



## FREE SPEECH, TRANSPARENCY, AND DEMOCRATIC GOVERNMENT: AN AMERICAN PERSPECTIVE

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

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Governmental openness and accountability are essential to the proper functioning of a democratic society. At one point in history, monarchy was the dominant form of government in Europe, and some monarchies tried to justify their existence through the concept of “Divine Right,”<sup>1</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>2</sup> Of course, to the extent that monarchs really were carrying out God’s will, concepts like openness, transparency and democratic accountability had no role. 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?

With the dawn of the Enlightenment, and the influence of writers such as John Locke,<sup>3</sup> Thomas Paine<sup>4</sup> and Baron de Montesquieu,<sup>5</sup> the concept of Divine Right fell into disrepute,<sup>6</sup> and 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>7</sup> which implicitly rejects the concept of Divine Right, and declares the primacy of democratic

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<sup>1</sup> 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”).

<sup>2</sup> See *id.*

<sup>3</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (1664).

<sup>4</sup> THOMAS PAINE, COMMON SENSE 3 (1776) (Dover ed. 1997).

<sup>5</sup> BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151-152 (Cosimo Edition 2011).

<sup>6</sup> See Paine, *supra* note 4, at 6 (“There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required.”). Thomas Paine, who was British born, but who was in the American colonies during the Revolutionary period and who wrote extensively, expressed serious reservations regarding the British monarchy’s claim to rule by Divine Right: “no man in his senses can say that their claim (the British monarchs’ claim to the throne) under William the Conqueror is a very honorable one. A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original. – It certainly hath no divinity in it.” *Id.*, at 13-14.

<sup>7</sup> U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

principles: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>8</sup>

As democratic governance has 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.<sup>9</sup> 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.<sup>10</sup> 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 conceals information from the public, and starves the public of information regarding its functioning.<sup>11</sup>

This article provides a short evaluation of the status of openness and transparency in the United States. As we shall see, while the U.S. has made significant strides towards creating a government that is more open and transparent, and more consistent with democratic ideals, the U.S. government falls far short of that ideal in important respects.

## § 1– U.S. EFFORTS TO PROMOTE OPENNESS AND TRANSPARENCY

Unquestionably, the U.S. government is far more open and transparent than it was a century ago. Prior to the 1930s, neither the federal government, nor state governments, were subject to much in the way of transparency requirements. For example, even though the U.S. Constitution requires that “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the

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<sup>8</sup> *Id.*

<sup>9</sup> See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 S. CT. REV. 245; RUSSELL L. WEAVER, UNDERSTANDING THE FIRST AMENDMENT 10-13 (5<sup>th</sup> ed. 2014).

<sup>10</sup> See *id.*

<sup>11</sup> See John M. Ackerman & Irma E. 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.”); 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.”).

United States, whose Appointments are not herein otherwise provided for,” be confirmed only with the “advice and consent” of the U.S. Senate,<sup>12</sup> for most of U.S. history these confirmation hearings were closed to the public.<sup>13</sup> In addition, prior to the 1930s, administrative agencies were not required to publish proposed rules or regulations, much less their policy positions and choices, so that the process for promulgating rules and regulations was neither open nor transparent.<sup>14</sup> Commonly, agencies would simply announce and implement their regulatory wishes.

The U.S. government started moving towards greater openness and transparency in the early part of the twentieth century. The movement began with U.S. Senate’s processes for considering nominations to the U.S. Supreme Court. About a hundred years ago, the U.S. Senate decided to break with tradition and hold confirmation hearings in public.<sup>15</sup> 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 more interested and involved once the proceedings became public.<sup>16</sup> As the public began to realize that judicial views are important to the outcome of cases, the public began to galvanize both for and against particular nominees.<sup>17</sup> As a result, when Robert Bork was nominated to the U.S. Supreme Court,<sup>18</sup> public scrutiny of his nomination was intense, focusing on his positions on such hot button issues as abortion and privacy.<sup>19</sup> Interest groups immediately galvanized and actively

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<sup>12</sup> 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.

<sup>13</sup> See RICHARD S. BETH & BETSY PALMER, *SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011* 10 (2011) [hereafter BETH & PALMER].

