capable of sustaining and extending the consensus which makes civil society possible and enables the community to resolve problems in a legitimate and intelligent manner.” MATTHEW LEWANS, ADMINISTRATIVE LAW AND JUDICIAL DEFERENCE (forthcoming Dec. 2012).

99. *See supra* note 21 and accompanying text.

100. MEIKLEJOHN, FREE SPEECH, *supra* note 21, at 88–89. Meiklejohn distinguished between two kinds of freedom of speech: (1) the freedom of speech guaranteed by the First Amendment, which is imbued with a public purpose because it is essential to informed

Meiklejohn, the freedom of speech protected by the First Amendment is not based on “a sentimental vagary about the ‘natural rights’ of individuals,” but on “a reasoned and sober judgment as to the best available method of guarding the public safety.”¹⁰¹ Its value is instrumental. Significantly, the First Amendment is concerned with the success of representative government, which depends on an educated, informed, and engaged citizenry. For Meiklejohn, the freedom of speech protected by the First Amendment is analogous—and antecedent—to that which the Speech and Debate Clause grants to legislators:

The freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters. In spite of all the dangers it involves, Article I, section 6, suggests that the First Amendment means what it says: In the field of common action, of public discussion, the freedom of speech shall not be abridged.¹⁰²

The First Amendment does not protect “talkativeness;” nor does it “require that, on every occasion, every citizen shall take part in public debate.”¹⁰³ “What is essential,” according to Meiklejohn, is “that everything worth saying shall be said.”¹⁰⁴

discussion about matters of public concern, and (2) the “liberty of speech” protected by the Fifth and Fourteenth Amendments, which is a private right serving private purposes. *Id.* at 37–39. The former is “absolute,” while the latter, like other aspects of liberty, may be balanced, adjusted, and abridged. *Id.* The “liberty of speech” protected by the Fifth and Fourteenth Amendments is subject to regulation, but protected from “undue regulation.” *Id.* at 38.

101. *Id.* at 65.

102. *Id.* at 37. Meiklejohn also noted:

No one can possibly doubt or deny that congressional debate, on occasion, brings serious and immediate threat to the general welfare. . . . On the floors of both houses, in time of peace as well as in war, national policies have been criticized with an effectiveness which the words of private citizens could never achieve.

Id. at 36.

103. *Id.* at 25. Meiklejohn famously analogized speech to a New England town meeting. *Id.* at 22–24. Thomas I. Emerson, among others, has questioned the appropriateness of the analogy, based on the fact that it presupposes the existence of a moderator who is authorized to control the discussion in ways that would not be appropriate in other circumstances. Emerson, *supra* note 21, at 4–5.

104. MEIKLEJOHN, *FREE SPEECH*, *supra* note 21, at 25. Meiklejohn argued:

The point, Meiklejohn insisted, “is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”¹⁰⁵ Education is essential, but so is information: “What . . . would be the use of giving to American citizens freedom to speak if they had nothing worth saying to say?”¹⁰⁶ Indeed, all the education in the world would not be enough if citizens lacked the specific information necessary for making informed judgments about matters of public importance. Thus, the question arises as to where such information will come from and how it will be acquired, particularly when the executive has a monopoly over it and does not wish to disclose it.¹⁰⁷ In Meiklejohn’s view, a “right to know” is implicit in the First Amendment.¹⁰⁸

And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.

Id. at 26.

105. *Id.* at 88.

106. *Id.* at 102. Meiklejohn also noted that “the protection of public discussion in our nation takes on an ever-increasing importance as the nation succeeds in so educating and informing its people that, in mind and will, they are able to think and act as self-governing citizens.” *Id.* at 102–03.

107. Some would suggest that Congress should shoulder this responsibility. See Levi, *supra* note 24, at 331 (asserting that our system of government depends on Congress’s holding the executive to account, and that it is the responsibility of Congress, not individuals or institutions of civil society, to secure from the executive the information necessary for Congress and the public to hold the executive accountable); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar./Apr. 1982, at 14, 19 [hereinafter Scalia, *No Clothes*] (asserting that it is for Congress to procure information from the executive, and ridiculing the idea that that the public can or should engage in that pursuit). But Congress is often unwilling or unable to perform that function. In that respect, it is surely significant that the first FOIA case decided by the Supreme Court was one brought by members of Congress, who could not acquire the information they wanted through ordinary parliamentary means. See *EPA v. Mink*, 410 U.S. 73 (1973) (involving a suit by members of Congress to obtain documents relating to an underground atomic explosion). The George W. Bush administration regularly refused to comply with congressional requests for information. Pozen, *supra* note 13, at 259. The Obama Administration even invoked executive privilege to block the testimony of the White House social secretary regarding a breach of security at a state dinner. Michael Scherer, *No Testimony for Obama’s Social Secretary?*, TIME, Dec. 3, 2009, available at www.time.com/time/politics/article/0,8599,194519

In the mid-1970s, when the Supreme Court was being asked to infer from the First Amendment a governmental obligation to provide access to information within the government's control, Thomas I. Emerson, one of the most influential First Amendment scholars of the time, took up Meiklejohn's argument.¹⁰⁹ Emerson addressed the

2,00.html. Rodney Austin noted in 1985 that Congress had been a major beneficiary of FOIA. *See* Austin, *supra* note 7, at 365. Parliamentarians in other countries have also used access-to-information provisions to secure information from the executive. *See, e.g., HCLU v. Hungary*, *supra* note 20, at 2; *Claude Reyes*, *supra* note 20, ¶ 48.

108. Some later commentators have criticized Meiklejohn's theoretical and historical understanding. *See, e.g.,* William Marshall, *Free Speech and the Problem of Democracy (Book Review)*, 89 NW. U. L. REV. 191, 196–98 (1994) (taking issue with Meiklejohn's view concerning the centrality of political participation and with the premise that political speech is "at the core of the First Amendment"); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111–14 (1993) (criticizing Meiklejohn's interpretation of the First Amendment). On the other hand, John Courtney Murray, S.J., a contemporary who approached these issues from a Catholic perspective quite different from Meiklejohn's, expressed views remarkably similar to his:

[T]he proper premise of these freedoms [of speech and the press] lay in the fact that they were social necessities. . . . They were regarded as conditions essential to the conduct of free, representative, and responsible government. People who are called upon to obey have the right first to be heard. People who are to bear burdens and make sacrifices have the right first to pronounce on the purposes which their sacrifices serve. People who are summoned to contribute to the common good have the right first to pass their own judgment on the question, whether the good proposed be truly a good, the people's good, the common good. Through the technique of majority opinion this popular judgment becomes binding on government.

JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 34–35 (1960). Like Maritain, Murray had a strong influence on the development of Catholic attitudes toward democracy in the mid-twentieth century. Although "silenced" by his religious superiors in the years preceding the Second Vatican Council, Murray, like Maritain, had a profound influence on the Council, which adopted many of his (and Maritain's) ideas concerning democracy and individual freedom in key documents. *See* JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* 155 (2005) (noting Murray's silencing, rehabilitation, and participation in the Council).

109. *See* Emerson, *supra* note 21, at 4 (analyzing Meiklejohn's theory of the First Amendment). Emerson, however, parted company with Meiklejohn in several important respects. For example, Emerson had little sympathy for Meiklejohn's attempt to make "the right to know the sole touchstone in the interpretation of the [F]irst [A]mendment."

question “whether the right to know can be effectively incorporated into our legal structure, through development of an adequate constitutional theory and workable operating rules.”¹¹⁰ Like Meiklejohn, Emerson believed that “the right to know fits readily into the [F]irst [A]mendment and the whole system of freedom of expression.”¹¹¹ Indeed, Emerson believed that the most significant application of a constitutional right to know would come from the recognition of a right to obtain information from the government. Here, Emerson agreed with Meiklejohn’s theory.¹¹² According to Emerson:

[T]he greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the

Id. Emerson thought that “the right to know serves much the same function in our society as the right to communicate.” *Id.* at 2. It aids self-fulfillment, the search for truth (or for better answers), collective decision-making in a democratic society, and relatively peaceful social change. *Id.* Emerson criticized Meiklejohn’s austere theory of the First Amendment on four grounds:

[(1) it] neglects the function of the [F]irst [A]mendment in protecting the right of the speaker to personal self-fulfillment, [(2)] it is impossible to give absolute constitutional protection to the right to obtain information under all circumstances, [(3)] the dynamics of the system of freedom of expression rest on the assertion of individual rights by the person desiring to communicate, far more than on pressure from individuals desiring to listen, and [(4)] history, tradition, doctrine, and practice have all developed largely [in the opposite direction, that is,] on the basis of protecting the rights of the speaker.

Id. at 4–5. Emerson also rejected the validity of Meiklejohn’s analogy of free speech to the conduct of a New England town meeting, which is by nature a limited forum in which someone must allocate scarce resources, thereby “inject[ing] the government into decisions on the content, political relevance, and worth of the speech, an area that is no business of government in a free system.” *Id.* at 5.

110. *Id.* at 1. According to Emerson, there are several practical “advantages to recognizing the right to know as a legal right independent of, or perhaps supplemental to, the more traditional right of the speaker to communicate.” *Id.* at 2. Among other things, “the right to know focuses on the affirmative aspects of the . . . system of freedom of expression, as well as simply looking at the negative right to be free of government interferences.” *Id.*

111. *Id.* at 2. Emerson described “two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others.” *Id.* Although “the contours of the right to know remain [admittedly] obscure,” Emerson emphasized that the Court had repeatedly acknowledged its existence. *Id.* at 3.

112. *Id.* at 14.

right of the public to obtain information from the government. There is a firm, indeed overwhelming, theoretical base for accepting this position. . . . The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible. Whether or not such a guarantee of the right to know is the sole purpose of the [F]irst [A]mendment, it is surely a main element of that provision and should be recognized as such.¹¹³

Emerson recognized that a constitutional right to government information cannot be absolute, but he insisted that any “exceptions should be scrupulously limited to those that are absolutely essential to the effective operation of government institutions.”¹¹⁴ For example, he acknowledged “that some allowance would have to be granted for national security data, but only to the extent that tactical military movements, design of weapons, operation of espionage or counterespionage, and similar matters are concerned.”¹¹⁵ Emerson also noted that working out the contours of the constitutional “right to know” through judicial procedures “would . . . be a long and tedious process,” but suggested that, “a good start ha[d] already been made to achieve the same end through legislation,” namely, FOIA.¹¹⁶

Emerson did not suggest, however, that legislation should take the place of a constitutional right. Nor did he argue that the boundaries of the constitutional right should be defined by legislation. In-

113. *Id.* Emerson cited Justice Powell’s opinion in *Saxbe v. Washington Post Co.*, 417 U.S. 843, 872 (1974) (Powell, J., concurring in part and dissenting in part), in which Justice Powell observed “that the ‘underlying right’ is the ‘right of the public to the information needed to assert ultimate control over the political process,’” as well as Justice Douglas’s dissent in *Pell v. Procunier*, 417 U.S. 817, 839-40 (1974), in which he wrote that it was not the right of the journalists that was involved, “but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner.” Emerson, *supra* note 21, at 15-16.

114. *Id.* at 16-17.

115. *Id.* at 17. In addition, Emerson thought that some allowance should be made for diplomatic and collective bargaining negotiations, criminal investigations, and uncompleted litigation, and, where necessary, to ensure full and frank advice within the executive branch, and to protect personal privacy. *Id.*

116. *Id.*

deed, the opposite would appear to be the case inasmuch as it is the constitutional right to know that he thought was “entitled to support [from] legislation or other affirmative government action.”¹¹⁷ The adequacy of those statutory protections was to be measured against constitutional standards.¹¹⁸

III. THE PEOPLE’S ELUSIVE “RIGHT TO KNOW”: THE SUPREME COURT AND ITS CRITICS

Supreme Court opinions have often mentioned the “right to know,” as well as the necessary connection between democratic self-government and the free flow of information and ideas.¹¹⁹ This was particularly true during the 1960s and 1970s, especially in cases in which the Court wished to underscore the importance of a free press in a free society. For example, Justice Brennan, echoing his earlier opinion in *New York Times Co. v. Sullivan*, observed in *Garrison v. Louisiana*,¹²⁰ that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹²¹ According to Justice Brennan, the First Amendment “protects the paramount public interest in a free flow of information to the people concerning public officials, their servants.”¹²² In *Time, Inc. v. Hill*,¹²³ Justice Brennan observed that the freedom of the press is “not for the benefit of the press so much as for the benefit of all of us,” and that “[a] broadly defined freedom of the press assures the maintenance of our political

117. *Id.* at 2.

