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**IMODEV** est une organisation scientifique internationale, indépendante et à but non lucratif créée en 2009 qui agit pour la promotion de la bonne gouvernance publique dans le cadre de la société de l'information et du numérique. Ce réseau rassemble des experts et des chercheurs du monde entier qui par leurs travaux et leurs actions contribuent à une meilleure connaissance et appréhension de la société numérique au niveau local, national ou international en analysant d'une part, les actions des pouvoirs publics dans le cadre de la régulation de la société des données et de l'économie numérique et d'autre part, les modalités de mise en œuvre des politiques publiques numériques au sein des administrations publiques et des gouvernements ouverts.

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## ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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**IMODEV** is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

IMODEV regularly organizes conferences and symposiums on these topics, and in particular every year in November the Academic days on open government and digital issues, whose sessions are published online [ISSN: 2553-6931].

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## FREE SPEECH AND TRANSPARENCY IN A DIGITAL ERA

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Governmental openness and transparency is inextricably intertwined with freedom of expression.<sup>1</sup> In order to engage in scrutinize government, the people must have access to information regarding the functioning of government. As the U.S. Supreme Court has noted, “It is inherent in the nature of the political process that voters must be free to obtain information from divers sources in order to determine how to cast their votes”.<sup>2</sup> As one commentator noted, “Citizens need to understand what their government is doing in their name.”<sup>3</sup> Despite the need for transparency, the U.S. government has frequently functioned opaquely. For example, even though the U.S. Supreme Court is a fundamental component of the U.S. constitutional system, confirmation hearings for U.S. Supreme Court justices were held in secret for decades.<sup>4</sup> That changed about a hundred years ago when the U.S. Senate broke with tradition and began holding confirmation hearings in public.<sup>5</sup> The results of this openness have been both interesting and enlightening: the U.S. citizenry has become much more interested and involved in the confirmation process,<sup>6</sup> galvanizing and campaigning both for and against proposed nominees.<sup>7</sup> In the 1930s, Congress decided to open up the administrative process as well. For more than a century, administrative agencies were not required to notify the public of proposed actions, or to allow the

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<sup>1</sup> See R. WEAVER, *From Gutenberg to the Internet: Free Speech, Advancing Technology and the Implications for Democracy* (2013); see also D. CROWLEY & P. HEYER, *Communication in History: Technology, Culture, Society* (5<sup>th</sup> ed. 2007); I. FANG, *A History of Mass Communication: Six Information Revolutions* (1997).

<sup>2</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010).

<sup>3</sup> Katherine MCFATE, *Keynote Address: The Power of an Informed Public*, 38 VT. L. REV. 809, 825 (“Access to information is an important tool of democratic accountability. Governments need information to provide citizens with protection from harmful products and practices. Citizens need to understand what their government is doing in their name.”); See also J. ACKERMAN & I. SANDOVAL-BALLESTEROS, “The Global Explosion of Freedom of Information Laws”, 58 *Admin. L. Rev.* 85, 89 (2006) (“The current rules on open government are for the most part mainly a question of public hygiene. This regulation is intended to increase the transparency of public administration, with a view to better democratic control and social accountability of government.”).

<sup>4</sup> See R. BETH & B. PALMER, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011* 10 (2011) [hereafter BETH & PALMER].

<sup>5</sup> See Beth & Palmer, *supra* note 16, at 10.

<sup>6</sup> *Id.* at 10-11.

<sup>7</sup> *Id.*

public to have input on the policy choices reflected in proposed rules and regulations.<sup>8</sup> That changed in the 1930s when Congress adopted the federal Administrative Procedure Act (APA).<sup>9</sup> For the creation of so-called “informal rules,” the APA required agencies to publish a NOPR (notice of proposed rulemaking) in the Federal Register,<sup>10</sup> thereby providing the public with notice of the proposed rule.<sup>11</sup> Congress required that the NOPR provide the public with various types of information, including “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>12</sup> In addition to allowing interested parties the opportunity to comment on NOPRs,<sup>13</sup> and requiring agencies to “consider” those comments,<sup>14</sup> the APA also required agencies to issue a “concise general statement” of the “basis and purpose” of any final rule that they issue.<sup>15</sup> As with the U.S. Supreme Court’s confirmation processes, the APA’s rulemaking procedures led to greater citizen involvement in the rulemaking process.<sup>16</sup> The APA also promoted openness by requiring administrative agencies to voluntarily disclose various types of internal information to the public, including “interpretative rules and statements of policy.”<sup>17</sup> Congress supplemented the APA in the 1960s when it enacted the federal Freedom of Information Act (FOIA).<sup>18</sup> FOIA gave individuals and corporations a right of access to government held information. As a “disclosure” statute,<sup>19</sup> FOIA specifically provides that “upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”<sup>20</sup> Agencies are required to decide within twenty days whether to comply with a request.<sup>21</sup> However, the time limit can be tolled under certain circumstances.<sup>22</sup> Although FOIA is a disclosure statute, it does not require disclosure of *all* governmental documents.<sup>23</sup> In addition to FOIA, Congress also enacted the Federal Advisory Committee Act (FACA),<sup>24</sup> the

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<sup>8</sup> See W. FUNK, S. SHAPIRO & R. WEAVER, *Administrative Law* 740 (West, 5<sup>th</sup> ed., 2014) (hereafter FUNK, SHAPIRO & WEAVER).

