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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** 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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TRANSPARENCY, PRIVACY, AND DEMOCRACY IN A DIGITAL ERA

by **Russell L. WEAVER**, Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law (USA).

Governmental openness and transparency are indispensable elements of modern democratic societies. Of course, during the medieval period, when monarchy was the dominant form of government in Europe, and some monarchies claimed to exercise power based on “Divine Right”¹ – suggesting that kings were placed on their thrones by God, were divinely inspired and guided, and were carrying out God’s will through their actions² – concepts like openness, transparency, free speech and democratic accountability had no function. After all, why would society allow common people to criticize what God has done, or allow them 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 Independence³ 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.”⁴

As democratic governance gained ascendance in Western societies, it is now understood that the concept of the “consent of the governed” contains two essential elements. First, a free and democratic society must be premised on the right to freedom of expression.⁵ If the citizenry is free to decide who they will vote for, and which ideas or propositions to support and promote, they must be free to communicate their ideas with each other, and to attempt to persuade others to their positions.⁶ Second, the people must have access to information regarding the functioning of government. It is difficult to have meaningful democratic participation, or democratic accountability, when the government

¹ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 96 (1996) (noting that “centuries ago” there was a “belief that the monarch served by divine right”).

² See *id.*

³ U.S. *Declaration of Independence* (July 4, 1776).

⁴ *Id.*

⁵ See C. EDWIN BAKER, “Scope of the First Amendment Freedom of Speech”, 25 *U.C.L.A. L. Rev.* 964 (1978); R. H. BORK, “Neutral Principles and Some First Amendment Problems”, 47 *Ind. L.J.* 1 (1971); Th. EMERSON, “Toward a General Theory of the First Amendment”, 72 *Yale L.J.* 877 (1963); A. MEIKLEJOHN, “The First Amendment as an Absolute”, 1961 *S. Ct. Rev.* 245; R. WEAVER, *Understanding the First Amendment*, 10-13 (5th ed. 2014).

⁶ See *id.*

conceals information from the public, and starves the public of information regarding its functioning.⁷

In recent decades, various factors have led to dramatic improvements in the scope of governmental transparency. First, some improvements are attributable to attitudinal differences towards transparency. At one point in history, many governments did not feel obligated to be transparent or open with their citizens. For the U.S., that situation began to change when Congress' adopted the Freedom of Information Act (FOIA). FOIA gave citizens the right to access governmental documents subject to certain exceptions. FOIA was followed by other open government legislation. Second, efforts at transparency have also been aided by rapid advances in communications technology.⁸

In earlier times, mass communication was difficult and slow because books and documents had to be laboriously prepared by hand, and could not be quickly created or reproduced.⁹ With Johannes Gutenberg's invention of the printing press in the fifteenth century, communications possibilities were radically transformed,¹⁰ enabling the production and dissemination of multiple copies that directly affected the world of ideas.¹¹ Centuries later, the development of the Internet has had a similar impact on communications possibilities,¹² and has dramatically transformed the possibilities for open government and transparency as discussed more fully below.

Although the Internet comes with great transparency advantages, it also comes with a significant downside as to which there is a lack of transparency: the U.S. government has been collecting

⁷ See 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."); K. 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.").

⁸ 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* (5th ed. 2007); I. FANG, *A History of Mass Communication: Six Information Revolutions* (1997); Ch. MEADOW, *Making Connections: Communication Through the Ages* (2002); WEAVER, *Understanding the First Amendment*, *supra* note 5, at 261-276.

⁹ See: *A History of Mass Communication*, *supra* note 8, at 1-17.

¹⁰ See: *Communication in History*, *supra* note 8, at 82.

¹¹ See: *Communication in History*, *supra* note 8, at 82.; see also R. LASSO, "From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students", 43 *Santa Clara L. Rev.* 1, 4 n.2 (2002) ("The 17th century became known as 'the century of genius' in large part due to the explosion of creativity and new ideas fueled by printing... Increased output of printed works led first to the combination of old ideas, and later to the creation of entirely new systems of thought."); George PAUL & Jason BARON, *Information Inflation: Can the Legal System Adapt?*, 13 *RICH. J. L. & TECH.* 1, 8 (2007) ("There has been only one transformative advance in ... writing technology... The printing press allowed mass production of information and thus contributed to the Renaissance, the Scientific Revolution, and the Protestant Reformation.").

