# ATTORNEYS' FEES UNDER THE POST-2007 FREEDOM OF INFORMATION ACT: A ONETIME TEST'S RESTORATION AND AN OVERLOOKED TOUCHSTONE'S ADOPTION

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*"He used to declare that to make a direct statement in English is like trying to kill a mosquito with a forty-foot stock-whip when you have never before handled a stock-whip."*[1]



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1. FORD MADDOX FORD, JOSEPH CONRAD: A PERSONAL REMEMBRANCE 213 (1924).

## INTRODUCTION

James Madison.[2] Woodrow Wilson.[3] In written compositions, these presidents, joined and cited by an ever-growing multitude,

2. JAMES MADISON, REPORT ON VIRGINIA RESOLUTION 221, 227 (1800) ("In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description . . . .The value and efficacy of th[e public's] right ['of electing the members of the Government'] 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."). In this professed view of the press' necessity and openness' value, Madison echoed his mentor, Thomas Jefferson. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT 108–09 (Vintage reissue ed., 1989).

3. WOODROW WILSON, THE NEW FREEDOM 113–14 (1913) ("[G]overnment ought to be all outside and no inside. . . . Everybody knows that corruption thrives in secret

regarded government transparency and its two inescapable corollaries, freedom of information and the public's right to know,[4] as "among the pantheon of great political virtues," "fundamental attribute[s] of democracy," "norm[s] of human rights," and "tool[s] to promote political and economic prosperity."[5]

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places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.").

4. "Freedom of information" and its linguistic kin, "access to information," have been defined as "the right and ability of a member of a democratic society to obtain records and information concerning the actions of government." 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW § 4-2 (1979). The "right to know" refers to the public's privilege to know the information acquired and relied upon by government officials, a phrase which allegedly originated in a speech given by Kent Cooper, then 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, 237 n.1 (1995). The term "open government" or "transparent government" refers to a governmental entity, structure, or policy in which "the right to know" and "freedom of information" are recognized as distinct virtues. *See, e.g.*, Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government"*, 59 UCLA L. REV. DISCOURSE 178, 183 (2011). In such governments, "freedom of information" and "the right to know" operate in tandem and are thus indistinguishable for purposes of this article. The phrase "freedom of information" is also "a slogan of the information age," encompassing an individual's right to information and a liberty interest enjoyed by the information itself. Michael Herz*, Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 577 (2009); *see also* Beth Simone Noveck, *Is Open Data the Death of FOIA?*, 126 YALE L.J. F. 273, 273–74 (2016); Yu & Robinson, *supra*, at 202. This article deals exclusively with this phrase's first, not second, sense. *Cf.* Yu & Robinson, *supra*, at 181 (discussing the blurred distinction between the technologies of open data and the politics of open government). Lastly, a longstanding debate exists as to access regulation within the press in which the term "freedom of access" oft-appears. *See generally* Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1968); Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952 (2008). This debate and this use of the phrase "freedom of access" lies beyond this article's purview.

5. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006) [hereinafter Fenster, *Opacity*]; *see also* James E. Beaver, *The Newsman's Code, the Claim of Privilege, and Everyman's Right to Evidence*, 47 OR. L. REV. 243, 250 (1967); Catherine J. Cameron, *Fixing FOIA: Pushing Congress to Amend FOIA Section B(3) to Require Congress to Explicitly Indicate Intent to Exempt Records from FOIA in New Legislation*, 28 QUINNIPIAC L. REV. 855, 856 (2010); Melissa Davenport & Margaret Kwoka, *Good But Not Great: Improving Access to Public Records under the D.C. Freedom of Information Act*, 13 U.D.C. L. REV. 359, 360 (2010); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (discussing the various justifications for free speech); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 778 (1987) (linking popular sovereignty to freedom of access); David M. O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CONST. L.Q. 579 (1980) [hereinafter O'Brien, *First Amendment*]; Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9

While the notion that no republican government could or should afford unencumbered access to its every document, deliberation, and device elicited little controversy,[6] this understanding of a democracy's minimal needs compelled many to agitate for the imposition of some external restraint on any official's authority to camouflage every iota of government data; otherwise, these persons feared, the republic

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HASTINGS BUS. L.J. 261, 270 (2013); John M. Steel, Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311, 330–32 (1971) (characterizing the right to demand education on every side of the issue as implicit in the First Amendment); Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 455 (2015); *cf.* Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 112–14 (2015) (contending that, if the purpose of "free speech doctrine is to protect and enhance the ability of citizens to report on misconduct by lower-level officials," citizens "should enjoy some sort of positive right to obtain information about internal government affairs"). A Greek, perhaps, deserves the credit for the Western world's first recorded expression of this now venerable concept. Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 LAW LIBR. J. 613, 614 n.6 (2010) (quoting Aeschines, reportedly speaking in a law court in 330 B.C.). Even autocracies, not just multiparty democracies, have felt compelled to inscribe similarly effusive praise of free speech into their written constitutions. Bhagwat, *supra*, at 64–69, 86–101.

6. *See, e.g.*, Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 399 (2009) ("[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable."); Jerry Cohen, *Secrets of Governments, Enterprises and Individuals Affecting Access to Justice*, 93 MASS. L. REV. 220, 220 (2010) (observing that some government operations "require secrecy for effectiveness and fairness"); Fenster, *Opacity*, *supra* note 5, at 902–10 (identifying transparency's negative consequences and constitutional threat); Candice M. Kines, Note, *Aiding the Enemy or Promoting Democracy? Defining the Rights of Journalists and Whistleblowers to Disclose National Security Information*, 116 W. VA. L. REV. 735, 767–69 (2013) (discussing benefits of government secrecy); Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 215, 220–21 (2008) (summarizing the potential chilling effect of wide disclosure on internal deliberations); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 520–22 (2007) [hereinafter Kitrosser, *Secrecy*] (giving reasons why government secrecy may be good policy); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 72–88, 91–94 (1991) [hereinafter Kreimer, *Sunlight*]; Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1560–62 (2008) (detailing secrecy's apparent benefits); Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438, 1438 (1975) (conceding the validity of national security as a justification for barring public access in certain situations); Laura A. White, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071, 1078–90 (2003) (giving various justifications for secrecy). According to one man, "[s]ecrecy is the first essential in affairs of state." HUGH B. URBAN, THE SECRETS OF THE KINGDOM: RELIGION AND CONCEALMENT IN THE BUSH ADMINISTRATION 64 (2007) (quoting a maxim attributed to Cardinal Richelieu).

itself would sit dangerously exposed.[7] Yet, in actuality, the existence of an enforceable Constitutional right to know enflamed perpetual dispute,[8] and though America's fundamental law never explicitly granted the power to withhold information to the executive branch that it created,[9] the presidents that followed and the agencies that they oversaw zealously did so from the very moment of the republic's birth,[10] the same explanations repeated.[11] Historically then, in spite

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7. *See, e.g.*, Fenster, *Opacity*, *supra* note 5, at 888 (summarizing transparency's alleged benefits); Joshua Jacobson, *The Secretary's Emails: The Intersection of Transparency, Security, and Technology*, 68 FLA. L. REV. 1441, 1445 (2016) (same); Tai, *supra* note 5, at 455 (same); *cf.* Paul Haridakis, *Citizen Access and Government Secrecy*, 25 ST. LOUIS U. PUB. L. REV. 1, 5–7 (2006) (pointing to the existence of two contrary approaches to freedom of access in United States history).

8. *See, e.g.*, Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 485, 516–17 (1980); O'Brien, *First Amendment*, *supra* note 5, at 586, 618, 630–31. *But see infra* sources cited in note 476.

9. Mark J. Rozell, *Restoring Balance to the Debate Over Executive Privilege*, 8 WM. & MARY BILL RTS. J. 541, 542 (2000) [hereinafter Rozell, *Balance*]; *see also* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) (arguing that the Framers lacked any comprehensive theory of free speech or press when they drafted the Bill of Rights).

10. Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1, 4–5 (1977). Press freedom, in contrast, was viewed as of "paramount importance," and its security was therefore carefully ensured. Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 62 (2016) [hereinafter West, *Now*]; *see* Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 753 (2014) [hereinafter West, *Stealth*] (so arguing).

11. *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 2 (1974); Kitrosser, *Secrecy*, *supra* note 6, at 505–15; Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 4 n.6, 7–8 (2012). To be fair, Congress has been prone to its own bouts of secrecy. *See* William T. Bodoh & Lawrence P. Dempsey, *Bankruptcy Reform: An Orderly Development of Public Policy?*, 49 CLEV. ST. L. REV. 191, 193–94, 199–208 (2001); *cf.* Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1117–43 (2004) (discussing the ways that the press aided in the distillation and refocusing of issues in the course of several legislative debates over pending bankruptcy legislation). It has, for example, explicitly exempted itself from FOIA and other open government acts, *e.g.*, Bodoh & Dempsey, *supra*, at 248; Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 113, and "often been strangely quiescent on secrecy-related national security matters," Steven Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, 48 HARV. C.R.C.L. L. REV. 511, 529 (2013); *see also* Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in the Age of Terrorism*, 69 LAW & CONTEMP. PROBS. 99, 116 (2006); Haridakis, *supra* note 7, at 17–18; *cf.* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARODOZO L. REV. 1049, 1084–86 (2008) [hereinafter Kitrosser, *Oversight*] (discussing why there generally exist low or even negative political incentives for Congress to push the executive branch to disclose national

of the acknowledged connection between government information's generally free transmission and a democratic polity's subsistence,[12] secrecy rarely struck this nation's powerbrokers as an "abomination,"[13] as they steered an ostensibly democratic state "eternally resistant to disclosure."[14]

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security information); Sudha Setty, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L & PUB. POL'Y 247, 260–62 (2008) (explaining how Congress' will to combat executive overreaching is badly impaired during time of one-party government).

12. *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 88 (2006); Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM'N L. & POL'Y 511, 517–25 (2006); Kitrosser, *Oversight*, *supra* note 11, at 1066–68; Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012).

13. Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 16, 29 (1974). In contrast, Sweden passed the world's first freedom of information act in 1766. Ackerman & Sandoval-Ballesteros, *supra* note 12, at 88–93.

14. Fenster, *Opacity*, *supra* note 5, at 889–90; *see also, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 110–11 (summarizing the attitudes and perceptions of FOIA exhibited by legislators and officials); Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 446 (2012) [hereinafter Fenster, *Transparency*] ("The prerogative to create and maintain information asymmetries is one that government entities and officials do not easily surrender."); Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 887–94 (2008) [hereinafter Kitrosser, *Leaks*] (explaining the President's vast secret-keeping capacity and the capacity's manifestation in the nation's classification system); Kitrosser, *Oversight*, *supra* note 11, at 1061–63, 1065–66 (recapping previously dissected arguments in favor of a constitutional executive privilege); Kitrosser, *Secrecy*, *supra* note 6, at 491 (noting the ascendance of a "religion of secrecy" in the Executive Branch since World War II); Lee, *supra* note 6, at 198–99 (providing examples of the resistance to disclosure displayed by the administrations of William J. Clinton and George W. Bush); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 823–27 (2008) (discussing the Bush Administration's preference for secrecy); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 407–20 (2002) (pointing out some of the Bush Administration's early departures from recognized executive privilege norms); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 452–61, 479–83 (2004) (documenting the government's history of controlling confidential and public information). *See generally* Eric Lane, Frederick A.O. Schwarz, Jr., & Emily Berman, *Too Big A Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 761–62 (2008) (discussing some of the motives that inform government secrecy); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1 (2008) (detailing the Bush Administration's very expansive view of presidential powers and executive privilege);

In time, the public's skepticism about the government's wisdom surged,[15] and Congress responded by questioning and abandoning this orthodoxy. Beginning in the 1930s, with President Franklin D. Roosevelt offering the mildest encouragement, it passed the Federal Register Act of 1935[16] (FRA) and Section 3(c) of the Administrative Procedures Act[17] (APA). Because these laws quickly netted nothing but scorn for their ineffectiveness before the executive branch's obduracy, pressure for greater transparency again mounted.[18] Ultimately, these adjurations resulted in the passage of the first version of the Freedom of Information Act (FOIA),[19] "one of the strongest government accountability measures Congress has ever adopted," in 1966.[20] As originally enacted, FOIA strove "to clarify and protect the public's right of access to information concerning government operations."[21] But, in the years after its passage, suits

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15. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1174 (1983).

16. Pub. L. No. 74-220, 49 Stat. 501 (1935).

17. Administrative Procedure Act, § 3(c), Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

18. Cerruti, *supra* note 4, at 237–38, 322.

19. An act to amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes, § 3(c), Pub. L. 89-487, 80 Stat. 250 (current version at 5 U.S.C. § 552(a)(3)).

20. Margaret B. Kwoka, *Deference,* Chenery*, and FOIA*, 73 MD. L. REV. 1060, 1061 (2014) [hereinafter Kwoka, *Chenery*]. Many provided equally laudatory descriptions. *See, e.g.*, Davenport & Kwoka, *supra* note 5, at 404 ("FOIA is a powerful tool for democratic participation in our government."); Haridakis, *supra* note 7, at 12 (describing FOIA as "the most comprehensive legislation guaranteeing public access to government records"); Melanie A. Pustay, *Memorandums to Messages: The Evolution of FOIA in the Age of the Internet*, 126 YALE L.J.F. 252, 252 (2016) (quoting President Barack H. Obama II's description of FOIA as "the most prominent expression of a profound national commitment to ensuring an open government"); David C. Vladeck*, Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1795 (2008) (calling FOIA "truly an experiment in open government"). Perhaps ironically, FOIA's passage may have prevented the courts' development of a constitutional right of access. *See, e.g.*, Jacobson, *supra* note 7, at 1447; Susan N. Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference Under the National Security Exception of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 749 (2014); Susan N. Mart, *Let the People Know the Facts: Can Government Information Removed from the Internet Be Reclaimed?*, 98 LAW LIBR. J. 7, 9 (2006); Sullivan, *supra* note 11, at 17–18.

