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# Bankruptcy Reform: An Orderly Development of Public Policy

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# BANKRUPTCY REFORM: AN ORDERLY DEVELOPMENT OF PUBLIC POLICY?\*

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LAWRENCE P. DEMPSEY<sup>2</sup>

|   |     |
|---|-----|
| I. INTRODUCTION .....   | 192 |
| II. PROCEDURAL HISTORY OF THE BANKRUPTCY REFORM ACT.....  | 195 |
| III. THE SPECIAL POWER OF CONFERENCE COMMITTEES.....  | 197 |
| IV. CRITICISM WITHIN CONGRESS.....  | 199 |
| V. BANKRUPT EMBASSIES? .....  | 206 |
| VI. SENATE RULE XXVIII.....   | 208 |
| VII. A LEGISLATURE’S DUTY TO EXPLAIN.....   | 209 |
| VIII. “THE PEOPLE HAVE A RIGHT TO KNOW!”.....   | 212 |
| IX. STATEMENTS BY THE FOUNDERS SUPPORTING THE RIGHT TO KNOW .....                               | 215 |
| X. THE JOURNAL CLAUSE.....  | 217 |
| XI. SECRECY IN THE EARLY CONGRESS - AND TODAY.....  | 224 |
| XII. THE SOCIETAL PURPOSE OF THE FIRST AMENDMENT AND ACCESS TO CONGRESSIONAL DELIBERATION ..... | 229 |
| XIII. MODERN STATUTES RECOGNIZING THE RIGHT TO KNOW .....                                       | 241 |
| XIV. DRAGGING CLANDESTINE LAWMAKING OUT INTO THE SUNLIGHT .....                                 | 246 |
| XV. CONCLUSION.....   | 253 |

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## I. INTRODUCTION

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.<sup>3</sup>

In legislating the pending bankruptcy “reform,” Congress has made many of the key decisions behind closed doors. In fact, the process has been characterized as a congressional effort to pass a “stealth bankruptcy bill.”<sup>4</sup> This secrecy brings into question the democratic nature of congressional deliberation. Sadly, it also illustrates James Madison’s observation that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.”<sup>5</sup>

Open deliberation by legislative bodies is integral to representative democracy.<sup>6</sup> When the Framers designed the legislative branch, open debate was envisioned as the rule, not the exception. The Framers intended for public policy to become law only after open debate and public hearings. The Constitution was designed to foster the enactment of laws that are “not merely an expression of preferences driven by passion, but . . . reasoned, deliberate decisions.”<sup>7</sup> Thus, it is a premise of our system of government that “public knowledge of the considerations upon which governmental action is based is essential to the democratic process.”<sup>8</sup> The openness of American government has long been praised by commentators. Alexis de Tocqueville wrote that the American system “is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature.”<sup>9</sup>

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<sup>3</sup>JUSTICE LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY* 92 (Augustus M. Kelley ed., 1971) (1914), *quoted in* Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must be Public*, 51 *HASTINGS L.J.* 365, 397 (2000).

<sup>4</sup>*Stealth Bankruptcy Bill Moving Ahead: Causing Waves*, *CONSUMER BANKRUPTCY NEWS*, May 30, 2000.

<sup>5</sup>Letter to W.T. Barry (Aug. 4, 1822), in 9 *WRITINGS OF JAMES MADISON* 103 (Hunt ed. 1910); Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 *HARV. L. REV.* 1199, 1200 (1962) [hereinafter *Open Meeting Statutes*].

<sup>6</sup>Brian J. Caveney, *More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act*, 102 *W. VA. L. REV.* 131, 132 (1999).

<sup>7</sup>Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 *OHIO ST. L.J.* 1 n.130 (1999) (discussing bicameralism and presentment requirements of the Constitution).

<sup>8</sup>*Open Meeting Statutes*, *supra* note 5, at 1199, 1200.

<sup>9</sup>ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA*, Part I, 232 (Henry Steele ed., Henry Reeve trans., 1947), *quoted in* Michael B. Slade, *Democracy in the Details: A Plea For Substance Over Form In Statutory Interpretation*, 37 *HARV. J. ON LEGIS.* 187, 189 (2000).

Unfortunately, Congress has adopted a secretive, almost Court of Star Chamber-like approach to pushing through recent bankruptcy legislation. This secrecy is wholly inconsistent with the process of public deliberation which the Founders envisioned. Rather, it is consistent with a Congress which appears to view the American people as subjects rather than citizens.

Senator Russell Feingold has criticized the lack of open conference meetings on the bankruptcy bill as “legislating at its worst . . . .”<sup>10</sup> Of course, it is much easier to legislate a bill if dissent and debate are discouraged.<sup>11</sup> Rather than openly deliberating the merits of this legislation, Congress has instead used the cover of secrecy to adopt, wholesale, a bill largely created by lobbyists for special interests. This is a sharp reversal from the care which Congress formerly used to deliberate bankruptcy issues. In the words of the dissenting members of the Subcommittee on Commercial and Administrative Law who considered an earlier version of bankruptcy reform,

[f]or nearly 100 years, Congress has carefully considered the bankruptcy laws and legislated on a deliberate and bipartisan basis. In the past, Congress has elected also to carefully preserve an insolvency system, that provides for a fresh start for honest, hard-working debtors, protects ongoing businesses and jobs, and balances the rights of and between debtors and creditors.<sup>12</sup>

This more deliberative approach to public policy formation is exemplified by the legislative process which led to the 1978 Bankruptcy Act. It is said that when Congress addressed bankruptcy in the 1970’s, it undertook a balanced, professional, and unpoliticized approach.<sup>13</sup> Both Houses of Congress undertook “intensive study” of changes to the bankruptcy laws.<sup>14</sup> The Congress of the 1970’s evaluated and listened to the advice of the bench, the bar, academia, and the National Bankruptcy Review Commission.<sup>15</sup> Hearings were “extensive[,]” involving over 100 witnesses and 2,700 pages of testimony.<sup>16</sup> The approach did not make use of secret conference committees.<sup>17</sup>

Today’s efforts to reform bankruptcy commenced auspiciously with the work of the National Bankruptcy Review Commission. This independent Commission was

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<sup>10</sup>Kent Hoover, *Foes: Bankruptcy Reform “Legislating at its Worst,”* BUSINESS FIRST OF BUFFALO, May 15, 2000, at 21.

<sup>11</sup>Slade, *supra* note 9, at 190.

<sup>12</sup>146 CONG. REC. H9788, H9794 (2000) (statement of Representative Jackson-Lee).

<sup>13</sup>Brady C. Williamson, *Remarks from Views from the Bench* (Sept. 15, 2000), at <http://www.abiworld.org/reform/bradytalk.html>.

<sup>14</sup>LAWRENCE P. KING ET AL., B COLLIER ON BANKRUPTCY, App. Pt. 4(b)-201 (15th ed. rev’d 2001) [hereinafter B COLLIER ON BANKRUPTCY].

<sup>15</sup>B COLLIER ON BANKRUPTCY, *supra* note 14, at App. Pt. 4-203; Bankruptcy: The Next 20 Years (Report of the National Bankruptcy Commission); G COLLIER ON BANKRUPTCY, App. Pt. 44-8.1 (Oct. 20, 1997).

<sup>16</sup>B COLLIER ON BANKRUPTCY, *supra* note 14, at App. Pt. 4-202.

<sup>17</sup>Williamson, *supra* note 13.

created by Congress in 1994 to examine the bankruptcy code.<sup>18</sup> The Commission's goal was to "sponsor a national dialogue on bankruptcy policy . . ."<sup>19</sup> Moreover, the Commission sought to "raise the public's awareness of the causes and consequences of financial failure for American business and American families."<sup>20</sup> During 1996 and 1997 the Commission conducted 21 public hearings, heard from 600 witnesses, and received over 2,300 submissions.<sup>21</sup> This open process culminated in a 1300-page report which contained 172 recommendations and a variety of dissenting opinions.<sup>22</sup> Upon its completion, the Commission's report was delivered to the President, Congress, and the Chief Justice of the United States Supreme Court.<sup>23</sup>

Once Congress took up the current bankruptcy reform, Congress largely removed the process from public view. In a sharp departure from the decades-long congressional approach to bankruptcy legislation, "Congress stopped seeking expert advice and instead turned to special interest lobbyists . . ."<sup>24</sup> Thus, Congress utilized the cover of secrecy to boldly tailor the bankruptcy laws to serve special interests. The result is "diametrically opposed to the approach recommended by the [National Bankruptcy Review] Commission[.]"<sup>25</sup> As the late Professor Lawrence P. King observed in his final public speech, the philosophy of bankruptcy law

could be summed up as granting a new financial life to a financially distressed debtor and providing for an equitable distribution of the debtor's nonexempt assets among the debtor's unsecured creditors. At least that was the philosophy until the advent of the 105th, 106th, and the current 107th Congresses. It seems that today's philosophy is to damn the poor and struggling in order to pay the rich, who will not get paid anyway.<sup>26</sup>

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<sup>18</sup>*Id.*; *Tenn. Student Assistance Co. v. Hornsby* (In re Hornsby), 144 F.3d 433 n.4 (1998).

<sup>19</sup>Williamson, *supra* note 13.

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

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

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Alan N. Resnick, *The Impact and Influence of Professor Lawrence P. King*, 75 AM. BANKR. L.J. 341, 345 (2001). However, it was not the first time Congress gave into special interest demands in shaping the Bankruptcy Code. See Nancy Blodgett, *Bad Law? Brickbats for Bankruptcy Code*, 70 A.B.A.J. 28 (1984) (quoting Professor King as criticizing the 1984 Bankruptcy Code as "one of the sloppiest jobs Congress has ever done . . . [t]he consumer credit industry, shopping center owners, farmers, fishermen, unions, the securities industry, and trial lawyers all put in their two cents. It was not a matter of public policy but of who had the loudest voice and the greatest pull.").

<sup>25</sup>David Goch, *Washington Report*, COMMERCIAL LAW BULLETIN, Nov. / Dec. 1998, at 42-43.

<sup>26</sup>Lawrence P. King, Address at the American College of Bankruptcy Induction Ceremony (2001), in *Professor Larry King's final speech: 'Give something back. That is the rallying cry.'*, BANKRUPTCY COURT DECISIONS, WEEKLY NEWS & COMMENT, April 17, 2001, at A3; Resnick, *supra* note 24, at 348.

Consequently, “[t]he use of the term ‘bankruptcy reform’ is considered an oxymoron to most organizations of bankruptcy professionals . . . . Virtually every group of bankruptcy professionals, regardless of the constituency represented, opposed both the substance of the legislation and the process . . . taken by Congress.”<sup>27</sup> One member of Congress has even criticized the resulting bill as “not the product of a deliberative process, it is the off-spring of a rubber stamp bankruptcy reform [and it is] factory–manufactured . . . .”<sup>28</sup>

## II. PROCEDURAL HISTORY OF THE BANKRUPTCY REFORM ACT

Proponents of the current bankruptcy bill claim that the bill has been adequately deliberated because it has been through the Senate and House on three occasions.<sup>29</sup> During a Senate debate, Senator Hatch stated that “the bankruptcy reform legislation we are considering today is the same legislative language that was contained in the conference report passed by the Senate in December . . . . [T]he language was marked up in the Judiciary Committee . . . .”<sup>30</sup> Furthermore, Senator Grassley stated that since he and Senator Durbin introduced the bill two Congresses ago, the bill had been through subcommittee, full committee, in both the House and the Senate, and also the floor of both houses, through conference, and through passage by the House and Senate.<sup>31</sup> Senator Biden argued that Senate bill 420 is the same bill “by and large, with a couple improvements that passed with 70 votes last year.”<sup>32</sup>

However, despite the fact that this bill has been through three sessions of Congress, much of the key work on it has been both rushed and secretive. This is true for each of the three years that Congress has entertained “Bankruptcy Reform.” In the 105th Congress the House “hurried [the] bill through,” and the Senate also “pressed toward hasty passage,”<sup>33</sup> this is despite the fact that the bill engendered substantial criticism, including a letter deploring the bill signed by eighty-two law

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<sup>27</sup>Goch, *supra* note 25.

<sup>28</sup>146 Cong. Rec. H9788, H9793 (2000) (Statement of Rep. Jackson-Lee).

<sup>29</sup>Senator Sessions stated “this bill has cleared the Senate on at least three different occasions . . . and with large majorities.” 147 CONG. REC. S1925, S1925 (2001). As this article goes to press, the fate of the bankruptcy bill is still uncertain. Currently the bill is stalled in a “holding pattern” due to congressional disagreement about the bankruptcy treatment of debts incurred by protestors at abortion clinics. (See American Bankruptcy Institute, <http://www.abiworld.org/headlines/todayshead.html>; see also Philip Shenon, *Anti-Abortion Lobbyists Tying Up Bankruptcy Overhaul Bill*, NY TIMES, Sept. 23, 2002). Although Congress may have had more open hearings on the bankruptcy bill in 2002 than it did in the immediately preceding years, that does not make up for the fact that the key provisions of the bill were apparently originally inserted at the behest of special interests under the cover of legislative secrecy.

<sup>30</sup>147 CONG. REC. S1925, S1925 (2001).

<sup>31</sup>147 CONG. REC. S1925, S1935 (2001).

<sup>32</sup>147 CONG. REC. S1925, S1952 (2001).

<sup>33</sup>Russ Feingold, *Lobbyists’ Rush for Bankruptcy Reform*, THE WASHINGTON POST, June 7, 1999, at A19.

professors.<sup>34</sup> Although both Houses appointed members to serve on a Conference Committee, there was no real conference.<sup>35</sup> There were no public Conference Committee meetings.<sup>36</sup> There were no Conference Committee meetings at all involving members of Congress from the minority.<sup>37</sup>

Again in the 106th Congress, the official Conference Committee met in name only.<sup>38</sup> Instead, Congress implemented an informal “shadow” conference committee to exclude the minority from negotiations on the bill.<sup>39</sup> Members of Congress were excluded from these months-long secret negotiations, yet insiders were allowed to attend.<sup>40</sup> The negotiations in the shadow conference were behind closed doors,<sup>41</sup> “cloaked in secrecy.”<sup>42</sup> In 2001 proponents of bankruptcy reform planned yet again to push legislation through via a shadow conference.<sup>43</sup> Traditionally, conferences are open to the public.<sup>44</sup> The secret meeting of members of Congress made it difficult to obtain information about the shaping of the legislation.<sup>45</sup> Secret committee meetings are usually only held for military and intelligence matters.<sup>46</sup> That it was the de facto

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<sup>34</sup>Re: The Bankruptcy Reform Act of 1999 (S.625), available at <http://www.abiworld.org/legis/profit.html>. Professors criticized it as filled with “provisions that tighten the screws on families who legitimately need debt relief,” and containing “cumbersome requirements.” *Id.*

<sup>35</sup>Brady C. Williamson, Remarks at The University of Texas School of Law (Nov. 16, 2001) (draft on file with the authors). Mr. Williamson was Chairman of the National Bankruptcy Review Commission.

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

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Leahy Responds to Sensenbrenner Request to Begin Reconciliation*, NATIONAL JOURNAL’S CONGRESS DAILY, July 24, 2001; Donald L. Bartlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000 64 (“[n]ow members of both chambers are meeting in secret . . . .”); *Countdown to PTNR, Gas Tax Fight Livens a Pre-Recess Week*, NATIONAL JOURNAL’S CONGRESS DAILYPM, April 10, 2000 1 (discussing “behind the scenes negotiations”); Pamela Barnett, *As Deadline Nears, Bankruptcy Bill Shows Signs of Life*, NATIONAL JOURNAL’S CONGRESS DAILYPM, April 10, 2000 3 (labeling the “behind-the-scenes negotiations” as a “non-conference[.]”).

<sup>40</sup>*Stealth bankruptcy bill moving ahead, causing waves*, *supra* note 4.

<sup>41</sup>Pamela Barnett, *Another ‘Shadow’ Conference Expected on Bankruptcy*, NATIONAL JOURNAL’S CONGRESS DAILY, March 20, 2001. See John C. Henry, *House Gives Approval to Bankruptcy Reform*, THE HOUSTON CHRONICLE, October 13, 2000, at Business p.1.

<sup>42</sup>*Stealth Bankruptcy Bill Moving Ahead, Causing Waves*, *supra* note 4.

<sup>43</sup>Barnett, *supra* note 41.

<sup>44</sup>Ed Roberts, *Last-Ditch Effort Made to Save Bankruptcy Bill*, CREDIT UNION JOURNAL, May 8, 2000, at 1.

<sup>45</sup>Marcy Gordon, *House Passes Bankruptcy Bill; Clinton Threatens Veto*, THE RECORD, October 13, 2000, at B4.

<sup>46</sup>Allison C. Giles, *The Value Of Nonlegislators’ Contributions To Legislative History*, 79 GEO. L.J. 359 n.134 (1990).

conference committee that met in secret is particularly troubling, for conference committees are especially powerful.

### III. THE SPECIAL POWER OF CONFERENCE COMMITTEES

Most congressional work is done in committee.<sup>47</sup> Conference committees are typically used by Congress to iron out the discrepancies between the different House and Senate versions of a bill.<sup>48</sup> Conference committees are typically used for complex legislation.<sup>49</sup> A conference committee is effectively comprised of two committees, one from each house.<sup>50</sup> Each committee votes separately by majority vote.<sup>51</sup> Conference committees can last anywhere from hours to months, and there is no set requirement for the number of representatives and senators on a conference committee. In recent years they have ranged in size from six to two hundred members.<sup>52</sup> Conference committees have no set pattern.<sup>53</sup> No rules apply.<sup>54</sup> Often neither transcripts nor summaries are provided to the public.<sup>55</sup> The only explanation the public often gets to see of the mysterious workings of a secret conference committee is the conference report and its accompanying documents, which are often “murky.”<sup>56</sup> When a conference is complete, the House and Senate vote on the results as a whole, in an all-or-nothing fashion.<sup>57</sup> One commentator describes the typical conference committee as “a shadowy arm of Congress, composed of a handful of senior members who hold secret, late-night meetings to mull over key questions of federal policy. No rules govern their activities, and once they’ve made their decisions, their legislative handiwork is presented to rank-and-file lawmakers on a take-it-or-leave-it basis.”<sup>58</sup> In the words of one Senator, conference committees are so powerful that they are the part of Congress “least accountable to the public, [that]

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<sup>47</sup>*Open Meeting Statutes*, *supra* note 5, at 1204; John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268, 272 (1984).

<sup>48</sup>Richard E. Cohen, *The Third House Rises*, 33 NAT’L J., Vol. 33, No. 30 (2001). An alternative to the conference committee process often used when Congress is pressed for time is a “ping-pong” of messengers between the open House and open Senate. *Id.*

<sup>49</sup>Cohen, *supra* note 48.

<sup>50</sup>Charles W. Johnson, HOW OUR LAWS ARE MADE 37 (2000), available at <http://thomas.loc.gov/home/lawsmade.toc.html>.

<sup>51</sup>*Id.*

<sup>52</sup>Cohen, *supra* note 48.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* Technically there are rules that apply, *see infra* notes 65, 90 and text. But in practice the rules of procedure are frequently ignored.

<sup>55</sup>*Id.*

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

<sup>57</sup>Cohen, *supra* note 48; Johnson, *supra* note 50; *Bankruptcy Bill Ready to Head to House-Senate Conference?*, 2000 ABI JNL Lexis 4, \*2.

<sup>58</sup>Cohen, *supra* note 48.



... afford special interests many opportunities to influence legislation.”<sup>59</sup> In short, the conference committee is the “last bastion of secrecy in a lawmaking process that is supposed to operate in the sunshine.”<sup>60</sup> This secrecy is significant because conference committees are becoming increasingly important in the legislative process.<sup>61</sup> Such is the power of congressional committees that they are referred to as “the Third House of Congress,” “the Supreme Court of legislation.”<sup>62</sup>

The shadow conference on Bankruptcy reform was in contravention of the “regular process by which the House and Senate reconcile the differences between bills, which requires public debate on the floor, which provides the minority the right to raise its concerns on the floor and insist on a vote, which requires a vote of the members to go to conference, and which requires at least one open and public meeting . . . .”<sup>63</sup> In short, congressional leaders decided to pass the bill by ignoring the rules of congressional procedure at the expense of a fair, open process.<sup>64</sup> The House rules do not provide for such a shadow conference, and neither the House nor the Senate ever voted to go to conference as required.<sup>65</sup>

In the words of one commentator, “[u]sually . . . compromises are worked out in a conference committee with duly appointed members from both legislative bodies and at least the appearance of public scrutiny. But not so for the bankruptcy bill, which . . . virtually bypass[ed] the conference process by being attached as a last minute rider to a bill ready to leave its conference committee.”<sup>66</sup> Congress

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<sup>59</sup>Cohen, *supra* note 48, citing SENATOR WELLSTONE, *THE CONSCIENCE OF A LIBERAL*.

<sup>60</sup>William Safire, Essay, *Stop Conference Roulette*, N.Y. TIMES, April 12, 2001, A29.

<sup>61</sup>Society of Prof. Journalists v. Secretary of Labor, 616 F. Supp 569, 572 (D. Utah 1985), citing Watkins, *supra* note 47, at 271.

<sup>62</sup>Cohen, *supra* note 48; Johnson, *supra* note 50, at 37. Abuse of the conference committee process is detrimental to our system of representative democracy. In the words of the Parliamentarian of the U.S. House of Representatives,

[o]ne of the most practical safeguards of the American democratic way of life is this legislative process that with its emphasis on the protection of the minority, gives ample opportunity to all sides to be heard and make their views known. The fact that a proposal cannot become a law without consideration and approval by both Houses of Congress is an outstanding virtue of our bicameral legislative system.

Charles W. Johnson, *Guide to Legislative Process in the House*, at <http://www.house.gov/ruleslph-fore.htm> (last modified Jan. 1997).

<sup>63</sup>Rep. Jerrold Nadler, *Statement by Rep. Jerrold Nadler Condemning the Bankruptcy “Shadow Conference,”* at <http://www.abiworld.org/research/nadler.html> (May 2, 2000).

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* According to the Parliamentarian of the U.S. House of Representatives, [t]he rules of the House require that one conference meeting be open, unless the House, in open session, determines by a record vote that a meeting will be closed to the public. When the report of the conference committee is read in the House, a point of order may be made that the conferees failed to comply with the House rule requiring an open conference meeting. If the point of order is sustained, the conference report is considered rejected by the House . . . .

Johnson, *supra* note 50, at 37.