¹² See WEAVER, *supra* note 8.

large amounts of cyberdata.¹³ In the digital age, government has the ability to collect enormous amounts of information regarding the citizenry, and it is not clear that citizens are sufficiently informed of governmental efforts so that they are able to effectively exercise their democratic oversight function. These collection efforts create the possibility for governmental abuse.

This short article does several things. First, it discusses the development of openness and transparency principles in the United States, particularly in regard to freedom of information. Second, it examines how the Internet has helped expand transparency and enhance the ability of ordinary citizens to participate in governmental oversight and the democratic process. Finally, the article examines how modern technologies have created potential complications for individual privacy, often without transparency for affected individuals.

§ 1 – THE MOVEMENT TOWARDS OPENNESS AND TRANSPARENCY

The U.S. government is far more open and transparent than it was a century ago. Prior to the 1930s, both the federal government and state governments conducted governmental business with only a modicum of transparency. For example, prior to the 1930s, administrative agencies were not required to publish proposed rules or regulations, much less their policy positions and choices.¹⁴ Commonly, agencies would simply announce and implement their regulatory wishes. In addition, although the U.S. Constitution requires that “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,” be confirmed only with the “advice and consent” of the U.S. Senate,¹⁵ for much of U.S. history these confirmation hearings were closed to the public.¹⁶

The U.S. government started moving towards greater openness and transparency in the early part of the twentieth century. The movement began with the U.S. Senate’s processes for considering nominations to the U.S. Supreme Court. For decades, despite the importance of the U.S. Supreme Court, there was little

¹³ See S. SHANE, “No Morsel Too Minuscule for All-Consuming NSA: From Spying on Leader of U.N. to tracking Drug Deals, on Ethos of ‘Why Not?’”, *The New York Times*, A10 (Nov. 13, 2013); D. Stanglin, “Snowden Says NSA Can Tap Email Chats”, *The Courier-Journal*, A3 (Aug. 1, 2013).

¹⁴ See W. FUNK, S. SHAPIRO & R. WEAVER, *Administrative Law* 740 (West, 5th ed., 2014) (hereafter FUNK, SHAPIRO & WEAVER).

¹⁵ U.S. CONST., Art. II, cl. 2, sec. 2: “[2] He [The President] shall have Power, . . . by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.”

¹⁶ See R. BETH & B. PALMER, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011* 10 (2011) [hereafter BETH & PALMER].

transparency regarding confirmation hearings. On the contrary, confirmation hearings were generally closed to the public. Then, about a hundred years ago, the U.S. Senate broke with tradition and held confirmation hearings in public.¹⁷ The results of that openness have been interesting and enlightening. Although a number of confirmation hearings had been contentious prior to the twentieth century, the public became much more interested and much more involved once the proceedings became public.¹⁸ As the public began to realize that judicial views affect the outcome of cases, the public began to galvanize both for and against proposed nominees.¹⁹ As a result, when Robert Bork was nominated to the U.S. Supreme Court,²⁰ public scrutiny of his nomination was intense, focusing on his views on such hot-button issues as abortion and privacy.²¹ Interest groups actively opposed his nomination,²² expressing concerns regarding Bork's positions on civil rights,²³ and abortion.²⁴ Indeed, even prior to his nomination, interest groups had anticipated the nomination and had begun researching his record.²⁵

Attempts to influence Senate confirmation proceedings have now become commonplace. As a result, when an individual is nominated to the judiciary, interest groups opposed to the nomination immediately mobilize in an effort to thwart the nomination.²⁶ These groups use a variety of tactics, including researching nominees' positions, lobbying Senators, providing information to the media, arranging television advertising campaigns, sending opposition mailings, and organizing constituent letters and phone calls.²⁷ The Clarence Thomas confirmation hearings provide a good example. When he was nominated to the U.S. Supreme Court, there were questions regarding whether he had sexually harassed a former subordinate employee at the Equal Employment Opportunity Commission, and the confirmation process involved lengthy public hearings.²⁸

¹⁷ See BETH & PALMER, *supra* note 16, at 10.