21. Dave R. Kelleher, *Applying the Freedom of Information Act in the Area of Federal Grant Law: Exploring an Unknown Entity*, 27 CLEV. ST. L. REV. 294, 294 (1978). As a testament to its worth, FOIA has inspired similar legislation in every state, Noveck, *supra* note 4, at 273, and across the globe, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 95–98; Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y, July 1, 2002, at 50; *cf.* Fenster, *Opacity*, *supra* note 5 (tracing the

were too few, expenses too great, for the transparency it promised to be realized. In reaction, Congress tacked a fee section onto FOIA in 1974, one "designed both to encourage citizens to exercise their rights under FOIA and to deter agencies from unnecessarily withholding information."[22] From 1966 through today, much debate over FOIA's value has raged and often veiled its actual significance,[23] but this subsection, construed as establishing a causal or "catalyst" theory of recovery for attorneys' fees,[24] has long earned the praise of diverse groups, seen by commercial and non-profit constructs as an essential means for the securing of FOIA's well-known ends.

Consequently, when the Court invalidated this theory's application to two unrelated statutes in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[25] Congress stepped in with unusual alacrity. So as to prevent *Buckhannon*'s extension to FOIA cases, an overwhelming majority passed, and a Republican president signed, the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Act).[26] Emphasizing Congress's documented resolve to "fix" *Buckhannon* and secure the catalyst theory's viability in FOIA cases with this law, the few courts compelled to construe this latest emendation have again invoked the once-dishonored doctrine, a trend

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international rise of transparency as an administrative norm). Unfortunately, as here, lack of implementation and enforcement often blunts these laws' effectiveness. Ackerman & Sandoval-Ballesteros, *supra* note 12, at 109–15; Mitchell W. Pearlman, *Freedom of Information in the Americas: Where the United States Stands*, CONN. LAW., July 2009, at 28. At the other end of the spectrum, the so-called Johannesburg Principles, developed by thirty-five experts from every region of the world at a meeting in South Africa in 1995, endorse a broad right of access. Ackerman & Sandoval-Ballesteros, *supra* note 12, at 102–03.

22. Laura Danielson, Comment, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 997, 1006 (2012); *see also* Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1132–33 (1975). Even the fees charged have raised concerns about the true degree of access provided by FOIA. Zachary Pall, *The High Costs of Costs: Fees as Barriers to Access Within the United States and Canadian Freedom of Information Regimes*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 599, 618, 628 (2009).

23. Martin & Lanosga, *supra* note 5, at 626.

24. This theory allowed for recovery of attorney's fees, though a plaintiff did not win any judgment in its favor, so long as (1) its lawsuit was causally linked to securing the benefit obtained and (2) the benefit obtained was required by law and not a gratuitous act. For more, see *infra* Part III.B.2.

25. 532 U.S. 598, 610 (2001).

26. OPEN Government Act of 2007, Pub. L. No. 110–75, 121 Stat. 2524 (2007).

likely to impact interpretations of FOIA's state equivalents.[27] In short, with near unanimity, the nation's courts have apparently reverted to their pre-*Buckhannon* reading of FOIA's fee-shifting section.

In so doing, courts and counsel have erred, as this article strives to show in three substantive parts. Part II tells the story behind two recent headline-making FOIA cases in which the chance to clarify FOIA's newest standard was present but never seized. Culminating in two recent appellate opinions—*New York Times Company v. U.S. Department of Justice*[28] and *First Amendment Coalition v. U.S. Department of Justice*[29]—these cases underscore this oft-amended statute's present use and value, the executive branch's longstanding fetish for secrecy, and the possible permutations of the law's reenthroned theory of recovery.[30] Part III.A traces the history behind FOIA's adoption and its fee provision's codification and the catalyst theory's subsequent rise; Part III.B elucidates the logic advanced in *Buckhannon* and its peculiar rebuke, as embodied in the OPEN Act; and Part III.C concludes with a summary of recent trends, legal and otherwise, whose effect on FOIA's proper construction cannot be ignored—but which have been by nearly every court. Having clarified

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27. *See, e.g.*, Bertoli v. Cirty of Sebastopol, 233 Cal. App. 4th 353, 366 n. 9 (2015); Evening News Ass'n v. City of Troy, 339 N.W.2d 421, 428 (Mich. 1983); Jenson v. Schiffman, 544 P.2d 1048, 1052 (Or. Ct. App. 1976); William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 427 (2015).

28. 756 F.3d 100 (2d Cir. 2014).

29. First Amendment Coalition v. U.S. Dep't of Justice, 869 F.3d 868 (9th Cir. 2017).

30. Of these opinions, *FAC* alone acknowledges the textual conundrum raised by the OPEN Act. Unfortunately, rather than taking the opportunity to clarify the law, the panel concurred as to judgment, but split as to reasoning, with each judge opting for a different approach. Two judges hewed slavishly to the approach critiqued in this piece but disagreed as to their reasoning. In "reject[ing] the notion that the 2007 amendment has eliminated the need to establish causation once the lawsuit has been initiated," the lead opinion adduced but a point—"The statute cannot plausibly be read that way"—and proceeded to conjure one example as conclusive proof. *Id.* at 876. Unfortunately, that well-intended tactic ignores basic interpretive rules and privileges stray lines of legislative history. *See infra* Part IV.A, B.2. More shockingly, beyond this bald assertion of presumptive plausibility, the opinion fails to limn a single interpretive lodestar outside. In so doing, the author essentially affirmed the truth of Benjamin Franklin's old maxim: "So convenient a thing it is to be a *reasonable creature*, since it enables one to find or make a reason for everything one has a mind to do." BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 51 (Applewood Books 2008) (1793). Dissecting this opinion, only one judge spotted these errors in advocating for its own plausible interpretation, and it is her perceptive analysis that this article endorses and buttresses. Simply put, with its three opinions, this latest entry into FOIA jurisprudence forsakes accidental blindness for willful obtuseness and underscores the need for some coherent and cogent approach to FOIA. For more, see *infra* Part II.H.

these pivotal preliminaries, this article's third part limns the proper interpretation of FOIA's current fee provision. So as to establish a framework for this article's key discussion, Part IV.A explicates the interpretive principles, simple and familiar, relevant to deciphering this section, tenets which all courts must honor in construing FOIA. Applying these precepts to FOIA's fee provision in the aftermath of *Buckhannon*'s publication and the OPEN Act's passage, Part IV's second half shows precisely why courts need no longer feel bound to utilize the catalyst theory. Indeed, while it provides justification for ignoring the contrary intimations peppering this amendment's congressional analysis, that same section also shows how that history has been misread.

Advanced by only one judge over a decade's span, one conclusion animates this article: since Congress last overhauled FOIA's fee provision, fealty to an old theory has allowed a misimpression to fester within a still nascent jurisprudence and a favored law to fail to achieve its august purpose. As such, to the overwhelming majority, a simple plea dictated by those "well-established principles of statutory construction"[31] is herein made: follow patent prose and acknowledged aims. For even presidents dare tell untruths, and truths, once interred, can be too costly to disentomb, as a fiery account bares.

## I. AN ARABIAN TALE

### *A. The Hunt*

Born on April 21, 1971, in Las Cruces, New Mexico, to Yemeni immigrants, Anwar Al-Awlaki ("Awlaki" or "Aulaqi") spent his first seven years in his native land and his next eleven in his father's.[32] When he turned twenty, Awlaki returned to the United States to study civil engineering at Colorado State University.[33] "The geeky, gangly teen was just like any other student" traipsing across the flagship university's multi-acre campus.[34] Notwithstanding his

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31. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012).

32. Rupert Cornwell, *Cleric Who Inherited the Mantle of Washington's Most-Wanted*, INDEPENDENT (LONDON), Oct. 1, 2011, at 4, http://www.independent.co.uk/news/world/middle-east/cleric-who-inherited-the-mantle-of-washingtons-most-wanted-2364068.html.

33. Valerie J. Nelson, *Cleric Exploited His U.S. Ties*, CHI. TRIB., Oct. 1, 2011, at 7.

34. *"All-American" Kid Choose Evil: Friends and Family Saw Hate-Spewer's Fall from Grace*, N.Y. POST, Oct. 1, 2011, at 5.

obvious bookishness, the young graduate student began to preach, displaying an "emerging gift for oratory and persuasion"[35] to a young and appreciative audience;[36] to many, particularly in the Mile High City, he appeared "warm and adamantly nonviolent."[37] Soon, Awlaki abandoned his technical major and assumed the mantle of an imam in Denver, San Diego, and Fall Church,[38] a purported symbol of moderation[39] whose occasional, possibly incidental, meetings with men subsequently involved in terrorist attacks on United States soil spawned federal interest.[40] In 2002, as his secret life unraveled—the Federal Bureau of Investigation had maintained detailed records of his visits with sundry prostitutes[41]—Awlaki fled to London.

From that time onward, Awlaki preached. At mosques known for their espousal of the most radical ideologies, "his rhetoric became increasingly ferocious, his embrace of violence more open."[42] Soon, from a Yemeni hideout for Al-Qaeda in the Arabian Peninsula (AQAP), Awlaki raised his voice in favor of war with the United States,[43] initially solely an advocate for[44] but eventually a participant in violent strikes.[45] On April 6, 2010, after a formal investigation

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35. Bruce Finley, *Muslim cleric targeted by U.S. made little impression during Colorado years*, DENVER POST, Apr. 11, 2010, at A01, https://www.denverpost.com/2010/04/10/muslim-cleric-targeted-by-u-s-made-little-impression-during-colorado-years/.

36. Scott Shane, *Dead Reckoning*, N.Y. TIMES, Aug. 30, 2015, at MM56.

37. Massimo Calabresi, Timothy J. Burger & Elaine Shannon, *Why Did the Imam Befriend Hijackers?*, TIME, Aug. 11, 2003, http://content.time.com/time/magazine/article/0,9171,1005415,00.html.

38. Kristina Davis, *Evil Inspiration Long Outlives Local Cleric*, SAN DIEGO UNION TRIB., Oct. 2, 2016, at 1.

39. *See* Aamer Madhani, *What Makes Cleric al-Awlaki So Dangerous; Terrorist Wears Mask of Scholar, Knows His Foe*, USA TODAY, Aug. 25, 2010, at 1A.

40. Peter Bergen, *The American Who Inspires Terror from Paris to the U.S.*, CNN, Jan. 12, 2015, http://www.cnn.com/2015/01/11/opinion/bergen-american-terrorism-leader-paris-attack/index.html.

41. Action Memorandum from Pasquale D'Amuro, Assistant Director, Antiterrorism Division, Federal Bureau of Investigation, to James A. Baker, Counsel, Office of Intelligence Policy & Review 4–13 (Dec. 11, 2012).

42. Shane, *supra* note 36, at 56; *see also* Nelson, *supra* note 33, at 7.

43. Scott Shane & Souad Mekhennet, *Imam's Path from Condemning Terror to Preaching Jihad*, N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/world/09awlaki.html.

44. *Terrorist Threat to the U.S. Homeland—Al-Qaeda in the Arabian Peninsula (AQAP): Hearing Before the Subcomm. On Counterterrorism and Intelligence of the H. Comm. on Homeland Security*, 112th Cong. 11–13 (2011) (statement of Jarrett Brachman, Managing Director, Cronus Global).

45. *Threats to the American Homeland After Killing Bin Laden - An Assessment: Hearing Before the H. Comm. on Homeland Security*, 112th Cong. 25 (2011) (statement

substantiated Awlaki's links to an attempted bombing of a Detroit-bound Northwest Airlines flight, President Barack H. Obama authorized Awlaki's assassination, the first known targeting of an American citizen approved by this nation's sitting head of state.[46] A manhunt commenced,[47] culminating in the near continuous surveilling of Yemen by a pestilential cloud of armed drones.[48]

On September 30, 2011, on a typically sweltering morning on an Arabian Desert stretch, predators and reapers, the types of drones favored by the United States' Central Intelligence Agency (CIA), neared a group of clustered trucks.[49] Minutes before, the passengers, including one notorious American citizen, had stopped to eat breakfast on the way to the Ma'rib Governorate, a province located approximately 108 miles northeast of the broken nation's rebel-controlled capital.[50] As the men clambered into their idling vehicles, two predators aimed their lasers and sent coordinates to pilots thousands of miles away.[51] Readied in seconds, the reapers fired, and vicious men, among others, perished.[52] After a two-year pursuit, Awlaki—and two more American citizens—lived no more.[53]

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of Peter Bergen, Director, National Security Studies Program, New America Foundation).

46. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html.

47. Callum Borchers, *Al Qaeda Weak but Dangerous, US Official Says; Counterterrorism Chief Warns that "We Can't Rest"*, BOSTON GLOBE, Apr. 30, 2012, at A3.

48. CHRISTOPHER WOODS, SUDDEN JUSTICE: AMERICA'S SECRET DRONE WARS 120 (2015).

49. Maureen Callahan, *Booby Trap: How Double Agent Set Up Al Qaeda Fiend for Marriage – and Execution*, N.Y. POST, Aug. 17, 2014, at 5, https://nypost.com/2014/08/17/how-cia-used-a-groupie-to-set-up-terrorist-for-marriage-and-death/.

50. Damien McElory, Adrian Blomfield & Nasser Arrabyee, *Drone Kills US-Born Preacher Who Inspired the Lone Wolf Terrorists: The Death of Awlaki*, DAILY TELEGRAPH (LONDON), Oct. 1, 2011, at 18, 19.

51. Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html.

52. DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 110 (2016).

53. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html.

### *B. The Memos*

By the time the missiles struck, the Department of Justice's Office of Legal Counsel (OLC) had already prepared the legal justification for Awlaki's pursuit.[54] In the first memorandum so intended, sent on February 19, 2010, to the CIA (OLC-CIA Memo), the OLC defended Awlaki's prospective execution as consistent with Executive Order 12,333[55] and "any applicable constitutional limitations due to . . . [his] United States citizenship."[56] The OLC further opined on the legality of such an act, as contemplated by both the Pentagon and the CIA, in a second memo, dated July 16, 2010, and sent to the Department of Defense (DOD) (OLC-DOD Memo).[57] Albeit addressed to different executive entities, these two documents did not substantially differ in their analyses or conclusions.[58]

Briefly summed, as laid out in the government's typically turgid prose, their authors discussed and dismissed every possible legal impediment. Canvassing every relevant statute and executive order, these men discerned no domestic legal impediments to Awlaki's elimination by either the DOD's instrumentalities or the CIA's apparatuses.[59] The "contemplated operation," moreover, "compl[ied] with international law, including the laws of war applicable to this armed conflict, and . . . f[e]ll within Congress's authorization to use 'necessary and appropriate force' against al-Qaida."[60] Finally, "where high-level governed officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests," the

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54. RUDENSTINE, *supra* note 52, at 110.