<sup>66</sup>*Stealth Bankruptcy Bill Moving Ahead, Causing Waves, supra* note 4.

substituted the bankruptcy bill for an unrelated State Department funding bill which had already passed both chambers of Congress.<sup>67</sup> This highly unusual procedural tactic was designed to facilitate passage of the bankruptcy bill.<sup>68</sup> This procedural end-run allowed the Bankruptcy bill to bypass at least five opportunities for filibuster in the Senate.<sup>69</sup> As one former Senator states, “I thought I’d seen every trick in the book, but attaching a secretly negotiated Bankruptcy bill to completely unrelated legislation already in conference is unbelievable.”<sup>70</sup>

#### IV. CRITICISM WITHIN CONGRESS

The Senate version was shaped by a small group of Senators in what both Senators Feingold and Feinstein referred to as a “shadow conference.”<sup>71</sup> Senate negotiators in the shadow conference made “significant concessions to their House counterparts[,]” resulting in legislation “much harsher than the bill [the entire Senate] adopted . . . .”<sup>72</sup> Perhaps this is because “by some accounts, lobbyists for the credit card industry . . . literally helped draft sections of the pending legislation.”<sup>73</sup> Even congressional proponents of bankruptcy reform admit that the legislation was largely shaped by the financial services industry.<sup>74</sup> This is in sharp contrast to the shaping of bankruptcy legislation in 1978. Although the 1978 Bankruptcy Code legislation was influenced by lobbyists, they did not dominate the process.<sup>75</sup> In the words of Senator Feingold,

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<sup>67</sup>Henry, *supra* note 41.

<sup>68</sup>*Id.*

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

<sup>70</sup>*Stealth Bankruptcy Bill Moving Ahead, Causing Waves*, *supra* note 4 (statement of retired Sen. Howard M. Metzenbaum.).

<sup>71</sup>147 CONG. REC. S1925, S1950 (2001); 147 CONG. REC. S2343, S2375 (2001).

<sup>72</sup>Wellstone, *Feingold Urges Clinton to Veto Bankruptcy Bill*, NATIONAL JOURNAL’S CONGRESS DAILY, May 18, 2000.

<sup>73</sup>Williamson, *supra* note 13. Unfortunately, lobbyists who perform the work of Congress are not unique to bankruptcy reform. In the words of one observer, “some . . . lobbyists actually resent members of Congress . . . interfering with what they view as their legislation . . . . [W]e have . . . reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.” William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 140 (1996).

<sup>74</sup>According to Rep. Gekas, “[c]redit unions have played a critical role in shaping this bill[.]” Ed Roberts, *CUNA’s Influence Seen as Bankruptcy Vote Nears*, CREDIT UNION JOURNAL, Feb. 26, 2001, at 1. Although credit unions are normally political allies of consumer groups, the Credit Union National Association [hereinafter CUNA] elected to side with the American Bankers Association in working to thwart the recommendations made by the National Bankruptcy Review Commission. *Id.* CUNA lobbyists met secretly with lobbyists from the American Bankers Association in “working to draft priorities for legislation.” *Id.* Credit union lobbyists succeeded in inserting a special reaffirmation exception into the bill which allows credit unions “to use a short form with fewer disclosures[.]” thus encouraging debtors to reaffirm their debts to credit unions. *Id.*

<sup>75</sup>Williamson, *supra* note 13.

[A]mending the bankruptcy code used to be a nonpartisan exercise, where the Congress listened to experts--practitioners and law professors and judges and trustees, and made careful considered judgments about how the law should work. Now it seems as if we ignore the experts and instead do what the credit industry wants us to do. We use parliamentary tactics to avoid reasoned consideration. Those tactics harm the bill, and discredit the Senate.<sup>76</sup>

Similarly, Senator Wellstone observed:

[T]his bill was negotiated by only a small group of Members, out of the public eye. . . . [U]ntil this year, it had never been [before the full Senate] in an amendable fashion . . . . [U]ntil a hearing was held by the Judiciary Committee on February 8, there had been no hearings on this legislation. In fact, the Senate had not conducted its own hearing on bankruptcy since 1988 . . . .

So I see a compelling reason for some . . . debate on this bill. The bill deserves scrutiny. It should be held up to the light of day so that citizens can see what an ill-made misshapen attempt at reform this legislation is.

Colleagues in this body need to understand what bad legislation really is, how terrible an impact a piece of legislation such as this can have on America's most powerless families, and what a complete giveaway this piece of legislation is to banks, to credit card companies, and to other lenders.<sup>77</sup>

The fact that the bill had not been before the full Senate in an amendable fashion is significant because as Senator Feingold notes, the current Senate bill is basically the same as the one vetoed by former President Clinton.<sup>78</sup> There is an indication that members of Congress intentionally inserted extreme provisions into that bill for tactical reasons, so as to stake out a negotiating position against the President.<sup>79</sup> The Senate knew the bill would be vetoed.<sup>80</sup>

Most significantly, the bill suffered many adverse changes in the secret Conference Committee. As Senator Durbin stated, the more balanced bankruptcy bill which received substantial support on the floor of the Senate "went into the meat grinder of the conference committee and came out loaded with provisions which . . .

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<sup>76</sup>147 CONG. REC. S1925, S1947 (2001).

<sup>77</sup>147 CONG. REC. S1925, S1929 (2001).

<sup>78</sup>147 CONG. REC. S1925-02, S1947 (2001).

<sup>79</sup>According to Senator Feingold, "[i]n the past two Congresses, it has been my impression that the Republican majority has made decisions on the substance of this bill in order to stake out a negotiating position vis-a-vis the White House. Twice it has ignored the work done by the Senate on the floor and come up with a conference vehicle that was designed to provoke a veto." 147 CONG. REC. S1925, S1946 (2001).

<sup>80</sup>Senator Murray stated that the Senate knew the conference report would be vetoed by the president. 146 CONG. REC. S11683, S11728 (2000).

were unfair to consumers. . . .”<sup>81</sup> In short, the more even-handed bill was “decimated in conference.” The most recent iteration of this bill may still become the new Bankruptcy Code.<sup>82</sup>

Among the provisions changed by the secret Conference Committee: the Committee removed the cap on homestead exemptions which had previously been approved by the senate 76-22.<sup>83</sup> The Committee removed a provision which ensured that judgments entered under the Freedom of Access to Clinic Entrances Act could not be discharged in bankruptcy.<sup>84</sup> A requirement that Internet credit card solicitations contain advice about using credit cards was deleted.<sup>85</sup> An amendment which would have prevented credit card companies from charging interest retroactively was removed.<sup>86</sup> An amendment requiring a study to determine if credit card companies use zip codes to determine credit worthiness was omitted.<sup>87</sup> Senator

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<sup>81</sup>147 CONG. REC. S1925, S1938 (2001).

<sup>82</sup>Both chambers of the 107th Congress approved respective bankruptcy bills in March of 2001. *Sensenbrenner to Set Bankruptcy Conference*, NATIONAL JOURNAL’S CONGRESS DAILY, Nov. 2, 2001. There were approximately forty significant differences between the House and Senate Versions. *Bankruptcy Conferees Make Little Progress in Reconciling Bills*, THE BULLETIN’S FRONTRUNNER, Nov 15, 2001. The Conference Committee had been scheduled to meet to reconcile these differences on September 12, 2001. *Bankruptcy Conference May Resume as Netting Bill Considered*, NATIONAL JOURNAL’S CONGRESS DAILY, Oct. 30, 2001. Proponents such as Senator Grassley hoped to avoid an open Conference once more in 2001 through procedural machinations. Barnett, *supra* note 41. *See Supporters of Bankruptcy Reform Remain Hopeful*, NATIONAL JOURNAL’S CONGRESS DAILY, September 11, 2001.

In the aftermath of the September 11 terrorist attacks, Congress indefinitely postponed the Conference. *Bankruptcy Slips From Congressional Agenda in Wake of Terrorism*, at <http://www.abiworld.org/headlines/01sept17.html> (last visited Sept. 17, 2001). Yet by November 14, the Conference Committee was back at work. *Partisan Rhetoric Returns with Bankruptcy Bill*, CONSUMER BANKRUPTCY NEWS, Nov. 27, 2001. The Committee is comprised of nineteen House members and thirteen Senators. *Congressional Bankruptcy Panel Convenes*, THE DAILY DEAL, Nov. 14, 2001. At least six of these members of Congress “steadfastly oppose” the bill. *Id.* Detractors of the bill want the Conference Committee to re-evaluate the entire bill in light of the current recession. *Outlook Uncertain for Bankruptcy Reform Effort*, AUSTIN BUS. J., Nov. 23, 2001, at 10. Ironically, supporters of the bill now want to limit the scope of the Conference Committee’s deliberations to differences between the House and Senate versions of the bill. *Id.*; *Bankruptcy Conferees Make Little Progress in Reconciling Bills*, THE BULLETIN’S FRONTRUNNER, Nov. 15, 2001.

Proponents of altering our bankruptcy system face a political obstacle in the current economic downturn. “Giving creditors more power to collect debt might not be good politics at a time like this.” *Outlook Uncertain for Bankruptcy Reform Effort*, AUSTIN BUS. J., Nov. 23, 2001, at 10. Nonetheless, proponents considered inserting parts of the bankruptcy reform bill in unrelated legislation. *Consumer Bankruptcy after 9-11-01*, CONSUMER BANKRUPTCY NEWSM, Oct. 17, 2001. And the consumer credit industry is expected to push for bankruptcy reform yet again in 2002. *Id.*

<sup>83</sup>146 CONG. REC. S11683, S11726 (2000).

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

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>146 CONG. REC. S11683, S11728 (2000).

Durbin's amendment to curtail a predatory lending practice aimed at the elderly was "adopted unanimously on a previous bill [yet] was stripped out in conference."<sup>88</sup> The Conference report also omitted an amendment that would have allowed fishermen to use chapter 12 of the Bankruptcy Code.<sup>89</sup>

Even worse, the Committee used the cover of secrecy to improperly insert legislation favorable to special interests. Normally the matters that conferees are allowed to consider are "strictly limited" to matters on which the two Houses disagree.<sup>90</sup> Conferees are ordinarily prohibited from inserting new matter beyond the scope of the differences between the two Houses.<sup>91</sup> Yet with the bankruptcy bill, Senator Feingold noted that several provisions simply "appeared out of nowhere[.]" and were not contained in previous bills.<sup>92</sup> Representative Watt also stated "there were some provisions . . . that just appeared out of nowhere in the course of the conference . . . . They just like magic appeared."<sup>93</sup> One example is the provision entitled "Protection of Retirement Savings in Bankruptcy" which oxymoronically imposes a cap upon the amount of retirement savings which debtors can keep beyond the reach of creditors.<sup>94</sup>

Another example of "lawmaking at its worst" was the provision to assist investors in Lloyds of London.<sup>95</sup> Senator Feingold states that there were no hearings on the Lloyds' provision, it did not come out of Committee, nor did it come out of the Senate or House.<sup>96</sup> Instead, it was "just slipped into the bill at the last minute."<sup>97</sup> Additionally the cap on the homestead exemption was watered down during the "shadow conference."<sup>98</sup> Virtually all these substantive changes enacted by the secret Committee acted to benefit the credit card and banking industries. Senator Feingold explained this phenomenon by stating that "[p]owerful economic interests see an opportunity to push through major structural changes to the bankruptcy system before the public becomes aware of the consequences of what they are doing and

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<sup>88</sup>147 CONG. REC. S1925, S1941 (2001).

<sup>89</sup>146 CONG. REC. S11683, S11727 (2000).

<sup>90</sup>Johnson, *supra* note 50, at 37.

<sup>91</sup>*Id.* If a conference committee introduces extraneous material not committed to by either House, the conference committee is not in order. *Id.* A point of order may be made to reject such extraneous material. *Id.* at 38-41.

<sup>92</sup>147 CONG. REC. S1925, S1948. (2001).

<sup>93</sup>Bankruptcy Abuse and Consumer Protection Act of 2001, *Hearings Before the House Comm. on the Judiciary on H.R. 333*, 107th Cong. 1, 232 (2001) (statement of Rep. Watt), available at [http://commdocs.house.gov/committees/judiciary/hju71179.000/hju71179\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju71179.000/hju71179_of.htm) (last visited Feb 8, 2001).

<sup>94</sup>147 CONG. REC. S1925, S1948 (2001).

<sup>95</sup>147 CONG. REC. S1925, S1950 (2001) (statement of Sen. Feingold).

<sup>96</sup>147 CONG. REC. S1925, S1951 (2001).

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

<sup>98</sup>147 CONG. REC. S2324, S2334 (2001).

works to stop them.”<sup>99</sup> In short, it was an effort to “hijack the legislative process for the self-interested purposes of a single industry.”<sup>100</sup>

What motivated Congress to railroad bankruptcy reform through a secret committee? One commentator observes that, although neither the legislative process nor members of Congress are corrupt, there is “no escaping the fact that financial institutions . . . have made significant contributions to well-placed members of Congress of both parties.”<sup>101</sup> Prior to Senate votes on the bill, MBNA Corporation contributed \$250,000 to the Republican Senatorial committee, and \$150,000 to the Democratic Senatorial Campaign Committee.<sup>102</sup> Such was the largesse of the financial services industry that one congressional staff member who worked on the legislation observed “[i]f this were NASCAR, the members would have to have the corporate logos of their sponsors sewn to their jackets.”<sup>103</sup>

The most disturbing example is the recent revelation that in 1998, MBNA Corporation loaned \$447,500 to Representative James P. Moran Jr. just four days before Representative Moran emerged as one of the lead sponsors of the bankruptcy bill.<sup>104</sup> Representative Moran stated that the timing of the loan was “wholly coincidental”<sup>105</sup> and that “[t]here was no connection with my sponsoring bankruptcy [reform] and this loan . . . .”<sup>106</sup>

Yet the loan was the largest refinancing package given by MBNA to *any* individual debtor that year.<sup>107</sup> MBNA made this loan despite the fact that MBNA’s own rating system ranked the congressman’s credit score at the bottom 14th percentile of American consumers, with a 40% chance of default.<sup>108</sup> Moreover, critics allege that the terms of the loan were overly generous: the interest rate was unusually low, and MBNA appraised the congressman’s home at too high a value.<sup>109</sup> MBNA’s spokesman defends its loan to the congressman by stating “we thought this was a good business deal.”<sup>110</sup>

Perhaps it was. The loan from MBNA may well have enabled the congressman to avoid default, thus allowing him to subsequently state to his colleagues in

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<sup>99</sup>Feingold, *supra* note 33.

<sup>100</sup>*Id.*

<sup>101</sup>Williamson, *supra* note 13.

<sup>102</sup>Roberts, *supra* note 44; Bartlett & Steele, *supra* note 39.

<sup>103</sup>Bartlett & Steele, *supra* note 39.

<sup>104</sup>Jo Becker & Spencer S. Hsu, *Credit Firm Gave Moran Favorable Loan Deal; Lawmaker Supported Finance Industry Bill*, THE WASHINGTON POST, July 7, 2002 A01.

<sup>105</sup>Philip Shenon, *Bankruptcy Bill Opponents Criticize Loan*, THE NEW YORK TIMES, August 9, 2002 A11.

<sup>106</sup>Becker & Hsu, *supra* note 104.

<sup>107</sup>Shenon, *supra* note 105; Becker & Hsu, *supra* note 104.

<sup>108</sup>Becker & Hsu, *supra* note 104.

<sup>109</sup>Becker & Hsu, *supra* note 104.

<sup>110</sup>*Report: Moran championed lender’s cause after receiving loan*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 6, 2002 (statement of Brian Dalphon).

Congress that “the current bankruptcy system is broken” and that “the time-honored principle of moral responsibility and personal obligation to pay one’s debts has been eroded by the convenience and ease with which one can discharge his or her obligations.”<sup>111</sup>

Overall, the financial services industry showered members of Congress with more than \$23.4 million.<sup>112</sup> In short, the lobbying efforts involved a “sophisticated public-relations blitz” which lobbied for changes to our bankruptcy laws.<sup>113</sup>

Even sponsors of the bill are befuddled about the origin of special interest provisions within the bill. When Representative Watt enquired as to who inserted the special interest provision dealing with Lloyds, Representative Gekas replied “I’m not certain . . . . But I must tell you . . . in the interest of getting the . . . reform passed, that I acceded to this insertion.”<sup>114</sup>

Apparently while the special interest lobbyists understand this bill, Congress does not.<sup>115</sup> In the words of Senator Feingold, “[t]his is an immensely complicated bill about a very technical area of the law. There are provisions in the bill that . . . no one in the Senate really understands.”<sup>116</sup>

Senator Leahy recounted how the bill moved through the secret conference committee:

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<sup>111</sup>Shenon, *supra* note 105

<sup>112</sup>Lisa Fickenscher, *Bankruptcies Down; Enthusiasm for Reform Wanes*, AM. BANKER., Sept. 30, 1999. The lobbying campaign included the credit industry’s placement of advertisements pushing bankruptcy reform in publications read by members of Congress such as Roll Call and Congress Daily. *Id.* The financial industry also placed ads in national newspapers and funded studies to support bankruptcy reform. Bartlett & Steele, *supra* note 39.

<sup>113</sup>Bartlett & Steele, *supra* note 39; Common Cause, BANKRUPTCY LEGISLATION ENTERS FINAL STAGES; CONSUMER CREDIT INDUSTRY GAVE \$7.5 MILLION IN CAMPAIGN CONTRIBUTIONS IN 1999, ACCORDING TO COMMON CAUSE 1 (2000). Common Cause also noted that the five “shadow conferees” on bankruptcy reform received \$854,789 from creditor interests. *Id.* at 3-4.

<sup>114</sup>Bankruptcy Abuse and Consumer Protection Act of 2001, *Hearings Before the House Comm. on the Judiciary on H.R. 333*, *supra* note 93, at 485 (The Lloyds provision was ultimately taken out.).

<sup>115</sup>Senator Feingold criticized the influence of special interests upon bankruptcy reform, stating “[w]e have no idea what other provisions written by the credit card companies will be sneaked onto that bill.” Hoover, *supra* note 10, at 21.

<sup>116</sup>147 CONG. REC. S1925, S1950 (2001). One wonders how a court is to discern congressional intent when much of Congress’s work on the statute was secret. When parties ignore congressional intent in bankruptcy it undermines stability, increases costs, and leads to interpretive disputes. Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court’s Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 177-79 (2000). Interpretive disputes are particularly problematic in corporate bankruptcy. *Id.* When interpretive disputes foster litigation, the litigation expenses detract from the estate’s already limited resources. *Id.* The cost of increased litigation can make the difference between reorganization and liquidation. *Id.* “Every dollar spent litigating is a dollar removed from an asset base that is already inadequate to satisfy claims.” *Id.* at 178. In short, a statute where Congress hides its legislative intent may be particularly problematic when the statute relates to corporate bankruptcy.

The Senate had requested a conference in August 1999 on legislation to enhance security of U.S. missions . . . . That did not proceed. On October 11, 2000, the House appointed conferees not from the committee with jurisdiction over any embassy security issues, but from the House Judiciary Committee. Then a few hours later, out of nowhere, the leadership filed a conference report that strikes every aspect of the underlying legislation on which the two Houses had gone to conference and put in this wholly unrelated matter with reference to a bankruptcy bill that had not even passed. It had only been introduced that day. There was no debate, nothing. It is like: Whoops, open the closet door, let the special interests out, slam it down, and please pass it . . . . [This was] an autocratic, behind-closed-doors, undemocratic process, and it makes a mockery of the legislative process.<sup>117</sup>

Afterwards, the House voted 398-1 for an open Committee hearing. But two hours after the House vote, the sham conference report was filed.<sup>118</sup> Senator Wellstone deplored the process:

Let me say a few words about the process on this legislation, which is terrible. The House and Senate Republicans have taken a secretly negotiated bankruptcy bill and stuffed it into the State Department authorization bill in which not one provision of the original bill remains. Of course, State Department authorization is the last of many targets. The majority leader has talked about doing this on an appropriations bill, on a crop insurance bill, on the electronic signatures bill, on the Violence Against Women Act. So desperate are we to serve the big banks and credit card companies that no bill has been safe from this controversial baggage.

We are again making a mockery of scope of conference. We are abdicating our right to amend legislation. We are abdicating our right to debate legislation. And for what? Expediency. Convenience.

However, I am not sure that we have ever been so brazen in the past. Yes we have combined unrelated, extraneous measures into conference reports. Usually because the majority wishes to pass one bill using the popularity of another. Putting it into a conference report makes it privileged. Putting into a conference report makes it unamenable. So they piggy back legislation. Fine. But this may be the first time in the Senate's history where the majority has hollowed out a piece of legislation in conference--left nothing behind but the bill number--and inserted a completely unrelated measure . . . . The game is how to move legislation through the Senate with as little interference as possible from actual Senators."<sup>119</sup>

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<sup>117</sup>146 CONG. REC. S11683, S11692 (2000).

<sup>118</sup>*Id.*

<sup>119</sup>146 CONG. REC. S11683, S11687 (2000).



## V. BANKRUPT EMBASSIES?

The use of the American Embassy Security Act to railroad the bankruptcy bill through Congress is so extraordinary and remarkable that it bears further examination. Commenting on this unprecedented procedural ploy, Senator Leahy inquired:

[T]his was not a case where . . . the embassies were all going bankrupt? The embassy in London or in Moscow or, heaven forbid, in Dublin, might be in bankruptcy court in the Southern District of New York? That is not the case?<sup>120</sup>

Senator Wellstone replied, "I say to my colleague from Vermont that argument has not been made. So far, that argument has not been made."<sup>121</sup>

Senator Leahy continued,

I thank my friend from Minnesota. I appreciate his pointing this out. I just want students who might look at this afterward and wonder what bankruptcy has to do with embassies to go back and read what the distinguished Senator from Minnesota says, which is, of course, that it has absolutely nothing to do with embassies. It is a parliamentary trick to get a piece of special interest legislation through.<sup>122</sup>

Here is how bankruptcy reform was substituted for the American Embassy Security Act: Representative Chabot offered a motion to agree to the conference.<sup>123</sup> Then he yielded all the time to himself.<sup>124</sup> In effect, he would have denied the minority time to debate the bill.<sup>125</sup> Representatives from the minority strenuously objected. Representative Conyers pointed out that it is traditional that the minority receive half of the time for debate.<sup>126</sup> An agreement was reached that the minority would have ten minutes of time (instead of the thirty minutes it would ordinarily be entitled to.)<sup>127</sup> Representative Gekas indicated that not permitting the minority to debate was acceptable because of a prior gentleman's agreement.<sup>128</sup> However, at least one member of the House was not aware of any such prior agreement.<sup>129</sup> Then, Representative Conyers noted that "the State Department authorization has already been enacted." An excerpt from the exchange that followed is informative:

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<sup>120</sup> 146 CONG. REC. S11683, S11692 (2000).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> 146 CONG. REC. H9788, H9788 (2000).