<sup>14</sup> See WILLIAM E. FUNK, SIDNEY SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE LAW* 740 (West, 5<sup>th</sup> ed., 2014) (hereafter FUNK, SHAPIRO & WEAVER).

<sup>15</sup> See Beth & Palmer, *supra* note 12, at 10.

<sup>16</sup> *Id.* at 10-11.

<sup>17</sup> *Id.*

<sup>18</sup> See Linda 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).

<sup>19</sup> See Philip 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

opposed his nomination.<sup>20</sup> They were concerned about Bork's positions on civil rights,<sup>21</sup> as well as his position on abortion.<sup>22</sup> Indeed, interest groups had anticipated the Bork nomination and had begun researching his record some time prior to his nomination.<sup>23</sup>

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 mobilize in an effort to influence the Senate and thwart the nomination,<sup>24</sup> and they 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.<sup>25</sup> 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 and public hearings.<sup>26</sup> Despite considerable testimony against Thomas, most senators ultimately decided to give Thomas the benefit of the doubt.<sup>27</sup>

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),<sup>28</sup> 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.<sup>29</sup> The APA established two different types of procedures for creating rules, "formal" processes and "informal" processes.<sup>30</sup> The APA required that formal rules, also known as "adjudicative rules," must be created by "trial-type"

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judge reaffirmed his opposition to Supreme Court decisions upholding abortion rights and personal privacy.").

<sup>20</sup> See Greenhouse, *supra* note 17.

<sup>21</sup> *Id.*

<sup>22</sup> See Andrew Rosenthal, *Bork Gives Abortion Rights Convention Something to Shout About*, *The New York Times* A12 (July 13, 1987).

<sup>23</sup> See Greenhouse, *supra* note 17.

<sup>24</sup> *Id.* at 14; see also Neil A. Lewis, *Gay Rights Groups Join Opposition to Ashcroft for Justice Department*, *The New York Times* A15 (Jan. 9, 2001).

<sup>25</sup> See *id.*

<sup>26</sup> See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 298 (5<sup>th</sup> ed. 2008).

<sup>27</sup> *Id.*

<sup>28</sup> 5 U.S.C. § 551, *et seq.*

<sup>29</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 13, at 740.

<sup>30</sup> 5 U.S.C. § 553.

procedures, involving subpoenas, offers, of proof, etc.<sup>31</sup> Although formal procedures continue to exist, very few agencies use that process because it is regarded as 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,<sup>32</sup> thereby providing the public with notice of the proposed rule.<sup>33</sup> The NOPR must contain various items 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>34</sup> In addition to allowing interested parties the opportunity to comment on NOPRs,<sup>35</sup> and requiring the agency to “consider” those comments,<sup>36</sup> the APA also requires agencies to issue a “concise general statement” of the “basis and purpose” of any final rule that it issues.<sup>37</sup> However, the APA exempts various types of information from its rulemaking processes.<sup>38</sup>

As with the U.S. Supreme Court’s confirmation processes, adoption of the 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. Supreme Court nominations), and present detailed arguments both for and against proposed regulatory changes.<sup>39</sup>

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<sup>31</sup> 5 U.S.C. §§ 556-557.

<sup>32</sup> 5 U.S.C. § 553(b).

<sup>33</sup> *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.”).

<sup>34</sup> *Id.*

<sup>35</sup> *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.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at § 553.

<sup>38</sup> 5 U.S.C. § 553 (a)(1) &(2), and (b)(3)(A) & (B).

<sup>39</sup> See Steven P. 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.”).

The APA also promoted openness because it required administrative agencies to voluntarily disclose various types of information to the public, including “interpretative rules and statements of policy.”<sup>40</sup> 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.<sup>41</sup> Moreover, the obligation to publish interpretative rules and statements of policy was frequently ignored by administrative agencies without consequence,<sup>42</sup> even though FOIA (as discussed in more detail later) purports to impose sanctions on agency’s that fail to satisfy their disclosure obligations.

Congress has also enacted other pieces of legislation designed to promote openness and transparency. For example, beginning in the 1960s, Congress enacted the Freedom of Information Act (FOIA),<sup>43</sup> 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.<sup>44</sup> 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.”<sup>45</sup> Agencies are required to decide within twenty days whether to comply with a request.<sup>46</sup> However, the time limit can be tolled if the agency requests additional information, or as necessary to clarify the applicability of fees.<sup>47</sup> 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.”<sup>48</sup>

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 agencies to withhold various types of information from disclosure, including classified

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<sup>40</sup> 5 U.S.C. § 553(d).