55. In general, this order, issued by President Ronald Reagan in 1981, reiterated an extant proscription on the sponsoring or carrying out of an assassination by the United States' intelligence agencies. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981). Direct political assassinations had been banned since 1976, Exec. Order No. 11905, 14 Fed. Reg. 7,703 (Feb. 18, 1976), and indirect involvement had been forbidden since 1978, Exec. Order No. 12036, 43 Fed. Reg. 3,674 (Jan. 24, 1978). In some crucial details, Reagan's order rejected Carter's suspicions regarding the United States' intelligence agencies. *See* Duncan L. Clarke & Edward L. Neveleff, *Secrecy, Foreign Intelligence, and Civil Liberties: Has the Pendulum Swung Too Far?*, 99 POL. SCI. Q. 493, 506–08 (1984) (discussing the order's classification provisions).

56. Memorandum from Office of Legal Counsel, Department of Justice, to the Attorney General 1 (Feb. 19, 2010) [hereinafter OLC-CIA Memo].

57. Memorandum from Office of Legal Counsel, Department of Justice, to the Attorney General (July 16, 2010) [hereinafter OLC-DOD Memo].

58. *Compare* OLC-DOD Memo, *with* OLC-CIA Memo.

59. OLC-DOD Memo, *supra* note 57, at 35–38.

60. *Id.* at 30.

second missive concluded, "the use of lethal force would not violate the Fourth Amendment."[61]

Presented in a less formal way, these same reasons appeared in a DOJ paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force" (White Paper). For years, these documents constituted the most exhaustive defense available for an America citizen's foreign execution at a president's unreviewable command, but their content lingered in a shroud of secrecy.[62] Facing repeated attempts, the Obama Administration quietly fought the two OLC memos' release[63] but loudly rhapsodized about the public's right to know.[64]

### *C. Adversaries Joined*

On June 11, 2010, Scott Shane, a reporter from the *New York Times*, made a FOIA request to the OLC for the foregoing memoranda.[65] Specifically, he sought "all Office of Legal Counsel

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61. Memorandum from Office of Legal Counsel, Department of Justice, to the Attorney General 41 (Apr. 21, 2014).

62. *See* Greg Miller, *Legal Memo Backing Drone Strike that Killed American Anwar al-Awlaki is Released*, WASH. POST, June 23, 2014.

63. *Id.*; *see also* Michael D. Becker, Comment, *Piercing* Glomar*: Using the Freedom of Information Act and the Official Acknowledgment Doctrine to Keep Government Secrecy in Check*, 64 ADMIN. L. REV. 673, 675–77 (2012).

64. *See, e.g.*, Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009); Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 80 (2012); Tai, *supra* note 5, at 455; Laurence Tai, *A Tale of Two Transparency Attempts at FDA*, 69 FOOD & DRUG L.J. 423, 423 (2013); Erica Lynn Tokar, *Unlocking Secure Communities: The Role of the Freedom of Information Act in the Department of Homeland Security's Secure Communities*, 5 LEGIS. & POL'Y BRIEF 103, 116–24 (2013). In some ways, the Obama Administration proved more transparent than its predecessors. *See, e.g.*, Melissa Guy & Melanie Oberline, *Assessing the Health of FOIA After 2000 Through the Lens of the National Security Archive and Federal Government Audits*, 101 LAW LIBR. J. 331, 350 (2009); Haridakis, *supra* note 7, at 14–15; Shkabatur, *supra* note 64, at 92; Tokar, *supra* note 64, at 108–10; Wells, *supra* note 14, at 480–81; Yu & Robinson, *supra* note 4, at 196–97. Even with this caveat appended, however, it did not live up to the sanguine hopes embodied in the candidate's campaign statements and its opening memorandum. *See* Herz, *supra* note 4, at 598; Kines, *supra* note 6, at 743–48.

65. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 104–05 (2d Cir. 2014). Once a seeming bastion of the political establishment, *see* ELMER DAVIS, HISTORY OF THE NEW YORK TIMES: 1851–1921 at 374–75 (1921), the *New York Times* has emerged as one of FOIA's greatest users in the modern age. David McCraw, *Think FOIA Is a Paper Tiger? The New York Times Gives It Some Bite*, N.Y. TIMES, June 13, 2017, at

opinions or memoranda since 2001 that address the legal status of targeted killings, assassinations, or killing of people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government." In October 2011, Charlie Savage, a second reporter for the Gray Lady, filed a FOIA request in which he requested all OLC memoranda "analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist."[66] On October 19, the American Civil Liberties Union (ACLU) filed an independent request with the CIA, the DOJ, and the DOD, seeking a wide range of materials on the legality of the United States' drone program.[67]

Upon receipt of these demands, the DOJ refused to confirm or deny the existence of responsive records. Instead, it issued either a "no number, no list" response or a "Glomar response,"[68] for "the very fact of the existence or nonexistence of such a document is itself classified."[69] Having encountered such recalcitrance, the *New York Times* challenged the DOJ's response; similarly stymied, the ACLU launched its own suit against the OLC, DOJ, DOD, and CIA. The United States District Court for the Southern District of New York (New York Court) subsequently consolidated the two cases (SDNY Litigation) and granted summary judgment to the defendants on January 3, 2013.[70]

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A2 [hereinafter McCraw, *Paper Tiger*]; David McCraw, *FOIA, Subpoenas and Singapore's Libel Laws: All in a Day's Work*, N.Y. TIMES, Aug. 10, 2016.

66. *N.Y. Times Co.*, 756 F.3d at 105.

67. *Id.* at 106 (two of the DOJ's component agencies, OIP and OLC, also submitted requests).

68. First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW, 2014 WL 7148340, at *1 (N.D. Cal. Dec. 15, 2014). "A no number, no list response acknowledges the existence of documents responsive to the request, but neither numbers nor identifies them by title or description." *N.Y. Times*, 756 F.3d at 105. The term "*Glomar* response" refers to "a response that neither confirms nor denies the existence of documents responsive to the request." Ctr. for Constitutional Rights v. CIA, 765 F.3d 161, 164 n.5 (2d Cir. 2014). The term traces its roots to "the CIA's successful defense of its refusal to confirm or deny the existence of records regarding a ship named the Hughes Glomar Explorer." Conti v. U.S. Dep't of Homeland Security, No. 12-cv-5827, 2014 WL 1274517, at *3 n.2 (S.D.N.Y. March 24, 2014). In the eyes of some, *Glomar* responses allow the government to circumvent the requirement for a detailed affidavit in national security cases imputed into FOIA by federal courts. Margarent B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 142 (2017) [hereinafter Kwoka, *Secrecy*].

69. Compl. At ¶ 12, Ex. B, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Feb. 29, 2012), ECF No. 1.

70. N.Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 515–16 (S.D.N.Y. 2013).

On October 5, 2011, two days before the *New York Times* launched a third FOIA request, the First Amendment Coalition (FAC), a non-profit organization dedicated to freedom of speech and government transparency, submitted a written FOIA request to the OLC for "a legal memorandum prepared by OLC concerning the legality of the lethal targeting of Anwar al-Awlaki," the first FOIA request submitted by any entity after Awlaki's death.[71] Meanwhile, FAC proceeded to exhaust all requirements for administrative appeals and, having encountered only persistent silence, filed suit for declaratory relief in the United States District Court for the Northern District of California (California Court) on February 29, 2012 (California Litigation).[72] Although FAC and DOJ filed cross-motions for summary judgment, the California Court stayed further proceedings to await judgment in the SDNY litigation.[73] On January 10, 2013, that tribunal ordered supplemental briefing on the parties' outstanding dispositive motions in light of the New York Court's decision.[74]

### *D. Publication*

On February 4, 2013, *NBC News* published the White Paper.[75] Days later, though it had previously rebuffed congressional actors, the DOJ provided a copy of the unredacted sixteen-page précis to the Senate's Judiciary Committee and Select Intelligence Committee and the House of Representatives' Judiciary Committee and Permanent Select Committee on Intelligence.[76] On February 8, 2013, the United States officially disclosed the document to a reporter from *Truthout* in slightly different form as a response to an outstanding another outstanding FOIA request.[77] Amid further public attention, on May 22, 2013, the Attorney General of the United States acknowledged the nation's responsibility for Awlaki's end in a letter to the chair of the Senate's Committee on the Judiciary.[78]

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71. First Amendment Coalition v. U.S. Dep't of Justice, No. C 12-1013 CW, 2014 WL 1411333, at *2 (N.D. Cal. Apr. 11, 2014).

72. *Id.*

73. *Id.*

74. *Id.*

75. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 110–11 n.9 (2d Cir. 2014).

76. *Id.*

77. *Id.*

78. *Id.* at 111.

### *E. Judicial Proceedings Continued*

That same summer day, the DOJ withdrew its first motion for summary judgment in the California Litigation.[79] As justification, it cited the Attorney General's admission, adding that "the President has determined that the United States' responsibility for that operation can now be publicly acknowledged."[80] On June 21, the OLC too altered its FOIA response.[81] It now identified one responsive document—the OLC-DOD Memorandum—and continued to withhold it under three FOIA exemptions.[82] Having made this one concession, it restated its old *Glomar* responses.[83]

On September 5, 2013, the DOJ filed a second motion for summary judgment in the California Litigation, arguing against releasing the materials FAC had requested based primarily on three FOIA exemptions.[84] FAC again cross-moved for summary judgment and sought these documents' release.[85] After FAC cited to the White Paper, prepared for Congress and leaked and acknowledged by the government, as evidence,[86] DOJ retorted—"The White Paper is a draft document that was originally provided in confidence to Congress; the Executive Branch later acknowledged the draft document"[87]—but failed to inform FAC or the California Court of the White Paper's release to *Truthout*.[88] Partly relying on the incorrect belief that DOJ

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79. *First Amendment Coalition*, 2014 WL 1411333, at *2.

80. Defendant's Notice of Withdrawal of Motion for Summary Judgment, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. May 22, 2013), ECF No. 59.

81. *N.Y. Times Co.*, 756 F.3d at 107.

82. *Id.*

83. *Id.*

84. Defendant's Notice and Second Motion for Summary Judgment, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Sept. 9, 2013), ECF No. 63.

85. Plaintiff First Amendment Coalition's Cross-Motion for Summary Judgment and Omnibus Opposition to Defendant's Motion for Summary Judgment, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Oct. 3, 2013), ECF No. 66.

86. Plaintiff First Amendment Coalition's Reply in Support of Cross-Motion for Summary Judgment, First Amendment Coalition v. U.S. Dep't of Justice 12, No. C 12-1013-CW (N.D. Cal. Nov. 22, 2013), ECF No. 77.

87. Defendant's Reply Memorandum and Opposition to Cross-Motion at 13 n.3, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Sept. 9, 2013), ECF No. 76.

88. *See id.* at 16–17.

had not formally disclosed the White Paper, the California Court granted its motion.[89]

Events took a different course in the Empire State. On January 3, 2013, the New York Court granted the DOJ's summary judgment motion, and the *New York Times* and ACLU appealed to the Second Circuit.[90] The Second Circuit issued its decision on April 21, 2014, just ten days after the California Court had granted DOJ's motion for summary judgment.[91] Affirming in part, reversing in part, and remanding, the Second Circuit, as set forth in an opinion issued in July 2014, predicated its ruling on the conviction that the DOJ had already waived secrecy and privilege as to the legal analysis in the OLC memo: "[T]he substantial overlap in the legal analyses of the [White Paper and OLC memo] fully established that the Government may no longer validly claim that the legal analysis in the [OLC memo] is secret."[92] Accordingly, "[w]hatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper," and "a redacted version of the [OLC memo] . . . must be disclosed."[93] The Second Circuit strove to distinguish the California Court's contrary conclusion:

> [T]h[at] Court, being under the impression that there has been no official disclosure of the White Paper, . . . did not assess its significance, whereas in our case, the Government has conceded that the White Paper, with its detailed analysis of legal reasoning, has in fact been officially disclosed.[94]

On May 8, 2014, FAC moved for reconsideration of the California Court's ruling based on this appellate decision.[95] Before it could rule, the Second Circuit published a redacted version of the OLC memorandum.[96] Simultaneously, it held that "other legal opinions prepared by OLC must be submitted to the District Court for in

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89. First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW, 2014 WL 1411333, at *12 (N.D. Cal. Apr. 11, 2014).

90. Notice of Civil Appeal, New York Times Co. v. U.S. Dep't of Justice, No. 13-422 (2d Cir. Feb. 6, 2013), ECF No. 1.

91. N.Y. Times Co. v. U.S. Dept. of Justice, 752 F.3d 123, 131 (2d Cir. 2014).

92. N.Y. Times Co. v. U.S. Dept. of Justice, 756 F.3d 100, 116 (2d Cir. 2014).

93. *Id.* at 126, 144 (internal quotation marks omitted).

94. *Id.* at 139.

95. Plaintiff First Amendment Coalition's Motion for Reconsideration, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. May 8, 2014), ECF No. 88.

96. *N.Y. Times Co.*, 756 F.3d at 124.

camera inspection and determination of waiver of privileges and appropriate redaction[.]"[97] Upon this decision's release, counsel for DOJ emailed FAC's attorneys, acknowledging the existence of an additional memorandum and promising its release.[98] In due course, DOJ released a redacted version of the OLC-CIA Memorandum to *The New York Times* and the ACLU.[99]

On August 28, 2014, the parties in the California Litigation submitted an updated joint status report.[100] The opponents characterized the release of the OLC-DOD and OLC-CIA memoranda as leaving "no substantive issues . . . in this case."[101] With the parties in accord as to this issue, FAC moved to vacate the previous grant of summary judgment to the United States[102] and for attorneys' fees and costs,[103] the latter request eliciting fervent opposition.[104] On December 15, 2014, the California Court granted the motion to vacate but denied the motion for attorneys' fees, its reasoning encapsulated in three sentences.[105] "Defendant in this case released the documents largely as a result of the Second Circuit's ruling . . . not as a result of the ruling in this case," the California Court explained. "This does not satisfy the requirements of § 552(a)(4)(E)(ii)."[106] "Moreover," it added, "[FAC] voluntarily abandoned its motion for reconsideration of the Court's order and agreed that no issues remained for litigation instead of pursuing an appeal."[107]

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97. *Id.* at 103.