<sup>124</sup> *Id.*

<sup>125</sup> 146 CONG. REC. H9788, H9788-89 (2000) (statements of Reps. Nadler, Conyers, and Gejdenson).

<sup>126</sup> 146 CONG. REC. H9788, H9788 (2000).

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

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

<sup>129</sup> 146 CONG. REC. H9788, H9789 (2000).

Mr. CONYERS. I could give the gentleman the answer as well, but the question is, is this bill before us merely a vehicle to enact the bankruptcy provisions?

Mr. GEKAS. No, not merely.

Mr. CONYERS. Not merely. What else?

Mr. GEKAS. It depends on what the word “else” means and what “is” means. But at this point it is not merely to put in the bankruptcy.

Mr. CONYERS. Yes that is very good.

Mr. Speaker, this is a very poor process, as everybody on the floor has already noted. This is totally against tradition, to attempt to move this measure of bankruptcy into a measure that has already been passed into law. This is incredible . . . .<sup>130</sup>

Later, Representative Nadler inquired of Representative Gekas “[w]hat on earth does this have to do with the State Department authorization?”<sup>131</sup> The response of Representative Gekas merits careful reading: “it has to do with the search for better government within the Congress of the United States, in the realm of the State Department and in the realm of bankruptcy reform, and for the good of our people who demand action on the State Department and on bankruptcy reform.”<sup>132</sup> To this, Representative Nadler replied “[i]n other words, we are using the State Department Bill for something that has nothing to do with the State Department, because we cannot find an honest way under the rules of the House to do this.”<sup>133</sup>

Representative Nadler attempted to get the majority to make a “gentleman’s commitment” that the rules of the House would be observed and the conference committee meetings would be open to the public.<sup>134</sup> He sought a pledge from the majority that they would carry out an open conference committee meeting.<sup>135</sup> And the majority’s response? Representative Gekas equivocated.<sup>136</sup> The Chairman of the Committee on the Judiciary apparently did not care to comment at all.<sup>137</sup>

Representative Nadler offered a motion to instruct the conferees that all bankruptcy reform conference committee meetings “be open to the public and to the print and electronic media;” and “be held in venues selected to maximize the

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<sup>130</sup>*Id.*

<sup>131</sup>146 CONG. REC. H9788, H9790 (2000).

<sup>132</sup>*Id.* Representative Boucher later stated that “procedural hurdles in the Senate” necessitated the unprecedented State Department bill substitution. *Id.* at H9791.

<sup>133</sup>146 CONG. REC. H9788, H9790 (2000).

<sup>134</sup>146 CONG. REC. H9788, H9792 (2000).

<sup>135</sup>146 CONG. REC. H9788, H9793 (2000).

<sup>136</sup>146 CONG. REC. H9788, H9792 (2000).

<sup>137</sup>146 CONG. REC. H9788, H9793 (2000).

capacity for attendance by the public and the media.”<sup>138</sup> He was particularly concerned because previous iterations of bankruptcy reform had been in secret:

[I]f we are sending this bill to a conference committee, it should be a real conference committee, not the sham, shadow conference . . . we had 2 years ago, where after a ceremonial opening . . . everything else was done in camera . . . . If the spirit of democratic procedure with a small “d,” . . . is to be upheld, then the conference committee ought to be a real committee. There ought to be meetings. The meetings ought to be held in a room with chairs and seats and space for the media . . . as is . . . . uniformly the case with the rules of the House for committee meetings.<sup>139</sup>

Representative Nadler concluded that “the meetings of the conference committee should be in conformance with the normal practices, open meetings, and the bill should be a result of open deals openly arrived at, to paraphrase Woodrow Wilson.”<sup>140</sup>

And how do proponents of the bankruptcy reform debacle justify their secret approach? Expediency. In regards to the shadow conference, Senator Daschle remarked that it “seem[ed] to be the most efficient way of resolving this matter.”<sup>141</sup>

#### VI. SENATE RULE XXVIII

Senator Wellstone noted that “[c]onference reports are privileged. It is very difficult for a minority in the Senate to stop a conference report as they can with other legislation. That is why these conference reports are being used in this way, and that is why the rules are supposed to restrict their scope.” He noted that such a procedural move has only been possible since 1996, when the Senate changed Rule XXVIII which had limited the scope of a conference. Prior to the repeal of Rule XXVIII, the Senate had the power to strike extraneous pieces of legislation inserted by a conference Committee. At the time of the repeal, Senator Kennedy argued against the change, “[Conference] reports cannot be amended. So conference committees are already very powerful. But if conference committees are permitted to add completely extraneous matters in conference . . . conferees will acquire unprecedented power. They will acquire the power to legislate in a privileged, unreviewable fashion on virtually any subject. They will be able to completely bypass the deliberative process of the Senate.”<sup>142</sup>

Senator Daschle unsuccessfully attempted to get the prior version of Rule XXVIII reinstated in 1999. At the time, he stated that Rule XXVIII

is a complete emasculation of the process that the Founding Fathers had set up . . . . If you were to write a book on how a bill becomes a law, you would need . . . . a comic book because it is hilarious to look at the lengths

<sup>138</sup>146 CONG. REC. H9788, H9791 (2000).

<sup>139</sup>146 CONG. REC. H9788, H9791 (2000).

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

<sup>141</sup>*Regular Media Briefing With Senate Minority Leader Tom Daschle (D-SD)*, FEDERAL NEWS SERVICE, April 10, 2000.

<sup>142</sup>146 CONG. REC. S11683, S11687 (2000).

we have gone to thwart and undermine and . . . destroy a process that has worked so well for 220 years.<sup>143</sup>

Prior to bankruptcy reform, this change was used only three times for appropriations bills.<sup>144</sup>

Senator Wellstone summed up the bankruptcy “sham conference” as “a complete emasculation of the process that the Founding Fathers had set up.”<sup>145</sup> The Senator added that it was “a complete mockery of the legislative process. We have taken a State Department embassy bill and gutted it. There is not a word left; there is only a number. Instead, you had a bankruptcy bill put in, completely unrelated . . . without the deliberation, without the debate, without the ability to offer an amendment. This is not the way we legislate. This is the Senate at its very worst.”<sup>146</sup> Senator Wellstone also warned that Congress may be on “the road toward a virtual tricameral legislature – House, Senate, and conference committee.”<sup>147</sup> And while the House and Senate have the constitutional power to amend legislation passed by the other house, “measures adopted by the all-powerful conference committee are not amendable.”<sup>148</sup> Senator Feinstein concluded that “[t]he bankruptcy Conference Report . . . is a case study of how not to govern. There was no conference; this report emerged as the product of negotiations held exclusively between House and Senate Republicans.”<sup>149</sup>

#### VII. A LEGISLATURE’S DUTY TO EXPLAIN

Some commentators assert that legislatures have a normative duty to explain to the public the statutes they enact.<sup>150</sup> The duty to explain legislation stems from the respect Congress owes to the public.<sup>151</sup> A legislature that enacts legislation without explaining its actions “asserts superiority over and lack of accountability to the citizenry.”<sup>152</sup> Such a legislature effectively issues an unexplained mandate to command its citizens.<sup>153</sup> This denies basic human dignity.<sup>154</sup> In the words of Professor Laurence Tribe, “[L]aws, unlike naked commands must be understandable

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<sup>143</sup>*Id.* (statement of Senator Wellstone, *quoting* 145 CONG. REC. S9199-01, S9207 (1999) (statement of Senator Daschle)).

<sup>144</sup>146 CONG. REC. S11683, S11687 (2000).

<sup>145</sup>146 CONG. REC. S11683, S11687 (2000).

<sup>146</sup>146 CONG. REC. S11683, S11691 (2000).

<sup>147</sup>146 CONG. REC. S11683, S11687 (2000).

<sup>148</sup>*Id.*

<sup>149</sup>146 CONG. REC. S11683, S11727 (2000).

<sup>150</sup>Bell, *supra* note 7, at 9-10.

<sup>151</sup>*Id.* at 9. Commentators also argue that the First Amendment gives citizens a right to access information about legislative debate. *Id.* at 15. *See infra* note 326, at 71.

<sup>152</sup>Bell, *supra* note 7, at 11.

<sup>153</sup>Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 348, 353 (1982).

<sup>154</sup>*Id.*

. . . [A] citizen whose basic liberty is subject to control is always entitled to some answer.”<sup>155</sup> Ultimately, a clandestine legislative process is inconsistent with the Founders’ notion of a government which “derives all its powers directly or indirectly from the great body of the people . . . .”<sup>156</sup>

Commentators also argue that there is a “right to be told why,”<sup>157</sup> that “other people are entitled to be treated as autonomous and free beings rather than as manipulable things,”<sup>158</sup> and that this is “a commitment that has informed . . . the entire Western liberal tradition.”<sup>159</sup> This includes a right not to be misled by the legislature. When a legislature does its work in secret, it is difficult for the public to monitor the legislature’s work.<sup>160</sup> If citizens are unaware of the reasons for legislative enactments, they cannot effectively lobby the legislature. Nor can they exercise their constitutional right to petition the legislature.<sup>161</sup> Citizens subjected to a legislature that deliberates in secret are also unable to judge the accuracy of assumptions underlying legislative decisions.<sup>162</sup>

Professor Martha I. Morgan makes a strong case for a requirement that legislatures explain the reasons for their laws. She states that “[i]f voters are to make informed judgments concerning governmental decisions they must know why decisions have been reached.”<sup>163</sup> In short, “[e]ffective self-government is dependent upon a well informed public.”<sup>164</sup> Here, where the public cannot watch the bankruptcy laws being made profound questions arise about the legitimacy of the law. Since the legitimacy of a policy rests upon the consent of the governed, “excessive or questionable efforts by government to manufacture consent of the governed call the legitimacy of its action into question.”<sup>165</sup> In short, “the democratic character of any particular statute lies in the deliberative process it must undergo before becoming law. To deny any effectiveness to the process of deliberation is to deny that law’s democratic nature.”<sup>166</sup> A Congress that skips the deliberation, debate, and reports typically found in legislative history is a Congress that shirks its

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<sup>155</sup>Bell, *supra* note 7, at n.52, quoting Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 302 (1975).

<sup>156</sup>THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

<sup>157</sup>Bell, *supra* note 7, at 18, quoting Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 503 (2d ed. 1988).

<sup>158</sup>Bell, *supra* note 7, at 19, quoting Mortimer R. Kadish & Sanford H. Kadish, *DISCRETION TO DISOBEY* 12-13 (1973).

<sup>159</sup>*Id.*

<sup>160</sup>Wendy M. Rogovin, *The Politics of Facts: “The Illusion of Certainty,”* 46 HASTINGS L.J. 1723, 1740 (1995).

<sup>161</sup>Bell, *supra* note 7, at 21.

<sup>162</sup>Morgan, *supra* note 153, at 348.

<sup>163</sup>*Id.* at 316.

<sup>164</sup>*Id.* at 349.

<sup>165</sup>*Burt v. Blumenauer*, 699 P.2d 168, 175 (Or. 1985); Bell, *supra* note 7, at n.61.

<sup>166</sup>Slade, *supra* note 9, at 190.

constitutional responsibility and dodges its democratic duty. “[D]emocracy in this republic lies in the details, the extensive process an idea must undergo before it becomes law - - to the extent a statute is democratic, it is only so because of the processes necessary to produce it.”<sup>167</sup>

The Federalist Papers demonstrate that the Framers designed Congress to “preclude agreement on unprincipled, expedient statutes and allow the enactment of only well-considered statutes designed to further the public good.”<sup>168</sup> The Framers intended for legislative debate and compromise to act as safeguards of minority rights.<sup>169</sup> Thus, the Framers designed the American legislative process to be a process of “mediation, compromise, and reconciliation of differing views and opinions.”<sup>170</sup> The Constitution’s bicameralism and presentment requirements were designed to facilitate reasoned and deliberate decision making.<sup>171</sup> Furthermore, the Senate was especially designed to facilitate reasoned, deliberate legislation.<sup>172</sup> Overall, the Framers intended for Congress to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>173</sup> Underlying these considerations was the Founders’ central concern with the problem of factions.<sup>174</sup> Controlling the special-interest powers of factions is a “dominant theme” of the Federalist Papers.<sup>175</sup> As Madison stated in *The Federalist*, “[A]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”<sup>176</sup>

Professor Bernard W. Bell argues that courts should view the enactments of legislatures and legislative history as the action of an institution.<sup>177</sup> But for an action

<sup>167</sup>*Id.* at 190 (footnote omitted).

<sup>168</sup>Bell, *supra* note 7, at 37. See *THE FEDERALIST*, *supra* note 156, at Nos. 10, 51 (James Madison).

<sup>169</sup>Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 *CORNELL L. REV.* 527, 535 n.30 (1994).

<sup>170</sup>*Id.* at n.30, quoting James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 *CORNELL L. REV.* 881, 902 (1970).

<sup>171</sup>Bell, *supra* note 7, at n.130.

<sup>172</sup>*Id.*

<sup>173</sup>*THE FEDERALIST*, No. 10, *supra* note 156, at 82 (James Madison). Although Madison recognized the risk that “[m]en of factious tempers . . . may, by intrigue . . . betray the interests of the people.” *Id.* Madison even recognized that such a faction could arise with respect to bankruptcy: “Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other.” *Id.*

<sup>174</sup>Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 223 (1986); Cass R. Sunstein, *Interest Groups In American Public Law*, 38 *Stan. L. Rev.* 29, 40-44 (1985).

<sup>175</sup>Macey, *supra* note 174, at 243-44.

<sup>176</sup>*THE FEDERALIST* No. 10, *supra* note 156, at 77 (James Madison).

<sup>177</sup>Bell, *supra* note 7, at 79.

to be credited to the institution of Congress, it should be made known to all members of Congress.<sup>178</sup> Some commentators even assert that a legislature's role in publicizing government activities is more important than its legislative role.<sup>179</sup> In the words of James Madison, "the right of freely examining public characters and measures, and of communication thereon, is the only effectual guardian of every other right . . . ."<sup>180</sup> Madison's statement is echoed by the dissent in *Capital Cities Media, Inc. v. Chester*, which warned that granting Congress unfettered discretion to

decide for us what we need to know . . . . carries with it the seeds of destruction of participatory democracy, for it places in the hands of those chosen for positions of authority the power to withhold from those to whom they should be accountable the very information upon which informed voting should be based.<sup>181</sup>

#### VIII. "THE PEOPLE HAVE A RIGHT TO KNOW!"<sup>182</sup>

Many modern commentators including Alexander Meiklejohn,<sup>183</sup> David Mitchell Ivester, Martha I. Morgan, Bernard W. Bell, and Woodrow Wilson have observed that Americans have a right to know the workings of their government. This right lies in the "basic principle that self government requires the public to be informed of the activities of the government."<sup>184</sup> But the origins of the right to know stretch at

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<sup>178</sup>*Id.*

<sup>179</sup>*Id.* at n.46, citing WOODROW WILSON, CONGRESSIONAL GOVERNMENT 198 (2d ed. 1885) and JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 81-84 (Curran V. Shields ed., 1958).

<sup>180</sup>4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 576 (J. Elliot ed. 1836) [hereinafter ELLIOT].

<sup>181</sup>*Capital Cities Media Inc., v. Chester*, 797 F.2d 1164, 1186 (3rd Cir. 1986) (Gibbons, J., dissenting). Judge Gibbons also noted that "[o]ne cannot vote to throw the rascal out until informed of rascality." *Id.* at 1186. See *infra* notes 323, 405-407, 415, 416, 420, 424 for more discussion of *Capital Cities*.

<sup>182</sup>When newspapers undertook organized activities in the 1950's to crusade for open meetings, their rallying cry was "[t]he people have a right to know!" *Open Meeting Statutes*, *supra* note 5, at 1199. Another commentator attributes the origin of the term "right to know" to Kent Cooper, the Executive Director of the Associated Press in 1945. Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237 n.1 (1995).

<sup>183</sup>ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 95-96 (1948); David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 n.51 (1977). Meiklejohn's writings have been "enormously influential" upon the Supreme Court. *Capital Cities Media, Inc. v. Chester*, 797 F.2d at 1183 n.6. (Gibbons, J., dissenting) (listing thirteen Supreme Court opinions which refer to Meiklejohn).

<sup>184</sup>Michael F. DiMario, *Remarks Before the Conference on Government Information Issues in the 21st Century on the Foundations of Federal Public Access Policy* (Sept. 17, 1999), in ADMINISTRATIVE NOTES, NEWSLETTER OF THE FEDERAL DEPOSITORY LIBRARY PROGRAM Vol. 20, no. 17 (1999).

least as far back as 1644.<sup>185</sup> John Milton, in his *Areopagitica*, argued against Parliament's licensing of the press.<sup>186</sup> One of the issues in the English struggle over a free press was the freedom to publish parliamentary debates.<sup>187</sup> During that era, "the argument was repeatedly made that people need to know and have a right to know about the affairs of government."<sup>188</sup>

Ivester posits that the right to know is an independent constitutional right.<sup>189</sup> This right is implicit in the structure of our system of self governance.<sup>190</sup> "The sovereign people, by virtue of their station as the fundamental source of all governmental power, have an inherent right to know what their government is doing."<sup>191</sup> Ivester reasons that "[a]lthough pure democracy and an absolutely free flow of information are difficult, if not impossible, to achieve, the practical relationship between the two nevertheless remains unchanged. To the extent that a system shares responsibility for decisionmaking, information must also be shared."<sup>192</sup> A government which shares no information with its populace is authoritarian, contrary to the American tradition of self governance.<sup>193</sup> Self governance is impossible if the people have inadequate knowledge of their government's actions.<sup>194</sup>

Ivester convincingly demonstrates that the Founders viewed the right to know as fundamentally necessary to our structure of self government.<sup>195</sup> "[I]f the people are to function as a rational electorate, they must have adequate knowledge of what the government is doing."<sup>196</sup> However, critics of the right to know argue that there is no constitutional right to know since it is not explicitly spelled out by the Constitution.<sup>197</sup> This argument fails for two reasons. First, American jurisprudence

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<sup>185</sup>DiMario states the origins of the right to know stem as far back as Johann Gutenberg's development of movable type in 1455. *Id.* Movable type also fostered the concept of public access to government information. *Id.*

<sup>186</sup>Ivester, *supra* note 183, at 125, citing J. MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), in PRIMER OF INTELLECTUAL FREEDOM 169 (H. Jones ed., 1949).

<sup>187</sup>Ivester, *supra* note 183, at 125.

<sup>188</sup>*Id.*

<sup>189</sup>*Id.* at 109.

<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at n.34, citing *Pell v. Proconier*, 417 U.S. 817, 839-41 (1974) (Douglas, J., dissenting); *Branzburg v. Hayes* 408 U.S. 665, 713-15 (1972) (Douglas, J., dissenting) (further citations omitted).

<sup>192</sup>Ivester, *supra* note 183, at 109.

<sup>193</sup>*Id.*

<sup>194</sup>*Id.* at 115.

<sup>195</sup>*Id.* at 116.

<sup>196</sup>*Id.* at 115 (citation omitted.).

<sup>197</sup>David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 581, 588, 607 (1980); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 501 (1980).



and society recognize many rights that are not specifically enumerated in the Constitution. The right to privacy and the right to travel are but two examples.<sup>198</sup> And of course, the Constitution was enacted with the understanding that it was a limit on government power, and not an exhaustive list of people's rights.<sup>199</sup>

Second, it would be absurd if the Constitution granted Congress the power to withhold information "needed for a responsible exercise of the franchise."<sup>200</sup> After all, "[n]othing could be more irrational than to give the people power, and to withhold from them information without which power may be abused."<sup>201</sup> Under this view, the First Amendment "is not the guardian of mere 'talkativeness,' its aim is to 'prepare the people for an intelligent exercise of their rights as citizens.'"<sup>202</sup> Ivester cautions that there is not enough direct evidence to conclusively show that the people's right to know about governmental action was the purpose behind the First Amendment.<sup>203</sup> However, evidence of political thought at the time shows "the fundamental need for public information about governmental affairs was widely perceived" in England and America.<sup>204</sup> In fact, resentment of legislative secrecy "played a role in fanning the revolutionary flames that swept the colonies."<sup>205</sup>

In short, the inherent constitutional importance of a right to know is demonstrated by many statements made by the Founders and related persons before, during, and after the formation of our Constitution and Bill of Rights.

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<sup>198</sup>Shapiro v. Thompson, 394 U.S. 618 (1968) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1964) (right to privacy). See Ivester, *supra* note 183, at n.51. This raises the possibility that the Court could - and should - make an explicit recognition of the people's right to know the workings (and schemings) of their Congress. The increase in amount and speed of media today (C-SPAN, the internet, etc.) suggest that this argument is even more compelling.

<sup>199</sup>Ivester makes this point. Ivester, *supra* note 183, at n.99 (quoting Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667, 668 (1959) ("like many other fundamental rights, it was taken so much for granted that it was deemed unnecessary to include it.")). And as Alexander Hamilton wrote in THE FEDERALIST, a bill of rights would "contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted . . . . Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" THE FEDERALIST, *supra*, note 148, at No. 84, at 241 (Alexander Hamilton).

<sup>200</sup>Ivester, *supra* note 183, at 117, quoting Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 n.14 (1957).

<sup>201</sup>Ivester, *supra* note 183, at 117 (citations omitted).

<sup>202</sup>*Id.* at 118 (citations omitted).

<sup>203</sup>*Id.* at 124.

<sup>204</sup>*Id.* at 124-25. This is also evidenced by the fact that eighteenth century press in both the colonies and Great Britain defied government bans on reporting the debates of governing bodies. Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990's - An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 n.10 (1993).

<sup>205</sup>Watkins, *supra* note 47, at 271.

## IX. STATEMENTS BY THE FOUNDERS SUPPORTING THE RIGHT TO KNOW

Among the noted figures who have spoken and written on the importance of the public's right to know about governmental affairs are Benjamin Franklin, Thomas Jefferson, John Adams, Patrick Henry, John Marshall, James Wilson, and James Madison.