<sup>41</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 13, at 740.

<sup>42</sup> See JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE, § 6.05 at 6-19 (2d ed. 1995).

<sup>43</sup> 5 U.S.C. § 552 (1982).

<sup>44</sup> 5 U.S.C. § 552(a)(3).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 552(a)(6)(A)(i).

<sup>47</sup> *Id.* at § 552(a)(6)(A)(1) & (2).

<sup>48</sup> *Id.*



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.<sup>49</sup>

In addition to the APA and FOIA, Congress has also enacted the Federal Advisory Committee Act (FACA),<sup>50</sup> the Government in the Sunshine Act,<sup>51</sup> and amendments to FOIA.<sup>52</sup> Both statutes 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>53</sup>

## § 2 – 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 governmental process is undercut by a significant lack of transparency. There are many different reasons for these problems.

Regarding FOIA, I have detailed its shortcomings more fully elsewhere.<sup>54</sup> To briefly recap, there are numerous problems with FOIA, including the fact that many agencies do not fully and completely comply with FOIA's requirements,<sup>55</sup> do not create indices of their adjudicatory decisions,<sup>56</sup> do not comply with FOIA's production deadlines,<sup>57</sup> and suffer from "substantial FOI request backlogs that preclude timely determinations."<sup>58</sup> There are various reasons for these problems, including a lack of sufficient funding,<sup>59</sup> and

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<sup>49</sup> 5 U.S.C. § 552(b).

<sup>50</sup> 5 U.S.C. app. §§1-15 (2000) (enacted 1972).

<sup>51</sup> 5 U.S.C. s 552b(b), (h) (1994).

<sup>52</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 13, at 667-668.

<sup>53</sup> Kentucky Open Records Act, KRS 61.878(1)(h).

<sup>54</sup> See R. Weaver, *Congress and Transparency*, in IRÈNE BOUHADANA, WILLIAM GILLES & IRIS NGUYEN-DUY, *PARLIAMENTS IN THE OPEN GOVERNMENT ERA* \_\_\_\_ (2015) (forthcoming).

<sup>55</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 13, at 742.

<sup>56</sup> See GENERAL ACCOUNTING OFFICE, *FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS* (1986).

<sup>57</sup> See FUNK, SHAPIRO & WEAVER, *supra* note 13, at 742.

<sup>58</sup> *Id.*

<sup>59</sup> See Michael E. 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).

a lack of adequate systems<sup>60</sup> so that the “public has no efficient and accurate way of learning what information the agency has [and no idea] how the files are arranged, how long they are kept, or where they are stored.”<sup>61</sup> Although Congress has amended FOIA,<sup>62</sup> in an effort to solve some of these problems, many difficulties remain.<sup>63</sup>

The more serious difficulty today is that the U.S. suffers from major “transparency gaps.” In other words, even though government has enacted various pieces of legislation designed to promote greater openness and transparency, the government has maintained secrecy regarding major aspects of its operations.<sup>64</sup> In particular, the government has been operating a massive and secret cybersurveillance operation.<sup>65</sup> Had it not been for Edward Snowden, an NSA contractor who stole and released thousands of National Security Agency (NSA) documents,<sup>66</sup> the American people might never have known about the size and scope of the cybersurveillance program.<sup>67</sup>

The size of the NSA surveillance and collection program is absolutely staggering,<sup>68</sup> with the NSA spending some \$10.8 billion per year<sup>69</sup> and maintaining a staff of some 35,000 employees.<sup>70</sup> The NSA was systematically collecting data about virtually everyone, including millions of cell phone call records, e-mails, text messages, credit card purchase records and information from social media networks.<sup>71</sup> In addition, the NSA created a system (muscular) that enabled it to easily

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<sup>60</sup> See *id.* at 424.

<sup>61</sup> DEPARTMENT OF THE INTERIOR, REPORT OF THE NAT'L PERFORMANCE REV. FREEDOM OF INFORMATION ACT REINVENTION TEAM, GATEWAY TO GOVERNMENT INFORMATION at 11 (1995).