98. *See, e.g.*, Declaration of Jonathan L. Siegel, Ex. A, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. July 10, 2014), ECF No. 98-1; Status Report and Proposed Schedule 2, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. July 10, 2014), ECF No. 92.

99. *N.Y. Times Co.*, 756 F.3d at 144.

100. Joint Status Report Regarding Remaining Areas of Dispute and Proposed Briefing Schedule at 1, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. August 28, 2014), ECF No. 94

101. Status Report and Proposed Schedule at 2, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Aug. 28, 2014), ECF No. 94.

102. Motion to Vacate, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Sept. 25, 2014), ECF No. 96.

103. Corrected Motion for Attorney Fees and Costs, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Oct. 14, 2014), ECF No. 103; *see also* Reply in Support of Plaintiff First Amendment Coalition's Motion for Attorneys Fees and Costs, First Amendment Coalition v. U.S. Dep't of Justice, No. C 12-1013-CW (N.D. Cal. Nov. 14, 2014), ECF No. 108.

104. Response to Motion for Attorney Fees, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Oct. 31, 2014), ECF No. 106.

105. First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW, 2014 WL 7148340, at *3 (N.D. Cal. Dec. 15, 2014).

106. *Id.*

107. *Id.*

### *F. Familiar Arguments Repeated*

Spurned, FAC appealed to the Ninth Circuit.[108] As it argued, "[t]he OLC memoranda were made public after . . . [FAC's] persistence, notwithstanding the [g]overnment's political and legal gamesmanship" and after it "abruptly changed its position."[109] Its efforts, FAC pointed out, had netted "three important disclosures," including the OLC-DOD and OLC-CIA Memos and the DOJ's formal admission regarding its role in Awlaki's demise.[110] Citing to FOIA, as amended by the OPEN Act, DOJ denied that FAC had either obtained a favorable decree or secured any agency's voluntary change in position.[111] In its telling, the New York and California Litigations constituted separate and unrelated events; thus, FAC's inability to "point to a single decision by [the Ninth Circuit] upholding the award of FOIA fees in one case for material obtained as a result of an unrelated proceeding" doomed its request.[112] "[P]laintiff in this case is claiming credit for documents obtained as a result of a case in which it did *not* participate, in a different jurisdiction, by unrelated litigants"[113]—an absurd position incompatible with FOIA's standard of eligibility for attorneys' fees, the government asseverated.[114]

### *G. Unexpected Detour: Oral Argument*

*December 15, 2016, Courtroom 4 of the James R. Browning United States Courthouse in San Francisco, California:*[115]

"[W]hen this case began, the government conceded absolutely nothing," FAC's lawyer began. "By the end of the case not only had the Glomar response of the government been abandoned, but in fact the FAC had achieved complete success. It received two documents

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108. Notice of Appeal, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. Jan. 21, 2015), ECF No. 110.

109. Appellant's Opening Brief at 10, First Amendment Coalition v. U.S. Dep't of Justice, No. 15-15117 (9th Cir. Aug. 28, 2015), ECF No. 10-1.

110. *Id.* at 13.

111. Brief for the Defendant-Appellee at 36–50, First Amendment Coalition v. U.S. Dep't of Justice, No. 15-15117 (9th Cir. Jan. 22, 2016), ECF No. 30.

112. *Id.* at 47.

113. *Id.* at 47–48.

114. *Id.* at 10–11.

115. Drawn from an audio recording of the oral argument, the snippets excerpted in this section have been edited for clarity's sake. Recording for Case, First Amendment Coalition v. U.S. Dep't of Justice, No. 15-15117 (9th Cir. Dec. 15, 2016), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000016735.

responsive to its FOIA request and a representation from the government that those documents were the entire universe of documents that were available and responsive."

"So you have two memos that I am focused on and is it your position that each of those disclosures warrant your entitlement to fees, or just the second one?" the visiting judge queried.

"It is our position that both of those memoranda justify the award of the fees. Either one independently. . . ." FAC's lawyer answered.

"There's something that's really troubling to me here," one of the two long-time appellate jurists interjected. "You seem to accept throughout your briefing that the standard that applies here is the standard that applied before the amendment to the statute with regard for the causation requirement, is that right?"

"Yes."

"But the statute seems to me to say something different. It says that substantially prevailed is a voluntary or unilateral change in position if the claim is not insubstantial. It doesn't say anything about the voluntary or unilateral change having to be caused by the lawsuit. And there could be a good reason for that because we get into exactly the kind of problems we have here."

"I believe your honor is correct in construing the statute broadly because that construction is supported by the policy of FOIA. . . ."

"Prior to *FAC*, there's been—and I want to know this—is there any case since the amendment of the statute . . . ? All the cases cited by both sides that I could find with regard to the causation standard and how you indicate it were pre-statute. Is there any post-statute case that says it's the same standard and all those cases still apply?"

"Your honor, we haven't seen a case that directly addresses the issue you are raising. However, in our briefing below we did quote both the standard and the legislative history of the standard which suggests it was meant to be a broadening of the standard and the reasoning of the causation."

"But you didn't argue that here really. But it just seems obvious to me that the statute was meant to do something else, which was to preclude this kind of inquiry, which is practically an impossible inquiry. Because we don't know what caused them to do anything. . . ."

### *H. Repercussions: A Peek into FOIA's Incoherence*

On August 25, 2017, though all three judges "agree[d]—although for different reasons—that FAC [was] eligible for attorney's fees,"

each issued a separate opinion.[116] In a meagerly reasoned paragraph—he would offer up one example as underscoring any contrary construction's absurdity—the authoring judge "reject[ed] the notion that the 2007 amendment eliminated the need to establish causation once a lawsuit has been initiated."[117] One of his fellow jurist concurred that the catalyst theory incorporated a causal requirement but excoriated the district court's for a peculiar legal error: as FAC "would have prevailed on the merits but for unilateral government action, it was eligible for fees, if not necessarily entitled to them."[118] Concurring in judgment, the third critiqued both these opinions as "entirely divorced from the words of the statute we must apply to determine if FOIA plaintiffs are eligible for fees."[119] As she twice asserted, *FAC* basically yielded no "majority holding as to whether, absent judicial relief, a plaintiff must demonstrate a causal nexus between the lawsuit and the disclosure."[120]

## II. MODERN LANDSCAPE: THE LAW'S EVOLUTION AND MODERN REALITIES

### *A. History: 1789–1965*

In a private letter inked on August 4, 1822, nearly a decade after his eventful presidency's denouement,[121] Madison waxed to William T. Barry, a Kentucky state senator:[122] "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."[123] The retired

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116. First Amendment Coal. v. U.S. Dep't of Justice, 869 F.3d 868, 870 (9th Cir. 2017) (Block, J.).

117. *Id.* at 876.

118. *Id.* at 887, 889–90 (Murguia, J., concurring in part and concurring in judgment).

119. *Id.* at 885 (Berzon, J., conrruing in judgment).

120. *Id.* at 886.

121. *See* GARRY WILLIS, JAMES MADISON 153–61 (Arthur M. Schlesinger, Jr. ed. 2002).

122. Fittingly for this tale's purpose, President Andrew Jackson would grudgingly dismiss Barry for his corrupt and inefficient management of the United States Postal Service. *See* Jerry L. Masha, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln*, 1829–1861, 117 YALE L.J. 1568, 1620 (2008).

123 Letter from James Madison to William T. Barry (Aug. 4, 1822), *reprinted in* THE JAMES MADISON PAPERS AT THE LIBRARY OF CONGRESS. This statement retains its popularity, cited often in press briefs submitted in constitutional cases. RONALD DWORKIN, A MATTER OF PRINCIPLE 390 (1985). Stripped of its context, it factored prominently in congressional debates over FOIA, *see* Ray v. Turner, 587 F.2d 1187, 1201 n.10 (D.C. Cir. 1978) (Wright, J., concurring); John Moon, *The Freedom of*

Virginian continued, speaking not of a general right to government data but of the necessity for publicly funded primary and secondary schools: "Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives."[124] Time's passage, however, obscured the narrowness of Madison's focus; indeed, even an astute rail-splitter expressed his belief in the veracity of the common misinterpretation of his distant predecessor's articulate letter when he uttered his own swiftly misconstrued declaration, "Let the people know the facts, and the country will be safe."[125] In spite of these panegyrics,[126] perhaps due to the decisions of such powerful men in the midst of shattering events,[127] the vision implicit therein—that an entitlement to information warehoused in official files existed, and that such access

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*Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1157–58 (1985), and reappears in both judicial opinions and academic commentary, *see, e.g.*, Charles Herrick, *Homeland Security and Citizen Response to Emergency Situations: A Perspective on the Need for a Policy Approach to Information Access*, 42 POL'Y SCI. 195, 195 (2009); Moon, *supra* note 123, at 1157–58, 1169; Jim Smith, *The Freedom of Information Act of 1966: A Legislative History Analysis*, 74 LAW LIBR. J. 231, 231 (1981).

124. Letter from James Madison to William T. Barry (Aug. 4, 1822). Madison held tightly to such notions. RICHARD BROOKHISER, JAMES MADISON 103–07 (2011); *see also* Frederick A.O. Schwartz, Jr., *Access to Government Information is a Foundation of American Democracy – But the Courts Don't Get It*, 65 OKLA. L. REV. 645, 648–55 (2013); Sullivan, *supra* note 11, at 33–35.

125. ALAN CHARLES RAUL, PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY 40 n.85 (2012).

126. Schwartz, *supra* note 124, at 648–49; *cf.* Morton H. Halperin & Daniel N. Hoffman, *Secrecy and the Right to Know*, 40 LAW & CONTEMP. PROBS. 132, 132 (1976) ("The public's 'right to know' has always been a basic tenet of American political theory.").

127. *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1898 TO THE WAR ON TERRORISM 110–13 (2004); Timothy L. Ericson, *Building Our Own "Iron Curtain": The Emergence of Secrecy in American Government*, 68 AM. ARCHIVIST 18, 22–26 (2005); Rozell, *Balance*, *supra* note 9, at 547, 555–60; Mark J. Rozell, *"The Law": Executive Privielge: Definition and Standards of Application*, 29 PRESIDENTIAL STUD. Q. 921–22 (1999) [hereinafter Rozell, *Law*]; Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 889 (1986). The existence of a unitary executive may be the culprit. *Cf.* Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainity, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 412–21 (2011); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2080–92 (2009). Naturally, 9/11 led to proposal to restrict FOIA's scope. STONE, *supra* note 127, at 552; Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 263 n.2, 272–81, 285–87, 294–97 (2003).

constituted a public's rightful prerogative in a functional republic[128]—merited barely an aside within the United States' gilded legislative halls and chief executive's limestone house for more than a century.[129] With the Constitution mostly silent as to such an appanage's existence,[130] though purportedly pregnant intimations lay within the

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128. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 796, (1983) (holding that the legitimacy of a state's interest in "fostering informed and educated expressions of the popular will" is unquestionable); Mart & Ginsburg, *supra* note 20, at 780–81 (stressing importance of openness and transparency in government); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648–49 (1967) (touting the view that the First Amendment was designed to ensure the emergence of an informed citizenry); Cameron, *supra* note 5, at 874–75 (positing why access to government records may be a fundamental right); Adam S. Davis, Comment, *The Power of Information: The Clash Between the Public's Right to Know and the Government's Security Concerns in a Post-September 11th World*, 33 WM. MITCHELL L. REV. 1741, 1749–50 (2007) [hereinafter Davis, *Power*] (linking FOIA to the preservation of an informed citizenry, a crucial democratic need); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986) ("We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."); Newton N. Minow & Fred H. Cate, *Revisiting the Vast Wasteland*, 55 FED. COMM. L.J. 407, 428 (2003) (arguing that an informed electorate is necessary to a free society); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 651–52 (2001) (discussing the need for transparency in legislative decisionmaking); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917–18 (2006) ("[A] genuine program of popular accountability need[s] a system for disclosing information about government. Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty."); Sullivan, *supra* note 11, at 9 ("Legal recognition of the people's 'right to know' serves two separate democratic values: governmental accountability and citizen participation.").

129. MICHAEL SCHUDSON, RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975 at 57 (2015); *see also Government Information and the Rights of Citizens*, *supra* note 22, at 974–75. Congress' right to survey an agency's secret files was subject to much less doubt. *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927); Martin & Lanosga, *supra* note 5, at 614–15.

130. HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 132 (1953); HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 11 (1999); O'Brien, *First Amendment*, *supra* note 5, at 592–601; Moon, *supra* note 123, at 1168; Sullivan, *supra* note 11, at 28; *cf.* Samaha, *supra* note 128, at 916 ("The individual provisions of the U.S. Constitution say little about government secrecy or public access."). During its first 150 years, the Court never decided whether there is a public right of access to government information under the First Amendment. David S. Cohen, *The Public's Right of Access to Government Information Under the First Amendment*, 51 CHI.-KENT L. REV. 164, 178 (1974) [hereinafter Cohen, *Government Information*]; Akilah N. Folami, *Using the Press Clause to Amplify Civic Discourse Beyond Mere Opinion Sharing*, 85 TEMP. L. REV. 269, 278, 282 (2013); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y

First Amendment,[131] and with the founding generation's actions irreconcilable[132] and their opinions sparse,[133] such indifference

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113, 158–59 (2008); *cf.* O'Brien, *First Amendment*, *supra* note 5, at 579–80. Nonetheless, it subsequently acknowledged the existence of an *abstract* right to know. *See, e.g.*, BeVier, *supra* note 8, at 488–97; Haridakis, *supra* note 7, at 7–10; David M. O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1, 10–11 (1981) [hereinafter O'Brien, *Reassessing*]; O'Brien, *First Amendment*, *supra* note 5, at 603–06, 619–22; Sullivan, *supra* note 11, at 14–17; *cf.* Cerruti, *supra* note 4, at 241 ("As of 1980, there was no recognized constitutional right of public access to information held or controlled by the government."). Some have commended the Court for avoiding the cultivation of a constitutional right to know against the government and instead leaving the right to be demarcated by the Constitution's democratic branches. O'Brien, *Reassessing*, *supra* , at 60–62; *cf.* Barron, *supra* note 128, at 1641 (recommending that a right of access to the press be secured by legislation). Others note that not all countries share a similarly cabined view of freedom of speech. *See* Ackerman & Sandoval-Ballesteros, *supra* note 12, at 90–91. For an excellent summary of the contending sides, see Sullivan, *supra* note 11, at 37–64, 69–70.