Benjamin Franklin wrote in 1722 that “[g]overnment . . . the *Trustees of the People* . . . for whose Sake alone all publick Matters are . . . transacted, [must] see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publicly scan’d.”<sup>206</sup> Franklin also wrote that, if freedom of the press meant “the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please . . . .”<sup>207</sup>

In 1734 Andrew Bradford wrote that freedom of the press means “a *Liberty* of detecting the wicked and destructive Measures of *certain Politicians*; of dragging Villany out of it’s [sic] obscure lurking Holes, and exposing it in it’s [sic] full Deformity to Open Day; of attacking Wickedness in high Places . . . .”<sup>208</sup>

In 1747, when the governor of New York attempted to prevent publication of the legislature’s complaint over the appropriation of funds, New York’s legislature unanimously voted that “it is the undoubted Right of the People of this Colony, to know the Proceedings of their Representatives . . . . That any Attempt to prohibit the printing . . . any of the Proceedings of this House, is a infringement of the Privileges of this House and of the People they represent . . . .”<sup>209</sup> Several state constitutions and conventions also demonstrate support for the right to know about public affairs.<sup>210</sup> The right to know was also recognized in practice. The first instance of a legislature’s voting record being officially published in the press occurred with the publication of the division list of the Massachusetts House of Representatives in 1726.<sup>211</sup> By the 1760’s both the Massachusetts and Virginia assemblies had established public galleries.<sup>212</sup>

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<sup>206</sup>Ivester, *supra* note 183, at 120 (citations omitted) (Franklin used the term “Magistrates” to mean public civil officers, not solely judges.)

<sup>207</sup>*Id.* at n.82 (citations omitted).

<sup>208</sup>Ivester, *supra* note 183, at n.80, *quoting* THE AMERICAN WEEKLY MERCURY, Apr. 25, 1734 (further citations omitted).

<sup>209</sup>Ivester, *supra* note 183, at n.80, *quoting* 2 JOURNAL OF THE GENERAL ASSEMBLY OF NEW YORK, 193 (further citations omitted).

<sup>210</sup>Ivester, *supra* note 183, at 129-30. Pennsylvania’s 1776 Constitution stated “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature.” *Id.* at 130 (citations omitted). In 1788, the Pennsylvania Supreme Court held that this clause gives “to every citizen a right of investigating the conduct of those who are intrusted with the public business” *Id.* at 130.

<sup>211</sup>Eugene F. Miller, *From Politics of Trust to Politics of Vigilance*, 19 GA. L. REV. 781, 787(1985) (reviewing J.R. POLE, *THE GIFT OF GOVERNMENT: POLITICAL RESPONSIBILITY FROM THE ENGLISH RESTORATION TO AMERICAN INDEPENDENCE* (1983)); Pole, *supra* note 203, at 121, 151-2.

<sup>212</sup>Miller, *supra* note 211, at 787; Pole *supra* note 203, at 130.

After Shay's rebellion, Thomas Jefferson wrote,

[T]he way to prevent these [errors] of the people is to give them full information of their affairs thro' . . . public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.<sup>213</sup>

In another letter in 1804, Jefferson observed,

[N]o experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact that man may be governed by reason and truth. Our first object should be to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press. It is therefore, the first shut up by those who fear the investigation of their actions.<sup>214</sup>

Correspondence between Chief Justice William Cushing of Massachusetts and John Adams also evinces a belief in the right to know about government's workings. In response to the traditional Blackstonian notion that freedom of the press is solely a freedom from prior restraints, Cushing warned of the tyrannical consequences "if all men are restrained by the fear of jails, scourges and loss of ears from examining the conduct of persons in administration."<sup>215</sup> Cushing added that "it cannot be denied" that "liberty of the press" must include "a free scanning of the conduct of administration and shewing the tendency of it."<sup>216</sup>

In response Adams wrote "Senators are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary."<sup>217</sup>

Further support for the right to know is demonstrated by the circumstances surrounding the Alien and Sedition Acts. The Alien and Sedition Acts of 1798 were enacted when the United States was on the verge of war with France, and "ideas and rumors of French plots and espionage were sweeping the country."<sup>218</sup> Among other things, the Acts outlawed malicious writings against the government. In response to the Alien and Sedition Acts, James Madison - the drafter of the First Amendment - drafted the Virginia Resolutions of 1798, which were passed by Virginia's General

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<sup>213</sup>Ivester, *supra* note 183, at 120, *quoting* letter from Thomas Jefferson to Edward Carrington Jan. 16, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 49 (Boyd ed., 1955).

<sup>214</sup>Ivester, *supra* note 183, at n.59, *quoting* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 576 (A. Koch & W. Peden eds., 1944).

<sup>215</sup>Ivester, *supra* note 183, at n.61, *quoting* *Letters of William Cushing and John Adams*, 27 MASS L.Q. 12-16 (Oct. 1942), *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 147-153 (L. Levy ed., 1966).

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>Ivester, *supra* note 183, at n.63.

Assembly. Madison observed the acts ought to “produce universal alarm” because the acts were “leveled against the right of freely examining public characters and measures[] . . . which has ever been justly deemed the only effectual guardian of every other right.”<sup>219</sup>

John Nicholas of Virginia had warned that if the Alien and Sedition Acts were to pass, “the people will be deprived of that information on public measures which they have a right to receive, and which is the life and support of a free government . . . .”<sup>220</sup> Even supporters of the Alien and Sedition Acts acknowledged that “in Governments like ours, where all political power is derived from the people, and whose foundations are laid in public opinion it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities.”<sup>221</sup> In sum, since the 1700’s there has been a “long history of public opposition to and distrust of a government that operates behind closed doors.”<sup>222</sup>

To be sure, the Founders acknowledged that not every aspect of government could be in the open. In regards to legislative secrecy, Madison stated “[T]here was never any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community.”<sup>223</sup> However, proponents of the secrecy surrounding the bankruptcy bill have failed to explain how an open process for bankruptcy legislation would be “detrimental to the community.” The only thing that openness is detrimental to here is the ability of special interests to push legislation through at the community’s expense.

#### X. THE JOURNAL CLAUSE

The clandestine congressional conduct in efforts to legislate bankruptcy reform raises constitutional concerns. Does a secret conference committee violate the publication requirements of the Constitution’s Journal Clause? The Journal Clause of the Constitution states:

Each House shall keep a Journal of its Proceedings; and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House

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<sup>219</sup>Ivester, *supra* note 183, at 122, *citing* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528-29 (J. Elliot ed. 1901). Madison also stated that “the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.” ELLIOT, *supra* note 172, at 575.

<sup>220</sup>Ivester, *supra* note 183, at 123, *citing* 8 ANNALS OF CONG. at 2140 (1798)

<sup>221</sup>Ivester, *supra* note 183, at 124, *citing* 8 ANNALS OF CONG. at 930-931 (Mr. Rutledge).

<sup>222</sup>Pupillo, *supra* note 204, at n.10.

<sup>223</sup>Ivester, *supra* note 183, at n.93 (citations omitted).

on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.<sup>224</sup>

What is the meaning of “excepting such Parts as may in their Judgment require Secrecy[?]”<sup>225</sup> Does the Journal Clause grant Congress unfettered discretion as to what legislation and deliberation “require Secrecy[?]” Unfortunately, the Journal Clause is relatively obscure, and neither courts nor commentators have written much about it.<sup>226</sup> So a definitive answer to the above questions cannot be found in case law. However, it is clear that the process of secret conference committees for bankruptcy reform violated the Founders’ intentions as manifested in the Journal Clause.

Although on its face the Journal Clause appears to leave the decision as to what “Parts” of the journal “require Secrecy” wholly up to congressional “Judgment,” it is clear that the Founders did not intend for Congress to arbitrarily conceal important aspects of its proceedings from public view. The wording of the Journal Clause must be viewed in its context. The Journal Clause could have been enacted with different wording, and it underwent several iterations at the Constitutional Convention before reaching its final form.<sup>227</sup> In an earlier version proposed by James Madison and John Rutledge the Journal Clause would have read:

Each house shall keep a journal of its proceedings, and shall, from time to time, publish the same, except such parts of the proceedings of the Senate, *when not acting in its legislative capacity*, as may be judged by that house to require secrecy;<sup>228</sup>

Had this early version of the Journal Clause been enacted, Congress’s obligation to publish its legislative proceedings would be beyond dispute. However, nearly every state at the Convention objected vigorously to the phrase “when not acting in

<sup>224</sup>U.S. CONST. art. I, § 5, cl. 3. The Journal is also addressed in article I, § 7, clause 2 of the Constitution, which provides that when the president vetoes a bill, Congress must enter the president’s objections on the Journal; and that the names of persons voting for and against override of a veto must be recorded on the Journals. U.S. CONST. art. I, § 7, cl. 2. *See* *Prevost v. Morgenthau*, 106 F.2d 330, 335 (D.C. Cir. 1939). In addition to the Journal Clause, the Framers’ desire that the people be informed about their government’s workings is reflected in Article I, Section 9, clause 7 of the Constitution, which provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” U.S. Const. art I § 9, cl. 7. *See* *Capital Cities Media Inc., v. Chester*, 797 F.2d at 1168 (Gibbons, J., dissenting). Furthermore, Article II, Section 3 of the Constitution states that the President “shall from time to time give to the Congress Information of the State of the Union . . .” U.S. Const art. II § 3.

<sup>225</sup>U.S. Const. art. I, § 5, cl. 3.

<sup>226</sup>Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C.L.REV. 879 n.85 (1985). The Journal Clause is also referred to as the publication clause. *Id.* at n.85.

<sup>227</sup>ELLIOT, *supra* note 180, at 238-399; *See also* MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 257-60 (Yale University Press 1966) (1911) [hereinafter “FARRAND”].

<sup>228</sup>JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL 154 (1987); *See also* ELLIOT, *supra* note 180, at 238 (emphasis added).

its legislative capacity.”<sup>229</sup> Their objections were based on the concern that the phrase might grant the Senate the power to act in a capacity outside of its legislative role.<sup>230</sup> Consequently, the phrase “when not acting in its legislative capacity,” was replaced by the phrase “except such parts thereof in [the Senate’s] Judgment require secrecy . . . .”<sup>231</sup> Despite this change in wording, there was unanimous agreement that each House must keep a journal of its legislative proceedings and publish it from time to time.<sup>232</sup>

Moreover, examination of the constitutional debates surrounding the Journal Clause makes it clear that the “Judgment” phrase in the Journal Clause was intended only to allow Congress to keep confidential work related to diplomacy, military preparations, and war.<sup>233</sup> Thus, “the Framers intended to create *only* a narrow band of confidentiality to protect against the disclosure of military and diplomatic secrets.”<sup>234</sup> This echoes the Articles of Confederation, which required monthly publication of the proceedings of the Continental Congress yet contained an exception for treaties, alliances, and military operations.<sup>235</sup>

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<sup>229</sup>ST. JOHN, *supra* note 228, at 154.

<sup>230</sup>FARRAND, *supra* note 227, at 259; ST. JOHN, *supra* note 228, at 154.

<sup>231</sup>FARRAND, *supra* note 227, at 257; ST. JOHN, *supra* note 228, at 154. This substitution only passed by a “narrow 6 to 4 vote with one State divided.” *Id.*, *citing* FARRAND, *supra* note 227, at 260 (Yet Elliot states that the delegates struck the phrase “when it shall be acting in its legislative capacity[.]” and instead inserted the phrase “except such parts thereof as, in their judgment, require secrecy.” ELLIOT, *supra* note 180, at 238. Perhaps Elliot neglected to include the word “not[.]”) Several other proposals to alter the Clause failed. A proposal which would have required only the House to keep a Journal, while allowing dissenting members of the Senate to record dissents, failed. ELLIOT, *supra* note 180, at 238.

<sup>232</sup>ST. JOHN, *supra* note 228, at 154, *citing* FARRAND, *supra* note 227, at 260.

<sup>233</sup>ELLIOT, *supra* note 180, at 72 (“Mr. Steele observed . . . the necessity of publishing their transactions was an excellent check, and that every principle of prudence and good policy pointed out the necessity of not publishing transactions as related to military arrangements and war . . . Mr. Iredell seconded this, by remarking that ‘in time of war it was absolutely necessary to conceal the operations of government; otherwise no attack on an enemy could be premeditated with success, for the enemy could discover our plans soon enough to defeat them - that it was no less imprudent to divulge our negotiations with foreign powers . . . .’) *Id.* at 73. Mr. Perley also cited military considerations as a justification for secrecy, noting that it would have been imprudent for General Washington to publish his military strategies ahead of time. *Id.* at 52.

<sup>234</sup>Raveson, *supra* note 226, at n.85 (emphasis added), *citing* Kaye, *Congressional Papers, Judicial Subpoenas and the Constitution*, 24 UCLA L. REV. 523 (1977); FARRAND, *supra* note 227, at 270. Although a proposal to amend the clause to specifically make the secrecy provisions applicable only to “treaties and military operations” failed. ELLIOT, *supra* note 180, at 238.

<sup>235</sup>ST. JOHN, *supra* note 228, at 154, *citing* CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 430-31 (1937). Article IX of the Articles of Confederation stated “The congress of the united states . . . shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are

In sum, the Founders put the Journal Clause in the Constitution to facilitate the “restraints of public opinion[.]”<sup>236</sup> The Journal Clause is a literal commitment to grant the people the “opportunity of discovering with facility and clearness the misconduct of the persons they trust.”<sup>237</sup> The Journal Clause is a vital aspect of the Constitution because it facilitates the “restraints of public opinion[.]” upon the government.<sup>238</sup>

Nonetheless, delegates were concerned that the revised language in the Journal Clause granted too much leeway to Congress to work in secret. Mr. Widgery expressed concern that under the phrase “‘except such parts as may require secrecy,’ Congress might withhold the whole *journals* under this pretence and thereby the people be kept in ignorance of their doings.”<sup>239</sup> Mr. Gorham reassured Mr. Widgery that “[t]he printers, no doubt, will be interested to obtain the journals as soon as possible for publication, and they will be published in a book, by Congress, at the end of every session.”<sup>240</sup> Mr. Gorham noted secrecy was sometimes necessary, and he provided the example that foreign enemies must not be allowed to learn of the Union’s treaty negotiations.<sup>241</sup> When Mr. Graham asked for an explanation of the words “from time to time,” Mr. Davie answered that “there could be no doubt of . . . [Congress] publishing them as often as it would be convenient and proper, *and that they would conceal nothing but what it would be unsafe to publish.*”<sup>242</sup>

In fact, Oliver Ellsworth observed that the Journal Clause was superfluous, since “[t]he Legislature will not fail to publish their proceedings from time to time - The <people> will call for it if it should be improperly omitted.” (punctuation in the original)<sup>243</sup> In other words, the Founders presumed that people would have it “within their power and ability to monitor and check government secrecy even without an express constitutional provision.”<sup>244</sup>

Patrick Henry feared the Constitution still would not adequately prevent abuse of governmental secrecy: “[t]he liberties of a people never were, nor ever will be,

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above excepted, to lay before the legislatures of the several states.” O’Brien, *supra* note 189, at 591-2, *citing* 19 THE JOURNALS OF THE CONTINENTAL CONGRESS 214 (1912).

<sup>236</sup>Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 768, 757 (2001).

<sup>237</sup>*Id.* at 768-69, *quoting* THE FEDERALIST NO. 70 at 477-78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). However, other commentators argue that the Journal Clause merely emphasizes the accountability of individual legislators. Bell, *supra* note 7, at n.86.

<sup>238</sup>THE FEDERALIST No. 70 at 477-78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), *quoted in* Fitzgerald, *supra* note 236, at 768.

<sup>239</sup>ELLIOT, *supra* note 180, at 52 (emphasis in original).

<sup>240</sup>*Id.*

<sup>241</sup>*Id.*

<sup>242</sup>*Id.* at 72 (emphasis added); *See also* FARRAND, *supra* note 227, at 345 (emphasis added).

<sup>243</sup>FARRAND, *supra* note 227, at 260; Ivester, *supra* note 183, at 132, *citing* 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 408 (J. Elliot ed., 1901)

<sup>244</sup>Ivester, *supra* note 183, at 132.

secure, when the transactions of their rulers may be concealed from them . . . .” Henry understood a legitimate need for secrecy under certain conditions. “[S]uch transactions as relate to military operations . . . I would not wish to be published, till the end which required their secrecy should have been effected. But to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to his country.”<sup>245</sup> Henry criticized the Journal Clause for failing to specify both the frequency of journal publication, and the circumstances under which journals could be kept secret.<sup>246</sup>

Henry also warned that:

The important right of making treaties is upon the most dangerous foundation. The President, and a few senators, possess it in the most unlimited manner, without any real responsibility, if from sinister views, they should think proper to abuse it; for they may keep all their measures in the most profound secrecy, as long as they please. Were we not told that war was the case wherein secrecy was the most necessary? But by the paper on your table, their secrecy is not limited to this case only. It is as unlimited and unbounded as their powers. Under the abominable veil of political secrecy and contrivance, your most valuable rights may be sacrificed by a most corrupt faction, without having the satisfaction of knowing who injured you. They are bound by honor and conscience to act with integrity, but they are under no constitutional restraint.<sup>247</sup>

Henry added “I do not wish that transactions relative to treaties should, when unfinished, be exposed; but it should be known after they were concluded, who had advised them to be made, in order to secure some degree of certainty that the public interest shall be consulted in their formation.”<sup>248</sup>

John Marshall responded to Henry’s fears by reassuring him that in the Constitution, “secrecy is only used when it would be fatal and pernicious to publish the schemes of government.”<sup>249</sup> In fact, “in the most explicit language, one of the most influential members of the Constitutional Convention of 1787 declared before the Convention that the people have a right to know.”<sup>250</sup> James Wilson of Pennsylvania stated “[T]he people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings.”<sup>251</sup>

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<sup>245</sup>*Id.* at 131, *quoting* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170 (J. Elliot ed., 1901)

<sup>246</sup>Ivester, *supra* note 183, at n.96.

<sup>247</sup>ELLIOT, *supra* note 180, at 315-16.

<sup>248</sup>*Id.* at 316.

<sup>249</sup>Ivester, *supra* note 183, at 131, *quoting* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 233 (J. Elliot ed., 1901)

<sup>250</sup>Ivester, *supra* note 183, at 132-33.

<sup>251</sup>Ivester, *supra* note 183, at 132, *quoting* 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 233, 409 (J. Elliot ed., 1901); ST. JOHN, *supra* note 228, at 154, *citing* MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 260 (1966).



To be sure, this did not mean the Founders intended for Congress to make an exhaustive detailing of every proceeding. Mr. J. Galloway indicated that votes did not need to be recorded for “trifling occasions.”<sup>252</sup> However, Galloway noted that there was “no doubt” that votes would be required “on every occasion of importance.”<sup>253</sup>

Additionally, commentators observe that the Journal Clause imposes a congressional duty to explain.<sup>254</sup> In the words of Justice Story,

The object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts . . . . So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion.<sup>255</sup>

In *Marshall Field & Co v. Clark*, the appellants contested the validity of a statute.<sup>256</sup> They alleged that an entire section of the enacted statute was not contained in the form of the bill authenticated by the signatures of the presiding officers of the respective houses of Congress.<sup>257</sup> The pertinent issue was to determine “the nature of the evidence upon which a court may act when the issue is made as to whether a bill . . . was or was not passed by Congress.”<sup>258</sup> Quoting Justice Story, the Court held that the purpose of the Journal Clause is to foster publicity, facilitate the public development of public opinion, act as a check upon intrigue, and prevent the secret plotting of measures.<sup>259</sup>

However, the Court held that the Journal Clause does not place specific requirements upon Congress in terms of the “particular mode” Congress must employ to record those proceedings not expressly required to be entered on the

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<sup>252</sup>ELLIOT, *supra* note 180, at 73.

<sup>253</sup>*Id.*

<sup>254</sup>Bell, *supra* note 7, at n.86, citing Murial Morrissey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 n.14, 598 (1994).

<sup>255</sup>2 Story, CONST. §§ 840, 841, *quoted in* Field v. Clark, 143 U.S. 649, 670-71 (1892).

<sup>256</sup>*Clark*, 143 U.S. at 669.

<sup>257</sup>*Id.* at 669.

<sup>258</sup>*Id.* at 670.

<sup>259</sup>*Id.* at 670-71.

Journals.<sup>260</sup> Consequently, the level of detail required in the journals is “left to the discretion of the respective houses of Congress.”<sup>261</sup>

The Court noted that there are “certain matters [that] the Constitution expressly requires that they shall be entered on the journal.”<sup>262</sup> Yet the Court then stated that “[t]o what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal we need not inquire.”<sup>263</sup> So the Court dodged an examination of what the “certain matters” are that the “Constitution expressly requires . . . shall be entered on the journal.” The ambiguity of *Marshall Field’s* holding illustrates that a secret conference committee proceeding would probably not be actionable as a matter of black letter law. Nonetheless, it is clear that the “secret plotting of measures” violates the spirit of the Journal Clause. The Framers would likely be astonished to see Congress covering bankruptcy reform with Henry’s “veil of secrecy.”

A critic of this article might argue that secret congressional committees are not fundamentally problematic since the final votes of members of Congress on a bill are recorded. This is not a new argument. In 1738, when members of the House of Commons made a last effort to resist the publication of Parliamentary deliberations, Sir William Wyndham argued to his fellow members that the people “have a right to know somewhat more of the proceedings of this House than what appears upon your votes . . . .”<sup>264</sup> Wyndham noted that a people’s knowledge beyond just a plain voting record “is so necessary for their being able to judge of the merits of their representatives within doors.”<sup>265</sup> To be fully informed about their elected officials, the people must have more knowledge than a plain list of votes. To understand government institutions and to supervise the proceedings, people must be able to actually witness those proceedings.<sup>266</sup> So too the American people must be able to observe congressional deliberation.<sup>267</sup> Merely permitting the people to see a cold transcript of what transpired in Congress is not enough.<sup>268</sup> As Chief Justice Warren Burger wrote, “[P]eople in an open society do not demand infallibility from their

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<sup>260</sup>*Clark*, 143 U.S. at 671.

<sup>261</sup>*Id.* See *U.S. v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990).

<sup>262</sup>*Clark*, 143 U.S. at 671.

<sup>263</sup>*Id.* The Court has not expanded *Marshall Field* beyond its holding, and has pointed out that *Field* does not apply when another provision of the constitution is implicated. *Munoz-Flores*, 495 U.S. 385, at n.4.

<sup>264</sup>Ivester, *supra* note 183, at n.73, citing 10 W. COBBETT, PARLIAMENTARY HISTORY 803 (1812) (further citations omitted).

<sup>265</sup>*Id.*

<sup>266</sup>Cohn, *supra* note 3, at 399.