¹⁸ *Id.* at 10-11.

¹⁹ *Id.*

²⁰ See L. GREENHOUSE, "Washington Talk: The Bork Nomination; In No Time At All, Both Proponents and Opponents are Ready For Battle", *The New York Times* A24 (July 9, 1987).

²¹ See Ph. SHENON, "The Bork Hearings: Poll Finds Public Opposition to Bork is Growing", *The New York Times* A20 (Sept. 24, 1987) ("A growing number of Americans are expressing an unfavorable opinion of Judge Robert H. Bork after his week-long testimony at Senate hearings on his nomination to the Supreme Court, a New York Times/CBS News Poll shows. The poll did not look to determine why more people were responding unfavorably to Judge Bork. But it seemed clear that it was an effect of the confirmation hearings last week, in which the judge reaffirmed his opposition to Supreme Court decisions upholding abortion rights and personal privacy.")

²² See GREENHOUSE, *supra* note 20.

²³ *Id.*

²⁴ See A. ROSENTHAL, "Bork Gives Abortion Rights Convention Something to Shout About", *The New York Times* A12 (July 13, 1987).

²⁵ See GREENHOUSE, *supra* note 20.

²⁶ *Id.* at 14; see also N. Lewis, "Gay Rights Groups Join Opposition to Ashcroft for Justice Department", *The New York Times* A15 (Jan. 9, 2001).

²⁷ See *id.*

²⁸ See H. ABRAHAM, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 298 (5th ed. 2008).

Despite considerable testimony against Thomas, most senators ultimately decided to give Thomas the benefit of the doubt.²⁹ The next major step towards openness and transparency occurred when the U.S. Congress adopted the first major piece of “open government” legislation, the federal Administrative Procedure Act (APA),³⁰ in the 1930s. With the adoption of that act, agencies were no longer free to unilaterally adopt regulatory changes without consulting the public or regulated entities.³¹ The APA established two different types of procedures for creating rules: “formal” processes and “informal” processes.³² The APA required that formal rules, also known as “adjudicative rules,” must be created by “trial-type” procedures, involving subpoenas, offers of proof, etc.³³ Although formal procedures continue to exist, very few agencies use those processes because they are too difficult and too cumbersome. Most U.S. administrative agencies create virtually all rules and regulations using so-called informal procedures which require agencies to begin the promulgation process by publishing a NOPR (notice of proposed rulemaking) in the Federal Register,³⁴ thereby providing the public with notice of the proposed rule.³⁵ The NOPR must contain 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.”³⁶ In addition to allowing interested parties the opportunity to comment on NOPRs,³⁷ and requiring agencies to “consider” those comments,³⁸ the APA also requires agencies to issue a “concise general statement” of the “basis and purpose” of any final rule that they issue.³⁹ However, the APA exempts various types of information from its rulemaking processes.⁴⁰ As with the U.S. Supreme Court’s confirmation processes, adoption of the APA’s rulemaking procedures have led to greater citizen involvement. When administrative agencies propose a new rule or regulation, it is not at all uncommon for affected individuals and entities to offer comments, and sometimes to offer changes or amendments. In some instances, regulated entities mobilize (much as they do in response to U.S.

²⁹ *Id.*

³⁰ 5 U.S.C. § 551, *et seq.*

³¹ See FUNK, SHAPIRO & WEAVER, *supra* note 14, at 740.

³² 5 U.S.C. § 553.

³³ 5 U.S.C. §§ 556-557.

³⁴ 5 U.S.C. § 553 (b).

³⁵ *Id.* at § 553 (b) (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.”).

³⁶ *Id.*

³⁷ *Id.* at § 553 (c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

³⁸ *Id.*

³⁹ *Id.* at § 553.

⁴⁰ 5 U.S.C. § 553 (a) (1) &(2), and (b) (3) (A) & (B).