<sup>9</sup> 5 U.S.C. § 551, *et seq*; FUNK, SHAPIRO & WEAVER, *supra* note 8, at 740.

<sup>10</sup> 5 U.S.C. § 553(b).

<sup>11</sup> *Id.* at § 553(b).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 553(c).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at § 553.

<sup>16</sup> See S. CROLEY, “Public Interested Regulation”, 28 *Fla. St. L. Rev.* 7, 96 (2000).

<sup>17</sup> 5 U.S.C. § 553(d).

<sup>18</sup> 5 U.S.C. § 552.

<sup>19</sup> 5 U.S.C. § 552(a)(3).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at § 552(a)(6)(A)(I).

<sup>22</sup> *Id.* at § 552(a)(6)(A)(1) & (2).

<sup>23</sup> 5 U.S.C. § 552(b).

<sup>24</sup> 5 U.S.C. app. §§1-15 (2000) (enacted 1972).



Government in the Sunshine Act,<sup>25</sup> and amendments to FOIA,<sup>26</sup> all of which were designed to enhance governmental openness and transparency. In addition, many state legislatures have adopted their own open records provisions that are similar to FOIA.<sup>27</sup>

Despite these movements towards openness, advancements in speech technology have forced governments to become much more open and transparent than they have ever been. Some of this openness has been intentional as governmental entities have used new speech technologies to communicate with the citizenry and enhance its understanding of governmental operations. However, some of this openness has taken place despite governmental resistance. The net effect is that free speech, and changes in communications technologies, have produced a society that is much more open and transparent. This article examines the relationship between free speech, the new technologies, and governmental openness and transparency.

## § 1 – COMMUNICATIVE TRANSITIONS

Governmental openness and transparency are relatively new concepts. Centuries ago, when monarchy was dominant in Europe, and some monarchies claimed to exercise power based on “Divine Right”<sup>28</sup> – the idea that kings were placed on their thrones by God, were divinely inspired and guided, and were carrying out God’s will through their actions<sup>29</sup> – concepts like free speech, openness, transparency, and democratic accountability had no function. Few were interested in allowing common people to criticize what God had done (through the king), or in allowing people to rebuke the monarch for carrying out God’s choices and actions. However, with the dawn of the Enlightenment, an entirely new understanding of government and governmental authority began to emerge. In the United States, this new understanding was reflected in the U.S. Declaration of Independence<sup>30</sup> which implicitly rejected the concept of Divine Right, and declared the primacy of democratic principles: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>31</sup>

As the movement towards democracy gained ascendancy, attitudes towards freedom of expression began to change. Implicit within the idea of the "consent of the governed" is the idea that the people must be free to express their ideas and preferences in open political discussions as they seek to form political judgments and help shape the collective judgment. As

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<sup>25</sup> 5 U.S.C. s 552b(b), (h) (1994).

<sup>26</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 14, at 667-668.

<sup>27</sup> Kentucky Open Records Act, KRS 61.878(1)(h).

<sup>28</sup> See: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 96 (1996).

<sup>29</sup> See *id.*

<sup>30</sup> U.S. Declaration of Independence (July 4, 1776).

<sup>31</sup> *Id.*

the U.S. Supreme Court stated in *Citizens United v. Federal Election Commission*: “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government and a necessary means to protect it.”<sup>32</sup>

Speech technologies are integrally related to citizen participation in the political process. The difficulty is that, for most of human history, information moved relatively slowly, generally at the speed at which people could move (*e.g.*, by foot, horse, carriage or boat).<sup>33</sup> In ancient times, a Roman Emperor might wait days or weeks to learn the outcome of a battle fought in a distant place.<sup>34</sup> Likewise, in the mid-nineteenth century, ten days to two weeks were required to send a message across the United States using the Pony Express relay system.<sup>35</sup> In order to send information more quickly, societies were forced to resort to technology, including such primitive devices as torch relay systems,<sup>36</sup> flags,<sup>37</sup> and fires.<sup>38</sup>

Communications technologies did not advance much until the fifteenth century when Johannes Gutenberg of Mainz, Germany, invented moveable type.<sup>39</sup> While Gutenberg did not create the first printing press, since printing presses had existed in a crude form for some time,<sup>40</sup> his invention enabled the development of a more modern printing press. The printing press allowed individuals to create multiple copies of written works in a relatively efficient manner for the time.<sup>41</sup> Prior to Gutenberg’s invention, most books were handwritten by monks in Latin,<sup>42</sup> and were of a religious nature.<sup>43</sup> While the printing press did not allow information to move more quickly, it did allow people to create

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<sup>32</sup> 558 U.S. 310, 339 (2010); *see also* *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359) (“Maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

<sup>33</sup> *See* WEAVER, *supra* note 1; *see also*: *Communication in History*, *supra* note 1; *A History of Mass Communication*, *supra* note 1.