<sup>267</sup>Or the press, acting as the agent of the American people. The press acts as an “agent” for the public, and provides the public with “information needed for the intelligent discharge of . . . political responsibilities.” *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974); *Richmond Newspapers*, 448 U.S. 555, 584, n.2 (Brennan, J., concurring) (1980).

<sup>268</sup>*Richmond Newspapers*, 448 U.S. at n.22 (Brennan, J., concurring) (stating that availability of a trial transcript is no substitute for public presence at the trial itself).

institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>269</sup>

#### XI. SECRECY IN THE EARLY CONGRESS - AND TODAY

An examination of openness in Congress shows that Patrick Henry’s criticism of the Journal Clause was unfortunately prophetic. While the House of Representatives has met in public since its inception,<sup>270</sup> the same is not true of the Senate. For the first few years of its existence, the Senate had an informal “closed-door policy.”<sup>271</sup>

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<sup>269</sup>*Richmond Newspapers*, 448 U.S. at 572, quoted in Cohn, *supra* note 3, at 399.

<sup>270</sup>*Open Meeting Statutes*, *supra* note 5, at 1203; Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 n.46 (1992), citing Frank Thayer, LEGAL CONTROL OF THE PRESS 33 (1944). *But see* Watkins, *supra* note 47, at n.16 (stating the initial House sessions were attended by reporters in 1789, but that secrecy fell upon the House by 1792).

<sup>271</sup>Cohn, *supra* note 3, at 370-71. Readers with a knowledge of history will no doubt point out that secrecy in deliberation occurred prior to the establishment of Congress. During the Sixteenth and early Seventeenth centuries, the proceedings of the House of Commons were generally kept secret. Pole, *supra* note 211, at 89. Only the outcomes of the proceedings, in the form of laws were officially made known to the public. *Id.* at 89. The House of Commons implemented this secrecy policy largely to check the power of the crown. *Id.* at 90, 95, 141; Watkins, *supra* note 47, at 271. Furthermore the House of Commons generally operated under a fiction of unity, under which the entire House symbolically agreed upon the passage of a bill. Pole, *supra* note 211, at 100.

Nonetheless, upon their return home, House members often made reports of Parliamentary occurrences to their electors. *Id.* at 97-98, 104. Moreover, the ostensible rule of secrecy was frequently departed from. *Id.* at 113-15. By the 1730’s official written accounts of the occurrences in Parliament sold at rate of two thousand copies a day. *Id.* at 105. By 1780, Parliament was almost uniformly open to the public. *Id.* at 113.

In seventeenth century colonial America, assemblies resisted publishing their proceedings. Pole, *supra* note 211, at 119. Like Parliament, colonial assemblies feared interference by the crown. *Id.* at 119. But by the 1730’s, division lists were published in the colonial press. *Id.* at 121, 124, 128. By the time of the Revolution, “the old principle of legislative privacy began to crumble. It was tainted with the same odor as toryism, aristocracy, and oligarchy.” *Id.* at 131.

After the Revolution, state constitutions uniformly provided that legislative journals would be open to the public, and it became customary to admit the public to legislative debates. *Id.* at 131. Despite this, the Continental Congress proceeded to meet in secret. Pole, *supra* note 211, at 132. The Continental Congress implemented its policy of secrecy because it did not wish to appear divided and also because it had to negotiate with foreign powers. *Id.* at 132. Yet this secrecy aroused great suspicion and “destroyed much of the respect” in which the Continental Congress had been held. *Id.* at 132.

At the Constitutional Convention, the press was barred from entry and delegates were enjoined from revealing proceedings to the press. Dyk, *supra* note 270, at 931; *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 n.11 (1977). Yet the secrecy of the Constitutional Convention must be put into context. The Convention was only years after the Revolution, the “times that try men’s souls.” THOMAS PAINE, COMMON SENSE, THE AMERICAN CRISIS I (1776), reprinted in THOMAS PAINE, COLLECTED WRITINGS 91-99 (Eric Foner ed., 1995); see R. B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 883 (1994). The Founders feared that “publication of the Convention debates would provide opponents in the States ammunition to shoot down ratification of the proposed constitution.” ST. JOHN, *supra* note 228, at 155, 200.

This is not to say that all proceedings of the early Senate were secret. The Senate's first rules mentioned neither secrecy nor closed doors.<sup>272</sup> However, the Senate adopted resolutions to make proceedings secret.<sup>273</sup> Senators viewed themselves as an aristocracy, as they were not popularly elected.<sup>274</sup> The Federalist Party, taking an elitist view, preferred to conduct proceedings in secret.<sup>275</sup> On the other hand, the populist Republicans desired open sessions.<sup>276</sup>

The lack of public deliberation by the early Senate led to a great deal of resentment.<sup>277</sup> When the Senate approved the Jay Treaty in executive session in 1794, "the public outcry was deafening."<sup>278</sup> In fact, Senatorial secrecy was the most

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Furthermore, not all the Founders were in favor of the secrecy policy. Thomas Jefferson wrote, "I am sorry that they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions & ignorance of the value of public discussions." *Id.* at 19-20, 140. Benjamin Franklin also disapproved of the secrecy policy (and he required a delegate at his elbow when in public to remind him of the secrecy requirement). *Id.* at 19. James Wilson disliked the secrecy policy, and Luther Martin was "furious" about it. *Id.* at 20, 130. The press also complained of the secrecy policy. *Id.* at 37. Nor was the secrecy policy scrupulously observed. Leaks occurred to some extent. ST. JOHN, *supra* note 220, at 118-19, 129, 132. Secrecy combined with leaks resulted in a public that was often profoundly misinformed as to the state of the Convention. *Id.* at 87, 93, 158-59. This included circulation of the rumor that the delegates planned to make King George's son an elected monarch. *Id.* at 132-33.

Moreover, commentators argue that the secrecy of the Constitutional Convention is "quite irrelevant" because the Journal Clause of the Constitution provides for only limited congressional secrecy. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 206 (Harvard U. Press, 1974), *quoted in* Viet D. Dinh, Book Review, 13 CONST. COMMENT. 346, 349 (1996). In short, during the Constitutional Convention the need for press access to Congress was asserted, those claims were taken seriously, and the Framers viewed them as a relevant concern. Dyk, *supra* note 270, at 933-34.

<sup>272</sup>Cohn, *supra* note 3, at 371.

<sup>273</sup>*Id.*

<sup>274</sup>*Id.*

<sup>275</sup>*Id.* at 370. Members of the Federalist party took the elitist view that Congress was "supposed to discuss, decide, and speak for people[.]" James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 132 (1999). According to Martin, the Federalists saw congressional deliberation to be public "not in the sense of the village commons, open to all, but of a military base. The people own it but this does not mean individuals can traverse it at will." *Id.* at 138. But even the most elitist of the Federalists would likely be appalled to see the intense lobbying carried out to push bankruptcy reform. The Federalist party intended for Congress to be immune from the influence of organized factions, a Congress "set totally above the influence of a surrounding populace." *Id.* at 143 (citation omitted). The Federalist party did not intend for congressional deliberation to be taken over by "small minorities of active but unrepresentative citizens." *Id.* at 182.

<sup>276</sup>Cohn, *supra* note 3, at 370.

<sup>277</sup>*Id.* at 371; Pole, *supra* note 211, at 138 (describing early Senate secrecy as "regressive" in the face of the American people's established interest in knowing the workings of their legislature).

<sup>278</sup>Cohn, *supra* note 3, at 373.

criticized aspect of the Senate in its first five years.<sup>279</sup> Critics accused the Senate of creating plots behind closed doors.<sup>280</sup> Philip Freneau, editor of the *National Gazette*, launched a campaign to open the Senate's sessions.<sup>281</sup> Freneau observed that "shutting the doors of the legislature upon the people and excluding private citizens from their tables [was] dangerous to liberty and entirely inconsistent with the principle of a free government."<sup>282</sup> Freneau exclaimed "[A]re you freemen who ought to know the individual conduct of your legislators, or [are] you an inferior order of beings incapable of comprehending the sublimity of Senatorial functions, and unworthy to be entrusted with their opinions?"<sup>283</sup>

This increasing suspicion of Senate secrecy led the Senate to construct a public gallery in 1795 and to resolve that the galleries be opened every morning, except for situations which in the Senate's opinion required secrecy.<sup>284</sup> Thus by the mid-1790's, the press actively reported the debates of both houses of Congress.<sup>285</sup> In fact, the right to know had become "a generally recognized view[.]" from which no legislator would admit dissenting.<sup>286</sup> The right to know had become "a new condition of political legitimacy."<sup>287</sup>

Nonetheless, Senators continued to meet in secret sessions and to hold committee meetings in executive session.<sup>288</sup> Senators continued to so meet in part because they "liked to unbutton their vests, light up cigars and stretch out on the leather couches in the Senate chamber" while they debated policy.<sup>289</sup> For instance, the Bank of the United States was created behind closed doors.<sup>290</sup> The clandestine nature of the Bank's creation was criticized.<sup>291</sup>

In 1929 secrecy in Senate deliberations led to a leak which resulted in a false newspaper headline.<sup>292</sup> Reformers argued that open Senate deliberations would foster accuracy in press accounts.<sup>293</sup> Consequently, the Senate voted in 1929 to

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<sup>279</sup>*Id.* at 372.

<sup>280</sup>*Id.*

<sup>281</sup>*Id.* at 371.

<sup>282</sup>*Id.* at n.34, quoting Gerald L. Grotta, *Philip Freneau's Crusade for Open Sessions of the U.S. Senate*, JOURNALISM Q. 670 (Winter 1971).

<sup>283</sup>Cohn, *supra* note 3, at 371, citing Grotta, *supra* note 282, at 669.

<sup>284</sup>Cohn, *supra* note 3, at 372.

<sup>285</sup>Miller, *supra* note 211, at 785; Pole, *supra* note 211, at 138-39.

<sup>286</sup>Pole, *supra* note 211, at 140.

<sup>287</sup>*Id.*

<sup>288</sup>Cohn, *supra* note 3, at 373.

<sup>289</sup>*Id.*

<sup>290</sup>*Id.* at n.32.

<sup>291</sup>*Id.*

<sup>292</sup>*Id.* at 375 (referring to inaccurate front page headline from 1929).

<sup>293</sup>*Id.*; see also *Open Meeting Statutes*, *supra* note 5, at 1201 (observing that leaks from closed deliberations are often "incomplete and slanted according to the views of the informant.

reverse the presumption of Senate secrecy.<sup>294</sup> All executive sessions were to be open, unless the Senate voted specifically to shut the doors.<sup>295</sup> From 1929 to 2000, the Senate held fifty-three executive sessions with closed doors in which it discussed impeachment, and classified and national defense issues.<sup>296</sup> As recently as the early 1960's, one third of Senate committee meetings were closed.<sup>297</sup> However, committee sessions have been "routinely open to the public" since the mid-1970's.<sup>298</sup>

Today, it would seem that it is customary that Congress works in the open. After all, C-SPAN 2 has provided live "gavel-to-gavel" coverage of every public Senate session since 1986.<sup>299</sup> Nonetheless, some recent incidents of congressional secrecy have engendered substantial criticism. These recent incidents demonstrate that the secrecy surrounding the bankruptcy reform process is not an aberrant abuse of government power. Among recent examples of congressional secrecy are the 2001 tax cut, which was negotiated behind closed doors for two days before Congress's Memorial Day recess.<sup>300</sup> Negotiations on the 1998 Omnibus Budget Bill were also

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To restrict the press to such sources of information is a disservice both to the public, which is misled, and to the officials, who may be judged on the basis of these distorted reports.").

<sup>294</sup>Cohn, *supra* note 3, at 376.

<sup>295</sup>*Id.*

<sup>296</sup>*Id.*

<sup>297</sup>*Open Meeting Statutes, supra* note 5, at 1204.

<sup>298</sup>Watkins, *supra* note 47, at 272.

<sup>299</sup>Cohn, *supra* note 3, at 402. Of course, we are aware of the realities of the political process. "One of the problems with the legislative process today is that its results are often . . . the result of back-room, under-the-table deals between incumbents and special interests." Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 984 (1999). Legislatures commonly act in a deceptive manner, such as enacting a statute to protect an industry's special interest, yet presenting the statute as consumer-protection statute. Bell, *supra* note 7, at 21 n.64; Macey, *supra* note 174, at 232. And it is not unheard of for Congress to pass a statute with a scarce or vague legislative history. See *Kosak v. United States*, 465 U.S. 848, 855-47 (1984); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 116 n.7 (2d Cir. 1984), *cert. denied*, 109 S. Ct. 305 (1988). In fact, legislators are often unaware of the contents of a bill they vote for. See George Hager, *House Passes Spending Bill; Massive Omnibus Measure Larded With Pet Projects*, WASHINGTON POST, Oct. 21, 1998, at A01 (discussing House members' ignorance of the contents of a massive budget bill weighing forty pounds and quoting Rep. Peter A. DeFazio's observation that "half the members couldn't even lift it, let alone read it.").

Moreover, "[m]ost political maneuvering, legislative negotiation, and compromise takes place in circumstances where no official records are kept - at caucuses, leadership meetings . . . and private conferences." Bell, *supra* note 7, at n.273. "Indeed, strategic manipulation of rules by crafty legislators may ensure the passage of bills that might otherwise fail." Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341, 1346 (1990). But when, as with bankruptcy reform, congressional secrecy and manipulation of the rules rise to the level of constitutional import, it is not just politics as usual.

<sup>300</sup>Cohen, *supra* note 48.

held behind closed doors.<sup>301</sup> Nor is the problem of secrecy facilitating the questionable insertion of provisions into legislation unique to bankruptcy reform - Senator John McCain pointed out that the secrecy on the 1998 budget negotiations facilitated the insertion of a 52-page long list of wasteful expenditures, including a \$750,000 grant for grasshopper research in Alaska.<sup>302</sup> Consider also the \$50 billion tax break for the tobacco industry which was anonymously inserted into revenue legislation in 1997.<sup>303</sup>

Of course there is also the recurrent Senatorial practice of placing an anonymous secret "hold" upon a proposed nominee or action that a Senator disapproves of. Despite Senate efforts to end this secret practice,<sup>304</sup> the practice continues.<sup>305</sup> Moreover, there is some indication that in the wake of September 11th terrorist attacks, security concerns may be improperly used to excuse a reversal of the decades-long trend towards open government.<sup>306</sup>

The congressional secrecy which has received the most criticism in recent years involved the secret Senate debates and closed deliberations during the impeachment trial of former President Clinton.<sup>307</sup> Senators opposed to secrecy in the impeachment

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<sup>301</sup>John McCain, Editorial, *A Budget We Should Be Ashamed Of*, THE NEW YORK TIMES, Oct. 25, 1998, at section 4, 17; Denning & Smith, *supra* note 299, at 959.

<sup>302</sup>McCain, *supra* note 301; Denning & Smith, *supra* note 299, at n.18. *See id.* at 991 (criticizing secrecy with which "pork" appropriations are added to bills); Hager, *supra* note 291.

<sup>303</sup>Senator Russell Feingold, *The Supreme Issue: Wisconsin's Leadership in Government Reform*, 1998 WIS. L. REV. 823, 826 (1998) (mentioning a \$50 billion tax break for the tobacco industry anonymously inserted into revenue legislation in 1997).

<sup>304</sup>John Breshnahan, *Senate Leaders End Secrecy of 'Holds'*, ROLL CALL, March 8, 1999.

<sup>305</sup>Helen Dewar, *Senate Has a 'Hold' on Holbrooke; Policy Fails to Curtail Secret Delay Tactic*, THE WASHINGTON POST, July 3, 1999, at A05; *Leahy's Office Denies Hold on Walters Drug Czar Nomination*, THE BULLETIN'S FRONTRUNNER, Nov. 21, 2001; Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000*, 61 OHIO ST. L.J. 1361, 1440. When a secret "hold" is placed, even other senators are often unable to discover the identity of the senator who placed the "hold." Patry, *supra* note 73, at 147-48; *Anonymous Holds Still Slowing Bills in Senate*, THE BULLETIN'S FRONTRUNNER, Nov. 16, 2001.

<sup>306</sup>*See* Michael Y. Park, *Where the Sunshine Laws Don't Shine*, FOX NEWS, Nov. 29 2001, at <http://www.foxnews.com/story/0,2933,39672,00.html> (discussing reactions of Professors Laurence H. Tribe and Samuel Issacharoff to moves towards increased governmental secrecy in Florida, Iowa, and New Hampshire); Brendan Farrington, *Watchdog Groups Criticize Efforts to Close Meetings, Records*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 27, 2001 (discussing efforts to change State Senate rules in Florida to allow secret meetings and even secret votes); Connie Mabin, *Coryn: Lawmakers Should Study Open Records Security Exemption*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 11, 2001 (Texas Attorney General recommending the creation of a security exemption to state sunshine laws).

<sup>307</sup>Cohn, *supra* note 3, at 366, 392. Another example of the abuse of governmental secrecy in policy deliberation (albeit not a congressional abuse) involved the secrecy surrounding the Clintons' President's Task Force on National Health Care Reform. *See* Assoc. of Am. Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. 82, 84, 94 (D.D.C. 1993), *rev'd and remanded*, 337 U.S. 394 (D.C. Cir. 1999). The Administration kept the workings of the Task Force secret in an attempt to avoid press criticism. W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, 7 STAN. L. & POL'Y

process argued that the Senate must not act like a private club, and the public had a right to see how the Senate reached its decisions.<sup>308</sup> Senator Lieberman argued that Americans should be able to watch the impeachment trial “end on a note of rational and thoughtful debate.”<sup>309</sup> There were both Republican and Democrat Senators who agreed on the need for public deliberations.<sup>310</sup> Senator Arlen Specter stated, “[I]t is very important for the American people to understand as fully as possible why we are doing what we are doing.”<sup>311</sup>

## XII. THE SOCIETAL PURPOSE OF THE FIRST AMENDMENT AND ACCESS TO CONGRESSIONAL DELIBERATION

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information . . . relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self government.<sup>312</sup>

If we view the First Amendment as an American commitment to a framework of values, then the First Amendment requires open government.<sup>313</sup> As Justice Brennan observed, the First Amendment “has a structural role . . . in securing and fostering our republican system of self government.”<sup>314</sup> In his dissent in *Saxbe v. Washington Post*, Justice Powell wrote at length of the First Amendment’s “societal function . . . in preserving free public discussion of governmental affairs.”<sup>315</sup> He observed that “[n]o aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny.”<sup>316</sup> Justice Powell quoted then-Solicitor General Robert

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REV. 83, 88 (1995-96). The Task Force kept the names of its 500-odd members secret; and held at least 20 secret meetings and only one quasi-public meeting. *Id.* at 89-90. The secrecy of the Task Force’s deliberations was subject to widespread criticism. Nancy Benac, *White House to Release Secret Documents of Health Task Force*, THE ASSOCIATED PRESS, Aug. 18, 1994. Thus, secrecy was instrumental in the collapse of public support for the plan. Thomas, *supra* note 307, at 84.

<sup>308</sup>Cohn, *supra* note 3, at 392, quoting Senator Tom Harkin.

<sup>309</sup>*Id.* at 393.

<sup>310</sup>*Id.* at 394.

<sup>311</sup>*Id.*

<sup>312</sup>ALEXANDER MEIKLEJOHN, FREE SPEECH 26 (1948) (emphasis in original), quoted in *Saxbe v. Wash. Post*, 417 U.S. 843, 863 n.8 (Powell, J., dissenting).

<sup>313</sup>David A. Anderson, *Metaphorical Scholarship*, 79 CALIF. L. REV. 1205, 1217 (1991), citing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (Harvard University Press, 1990).

<sup>314</sup>*Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

<sup>315</sup>417 U.S. at 862 (Powell, J., dissenting.)

<sup>316</sup>*Id.*



H. Bork's observation that "the First Amendment is one of the vital bulwarks of our national commitment to intelligent self government."<sup>317</sup> Justice Powell added that the First Amendment

embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.<sup>318</sup>

Justice Powell further stated that "this reasoning . . . underlies our recognition in *Branzburg* that 'news gathering is not without its First Amendment protections . . .'"<sup>319</sup> The Justice added that "[b]y enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment."<sup>320</sup> In other words, "these expressly guaranteed freedoms 'share a 'common core purpose of assuring freedom of communication on matters relating to the functioning of government'."<sup>321</sup>

It is clear that the Framers intended for the First Amendment to act as a check on the actions of government officials. In fact, Patrick Henry argued that one of the main reasons necessitating the adoption of a bill of rights was to prevent the abuse of governmental secrecy.<sup>322</sup> The author of the First Amendment, James Madison, repeatedly made statements in Congress indicating that he intended for the First Amendment to restrain the abuse of power by public officials.<sup>323</sup> Madison contrasted Britain's nearly omnipotent Parliament with Congress:

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain but from legislative restraint also; and this exemption, to be effectual must be an exemption, not only from the previous inspection of licensers, but from

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<sup>317</sup>*Id.*

<sup>318</sup>417 U.S. at 862-63 (Powell, J., dissenting)(citations and footnote omitted).

<sup>319</sup>*Id.* at 863, *citing* *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

<sup>320</sup>417 U.S. at 862 (Powell, J., dissenting).

<sup>321</sup>*Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 517 (1984) (Stevens, J., concurring).

<sup>322</sup>ELLIOT, *supra* note 180, at 314-316; *see supra* note 243 and text.

<sup>323</sup>*Capital Cities Media, Inc.*, 797 F.2d at 1184 (Gibbons, J., dissenting) (noting that Madison articulated this justification for the speech-press clause in the House of Representatives on June 8, 1789, in a House debate in 1794, and again in 1799) (citations omitted).

the subsequent penalty of laws . . . . In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both, being elective, are both responsible.<sup>324</sup>

Thomas Jefferson also viewed freedom of the press as putting a “legal check . . . into the hands of the Judiciary.”<sup>325</sup>

Similarly, many modern commentators have written on the importance of the First Amendment in restraining governmental abuses of power.<sup>326</sup> They note that by providing the public with information pertaining to governmental decisions, the press acts as a check on governmental abuse.<sup>327</sup> Professor Vincent Blasi is a noted proponent of this concept of the First Amendment, which gives each citizen a right to hear “all matters relevant to governance.”<sup>328</sup> While this may not mean that all citizens are personally involved in forming public policy, it does envision citizens using their right to vote for officials to veto public policy.<sup>329</sup> The “checking” concept of the First Amendment has been noted by the Court. In *Grosjean v. American Press Co.*, the Court recognized that the “untrammeled press” is a “vital source” of “public information” and stated that “informed public opinion is the most potent of all restraints upon misgovernment. . . .”<sup>330</sup> In *Mills v. Alabama*, the Court stated that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”<sup>331</sup> Moreover, the requirement that a legislator explain her vote facilitates

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<sup>324</sup>James Madison, *quoted in Capital Cities Media, Inc.*, 797 F.2d at 1184 (Gibbons, J., dissenting), *citing* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 569-70 (J. Elliot ed., 1881).