<sup>62</sup> Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 (Supp. II 1996)).

<sup>63</sup> See Tankersley, *supra* note 63, at 450.

<sup>64</sup> For a more comprehensive discussion and analysis of this program, and its democratic implications, see Russell L. Weaver, *Cybersurveillance in a Free Society*, \_\_\_ WASH. & LEE L. REV. \_\_\_ (2015).

<sup>65</sup> See Doug Stanglin; *Snowden Says NSA Can Tap Email Chats*, *The Courier-Journal*, A3 (Aug. 1, 2013); Shane Scott, *Disclosures on NSA, Surveillance Put Awkward Light on Previous Denials*, *N.Y. Times*, Jun. 12, 2013, at A. 18.

<sup>66</sup> See Scott 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); Doug Stanglin; *Snowden Says NSA Can Tap Email Chats*, *The Courier-Journal*, A3 (Aug. 1, 2013).

<sup>67</sup> E.g., Scott, *supra* note 66, at A18.

<sup>68</sup> See Shane, *supra* note 67, at A10.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at A10; see also Peter Maass, *How Laura Poitras Helped Snowden Spill His Secrets*, *The New York Times*, § MM (Aug. 13, 2013); Charlie Savage, *C.I.A. Ties to AT&T's Add Another Side to Spy Debate*, *International Herald Tribune*, A5 (Nov. 8, 2013).



access Yahoo and Google accounts.<sup>72</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>73</sup>

From the perspective of openness, transparency and democratic accountability, the NSA program was particularly disturbing. Undoubtedly, government has an interest in shielding aspects of the program 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 without any semblance of 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, 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, including communications of “foreign intelligence value”<sup>74</sup> and foreign intelligence targets.<sup>75</sup> President Obama boldly proclaimed, “Nobody is listening to your telephone calls.”<sup>76</sup> 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.”<sup>77</sup> 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),<sup>78</sup> and was routinely collecting extraordinarily

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<sup>72</sup> See Barton Gellman & Ashkan Soltani, *NSA Hacks Yahoo, Google: Global Data Links Expose Untold Millions of Accounts*, *The Courier-Journal*, A-1 (Oct. 31, 2013).

<sup>73</sup> See Martha Mendoza, *Reagan’s Order Led to NSA’s Broader Spying*, *The Courier-Journal*, A10, c. 1-6 (Nov. 24, 2013).

<sup>74</sup> See Scott 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.

<sup>75</sup> *Id.*

<sup>76</sup> See *Documents Detail Restrictions*, *supra* note 75.

<sup>77</sup> *Id.*

<sup>78</sup> See Scott Shane & David E. Sanger, *Job Title Key to Inner Access Held by Leaker*, *The New York Times* A1 (July 1, 2013)..

large amounts of information.<sup>79</sup> As a result, even if Americans were not the intended targets of NSA eavesdropping, they routinely fell “into the agency's global net.”<sup>80</sup>

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 not to publicly acknowledge the letters or the disclosures, or even alert their customers regarding the nature and scope of NSA inquiries.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.”<sup>85</sup> Clapper later admitted that he lied to Congress.<sup>86</sup>

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<sup>79</sup> See *Documents Detail Restrictions*, *supra* note 75.

<sup>80</sup> See *id.*

<sup>81</sup> See Shane, *supra* note 67, at A10; Stanglin, *supra* note 66, at A3.

<sup>82</sup> See *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013).

<sup>83</sup> See 5 U.S.C. § 552(b).

<sup>84</sup> See Editorial Board, *Edward Snowden, Whistle Blower*, *The New York Times* A18 (Jan. 2, 2014) (“[Snowdens] 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.); Andrew Rosenthal, *Clapper and Carney Get Slippery on Surveillance*, *The New York Times*, Taking Note (Oct. 24, 2013); Charlie Savage & Scott 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).

<sup>85</sup> See *N.S.A. Leaker Denies Giving Secrets to China*, *supra* note 85.

<sup>86</sup> See Rosenthal, *supra* note 85.

## 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, 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 citizen participation. 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, and produced significantly more 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.

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. Although the government conducts a massive cybesurveillance operation, which sweeps in communications by 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.