Supreme Court nominations), and present detailed arguments both for and against proposed regulatory changes.⁴¹

The APA also promoted openness because it required administrative agencies to voluntarily disclose various types of internal information to the public, including “interpretative rules and statements of policy.”⁴² However, even though the APA was beneficial, in that it was designed to require agencies to voluntarily disclose information to the public, the disclosure obligations were limited to certain types of information (e.g., certain documents related to rulemakings, interpretations and policy statements), but did not create a general right of access to agency documents.⁴³ Moreover, the obligation to publish interpretative rules and statements of policy has been frequently ignored by administrative agencies without consequence,⁴⁴ even though FOIA purports to sanctions agencies that fail to satisfy their disclosure obligations.

Congress has also promulgated other legislation designed to promote openness and transparency. For example, in the 1960s, Congress enacted the Freedom of Information Act (FOIA),⁴⁵ which gives individuals and corporations a right of access to information held by the U.S. government. FOIA is a “disclosure” statute because Congress assumed that government would disclose rather than conceal documents.⁴⁶ FOIA specifically states 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.”⁴⁷ Agencies are required to decide within twenty days whether to comply with a request.⁴⁸ However, the time limit can be tolled if the agency requests additional information, or as necessary to clarify the applicability of fees.⁴⁹ If the agency fails to comply with the applicable time limits, it cannot require the requesting party to pay search fees absent “unusual or exceptional circumstances.”⁵⁰

Although FOIA is a disclosure statute, it does not require disclosure of *all* governmental documents. Indeed, despite the assumption of disclosure, FOIA explicitly allows administrative

⁴¹ See S. CROLEY, “Public Interested Regulation”, 28 *Fla. St. L. Rev.* 7, 96 (2000) (“Rulemaking certainly did not rein the agencies in. It is true, as McNollgast argue, that notice and comment provided an opportunity for congressional constituencies to mobilize against the EPA’s, FDA’s, and OCC’s rules. But, as the examples show, the procedure also provided public interest groups, health organizations, and academic researchers opportunities to register their data and arguments in the agencies’ rulemaking record.”).

⁴² 5 U.S.C. § 553 (d).

⁴³ See FUNK, SHAPIRO & WEAVER, *supra* note 14, at 740.

⁴⁴ See JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE, § 6.05 at 6-19 (2d ed. 1995).

⁴⁵ 5 U.S.C. § 552.

⁴⁶ 5 U.S.C. § 552 (a) (3).

⁴⁷ *Id.*

⁴⁸ *Id.* at § 552 (a) (6) (A) (I).

⁴⁹ *Id.* at § 552 (a) (6) (A) (1) & (2).

⁵⁰ *Id.*

agencies to withhold various types of information from disclosure, including classified information, internal agency rules and practices, information specifically exempted from disclosure by statute; private commercial or trade-secret information, inter-agency or intra-agency privileged communications, personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy; information compiled for law enforcement purposes, information related to reports for or by an agency involved in regulating financial institutions, and geological information concerning wells.⁵¹

In addition to the APA and FOIA, Congress has also enacted the Federal Advisory Committee Act (FACA),⁵² the Government in the Sunshine Act,⁵³ and amendments to FOIA,⁵⁴ 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.⁵⁵

§ 2 – THE INTERNET AND THE ENVIRONMENT

The Internet, which has revolutionized communication,⁵⁶ has also had a major impact on governmental openness and transparency. At one point, it was relatively difficult for ordinary individuals to obtain information from the government, as well as to have the ability to analyze that information.⁵⁷ 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.⁵⁸ 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 actions⁵⁹ – 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.”⁶⁰ In the modern era,

⁵¹ 5 U.S.C. § 552 (b).

⁵² 5 U.S.C. app. §§1-15 (2000) (enacted 1972).

⁵³ 5 U.S.C. s 552b (b), (h) (1994).

⁵⁴ See FUNK, SHAPIRO & WEAVER, *supra* note 14, at 667-668.

⁵⁵ Kentucky Open Records Act, KRS 61.878 (1) (h).

⁵⁶ See WEAVER, *supra* note 8.