<sup>34</sup> *See*: *A History of Mass Communication*, *supra* note 1, at 15.

<sup>35</sup> *See* T. STANDAGE, “Telegraphy – The Victorian Internet”, in *Communication in History*, *supra* note 1, at 130.

<sup>36</sup> *See*: *Communication in History*, *supra* note 1, at 118.

<sup>37</sup> *See* D. HEADRICK, “The Optical Telegraph”, in *Communication in History*, *supra* note 1, at 119., at 123.

<sup>38</sup> *See Id.*, at 121.

<sup>39</sup> *See id.* at 82.

<sup>40</sup> *See id.* at 64-65.

<sup>41</sup> *See*: *A History of Mass Communication*, *supra* note 1, at 40.

<sup>42</sup> *See* R. LASSO, “From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21<sup>st</sup> Century Law Students”, 43 *Santa Clara L. Rev.* 1, 4 n.2 (2002); P. K. YU, “Of Monks, Medieval Scribes and Middlemen”, 2006 *Mich. St. L. Rev.* 1, 7.

<sup>43</sup> *See*: *A History of Mass Communication*, *supra* note 1, at 22-23.



multiple copies of written works, thereby enabling the widespread dissemination of ideas.<sup>44</sup> The result was a flowering of knowledge and information.<sup>45</sup> One commentator described the printing press as “the major cultural/technological transformation in the history of the West,” and suggested that “printing, along with numerous other developments, marked the transition between the end of the Middle Ages and the dawn of the modern era.”<sup>46</sup> Gutenberg’s invention was credited with contributing to the Renaissance, the Scientific Revolution, and the Protestant Reformation.<sup>47</sup>

However, the speed at which information moved remained relatively unchanged until the development of electricity; an invention that enabled the much faster movement of information. Electricity led to development of the telegraph which made it possible to send information across the United States in a matter of seconds.<sup>48</sup> The telegraph was eventually followed by the harnessing of broadcast technology<sup>49</sup> which led to the development of the radio in the 1920s,<sup>50</sup> and the television about the same time (although televisions were not widely used before the 1930s).<sup>51</sup> Radio and television were transformational because they made it possible to convey audio and visual images (in the case of television) nationwide.<sup>52</sup>

Of course, technologies such as radio and television were ultimately supplemented by a much more radical technology: the Internet. The Internet was extraordinary because it enabled ordinary people to communicate with each other, and to do so relatively quickly.<sup>53</sup> Of course, these developments were ultimately supplanted by the Internet which was a more radical innovation because it enabled mass communication by ordinary individuals.<sup>54</sup> In addition to facilitating communication, the Internet has had a profound impact on governmental openness and transparency. As we shall see, technological advances have enabled individuals to access greater quantities of information, including governmental information. In addition, these advances have better enabled the citizenry to disseminate this information to their fellow citizens.

## § 2 – GOVERNMENTAL PARTICIPATION AND FACILITATION OF OPENNESS

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<sup>44</sup> See LASSO, *supra* note 42, at 4 n.2.

<sup>45</sup> See *id.* (“Printing changed every aspect of the human condition--from thinking, learning, and language, to science, religion, and government.”).

<sup>46</sup> See: *Communication in History*, *supra* note 1, at 82.

<sup>47</sup> See G. PAUL & J. BARON, “Information Inflation: Can the Legal System Adapt?”, 13 *Rich. J. L. & Tech.* 1, 8 (2007).

<sup>48</sup> See STANDAGE, *supra* note 35, at 130.

<sup>49</sup> See: *A History of Mass Communication*, *supra* note 1, at 90.

<sup>50</sup> See: *Communication in History*, *supra* note 1, at 204.

<sup>51</sup> See: *A History of Mass Communication*, *supra* note 1, at 156.

<sup>52</sup> See: *Communication in History*, *supra* note 1, at 243.

<sup>53</sup> See WEAVER, *supra* note 1.

<sup>54</sup> See *id.*

Developments in the environmental area illustrate the impact of the Internet. At one point, it was relatively difficult for ordinary individuals to obtain environmental information from the government, as well as to have the ability to analyze that information.<sup>55</sup> In the environmental area, for example, this work was done largely by large organizations who could afford to hire large staffs that could seek information from the government, and who had the technical ability to analyze that information.<sup>56</sup> With the advent of the Internet, ordinary people are able to get involved in the process. Professor William Gilles, a strong advocate for the idea of “sousveillance” – the idea that individual members of society can observe governmental actors and try to influence their actions<sup>57</sup> – has noted the “increasing tendency of the citizenry to watch, gaze, look and monitor, from the bottom, the practices of their governments, or even more widely, everyone’s action thanks to the democratization of ICT tools.”<sup>58</sup> In the modern era, sousveillance has become a reality. As one commentator noted, “Today, one environmental advocate with a 56k modem and a \$20 per month Internet account has more power to acquire information, to communicate, and to participate than a whole staff of people did ten years ago.”<sup>59</sup>