<sup>325</sup>Dyk, *supra* note 270, at 933, *quoting* Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 1788-1789 at 659 (1958).

<sup>326</sup>Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 542 (1977); Margaret S. DeWind, *The Wisconsin Supreme Court Lets the Sun Shine In: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 832 (1988).

<sup>327</sup>Scott A. MacNair, *Is There a Right to View the Dead at Dover? JB Pictures v. Department of Defense: Limits on the Media's Right to Gather Information*, 4 VILL. SPORTS & ENT. L.J. 387, 388 (1997).

<sup>328</sup>Blasi, *supra* note 326, at 524.

<sup>329</sup>DeWind, *supra* note 326, at 832.

<sup>330</sup>*Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

<sup>331</sup>*Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Zurcher v. Stanford Daily*, 436 U.S. 547, 571-72 (1978) (Stewart, J., dissenting) (“[p]rotection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public . . .”). Justice Potter Stewart also has spoken on the importance of the press as a check upon government power. Dyk, *supra* note 270, at 931.

deliberation by the legislature and “induce[s] votes that transcend narrow interests.”<sup>332</sup>

Consequently, this concept of the First Amendment recognizes that governmental restrictions on speech may allow abuses to go unrecognized.<sup>333</sup> So the First Amendment principle of access serves to facilitate the public’s monitoring of government officials.<sup>334</sup> Open meetings of the legislature are essential “because they provide the individual with information to make voting choices, which is the major means by which citizens exert power over their elected officials.”<sup>335</sup> In sum, Madison’s vision of the First Amendment, Meiklejohn’s writings upon the First Amendment’s integral role in self government, and modern ideas of the value of the First Amendment’s value are all “directly involved when those in power in government attempt to withhold information about their activities from the people to whom the government belongs.”<sup>336</sup>

Unfortunately, the Framers’ views of the First Amendment have not yet been fully realized as a matter of black letter law. Nonetheless, over the 20th century, First Amendment jurisprudence evolved into a strong right of access to judicial proceedings.<sup>337</sup> This First Amendment right of access is not absolute.<sup>338</sup> Rather, it is a qualified right, evaluated on a case-by-case basis.<sup>339</sup> A landmark case in the development of the First Amendment right of access is *Richmond Newspapers, Inc. v. Virginia*.<sup>340</sup> *Richmond Newspapers* involved a trial court’s closing of a murder trial to the public.<sup>341</sup> The Supreme Court held that the First Amendment guarantees the right of the press and the public to attend criminal trials.<sup>342</sup> This is because it is a

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<sup>332</sup>Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 943-44 (1988) (citation omitted) (“[t]he requirement of public voting and public explanation restricts the capacity of legislators to vote . . . their own dark urges . . .”)

<sup>333</sup>MacNair, *supra* note 327, at 388.

<sup>334</sup>United States v. Beckham, 789 F.2d 401, 420 (6th Cir. 1986) (Contie, J., dissenting).

<sup>335</sup>DeWind, *supra* note 326, at 832. This is not to say that First Amendment is a perfectly effective restraint upon governmental action. “One of the primary reasons for the public’s failure to rise up in indignation at the special interest nature of certain pieces of legislation is simply the cost of discovering what Congress is doing.” Macey, *supra* note 174, at 256 (citation omitted).

<sup>336</sup>*Capital Cities Media, Inc.*, 797 F.2d at 1184 (Gibbons, J., dissenting).

<sup>337</sup>Cohn, *supra* note 3, at 400.

<sup>338</sup>Hon. William T. Bodoh & Michelle M. Morgan, *Protective Orders in Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and its Constitutional Implications*, 24 HASTINGS CONST. L.Q. 67, 73 (1996).

<sup>339</sup>*Id.*

<sup>340</sup>*Richmond Newspapers*, 448 U.S. 555.

<sup>341</sup>*Id.* at 560.

<sup>342</sup>*Id.* at 575-80. The First Amendment considerations - and the public’s right of access - are especially strong when a criminal trial involves the conduct of government officials. *United States v. Myers (In re Application of National Broadcasting Co.)*, 635 F.2d 945, 952 (2d Cir.1980); *United States v. Shannon (In re the Application of CBS, Inc.)*, 540 F. Supp. 769,

core purpose of the First Amendment to assure “freedom of communication on matters relating to the functioning of government.”<sup>343</sup> Thus, “[f]ree speech carries with it some freedom to listen.”<sup>344</sup> In his concurring opinion in *Richmond Newspapers*, Justice Stevens stated: “the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment . . . . I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government . . . .”<sup>345</sup>

*Richmond Newspapers*’ requirement of openness has undergone an “extraordinary expansion” to require open proceedings in both criminal and civil court proceedings and documents.<sup>346</sup> Subsequent to *Richmond*, the Supreme Court found that the qualified First Amendment right of access to criminal trials extends to transcripts of criminal voir dire proceedings,<sup>347</sup> the testimony of minors in cases involving sexual offenses,<sup>348</sup> and pretrial suppression hearings.<sup>349</sup> Thus, *Richmond* and its progeny stand for the proposition that if a “proceeding has traditionally been open to the public and public access furthers the democratic process, public access to the proceeding is protected by the First Amendment.”<sup>350</sup>

Under *Richmond*, “[w]hether the qualified First Amendment right of access extends to a particular proceeding . . . depends . . . on whether access would secure to the public information relevant to the discussion of governmental activity.”<sup>351</sup> The Court relied upon two considerations to make such a determination.<sup>352</sup> The first consideration is whether access to the proceedings would “contribute to the self governing function and further the democratic process.”<sup>353</sup> This is known as the

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771-72 (N.D. Ill. 1982); *United States v. Martin*, 746 F.2d 964, 969 (3d Cir. 1984); *United States v. Beckham*, 789 F.2d at 421 (Contie, J., dissenting).

<sup>343</sup>*Richmond Newspapers*, 448 U.S. at 574.

<sup>344</sup>*Id.* *Richmond* also noted that the right to listen, observe, and learn when peaceably assembled in public stems from the First Amendment. *Id.* at 578 (citing *Hague v. CIO*, 307 U.S. 496, 519 (1939)).

<sup>345</sup>*Richmond Newspapers*, 448 U.S. at 582-83.

<sup>346</sup>Cerruti, *supra* note 182, at 263.

<sup>347</sup>*Press-Enter. Co.*, 464 U.S. 501.

<sup>348</sup>*Globe Newspaper Co. v. Super. Court*, 457 U.S. 596 (1982).

<sup>349</sup>*Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Waller v. Georgia*, 467 U.S. 39 (1984).

<sup>350</sup>*Bodoh & Morgan*, *supra* note 338, at 71 (citation omitted).

<sup>351</sup>Dan Paul, et al., *The Development and Structure of the First Amendment Right of Access to Government Proceedings and Records*, 625 PLIP at 71, 85 (2000). Whether access should be granted in a particular case depends on “whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589.

<sup>352</sup>Paul, et al., *supra* note 351, at 85.

<sup>353</sup>*Id.*; see *Press-Enter. Co.*, 464 U.S. at 506-08; *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986); *Globe Newspaper Co.*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 582-84 (Stevens, J., concurring); 448 U.S. 584-98 (Brennan and Marshall, JJ., concurring); *Gannett Co.*, 443 U.S. at 400 (Powell, J., concurring).

“access doctrine.” The second consideration is whether the proceeding has historically been open to the public: whether there has been a presumption of access.<sup>354</sup> This is known as the “history prong.”

Following *Richmond*, circuit courts held that civil trials must also be open to the public.<sup>355</sup> Unfortunately, courts have not made wide use of *Richmond*'s doctrine to mandate public access to branches of government other than the judiciary.<sup>356</sup> Nonetheless, the Court has never expressly limited application of the people's right to information about the functioning of their government to the judicial branch.<sup>357</sup> And this right of access is still developing.<sup>358</sup>

One perceived difficulty in extending the First Amendment rationale of *Richmond Newspapers* is that *Richmond* held that the government could not arbitrarily close criminal trials to the public because of the long standing history of open criminal trials, even prior to the adoption of the First Amendment.<sup>359</sup> Historically, Congress has not been as uniformly open to public scrutiny as have criminal trials. However, the tradition of openness need not extend for centuries to satisfy the history prong. In *Cable News Network*, the court found the history prong's requirement of an “enduring and vital tradition of public entree” satisfied by a tradition of television media coverage of presidential activities extending over several past administrations.<sup>360</sup>

Moreover, the history prong's importance is in dispute.<sup>361</sup> Some commentators argue that the history prong has essentially been abandoned in favor of the access doctrine.<sup>362</sup> In *Globe Newspaper Co.*, the Court stated that the historical pattern of public access is important merely because “a tradition of accessibility implies a favorable judgment of experience.” Under this view, one should account for the fact

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<sup>354</sup>Paul, et al., *supra* note 351, at 85; *Press-Enter. Co.*, 478 U.S. at 8; *Press-Enter. Co.*, 464 U.S. at 506-08; *Globe Newspaper Co.*, 457 U.S. at 605.

<sup>355</sup>*See* Westmoreland v. Columbia Broad. Sys., 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc.*, 733 F.2d 1059, 1071 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983).

<sup>356</sup>Cerruti, *supra* note 182, at 263-69.

<sup>357</sup>*United States v. Beckham*, 789 F.2d 401, 418 (6th Cir. 1986) (Contie, J., dissenting); Scott A. MacNair, *supra* note 327, at 399.

<sup>358</sup>Paul, et al., *supra* note 351, at 87.

<sup>359</sup>*Richmond Newspapers*, 448 U.S. at 576.

<sup>360</sup>*Cable News Network v. Am. Broad. Cos., Inc.*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981).

<sup>361</sup>Paul, et al., *supra* note 351, at 85.

<sup>362</sup>Cerruti, *supra* note 182, at 308. *But see* *Capital Cities Media, Inc., v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (arguing history prong is integral). Yet even the majority in *Capital Cities* admitted that “[o]ne could envision a special case . . . where access to governmental proceedings might be deemed so significant to a democratic government that the First Amendment would mandate access even without a showing of a tradition of openness.” 797 F.2d at 1177 (Adams, J., concurring). If Congress - the embodiment of representation in our democracy - is not that special case, then what is?

that the Senate decided to open its doors early in its history, and that secrecy in Congress has been the exception, not the rule.<sup>363</sup>

An alternative to *Richmond's* tests is the balancing test set out in Justice Powell's concurring opinion in *Branzburg v. Hayes*.<sup>364</sup> The balancing test weighs the public's interest in obtaining information against the government's interest in restricting access. *Branzburg's* balancing test was the "primary analytical tool" used by the Court in addressing the media's right of access to penitentiary institutions.<sup>365</sup>

Ultimately, commentators observe that *Richmond Newspapers* and its progeny demonstrate that the First Amendment encompasses a broad array of rights ensuring that citizens can participate in our republican self government.<sup>366</sup> And several courts have found that the First Amendment and *Richmond Newspapers* mandate a right of access to non-judicial proceedings.<sup>367</sup> Unfortunately, there is scarce case law addressing whether the First Amendment doctrine of *Richmond Newspapers* extends to legislative deliberation.<sup>368</sup> Only one federal court has explicitly advocated this view of the First Amendment. In *WJW-TV, Inc. v. Cleveland*, a city council prohibited the press and public from attending a scheduled city council meeting.<sup>369</sup> The council meeting did not discuss privileged or confidential matters.<sup>370</sup> Nonetheless, the city council simply claimed it had a prerogative to forbid the public and press from attending city council meetings.<sup>371</sup> In addressing this issue, the district court held that the press and public have a qualified First Amendment right of access to legislative meetings.<sup>372</sup> The court reasoned that "*Richmond Newspapers* is a case about access not only to criminal trials, but equally to 'matters relating to the functioning of government.'" <sup>373</sup> The court concluded that the qualified right of access to legislative proceedings "is an inescapable consequence of first amendment jurisprudence."<sup>374</sup> The Sixth Circuit vacated *WJW-TV, Inc. v. Cleveland* as moot

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<sup>363</sup>See *supra* notes 270-98 and text.

<sup>364</sup>*Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

<sup>365</sup>Scott A. MacNair, *supra* note 327, at 393.

<sup>366</sup>Paul, et al., *supra* note 351, at 84.

<sup>367</sup>*Cable News Network*, 518 F. Supp. at 1238; *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180, 1186 (10th Cir. 1987).

<sup>368</sup>See Paul, et al., *supra* note 351, at 336-39. A handful of courts have also examined the common law access right to government information. *Id.* at 87.

<sup>369</sup>*WJW-TV, Inc. v. City of Cleveland*, 686 F. Supp. 177 (N.D. Ohio 1988), *vacated on other grounds by*, 870 F.2d 658 (6th Cir. 1989), *re-reported in full*, 878 F.2d 906 (6th Cir. 1989).

<sup>370</sup>*Id.* at 178.

<sup>371</sup>*Id.*

<sup>372</sup>*Id.* at 177.

<sup>373</sup>*WJW-TV, Inc.*, 686 F. Supp. at 178.

<sup>374</sup>*Id.* at 180.

because a state court had found that the city council's closed meetings violated state law and the city's municipal charter.<sup>375</sup>

There are other cases which provide suggestion by analogy for the proposition that it is unconstitutional for Congress to have unfettered discretion to deliberate in secret. *Cable News Network v. American Broadcasting Companies* addressed a White House policy excluding television media from "limited coverage" events that the print media was allowed to attend.<sup>376</sup> The *Cable News Network* court held that the press has a First Amendment right of access to presidential news conferences held in the White House.<sup>377</sup> The court observed that both the press and the public have a qualified First Amendment right of access to news and information concerning the operations and activities of government.<sup>378</sup> Of course, the right is qualified by limiting considerations such as confidentiality, security, orderly process, and spatial limitations.<sup>379</sup>

Following *Cable News Network*, the court in *Society of Professional Journalists v. Secretary of Labor* extended the access doctrine to open up closed hearings held by a federal agency.<sup>380</sup> These formal fact-finding hearings involved the Mine Safety and Health Administration's investigation of a fire in a coal mine which killed 27 miners.<sup>381</sup> Despite the fact that the statute governing the hearings did not require that the Secretary hold the hearings in public, the court held that the hearings must be open.<sup>382</sup> The court based its holding not only on the freedom of the press, but also on the "penumbra of the first amendment guarantees[.]"<sup>383</sup> And it specifically required that the public be granted access to the hearings despite the scarcity of a tradition of openness in administrative hearings.<sup>384</sup> The court observed that historically both civil trials and congressional sessions have been open to the public.<sup>385</sup> Reasoning by analogy, the court held that administrative hearings must also be open to the public.<sup>386</sup>

The court cited to James Madison's famous admonition regarding open government<sup>387</sup> and noted that

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<sup>375</sup>*WJW-TV, Inc.*, 878 F.2d at 909-12, citing *State ex rel. Plain Dealer Publ'g Co. v. Barnes*, 527 N.E.2d 807 (Ohio 1988).

<sup>376</sup>*Cable News Network*, 518 F. Supp. at 1240.

<sup>377</sup>*Id.* at 1238.

<sup>378</sup>*Id.* at 1244.

<sup>379</sup>*Id.*

<sup>380</sup>*Soc'y of Prof'l Journalists*, 616 F. Supp. at 573, remanded as moot, 832 F.2d 1180 (10th Cir. 1987).

<sup>381</sup>*Soc'y of Prof'l Journalists*, 616 F. Supp. at 570.

<sup>382</sup>*Id.* at 572; 30 U.S.C. § 813(b) (1994).

<sup>383</sup>*Soc'y of Prof'l Journalists*, 616 F. Supp. at 573.

<sup>384</sup>*Id.* at 575.

<sup>385</sup>*Id.*

<sup>386</sup>*Id.*

<sup>387</sup>See *supra* note 3 and text.

[o]penness is essential . . . to the proper functioning of democratic processes. Majoritarian pressures are not felt if the majority of the people are unaware or misled about information crucial to their decisions. The cloak of secrecy can be used to hide abuses or disguise mistakes until it is too late to prevent damage from being done. Openness acts as both a preventative and a curative of such abuses.<sup>388</sup>

The court further added,

[I]n our democracy, the people control the government. A shift from the people controlling the government to the government controlling the people is a shift from democracy to totalitarianism. Administrative difficulties such as [the administrative burden of conducting open meetings] are a small price to pay to entrench the procedural safeguards that keep our society from creeping even slightly closer to totalitarianism. Such difficulties pale in the light of the constitutional rights of free speech and a free press.<sup>389</sup>

Although the court in *Society of Professional Journalists* took pains to note that its holding was limited to the facts before it,<sup>390</sup> it is also clear that its reasoning about open government has wide applications. “A right to open proceedings is necessary to prevent any governmental body from abusing the power it is given.”<sup>391</sup>

*Sherrill v. Knight* dealt with the Secret Service’s denial of a White House press pass to a reporter. The D.C. Circuit held that because the White House had made press facilities open to reporters, the First Amendment required that refusal of a White House press pass be based on a compelling governmental interest.<sup>392</sup> The court noted that the case did not involve a claim that the White House must open its doors to the press.<sup>393</sup> Rather, the White House had already made press facilities open to all bona fide reporters.<sup>394</sup> Given that most congressional conference committees are open to the press, and that the Conference Committee for bankruptcy reform was generally closed to the public yet insiders were allowed to attend, it seems that similar First Amendment concerns are raised as in *Sherrill*.

On the other hand, one can stitch together quotes from the Supreme Court in such a way as to imply that there is no First Amendment right of access to legislative proceedings. Cases decided prior to *Richmond Newspapers* took a more restrictive view of the First Amendment.<sup>395</sup> Prior to *Richmond Newspapers*, the Court stated that “public bodies may confine their meetings to specified subject matter and may

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<sup>388</sup>*Soc’y of Prof’l Journalists*, 616 F. Supp. at 577.

<sup>389</sup>*Id.* at 579.

<sup>390</sup>*Id.* at 578.

<sup>391</sup>*Id.* at 576.

<sup>392</sup>*Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977).

<sup>393</sup>*Id.* at 129.

<sup>394</sup>*Id.*

<sup>395</sup>*See Cable News Network*, 518 F. Supp. at 1242.



hold nonpublic sessions to transact business.”<sup>396</sup> Furthermore, Justice Holmes wrote that the “Constitution does not require all public acts to be done in town meeting or an assembly of the whole.”<sup>397</sup> In *Branzburg v. Hayes*, the Court stated, “[I]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>398</sup> And in *Houchins v. KQED, Inc.*, Chief Justice Burger stated, “[T]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”<sup>399</sup> Yet all the above cases were decided prior to *Richmond Newspapers* and they should be viewed as modified by that case.

Furthermore, the Court’s statements in *Houchins v. KQED* must be put into context. In that case a news organization sought to take cameras into a prison - an environment with dramatically different considerations than Congress. Congress does not have the same “penological interests” of “confinement” as a prison.<sup>400</sup> It would be absurd to permit congressional lawmaking to be as enclosed as the “special environment” of a prison.<sup>401</sup>

In *Globe Newspaper Co.*, decided after *Richmond Newspapers*, Justice O’Connor declared in a concurring opinion that she did not interpret the case “to carry any implications outside the context of criminal trials.”<sup>402</sup> She focused on the statement that “it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.”<sup>403</sup> But the deliberations of Congress are at least as important as a criminal trial. In fact, congressional deliberations are more important, as they often involve the enactment of a statute that will directly affect virtually every American. Compare this to a criminal trial which commonly affects only one or several people. Certainly an overhaul of our bankruptcy system impacts more persons than an ordinary criminal trial.<sup>404</sup>

The most outspoken criticism of the people’s right to know is the majority holding in *Capital Cities Media, Inc. v. Chester*.<sup>405</sup> That case involved a state environmental agency’s refusal to allow a newspaper to view documents regarding

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<sup>396</sup>Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n, 429 U.S. 167, 183 n.8 (1976).

<sup>397</sup>*Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

<sup>398</sup>*Branzburg*, 408 U.S. at 684.

<sup>399</sup>*Houchins v. KQED, Inc.* 438 U.S. 1, 19 (1978).

<sup>400</sup>*Id.* at 36 n.29 (Stevens, J., dissenting).

<sup>401</sup>*See Entm’t Network Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1017-18 (S.D. Ind. 2001).

<sup>402</sup>*Globe Newspaper Co.*, 457 U.S. at 611 (O’Connor, J., dissenting).

<sup>403</sup>*Id.* (citing *Richmond Newspapers*, 448 U.S. at 575).

<sup>404</sup>As Senator Feingold commented upon the congressional effort to change the bankruptcy code, “[w]e’re about to fundamentally change a legal system . . . I hope we act wisely.” Shannon D. Murray, *Congressional Bankruptcy Panel Convenes*, THE DAILY DEAL, Nov. 14, 2001.

<sup>405</sup>*Capital Cities Media*, 797 F.2d at 1164.

the state agency's investigation of water contamination from which over four hundred persons had become ill.<sup>406</sup> The Third Circuit held that the newspaper failed to state a First Amendment claim for access because it failed to allege a historical pattern of access to documents at the state environmental agency. Thus the Third Circuit viewed meeting the history prong of *Richmond* as a mandatory requirement, regardless of the other merits of a First Amendment claim of access.<sup>407</sup> Not all courts share this view. In *JB Pictures, Inc. v. Department of Defense*, the D.C. Circuit criticized the *Capital Cities* approach and declined to follow it.<sup>408</sup> Instead, the D.C. Circuit used the balancing test set out in *Branzburg*.<sup>409</sup>

The *Capital Cities Media, Inc.* majority argued that the Founders intended access to government-held information to “depend upon political decisions made by the people and their elected representatives.”<sup>410</sup> Yet the majority's holding utterly failed to address the First Amendment's role in preventing governmental abuse of power. This is an omission for which the dissent strongly criticized the majority's opinion.<sup>411</sup> The dissent noted that the state agency made no demonstration of a compelling interest justifying its secrecy and that the majority consequently “sidestep[ped] its obligation under conventional first amendment jurisprudence to examine the restraint and to determine whether it is narrowly tailored to the identified governmental interest.”<sup>412</sup> The dissent further criticized the majority's opinion as “profoundly anti-democratic.”<sup>413</sup> The dissent observed that the majority opinion rejected the “information role of the speech-press clause in citizen participation in self government in favor of a model of government in which elected executive or legislative branch officials are deemed to have been delegated the power to decide for us what we need to know.”<sup>414</sup> Furthermore, “the ultimate prior restraint by government . . . is ignorance of governmental affairs imposed by nondisclosure.”<sup>415</sup> Obviously, “people cannot discuss governmental activities of which they are kept in ignorance.”<sup>416</sup>

In sum, there is a certain ambiguity, and indeed conflict, in case law on the right of access.<sup>417</sup> Consequently lower courts vary in their approach to the right of access: some courts use the two prong analysis from *Richmond*; other courts use the

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<sup>406</sup>*Id.* at 1165.