118. Emerson also addressed the leaking of information by current or former government employees. According to Emerson, leaks could be dealt with through criminal prosecutions or disciplinary proceedings, but there should be no further efforts to restrict “circulation of information which has escaped the government’s grasp.” *Id.* at 18. Additional efforts would stifle “all discussion or circulation of information about public affairs” and leave citizens “exclusively dependent on the bland handouts of government agencies.” *Id.*

119. David O’Brien noted in 1980 that the Justices had acknowledged a “right to know” in opinions filed in twenty-four cases between 1943 and 1980, with eleven of the cases being decided after 1970. O’Brien, *supra* note 25, at 619.

120. 379 U.S. 64 (1964); *see also generally* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (discussing the importance of the limits that the First Amendment places on government regulation of expression).

121. *Garrison*, 379 U.S. at 74–75.

122. *Id.* at 77.

123. 385 U.S. 374 (1967).

system and an open society.”¹²⁴ In *Mills v. Alabama*,¹²⁵ Justice Black likewise emphasized the media’s “important role in the discussion of public affairs.”¹²⁶ In *Curtis Publishing Co. v. Butts*,¹²⁷ Justice Harlan noted that the “Founders . . . felt that a free press would advance . . . responsible government.”¹²⁸ Finally, in *Red Lion Broadcasting Co. v. FCC*,¹²⁹ Justice White stated that “speech concerning public affairs is . . . the essence of self-government.”¹³⁰ Most important, Justice White observed that “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”¹³¹

But none of those cases involved either the publication of information secured from the government without its consent or a demand that the government make available information that it wished to keep secret. This Part will discuss two Supreme Court cases that did address those issues: *New York Times Co. v. United States*, which involved the former and was decided in 1971, and *Houchins v. KQED*, which involved the latter and was decided in 1978. This Part will also discuss responses to the *New York Times* decision by Louis Henkin and Edward Levi, as well as two essays written shortly after the *Houchins* decision by Lillian BeVier and David O’Brien.

In *New York Times Co. v. United States*,¹³² a deeply divided Court¹³³ held that the First Amendment precluded the issuance of an injunc-

124. *Id.* at 389.

125. 384 U.S. 214 (1966).

126. *Id.* at 219.

127. 388 U.S. 130 (1967).

128. *Id.* at 147 (citation omitted).

129. 395 U.S. 367 (1969).

130. *Id.* at 390 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

131. *Id.* Justice Souter struck a similar chord in *Cohen v. Cowles Media Co.*, when he noted in dissent that “freedom of the press is ultimately founded on the value of enhancing [public] discourse for the sake of a citizenry better informed and thus more prudently self-governed.” 501 U.S. 663, 678 (1991) (Souter, J., dissenting).

132. The newspapers argued that they were entitled to publish the Pentagon Papers because of the people’s “right to know” what their government was doing. *Id.* at 749. The press would later rely on that argument to justify demands for special access to closed facilities such as prisons and for the recognition of a right to shield confidential sources. In cases like *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Court acknowledged the press’s special role in serving “the paramount

tion to prohibit publication of the Pentagon Papers, which consisted of portions of a top-secret history commissioned by Secretary of Defense Robert F. McNamara and pertaining to United States-Vietnam relations from 1945 to 1967.¹³⁴ The *Times* had received portions of the report from Daniel Ellsberg, a Rand Corporation defense analyst.¹³⁵

On June 12, 1971, the *New York Times* began publishing the Pentagon Papers.¹³⁶ On the following day, the Attorney General threatened prosecution under the Espionage Act.¹³⁷ On June 15, the gov-

public interest in a free flow of information to the people,” but nonetheless held, over strong dissents, that the press had no greater rights than the general public. *Pell*, 417 U.S. at 832-34 (citations omitted). In his dissent in *Saxbe*, for example, Justice Powell emphasized that the democratic values embodied in the First Amendment require that public debate be informed as well as unfettered, and he noted that “official restraints on access to news sources . . . may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience.” *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting).

133. The Court decided the case in a brief per curiam opinion. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). Each of the Justices (six in the majority, three in dissent) also filed a separate opinion. Several Justices also joined the opinions of others. Justice Black and Justice Douglas joined in each other’s opinions, as did Justices Stewart and White. *Id.* at 714, 720, 727, 730. Justices Brennan and Marshall did not join in anyone else’s opinion. In dissent, Chief Justice Burger wrote for himself, as did Justice Blackmun. *Id.* at 748, 759. Both the Chief Justice and Justice Blackmun joined in Justice Harlan’s dissent. *Id.* at 752. The opinions reflect a variety of theories.

134. *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. June 15, 1971), *remanded by* 444 F.2d 544 (2d Cir. 1971), *rev’d*, 403 U.S. 713 (1971).

135. William R. Glendon, *The Pentagon Papers—Victory for a Free Press*, 19 CARDOZO L. REV. 1295, 1296 (1998); DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 365–68, 372–75 (2002). The Pentagon Papers, as published by the news media, constituted only a part of the overall report, which remained classified until 2011. The same material was later published in book form. NEIL SHEEHAN ET AL., *PENTAGON PAPERS: THE SECRET HISTORY OF THE VIETNAM WAR* (1971). The full report is now available on the website of the National Archives. REPORT OF THE OFFICE OF THE SECRETARY OF DEFENSE VIETNAM TASK FORCE, <http://www.archives.gov/research/pentagon-papers/> (last visited Nov. 18, 2012).

136. *N.Y. Times Co.*, 328 F. Supp. at 326.

137. Glendon, *supra* note 135, at 1296–97. On the same day, the *Times* retained Alexander Bickel, a Yale Law School professor, and Floyd Abrams, a New York practitioner, as

ernment moved for injunctive relief in federal district court in New York.¹³⁸ When the *Washington Post* began publication on June 18, the government moved for an injunction against the *Post* in the federal district court for the District of Columbia. Both courts granted temporary injunctions and appeals followed.¹³⁹ On June 23, the District of Columbia Circuit ruled in favor of the *Post*, while the Second Circuit ordered a remand in the case against the *Times*.¹⁴⁰ On the afternoon of June 25, the Supreme Court granted certiorari and set the cases for oral argument on the following day,¹⁴¹ at which time briefs also were to be exchanged.¹⁴² On June 30—fifteen days after the filing of the *Times* case in the district court—the Supreme Court upheld the newspapers' right to publish.

In a Delphic per curiam opinion that masked many significant disagreements, the Court decided the case as narrowly, and with as little explanation, as possible. After noting that “[a]ny system of prior restraints . . . comes to this Court bearing a heavy presumption against its constitutional validity,” the Court observed that both trial courts and the District of Columbia Circuit had found that the government

counsel, because the newspaper's regular attorneys had declined to act for the newspaper. *Id.* at 1296. William R. Glendon represented the *Post*. *Id.* at 1295 n.**.

138. *N.Y. Times Co.*, 328 F. Supp. at 326.

139. *N.Y. Times Co. v. United States*, 403 U.S. 713, 755 (1971) (Harlan, J. dissenting).

140. *Id.* at 753.

141. *Id.* The Court was initially divided as to the proper course. Four Justices apparently wanted to allow publication without further ado, while four other Justices wanted to leave the injunctions in place and set the cases for argument in the fall. Glendon, *supra* note 135, at 1298–99. According to Glendon, Justice Stewart broke the deadlock by stating that he would vote for immediate publication unless the cases were heard without delay. *Id.* at 1298.

142. *N.Y. Times Co.*, 403 U.S. at 753 (Harlan, J., dissenting). Erwin Griswold, the former dean of Harvard Law School who served as President Nixon's Solicitor General, complained repeatedly during oral argument that the Court's expedited briefing and argument schedule had not left him sufficient time to prepare the case—a point that the dissenting Justices would develop further in their opinions. See Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25. Although it was not possible for Griswold to review all of the materials at issue in the case before the argument, he later did so. *Id.* Based on that review, he concluded there was nothing in the Pentagon Papers that warranted their withholding. *Id.*

had failed to overcome that presumption.¹⁴³ The Court simply stated: “We agree.”¹⁴⁴

Two members of the Court—Justices Black and Douglas—thought that the First Amendment prohibited all prior restraints.¹⁴⁵ Justice Black stated:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.¹⁴⁶

Justice Douglas likewise asserted that “[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”¹⁴⁷ He further observed that “[s]ecrecy in government is fundamentally anti-democratic,” while “[o]pen debate and discussion of public issues are vital to our national health.”¹⁴⁸

Justice Brennan wrote separately. He did not believe that prior restraints were categorically prohibited,¹⁴⁹ but thought that the government’s case was insufficient because it was “predicated upon surmise or conjecture” as to the possibility of “untoward consequences,” rather than “proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea.”¹⁵⁰

Justices Stewart, White, and Marshall also concurred. Justice Stewart emphasized the importance of the First Amendment in view of the executive’s enormous power in foreign affairs and national de-

143. *N.Y. Times Co.*, 403 U.S. at 714 (citations omitted) (internal quotation marks omitted).

144. *Id.*

145. *Id.* at 717 (Black, J., concurring).

146. *Id.*

147. *Id.* at 723–24 (Douglas, J., concurring).

148. *Id.* at 724.

149. *Id.* at 725–26 (Brennan, J., concurring).

150. *Id.* at 725–27.

fense, which “ha[d] been pressed to the very hilt since the advent of the nuclear missile age.”¹⁵¹ Justice Stewart continued:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.¹⁵²

Justice White emphasized the government’s failure to meet the heavy burden of justifying a prior restraint.¹⁵³ Finally, Justice Marshall thought that the case presented a separation of powers issue because the president was asking the courts to use their equity powers to protect the national interest and “to prevent behavior that Congress has specifically declined to prohibit.”¹⁵⁴

Each of the dissenting Justices wrote separately.¹⁵⁵ Chief Justice Warren Burger did not reach the merits, but emphasized the “deriva-

151. *Id.* at 727 (Stewart, J., concurring).

152. *Id.* at 728. Justice Stewart thought that the government was required to show that “disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people.” *Id.* at 730. Justice Stewart recognized that the president must strike the balance between public disclosure and secrecy, but he emphasized that “secrecy for its own sake” must be avoided. *Id.* at 729. He continued: “For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.” *Id.*

153. “At least in the absence of legislation,” Justice White could not accept the government’s assertion that

the President is entitled to an injunction against publication . . . whenever he can convince a court that [disclosure] threatens ‘grave and irreparable’ injury to the public interest, [without regard to] whether or not the material . . . is classified, whether or not publication would be lawful under relevant criminal statutes . . . and regardless of the circumstances in which the newspaper [gained] possession of the information.

Id. at 732 (White, J., concurring).

154. *Id.* at 742 (Marshall, J., concurring) (internal citations omitted).

155. Taking their cue from the Solicitor General, each of the dissenters decried the “undue haste” with which the case had been litigated. Due to the way “in which the *Times* [had] proceeded from the date it obtained the purloined documents,” the Chief Justice

tive” nature of the newspapers’ claim based on the public’s “right to know”:

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public “right to know”; by implication, the *Times* asserts a sole trusteeship of that right by virtue of its journalistic “scoop.” The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute There are . . . exceptions. . . . Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures.¹⁵⁶

Chief Justice Burger suggested that the *Times*, which had taken the time to review the documents carefully before publishing them, had shown little urgency in satisfying the public’s “right to know.”¹⁵⁷ The Chief Justice further observed: “After these months of deferral, the alleged ‘right to know’ has somehow and suddenly become a right that must be vindicated instantaneously.”¹⁵⁸ He described the case as “a parody of the judicial function.”¹⁵⁹

Justice Harlan would have affirmed in the *Times* case because the Second Circuit had not abused its discretion in holding that the government had not been given an adequate opportunity to prove its case.¹⁶⁰ According to Justice Harlan, a “more fundamental reason” for ruling in favor of the government was “the [narrow] scope of the judicial function in passing upon the activities of the Executive

thought that the case had been litigated with an “unseemly,” “unjudicial,” and “frenetic haste.” *Id.* at 748–49 (Burger, C.J., dissenting). Justice Harlan thought that the Court had been “almost irresponsibly feverish” in its handling of the cases, which presented issues “as important as any that ha[d] arisen during [his] time on the Court.” *Id.* at 753, 755 (Harlan J., dissenting). Justice Blackmun pointed to the “hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without . . . [sufficiently] careful deliberation.” *Id.* at 760 (Blackmun, J., dissenting).