If one examines the environmental area, one can readily see that governmental processes are more open and transparent today than at any point in the past. There are a number of websites, including governmental websites, that allow the public to access environmental information.<sup>60</sup> For example, the United States Environmental Protection Agency (EPA) maintains a website entitled “Envirofacts”<sup>61</sup> that is designed to provide “multi year information about a variety of sources of pollution: stationary sources of air pollution; large-quantity generators of hazardous wastes; treatment, storage and disposal facilities; Superfund sites ; facilities required to develop Risk Management Plans under the Clean Air Act; facilities that submit Toxic Release Inventory reports characterizing multimedia releases of toxic chemicals; and facilities required to report wastewater discharges pursuant to the Permit Compliance System.”<sup>62</sup> Some analysts tout Envirofacts as “one of the best sources of environmental information on the Internet” because it is available in multiple formats, is easy to use in that it can be accessed through a “fill-in-the-blank” form, and “almost all of the information on the site is derived directly from

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<sup>55</sup> K. HARLEY & H. D. GORDON, “Public Participation and Environmental Advocacy in the Internet Era,” 16 *Nat. Resources & Environment* 296 (2001).

<sup>56</sup> *Id.*

<sup>57</sup> W. GILLES & I. BOUHADANA, “From the Right to Be Let Alone to the Right to Be Forgotten: How Privacy Is Moving in the Collecting Data Age”, in R. WEAVER, S. FRIEDLAND, W. GILLES & I. BOUHADANA, *Privacy in a Digital Age: Perspectives From Two Continents* \_\_\_\_ (2016).

<sup>58</sup> *Id.* at \_\_\_\_.

<sup>59</sup> See HARLEY & GORDON, *supra* note 55.

<sup>60</sup> See *id.*

<sup>61</sup> [www.epa.gov/enviro](http://www.epa.gov/enviro)

<sup>62</sup> See HARLEY & GORDON, *supra* note 55, at 297.

industry self-reporting to the U.S. EPA and/or its state counterparts, pursuant to mandates imposed by law.”<sup>63</sup>

Today, private websites compliment governmental websites as a method for disseminating environmental information, including governmental information. For example, the Right-To-Know Network<sup>64</sup> “offers information from government files about chemical accidents and unpermitted releases, chemical testing and federal civil enforcement action, and also includes other information (e.g., census, environmental, and mapping information).”<sup>65</sup> In addition, Environmental Defense maintains the Scorecard,<sup>66</sup> a website that publishes information in an effort to “encourage and sustain activism.” Scorecard focuses on matters “like lead poisoning and runoff from animal lots,” and includes “a report card ranking system by which states (and in most cases, smaller geographic areas) and facilities are contrasted with each other.” Another website is maintained by the Natural Resources Defense Council’s (NRDC) which posts information on its website<sup>67</sup> related to the EPA’s Cumulative Exposure Project (CEP).<sup>68</sup> There are other similar websites.<sup>69</sup>

These websites are complimented by governmental and private websites that provide individuals with the scientific and technical information needed to evaluate the technical environmental information that they find on the EPA website or other sites.<sup>70</sup> For example, the U.S. EPA’s Office of Air Quality, Planning and Standards maintains the Technology Transfer Network,<sup>71</sup> a “clearinghouse of the scientific and engineering information used to generate EPA’s multiple Clean Air Act activities.”<sup>72</sup> The website includes the Maximum Achievable Control Technology (MACT), which contains emissions and pollution control information reported by industry sector, and the Ozone Transport Assessment Group, which documents “nitrogen oxide (NO) transportation across the eastern United States.”<sup>73</sup> Of course, individuals can also use search engine directories such as the Google Web Directory which “offers numerous subcategories of websites under ‘environment,’ including ten sites on environmental ethics, seventy-six sites on forests and rainforests, and 385 sites on biodiversity.”<sup>74</sup>

In addition to being able to find technical and scientific information on the Internet, individuals can also access governmental and private sources that help them legally analyze data. For example, individuals can access legal information

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<sup>63</sup> *Id.*

<sup>64</sup> [www.rtknet.org](http://www.rtknet.org)

<sup>65</sup> See HARLEY & GORDON, *supra* note 55, at 297.

<sup>66</sup> [www.scorecard.org](http://www.scorecard.org)

<sup>67</sup> [www.nrdc.org/air/pollution/cep](http://www.nrdc.org/air/pollution/cep)

<sup>68</sup> See HARLEY & GORDON, *supra* note 55, at 297.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> [www.epa.gov/ttn](http://www.epa.gov/ttn)

<sup>72</sup> See HARLEY & GORDON, *supra* note 55, at 297.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

through sites such as “Findlaw” and the Government Printing Office’s “GPO Access.”<sup>75</sup> Findlaw<sup>76</sup> “provides a wide array of useful legal documents and links to legal resources for environmental advocates,” including the United States Code, the Code of Federal Regulations and *Federal Register* notices, as well as statutes and administrative codes for many states, and some U.S. Supreme Court opinions and lower court information and opinions.<sup>77</sup> « Findlaw also provides links to websites for nonprofit legal groups and information regarding the U.S. House of Representatives, Senate, and Council on Environmental Quality. »<sup>78</sup> GPO Access<sup>79</sup> provides many of the same documents available on Findlaw, including a collection of earlier U.S. Supreme Court opinions, as well as “congressional bills and hearing reports, House and Senate reports and *Congressional Records*.”<sup>80</sup>