131. *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (1961); Wallace Parks, *Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957); *cf.* Cameron, *supra* note 5, at 874 ("If access to government records is not in itself a fundamental or a constitutional right, it appears that it is at least essential to the protection of fundamental and constitutional rights."). Professors Alexander Meiklejohn and Thomas Emerson were considered the premier scholarly proponent of this view. *See* Sullivan, *supra* note 11, at 37–43; Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 439–40 (2009). In this ongoing debate, many challenge this view, *see, e.g.*, O'Brien, *First Amendment*, *supra* note 5, at 586, 618, 630–31; BeVier, *supra* note 8, at 485, 516–17, and have been questioned in turn, *see* Perry, *supra* note 15, at 1194–200.

132. *See, e.g.*, Bodoh & Dempsey, *supra* note 11, at 224–29; Sam Ervin, *Foundation Media-Evolution of Printed Communication*, 60 GEO. L.J. 867, 876 (1972) [hereinafter *Mass Media*]; O'Brien, *First Amendment*, *supra* note 5, at 592–603; Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L & PUB. INT. 89, 90–91 (2015); White, *supra* note 6, at 1073–78; Rozell, *Balance*, *supra* note 9, at 555–60; Sofaer, *supra* note 10, at 19–24; *cf.* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 516–21 (1983) [hereinafter Anderson, *Origins*] (discounting the relevance of the Alien and Sedition Acts of 1798 to such an analysis). The Court, for instance, acknowledged the President's interest in maintaining the confidentiality of his or her deliberations in *Marbury v. Madison*. 5 U.S. 137, 144 (1803).

133. *See, e.g.*, Bodoh & Dempsey, *supra* note 11, at 215–17; Cameron, *supra* note 5, at 873; Timothy I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 737 (1977); Perry, *supra* note 15, at 1140; Ugland, *supra* note 130, at 170–71. *But see* Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503, 506–12 (2010) (collecting contrary evidence); G. Larry Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U. L. REV. 184, 185–86 (1973) (contending otherwise). Madison, for example, believed that a relatively low level of executive accountability to Congress and to the public was sufficient. Setty, *supra* note 11, at 280.

repeatedly proved fatal to its emergence[134] in the face of presidential intransigence.[135] Thus, even though the common law arguably recognized such a right,[136] improper secrecy still blossomed in the capital's cleared marshes.[137]

Tentatively, the seeds of a permanent transformation were planted during the New Deal Era, two acts signaling a philosophical and political evolution traceable to the rise of a vast administrative state.[138] Stung by the government's failure to notice the elimination of a dispositive legal term, a fiasco excoriated by the Court in *Amazon Petroleum Corporation v. Ryan* and *Panama Refining Company v.*

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134. *See* SCHUDSON, *supra* note 129, at 54–55 (commenting about the absence of any such legislative action prior to the twentieth century).

135. *See* Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 684 nn. 266–67 (1991); Rozell, *Balance*, *supra* note 9, at 569–70. Considering executive branch discretion and control of the classification system is almost surely "inevitable," this perpetual resistance cannot be regarded as surprising. Kitrosser, *Leaks*, *supra* note 14, at 894.

136. *See, e.g.*, Nixon v. Warner Commc'ns Inc., 435 U.S. 589, 597 & nn.7–8, (1978) (collecting cases, some from as early as 1894, recognizing a general right to inspect and copy public records and documents, including judicial records and documents);Davis, *supra* note 128, at 1747; Regalia, *supra* note 132, at 94–95. True, the government's right to withhold information apparently extended to state secrets, informers' identities, investigatory information, and internal agency communications at common law. Engel, *supra* note 133, at 186; *see also* JOHN BUZZARD ET AL., PHIPSONS ON EVIDENCE § 14-04 (13th ed. 1982); Cohen, *Government Information*, *supra* note 130, at 169; Bernard Schwartz, *Estoppel and Crown Privilege in English Administrative Law*, 55 MICH. L. REV. 27, 45, 51–52, 54–55 (1956). Every person, however, was entitled to the inspection of public records, "provided he has an interest therein which is such that would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information." Nowack v. Auditor Gen., 219 N.W. 749, 750 (Mich. 1928). By the late 1800s, state courts started altering the common law's pro-secrecy presumption by either weakening or forsaking the interest requirement. *See* Burton v. Tuite, 44 N.W. 282, 285 (Mich. 1889) (affirming a citizen's right of free access to and public inspection of public records); Cameron, *supra* note 5, at 873 (discussing right's emergence); Martin & Lanosga, *supra* note 5, 631–33 (citing cases). Eventually, at its broadest, this right extended to any and all public records. Regalia, *supra* note 132, at 100; *see also, e.g.*, United States v. Mitchell, 551 F.2d 1252, 1257 (D.C. Cir. 1976), *rev'd sub nom.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); State ex rel. Colescott v. King, 57 N.E. 535, 537 (Ind. 1900). On this issue, history offers up one interesting tidbit: the phrase "in as ample a manner as hath at any time been secured by the common law" was expressly deleted from the First Amendment by the Senate. *See* Anderson, *Origins*, *supra* note 132, at 480–81.

137. *See* H.R. REP. NO. 89-1497, at 23 (1966).

138. *See, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 116–17; Cameron, *supra* note 5, at 880; Mart & Ginsburg, *supra* note 20, at 735–36; Samaha, *supra* note 128, at 951–52; Yu & Robinson, *supra* note 4, at 184–85. By some accounts, this abiding mistrust of executive agencies was but the most recent manifestation of America's paranoid style and anti-intellectual tradition.

*Ryan*,[139] Congress passed and the President signed the FRA in July 1935.[140] Championed by an associate justice—the Honorable Louis D. Brandeis[141]—and a new professor—Erwin N. Griswold[142]—this short law ordered the publication of certain documents in the newly created *Federal Register* (*FR*).[143] To explain this statute's purpose, the Committee on the Judiciary of the House of Representatives, led by a determined Emanuel Celler,[144] pointed to certain cardinal truths. First, "[i]n the first 15 months after March 4, 1933, the President alone issued 674 [e]xecutive orders"; the National Recovery Administration itself issued "some 10,000 pages of 'law'"; and "a tremendous number of rules and regulations" had led to an "avalanche of [e]xecutive orders, decrees, regulations, notices, and codes."[145] Second, while "[t]he enactments of Congress are easily available . . . often the regulations issued under them are more important than the basic acts" but "cannot be [readily] found" due to the "utter chaos" of "their publication and distribution."[146] These verities, it contended, necessitated the creation of both "the machinery

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139. 293 U.S. 388, 412 (1935).

140. Federal Register Act of 1935, Pub. L. 74-220, 49 Stat. 501 (current version at 44 U.S.C. § 1505(a)(2)).

141. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 700 (2009); *see also* Aftergood, *supra* note 6, at 399 (citing quote). As to this issue, the professor had written: "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." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). As a justice, Brandeis had emphasized the need for an informed citizenry: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 459–66 (1988) (outlining Brandeis' vision).

142. Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204, 211–13 (1934) [hereinafter Griswold, *Ignorance*]; *see also* Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25 (ascribing the primary motive for secrecy in government not as "national security" but as hiding "governmental embarrassment of one sort or another").

143. Federal Register Act of 1935, Pub. L. 74-220, 49 Stat. 501 (current version at 44 U.S.C. § 1505(a)(2)).

144. ERWIN N. GRISWOLD, OULD FIELD, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 118 (1992).

145. H.R. REP. NO. 74-280, at 1 (1935); *see also* Griswold, *Ignorance*, *supra* note 142, at 198–99 (making similar observations).

146. H.R. REP. NO. 74-280, at 2; *see also* Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 766 (2014) (discussing impetus behind the FRA).

and the staff to provide, first, for the publication and dissemination of all future rules and regulations and orders of departments . . . and for the codification, classification, and indexing of all existing rules, orders, and regulations of the executive departments."[147] Initially viewed as "the first strong step toward controlling agencies and protecting individual rights,"[148] experience soon showed that neither the FRA nor the *FR* "provide[d] satisfactory methods by which the people could learn of the rules and procedures proliferated by administrative agencies."[149]

As a result, pleas for better remedies flourished. These cries proved so potent that in 1939, once more attempting to "deflect the new momentum for strict control of agencies"[150] spearheaded the American Bar Association,[151] Roosevelt appointed the Attorney General's Committee on Administrative Procedure (AG's Committee).[152] Among the many proposals dotting its lengthy final report, this collection of judges, scholars, and practitioners endorsed passing a law mandating that information concerning agency organization, policy statements, statutory interpretations, substantive regulations, rules of procedure, forms, and instructions "be made available, in orderly and readily accessible form, to the public."[153] Enacted in 1946, Section 3(c) of the APA codified this final recommendation by making agencies "public records" newly available,[154] a first attempt "to bring some order out of the growing chaos of Government regulations."[155] These public information requirements were hailed as "among the most important, far-reaching, and useful provisions" of the APA, "requir[ing] agencies to

147. H.R. REP. NO. 74-280, at 3; *cf.* Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the Federal Register*, 61 PUB. ADMIN. REV. 359, 366–67 (2001) (discussing the legislative and judicial ferment from which the FRA emerged).

148. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1580 (1996); *see also* 76 CONG. REC. 4590, 4591 (1940) (statement of Rep. Hancock).

149. Major John T. Sherwood, Jr., *The Freedom of Information Act: A Compendium for the Military Lawyer*, 52 MIL. L. REV. 103, 104 (1971).

150. Shepherd, *supra* note 148, at 1594.

151. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L. REV. 1207, 1224–25 (2015).

152. COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 1 (1941); *see also* Sperry v. Florida, 373 U.S. 379, 396 (1963).

153. COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 26 (1941).

154. Act of June 11, 1946, § 3(c), Pub. L. 79-404, 60 Stat. 237.

155. H.R. REP. NO. 89-1497, at 3 (1966).

take the mystery out of the administrative process by stating it."[156] As not one person doubted, a theory—"that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definitiveness and assurance"—lay behind Section 3.[157]

Still, this highfaluting rhetoric obscured glaring weaknesses. Within Section 3's bare text, limiting provisions abounded, including exceptions for "any function of the United States requiring secrecy in the public interest," "relating solely to the internal management of any agency," "those [materials] required for good cause to be held confidential and not cited as precedents," and a requirement that the propounding persons be "properly and directly concerned."[158] The absence of any judicial recourse too proved to be a rather conspicuous omission.[159] So enervated,[160] Section 3 became "the major statutory excuse for withholding government records from public view,"[161] various agencies justifying their resistance with additional citations

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156. S. REP. NO. 79-752, at 198 (1945); *see also, e.g.*, Batterton v. Marshall, 648 F.2d 694, 704 n.47 (D.C. Cir. 1980) ("'[P]ublic participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests.'" (quoting S. REP. NO. 79-248, at 20 (1946))); Guardian Federal Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1979) (characterizing the APA's public participation requirement as "assur[ing] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solution").

157. S. REP. NO. 79-752, at 198; Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1043 n.5 (D.C. Cir. 2007) (quoting report).

158. Act of June 11, 1946, § 3, Pub. L. 79-404, 60 Stat. 237.

159. Charles H. Koch, Jr., *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189, 194 (1972).

160. GTE Sylvania v. Consumers Union of United States, 445 U.S. 375, 384–85, 100 S. Ct. 1194, 1200–01, 63 L. Ed. 2d 467, 476 (1980); *cf.* Patsy T. Mink, *The* Mink *Case: Restoring the Freedom of Information Act*, 2 PEPP. L. REV. 8, 11 (1974) ("It was in the context of demonstrable federal agency abuses relating to 'good cause,' 'public interest,' and other loopholes that Congress passed the 1966 act.").

161. Charles P. Bennett, *The Freedom of Information Act, is it a Clear Public Record Law?*, 34 BROOK. L. REV. 72, 73 (1967); *see also, e.g.*, H.R. REP. NO. 89-1497, at 25 (1966); S. REP. NO. 89-813, at 40 (1965); Davis, *Power*, *supra* note128, at 1746; Martin E. Halstuk*, When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 434 (2008); John A. Hoglund & Jonathan Kahan, *Invasion of Privacy and the Freedom of Information Act:* Getman v. NLRB, 40 GEO. WASH. L. REV. 527, 527–28 (1972); Benny L. Kass, *The New Freedom of Information Act*, 53 A.B.A. J. 667, 668 (1967); Patrick Lightfoot, Comment, *Waving Goodbye to Nondisclosure Under FOIA's Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807, 810 (2012); Mart & Ginsburg, *supra* note 20, at 735; Sherwood, *supra* note 149, at 104.

to a housekeeping statute first passed in 1789 and eventually codified in 1875.[162] To the chagrin of four presidents,[163] this pattern precipitated repeated calls for reform,[164] consistently promoted by the American Society of Newspaper Editors[165] and a Californian representative, John E. Moss, throughout the 1950s and 1960s.[166]

### *B. Modern Law: 1966–2007*

#### 1. FOIA's Early Versions: 1966–2017

##### i. First Iteration

In the summer of 1966, Moss' efforts culminated in the first federal statute to establish an enforceable right of public access to executive branch information.[167] Specifically, on June 5 and July 4,

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162. An Act to provide for the safe-keeping of the Acts, Records and Seal of the United States, and for other purpose, 1 Stat. 68 (current version at 5 U.S.C. § 303); Martin & Lanosga, *supra* note 5, at 622 (discussing law); William Bradley Russell, Jr., *A Convenient Blanket of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 749–50, 753–54 (2005) (tracing law's history and its frequent invocation in the 1950s and 1960s); Engel, *supra* note 133, at 187 (denouncing agencies' frequent "misuse[]" of this statute to keep their information secret). This maddening utilization led to this law's one-sentence amendment in 1958. *See* Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy*, 46 PUB. ADMIN. REV. 615, 615 (1986); Comment, *supra* note 6, at 1442.

163. FOERSTEL, *supra* note 130, at 18–19, 37–42; *cf.* Kitrosser, *Leaks*, *supra* note 14, at 895 (contending that the problem of over-classification by executive agencies "is not unique to any one party, President, or era").