156. *Id.* at 749, 752 (Burger, C.J., dissenting).

157. *Id.* at 750.

158. *Id.* There was no reason, the Chief Justice asserted, for now putting this pressure on “the . . . Government, from whom this information was illegally acquired . . . [or on] all the counsel, trial judges, and appellate judges.” *Id.*

159. *Id.* at 752.

160. *Id.* at 758 (Harlan, J., dissenting).

Branch . . . in the field of foreign affairs.”¹⁶¹ In his dissent, Justice Blackmun famously observed that “[t]he First Amendment, after all, is only one part of an entire Constitution.”¹⁶²

Shortly after the decision was announced, Louis Henkin, a prominent scholar of foreign relations law, took issue with all the talk, “[b]oth before the courts and in the Press” about “‘the right of the people to know’ what government was up to.”¹⁶³ No such right can be found in the constitutional text, Henkin noted, and the government, from its earliest days, “has asserted the right to conceal and, therefore, in practical effect not to let the people know.”¹⁶⁴ Moreover, “in the law at least, the people’s right to know was derivative, the obverse of the right of the Press to publish, and coextensive with it.”¹⁶⁵ Henkin further noted that “any right of the people to know was not con-

161. *Id.* at 756. Justice Harlan thought the judicial role properly limited to [(1)] review[ing] the initial Executive determination to the point of satisfying [the Court] that the subject matter of the dispute does lie within the proper compass of the President’s foreign relations power, [and (2)] insist[ing] that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer.

Id. at 757. In Justice Harlan’s view, these inquiries were constitutionally necessary to avoid “a complete abandonment of judicial control,” but the courts could “not properly go [further] and redetermine . . . the probable impact of disclosure on the national security.” *Id.* (citation omitted) (internal quotation marks omitted).

162. *Id.* at 761 (Blackmun, J., dissenting). Justice Blackmun also suggested the need for a weighing, “upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent,” but he observed that “[s]uch standards are not yet developed.” *Id.*

163. Henkin, *supra* note 24, at 273. Henkin conceded that the phrase “might have appealed to the authors of the Declaration of Independence and even to Constitutional Fathers,” but emphasized that “the Constitution . . . expressed no such right, if only because the . . . Framers were committed to minimal, ‘watch dog’ government, and saw rights as ‘retained by the people’ to be safeguarded against infringement by government . . . [and] did not declare obligations by the government to the people or declare rights of the people that government was obliged affirmatively to effectuate.” *Id.*; see also generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (discussing the distinction between “positive rights” and “negative rights,” and the extent to which the United States Constitution may or may not protect the former).

164. Henkin, *supra* note 24, at 273.

165. *Id.*

sidered violated if government maintained secrecy in some matters; it was assumed, no doubt, that the people agreed it should not know what could not be told it without damage to the public interest.”¹⁶⁶ Although government secrecy may have been accepted only as “a necessary evil,”¹⁶⁷ the tendency of “mammoth, complex government” to withhold “more and for longer than it has to” has been understood as a political problem, and not as a constitutional issue for the courts to decide.¹⁶⁸

Henkin did not believe that the *New York Times* decision altered any of these assumptions. Indeed, he argued that “[t]he [only] question raised . . . was whether publication by the Press is different.”¹⁶⁹ Henkin recognized that the “Government has a monopoly of . . . important information and it could effectively curtail the freedom of the Press . . . by withholding that information, or distort the function of the Press by selective ‘hand out,’”¹⁷⁰ but he noted that, “[e]ven as to the Press, [no one has] claimed that the Government was constitutionally obliged to tell the Press everything, or anything.”¹⁷¹ Nor, he wrote, did anyone doubt the government’s right to enact harsh secrecy laws to deter leaks.¹⁷²

Nonetheless, Henkin was critical of the Court’s decision. First, he argued that permitting the executive to conceal information, while permitting the press to try and discover it, encouraged a “trial by battle and cleverness” that could not guarantee either the secrecy of that which should remain secret or the disclosure of that which should be disclosed.¹⁷³ Second, he found the Court’s faith in judicial balancing

166. *Id.*

167. *Id.* at 275.

168. *Id.* at 275–76. Henkin noted that Congress had enacted legislation to create certain governmental restraints, and citizen rights, in this area. *Id.* at 276. Henkin recognized, however, that statutes such as FOIA “do not begin to reach the problem of ‘overconcealment’ by mammoth, complex government.” *Id.* The political problem involved a lack of popular trust in government, which would not be solved, Henkin thought, “[u]ntil Congress and Presidents turn a hard face to unnecessary classification.” *Id.* at 280. Unfortunately, that “hard face” has yet to be turned. See Goitein & Shapiro, *supra* note 14, at 21–32 (addressing the ongoing failure of the political branches to address the problem of overclassification in an effective way).

169. Henkin, *supra* note 24, at 276.

170. *Id.* at 277.

171. *Id.* at 276.

172. *Id.* at 276–77.

173. *Id.* at 278.

misplaced because courts cannot weigh factors such as the government's need to conceal, the press's need to publish, and the people's need to know.¹⁷⁴ According to Henkin, the result of judicial review would continue to be over-concealment, but with judicial approval.¹⁷⁵ Acknowledging the reality, in some sense, of the "right to know," Henkin sounded a somber note: "The unhappy game of trial by cleverness . . . with an infrequent journalistic success will do little to support the people's right to know when Government abuses its responsibility to withhold."¹⁷⁶

In 1974, President Nixon resigned in disgrace after a unanimous Supreme Court upheld a district court order requiring him to produce tapes and records thought to constitute evidence of crime.¹⁷⁷ Nixon had asserted his entitlement to "an absolute, unqualified Presidential privilege of immunity from judicial process under all circum-

174. *Id.* at 278–79. Henkin also found the Court's reliance on the "prior injunction" doctrine unpersuasive because "stiff penalties" are as effective "as any injunction." *Id.* at 278.

175. *Id.* at 279. Justice Jackson made a similar point in *Korematsu v. United States*, where he observed that, "[a] military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes a doctrine of the Constitution." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

176. Henkin, *supra* note 24, at 280. As Henkin recognized, there are many reasons for maintaining secrecy, only some of which have anything to do with legitimate governmental purposes. The avoidance of possible embarrassment is often the real motivation for secrecy, as is the desire to avoid legitimate democratic debate with respect to a range of legitimate public policy choices. Many years after he defended the government, Griswold observed that nothing in the Pentagon Papers actually warranted withholding, and that the case provided a compelling example of the problem of over-classification. *See* Griswold, *supra* note 142, at A25 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.").

177. *See* *United States v. Nixon*, 418 U.S. 683 (1974) (ordering President Nixon to turn over tapes for review); *WATERGATE: A BRIEF HISTORY WITH DOCUMENTS* 190–99 (Stanley I. Kutler ed., 2d ed. 2010) (discussing the case and Nixon's subsequent resignation). The decision was unanimous, but only eight Justices heard the case because Justice Rehnquist recused himself due to his prior service in the Nixon administration. Robert L. Jackson, *Decision 2000/America Waits: Calls for Recusal of Thomas, Scalia, Are Undue, Experts Say*, L.A. TIMES, Dec. 13, 2000, at 25.

stances.”¹⁷⁸ Indeed, his lawyer apparently told the Court that “[t]he president want[ed him] to argue that [the president] is as powerful a monarch as Louis XIV, only for four years at a time, and is not subject to the processes of any court in the land except the court of impeachment.”¹⁷⁹

In 1975, writing in the aftermath of Watergate, a new Attorney General, Edward H. Levi, lamented that “the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government.”¹⁸⁰ In addition, according to Levi, any limitation on disclosure was treated as an unjustifiable “abridgment of the people’s right to know,” and was thought by many to “serve[] no purpose other than to shield improper or unlawful action from public scrutiny.”¹⁸¹

While insisting on the need for confidentiality in government, particularly concerning foreign and military affairs,¹⁸² Levi also recognized the claims of representative democracy. Invoking Meiklejohn, Levi wrote:

[T]he First Amendment is thus an integral part of the plan for intelligent self-government. But it is equally clear that it is not enough that people be able to discuss issues freely. They must also have access to the information required to resolve the issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government.¹⁸³

Levi saw these competing claims as a conflict of values, the resolution of which necessarily required a precise account of the nature of citizenship. For Levi, the people’s faith in government—in the reality of

178. *Id.* at 706; *see also* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 34–52 (1978) (discussing the Watergate scandal as a problem caused by an aggrandizement of executive power and an erosion of the separation of powers).

179. CHRISTOPHER H. PYLE, GETTING AWAY WITH TORTURE: SECRET GOVERNMENT, WAR CRIMES, AND THE RULE OF LAW 245 (2009) (citation omitted). Stanley I. Kutler has compiled a useful collection of materials relating to the Watergate scandal. *See generally* WATERGATE: A BRIEF HISTORY WITH DOCUMENTS, *supra* note 177.

180. Levi, *supra* note 24, at 323.

181. *Id.*

182. *Id.* at 328–31.

183. *Id.* at 326 (footnote omitted).

effective representation and working representative institutions—was critical:

[N]either the concept of democracy nor the First Amendment confer on each citizen an unbridled power to demand access to all the information within the government's possession. The people's right to know cannot mean that every individual or interest group may compel disclosure of the papers and effects of government officials whenever they bear on public business. Under our Constitution, the people are the sovereign, but they do not govern by the random and self-selective interposition of private citizens. Rather, ours is a representative democracy . . . and our government is an expression of the collective will of the people. The concept of democracy and the principle of majority rule require a special role of the government in determining the public interest. The government must be accountable, so it must be given the means, including some confidentiality, to discharge its responsibilities.¹⁸⁴

It was important to Levi, therefore, that questions of disclosure be left to the political branches. "For the most part," Levi argued, "we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the other branches and to the public."¹⁸⁵ Conflicts were to be resolved by "political persuasion and accommodation," with "each branch [acting] in a responsible fashion [and] the people [serving] as the ultimate judge."¹⁸⁶ Notwithstanding the enactment of FOIA, Levi suggested, these matters were to be left principally to the people's representatives, and not to the people themselves.¹⁸⁷

In 1978, seven years after the Pentagon Papers decision, a deeply fractured seven-member Court decided *Houchins v. KQED*, which upheld the Alameda County Sheriff's decision to provide the press with the same access to jail facilities that was provided to the general public, that is, the possibility of inclusion in a monthly tour of the jail, limited to twenty-five persons who were prohibited from visiting certain parts of the jail, from bringing cameras or tape recorders, and from

184. *Id.* at 327–28.

185. *Id.* at 332.

186. *Id.*

187. The view that this work belongs only to elected officials also has influenced attitudes concerning FOIA. *Id.* at 327–28.

interviewing prisoners.¹⁸⁸ Chief Justice Burger wrote for himself, Justice White, and Justice Rehnquist.¹⁸⁹ Justice Stewart concurred in the judgment, but not in the Chief Justice's opinion.¹⁹⁰ Justice Stevens dissented in an opinion joined by Justice Brennan and Justice Powell.¹⁹¹ Justices Marshall and Blackmun did not participate in the decision.¹⁹²

Chief Justice Burger was unequivocal in his rejection of the press's argument. In a tone reminiscent of his opinion in *New York Times Co. v. United States*, the Chief Justice warned that "[t]he media are not a substitute for or an adjunct of government," and that, "[w]e must not confuse the role of the media with that of government; each has special, crucial functions, each complementing—and sometimes conflicting with—the other."¹⁹³ Significantly, he interpreted the Court's prior jurisprudence as confirming that freedom of the press is only "the freedom . . . to *communicate* information once it is obtained; [no precedent] *compels* the government to provide the media with information or access to it on demand."¹⁹⁴ The Chief Justice added: "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information,"¹⁹⁵ and recognizing such a right would involve the Court in "a legislative task which the Constitution has left to the political processes."¹⁹⁶

188. *Id.* at 3–6. The district court had entered a preliminary injunction, prohibiting the Sheriff from denying respondents reasonable access to the jail, from preventing the use of photographic and sound recording equipment, and from prohibiting inmate interviews. *Id.* at 6–7.