The Internet has also enabled the citizenry to more easily participate in governmental permitting, rulemaking, and legislative decisions. For one thing, individuals can use the Internet to obtain information regarding the existence of ongoing administrative proceedings. For example, the EPA’s rulemaking process can be accessed through the web.<sup>81</sup> On a local level, many states and regional EPAs now place online draft permits, public notices, final permits, summary documents, and point-of-contact information online.<sup>82</sup> For example, in Illinois, air permits are posted on a single website.<sup>83</sup> Individuals can also submit comments online.

The Internet also offers public interest advocates a new way to communicate with one another, organize political constituencies, and thereby attempt to influence governmental action. For example, the Clean Air Network (CAN) is a Washington-based organization that tries to build coalitions among a wide range of groups from across the country in an effort to promote clean air.<sup>84</sup> The Internet has also enabled the media to advocate for governmental responses to climate change.<sup>85</sup> For example, one blog on the New York Times website advocates in favor of climate change theory,<sup>86</sup> and another blog discusses ways that ordinary people can combat the change.<sup>87</sup> The evidence suggests

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<sup>75</sup> *Id.* at 297-298.

<sup>76</sup> [www.findlaw.com](http://www.findlaw.com)

<sup>77</sup> See HARLEY & GORDON, *supra* note 55, at 298.

<sup>78</sup> *Id.*

<sup>79</sup> [www.access.gpo.gov](http://www.access.gpo.gov)

<sup>80</sup> See HARLEY & GORDON, *supra* note 55, at 298.

<sup>81</sup> [www.epa.gov/fedrgstr](http://www.epa.gov/fedrgstr)

<sup>82</sup> See HARLEY & GORDON, *supra* note 55.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 298.

<sup>85</sup> See D. ALTMAN, “Blogging and Thinking About the Big Issues: Managing Globalization”, *International Herald Tribune* 12 (May 30, 2007).

<sup>86</sup> See E. BERGER, “BLOG: SciGuy: Climate Olympics: Two Compete for the Grandstanding Medal”, *International New York Times* (Nov. 8, 2015).

<sup>87</sup> See B. WASSENER, “A Fight That Doesn’t Need Heroes”, *International New York Times* 19 (Apr. 8, 2010).

that some of these blogs have broad readership,<sup>88</sup> including governmental policymakers who seem to be aware of what is being written in blogs.<sup>89</sup> For example, governmental policymakers have critiqued information contained in blogs (even though those policymakers might not have been altered or shifted by the blogs).<sup>90</sup>

### § 3 – FREE EXPRESSION, LEAKS, AND TRANSPARENCY

The most dramatic link between free speech and transparency has come through non-governmental sources that leak material that has been purloined from government or candidate campaigns. Perhaps the most dramatic leak occurred when Edward Snowden, a former governmental contractor, revealed that the National Security Agency (NSA) was maintaining a massive secret cybersurveillance operation.<sup>91</sup> The Snowden disclosures alerted the American people to an NSA surveillance that was spending some \$10.8 billion per year and maintaining a staff of some 35,000 employees, in order to systematically collect data about virtually everyone, including collecting millions of cell phone call records, e-mails, text messages, credit card purchase records and information from social media networks.<sup>92</sup> The end result was that the NSA intercepted some 182 million communication records, including “to” and “from” e-mail information, as well as text, audio and video information.<sup>93</sup>

WikiLeaks is an organization that has been devoted to promoting governmental openness and transparency.<sup>94</sup> WikiLeaks investigates and publishes articles about government and institutions, and it leaks confidential and classified documents to the public and sometimes to the press.<sup>95</sup> WikiLeaks fervently embraces its role as a leaker of information. On its website, WikiLeaks asks this simple but poignant question “Have documents the world needs to see?”<sup>96</sup> It then proclaims that “We help you safely get the truth out,”<sup>97</sup> and exhorts the public to help WikiLeaks in this effort: “Disclosed documents are classified, censored or otherwise opaque to the public record. We rely on

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<sup>88</sup> See D. ALTMAN, *supra* note 87, at 12 (May 30, 2007).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> For a more comprehensive discussion and analysis of this program, and its democratic implications, see R. WEAVER, “Cybersurveillance in a Free Society”, 72 *WASH. & LEE L. REV.* 1207 (2015).

<sup>92</sup> See P. MAASS, “How Laura Poitras Helped Snowden Spill His Secrets”, *The New York Times*, § MM (Aug. 13, 2013); Ch. Savage, “C.I.A. Ties to AT&T’s Add Another Side to Spy Debate”, *International Herald Tribune*, A5 (Nov. 8, 2013).

<sup>93</sup> See M. MENDOZA, “Reagan’s Order Led to NSA’s Broader Spying”, *The Courier-Journal*, A10, c. 1-6 (Nov. 24, 2013).