164. *See, e.g.*, H.R. REP. NO. 89-1497, at 24–27; S. REP. NO. 89-813, at 38–39; Davis, *Power*, *supra* note 128, at 1746.

165. *See, e.g.*, Fenster, *Transparency*, *supra* note 14, at 454–65; Halstuk, *supra* note 161, at 435–36. This organization sponsored the publication of a report by Harold L. Cross that detailed the extent to which federal and state governments routinely denied public requests for access to information. *Id.* at 436. This report, as well as an earlier book written by Kent Cooper, the general manager of the Associated Press, have proven influential over the last fifty years. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1369–70 (2016) [hereinafter Kwoka, *Inc.*]; Smith, *supra* note 123, at 231–32.

166. *See, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 119; Davis, *Power*, *supra* note 128, at 1746–47; Halstuk, *supra* note 161, at 437; MICHAEL R. LEMOV, PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS 56–60 (2011); Rozell, *Law*, *supra* note 127, at 923–24; SCHUDSON, *supra* note 129, at 34–36;. For more on Moss' efforts, see Robert O. Blanchard, *Present at the Creation: The Media and the Moss Committee*, 49 JOURNALISM Q. 271 (1972).

167. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 634 (2005) [hereinafter Pozen, *Mosaic*].

1966, respectively, Congress enthusiastically passed and Lyndon B. Johnson's resentfully signed "an act to amend section 3 of the Administrative Procedure Act . . . to clarify and protect the right of the public to information, and for other purposes,"[168] an accurate description of an emendation[169] which quickly attained its colloquial appellation, FOIA.[170] In its enacted form, FOIA effected three changes to the APA's third section: it (1) eliminated the "properly and directly concerned" test of eligibility for disclosure, authorizing the "prompt[]" release of documents not previously published in the FR to "any person";[171] (2) replaced phrases of "good cause found," "in the public interest," and "internal management" with specific definitions of information which could be withheld;[172] and (3) provided an aggrieved citizen with the right to appeal a denial to a federal district court.[173] By so "requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions," FOIA sharply departed from Section 3.[174] "[B]roadly conceived,"[175] this first variant covered an extensive spectrum of information so as "to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable

168. Lemov, *supra* note 166, at 63–68; Vladeck, *supra* note 20, at 1798.

169. *See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 12 (1974).

170. SCHUDSON, *supra* note 129, at 36; *see also* Yu & Robinson, *supra* note 4, at 186 (discussing FOIA's history and Johnson's reasons for disliking it). FOIA's passage, most agree, simultaneously displaced any federal common law right to information. Regalia, *supra* note 132, at 123–25.

171. FOIA § 3(c) (current version at 5 U.S.C. § 552(a)(3)); *see also* H.R. REP. NO. 89-1497 (1966), at 22; S. REP. NO. 89-813, at 42–43.

172. FOIA § 3(e) (current version at 5 U.S.C. § 552(b)(1)); *see also* H.R. REP. NO. 89-1497, at 22–23; S. REP. NO. 89-813, at 43–45.

173. FOIA § 3(c) (current version at 5 U.S.C. § 552(a)(4)(B)); *see also* H.R. REP. NO. 89-1497, at 2; S. REP. NO. 89-813, at 7–8.

174. H.R. REP. NO. 89-1497, at 22; *see also* S. REP. NO. 89-813, at 38.

175. EPA v. Mink, 410 U.S. 73, 80; *see also* Reilly v. EPA, 429 F. Supp. 2d 335, 340 (D. Mass. 2006) (quoting *EPA*, 410 U.S. at 80).

public right to secure such information from possibly unwilling official hands,"[176] subject only to exemptions "explicitly made exclusive."[177]

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176. *EPA*, 410 U.S. at 80; *see also* Coleman v. DEA, 714 F.3d 816, 828 (4th Cir. 2013) (quoting *EPA*, 410 U.S. at 80); *see also, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 118 ("The U.S. FOIA grew out of the same distrust in the power of administrative agencies that had stimulated the passage of the APA."); Ericson, *supra* note 127, at 41–43 (providing some examples of the rabid misclassification which prompted FOIA's adoption); Kitrosser, *Leaks*, *supra* note 14, at 894 ("There long has been widespread concern across the political spectrum about the existence of rampant overclassification."); Pack, *supra* note 14, at 820 (characterizing FOIA as creating a "presumption of accessibility"); Pozen, *Mosaic*, *supra* note 167, at 635 ("The Act became a powerful tool for inducing disclosure and a powerful symbol of America's commitment to governmental transparency."); Sullivan, *supra* note 11, at 66 (describing FOIA as a super-statute in which Congress "sought to protect the people's 'right to know'" and not "to balance the need for disclosure with the need for secrecy," as the Court has often maintained); Tokar, *supra* note 64, at 103–04 (summarizing law's purposes); Comment, *supra* note 6, at 1442 ("Congress enacted the FOIA as a comprehensive attempt to set standards for public access to government information, to limit the areas in which disclosure could be denied, and to provide a remedy for wrongful withholding.").

177. Milner v. U.S. Dep't of the Navy, 562 U.S. 562, 565 (2011); *see also* U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (describing FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"); Kayla Berline, Comment, *Let Freedom Ring: Broadening FOIA's Public Domain and the Applicability of the Waiver Doctrine*, 35 LOY. L.A. ENT. L. REV. 63, 69 (2014) ("FOIA presumes disclosure[.]"); Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967) [hereinafter Davis, *Act*] ("The Act contains no provision forbidding disclosure. It requires disclosure of all records except what is 'specifically' within the nine exemptions and other provisions."); Halstuk, *supra* note 161, at 443 (contending the legislative history allows for no other approach); Tokar, *supra* note 64, at 108 (contending that this predilection provides agencies with an incentive to disclose records that are not clearly exempt). FOIA's exemptions number nine. 5 U.S.C. § 552(b) (2016); Davis, *Power*, *supra* note 128, at 1745–46. FOIA's codification of only nine exceptions has not completely stymied judicial creativity: today, courts often evaluate the factual circumstances surrounding a type of record to determine whether it would normally be covered by an existing exemption, effectively expanding such an exemption's denotation. Joseph Wenner, Comment, *Who Watches the Watchmen's Tape? FOIA's Categorical Exemptions and Police Body-Worn Cameras*, 2016 U. CHI. LEGAL F. 873, 874, 905–06 (2016). In this process, courts appear guided by the relevant exception's apparent purposes. *See* Sherman, *supra* note 27, at 425. Arguably, they have thereby muddied FOIA's operation. David E. McCraw, *The"Freedom From Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. F. 232, 236–40 (2016) [hereinafter McCraw, *Freedom*]. An interesting effect of this common practice and FOIA's exclusive exceptions has been the attempted use of FOIA to obtain information during another case's discovery process. *See Government Information and the Rights of Citizens*, *supra* note 22, at 1149–50. FOIA's unanticipated uses, in fact, have multiplied in recent years. Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 YALE L.J. F. 265, 266 (2016) [hereinafter Kwoka, *Inside*].

Inevitably, problems emerged as FOIA's "technical rather than inspirational"[178] language was parsed and applied.[179] In its favor, FOIA empowered a district court to conduct de novo, but not in camera, review and placed the burden of justifying any withholding upon the agency.[180] On the other hand, while the courts' deferential application of this non-deferential standard created its own problems,[181] a strange sparseness within FOIA's skimpy text blunted its remedial provisions' concrete effectiveness.[182] However much data it technically unshackled, FOIA allowed for only one tonic to the ills that multiple congressional committees had documented—enjoinment of "the agency from withholding of agency records and . . . order[ing] production of any agency records improperly withheld by the complainant"—and one punitive sanction for noncompliance—contempt.[183] Curiously, the original bill, as introduced by Missouri's Edward V. Long on June 4, 1963, in the Senate, had guaranteed vindicated complainants not just the records improperly withheld but also recuperation of their costs and legal fees.[184] When Senator Long

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178. Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 743 (1975).

179. *See, e.g.*, Lightfoot, *supra* note 161, at 812; Patrick J. Ward, Note, *The Vaughn Index – Enforcing Agency Compliance Under the Freedom of Information Act:* Coastal States Gas Corp. v. DOE, 16 NEW ENGL. L. REV. 979, 1002–03 (1981) (summarizing critiques).

180. FOIA § 3(c) (current version at 5 U.S.C. § 552(a)(4)(B)); *see also, e.g.*, EPA v. Mink, 410 U.S. 73, 81 (1973) (holding that an in camera inspection was not authorized under pre-1974 FOIA); H.R. REP. NO. 89-1497, at 30 (1966) (stating the reasons for this arrangement of burdens). Even now, whether an *appellate* court can also conduct de novo review of a district court order affirming an agency's denial of a party's FOIA request is an open question. *Compare* Halpern v. FBI, 181 F.3d 279, 287–88 (2d Cir. 1999), *with* Lame v. U.S. Dep't of Justice, 767 F.2d 66, 69 (3d Cir. 1985). For more on this dispute, see Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731 (2006).

181. *See, e.g.*, Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1506–08 (2015) [hereinafter Kwoka, *Rejection*]; Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1431 (2015) [hereinafter Kwoka, *Leaking*].

182. *Cf.* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 937 (1992) (pointing to FOIA's unreliability, as evidenced by its manifold exemptions and the belated release caused by agencies' resistance to information requests).

183. FOIA § 3(c) (current version at 5 U.S.C. § 552(a)(4)(B)); *see also* H.R. REP. NO. 89-1497, at 9 (summarizing the limited remedies provided in the act). It was not even clear whether the judicial review provision applied when agency opinions or orders were wrongfully withheld. *Government Information and the Rights of Citizens*, *supra* note 22, at 1120.

184. S. 1666, 88th Cong. § 3(c) (1963).

reintroduced the bill that would become FOIA on February 17, 1965, however, any such sentence had been extirpated.[185]

### ii. 1974 Amendments

Launched with fond hopes, FOIA's "efficient operation" was "hindered by 5 years of foot-dragging by the Federal bureaucracy."[186] On a daily basis, "the executive branch remain[ed] unwilling to accept any inroads which limit[ed] executive power."[187] The Court bolstered this resistance when it determined that Congress had not empowered judges to question executive classifications and therefore conduct in camera review of those classifications.[188]

Although the aforementioned ambiguities bore some of the blame for this reality, two reports pushed judicial interpretations of the adolescent FOIA in a more conservative pro-agency direction. The first originated in Congress, for while the Senate's final report advocated an interpretation generally favorable to public disclosure of executive agency information,[189] the one prepared by the Committee on Government Operations of the House of Representatives did not.[190] Seemingly, "the House committee was subjected to pressures to restrict the disclosure requirements," pressures to which it "yielded," albeit without changing FOIA's actual text.[191] In fact, "[t]he main

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185. President Lyndon B. Johnson, *Statement on Signing Senate Bill 1160* (July 4, 1966).

186. H.R. REP. NO. 92-1419, at 8 (1972); *see also* S. REP. NO. 93-854, at 3, 22 (1974) (echoing this observation); McCraw, *Freedom*, *supra* note 177, at 232 (citing Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970)); Cameron, *supra* note 5, at 882 (summarizing history of 1974 Amendments); Ackerman & Sandoval-Ballesteros, *supra* note 12, at 118–19 (same).

187. Mink, *supra* note 160, at 25; *see also* Joshua Apfelroth, *The OPEN Government Act: A Proposed Bill to Ensure the Efficient Implementation of the Freedom of Information Act*, 58 ADMIN. L. REV. 219, 221 (2006) (attributing the 1974 amendments to agencies' abuse of discretion in denying FOIA requests); Mart & Ginsburg, *supra* note 20, at 741–45 (giving background to 1974 Amendments); Comment, *supra* note 6, at 1447 ("By the spring of 1973 Congress had become aware of the problems of the FOIA as it then existed."); Kenneth D. Salomon & Lawrence H. Wechsler, Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151 (1969) ("Though its aims were admirable, the 1966 Act has as yet failed to achieve what it was designed to do.").

188. EPA v. Mink, 410 U.S. 73, 82–84 (1973).

189. S. REP. NO. 89-813, at 22–23 (1965).

190. H.R. REP. NO. 89-1497, at 37, 39–40 (1966).

191. Davis, *Act*, *supra* note 177, at 809; *see also, e.g.*, Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971) (describing the House's report as "characteristically broader and goes beyond the express terms of the statute" and agreeing with two federal trial courts "that the Senate report is to be preferred over the House report as

thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure."[192] Because the Senate's explication, but not the House's, was presented to both chambers,[193] and the latter occasionally contradicts the plain text,[194] most courts and commentators accorded greater weight to the former,[195] but that approach could not obscure the differences in tone and analysis between these two imprints and the tentativeness thereby encouraged.[196] Soon after FOIA's passage, the Attorney General of the United States produced the second constrictive document, a forty-seven page printed pamphlet studying Moss' law line-by-line released soon after its enactment.[197] Albeit skillful and meticulous, this overview reflected the views of the very agencies that so consistently opposed FOIA's enactment[198] and "adopt[ed] the more restrictive pro-agency view of the House of Representatives";[199] by some accounts, its deviations from FOIA's first version were even more pronounced.[200] Whether due to its written gaps or these doubting expositions, during

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a reliable indication of legislative intent because the House report was not published until after the Senate had already passed its bill").

192. Davis, *Act*, *supra* note 177, at 763; *see also* Stokes v. Hodgson, 347 F. Supp. 1371, 1373–74 (N.D. Ga. 1972) ("[T]he court ventures the view that the Senate Report accurately explains the meaning of § 552(b)(2)[, FOIA's housekeeping exception,] while the House Report contradicts it. The Attorney General appears to follow the erroneous interpretation of the House committee."); Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wa. 1968) (rejecting GSA's attempt to categorize its "routine" intra-agency memoranda within FOIA's housekeeping exception, as "[t]he word 'routinely' does not appear in the statute, nor does it appear in the Senate Report"); Engel, *supra* note 133, at 189 ("Interpretation of . . . [FOIA] is complicated by the fact that the House Report is significantly more restrictive than the Senate Report.").

193. *Getman*, 450 F.2d at 673 n.8.

194. Davis, *Act, supra* note 177, at 773–74. The Senate, of course, exhibits several imperfections. *Id.* at 789–91, 800.

195. Mink, *supra* note 160, at 13; *see also* Salomon & Wechsler, *supra* note 187, at 153–55 (summarizing this report's numerous flaws).