189. *Id.* at 3.

190. *Id.* at 16 (Stewart, J., concurring).

191. *Id.* at 19 (Stevens, J., dissenting).

192. *Id.* at 16 (majority opinion).

193. *Id.* at 8–9.

194. *Id.* at 9.

195. *Id.* at 14.

196. *Id.* at 12. In a curious aside, but one wholly consistent with the tenor of his dissent in *New York Times Co.*, the Chief Justice noted that "[p]ublic bodies and public officers . . . may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known." *Id.* at 14. The Chief Justice also apparently relied on the inmates' privacy interests, which the Sheriff presumably wished to protect: "Inmates . . . retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2. As Justice Stevens pointed out in dis-

Justice Stewart agreed that “[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.”¹⁹⁷ But he parted company with the Chief Justice on the meaning of “equal access.”¹⁹⁸ According to Justice Stewart, equal access does not mean “access that is identical in all respects.”¹⁹⁹ Instead, “[t]he Constitution requires sensitivity to [the media’s critical] role, and to the special needs of the press in performing it effectively.”²⁰⁰ Justice Stewart further observed: “In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.”²⁰¹ Justice Stewart concurred in the judgment because he believed that the preliminary injunction affirmed by the court of appeals was overly broad, but he also thought that some form of injunction might be appropriate on remand.²⁰²

Justice Stevens began his dissent with an account of the conditions at the jail, which a federal court previously had found to be “shocking and debasing [and constituting] cruel and unusual punishment for man or beast as a matter of law.”²⁰³ After visiting the facility, the federal court “reached the ‘inescapable conclusion . . . that [part of the jail] should be razed to the ground.’”²⁰⁴ Notwithstanding a suicide and illnesses that a (subsequently fired) prison psychiatrist attributed to conditions at the jail, the news media, “[e]xcept for a carefully supervised tour in 1972 . . . were completely excluded from

sent, the evidence showed that journalists customarily secure written consent if inmates are to be interviewed or photographed. *Id.* at 23 n.11 (Stevens, J., dissenting).

197. *Id.* at 16 (Stewart, J., concurring).

198. *Id.*

199. *Id.*

200. *Id.* at 17.

201. *Id.*

202. *Id.* at 18–19; see also Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631 (1975) (excerpting Justice Stewart’s Yale Law School Sesquicentennial Convocation Address of November 2, 1974).

203. *Houchins*, 438 U.S. at 19 (Stevens, J., dissenting) (quoting *Brenneman v. Madigan*, 343 F. Supp. 128, 132–33 (N.D. Cal. 1972)).

204. *Id.* at 19 n.1 (quoting *Brenneman*, 343 F. Supp. at 132–33).

the inner portions of the . . . jail until after [the lawsuit] was commenced.”²⁰⁵

Justice Stevens also took a different view of the issue presented: “[T]he unconstitutionality of [the] policies which gave rise to this litigation does not rest on the premise that the press has a greater right of access to information regarding prison conditions than do other members of the public.”²⁰⁶ Justice Stevens observed that the Sheriff had “enforced a policy of virtually total exclusion of both the public and the press from those areas within the . . . jail where the inmates were confined,” as well as “a policy of reading all inmate correspondence addressed to persons other than lawyers and judges and censoring those portions that related to the conduct of the guards who controlled their daily existence.”²⁰⁷ Although acknowledging that the Court’s jurisprudence established that there is no “‘*unrestrained* right to gather information,’” Justice Stevens noted that “the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny.”²⁰⁸

Invoking Madison and Meiklejohn, as well as the Court’s prior cases, Justice Stevens argued that the First Amendment, in addition to protecting the rights of individual speakers and listeners, “serves [the] essential societal function”²⁰⁹ of protecting “the free flow of information to the public,”²¹⁰ with a view toward ensuring that public debate is “‘informed’” as well as “‘unfettered.’”²¹¹ Significantly, Justice Stevens observed:

It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the

205. *Id.* at 19–20 & nn.2–4.

206. *Id.* at 25.

207. *Id.* at 26.

208. *Id.* at 27–28, 28 n.15.

209. *Id.* at 31 (internal quotation marks omitted).

210. *Id.* at 29 n.17.

211. *Id.* at 31 n.20 (quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862–63 (1974) (Powell, J., dissenting)).

process of self-governance contemplated by the Framers would be stripped of its substance.²¹²

As a general matter, Justice Stevens had no quarrel with the need for confidentiality in government or with the ordinary primacy of the political branches in making decisions about disclosure.²¹³ But the ultimate responsibility for managing prisons rests with the citizenry, and here, as Justice Stevens pointed out, a federal court had found that the conditions of confinement violated the Eighth Amendment.²¹⁴ Whether those conditions persisted was clearly a matter of public concern, and it was critical for “a democratic community [to have] access to knowledge about how its servants were treating some of its members who have been committed to their custody.”²¹⁵ Justice Stevens concluded: “An official prison policy of concealing such knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments”²¹⁶

In 1980, two years after the *Houchins* decision, Lillian BeVier and David O’Brien each published articles critical of the “right to know.” Although there were important differences between them, both commentators saw the world, and the proper role of the courts, very differently from Justice Stevens.

BeVier emphasized the distinction between democratic and representative forms of government, and the fact that the American government is a representative government, not a democracy.²¹⁷ She echoed Levi in that regard, but also made a more direct challenge to Meiklejohn’s conception of citizenship. Because the people delegate most decisions to their representatives, BeVier argued, Meiklejohn was wrong to read the Constitution to mean that “public issues shall

212. *Id.* at 32. Echoing Justice Brennan’s statement in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring), that “[i]t would be a barren marketplace of ideas that had only sellers and no buyers,” Justice Stevens observed that it would be “an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.” *Houchins*, 438 U.S. at 32 n.22 (Stevens, J., dissenting).

213. *Id.* at 34–35.

214. *Id.* at 37 n.33.

215. *Id.* at 38.

216. *Id.*

217. BeVier, *supra* note 24, at 501–06.

be decided by universal suffrage.”²¹⁸ According to BeVier, “the democratic processes embodied in the Constitution prescribe a considerably more attenuated role for citizens.”²¹⁹ Thus, “it is surely more accurate to [say] that public issues shall be decided by *representatives of the people* who shall be elected by universal suffrage.”²²⁰ Ultimate sovereignty may rest with the people, BeVier argued, but “[t]he Constitution envisions . . . a system in which the citizens do not directly . . . make or implement public decisions,” but “retain their authority to choose the direction of governmental policy” through the election of representatives.²²¹

Although citizens monitor their representatives, they generally do so at a distance. According to BeVier, the principal activity of citizens is the casting of votes at periodic elections, presumably based on their evaluations of the candidates’ promises and records with respect to a vast and diverse array of subjects, and on predictions about the candidates’ likely future actions.²²² Even when a strong majority profoundly disagrees with their government’s present policies, they cannot normally take any immediate, authoritative action with respect to those policies. As opposed to a pure democracy, in which everyone must decide and vote on everything, citizens in a representative democracy have fewer decisions to make, and much less need for detailed or instantaneous information about the workings of government.²²³ Most important, BeVier insisted, the First Amendment guarantees freedom of speech, not the right to engage in *well-informed* speech.²²⁴ According to BeVier, and contrary to the views expressed by Justice Stevens in *Houchins*, the government has no obligation to afford access to information or to remove obstacles to the gathering and dissemination of information.²²⁵ The extent of access to govern-

218. *Id.* at 505 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960)).

219. *Id.*

220. *Id.*

221. *Id.* at 505–06.

222. *Id.* at 507.

223. *Id.* at 506.

224. *Id.* at 484–85.

225. *Id.* at 514–15. This view also has often influenced the interpretation of FOIA, which some have thought to be fundamentally inconsistent with the theory of American government since its enactment was first proposed. *See supra* note 44 and accompanying text.

ment information, like other issues, is simply a matter for the people's representatives to decide.²²⁶

BeVier's view is too facile a rejoinder. Meiklejohn may have overstated the point, but BeVier's view comes close to reducing citizenship "to obey[ing] law and perhaps, in periodic elections, to confirm[ing] the choice of leaders whose election gives them the power to enact into law whatever policies they see fit."²²⁷ Meiklejohn is surely correct that citizenship in a representative democracy must allow for—indeed, requires—a more active participation in government. The American founders may not have wanted the people's control of the government to be direct or absolute, but neither did they contemplate a system of government in which the people had little need for information because they lacked an effective voice in directing the affairs of government. Moreover, our constitutional system, as it has evolved through numerous amendments and judicial decisions, has become far more democratic than the system contemplated by some of the founding generation, and the role of the citizen has expanded accordingly. Of course, the obstacles to fulfilling that role also have increased, but that should not detract from the fact that the governors are not meant to have unquestioned authority in our system of government, and citizens are not meant to be silent passengers. In our system of representative democracy, meaningful access to government information is critical, both to effective citizen participation and to the proper accountability of officials responsible for policy-making and administration.²²⁸

226. BeVier, *supra* note 24, at 506–07.

227. Sullivan, *Methods*, *supra* note 52, at 9 (quoting COTTERRELL, *supra* note 4, at 159).

228. BeVier, *supra* note 24, at 428. Even if BeVier's account of the citizen's role were correct, it would not necessarily follow that citizens would have less need for information. At first blush, it might seem that citizens with no active role to play in government might have a lesser need for information. If the only way for citizens to make their views felt is through the ballot box at periodic elections, however, that might suggest an even greater need for information. It is common ground that modern governments (of whatever description) have a responsibility to advance the interests of their people and must be held accountable for doing so. If that is correct, it would follow that citizens should be entitled to the information necessary to determine whether government is performing that function. In a perverse way, it might be argued that the less opportunity there is for active participation in government, the greater the citizen's need for information. If the fundamental purpose of government is to serve the interests of citizens, those who are not consulted continuously may have an even greater need for information. In these circumstances, transparency may be the only means available for ensuring accountability.

In his 1980 article, David O'Brien observed that the "right to know" ha[d] become an increasingly popular political ideal in America," but that the Burger Court was "particularly unsympathetic to claims that the First Amendment either specifically guarantees a 'right to know' or grants the press special privileges in order to inform the public."²²⁹ In O'Brien's view, however, the Burger Court's stance was "an occasion for celebration, not condemnation," because recognition of a "directly enforceable"²³⁰ constitutional "right to know" would "raise[] fundamental issues about the nature and limits of constitutional interpretation and about the role of judicial review in a constitutional democracy."²³¹ In addition, the recognition of such a right, according to O'Brien, would seem "inconsistent with the First Amendment and the Founding Fathers' understanding of the need for a delicate balance between egalitarian demands for an informed populace . . . and efficient decision-making by government officials."²³² Moreover, the practical problems in determining the scope of an enforceable "right to know" ought to "admonish scholars and the Supreme Court against further attempts to articulate" such a right.²³³ At the same time, O'Brien emphasized that the First Amendment is "crucial . . . because the electorate must be able to inform its representatives concerning issues of public moment [and] be informed by critical appraisals of official activity and the operations of government."²³⁴

O'Brien was unequivocal in rejecting the idea that the First Amendment encompassed an actionable right to know, but he made clear that a substantial part of his concern was with individual enforceability, and with the role that courts necessarily would play in the enforcement of such a right, rather than with the "right" itself. Thus, he did not rule out the possibility that such a "right" might be given effect in other ways:

229. O'Brien, *supra* note 25, at 579–80 (footnote omitted).

230. *Id.* at 586. O'Brien noted that "an affirmative, enforceable 'right to know' ha[d] been endorsed only by dissenting justices." *Id.* at 620. Thus, the only basis for the "emerging constitutional right" perceived by Emerson was to be found in "dicta and dissenting opinions." *Id.* at 622 (footnote omitted) (internal quotation marks omitted).

231. *Id.* at 585–86. O'Brien saw the recognition of a "right to know," at least as an actionable right, as the creation of "constitutional common law." *Id.* at 585.

232. *Id.* at 586.

233. *Id.* at 609.

234. *Id.* at 603.