⁵⁷ K. HARLEY & H. GORDON, “Public Participation and Environmental Advocacy in the Internet Era”, 16 *Nat. Resources & Environment* 296 (2001) (“Ten years ago, ... the environmental movement inevitably was dominated by environmental organizations that could afford to maintain staffs of scientists, organizers and lawyers. Such organizations could accomplish internally driven policy initiatives, fueled by membership contributions and grants from large foundations.”).

⁵⁸ *Id.*

⁵⁹ 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).

⁶⁰ *Id.* at ____.

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.”⁶¹

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.⁶² For example, the United States Environmental Protection Agency (EPA) maintains a website entitled “Envirofacts”⁶³ that is designed to provide “multiyear 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.”⁶⁴ 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 industry self-reporting to the U.S. EPA and/or its state counterparts, pursuant to mandates imposed by law.”⁶⁵

Today, private websites compliment governmental websites as a method for disseminating environmental information, including information obtained from the government. For example, the Right-To-Know Network⁶⁶ “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).”⁶⁷ In addition, Environmental Defense maintains the Scorecard,⁶⁸ 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

⁶¹ See HARLEY & GORDON, *supra* note 57.

⁶² See *id.*

⁶³ www.epa.gov/enviro

⁶⁴ See HARLEY & GORDON, *supra* note 57, at 297.

⁶⁵ *Id.*

⁶⁶ www.rtknet.org

⁶⁷ See HARLEY & GORDON, *supra* note 57, at 297.

⁶⁸ www.scorecard.org

on its website⁶⁹ related to the EPA's Cumulative Exposure Project (CEP).⁷⁰ There are other similar websites.⁷¹

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.⁷²

For example, the U.S. EPA's Office of Air Quality, Planning and Standards maintains the Technology Transfer Network,⁷³ a "clearinghouse of the scientific and engineering information used to generate EPA's multiple Clean Air Act activities."⁷⁴ 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."⁷⁵ 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."⁷⁶

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 analyze data from a legal perspective. For example, individuals can access legal information through sites such as "Findlaw" and the Government Printing Office's "GPO Access."⁷⁷ Findlaw⁷⁸ "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.⁷⁹ "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."⁸⁰ GPO Access⁸¹ 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

⁶⁹ www.nrdc.org/air/pollution/cep

⁷⁰ See HARLEY & GORDON, *supra* note 57, at 297.

⁷¹ *Id.* ("Perhaps the best site for obtaining quality, understandable information about potential hazards posed by different chemicals is offered by the Agency for Toxic Substances and Disease Registry [ATSDR], a division of the Centers for Disease Control.")

⁷² *Id.*

⁷³ www.epa.gov/ttn

⁷⁴ See HARLEY & GORDON, *supra* note 57, at 297.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 297-298.

⁷⁸ www.findlaw.com

⁷⁹ See HARLEY & GORDON, *supra* note 57, at 298.

⁸⁰ *Id.*

⁸¹ www.access.gpo.gov

hearing reports, House and Senate reports and *Congressional Records*.⁸²

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.⁸³ 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.⁸⁴ For example, in Illinois, air permits are posted on a single website.⁸⁵ 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.⁸⁶ The Internet has also enabled the media to advocate for governmental responses to climate change.⁸⁷ For example, one blog on the New York Times website advocates in favor of climate change theory,⁸⁸ and another blog discusses ways that ordinary people can combat the change.⁸⁹ The evidence suggests that some of these blogs have broad readership,⁹⁰ including governmental policymakers who seem to be aware of what is being written in blogs.⁹¹ For example, governmental policymakers have critiqued information contained in blogs (even though those policymakers might not have been altered or shifted by the blogs).⁹²

⁸² See HARLEY & GORDON, *supra* note 57, at 298.

⁸³ www.epa.gov/fedrgstr

⁸⁴ See HARLEY & GORDON, *supra* note 57.

⁸⁵ *Id.*

⁸⁶ *Id.* at 298.

⁸⁷ See D. ALTMAN, "Blogging and Thinking About the Big Issues: Managing Globalization", *International Herald Tribune* 12 (May 30, 2007).