<sup>407</sup>*Id.* at 1173-76.

<sup>408</sup>*JB Pictures, Inc. v. Dep't of Def.*, 86 F.3d 236, 239 (D.C. Cir. 1996).

<sup>409</sup>*Id.* at 239.

<sup>410</sup>797 F.2d at 1167.

<sup>411</sup>*Id.* at 1185 (Gibbons, J., dissenting).

<sup>412</sup>*Id.* at 1190.

<sup>413</sup>*Id.* at 1186.

<sup>414</sup>*Id.*

<sup>415</sup>*Capital Cities Media, Inc.*, 797 F.2d at 1186.

<sup>416</sup>*Id.*

<sup>417</sup>*Cable News Network*, 518 F. Supp. at 1242; MacNair, *supra* note 327, at 399.

balancing test from *Branzburg*.<sup>418</sup> Despite the lack of complete agreement on the public's right of access to governmental proceedings, courts generally hold the opinion that under *Richmond Newspapers*, both the public and the press have a limited right of access to information concerning governmental activity.<sup>419</sup>

So does the First Amendment right of access encompass the people's right to observe the deliberations of Congress? It must! It must because the ability to see the workings of government underlies the societal purpose of the First Amendment. It is indisputable that granting the people access to congressional deliberation contributes to self government and furthers democracy.

If the Supreme Court ever does address the issue of secret congressional deliberation, it will not blindly defer to Congress's determination to make its proceedings secret.<sup>420</sup> Rather, it is likely that the Court will weigh the competing values of the congressional interest in secrecy versus the values of openness and accountability embodied in the First Amendment and the Journal Clause.<sup>421</sup> (This approach seems appropriate, as Congress may indeed have legitimate reasons for secrecy on, say, portions of a bill that actually deal with the security of foreign embassies.)

If the Court recognizes a qualified right of public access to observe congressional deliberations, it will further the First Amendment's societal function of "preserving free public discussion of governmental affairs[.]"<sup>422</sup> Consider the converse. If the American people are forbidden from observing the process of lawmaking - as they were forbidden from observing key aspects of bankruptcy reform - it renders impossible the intelligent discussion of public issues.

*Richmond Newspapers* and its progeny support recognition of a right to observe congressional lawmaking. Nothing would go further to "assur[e] freedom of communication on matters relating to the functioning of government."<sup>423</sup> As the dissent in *Capital Cities* noted, "Cases from *DePasquale* through *Press-Enterprise* . . . make clear that a governmental restriction on access to information about governmental matters presents a first amendment question, and that such a restriction, like any other prior restraint, can be sustained only if it demonstrably advances significant governmental interests and is narrowly tailored to serve those interests."<sup>424</sup>

*Richmond Newspapers's* history prong is no obstacle to recognition of this right. Insofar as Congress has generally been open to the public, it supports this right. And given that conference committees have generally been open over the last few

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<sup>418</sup>MacNair, *supra* note 327, at 399-400.

<sup>419</sup>*Cable News Network*, 518 F. Supp. at 1242 (Contrary to the view of the *Capital Cities* majority, we posit that the initial consideration should be one of access unless there is an articulated government reason for lack of access).

<sup>420</sup>*Capital Cities Media, Inc.*, 797 F.2d at 1185 (Gibbons, J., dissenting).

<sup>421</sup>*Id.*, citing *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>422</sup>*Saxbe*, 417 U.S. at 862 (Powell, J., dissenting).

<sup>423</sup>*Press Enterprise Co.*, 464 U.S. at 518 (Stevens, J., concurring).

<sup>424</sup>*Capital Cities Media, Inc.*, 797 F.2d at 1189 (Gibbons, J., dissenting) (citations omitted).

decades, it also passes the test of the history prong. Certainly there is no justification for the creation of a special secrecy exception exempting conference committees from the general tradition of openness in Congress.

Alternatively, under *Branzburg's* balancing test it is clear the public must have a right to observe congressional deliberation. The public's interest in legislation as wide ranging as bankruptcy reform is weighty indeed. And the only interest that congressional proponents of secrecy in "reforming" bankruptcy have been able to come up with is expediency.<sup>425</sup>

A proper view of the First Amendment places the burden on Congress to explain the compelling governmental interest justifying its denial of public access to committee meetings.<sup>426</sup> Congressional proponents of bankruptcy reform also ought to explain how a secret Conference Committee which arbitrarily allows certain lobbyists and insiders to attend is narrowly tailored to serve this purported compelling interest in secrecy.<sup>427</sup>

### XIII. MODERN STATUTES RECOGNIZING THE RIGHT TO KNOW

Even if the First Amendment does not explicitly require that Congress refrain from making laws in secret, the trend in First Amendment jurisprudence over time has been towards openness in governmental deliberation.<sup>428</sup> In fact, acts such as the Government in the Sunshine Act,<sup>429</sup> the Federal Advisory Committee Act,<sup>430</sup> and the Freedom of Information Act<sup>431</sup> show that "Congress and many state legislatures have concluded that open deliberation often serves the public interest."<sup>432</sup>

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<sup>425</sup>Admittedly there could be circumstances such as the deliberation of sensitive details pertaining to national security which would constitute a compelling interest in secrecy. See generally Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 275 (1971) (discussing responsibility of the government to withhold sensitive information). But even then it would seem that narrowly tailored pockets of secrecy to conceal sensitive details would suffice. One would not expect it to be necessary to conceal the entire proceedings of a conference committee's work on a national security bill. Certainly congressional debate about broad aspects of national security policy ought to be open to the American people.

<sup>426</sup>See generally *Capital Cities Media, Inc.*, 797 F.2d at 1191 (Gibbons, J., dissenting).

<sup>427</sup>*JB Pictures, Inc.*, 86 F.3d at 239, citing *Press-Enterprise Co.*, 464 U.S. at 510; *Richmond Newspapers, Inc.*, 448 U.S. at 581; *Globe Newspaper Co.*, 457 U.S. at 606-07 (requiring a compelling interest).

<sup>428</sup>Cerruti, *supra* note 182, at 237-38. An early example of this trend is the Act of 1813 (3 Stat. 140). DiMario, *supra* note 176. In this Act, Congress required copies of the Senate and House journals be sent to the executive branch, state legislatures, and to universities in each state. Wendy R. Brown, *Federal Initiatives to Promote Access to Electronic Government Information: The Impact on the Federal Depository Library Program*. 91 LAW. LIBR. J. 291, 292 (1999).

<sup>429</sup>5 U.S.C. § 552b (2002).

<sup>430</sup>5 U.S.C. App. §§ 1-14 (2002).

<sup>431</sup>5 U.S.C. § 552.

<sup>432</sup>*B. H. v. McDonald*, 49 F.3d 294, 303 (7th Cir. 1995) (Easterbrook, J., concurring).

The Government in the Sunshine Act requires that the deliberations of every government agency be open to the public.<sup>433</sup> Government agency meetings may be closed to the public only if the meetings relate to certain enumerated exceptions, for issues such as national defense, trade secrets, criminal investigations, and personal information.<sup>434</sup> The Government in the Sunshine Act was enacted to bring the “whole decision-making process” of the Administrative Branch into public view.<sup>435</sup> When Congress enacted the Government in the Sunshine Act, the House declared that “the policy of the United States [is] that the public is entitled to the fullest practicable information regarding the decision making processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”<sup>436</sup> In short, it is the policy of the Government in Sunshine Act that government should conduct the public’s business in public.<sup>437</sup>

The Federal Advisory Committee Act,<sup>438</sup> prevents federal agencies from using secret advisory committees.<sup>439</sup> Advisory committees include committees, boards, and commissions utilized by federal agencies or the President.<sup>440</sup> Under the Act, advance notice of an advisory committee meeting must be given. The meeting must be open to the public, and the public must be allowed to attend the meeting and to appear or file statements with the committee.<sup>441</sup> Advisory committees are prohibited from allowing only select members of the public to attend meetings.<sup>442</sup> This stands in sharp contrast to the shadow committee on bankruptcy reform which allowed industry insiders to attend deliberations yet closed its doors on the public.

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<sup>433</sup>5 U.S.C.A. § 552b (West 1996).

<sup>434</sup>5 U.S.C.A. § 552b (c)(1) (West 1996).

<sup>435</sup>S. Rep. No. 354 (1975); Cerruti, *supra* note 182, at 320.

<sup>436</sup>Government in the Sunshine Act, 5 U.S.C.A. 552 b (West 1996).

<sup>437</sup>*Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891 (D.D.C. 1994), *rev'd* 80 F.3d 535 (D.C.C. 1996), *on remand* 27 F. Supp.2d 32 (D.D.C. 1998).

<sup>438</sup>5 U.S.C. App. I (West 1996).

<sup>439</sup>5 U.S.C.A. App. I (West 1996); *see also* James T. O’Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. KY. L. REV. 27 (1986).

<sup>440</sup>5 U.S.C.A. App. I § 3 (West 1996). State and local governmental advisory committees are not covered by the Act. 5 U.S.C.A. App. I § 4(c) (West 1996), and there is also an exception for committees utilized by the Central Intelligence Agency and the Federal Reserve System. 5 U.S.C.A. App. I § 4(b) (West 1996).

<sup>441</sup>5 U.S.C.A. App. I § 10 (West 1996).

<sup>442</sup>O’Reilly, *supra* note 439, at 30. But there is an exception to allow consultants to attend closed meetings. *Id.*

The Freedom of Information Act (“FOIA”) grants the public a right of access to government agency records.<sup>443</sup> When Lyndon B. Johnson signed FOIA into law, he declared

[T]his legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.<sup>444</sup>

FOIA does contain an exception for agency policy documents still under internal development.<sup>445</sup> Nonetheless, under FOIA, an agency is prohibited from allowing only select members of the public to see documents of proposed agency plans.<sup>446</sup>

In addition to well-known acts such as FOIA, there are approximately an additional 400 federal statutes requiring the dissemination of information about a variety of federal programs.<sup>447</sup> Furthermore, there is a great demand by the American public for this information. For example, more than 20 million documents are downloaded monthly from the Government Printing Office’s website.<sup>448</sup> These legislative documents “represent a major avenue of communication between the government and the public.”<sup>449</sup>

Moreover, each of the fifty states has a sunshine law which grants the public the right to attend deliberative meetings.<sup>450</sup> The authors of *Open Meeting Statutes* surveyed newspaper editors and found that “the overwhelming consensus of newspaper editors” was that open meeting statutes are effective in making it easier

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<sup>443</sup>Congress enacted FOIA in 1966, and amended it in 1974. In 1996 Congress amended FOIA to grant a right of access to electronic records.

<sup>444</sup>Statement by the President upon Signing the “Freedom of Information Act,” 316 Pub. Papers 699 (July 4, 1966).

<sup>445</sup>FOIA exempts classified defense and foreign relations information, internal agency rules and practices, information which another law prohibits disclosing, trade secrets, agency communications protected by legal privilege, information regarding personal privacy, law enforcement information, information about the supervision of financial institutions, and geological information. 5 U.S.C. § 552 b.

<sup>446</sup>O’Reilly, *supra* note 439, at n.21, *citing* North Dakota v. Andrus, 581 F.2d 177 (8th Cir. 1978).

<sup>447</sup>DiMario, *supra* note 184, *citing* Jane Bortnick Griffith and Harold Relyea, “*Compilation of Statutes Authorizing Dissemination of Government Information to the Public*,” CONGRESSIONAL RESEARCH SERVICE (1996). Notable among these numerous open government statutes is the Presidential Records Act of 1978 44 U.S.C.A. § 2201, which provides for public availability of virtually all presidential records and papers twelve years after a president leaves office. The extent of the Presidential Records Act is a matter of current dispute. *See* Am. Historical Ass’n v. Nat’l Archives and Records Admin. (D.D.C. filed Nov. 28 2001).

<sup>448</sup>DiMario, *supra* note 184.

<sup>449</sup>*Id.*

<sup>450</sup>Anderson, *supra* note 312, at n.49 (1991), *citing* J. Watkins, THE MASS MEDIA AND THE LAW 214-15 (1990); Watkins, *supra* note 47.

for reporters to be admitted to legislative meetings.<sup>451</sup> Reporters sometimes even flourished their state's open meeting statute to gain admittance to an otherwise closed meeting.<sup>452</sup> Overall, open meetings laws are credited with opening the meetings of state and local governmental legislatures and organizations, including deliberative bodies such as school boards, city councils, and university boards of trustees.<sup>453</sup> State open meeting statutes have led to a "ubiquitous policy of openness" which has "improved the working dynamic of the American political structure."<sup>454</sup>

Are the legislative considerations in Congress (other than foreign relations and national security concerns)<sup>455</sup> so singular that Congress could not conduct its business with an open meeting statute similar to the ones that govern every state?<sup>456</sup>

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<sup>451</sup>*Open Meeting Statutes, supra* note 5, at 1216.

<sup>452</sup>*Id.*

<sup>453</sup>*Id.* at 1199, 1200, 1217. However, there are limits to the effectiveness of open meetings laws, as "no law will ever do away with sneak executive sessions or informal meetings of public officials who don't want to meet in public." *Id.* at 1217 n.133.

<sup>454</sup>Caveney, *supra* note 6, at 183.

<sup>455</sup>To the best of the authors' knowledge, there are no national security secrets contained in our nation's Bankruptcy Code.

<sup>456</sup>Admittedly, there are some arguments in support of secret law making by Congress. Arguably closed meetings may grant legislators more freedom to openly discuss all options, even unpopular ones, without becoming publicly committed to them. DeWind, *supra* note 318, at 830; O'Reilly, *supra* note 439, at 456. "[E]xperience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705.

Yet most open meetings statutes do not prevent free and open discussion among officials. Since most open meeting statutes prevent closed meetings of a quorum, legislators are still free to privately discuss issues on a one-to-one basis. DeWind, *supra* note 326 at 828. Moreover, legislators must not be allowed to use this argument for secret deliberation to trump the public's right to vote against legislators who express unpopular ideas. *Id.* at 831. Rather, "[v]oters are supposed to pressure legislators with the threat of voting against them." Laura Schenck, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 FED. COMM. L.J. 371, 383 (1996).

Secrecy may also facilitate the accommodation of conflicting interests. *Open Meeting Statutes, supra* note 5, at 1201. Yet the notion of secrecy facilitating reconciliation could not have been a concern during the shadow bankruptcy committee, since only selected insiders were present. See *supra* note 40 and text. Furthermore, open legislative meetings foster public debate of political issues and thus strengthen freedom of speech. DeWind, *supra* note 326, at 830.

Open meetings may discourage uninformed officials from requesting information out of fear of appearing ignorant. *Open Meeting Statutes, supra* note 5, at 1201. And secret meetings may prevent oratorical grandstanding. *Id.* Yet if open meetings make legislators appear uninformed, then those legislators ought to do their homework. And if open deliberations cause politicians to grandstand, the public can see through it. Cohn, *supra* note 3, at 406. In short, "[t]he weaknesses of those we elect must be exposed, not used as an excuse to function in secret." *Id.*

Moreover, secrecy makes it incredibly difficult for the public to monitor the legislature's work and the assumptions behind it. Rogovin, *supra* note 160, at 1740. "The public's ability to make decisions in a well-informed and rational fashion depends on its understanding of

*Open Meeting Statutes* concludes that “[e]nsuring the people access to the greatest possible amount of information about governmental activities is an unimpeachably sound concept, and as a basic tenet of democratic government, merits legislative recognition.”<sup>457</sup> Typical of state sunshine laws is New York’s Open Meetings Law which fosters the policy that in a democracy, citizens must be “fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.”<sup>458</sup>

In short, the secretive deliberation employed by Congress in bankruptcy reform would not have been a permissible approach for a federal agency to take in deliberating policy. Nor would it have been permissible for most state legislatures or local governments to go about secretly setting public policy in such a manner. Congressional deliberation - arguably the most important legislative deliberation must be held to the same standards of openness and accountability as virtually all other legislative deliberation in America today.<sup>459</sup> After all, “without [freedom of information,] the citizens of a democracy have but changed their kings.”<sup>460</sup>

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facts underlying legislation.” *Id.* at 1740. Open legislative deliberation enhances: the public’s respect for legislative process, the ability of the public to engage in informed discussion, the public’s ability to make informed votes, and the integrity of the legislature’s fact-finding process (which is especially important for fact-intensive legislation such as bankruptcy reform.) *WJW-TV, Inc.*, 686 F. Supp. at 180, *citing* League of Women Voters v. Adams, 13 Med. L. Rep. 1433 (Super.Ct. 1986).

In sum, the minor conveniences that secrecy provides to legislators are overridden by the underlying fact that the people’s participation in decision making has traditionally been considered the basis of democracy. DeWind, *supra* note 326, at 827. Open meeting laws enable the public to learn *why* and *how* a legislature makes its decisions. *Id.* at 828.

Of course, the judiciary also uses secrecy to facilitate decision making. Both individual judges and judicial panels discuss and write court opinions in confidentiality, until the opinion is actually published. But courts operate under different considerations than a legislature. First of all, judges do not set public policy. Second, unlike members of Congress, members of the Judiciary are subject to strict ethical constructs against partiality and the reception of lobbying. Efforts by interested parties to influence judges are almost always in full public view—in the form of argument in open court or in written pleadings. Finally, judges typically issue reasoned opinions which explain the rationale behind their decisions.

Here Congress is foisting a complex, difficult to understand legal code upon an American public with virtually no explanation of the origins of myriad special interest provisions which were heavily lobbied for in secrecy.

<sup>457</sup>*Open Meeting Statutes*, *supra* note 5, at 1220.

<sup>458</sup>N.Y. PUB. OFF. LAW § 100 (McKinney 1988). But New York’s law has had problems stemming from loopholes allowing secret deliberation. See Timothy P. Whelan, *New York’s Open Meetings Law: Revision of the Political Caucus Exemption and Its Implications for Local Government*, 60 BROOK. L. REV. 1483, 1501 (1995).

<sup>459</sup>At least one commentator observes that FOIA is one of the most important statutes which Congress has not seen fit to apply to itself. Harold H. Bruff, *That the Laws Shall Bind Equally on All*, 48 ARK. L. REV. 105, 113 (1994).

<sup>460</sup>H. CROSS, THE PEOPLE’S RIGHT TO KNOW, xiii (1953), *quoted in* David A. Barrett, *Facilitating Government Decision Making: Distinguishing Between Meeting and Nonmeetings under the Federal Sunshine Act*, 66 TEX. L. REV. 1195 n.1 (1998).



## XIV. DRAGGING CLANDESTINE LAWMAKING OUT INTO THE SUNLIGHT

How can we expose secret lawmaking to sunlight? There are basically three options. First, Congress could better police itself. Second, the judiciary could explicitly recognize the people's First Amendment right to observe legislative deliberation. Third, Congress could enact an open meetings statute designed to end secret congressional deliberation.

Under the first approach, Congress could do a better job of following internal rules to prevent inappropriate secret deliberation. There are already norms and rules in place to encourage open deliberation by Congress. By creating an internal mechanism, Congress avoids the separation of powers concerns that might occur with an executive agency overseeing congressional deliberation. An internal mechanism also would avoid the risk of the executive overbearing on congressional autonomy.<sup>461</sup>

Unfortunately, bankruptcy reform illustrates that internal congressional norms are easily violated. Expecting Congress to self-enforce internal norms against secret deliberation is simply unrealistic. The basic structure of the legislative process is influenced by standing rules, congressional precedent, and legislative custom.<sup>462</sup> Many of these conventions are normally followed but "may be violated when circumstances warrant."<sup>463</sup> Since Congress enforces its own rules of procedure, the rules have no effect unless members of Congress bring them into play.<sup>464</sup> Each member of Congress must protect his or her own interests by making the appropriate procedural order if a pending action will violate the rules.<sup>465</sup>

In short, "the rules have absolutely no effect unless a member brings them into play."<sup>466</sup> As it is, the rules of the House have no independent enforcement mechanism, and they are often waived or ignored.<sup>467</sup> Each house of Congress is constitutionally empowered to "determine the Rules of its Proceedings."<sup>468</sup> And it is probably the majority view that "[i]t is up to the House and the Senate to enact, modify or repeal their rules, or decide whether to even abide by them. These rules have generally not been subjected to judicial review."<sup>469</sup> Thus, "for the most part Congress determines its rules of procedure free of any external pressures."<sup>470</sup>

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<sup>461</sup>Bruff, *supra* note 459, at 107.

<sup>462</sup>Miller, *supra* note 299, at 1344.

<sup>463</sup>*Id.*, quoting Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 735 (1989).

<sup>464</sup>Miller, *supra* note 299, at 1346.

<sup>465</sup>*Id.*

<sup>466</sup>*Id.*, citing Bach, *supra* note 463, at 739-40.

<sup>467</sup>146 CONG. REC. H9788, H9792 (Statement of Rep. Nadler).

<sup>468</sup>U.S. CONST. art. I, 5, cl. 2. Apparently this provision of the Constitution was adopted without debate. Cohn, *supra* note 3 at n.17, citing James Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 385, 387-88, 431, 616, 618 (1987).

<sup>469</sup>Cohn, *supra* note 3, at 370.

<sup>470</sup>Miller, *supra* note 299, at 1343.