[I]f the public's "right to know" is in any sense a constitutional right, it must be an abstract right justifiable in terms of both the general principles of constitutionally limited government and the specific guarantees of the First Amendment. As an abstract right, the political ideal of the public's "right to know" at once underscores and gains significance from the enumerated guarantees of freedom of speech and of the press, but does not mandate a concrete "right to know" which is directly enforceable against the government.²³⁵

Thus, even if O'Brien were justified in rejecting the "right to know" as an individually enforceable right, that would not make it a dead letter. There is other work for it to do.

There are many structural aspects of the Constitution that do not create individually enforceable rights but nonetheless protect liberty.²³⁶ The diffusion of governmental power, effectuated through the institution of federalism and the separation of powers,²³⁷ is a fundamental aspect of the Constitution that could be described in this way. The duty of both Houses of Congress to keep journals of their proceedings is another structural feature that benefits the governed.²³⁸ So too, at least indirectly, is the requirement that the president periodically provide Congress with an account of the State of the Union.²³⁹

Less obvious, perhaps, is the possibility that certain "rights" may play a constitutive role in the proper functioning of government, and that they should therefore be evaluated on that basis. The Speech and Debate Clause, for example, confers a special benefit on legislators, but its central purpose is to benefit the process of government.²⁴⁰ Meiklejohn saw the First Amendment in the same way: it was not justified by reference to the values of individual self-expression or self-

235. *Id.* at 588.

236. *See* THE FEDERALIST NO. 84, at 578–80 (Alexander Hamilton) (Jacob E. Cooke ed., 8th prtg. 1977) (arguing against the need for including a bill of rights in the Constitution). Publius argued that a bill of rights was not only dangerous but unnecessary, in part because the structure of the government created by the Constitution served the function of ensuring the protection of individual rights. *Id.* at 579.

237. THE FEDERALIST NO. 51, *supra* note 80, at 348.

238. U.S. CONST. art. I, § 5, cl. 3.

239. *Id.* art. II, § 3.

240. *See id.* art. I, § 6, cl. 1. The Statement and Account Clause does not create an individual right of action, but provides a similar structural safeguard. *See id.* art. I, § 9, cl. 7.

realization, but by the public necessity of informed discussion about matters of public concern.²⁴¹ O'Brien embraced this aspect of Meiklejohn's theory, viewing the First Amendment as "concerned, not with a private right, but with a public power, a governmental responsibility."²⁴² For O'Brien, it established "a regulatory principle," not an individual right.²⁴³

Taking O'Brien at his word, therefore, it seems clear that the "right to know," even if it is not an individually actionable right, has an important role to play as a background or structural value implicit in the First Amendment and must be recognized, at the very least, as being essential to the life of a democratic society. Indeed, O'Brien argued:

To comprehend the important truth of Justice Stewart's observation that "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect," is both to appreciate the public's "right to know" as a political ideal and to understand the illegitimacy of a directly enforceable constitutional "right to know."²⁴⁴

One important and obvious use for this "political ideal" might be to provide a framework for interpreting FOIA. Interestingly, although O'Brien was writing fourteen years after the enactment of FOIA, he did not mention the statute until the final paragraph of his article, and then only in the context of a further admonition that the Court should not recognize the validity of an individually enforceable constitutional "right to know."²⁴⁵ O'Brien stated: "In the last decade, major legislation designed to ensure governmental openness and to vindicate the public's 'right to know' has been enacted. These important policy developments, however, do not legitimate claims of a constitutional 'right to know.'"²⁴⁶

In a sense, however, they clearly do. There can be no doubt that FOIA was enacted for the purpose of giving effect to the values embodied in O'Brien's abstract "right to know," and, indeed, to give ef-

241. Meiklejohn, *Absolute*, *supra* note 21, at 255.

242. O'Brien, *supra* note 25, at 615 (quoting Meiklejohn, *Absolute*, *supra* note 21, at 255).

243. *Id.* at 616.

244. *Id.* at 630-31.

245. *Id.*

246. *Id.* at 631 (footnote omitted).

fect to the vision of citizenship expressed by Madison in the 1790s and made incarnate through two centuries of constitutional amendment and interpretation. Nor can there be any doubt that the Act is remedial legislation in a profound sense. At the time FOIA was enacted, its primary objective was to unlock government secrets and open up channels of information. Justice Stewart might well have been describing the significance of the Act when he noted, in *New York Times Co. v. United States*, the need to counter the “enormous power” of the executive, which has been “pressed to the very hilt since the advent of the nuclear age.”²⁴⁷ As Justice Stewart further noted,

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power [in the areas of national defense and international affairs] may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of a democratic government.²⁴⁸

Justice Stevens made a similar point in *Houchins*, when he emphasized that the representative government contemplated by the founders requires that public debates and discussions be “informed” as well as “unfettered,” and that there must be “some protection for the acquisition of information about the operation of public institutions,” lest “the process of self-governance . . . be stripped of its substance.”²⁴⁹ The concerns expressed by Justice Stewart and Justice Stevens were the same concerns that gave birth to FOIA, which clearly was intended to mark a fundamental change in the structure and operation of government, insofar as the relationship of the people to their elected officials was concerned.

The Act is a special kind of statute. One might say that it is foundational, or “quasi-constitutional,” or a “super-statute,” to use the terminology of William Eskridge and John Ferejohn.²⁵⁰ As Eskridge and Ferejohn have pointed out:

Not all statutes are created equal. Appropriations laws perform important public functions, but they are usually short-sighted and have little effect on the law beyond the

247. 403 U.S. 713, 727-28 (1971) (Stewart, J., concurring).

248. *Id.* at 728.

249. 438 U.S. at 30, 32 (Stevens, J., dissenting); see *supra* notes 209–212 and accompanying text.

250. Eskridge & Ferejohn, *supra* note 44, at 1215, 1217.

years for which they apportion public monies. Most substantive statutes adopted by Congress and state legislatures reveal little more ambition: they cover narrow subject areas or represent legislative compromises that are short-term fixes to bigger problems and cannot easily be defended as the best policy result that can be achieved. Some statutes reveal ambition but do not penetrate deeply into American norms or institutional practice. Even fewer statutes successfully penetrate public normative and institutional culture in a deep way. These last are what we call *super-statutes*.²⁵¹

According to Eskridge and Ferejohn,

A super-statute is a law . . . that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem The law must also prove robust as a solution . . . over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.²⁵²

Given their foundational nature, such statutes should be approached with special respect by all three branches of government: the judicial branch should interpret them by giving effect to their broad purposes, the executive branch should not disregard them, and

251. *Id.* at 1215.

252. *Id.* at 1216. Eskridge and Ferejohn refer to the act creating the Bank of the United States, the nineteenth-century Civil Rights Acts, the Interstate Commerce Act, the Sherman Act, the Pure Food and Drugs Act, the Civil Rights Act of 1964, and the Endangered Species Act as examples of quasi-constitutional or super-statutes. *Id.* at 1223–42. Peter Schuck refers to the Administrative Procedure Act as a quasi-constitutional enactment. PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (1994). Louis Michael Seidman makes a similar, though different, point, noting that some statutes, such as the Civil Rights Act of 1964 and the section of the United States Code prescribing the number of Justices of the Supreme Court, are in effect “constitutional” because they embody a “fundamental principle of justice” or provide a “focal point.” Louis Michael Seidman, *Ac-contextual Judicial Review*, 32 CARDOZO L. REV. 1143, 1154 (2011). David Strauss discusses “what might be called quasi-constitutional statutes that address complex problems in a way that is intended to change the legal landscape significantly and for a long time.” David A. Strauss, *Statutes’ Domains and Judges’ Prerogatives*, 77 U. CHI. L. REV. 1261, 1268 (2010).

the legislative branch should be reluctant to amend them; it certainly should not do so without meaningful debate or in the middle of the night. Nor should the legislative branch alter such super-statutes by attaching amendments to defense appropriation bills.²⁵³

The Act clearly meets these criteria. In enacting FOIA, Congress sought to protect the people's "right to know," which had been acknowledged in countless Supreme Court cases, but had not been found to give rise to an individually enforceable right.²⁵⁴ Congress sought to establish an institutional framework for government transparency through broad public access to government records. The legislation "stuck" in public culture, having a broad effect on the development of the law at the national and state levels, as well as in the many other countries that have adopted similar laws. In a very profound way, FOIA altered the relationship of the people to their government.

Contrary to dicta in some Supreme Court opinions, the objective of FOIA was not to balance the need for disclosure with the need for secrecy.²⁵⁵ The objective of the Act was to require disclosure, except in those cases in which the government could make a compelling case that the requested information was exempt from disclosure under one of the statute's specific exemptions. At the time FOIA was enacted, there was no shortage of government secrecy; it was disclosure that was in short supply. The central purpose of FOIA was to remediate that imbalance, and that purpose should be given effect by all three branches of government.

O'Brien might balk at these conclusions. After all, one of his principal concerns was with the fact that recognizing a directly enforceable "right to know" would allow decisions about the disclosure of government information to be made by judges, rather than by executive branch officials, and that the implementation of that right would present intractable practical problems.²⁵⁶ But Congress, in enacting FOIA, already had determined that such decisions must be made, and that judges must have a key role in making them. Of

253. See Michael C. Dorf, *A Supreme Court Ruling Means Prisoner Abuse Photos Stay Secret*, FINDLAW (Dec. 2, 2009), <http://writ.news.findlaw.com/dorf/20091202.html> (describing the passage of the National Security Documents Act).

254. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974).

255. See, e.g., *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *EPA v. Mink*, 410 U.S. 73, 80 (1973).

256. See *supra* note 235 and accompanying text.

course, judges are not meant by FOIA to decide whether the world would be a better place if the requested information were disclosed; they can only decide whether the government has made a sufficient showing to satisfy one or more of the FOIA exemptions. But the attitudes with which judges approach those questions may be critically important.

IV. CONSTRUING FOIA: “THE FULLEST RESPONSIBLE DISCLOSURE”

Among the factors that influence judicial decisions are the more or less tacit underlying assumptions of legal culture that guide the way in which arguments are made and cases are decided.²⁵⁷ Because FOIA was intended to be transformative, it presented a challenge to certain basic assumptions concerning the nature of the American constitutional order. Justice Scalia, in a 1982 essay, touched on three of them: (1) the understanding that a representative government can

257. Judge Learned Hand wrote that, in constitutional cases, “everything turns upon the spirit in which [the judge] approaches the questions before him.” Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930). “Men do not gather figs of thistles,” he said, “nor supply institutions from judges whose outlook is limited by parish or class.” *Id.* at 12–13. Similarly, Justice Jackson observed that, in some cases, “a judge is likely to leave by the same door through which he enter[ed].” *Dalehite v. United States*, 346 U.S. 15, 49 (1953) (Jackson, J., dissenting). Justice Jackson continued: “As we have been told by a master of our craft, ‘Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.’” *Id.* (quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 102 (1924)). In many cases, the result may be determined by the judge’s choice of interpretive strategy, but that choice may or may not have been the subject of conscious decision-making. See, e.g., James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893) (advocating deference except where a statute is unconstitutional beyond a reasonable doubt); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 3 (1985) (arguing that constitutional interpretation should be guided by the understanding that human dignity is the core constitutional value); ANTONIN J. SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16–18 (1998) (advocating originalist theory of constitutional interpretation); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* xiv, 3–19, 124 (2006) (advocating purposive theory of interpretation). Likewise, a judge’s strong belief that the judiciary has only a minor role to play in a representative government is likely to influence the attitude with which he approaches a case challenging the constitutionality of legislative or executive action. See H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 9 (2008) (discussing judges’ views of judicial review).

be counted on to tell the people what they really need to know, (2) that such disclosures of information are produced through the tug-and-pull of inter-branch conflict, rather than through the efforts of the press or the public, and (3) that anything arguably or remotely related to foreign affairs or national security is unsuitable for judicial consideration.²⁵⁸

Justice Scalia thought FOIA seriously defective, but despaired of curing those defects “as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press.”²⁵⁹ The effectiveness of such oversight is “a romantic notion,”²⁶⁰ he argued, as indicated by the fact that “[t]he major exposés of recent times . . . owe virtually nothing to the FOIA [and] are primarily the product of the institutionalized checks and balances within our system of representative democracy.”²⁶¹ Likewise, Justice Scalia found untenable the idea that courts should review executive branch determinations relating to foreign affairs:

What is needful for our national defense and what will impair the conduct of our foreign affairs are questions of the sort that the courts will avoid—on the basis of the “political question” doctrine—even when they arise in the context of the most significant civil and criminal litigation. Imagine pushing the courts into such inquiries for the purpose of ruling on an FOIA request!²⁶²

A “mere” FOIA request, Justice Scalia might have said.