⁸⁸ See E. BERGER, "BLOG: SciGuy: Climate Olympics: Two Compete for the Grandstanding Medal", *International New York Times* (Nov. 8, 2015).

⁸⁹ See B. WASSENER, "A Fight That Doesn't Need Heroes", *International New York Times* 19 (Apr. 8, 2010).

⁹⁰ See D. ALTMAN, *supra* note 87, at 12 (May 30, 2007) ("When an editor suggested finding out why so few women left comments by taking the subject on in a post, female 'lurkers' immediately made their presence known with varying degrees of indignation.").

⁹¹ *Id.*

⁹² *Id.* ("While commenters butted heads and shared their knowledge, was anyone in high places reading? Apparently so, as Stephen Adams, a spokesman for Peter Mandelson, the European Union's commissioner for trade, took issue with the headline 'Mandelson: Repent, repent!' He had read it as 'Mandelson, repent, repent!' After a short offline discussion of punctuation, Adams contributed a substantive response to the blog.").

§ 3 – SHORTCOMINGS IN THE U.S. SYSTEM

Despite the advances towards openness and transparency that have occurred in the U.S., the ability of Americans to participate in the democratic process nonetheless suffers from a significant lack of transparency. There are many different problems.

Regarding FOIA, many agencies do not fully and completely comply with FOIA's requirements,⁹³ do not create indices of their adjudicatory decisions,⁹⁴ do not comply with FOIA's production deadlines,⁹⁵ and suffer from "substantial FOI request backlogs that preclude timely determinations."⁹⁶ These shortcomings make it difficult for the public to find and obtain the documents that they seek. Agencies have difficulties complying because of a lack of sufficient funding,⁹⁷ and a lack of adequate systems⁹⁸ that provide the "public [with an] efficient and accurate way of learning what information the agency has how the files are arranged, how long they are kept, or where they are stored."⁹⁹ Although Congress has amended FOIA,¹⁰⁰ in an effort to solve some these problems, many difficulties remain.¹⁰¹

The more serious difficulty today is that, even though government has enacted various pieces of legislation designed to promote greater openness and transparency, the government has tried to maintain secrecy regarding major aspects of its operations,¹⁰² including the fact that it is operating a secret cybersurveillance operation.¹⁰³ Had it not been for Edward Snowden, an NSA contractor who decided to release thousands of secret National Security Agency (NSA) documents,¹⁰⁴ the American people might never have known much about the program.¹⁰⁵

The size of the NSA surveillance and collection program that Snowden revealed was absolutely staggering.¹⁰⁶ The NSA was spending some \$10.8 billion per year¹⁰⁷ and maintaining a staff of some 35,000 employees,¹⁰⁸ in order to systematically collect data

⁹³ See FUNK, SHAPIRO & WEAVER, *supra* note 14, at 742.

⁹⁴ See: *General Accounting Office, Freedom of Information Act: Noncompliance with Affirmative Disclosure Provisions* (1986).

⁹⁵ See: FUNK, SHAPIRO & WEAVER, *supra* note 14, at 742.

⁹⁶ *Id.*

⁹⁷ See M. TANKERSLEY, *How the Electronic Freedom of Information Act Amendments of 1966 Update Public Access for the Information Age*, 50 AD. L. REV. 421, 423 (1998).

⁹⁸ See *id.* at 424.

⁹⁹ *Department of the Interior, Report of the Nat'l Performance Rev. Freedom of Information Act Reinvention Team, Gateway to Government Information* at 11 (1995).

¹⁰⁰ *Pub. L. No. 104-231*, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 [Supp. II 1996]).

¹⁰¹ See TANKERSLEY, *supra* note 97, at 450.

¹⁰² 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).

¹⁰³ See STANGLIN; *supra* note 13, at A3; SHANE, *supra* note 13.

¹⁰⁴ See S. SHANE, *supra* note 13; D. STANGLIN; *supra* note 13, at A3.

¹⁰⁵ *E.g.*, SHANE, *supra* note 13, at A18.