<sup>94</sup> <http://mirror.wikileaks.info/>

<sup>95</sup> See *Id.*

<sup>96</sup> <http://mirror.wikileaks.info/>; see also/ R. SATTER & M. WEISSENSTEIN, “WikiLeaks’ War Records Reveal Grim Accounts: Iraqis Accused of Torture Slayings”, *The Courier-Journal*, at A5 (Oct. 23, 2010).

<sup>97</sup> *Id.*

readers to alert their communities and press to the revelations here. Go to it ! »<sup>98</sup>

Some of WikiLeaks' disclosures have generated much diplomatic uproar,<sup>99</sup> and forced U.S. governmental officials to scramble to deal with diplomatic and political pressures.<sup>100</sup> For example, In November 2010, WikiLeaks created a worldwide uproar when it claimed to have gained possession of a quarter-of-a-million classified diplomatic documents,<sup>101</sup> dealing with U.S. diplomacy, and containing candid views regarding foreign leaders.<sup>102</sup> Although WikiLeaks initially released only a few hundred of those documents,<sup>103</sup> it followed that disclosure with additional releases.<sup>104</sup> The documents involved a variety of issues,<sup>105</sup> including internal details regarding the Israeli-Palestinian peace talks,<sup>106</sup> bargaining about how to remove prisoners from Guantanamo Bay,<sup>107</sup> and concerns about Pakistan.<sup>108</sup> The documents also detailed purported torture and murder by Iraqi forces,<sup>109</sup> the beginning and conduct of the Iraq War,<sup>110</sup> and a tale of intrigue related to the Nazis, a famous Impressionist painting and sunken treasure.<sup>111</sup> Finally, questions were raised regarding the Securities and Exchange Commission's regulation of the financial industry.<sup>112</sup>

Some of the information released by WikiLeaks was not only classified, but sensitive and potentially damaging to U.S. relations with foreign nations and foreign leaders.<sup>113</sup> For example, the documents contained criticisms by U.S. officials of foreign leaders,<sup>114</sup> including Afghan President Hamid Karzai,<sup>115</sup> and

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<sup>98</sup> *Id.*

<sup>99</sup> See S. SHANE, "WikiLeaks Prompts New Round of Diplomatic Uproar: Envoys Fear for Sources' Safety as Reporters Sift Newly Released Cables for Revelations", *The New York Times*, at A11 (Sept. 1, 2011).

<sup>100</sup> See E. SCHMITT & H. COOPER, "Document Leak Adds to Pressure on White House: Policy Faces Scrutiny", *The New York Times*, at A1 (July 27, 2010).

<sup>101</sup> See D. TEMPLE RASTON, "WikiLeaks Release Reveals Messier Side of Diplomacy", *National Public Radio* (Nov. 28, 2010).

<sup>102</sup> See S. SHANE & A. LEHREN, "Leaked Cables Offer Raw Look at U.S. Diplomacy", *The New York Times*, at A1 (Nov. 29, 2010).

<sup>103</sup> See R. SOMAIYA & A. COWELL, "WikiLeaks Founder Said to Fear 'Illegal Rendition' to U.S.", *The New York Times*, A6 (Jan. 12, 2001).

<sup>104</sup> See D. FOLKENFLIK, "WikiLeaks: An Editor-in-Chief or Prolific Source?", *National Public Radio*, Weekend Edition Saturday (July 31, 2010).

<sup>105</sup> See D. TEMPLE RASTON, *supra* note 101; see: *Leaked Cables Offer Raw Look*, *supra* note 102.

<sup>106</sup> See E. BRONNER, "Leaked Documents Open a Door on Mideast Peace Talks", *The New York Times*, A4 (Jan. 25, 2011).

<sup>107</sup> See Ch. SAVAGE & A. LEHREN, "Cables Depict U.S. Haggling to Clear Guantanamo", *National Public Radio* (Nov. 29, 2010).

<sup>108</sup> See J. PERLEZ, D. SANGER & E. SCHMITT, "State Secret's Day: Wary Dance With Pakistan in Nuclear World", *The New York Times*, at A1 (Dec. 1, 2010).

<sup>109</sup> See: *WikiLeaks' War Records*, *supra* note 102.

<sup>110</sup> See B. CHAPPELL, "WikiLeaks Begins Exposing 400,000 U.S. Documents About the Iraq War", *National Public Radio*, The Two-Way (Oct. 22, 2010).

<sup>111</sup> See K. SEVERSON & R. BROWN, "WikiLeaks Cables Make Appearance in a Tale of Sunken Treasure and Nazi Theft", *The New York Times*, at A10 (Jan. 7, 2011).

<sup>112</sup> See A. ROSS SORKIN, "A WikiLeaks Problem for Enforcers", *The New York Times*, at B1 (Dec. 21, 2010).

<sup>113</sup> See D. TEMPLE RASTON, *supra* note 101.