Justice Scalia’s views are not idiosyncratic. The idea that the people should be seen and not heard, that they need less than the fullest information, and that they can trust their elected representatives to decide exactly what and how much information they need, as well as when they need it, is an idea with a long pedigree.²⁶³ Similarly, the idea that the courts should steer clear of matters that the government claims to be related in some way to national security or foreign

258. See Scalia, *No Clothes*, *supra* note 107.

259. *Id.* at 19. By 1982, Congress had provided for *de novo* review of classification decisions, thereby overruling *EPA v. Mink*, 410 U.S. 73 (1973). See *infra* note 281.

260. Scalia, *No Clothes*, *supra* note 107, at 19.

261. *Id.*

262. *Id.* at 18.

263. See *supra* note 24.

affairs is not a new one. In *Hirabayashi v. United States*²⁶⁴ and *Korematsu v. United States*,²⁶⁵ for example, the Supreme Court famously upheld the constitutionality of a curfew and the evacuation of Japanese-Americans during World War II because the Court was convinced by military authorities who argued that it was impossible to segregate the loyal from the disloyal.²⁶⁶ If such operational decisions could not be tested in any way, perhaps decisions relating to access to information should also be immune from review. It was not long before the new paradigm embodied by FOIA encountered the headwinds that these two objections represented. How FOIA would fare depended in large part on whether the courts perceived it to be propelled by the First Amendment or simply flying on its own power.

There are two points to be made about the FOIA jurisprudence. First, the cases reflect, at best, a general uneasiness or ambivalence about the purpose and place of the Act in a representative government (Levi's position), or, at worst, an outright hostility to the possi-

264. 320 U.S. 81 (1943).

265. 323 U.S. 214 (1944).

266. *Id.* at 219. Similarly, in *Liversidge v. Anderson* [1942] AC 206 (HL), the House of Lords held that although the Emergency Powers (Defence) Act 1939 required that the Home Secretary have "reasonable cause" to justify a detention, whether there was reasonable cause in fact was not for the courts to decide. Eric Muller has recently discussed Justice Jackson's ambivalence in the Japanese Internment Cases, where he deemed the government's actions (based on claims of "military necessity") to be clearly unconstitutional, but nonetheless thought that judicial review was undesirable. Muller, *supra* note 67, at 352. Muller notes:

A judge wishing to apply the teachings of Nürnberg—to 'demonstrate . . . the supremacy of law over such lawless and catastrophic forces as war and persecutions,' as Jackson put it in [his] 1946 [Buffalo lecture]—might be expected to conclude that the judiciary had the obligation to review and overturn such a war-time measure. . . . But Jackson [thought that the Court] should . . . declare the issue inappropriate for a civilian court's adjudication.

Id. at 352–53 (first alteration in original) (footnotes omitted). Muller continues:

What a stunning position for an advocate of the rule of law as a restraint on war-time excesses! . . . For the rest of the world, Justice Jackson preached the rule of law as an agent of reckoning. Law would accomplish the 'practical task of doing justice to offenders' and 'set straight the thinking of responsible men.' For the United States, Justice Jackson was prepared to trust these tasks to politics.

Id. at 353–54 (final alteration in original) (footnotes omitted). But, as Muller notes, "[p]olitics had not been up to the task of preventing the mass racial exile and incarceration of Japanese Americans in 1942." *Id.* at 354.

bility that access to executive information should be deemed anything but a matter for discretionary decision by executive branch officials (BeVier's and Scalia's position). Second, the FOIA jurisprudence relating to national security in particular demonstrates a strong inclination to defer to executive assertions in such matters and an extreme reluctance to test the truth of those assertions. Neither attitude is consistent with a proper understanding of FOIA or the constitutional "right to know."

The Act has been amended many times, and for diverse purposes, since its enactment in 1966. At the beginning, Congress clearly echoed the thoughts of Emerson and Meiklejohn, emphasizing that the "right to know" is inherent in the "right to speak" and "the right to print," and that a well-informed electorate is necessary for a representative government.²⁶⁷ Congress's purpose was clearly remedial. House and Senate Reports insisted that existing law—Section 3, the public information section of the Administrative Procedure Act²⁶⁸—had been "of little or no value to the public in gaining access to records of the Federal Government"; it permitted "any Government official [to] withhold almost anything from any citizen under [its] vague standards—or, more precisely, lack of standards."²⁶⁹ Section 3, the House and Senate Reports reiterated, "gave the agencies broad and effectively unreviewable discretion to determine whether information should be withheld 'for good cause' or 'in the public interest,' [which they used] '[i]nnumerable times . . . to cover up embarrassing mistakes or irregularities.'"²⁷⁰ Indeed, Congress believed that Section 3 had proved to be "more . . . a withholding statute than a disclosure statute."²⁷¹

Congress also recognized that government cannot be conducted in the round, and that some matters must be exempt, but it insisted that those exemptions were to be clearly stated and narrowly construed.²⁷² In the words of the Senate Report, the point of FOIA was to enable the public to "readily . . . gain access to the information necessary to deal effectively and upon equal footing with Federal agencies,"

267. H.R. REP. NO. 89-1497, at 2 (1966).

268. *Id.* at 4; *see also* 5 U.S.C. § 1002 (1964).

269. S. REP. NO. 89-813, at 5 (1965).

270. *Ray v. Turner*, 587 F.2d 1187, 1222 (D.C. Cir. 1978) (Wright, J., concurring) (alteration in original) (quoting S. REP. NO. 89-813, at 3).

271. *EPA v. Mink*, 410 U.S. 73, 79 (1973).

272. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 161 (1989) (Scalia, J., dissenting); S. REP. NO. 89-813, at 8.

which required “the fullest responsible disclosure.”²⁷³ In broader terms, Congress’s purpose in enacting FOIA was to substitute a presumption of transparency for an existing presumption of secrecy. In a very profound way, Congress sought to alter the relationship of the governors to the governed.

The courts, on the other hand, gave FOIA a crabbed construction from the start. In *EPA v. Mink*,²⁷⁴ the Supreme Court’s first FOIA case, the Court found that the Act provided no avenue for members of Congress (or anyone else) to require the production of government information relating to controversial underground nuclear tests the Nixon Administration planned to conduct in Alaska.²⁷⁵ Writing for the Court, Justice White acknowledged that FOIA was intended to achieve “the fullest responsible disclosure,”²⁷⁶ but went on to hold that the judicial role under Exemption 1—the national security and foreign affairs exemption—was limited to ascertaining “whether the President has determined by Executive Order that particular documents are to be kept secret.”²⁷⁷ In other words, the Court determined that Exemption 1 required the courts to decide whether records actually had been classified, but not whether they had been properly classified.²⁷⁸ Although clearly lacking sympathy for the government’s position, Justice Stewart concurred, believing that Congress’s choice of language necessarily dictated the result; he interpreted the statutory language as manifesting Congress’s intent to create “an exemption [to FOIA] that provides no means to question an Executive decision to stamp a document ‘secret,’ however cynical, myopic, or even corrupt that decision might have been,” thereby “decree[ing] blind acceptance of Executive fiat.”²⁷⁹ Justice Stewart also noted that “a nuclear test that engendered fierce controversy within the Executive Branch . . . would [seem to] be precisely the kind of event that should

273. S. REP. NO. 89-813, at 3, 8.

274. 410 U.S. 73 (1973).

275. See generally DEAN W. KOHLHOFF, *AMCHITKA AND THE BOMB: NUCLEAR TESTING IN ALASKA* (2002) (providing useful background concerning the Aleutian Islands testing program).

276. *Mink*, 410 U.S. at 80 (quoting S. REP. NO. 89-813, at 3).

277. *Id.* at 82.

278. The government recently made a similar argument concerning enemy combatants, namely, that the only question for the courts to decide was whether the president had actually classified the detainee as an enemy combatant, not whether the classification was legally or factually valid. *Hamdi v. Rumsfeld*, 542 U.S. 507, 526 (2004).

279. *Mink*, 410 U.S. at 95 (Stewart, J., concurring).

be opened to the fullest possible disclosure consistent with legitimate interests of national defense.”²⁸⁰ In a separate opinion, Justice Brennan argued that the Court’s decision limited the judicial role to a “‘meaningless judicial sanctioning of agency discretion,’ the very result Congress had sought to prevent.”²⁸¹

Congress promptly overruled *Mink* by enacting an amendment that required the courts to determine whether records are in fact properly classified pursuant to an executive order, thereby ensuring a more muscular form of review.²⁸² But the Court continued to give a broad construction to FOIA’s exemptions.

280. *Id.* at 94.

281. *Id.* at 105 (Brennan, J., concurring in part and dissenting in part) (citation omitted). Justice Douglas dissented, putting the blame not on Congress but on the Court, which had made “a shambles” of the statute. *Id.* at 109 (Douglas, J., dissenting). Significantly, Justice Douglas also stated that he would have approached the case by starting from “what [he] believe[d] to be the philosophy of Congress expressed in the Freedom of Information Act.” *Id.* at 105 (citation omitted). To explain that philosophy, Justice Douglas quoted Henry Steele Commager, a distinguished historian of the period, who had recently written about how the United States had fallen significantly short of realizing the transparency in government intended by the founding generation: “Now almost everything the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to, but even the Congress and, one suspects, the President [witness the ‘unauthorized’ bombing of the North last fall and winter] are kept in darkness.” *Id.* (alteration in original). Justice Douglas thought that the whole thrust of Congress’s enactment of FOIA was to alter that state of affairs.

282. S. REP. NO. 93-854, at 15–16 (1974). In 1974, Congress also amended Exemption 7 to permit the withholding of investigatory “records;” it previously permitted the withholding of entire “files.” *Id.* at 17. Since that time, Congress has further amended Exemption 7 and the courts have construed some of those amendments to permit greater withholding in certain circumstances. See U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 491 (2009), available at www.justice.gov/oip/foia_guide09/exemption7.pdf (explaining Exemption 7). In 1975, the Court took a similarly expansive view of Exemption 3, which exempted from mandatory disclosure matters “specifically exempted from disclosure by statute.” *FAA v. Robertson*, 422 U.S. 255, 257 (1975). In *FAA*, the Court held that this test would be met, that is, the matters would be deemed “specifically exempted from disclosure by statute,” so long as a statute simply left disclosure to the discretion of the relevant official by permitting, as opposed to requiring, withholding. *Id.* at 264–65. Again, Congress swiftly overruled that determination. See H.R. REP. NO. 94-1441, at 25 (1976) (Conf. Rep.) (stating Congress’s intention to overrule the Court’s decision in *FAA*).

Thereafter, the Court would regularly pay lip service to the statutory policy in favor of disclosure, but would seldom again invoke “the fullest responsible disclosure” language of the 1965 Senate Report.²⁸³ Moreover, while the Court sometimes would remark on the importance of public access to government information in a representative government, it typically used such rhetorical flourishes for the purpose of embellishing decisions in which it actually held that disclosure was not required. In *NLRB v. Robbins Tire and Rubber Co.*,²⁸⁴ for example, the Court was eloquent: “The basic purpose of FOIA is 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.”²⁸⁵ But the Court affirmed the denial of access to information in that case.²⁸⁶

The Court also has frequently noted that FOIA exemptions must be narrowly construed. As Justice Scalia observed in dissent in *John Doe Agency v. John Doe Corp.*,²⁸⁷ however, that decision and others show that judicial pronouncements about the narrow construction to be given FOIA exemptions are simply “a formula to be recited rather than a principle to be followed.”²⁸⁸ More often, the Court speaks in terms of two competing statutory policies—transparency and confidentiality—as if the two policies were *pari passu*.²⁸⁹

283. Among the more than thirty FOIA cases that the Supreme Court has decided, the phrase appears in only three other majority opinions and in one dissent. See *FBI v. Abramson*, 456 U.S. 615, 641-42 (1989) (O'Connor, J., dissenting); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 (1983); *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 n.12 (1979); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361-62 (1976).