¹⁰⁶ See SHANE, *supra* note 13, at A10.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

about virtually everyone, including collecting millions of cell phone call records, emails, text messages, credit card purchase records and information from social media networks.¹⁰⁹ In addition, the NSA created a system (muscular) that enabled it to easily access Yahoo and Google accounts.¹¹⁰ The end result was that the NSA intercepted some 182 million communication records, including “to” and “from” email information, as well as text, audio and video information.¹¹¹

From the perspective of openness, transparency and democratic accountability, the NSA program was particularly disturbing. Undoubtedly, government has an interest in shielding aspects of its terrorist surveillance programs from public view. After all, if the goal is to discover and thwart potential terrorists, the government cannot reveal its investigative processes so that potential terrorists become familiar with the nation’s surveillance methods, and are able to evade them. The difficulty is that the NSA program was shrouded in almost complete secrecy with very little democratic accountability.

Not only was there a lack of transparency, U.S. governmental officials affirmatively misled the nation regarding the nature, size and scope of the NSA program. For example, following the Snowden revelations, President Obama assured the U.S. public that the NSA was not targeting ordinary U.S. citizens, but rather was focused only on individuals who posed a terrorist threat to the United States, and was focused on communications of “foreign intelligence value”¹¹² and foreign intelligence targets.¹¹³ President Obama boldly proclaimed, “Nobody is listening to your telephone calls.”¹¹⁴ Likewise, the NSA declared that it was not collecting and storing private online or phone information except under limited circumstances: when it believed that the recording or transcript contained “foreign intelligence information,” evidence of a possible crime, a “threat of serious harm to life or property,” or that shed “light on technical issues like encryption or vulnerability to cyber attacks.”¹¹⁵ However, it soon became clear that many of these statements were untrue. The NSA had established a huge data collection and storage center (taking advantage of the declining cost of data storage and advances in search software sophistication),¹¹⁶ and was routinely collecting

¹⁰⁹ See *id.* at A10; see also 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).

¹¹⁰ See B. GELLMAN & A. SOLTANI, “NSA Hacks Yahoo, Google: Global Data Links Expose Untold Millions of Accounts”, *The Courier-Journal*, A-1 (Oct. 31, 2013).

¹¹¹ See M. MENDOZA, *Reagan’s Order Led to NSA’s Broader Spying*, *The Courier-Journal*, A10, c. 1-6 (Nov. 24, 2013).

¹¹² See S. SHANE, “Documents Detail Restrictions on N.S.A. Surveillance”, *The New York Times* A9 (June 21, 2014); see also Mendoza, *supra* note 74, at A10.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See S. SHANE & D. SANGER, *Job Title Key to Inner Access Held by Leaker*, *The New York Times* A1 (July 1, 2013).

extraordinarily large amounts of information.¹¹⁷ As a result, even if Americans were not the intended targets of NSA eavesdropping, they routinely fell “into the agency’s global net.”¹¹⁸ The NSA cultivated secrecy in a variety of ways. The government issued National Security Letters to large telecommunications companies, requiring them to turn over data to the NSA, and ordering the companies served with the subpoenas not to publicly acknowledge the letters or the disclosures, or even alert their customers regarding the nature and scope of NSA inquiries.¹¹⁹ NSA Search warrants were (and are) issued by secret courts and the warrants and the court orders were (and are) classified as “secret” and withheld from the public. To the extent that individuals tried to challenge the surveillance program in court, the courts refused to consider the cases because litigants could not prove that the government was actually surveilling them (what a surprise given the secrecy of the program?), and thereby could not establish standing to sue under Article III of the U.S. Constitution.¹²⁰ For those who made FOIA requests, those requests would have been denied on the basis that information regarding the program was “classified” and “secret” and therefore privileged.¹²¹ In other words, secrecy rather than transparency was the norm.

The tendency towards secrecy even led governmental officials to deceive Congress (and the public) regarding the scope of the program. In particular, NSA Director, James Clapper lied to Congress about the program.¹²² When he was directly asked whether the NSA was collecting “any type of data at all on millions or hundreds of millions of Americans,” he flatly stated, “No, sir. Not wittingly.”¹²³ Clapper later admitted that he lied to Congress.¹²⁴ Because of Snowden’s revelations, the NSA’s authority to collect and retain information was limited.