<sup>114</sup> See: *WikiLeaks Prompts New Round of Diplomatic Uproar*, *supra* note 99.



suggested that Afghan leaders were corrupt.<sup>116</sup> The leaked documents also contained critical views of then Prime Minister Silvio Berlusconi of Italy,<sup>117</sup> unflattering references to a number of world leaders,<sup>118</sup> indications that Palestinian leaders were saying one thing in private and another (inconsistent) thing in public,<sup>119</sup> and secret information regarding Swiss bank accounts.<sup>120</sup> The cables also offered considerable insight into China's efforts to control Internet usage, including its attempts to pressure Google to help censor Internet content.<sup>121</sup> U.S.-Mexico relations were severely strained by some of the disclosures.<sup>122</sup> WikiLeaks has become increasingly sophisticated about how it releases leaked documents. For example, in addition to publishing documents on its own website, WikiLeaks has distributed them to more traditional publishers such as *The New York Times*, Germany's *Der Spiegel* magazine, Britain's *Guardian* newspaper,<sup>123</sup> France's *Le Monde* newspaper<sup>124</sup> and Spain's *El Pais* newspaper.<sup>125</sup> In all, WikiLeaks worked with more than fifty local partners, including the *Daily Taraf* in Turkey, *Expresso* in Portugal, and *The Hindu* in India.<sup>126</sup> A number of these relationships have since frayed.<sup>127</sup> In the recent disclosures, there were so many documents and so much information that researchers had difficulty digesting it all, and it is likely that the leaked documents will have implications for business and private interests as well as government.<sup>128</sup> *The Guardian*, a British newspaper, was offered 500,000 military dispatches from Afghanistan and Iraq.<sup>129</sup> The publications that received the documents worked together to sort through and verify the documents.<sup>130</sup> This type of cooperation, between Internet-based sources and traditional media, is becoming increasingly common. In other words, rather than just competing with each other, Internet organizations and

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<sup>115</sup> See H. COOPER & C. GALL, "Cables Depict a Roller-Coaster Trajectory for Karzai, From Exalted to Baffling", *The New York Times*, A10 (Dec. 3, 2010).

<sup>116</sup> See S. SHANE, M. MAZETTI & D. FILKINS, "State's Secrets Day 5; Pervasive Afghan Graft, Starting at Top", *The New York Times*, at A1 (Dec. 3, 2010).

<sup>117</sup> See R. DONADIO & C. BOHLEN, "Caustic U.S. Views of Berlusconi Churn Italy's Politics", *The New York Times*, A11 (Dec. 3, 2010).

<sup>118</sup> See: *WikiLeaks Begins Exposing 400,000 U.S. Documents*, *supra* note 110.

<sup>119</sup> See: *Leaked Documents Open a Door*, *supra* note 1397, at A4.

<sup>120</sup> See REUTERS, "Former Swiss Banker is Arrested in WikiLeaks Case, After a Conviction", *The New York Times*, at B3 (Jan. 20, 2011).

<sup>121</sup> See J. GLANZ & J. MARKOFF, "Vast Hacking by a China Fearful of the Web: Cables Depict Google Shock, Censorship and Cyberattacks", *The New York Times*, at A1 (Dec. 5, 2010).

<sup>122</sup> See M. SHERDAN, "US-Mexico Relations Hit Bottom Over WikiLeaks", *The Sydney Morning Herald*, at 25 (Mar. 5-6, 2011).

<sup>123</sup> See D. TEMPLE RASTON, *supra* note 101.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See B. STELTER & N. COHEN, "In WikiLeaks' Growth, Some Control is Lost: Mad Scramble to be First to Reveal Secrets", *The New York Times*, at A11 (Apr. 27, 2011).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *Id.*, at 34.

traditional media organizations are beginning to cooperate with each other.<sup>131</sup>

The WikiLeaks case underscores the power of the Internet as a communications medium. In the 1960s, when Daniel Ellsberg turned the so-called “Pentagon Papers” – stolen from the U.S. Department of Defense – over to *The New York Times* and the *Washington Post*,<sup>132</sup> communication methods were much less dynamic. Although the lower courts enjoined publication of the Pentagon Papers, the U.S. Supreme Court ultimately lifted the injunction and allowed both papers to publish them.<sup>133</sup> WikiLeaks’ disclosure of classified documents is the *Pentagon Papers* case on steroids. In the 1960s, it would have been extremely difficult for a single newspaper (or a couple of newspapers) to have reprinted so many documents in such a short period of time. By contrast, WikiLeaks was able to simply post documents on its website. In addition, the speed of the disclosure was also unprecedented. Had the Pentagon Papers been published by *The New York Times*, the entire world could eventually have gained access to them, but the distribution process would have been slow and ponderous given that *The New York Times* was not available on the Internet at that time. As a result, those who wanted to review *The New York Times*’ account of the Pentagon Papers would have had to wait until they could obtain a copy of the newspaper, or another newspaper’s summary or republication of the contents of the report. Because of the Internet, WikiLeaks was capable of making all of the quarter-of-a-million documents available instantaneously to the entire world over the Internet.