284. 437 U.S. 214 (1978). In *Robbins Tire*, an employer sought to use FOIA as a means of expanding the discovery available to it in connection with agency litigation. *Id.* at 216-17. Other requesters have often sought to use FOIA to secure some commercial advantage. See, e.g., *Chrysler Corp.*, 441 U.S. at 287-88 (upholding refusal to disclose company statistics to a third party).

285. *Robbins Tire*, 437 U.S. at 242.

286. *Id.* at 242-43. These themes were often expressed, more forcefully, in dissents. See, e.g., *Forsham v. Harris*, 445 U.S. 169, 188 (Brennan J., dissenting); *Abramson*, 456 U.S. at 641-42 (O'Connor, J., dissenting).

287. 493 U.S. 146 (1989).

288. *Id.* at 161 (Scalia, J., dissenting).

289. See, e.g., *John Doe Agency*, 493 U.S. at 152 (majority opinion) (“Congress sought ‘to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.’” (quoting H.R. REP. NO. 89-1497, at 6 (1966))); *Weinberger v.*

The Court has narrowly construed the Act in numerous ways.²⁹⁰ It also has facilitated continued non-disclosure by allowing expansive and patently erroneous constructions of FOIA exemptions to stand, sometimes for decades, without correction. For example, in 1966, Congress carefully limited Exemption 2 to materials “related solely to the internal personnel rules and practices of an agency.”²⁹¹ Congress considered the prior formulation—“any matter relating solely to the internal management of an agency”—as too broad, too expansive, and too subject to abuse.²⁹² In 1981, however, the District of Columbia Circuit reconstituted Exemption 2—creating the so-called “High 2” exemption—to permit the withholding a broader range of materials, including such materials as government law enforcement training manuals.²⁹³ That innovation—based on an almost inconceivable read-

Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 144 (1981) (“FOIA was intended by Congress to balance the public’s need for access to official information with the Government’s need for confidentiality.”); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (“The FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment.”); *FAA v. Robertson*, 422 U.S. 255, 261 (“The [FOIA] has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential in certain areas of Government operations.”).

290. See, e.g., *Kissinger*, 445 U.S. at 153–54 (finding no obligation under FOIA to create or retain documents, let alone to retrieve or produce records wrongfully removed from agency); *Forsham*, 445 U.S. at 178–79 (concluding that records created by federal grantees are not “agency records”); *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (determining that the right to disclosure depends upon the requested records being related to FOIA’s “core purpose” of permitting and advancing public scrutiny of government); *United States Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994) (same). In *Kissinger*, Justice Brennan would have found that records were “withheld” where an agency had taken no steps to retrieve a record to which it was entitled. *Kissinger*, 445 U.S. at 165 (Brennan, J., concurring in part and dissenting in part). In *Department of Defense*, Justice Ginsburg correctly noted that the “core purpose” test had no textual basis, and that FOIA imposed on requesters no obligation to disclose any purpose, let alone to show a “core purpose.” 510 U.S. at 507 (Ginsburg, J., concurring in judgment).

291. 5 U.S.C. § 552(b)(2) (1970).

292. See *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1262 (2011) (discussing the congressional intent behind Exemption 2).

293. *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Previously, the D.C. Circuit had taken Exemption 2 to exempt only materials

ing of straightforward statutory language—persisted for thirty years. In *Milner v. Department of the Navy*,²⁹⁴ the government persuaded the Ninth Circuit that “data and maps used to help store explosives at a naval base in Washington State” were materials “‘related solely to the internal personnel rules and practices of an agency,’” and were therefore protected under the “High 2” exemption.²⁹⁵ Although the documents were not classified, and Exemption 1 was not formally invoked, the government made much of the national security context.²⁹⁶ In *Milner*, a virtually unanimous Supreme Court rejected the government’s argument and finally interred the judicially-crafted “High 2” exemption.²⁹⁷

As *Milner* shows, the government regularly invokes exemptions other than Exemption 1 to withhold records on national security grounds. In many cases, the government cannot invoke Exemption 1 because the records are not classified.²⁹⁸ Sometimes the government will invoke Exemption 3, which permits the withholding of information “specifically exempted from disclosure by [a statute which either] requires the matters to be withheld from the public in such a

relating to “pay, pensions, vacations, hours of work, lunch hours, parking etc.” *Id.* at 1056 (internal quotations omitted). The court found justification for its new reading in *Department of Air Force v. Rose*, which disapproved the withholding of Air Force Academy honor hearing summaries, but acknowledged that withholding might be justified “where disclosure may risk circumvention of agency regulation.” 425 U.S. 352, 369 (1976). The D.C. Circuit’s understanding of Exemption 2 flowed from FOIA’s “overall design,” its legislative history, “and even common sense,” because Congress *could not have meant* to “enact[] a statute whose provisions undermined . . . the effectiveness of law enforcement agencies.” *Crooker*, 670 F.2d at 1074.

294. 131 S. Ct. 1259 (2011).

295. *Id.* at 1262 (quoting 5 U.S.C. § 552(b)(2) (2006)).

296. *Id.* at 1271.

297. *Id.* at 1262–71.

298. On November 4, 2010, however, President Obama signed Executive Order No. 13,556, which authorizes post-hoc classification. Exec. Order No. 13,556, 75 Fed. Reg. 68675 (Nov. 4, 2011). In an earlier Executive Order, President Obama authorized agencies to use a so-called “*Glomar* response” to answer FOIA requests for records “whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” Exec. Order No. 13,526, 75 Fed. Reg. 707, 719 (Jan. 5, 2010). In a *Glomar* response, the government declines to produce the requested records, but neither admits nor denies that the records exist. See Michael D. Becker, Comment, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 ADMIN. L. REV. 673, 675–78 (2012).

manner as to leave no discretion on the issue” or “establishes particular criteria for withholding or refers to particular types of matters to be withheld.”²⁹⁹ The National Security Act,³⁰⁰ which gives the CIA “sweeping power to protect its ‘intelligence sources and methods,’”³⁰¹ is an Exemption 3 statute. The government also invokes other exemptions, such as the law enforcement provisions of Exemption 7, to withhold documents on national security grounds.³⁰²

Sometimes, as with the detention photos involved in *ACLU v. Department of Defense*,³⁰³ the government has difficulty locating a justification for nondisclosure within the canonical exemptions. In *ACLU*, the government sought to prevent the disclosure of photographs portraying the abuse of prisoners in American custody in Iraq and Afghanistan.³⁰⁴ The government did so on a number of grounds, invoking several distinct FOIA exemptions during the litigation.³⁰⁵ In the court of appeals, the government relied principally on an extravagant reading of Exemption 7(F) (the endangerment of the life or physical safety of any individual exemption),³⁰⁶ which the government did not raise until after the case had been briefed, argued, and submitted for decision in the district court.³⁰⁷ The government argued that the photographs should be withheld from the American public because American military personnel could be endangered by the reaction of

299. 5 U.S.C. § 552(b)(3)(A), (B) (2006).

300. National Security Act of 1947, Pub. L. No. 235, 61 Stat. 495.

301. *CIA v. Sims*, 471 U.S. 159, 168–69 (1985).

302. See *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1180 (2011) (invoking Exemption 7); *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 160 (2004) (same); *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 216 (1978) (same); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162–63 (1975) (same). The Obama Administration’s (far from unprecedented) selective leaking of information about classified initiatives, such as the government’s drone program and use of cyber-attacks, provides context for the government’s attempts to use invocations of national security concerns as a way of bolstering other FOIA exemptions. See Shane, *supra* note 6 (reporting the selective leaking of drone attacks in Pakistan).

303. 543 F.3d 59 (2d Cir. 2008), *vacated*, *Dep’t of Defense v. ACLU*, 130 S. Ct. 777 (2009).

304. *Id.* at 63.

305. *Id.*

306. Exemption 7(F) exempts from mandatory disclosure records the disclosure of which “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F) (2006).

307. *ACLU*, 543 F.3d at 64.

foreign nationals to the publication of the pictures.³⁰⁸ The Second Circuit rejected the government's arguments and declined to hold that the photographs were exempt from disclosure.³⁰⁹ In any event, the government regularly argues that its precise choice of exemption is immaterial, and that whatever exemption it chooses should be put on steroids whenever the government can point to some arguable national security concern.

The nature of the FOIA litigation process and the evidentiary record developed in FOIA cases makes the acceptance of such entreaties particularly significant. Cases involving FOIA do not involve extensive discovery or live testimony. They generally stand or fall on affidavits, and much therefore depends on the willingness of a judge to engage and interrogate the government's representations. The Act authorizes, but does not require, judges to review the requested records *in camera*; judges seldom do so.³¹⁰ The records that are potentially responsive to a FOIA request are often voluminous; a judge could do little more than "dip into" them,³¹¹ and even then she would be required to evaluate their contents without guidance from the re-

308. *Id.* at 63. In other words, the government argued that the American people should be precluded from evaluating evidence of crimes committed on their behalf because our enemies might use the truth against us. If that reasoning were valid, the government would always be entitled to conceal its very worst behavior from the people, which turns the principle of representative democracy on its head. Sullivan, *Methods*, *supra* note 52, at 17–18.

309. *ACLU*, 543 F.3d at 63–64.

310. See *Juarez v. Dep't of Justice*, 518 F.3d 54, 59–60 (D.C. Cir. 2008) ("It is true that FOIA provides district courts the option to conduct *in camera* review . . . but it by no means compels the exercise of that option."). In *Founding Church of Scientology v. NSA*, 610 F.2d 824 (D.C. Cir. 1979), NSA denied possession of any responsive materials, but parallel State Department and CIA requests showed that NSA actually did have such materials. *Id.* at 825. The district court granted summary judgment for NSA, but the appellate court reversed, citing the inadequacy of NSA's affidavit: "Barren assertions that an exempting statute has been met cannot suffice to establish that fact, yet one will search the Boardman affidavit in vain for anything more." *Id.* at 825, 831 (footnote omitted). The court further noted "[t]he importance of maximizing adversary procedures in suits such as this," because "the parties and the court, if sufficiently informed, may discern a means of liberating withheld documents without compromising the agency's legitimate interests." *Id.* at 832–33. Subsequent jurisprudence contemplates a far less active role for requestors and the courts.

311. See *Morgan v. United States*, 304 U.S. 1, 17 (1938) ("The bulky record was placed upon [the Secretary's] desk and he dipped into it from time to time to get its drift.").

questor.³¹² Moreover, strong appellate admonitions against in camera review further discourage courts from conducting such a review.³¹³ Appellate courts may be concerned that a more searching review would sometimes contribute to judicial mistakes that would harm our national interests, but reviewing courts sit to correct such mistakes. In addition, Congress can always adopt a legislative solution, as it did when it promptly overturned the Second Circuit's *ACLU* decision.³¹⁴ Indeed, the process that Congress used to overturn that decision is itself remarkable. With virtually no debate, Congress created a specific exemption for the pictures at issue, presumably because the possible reaction in foreign countries to these photographic records of misconduct by U.S. military personnel justified the withholding from the American people of the apparently damning evidence.³¹⁵

The courts also will be constrained by the so-called "mosaic" theory, which posits that judges should defer to expert government judgments because enemies of the United States are able to connect seemingly innocuous bits of information in ways that will not be obvious to judges.³¹⁶ Finally, affidavits necessarily will contain expert pre-

312. In *Juarez*, which was not a national security case, the court upheld a summary judgment for the government based on Exemption 7(A) because the DEA's affidavits confirmed the existence of an ongoing investigation and averred that "the release of any portion of the withheld documents would compromise the investigation as it could lead to destruction of evidence and disclosure of potential witnesses' identities as well as DEA's investigative techniques." *Juarez*, 518 F.3d at 58. The district court granted the motion without an in camera review of the records—which consisted of only fifteen pages—and the court declined to give any explanation for failing to conduct such a review. *Id.* at 59–60. In addition, the district court failed to make any determination concerning segregability, which technically constituted reversible error. *Id.* at 60–61. The appellate court also declined to inspect the fifteen-page record, but held that reversal was unnecessary. *Id.*

313. See, e.g., *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009) ("Although district courts possess broad discretion regarding whether to conduct *in camera* review, . . . we have made clear that '[w]hen the agency meets its burden . . . *in camera* review is neither necessary nor appropriate.' (first alteration in original) (citation omitted)).