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

¹¹⁷ See *Documents Detail Restrictions*, *supra* note 112.

¹¹⁸ See *id.*

¹¹⁹ See SHANE, *supra* note 13, at A10; Stanglin, *supra* note 13, at A3.

¹²⁰ See *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013).

¹²¹ See 5 U.S.C. § 552 (b).

¹²² See EDITORIAL BOARD, “Edward Snowden, Whistle Blower”, *The New York Times* A18 (Jan. 2, 2014) (“[Snowden’s] leaks revealed that James Clapper Jr., the director of national intelligence, lied to Congress when testifying in March that the N.S.A. was not collecting data on millions of Americans. (There has been no discussion of punishment for that lie.); A. ROSENTHAL, “Clapper and Carney Get Slippery on Surveillance”, *The New York Times*, Taking Note (Oct. 24, 2013); Ch. SAVAGE & S. SHANE, “N.S.A. Leaker Denies Giving Secrets to China”, *The New York Times* A5 (June 18, 2013) (suggesting that Snowden decided to go public because Director Clapper had lied to the American public regarding the NSA data collection program).

¹²³ See *N.S.A. Leaker Denies Giving Secrets to China*, *supra* note 122.

¹²⁴ See Rosenthal, *supra* note 122.

right to freely and openly express their beliefs. However, in order for citizens to fully exercise their right to free expression, openness and transparency are also essential. Unless the public has information regarding the functioning of government, it is impossible for the citizenry to fully and effectively exercise their right to freedom of expression. As a result, democratic accountability is inextricably intertwined with transparency.

Over the last century, the United States has made significant strides towards increasing openness and transparency. Senate hearings on U.S. Supreme Court nominees, which were once held in secret, are now open to public participation and scrutiny. In addition, Congress has passed various pieces of legislation designed to open up government, including the Administrative Procedure Act, the Freedom of Information Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act. In addition, various executive actions have been taken to open governmental actions to scrutiny.

Many of these efforts to increase openness have enhanced the ability of the citizenry to participate in the functioning of governmental process. When the U.S. Senate opened confirmation hearings to the public, those confirmation processes became more political with much greater public interest and participation. In some instances, that participation has led the Senate to reject nominees, or subject them to a heightened level of scrutiny. Statutes like the APA have also increased citizen participation. The publication of NOPRs, in conjunction with the enactment of administrative rule and regulations, have encouraged affected individuals and entities to submit comments and attempt to influence agency decisionmakers. In other words, there is a very real and strong relationship between openness, freedom of expression and democratic accountability.

Citizen participation has only been enhanced by the development of the Internet. The Internet has dramatically transformed communication, including communication related to the environment. It has enabled ordinary people to engage in “sousveillance” in the sense that they can access environmental information from both governmental and private websites. In addition, it has enabled ordinary people to access the technical information needed to evaluate environmental information, and has provided individuals with the legal information needed to evaluate the information that they have discovered. 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,” and that will make it “increasingly difficult for the regulated community to avoid public scrutiny of environmental performance.”¹²⁵ The Internet has also provided individuals to communicate with administrative agencies online, as well as to mobilize environmental activism. Through emails, listserves, and a

¹²⁵ See Harley & Gordon, *supra* note 57, at 297.

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 environmental activism.

Nevertheless, the progress towards open government has been halting and incomplete. Even though both the APA and FOIA require agencies to publish various types of documents, those laws are frequently honored in the breach. Moreover, although FOIA requires agencies to disclose various types of information on request, FOIA is beset by numerous exceptions, as well as delays and calculated efforts to avoid disclosure. The net result has been less than perfect, and less than that which might otherwise be considered desirable. As a result, the goal of open government remains a work in progress in the United States.

The goal of openness is further undercut by the war on terror. As the cybersurveillance controversy suggests, the United States has so far been unable to find the proper balance between openness and secrecy. The government conducts a massive cybesurveillance operation, which involves collection of communications information affecting virtually all Americans, the government has tried to conduct this operation in secrecy, free of governmental or democratic accountability. In a free society, this level of secrecy is disturbing.