Under the second option, the judiciary could better recognize the people's right to observe congressional deliberation. There are several ways courts could do this. Courts could recognize a constitutional principle that Congress subject itself to the laws it enacts.<sup>471</sup> Under this "due process of lawmaking," a citizen could challenge a statute on the ground that Congress exempted itself from the statute.<sup>472</sup> Courts could review legislative procedure with an eye to this end.<sup>473</sup> While the Court has never insisted that a legislature articulate its reasons for enacting a statute,<sup>474</sup> members of the Court hold divergent views on this issue.<sup>475</sup> Professor Morgan notes that legislative statements of purpose would encourage careful deliberation and valid decision making.<sup>476</sup>

Alternatively, courts should grant full recognition to the principle that citizens have a First Amendment and due process right to challenge the secret deliberation of a statute. As Ivester notes, recognizing a "directly enforceable right to know," would "do justice to the evident sentiments of the framers[.]"<sup>477</sup> This judicial approach would involve courts extending the rationale of *Richmond Newspapers* to lift the veil of secrecy from legislative deliberation. "Free speech carries with it some freedom to listen."<sup>478</sup> Justice Brennan's concurrence in *Richmond Newspapers* points out that for public debate to be valuable, the debate must be informed.<sup>479</sup> Justice Brennan wrote that "[s]ecrecy is profoundly inimical" to a judicial system that demonstrates the fairness of the law.<sup>480</sup>

As shown above, commentators have argued that although *Richmond Newspapers* and *Globe* concern access to courts, the rationale underlying those cases should extend to a right of access to legislative deliberation.<sup>481</sup> As Professor Eugene Cerruti observes, "The central premise of *Richmond Newspapers* is that meaningful self government requires an informed electorate, and that where the representative government itself maintains control of information essential to such an informed public discourse, the government may be affirmatively required to provide that information to the public."<sup>482</sup> In his dissent in *Capital Cities*, Judge Gibbons argued

<sup>471</sup>Bruff, *supra* note 459, at 115.

<sup>472</sup>*Id.*

<sup>473</sup>Morgan, *supra* note 153, at 345-46.

<sup>474</sup>*Id.* at 346, *citing* U. S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

<sup>475</sup>Morgan, *supra* note 153, at 346, *citing* Schweiker v. Wilson, 450 U.S. 221, 243 (1981) (Powell, J., dissenting).

<sup>476</sup>Morgan, *supra* note 153, at 347.

<sup>477</sup>Ivester, *supra* note 183, at 134.

<sup>478</sup>*Richmond Newspapers*, 448 U.S. at 576. For an excellent account of the history surrounding *Richmond Newspapers*, see Cerruti, *supra* note 182, at 242.

<sup>479</sup>*Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

<sup>480</sup>*Id.* at 595

<sup>481</sup>Morgan, *supra* note 153, at 315-16 n.196; R. James Assaf, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE. W. RES. L. REV. 227, 230 (1990).

<sup>482</sup>Cerruti, *supra* note 182, at 239.

that the rationale of the *Richmond Newspapers* line of cases is in fact *more* applicable to Congress and the executive than it is to the judiciary, as the legislative and executive branches possess more power - and more capacity to abuse power - than does the judiciary.<sup>483</sup> Underlying *Richmond Newspapers* is Alexander Meiklejohn's observation that "freedom of speech springs from . . . the basic American agreement that public issues shall be decided by universal suffrage."<sup>484</sup> This suffrage must be informed.<sup>485</sup> Consequently, government must not withhold information in such a way as to treat citizens as subjects.<sup>486</sup>

Admittedly, it may not be likely that the Court will apply these First Amendment doctrines to Congress any time soon. But this lack of judicial action is all the more reason for Congress itself to enact an open government statute to shed sunlight on its proceedings.<sup>487</sup>

The third and superior approach to curing congressional secrecy is for Congress to enact legislation which takes an active stance in prohibiting Congress from deliberating public policy behind closed doors. This could be done by enacting or amending a statute like FOIA, FACA, or the Sunshine Act to specifically cover Congress.

Currently, open government acts such as FOIA, FACA, and the Sunshine Act do not apply to Congress. Congress' penchant for exempting itself from its own laws has engendered increasing criticism.<sup>488</sup> Many commentators argue that open government statutes such as FOIA should apply to Congress.<sup>489</sup> Such an application would greatly improve congressional accountability.<sup>490</sup> The fact that freedom of information statutes do not cover Congress has been criticized as a "fatal flaw[.]"<sup>491</sup> These commentators take the view that it is "fundamentally inappropriate in a democratic society" to exempt Congress from open government statutes such as FOIA.<sup>492</sup>

One commentator observes that "the typical voter reacts with surprise or disgust[.]" upon "[d]iscovering that Congress is not subject to its own

<sup>483</sup>*Capital Cities Media, Inc. v. Chester*, 797 F.2d at 1191 (Gibbons, J., dissenting).

<sup>484</sup>Cerruti, *supra* note 182, at 287, quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1965).

<sup>485</sup>Cerruti, *supra* note 182, at 290.

<sup>486</sup>*Id.* at 290-91.

<sup>487</sup>Commentators note that the judicial reluctance to establish a clear constitutional right to attend legislative meetings means that legislatures must pass legal enactments to assure access to governmental deliberations. *Open Meeting Statutes*, *supra* note 5, at 1204.

<sup>488</sup>Bruff, *supra* note 459, at 105; James T. O'Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 HARV. J. ON LEGIS. 415, 416 (1993).

<sup>489</sup>Schenck, *supra* note 456, at 372; O'Reilly, *supra* note 488, at 443; Bruff, *supra* note 459, at 134.

<sup>490</sup>O'Reilly, *supra* note 488, at 415, 445.

<sup>491</sup>Schenck, *supra* note 456, at 372.

<sup>492</sup>*Id.* at 374.

enactments.”<sup>493</sup> In fact in 1995 Congress demonstrated that it understood the wisdom of extending many of its enactments to itself. The congressional Accountability Act of 1995 applies the core provisions of eleven statutes to cover Congress, including the Fair Labor Standards Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination Act, and the Occupational Safety and Health Act.<sup>494</sup> Inconsistent with this notion of congressional accountability, the Congressional Accountability Act did not extend freedom of information and open meeting laws to end secret congressional deliberation.

Commentators have advocated different approaches to applying open government laws to Congress. Congress could create an independent commission and/or internal rules that mirror FOIA, FACA, and other open government statutes. In the past, Congress has created internal rules to shadow legislation which applies to it.<sup>495</sup> For instance, the House passed a rule creating an Office of Fair Employment Practices to enforce the central provisions of employment discrimination statutes upon the House.<sup>496</sup> Of course, without an external enforcement mechanism, this might not be any more effective than the current system.

Professor James T. O’Reilly undertakes a detailed examination of the possibility of applying FOIA, FACA, and the Government in the Sunshine Act to Congress.<sup>497</sup> O’Reilly advocates applying FOIA to cover Congress. However, he notes that constitutional obstacles prevent simply amending FOIA by pasting the word “Congress” to the Act’s list of covered entities.<sup>498</sup> Consequently, O’Reilly argues that a carefully tailored version of FOIA should cover Congress.<sup>499</sup>

Laura Schenck also makes an insightful argument for the enactment of laws requiring Congress to meet in the open.<sup>500</sup> She asserts that the legislative branch can voluntarily subject itself to a freedom of information statute enforced by the executive branch.<sup>501</sup> This is consistent with separation of powers principles, as the Framers anticipated an executive strong enough to “counteract overreaching legislatures.”<sup>502</sup> After all, James Madison argued that the legislative, executive, and judicial departments should not be kept totally distinct.<sup>503</sup> Schenck concludes that

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<sup>493</sup>O’Reilly, *supra* note 488, at 416.

<sup>494</sup>Bruff, *supra* note 459, at 157; Congressional Accountability Act of 1995 2 U.S.C.A. §§ 1302 (West 1997).

<sup>495</sup>Bruff, *supra* note 459, at 109.

<sup>496</sup>*Id.*, citing Fair Employment Practices Resolution, H.R. RES. 558, 100th Cong., 1st Sess. (1987) (codified as House Rule 51, H.R. RES. 5, 103d Cong., 1st Sess. (1993)).

<sup>497</sup>O’Reilly, *supra* note 488, at 415.

<sup>498</sup>*Id.* at 430.

<sup>499</sup>*Id.* at 454. Other commentators agree that FACA and FOIA would have to be modified before their application to Congress. Bruff, *supra* note 459, at 133.

<sup>500</sup>Schenck, *supra* note 456, at 386.

<sup>501</sup>*Id.* at 386-87.

<sup>502</sup>*Id.* at 386, quoting Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994).

<sup>503</sup>THE FEDERALIST No. 47, *supra* note 156, at 307, 300-08 (James Madison).

“[t]he fact that the executive branch could be ‘intrusively involved’ with the affairs of the legislature does not present a separation of powers obstacle, as long as the legislature authorizes the intrusion.”<sup>504</sup>

One might argue that courts are prevented from mandating open congressional deliberation by concerns regarding separation of powers. The details of this issue are largely beyond the scope of this article. However, it bears mentioning that it is “archaic” to view “the separation of powers as requiring three airtight departments of government.”<sup>505</sup> The Framers did not intend the separate branches of government to operate with absolute independence.<sup>506</sup> This is reflected in The Federalist Papers’ citation to Montesquieu that separation of powers “did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other.”<sup>507</sup> Instead, the Framers intended for separation of powers to facilitate the different branches’ “means of keeping each other in their proper places.”<sup>508</sup> Secrecy allows Congress to aggrandize its power at the expense of the Executive and Judicial branches.<sup>509</sup> Therefore, separation of powers considerations weigh in favor of ending the practice of unfettered congressional secrecy.

In *Nixon v. Administrator of General Services*, the Court rejected the claim that the Presidential Recordings and Materials Preservation Act infringed upon separation of powers.<sup>510</sup> The Court held that the proper inquiry as to whether a statute violates the doctrine of separation of powers focuses on the extent to which the statute prevents the branch from “accomplishing its constitutionally assigned functions.”<sup>511</sup> A statute requiring open congressional deliberation on matters of public concern would not prevent Congress from accomplishing its constitutionally assigned functions. Rather, such a statute would assist Congress in accomplishing those functions in a constitutional manner consistent with the First Amendment and the Framers’ intentions of open government.

Moreover, it is worth noting that courts have not established a privilege of deliberative secrecy for Congress.<sup>512</sup> Congress usually honors judicial subpoenas for congressional papers, yet simultaneously protests that its compliance is voluntary.<sup>513</sup>

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<sup>504</sup>Schenck, *supra* note 456, at 386-87.

<sup>505</sup>*Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977), quoting *Nixon*, 408 F. Supp. at 342.

<sup>506</sup>*Nixon*, 433 U.S. at 443. See also *U.S. v. Nixon*, 418 U.S. 683, 705-08 (1974).

<sup>507</sup>*Nixon*, 433 U.S. at 443, quoting THE FEDERALIST No. 47, pp. 325-326 (J. Cooke ed., 1961) (emphasis in original).

<sup>508</sup>THE FEDERALIST No. 51, *supra* note 156, at 320 (James Madison).

<sup>509</sup>See *infra* note 515 and text.

<sup>510</sup>*Nixon*, 433 U.S. at 440.

<sup>511</sup>*Id.* at 443

<sup>512</sup>Bruff, *supra* note 459, at 133.

<sup>513</sup>*Id.* Note also that the Speech or Debate Clause of the Constitution does not absolutely prohibit judicial review of congressional conduct. Schenck, *supra* note 456, at 381. Since *Kilbourn v. Thompson*, it has been a settled proposition that the Court has the power to review legislative conduct. 103 U.S. 168, 199 (1881); Schenck, *supra* note 456, at 381. The Speech or Debate Clause was intended to grant legislators the right to represent their constituents and

In addition, secret congressional deliberation itself has an adverse impact on separation of powers. Secret meetings grant the Senate the power to “amend, revise, and reject . . . with abandon.”<sup>514</sup> This allows Congress to expand its power at the expense of the executive branch.<sup>515</sup>

If Congress passes legislation recognizing the people’s right to observe legislation, it must be effective legislation. A toothless platitude in favor of open meetings is inadequate. There must be effective means of enforcement. Lessons can be learned from state open meetings laws. For deliberations to be truly open, the public must have advance knowledge of the time and place of the deliberations.<sup>516</sup> Otherwise, legislators can create de facto secrecy by meeting at unannounced times in unknown places.<sup>517</sup> Some state open meetings laws require twenty-four hours notice to the public before holding unscheduled meetings.<sup>518</sup> Other laws provide for emergency meetings only after two hour’s advance notice to the press.<sup>519</sup> Most state open meeting statutes provide for executive sessions to deal with subjects which rightfully should not be publicized.<sup>520</sup> This provides for confidential deliberation, for example, to screen appointees, negotiate land purchases, and discuss sensitive public security issues.<sup>521</sup> A similar set of exemptions would be appropriate for Congress. Of course this exemption should allow Congress to keep confidential those issues pertaining to national security.

State open meeting laws take varying approaches to enforcement. Some provide for criminal penalties for legislators who secretly deliberate.<sup>522</sup> This would be

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express their views in Congress without fear of harassing litigation. *Id.* at 381. Consequently, the Speech or Debate clause prevents courts from imposing liability upon legislators for what they have stated during the legislative process. *Id.* at 382.

The current test is whether under *Gravel v. U.S.*, deliberational secrecy is a core legislative function. 408 U.S. 606, 609-10; Schenck, *supra* note 456, at 383. Would the Court consider secrecy to be a protected legislative act, “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation. . . .[?]” *Gravel*, 408 U.S. at 609-10; Schenck, *supra* note 456, at 384.

It is clear from the statements of the Founders that secrecy was not intended to be such an integral part of congressional deliberation on domestic issues. Furthermore, *Gravel* found that for the purposes of Speech or Debate clause immunity, distribution of information to the public does not constitute “an integral part of the deliberative and communicative process.” *Gravel*, 408 U.S. at 616; Schenck, *supra* note 456, at 384.

<sup>514</sup>Cohn, *supra* note 3 at 373.

<sup>515</sup>This is similar to the early Parliament’s use of secrecy to expand its power at the expense of the crown. *See supra* note 298.

<sup>516</sup>*Open Meeting Statutes*, *supra* note 5, at 1207.

<sup>517</sup>*Id.*

<sup>518</sup>*Id.* at 1208.

<sup>519</sup>*Id.*

<sup>520</sup>*Id.*

<sup>521</sup>*Open Meeting Statutes*, *supra* note 5, at 1208.

<sup>522</sup>*Id.* at 1211; Pupillo, *supra* note 204, at 1174.

problematic because of the sometimes inherent ambiguity as to when an executive session is legitimate.<sup>523</sup> To avoid unwitting violations by members of Congress who honestly thought an issue worthy of executive session, criminal sanctions would have to be limited to intentional violations.<sup>524</sup> Moreover, given the unpalatability of prosecuting members of Congress, criminal sanctions might never be invoked.

Other state open meeting laws provide for injunctive relief.<sup>525</sup> Evidence of previous violations of a sunshine statute can serve as a basis for an injunction enjoining future violations.<sup>526</sup> However, the prospective nature of injunctive relief makes this remedy imperfect.<sup>527</sup> Members of Congress might be tempted to quickly enact secretly deliberated legislation, pass it, and let it stand as a *fait accompli*.

The superior approach is to set up statutory guidelines providing for the invalidation of legislation enacted without open deliberation. By enacting such a statute, Congress could specifically grant the judiciary this power. Many states have seen the wisdom of this approach and have enacted statutes specifically providing for the voiding of actions and legislation made in violation of state open meeting laws.<sup>528</sup> Numerous courts have utilized this approach.<sup>529</sup> Courts have invalidated actions taken during non-public meetings by legislators even when it was clear that the secrecy of the proceedings was unintended.<sup>530</sup> An objection to the invalidation approach is that it has heavy costs, as persons who rely upon a statute may later find

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<sup>523</sup>*Id.*

<sup>524</sup>*Open Meeting Statutes*, *supra* note 5, at 1211.

<sup>525</sup>Watkins, *supra* note 47, at 346-47; Pupillo, *supra* note 204, at 1174-75.

<sup>526</sup>Watkins, *supra* note 47, at 347.

<sup>527</sup>*Id.*

<sup>528</sup>*See* CAL. GOV. CODE § 54950, § 54960.1; TEX. REV. CIV. STAT. ANN. ART. 6252-17, § 3(a) (Supp. 1991); FLORIDA F.S.A. § 286.011; [FN65]; *see also* Pupillo, *supra* note 204, at n.65, n.66, *citing* COLO. REV. STAT. ANN. § 24-6-402(8) (West Supp.1992); IDAHO CODE § 67-2347(1) (Supp.1993) (providing that action taken at a meeting which violates the statute is null and void); ALASKA STAT. § 44.62.310(f) (1989) (providing that action taken contrary to statute is void); ARIZ. REV. STAT. ANN. § 38-431.05(A) (1985); MD. CODE ANN., STATE GOV'T § 10-501(d)(4) (1993) (providing that if the statute is willfully violated and another adequate remedy does not exist, a court may void action taken in violation of act); MICH. COMP. LAWS ANN. § 15.270(2) (West 1981). Unfortunately, while many state open meeting laws apply to local legislative bodies, they do not apply to state legislatures. Pupillo, *supra* note 204, at n.27. This is a "fundamental flaw" of many open meeting statutes. *Id.* Fortunately some states have changed their open meeting laws to remedy this. *Id.* at 1178-79.

<sup>529</sup>*Toyah Indep. School Dist. v. Pecos-Barstow Indep. School Dist.*, 466 S.W.2d 377, 380 (1971) ("[i]t is an anomaly to say that a [closed governmental] meeting, the holding of which is forbidden by law, is a legal meeting"); *Goetschius v. Bd. of Ed.*, 721 N.Y.S.2d 386, 388 (2001); *Quast v. S.R. Knutson*, 150 N.W.2d 199, 200 (1967); *Bogert v. Allentown Hous. Auth.*, 231 A.2d 147 (1967); *see also Open Meeting Statutes*, *supra* note 5, at 1212-13, *citing Hamrick v. Town of Albertville*, 122 So. 448, 456 (1929); *City of Lexington v. Davis*, 221 S.W.2d 659 (1949); *Blum v. Board of Zoning and App.*, 149 N.Y.S.2d 5, 9 (1956); *Green v. Beste*, 76 N.W.2d 165 (1956); *see also Pupillo*, *supra* note 204, at n.25.

<sup>530</sup>*Town of Paradise Valley v. Acker*, 411 P.2d 168, 170 (1966); *City of Lexington v. Davis*, 221 S.W.2d 659, 661 (1949).

it invalidated.<sup>531</sup> But if this objection were paramount, the Supreme Court would have its hands tied in all areas of constitutional law. The Court invalidates statutes that infringe upon other constitutional rights. Why not grant this facet of the First Amendment the same protection? Invalidation serves as an effective deference to secret governmental deliberation.<sup>532</sup>

Critics of the right to know argue that the abstract constitutional ideal of a people's right to know does not mandate a concrete, legally enforceable right to know.<sup>533</sup> They assert that the right to know is too open-ended to be enforceable.<sup>534</sup> They argue that the ideal of a right to know cannot possibly grant every individual the right to "compel disclosure of the papers and effects of government officials whenever they bear on public business."<sup>535</sup> Thus they raise the specter of an enforceable right to know granting nosy citizens the right to peek inside every government desk drawer.<sup>536</sup>

We do not advocate such an unbounded approach. A right to view congressional deliberation is not an open-ended right. It is a concise right which can be clearly delineated. The general success of other right to know statutes such FOIA and state open meetings laws demonstrates that the right to know can be articulated with clarity.

In sum, we advocate congressional enactment of a statute that explicitly recognizes the people's right to view the congressional lawmaking process. This can be done by amending a statute such as the Federal Advisory Committee Act to cover Congress, or by creating a new statute modeled upon state open meeting laws. The precise approach taken does not matter, but it is important that the statute have adequate enforcement mechanisms. It will also be necessary to elucidate what situations the statute covers. Obviously the statute should require an open meeting for discussions among a quorum. But it must also mandate open meetings for conference committees, which are often small in number. Such a statute will grant the public more access to the legislative process and further the democratic process.

#### XV. CONCLUSION

We have seen that recent efforts to alter the bankruptcy system under the cover of secrecy have received harsh criticism from members of Congress, the press, and various commentators. We have seen that proponents of bankruptcy reform are so intent upon enacting legislation favoring special interests that they have taken the unprecedented step of attempting to enact the legislation under the guise of a completely unrelated, already-enacted bill. We have seen that the shadowy tactics

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<sup>531</sup>*Open Meeting Statutes*, *supra* note 5, at 1213.

<sup>532</sup>*See* *Revelle v. Marston*, 898 P.2d 917, 924 (1995).

<sup>533</sup>O'Brien, *supra* note 197, at 588, 607; BeVier, *supra* note 188, at 501.

<sup>534</sup>O'Brien, *supra* note 197, at 611; BeVier, *supra* note 188, at 505-10.

<sup>535</sup>O'Brien, *supra* note 197, at 597, *quoting* Levi, *Confidentiality and Democratic Government*, 30 REC. N.Y. CITY B.A. 323, 327 (1975).

<sup>536</sup>O'Brien, *supra* note 197, at 611, *citing* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (noting that a citizen's desire to gather information about the way the country is being run does not grant him the right to unauthorized entry into the White House).



involved in mysteriously inserting provisions in the bankruptcy legislation border upon the tactics of a patrician senate, issuing commands by fiat to a subjected populace. And we have seen that these tactics of secrecy flout the people's right to know, are contrary to the intent of the Framers, are inconsistent with the societal purpose of the First Amendment, are in contravention of the intent of the Journal Clause, and contradict the philosophy of modern statutes recognizing the public's right to know. These tactics of congressional secrecy are contrary to the process of open, reasoned, and deliberate decision making that is a cornerstone of American democracy.

Given that open government and open meeting laws apply to every state, to government documents, to the meeting of federal advisory committees, and to the meeting of federal agencies, it is an anomaly for Congress to deliberate in secret. Even in 1790, the American people were "freemen who ought to know the individual conduct of [their] legislators," not an "inferior order of beings incapable of comprehending the sublimity of Senatorial functions . . ."<sup>537</sup> In this new millennium, it is time to discard the secretive practices of an aristocratic Senate. Let the people view the work of their representatives. Bankruptcy reform - and *all* legislation of public concern - must be deliberated in full view of the American people. Congress must do its work openly in the sunlight. This is consistent with the intent of the Framers, as manifested in the Journal Clause and the First Amendment.

As Woodrow Wilson stated in a criticism of secret congressional committee hearings:

I say that until you drive all those things into the open, you are not connected with your government; you are not represented; you are not participants in your government. Such a scheme of government by private understanding deprives you of representation, deprives the people of representative institutions. It has got to be put into the heads of legislators that public business is public business.<sup>538</sup>

Indeed, public business **is** public business.

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<sup>537</sup>See *supra* note 283.

<sup>538</sup>Bell, *supra* note 7, at 14, quoting WOODROW WILSON, *THE NEW FREEDOM* 85 (William E. Leuchtenburg ed., 1961) (1913).