196. Davis, *Act*, *supra* note 177, at 763.

197. RAMSEY CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), *reprinted in* 20 ADMIN. L. REV. 263 (1968).

198. Davis, *Act*, *supra* note 177, at 761; Cohen, *Government Information*, *supra* note 130, at 175; *cf.* Halstuk, *supra* note 161, at 439–40.

199. Salomon & Wechsler, *supra* note 187, at 155; *see also, e.g.*, Samuel J. Archibald, *The Freedom of Information Act Revisited*, 39 PUB. ADMIN. REV. 311, 315 (1979); Engel, *supra* note 133, at 217–18; Pozen, *Mosaic*, *supra* note 167, at 636;. For examples, see Davis, *supra* note 177, at 775–76, 785–86; Salomon & Wechsler, *supra* note 187, at 155–56.

200. Davis, *Act*, *supra* note 177, at 788, 791, 798.

its first decade of life, FOIA's victories numbered few,[201] its design was denounced as "unworkable," and its enforcement provisions were knocked as infirm[202] by open government advocates.[203]

Responding to these inadequacies,[204] amplified by the fears raised and substantiated by the Watergate Scandal,[205] Congress overrode a presidential veto[206] and enacted substantial amendments on November 20 and 21, 1974.[207] In the process, in both floor speeches and official reports, a resounding legislative majority expressly emphasized the significance of judicial review in the creation and maintenance of the fully informed citizenry upon which any democracy depends.[208] Among the changes made, Congress, for the

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201. Salomon & Wechsler, *supra* note 187, at 157–63. The Court would heavily rely on the House's report and the Attorney General's pamphlet to support its narrow construal of FOIA's "national security" exemption. EPA v. Mink, 410 U.S. 73, 81–82 (1973); *see also* Mink, *supra* note 160, at 19–20.

202. Davis, *supra* note 177, at 803–05; *see also* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1347 (1972).

203. *See* Engel, *supra* note 133, at 196–97; Nader, *supra* note 186, at 5 (contending that agencies manipulate their "broad ambit of discretion" under FOIA and that this law, "which came in on a wave of liberating rhetoric, is being undercut by a riptide of agency ingenuity").

204. *The Freedom of Information Act: Hearing on H.R. 5425 and H.R. 4960 Before the Subcomm. on Foreign Operations and Gov't Info. of the H. Comm. on Gov't Operations*, 93d Cong., 25 (1973); *see also* Halstuk, *supra* note 161, at 446.

205. 120 CONG. REC. S19806 (daily ed. Nov. 21, 1974) (statement of Senator Edward M. Kennedy); *see also* Danielson, *supra* note 22, at 986–87; Halstuk, *supra* note 161, at 445–46; *cf.* Lowell E. Baier, R*eforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 11–17 (2012) (discussing the era of public interest law which commenced in 1968). Ironically, President Richard Nixon responded most forthrightly to Moss' requests for clarification of White House policy on the use of executive privilege. Rozell, *Law*, *supra* note 127, at 923.

206. *Message from the President of the United States Vetoing H.R. 12471, An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act*, Gerald R. Ford, Pres. (Oct. 17, 1974). President Gerald Ford so acted on the recommendation of several advisors and executive departments. *See, e.g.*, Letter from Kenneth R. Cole, Jr., Director, White House Domestic Policy Council, to Gerald R. Ford, Jr., President of the United States (Sept. 25, 1974); *see also, e.g.*, Ray v. Turner, 587 F.2d 1187, 1207–09 (D.C. Cir. 1978) (Wright, J., concurring) (discussing legislative history of 1974 Amendments); Mart, *supra* note 20, at 9 (same). Many of the amendments' proponents viewed the veto as directly contrary to Ford's promise to run an "open government." Mink, *supra* note 160, at 26.

207. 120 CONG. REC. 36,633, 36,882 (1974).

208. *Ray*, 587 F.2d at 1209–10; Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 134 (1992).

first time, inputted an attorneys' fee provision.[209] Identically phrased in the Senate and House reports,[210] this provision then read: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[211] This language dictated a complainant's eligibility for attorney fees; under the 1974 amendments, that party's entitlement to such fees would continue to lie within a district court's sound discretion,[212] an award of fees never automatically following a positive eligibility determination.[213] While the Senate proposed the codification of factors to help guide this discretionary exercise,[214] the Committee of Conference deleted any such language based on its alleged immateriality, "the existing body of law on the award of attorney fees [already] recogniz[ing] such factors."[215] For these reasons, until 2007,

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209. Goldstein v. Levi, 415 F. Supp. 303, 304 (D.D.C. 1976). One of the most important alterations made included the addition of strict deadlines for an agency's response, an emendation which proved problematic in practice. *See generally* Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 325 (1994), and a provision authorizing a court's *in camera* review; *Government Information and the Rights of Citizens*, *supra* note 22, at 1124–25; Comment, *supra* note 6, at 1448–50.

210. H.R. REP. NO. 93-1380, at 220 (1974); *see also* Am. Fed'n of Gov't Emp. v. Rosen, 418 F. Supp. 205, 207 (N.D. Ill. 1976).

211. 1974 Amendments § (b)(2) (current version at 5 U.S.C. § 552(a)(4)(E)(i)); Oregon Nat. Desert Ass'n v. Locke, 572 F.3d 610, 614 (9th Cir. 2007) (quoting original subsection). Senator Edmund Muskie would propose, and the Conference Committee would endorse, a further sanction: "Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding." 1974 Amendments § (b)(2); *Government Information and the Rights of Citizens*, *supra* note 22, at 1144. "If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him." 1974 Amendments § (b)(2); *see also Government Information and the Rights of Citizens*, *supra* note 22, at 1144–49 (discussing provision).

212. Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991).

213. Chesapeake Bay Found. v. U.S. Dep't of Agric., 11 F.3d 211, 216 (D.C. Cir. 1993).

214. S. REP. NO. 93–854, at 19 (1974); *Am. Fed'n of Gov't Emps.*, 418 F. Supp. at 207–08. The factors numbered four: (1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting from disclosure, (3) the nature of the plaintiff's interest in the disclosed records, and (4) whether the government's withholding of the records had a reasonable basis in law. S. REP. NO. 93–854, at 19.

215. H.R. REP. NO. 93–1380, at 10 (1974). Though tossed by Congress, sundry courts came to treat the Senate's tetrad as the relevant lodestars for determining

FOIA neither identified when a complainant "substantially prevailed" nor specified the criteria for measuring the reasonableness of a party's litigation costs and fees.[216]

### 2. Judicial Explication of FOIA's Fee Eligibility Standard: 1974–2007

#### i. The Catalyst Test's Creation

Lacking such guidance, federal courts fashioned their own definition of "substantially prevailed." In *Vermont Low Income Advocacy Council, Inc. v. Usery*, the Second Circuit coined a most influential understanding of this pivotal phrase (*Vermont* Standard or *Vermont* Test),[217] presumptively resting on a reading of the word "prevail," which "[i]n every day use, . . . means 'gain victory by virtue of strength or superiority: win mastery: trumph.'"[218] As Henry Friendly explained on behalf of a unanimous panel, "[i]n order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had *substantial causative effect* on the delivery of the information."[219] "[C]onstrued to encompass situations in which the government discloses documents after the litigation has commenced,"[220] the test did not render a court judgment as a prerequisite to an award of costs and fees.[221] The Fifth

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entitlement. *See, e.g.*, United Ass'n of Journeymen & Apprentices, Plumbing & Pipefitting Indus., Local 598 v. Dep't of the Army, 841 F.2d 1459, 1461 (9th Cir. 1988); Lovell v. Alderete, 630 F.2d 428, 431–34 (5th Cir.1980); Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977). Some courts consider far more. *See, e.g.*, Trimper v. City of Norfolk, 58 F.3d 68, 73 (4th Cir. 1995) (listing twelve); Johnson v. Georgia Highway Express, 488 F.2d 714, 714 (5th Cir. 1974) (same).

216. *See, e.g.*, Blue v. Bureau of Prisons, 570 F.2d 529, 533 (5th Cir. 1978); *Am. Fed'n of Gov't Emps.*, 418 F. Supp. at 208. This omission is common. Martha Pacold, Comment, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1012 (2001).

217. Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976). The standard itself was borrowed from other areas of substantive law. *Government Information and the Rights of Citizens*, *supra* note 22, at 1136–37.

218. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 633 (2001) (Ginsburg, J., dissenting).

219. *Vermont Low Income*, 546 F.2d at 513 (emphasis added).

220. Ajluni v. FBI, 947 F. Supp. 599, 609 (N.D.N.Y. 1996); *see also, e.g.*, Kaye v. Burns, 411 F. Supp. 897, 902 (S.D.N.Y. 1976).

221. Nationwide Bldg. Maint., Inc. v. Sampson, 559 F.2d 704, 708–09 (D.C. Cir. 1977); *see also, e.g.*, Muffoletto v. Sessions, 760 F. Supp. 268, 273 (E.D.N.Y. 1991).

Circuit adopted the Second Circuit's formulation,[222] followed by the Eleventh Circuit in 1982[223] and for the First Circuit in 1993.[224] A fourth appellate court, meanwhile, constructed a slightly modified standard: "[T]he party seeking such fees in the absence of a court order must show that the prosecution of the action could reasonably be regarded as necessary to obtain the information . . . *and that a causal nexus exists between that action and the agency's surrender of that information*."[225] But, as even it conceded, whether spoken of in terms of a "substantial causative effect" or a "causal nexus," "[i]t is well established . . . that this inquiry is largely a question of causation."[226] Subsequent to these opinions, the Ninth Circuit endorsed the Second Circuit's iteration in *Church of Scientology of California v. United States Postal Service*[227] (*Church of Scientology* Test or *Church of Scientology* Standard) and utilized it consistently thereafter.[228] For more than twenty years, analysis of FOIA fee eligibility in the federal courts hence endured essentially unchanged. The *Church of Scientology* touchstone was uncontroversial within the

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222. *See* Cazalas v. U.S. Dep't of Justice, 660 F.2d 612, 619 (5th Cir. 1981) (citing Lovell v. Alderete, 630 F.2d 428, 432 (5th Cir. 1980)). Some have drawn a distinction between the Fifth Circuit's iteration and the *Vermont Low Income* test. *See* Doe v. Busbee, 684 F.2d 1375, 1379–80 (11th Cir. 1982).

223. Clarkson v. IRS, 678 F.2d 1368, 1371 (11th Cir. 1982).

224. Maynard v. CIA, 986 F.2d 547, 568 (1st Cir. 1993). At least once, the First Circuit appeared to avoid this common test's utilization in a case with unusual facts. Crooker v. U.S. Dep't of Justice, 632 F.2d 916, 919 (1st Cir. 1980); *see also* Ginter v. IRS, 648 F.2d 469, 471–73 (8th Cir. 1981) (noting both the *Vermont Low Income* test and the modified *Crooker* test and concluding that plaintiff failed to satisfy either test). The First Circuit in *Maynard*, however, made clear that the basic *Vermont Low Income* test controlled in most circumstances. *Maynard*, 986 F.2d at 568 (discussing *Crooker*).

225. Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1496 (D.C. Cir. 1984) (quoting Cox v. U.S. Dep't of Justice, 601 F.2d 1, 6 (D.C. Cir. 1979)) (emphasis added); *see also, e.g.*, Calypso Cargo, Ltd. v. U.S. Coast Guard, 850 F. Supp. 2d 1, 5–6 (D.D.C. 2012) (finding that plaintiffs were not "eligible" for attorneys' fees because the suit did not cause agency's release of documents, as shown by "detailed timeline" reflecting "diligent, ongoing process that began before the initiation of the instant lawsuit" to respond to FOIA request); Short v. U.S. Army Corps of Eng'rs, 613 F. Supp. 2d 103, 106 (D.D.C. 2009) ("The causation requirement is missing when disclosure results not from the suit but from delayed administrative processing.").

226. *Weisberg*, 745 F.2d at 1496; *accord, e.g.*, Reinbold v. Evers, 187 F.3d 348, 363 (4th Cir. 1999); Abernethy v. IRS, 909 F. Supp. 1562, 1567 (N.D. Ga. 1995).

227. 700 F.2d 486, 489 (9th Cir. 1983). Within the Ninth Circuit, the test first appeared in 1978. *See* Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978), *aff'd*, 612 F.2d 1202, 1202 (9th Cir. 1980).

228. *E.g.*, Lissner v. U.S. Customs Serv., 56 F. App'x 330, 331 (9th Cir. 2003) (employing the *Church of Scientology* standard); Long v. IRS, 932 F.2d 1309, 1313 (9th Cir. 1991) (same).

Ninth Circuit;[229] other circuits employed similar or identical criteria;[230] and all tightly restricted the inquiry into eligibility to the issue of causation.[231]

Although this line of cases did not always employ the specific phrase "catalyst theory" or "catalyst,"[232] *Vermont Low Income Advocacy Council, Inc.*, *Church of Scientology*, and their progeny all effectively endorsed a "catalyst theory of recovery."[233] Under this theory, as broadly divined, a plaintiff could recover attorney's fees through means other than a judgment in its favor if (1) its lawsuit was causally linked to securing the benefit obtained and (2) the law, not a defendant's voluntary grace, impelled that benefit's bequest.[234] In the common case, the requisite causal connection would be found whenever a particular plaintiff's lawsuit was a "catalytic, necessary, or substantial factor in attaining the relief," [235] a factual inquiry[236] best left to the trial court's discretion.[237] Serving as "an alternate theory for determining the prevailing party if no relief on the merits

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229. *See, e.g.*, Galedrige Constr. Inc. v. IRS, No. 94-16628, 1996 WL 21609, at *1 (9th Cir. 1996); Van Strum v. EPA, Nos. 91-35404, 91-35577, 1992 WL 197660, at *2 (9th Cir. 1992).

230. *See, e.g.*, Citizens Against Tax Waste v. Westerville City Sch. Dist. Bd. of Ed., 985 F.2d 255, 257–58 (6th Cir. 1993); Institutionalized Juveniles v. Sec'y of Pub. Welfare, 758 F.2d 897, 910–17 (3d Cir. 1985); J & J Anderson, Inc. v. Erie, 767 F.2d 1469, 1474–75 (10th Cir. 1985); Gerena–Valentin v. Koch, 739 F.2d 755, 758–59 (2d Cir. 1984); Stewart v. Hannon, 675 F.2d 846, 851 (7th Cir. 1982); Doe v. Busbee, 684 F.2d 1375, 1379 (11th Cir. 1982); Robinson v. Kimbrough, 652 F.2d 458, 465–67 (5th Cir. 1981); Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980); Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275, 279–81 (1st Cir. 1978).