314. Sullivan, *Methods*, *supra* note 52, at 18–19.

315. See *id.* at 19 (describing the legislative process involved). In recent years, Congress has also enacted legislation to protect critical infrastructure materials from disclosure. See RICHARD J. PIERCE, *ADMINISTRATIVE LAW* (2d ed. 2012).

316. See David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 632 (2005) (arguing that affording additional judicial deference to agencies is a practice contrary to FOIA); see also Liz Heffernan, *Evidence and Na-*

dictions, rather than simple recitations of historical fact; they may address matters such as the likely reaction in other countries to evidence of American misconduct, including the mistreatment of enemy combatants or other detainees. In such circumstances, the government will contend that records should be withheld from the American people because they could be used for propaganda purposes or to incite violence against American personnel by America's enemies.³¹⁷ As Justice Stewart said about the nuclear test reports at issue in *Mink*, however, this is precisely the kind of information that ought to be the subject of robust public debate in a representative democracy.³¹⁸

The District of Columbia Circuit has long accepted the government's argument that, regardless of the precise exemption invoked, extraordinary deference should be paid to decisions about withholding information that bear some relationship to national security.³¹⁹ In *ACLU*, for example, the court observed that the government's burden in such cases is "a light one."³²⁰ The court also noted: "[I]n the FOIA

tional Security: Belief Evidence Before the Irish Special Criminal Court, 15 EUR. PUB. L. 65, 76–77 (2009) (describing deference afforded under Irish practice).

317. See Sullivan, *Methods*, *supra* note 52, at 17–19 (discussing litigation and legislation concerning enemy combatant photos).

318. *EPA v. Mink*, 410 U.S. at 94–95 (Stewart, J., dissenting); see also *Houchins v. KQED*, 438 U.S. 1, 37–38 (1977) (Stevens, J., dissenting) (observing that citizens are ultimately responsible for prison conditions and the treatment of prisoners in a democratic society and are entitled to be well-informed about them). Presumably, the government would have withheld the recently published photos of U.S. Marines urinating on the bodies of enemy fighters in Afghanistan, if it had been able to do so, based on their potential propaganda value. But propaganda value often is related to truly deplorable behavior, which the people have a responsibility—as well as a right—to know about. See Graham Bowley & Matthew Rosenberg, *Video Inflames A Delicate Moment for U.S. in Afghanistan*, N.Y. TIMES, Jan. 12, 2012, at A4 (reporting on an incident in which a group of United States Marines urinated on dead Taliban soldiers).

319. Legislative history indicates that courts should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" under Exemption 1, H.R. REP. NO. 93-1380, at 12 (1974), but it is unclear precisely what "substantial weight" means, particularly because the legislative history also emphasizes that the courts are not to "defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious." S. REP. NO. 93-854, at 16 (1974). The D.C. Circuit has extended this analysis to Exemption 3, but the Supreme Court has not yet done so. See *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (giving substantial weight to agency affidavits).

320. *ACLU v. Dep't of Defense*, 628 F.3d 612, 624 (2011).

context, we have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review.”³²¹ Thus, “[t]he CIA’s arguments need only be both ‘plausible’ and ‘logical’ to justify the invocation of a FOIA exemption in the national security context.”³²²

Exactly what the court meant by “defer[ring] to executive affidavits” is not clear. Nor is it clear how searching the review must be before such searching becomes unwise. Many opinions add little because they provide only excerpts from affidavits, making it difficult to ascertain the full scope and flavor of the submissions; only rarely is an affidavit set out in full.³²³ It is sobering, however, to see how little the government sometimes thinks is necessary to include in affidavits, as demonstrated by the declaration submitted in the indefinite detention case of Yaser Hamdi.³²⁴ In that case, of course, the conclusory affidavit was not offered simply in opposition to a request for government information, but in support of the government’s contention that it had the absolute power to incarcerate a suspected young terrorist indefinitely, perhaps for his entire life, without the possibility of independent review of the reasons presumably supporting his continued incarceration. In any event, the burden is indeed light if an affidavit need only be plausible and logical. Affidavits can be highly plausible and highly logical, while bearing little relationship to reality. When Congress amended Exemption 1 in 1974—specifically because the *Mink* Court eschewed any need for “searching” review—it clearly

321. *Id.* (alteration in original) (quoting *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)).

322. *Id.* Moreover, in *Larson v. Department of State*, the court emphasized that in camera inspection is a matter of “last resort” in “national security situations” and cannot be justified on the ground that “it can’t hurt.” 565 F.3d 857, 870 (D.C. Cir. 2009).

323. Occasionally, the courts have set out an affidavit in its entirety, usually in cases in which the affidavit was found to be inadequate. See, e.g., *Ray v. Turner*, 587 F.2d 1187, 1198–99 (D.C. Cir. 1978).

324. Declaration of Michael Mobbs, Special Advisor to the Under Secretary of State, *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. Va.), dated July 24, 2002, available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html>. In *Hamdi v. Rumsfeld*, the Fourth Circuit held:

[N]o evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.

316 F.3d 450, 473 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

intended a more muscular form of judicial review.³²⁵ Otherwise, the 1974 Senate Report would not have insisted that courts should not “defer to the discretion of the agency, even if [they find] the determination not arbitrary or capricious.”³²⁶

The D.C. Circuit’s approach is exemplified by *Center for National Security Studies v. U.S. Department of Justice*,³²⁷ which upheld the withholding of records relating to the detention of hundreds of persons of Arab or Muslim background after the September 11, 2001 attacks.³²⁸ Even the names of the detainees’ lawyers were found to be exempt from disclosure.³²⁹ The panel majority asserted that the courts should not second-guess the executive.³³⁰ A rare dissent, however, observed that “the court’s uncritical deference to the government’s vague, poorly explained arguments for withholding broad categories of information . . . as well as its willingness to fill in the factual and logical gaps in the government’s case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.”³³¹ What the majority saw as appropriate deference to executive authority the dissent saw as a total abdication of judicial responsibility.³³²

325. Moreover, Congress authorized that searching review with respect to records that the executive had actually classified, not simply those that it wanted to keep secret for less compelling reasons.

326. S. REP. NO. 93-854, at 16 (1974).

327. 331 F.3d 918 (D.C. Cir. 2003).

328. *Id.* at 920–21, 925–32.

329. *Id.* at 932–33.

330. *Id.* at 928.

331. *Id.* at 937 (Tatel, J., dissenting).

332. *Id.* at 951–52. The question of deference to conclusory government affidavits also arose in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). In that case, certain U.S. citizens and domestic organizations challenged the constitutionality of a criminal statute that makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.” 18 U.S.C. § 2339B(a)(1). In part, the dispute involved the question whether the plaintiffs were providing “material support or resources” by engaging in otherwise lawful activities that benefited these groups. The government’s position was that by providing even clearly lawful services, such as advocacy training, the plaintiffs would be aiding terrorism by freeing up other resources that could be used to support terrorist activities. In support of that theory, the government presented an affidavit stating that “it is highly likely that any material support of these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.” *Id.* at 2727 (quot-

The plausible and logical test effectively asks judges to approach the government's affidavits with an exceptionally strong, and perhaps irrebuttable, presumption of correctness, not with the critical eye that judges normally are expected to bring to fact-finding. Other tests, however, are available. For example, in *Attaran v. Minister of Foreign Affairs*,³³³ a Canadian federal court recently required the government "to satisfy the Court on the balance of probabilities through clear and direct evidence that there will be a reasonable expectation of probable harm from disclosure of specific information" and to provide "specific detailed evidence" showing that "confidentiality [was] justified . . . and [not simply the result of] an overly cautious approach."³³⁴

Current jurisprudence tells judges that they must affirm a denial of disclosure whenever it is supported by an affidavit that is logical and plausible, but nothing more. In addition, current jurisprudence tells judges that they should not risk confusing themselves with the facts by inspecting the requested records. These instructions only serve to confirm the conviction that access to government infor-

ing affidavit). In upholding the constitutionality of the statute, the majority held that such factual evaluations by the Executive were entitled to deference. *Id.* Writing for the Court, Chief Justice Roberts denied that such deference constituted abdication of judicial responsibility and emphasized that "[i]n this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government." *Id.* at 2728. On the other hand, Justice Breyer's dissenting opinion concluded with the observation:

[T]he Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

Id. at 2743 (Breyer, J., dissenting).

333. [2009] F.C.R. 399 (Can.), *rev'd*, [2011] 4 F.C.R. D-1.

334. *Id.* ¶ 43 (citation omitted) (internal quotation marks omitted). Another Canadian case elaborates on the test:

Judges working under the process have eschewed an overly deferential approach, insisting instead on a searching examination of the reasonableness of the certificate on the material placed before them They are correct to do so, having regard to the language of the provision, the history of its adoption, and the role of the designated judge.

Charkaoui v. Minister of Citizenship and Immigration, [2007] 1 S.C.R. 350, ¶ 38 (Can.). *But see* Heffernan, *supra* note 318, at 76-77 (describing deference afforded under Irish practice).

mation is merely a political matter, rather than a legal one, and the belief that any mention of foreign affairs or national security, however fanciful or unsupported by fact, justifies the creation of a judicial “no-fly-zone.” A better approach was suggested by Justice Stevens at his 1975 Senate confirmation hearing. Senator Mathias asked then-Seventh Circuit Judge Stevens about the proper judicial attitude toward assertions that national security considerations permitted the government to undertake actions that would otherwise violate the law.³³⁵ Then-Judge Stevens replied: “I would think that one who relies on national security as a justification for action that otherwise would be impermissible bears a very heavy burden,” that is, “the burden is on the Government . . . to show that this is a valid reason and to be prepared to make such a demonstration.”³³⁶

What is missing from current law is a genuine commitment to the people’s “right to know,” a right embedded in the First Amendment and realized by Congress in FOIA as a vehicle to ensure that the people would have the “fullest responsible disclosure” of government records. A statute based on such fundamental considerations relating to the very nature of our system of self-government deserves respect from each of the branches of government; and it requires each of the branches to be mindful of those considerations in their encounters with the statute. Courts, by accepting the sufficiency of vague and conclusory affidavits to justify the withholding of information from the public, do not manifest that necessary respect. Nor does Congress when it overturns judicial decisions requiring disclosure with no mention of the public’s “right to know” and no real debate about whether curtailment of that right is justifiable under the circumstances.

V. CONCLUSION

The Freedom of Information Act recognizes that citizens need information to fulfill their responsibilities as citizens.³³⁷ At the present time, when political leaders can commit the nation to costly wars of choice, with little public debate or discussion, in aid of a seemingly endless war on terror, the citizen’s need for information is as compel-

335. Nomination of John Paul Stevens to be a Justice of the Supreme Court, Hearings Before the Committee on the Judiciary, 94th Cong., at 59 (1975).

336. *Id.* But see Heffernan, *supra* note 318 at 76–77 (describing deference afforded under Irish practice).

337. See *supra* Part II.

ling as it ever has been.³³⁸ But the promise of FOIA remains unfulfilled, particularly when national security considerations can be interposed as plausible objections to disclosure, no matter how transient, ephemeral, or remote the danger to national security may be.³³⁹

Government officials routinely produce vague and conclusory affidavits to justify the withholding of information, and courts routinely find those affidavits sufficient to justify the withholding.³⁴⁰ Courts do not focus on FOIA's constitutional parentage, let alone on the centrality of a well-informed public to the project of representative democracy; they choose instead to justify their decisions in terms of deference to the political branches.³⁴¹ But the political branches also show little respect for the legitimacy of the people's right to know.³⁴²

Judicial performance in this vital area leaves much to be desired. It is tempting to conclude that "judges care mostly about their formal place in legal order," and that, "[a]s long as they get to wield the final stamp of approval, they do not mind validating arbitrariness."³⁴³ Until courts engage in a more searching form of review with respect to the government's representations, there will be no reason to resist that temptation.

338. *See supra* Part II.

339. *See supra* Part II.

340. *See supra* Part III.

341. *See supra* Part III.

342. *See supra* Part III.

343. Dyzenhaus, *supra* note 55, at 170 (footnotes omitted) (paraphrasing A.W.B. SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 363 (1995)); *see also* Barry Sullivan, *Justice Jackson's Republic and Ours*, in LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 172 (H. Jefferson Powell & James Boyd White, eds. 2009).