WikiLeaks has also led to the creation of a variety of other similar organizations. For example, some leaks organizations focus on specific topics (*e.g.*, environmental issues, whistleblowers, or particular areas of the world)<sup>134</sup> Some of that these new websites are consistent with WikiLeaks’ idea that “mass leaking” would leave governments “exquisitely vulnerable to those who seek to replace them with more open forms of governance.”<sup>135</sup> In Russia, the group Anonymous claims that it was able to hack into the e-mail accounts of the Nashi organization (described as a Kremlin-financed youth group),<sup>136</sup> and released what it claimed were hundreds of Nashi e-mails that offered a “rare peek into a world of pro-Kremlin bloggers and hackers who are paid to flatter Prime Minister Vladimir Putin and smear his political rivals.”<sup>137</sup>

WikiLeaks has also transformed political campaigns, revealing lots of information about the Clinton campaign for the presidency. Using hacked emails, WikiLeaks released documents showing that

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<sup>131</sup> *Id.*

<sup>132</sup> See *New York Times Company v. United States*, 403 U.S. 713 (1971).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See A. CULLISON, *Web Strike Blamed on Pro-Putin Youth*, *The Wall Street Journal*, A11 (Feb. 10, 2012).

<sup>137</sup> *Id.*

interim Democratic National Committee chairwoman Donna Brazile, formerly a paid CNN commentator, had informed Hillary Clinton regarding questions she would be asked at a CNN organized Democratic primary debate.<sup>138</sup> Brazile purportedly told John D. Podesta, Clinton’s campaign chair, and Jennifer Palmieri, Clinton’s communications director, that a woman with a rash would mention that her family has lead poisoning and would ask “what, if anything, will Hillary do as president to help the ppl of Flint.”<sup>139</sup> Following the disclosure, Brazile resigned from CNN, suggesting that “didn’t want to put CNN in the middle of what has been a real invasive cyberintrusion.”<sup>140</sup> This disclosure was preceded by another WikiLeaks disclosure regarding a debate question related to the death penalty.<sup>141</sup> The disclosures caused Clinton’s opponent, Donald Trump, to make a political issue of the disclosures, specifically raising questions regarding Clinton’s honesty.<sup>142</sup>

WikiLeaks also disclosed lots of other internal information from the Clinton campaign.<sup>143</sup> For example, the disclosures contained quite candid, and sometimes, profane internal observations and advice to the Clinton campaign. Indeed, at one point, an adviser referred to Clinton’s instincts as “suboptimal,”<sup>144</sup> and she referred to Clinton’s campaign director as “insufferable.”<sup>145</sup> “The emails have shown cynical approaches by Hillary Clinton and her team to fund-raising; a penchant for secrecy; a coziness with reporters that is too often the case with both parties in Washington; and a calculated approach to environmental issues, free trade and banking that is already causing trouble on her left flank, as Politico reported.”<sup>146</sup>

## CONCLUSION

Freedom of expression is an essential element of the democratic process. In order to choose their representatives, or express their opinions on policy ideas or proposals, the citizenry must have the right to freely and openly express their beliefs. However, governmental openness and transparency are essential predicates to the exercise of the right to free expression. Unless the public has information regarding the functioning of government, it is impossible for it to fully and effectively exercise their right to freedom of expression. As a result, democratic accountability is inextricably intertwined with transparency.

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<sup>138</sup> See/ M. GRYNBAUM, “CNN Cuts Ties to Analyst as Emails Show She Tipped Off Clinton Allies”, *The New York Times* A20 (Nov. 1, 2016).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See S. EDER & N. CONFESSORE, “Leaks Lay Bare a Longtime Clinton Adviser’s Unflinching Straight Talk”, *The New York Times* A20 (Oct. 30, 2016).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See J. RUTENBERG, “WikiLeaks’ Gift to American Democracy”, *The International New York Times* (Oct. 23, 2016).

Although the United States has made significant strides towards increasing openness and transparency over the last century, the Internet has pushed the United States into an entirely new era. Developments in speech technology, in particular the Internet, have radically altered the flow of information by and about government, and thereby increased openness and transparency regarding governmental operations. This increased openness is due in part to the fact that the government has used the Internet to increase the flow of information to the public. It is also due to the fact that outside organizations have used the Internet to create resources that help ordinary people scrutinize governmental operations. The Internet has also provided individuals to communicate with administrative agencies online, as well as to mobilize environmental activism. Through e-mails, listserves, and a multitude of other Internet devices, individuals have the ability to communicate with each other, to mobilize others, and influence the political process. The net effect is that ordinary individuals have a previously-unavailable capacity to engage in activism.

However, some of the Internet's impact has developed without governmental sanction. Through the Internet, individuals have been able to hack into governmental organizations, as well as the email accounts of those working in political campaigns. In addition, once these hacks have been completed, the Internet provides the means for communicating documents obtained through these hacks. The net effect is that the Internet has enabled ordinary people to engage in "sousveillance" in the sense that they can access information from both governmental and private sources, and thereby monitor and control the government. In short, the Internet has resulted in a shift in the balance of power that "has the potential for profound implications among the regulated community, regulators, and public interest advocates." The net effect is that ordinary individuals have a previously-unavailable capacity to engage in activism.