231. *See, e.g.*, Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 625–26 (2001) (Ginsburg, J., dissenting) (summarizing this case law); Manos v. U.S. Dep't of the Air Force, 829 F. Supp. 1191, 1192 (N.D. Cal. 1993) (applying the *Church of Scientology* Test).

232. *But see* Dorsen v. SEC, 15 F. Supp. 3d 112, 118 (D.D.C. 2014).

233. Kilgour v. City of Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995); *accord* Beach v. Smith, 743 F.2d 1303, 1306 (9th Cir. 1984).

234. *See, e.g.*, Sw. Ctr. for Biological Diversity v. Carroll, 182 F. Supp. 2d 944, 946 (C.D. Cal. 2001); Richardson v. City of Boston, 135 F. Supp. 2d 60, 63–64 (D. Mass. 2001).

235. Gerena-Valentin v. Koch, 739 F.2d 755, 758–59 (2d Cir. 1984) (quotation marks and citation omitted); *see also, e.g.*, Associated Builders & Contractors, Inc. v. Orleans Parish Sch. Bd., 919 F.2d 374, 378 (5th Cir. 1990) ("[A] party may be entitled to fees as a prevailing party 'if its ends are accomplished as a result of the litigation'."); Institutionalized Juveniles v. Sec'y of Pub. Welfare, 758 F.2d 897, 910 (3d Cir. 1985) (employing the same two-part definition); Pascuiti v. New York Yankees, 108 F. Supp. 2d 258, 265 (S.D.N.Y. 2001) (quoting and applying standard).

236. Posada v. Lamb Cty., Tex., 716 F.2d 1066, 1072 (5th Cir. 1983).

237. *See* Pullman-Std. v. Swint, 456 U.S. 273, 293 (1982).

is obtained,"[238] this test allowed plaintiffs to dodge the need to obtain a favorable judgment or settlement so long as "the defendant, under pressure of the lawsuit, alter[ed] his[, her, or its] conduct (or threatened conduct) towards the plaintiff that was the basis for the suit."[239] Personal vindication in the form of a litigated decree was simply not required, only a curative rerouting for which a plaintiff's lawsuit was "a material factor"[240] in "a 'practical sense.'"[241] Some courts seemingly applied an even looser construction by holding that a prevailing party is one who achieved only "*some* of the benefit . . . sought"[242] by its lawsuit; a "substantial" or "significant" causal chain was not necessarily required.[243] Regardless of its contours, under this test's multiple forms, the mere filing of the complaint and the subsequent release of the pertinent documents could not establish causation, but neither could an agency prevent an award of attorneys' fees simply by releasing the requested information without requiring the complainant to obtain a court order.[244] Whether affirmed

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238. *Kilgour*, 53 F.3d at 1010 (citing to Beach v. Smith, 743 F.2d 1303, 1306 (9th Cir. 1984)); *accord* Exeter-West Greenwich Reg'l Sch. v. Pontarelli, 788 F.2d 47, 50 (1st Cir. 1986).

239. McGinty v. New York, 251 F.3d 84, 100 (2d Cir. 2001).

240. Disabled in Action v. Pierce, 789 F.2d 1016, 1019 (3d Cir. 1986); *see also, e.g.*, Sullivan v. Pa. Dep't of Labor & Indus., 663 F.2d 443, 449 (3d Cir. 1981) (describing that circuit's "causal-connection standard whose central inquiry has been variously stated as whether the plaintiff obtained the relief sought 'as a result of' the civil rights judicial efforts . . . or whether these efforts were a 'material factor' in obtaining the relief"); Williams v. Alioto, 625 F.2d 845, 845 (9th Cir. 1980) ("Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." (quoting Maher v. Gagne, 448 U.S. 122, 129 (1980))).

241. Stewart v. Hannon, 675 F.2d 846, 851 (7th Cir. 1982) (quoting Dawson v. Pastrick, 600 F.2d 70, 78 (7th Cir. 1979)).

242. Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 131 (3d Cir. 1991).

243. Laura Kendall, Note, *The Losing Argument Continues for Prevailing Without Winning: A Critical Summary of the Impact of* Buckhannon *on the Catalyst Theory*, 54 CASE W. RES. L. REV. 573, 575–76 (2003).

244. Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1496; *see also, e.g.*, Hertz Schram PC v. FBI, No. 12-cv-14234, 2015 WL 5719673, at *5 (E.D. Mich. Sept. 30, 2015) ("[T]he mere sequence of events is not sufficient to establish that the lawsuit was the triggering agent for. . . [an agency's] response.").

implicitly or explicitly, the catalyst doctrine stood unquestioned,[245] applied with uncontroversial regularity.[246]

### ii. Preview: *Farrar v. Hobby*

On the heels of three cases—*Hewitt v. Helms*,[247] *Rhodes v. Stewart*,[248] and *Texas State Teachers Association v. Garland Independent School District*[249]—*Farrar v. Hobby*[250] attempted to clarify the test limned in this trio and thus initially left FOIA's jurisprudence unscathed.[251] Characterized as a humdrum endorsement of an "uncontroversial principle,"[252] *Farrar* centered

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245. *See, e.g.*, Foreman v. Dallas Cty., 193 F.3d 314, 319–20 (5th Cir. 1999); Marbley v. Bane, 57 F.3d 224, 235 (2d Cir. 1995); Mark C. Weber, *Special Education Attorneys' Fees After Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*, 2002 BYU EDUC. & L.J. 273, 276–77 (2002).

246. This liberality did not proceed unhampered. For example, the Presidential Records Act of 1978 (PRA) gave the President nearly untrammeled discretion over the distribution of documents created during his or her term in office. *See* 44 U.S.C. §§ 2201–2207 (2016); Marcy Lynn Karin, Note, *Out of Sight, but Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 538–40 (2002) (discussing the act's abuse). As a result, a tension exists within the United States Code between the pro-production tendency enshrined in FOIA and FRA and the pro–nondisclosure penchant embodied in the PRA. See Andree Yingling, *Restoring FOIA's Reach to the National Security Council*, 22 COMMLAW CONSPECTUS 407, 410 (2014), and hallowed by history, *see supra* Part III.A.

247. 482 U.S. 755, 755 (1987) (holding that, so long as a lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment, whether a monetary settlement or a change in conduct that redresses the plaintiff's grievances, a party prevails for purposes of Section 1988). *Helms* is sometimes said to have adopted a so-called "behaoviral test." *See* Daniel L. Lowery, Note, *"Prevailing Party" Status for Civil Rights Plaintffs: Fee-Shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1441, 1448 (1993).

248. 488 U.S. 1, 1 (1988) (reaffirming the holding in *Hewitt*).

249. 489 U.S. 782 (1989). In *Texas State*, the Court seemingly manufactured a new criterion, thereafter known as the "legal relationship" test: "[T]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792–93.

250. 506 U.S. 103 (1992).

251. *See* Stefan Hanson, Buckhannon, *Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 538 (2006); Joel H. Trotter, Note, *The Catayst Theory of Civil Rights Fee-Shifting After* Farrar v. Hobby, 80 VA. L. REV. 1429, 1437–39 (1994). *See generally* Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 829 (2016) (for more on *Farrar* and its progeny).

252. Morales v. City of San Rafael, 96 F.3d 359, 362 (9th Cir. 1996).

exclusively on the attorney fee provision set forth in Section 1988 of the United States Code's forty-second title.[253] This non-jurisdictional statute,[254] which bore the title "The Civil Rights Attorney's Fees Awards Act of 1976" at its passage,[255] authorized a court to "in its discretion . . . allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" incurred "[i]n any action or proceeding to enforce" several federal civil rights statutes.[256] Expert fees could be included "as part of th[is award of] attorney's fee,"[257] a subsection added in response to the Court's *West Virginia University Hospitals v. Casey*.[258] While "no precise rule or formula for making these determinations" has yet been manufactured,[259] a district court should normally "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation,"[260] "the most critical factor" being "the degree of success obtained."[261] Therefore, pursuant to § 1988, that tribunal "may simply reduce the award to account for the limited success,"[262] partial awards for partial successes always possible.[263] Still, it "must provide concise and clear explanation of its reasons" for doing so,[264] as "[t]he record ought to assure . . . [any reader] that the district court did not eyeball the fee request and cut it down by an

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253. 42 U.S.C. § 1988(b) (2016). In this article, any reference to "Section 1988" or "§ 1988" is to this particular statute unless otherwise noted.

254. *E.g.*, Barr v. United States, 478 F.2d 1152, 1156 (10th Cir. 1973); Johnson v. New York State Educ. Dep't, 319 F. Supp. 271, 276 (E.D.N.Y. 1970).

255. 16 Pub. L. No. 94–559, 90 Stat. 2641 (1976).

256. 42 U.S.C. § 1988(b); *see also* Flitton v. Primary Residential Mortg., Inc., 614 F.3d 1173, 1176 (10th Cir. 2010) (reviewing an attorney's fee award for abuse of discretion); Perotti v. Seiter, 935 F.2d 761, 763 (6th Cir. 1991) (same).

257. 42 U.S.C. § 1988(c) (2016); Paschal v. Flagstar Bank, 297 F.3d 431, 437 (6th Cir. 2002) (citing provision).

258. 499 U.S. 83, 83 (1991); *see also* T.D. v. La Grange Sch. Dist., 349 F.3d 469, 481 n.5 (7th Cir. 2003) (so observing).

259. Hensley v. Eckerhart, 461 U.S. 424, 436 (1983); *see also* Binta B. v. Gordon, 710 F.3d 608, 639 (6th Cir. 2013) (citing *Henlsey*).

260. *Hensley*, 461 U.S. at 435; *see also* Riverside v. Rivera, 477 U.S. 561, 569 (1986) (quoting *Hensley*).

261. *Hensley*, 461 U.S. at 436; *see also* Phelps-Roper v. Koster, 815 F.3d 393, 398 (8th Cir. 2016).

262. *Hensley*, 461 U.S. at 436–37; *see also* Azua ex rel. Dupree v. Nat'l Steel & Shipbuilding Co., 534 F. App'x 618, 619 (9th Cir. 2013).

263. Wal-Mart Stores, Inc. v. Barton, 223 F.3d 770, 772 (8th Cir. 2000).

264. Zisumbo v. Ogden Reg'l Med. Ctr., 801 F.3d 1185, 1208 (10th Cir. 2015) (explicating the *Hensley* standard).

arbitrary percentage"[265] and did not disregard the verity that "the range of possible success is vast" in civil rights litigation.[266]

Within this body of law, as none could reasonably dispute, the Court rightly discerned no flaw or controversy. As the majority explained, § 1988 afforded "no startling new remedy."[267] Rather plainly, its drafters designed it to meet "the technical requirements that the Supreme Court has laid down if the [f]ederal courts are to continue the practice of awarding attorneys fees which had been going on for years prior to the Court's . . . decision"[268] in *Alyeska Pipeline Service Co. v. Wilderness Society*.[269] "The idea of the 'private attorney general' is not a new one, nor are attorneys' fees a new remedy," the Senate further explained, "Congress has commonly authorized attorneys' fees in laws under which 'private attorneys general[s]' play a significant role in enforcing our policies," having "authorized fee shifting under more than 50 laws" since 1870.[270] Indeed, the vindication of the rights enshrined in federal civil rights laws has always "depend[ed] heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important [c]ongressional policies which these laws contain."[271] "If private citizens are to be able to assert their civil rights, and if those who violate the [n]ation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."[272] Bare utility justified such a fee-shifting act, as it prevented a slew of civil rights statutes from devolving into

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265. People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 90 F.3d 1307, 1314 (7th Cir. 1996) (quotation marks omitted).

266. *Hensley*, 461 U.S. at 436; *cf.* Biery v. United States, 818 F.3d 704, 712 (Fed. Cir. 2016) ("Though a court may reduce an award, it should not do so in a rigid, mechanical way.").

267. S. REP. NO. 94-1011, at 6 (1976); City of Greensburg v. Wisneski, 75 F. Supp. 3d 688, 698 (W.D. Pa. 2015) (quoting this congressional affirmation).

268. S. REP. NO. 94-1011, at 6; Yakowicz v. Pennsylvania, 683 F.2d 778, 781 n.4 (3d Cir. 1982) (citing this report in hazarding an interpretation of the fee provision in Title VII of the Civil Rights Act of 1964).

269. 421 U.S. 240 (1975).

270. S. REP. NO. 94-1011, at 3; *see also* Zarcone v. Perry, 438 F. Supp. 788, 790 (E.D.N.Y. 1977) (quoting report). In spite of this judicial observation, the "private attorney general" concept, which draws from two older doctrines, only emerged in the course of case law developing the attorney fees provision in the Civil Rights Act of 1964. *Government Information and the Rights of Citizens*, *supra* note 22, at 1140–41.

271. Inmates of D.C. Jail v. Jackson, 158 F.3d 1357, 1363 (D.C. Cir. 1999) (quoting S. REP. NO. 94-1011, at 2).

272. S. REP. NO. 94-1011, at 2; Riverside v. Rivera, 477 U.S. 561, 578 (1986) (quoting S. REP. NO. 94-1011, at 2).

"hollow pronouncements," while "limiting the growth of the enforcement bureaucracy."[273]

From these uncontroversial tidbits of history and policy, however, the Court spun a more debatable rule. In particular, the majority newly (and unexpectedly) defined a "prevailing party" as a person whose "actual relief on the merits of his[, her, or its] claim" amounts to the "modif[ication of] the defendant's behavior in a way that directly benefits the plaintiff", and thus a concurrent "alter[ation in] the legal relationship between the parties."[274] In others word, "'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,'" "a generous formulation that brings the plaintiff . . . across the statutory threshold."[275]

### iii. Turning Point: Buckhannon

Two years after its release, *Farrar* finally imparted discord into FOIA's mature and sturdy elucidation. In March 1994, the Fourth Circuit sat en banc in *S-1 & S-2 v. State Board of Education of North Carolina*[276]—and, less than thirty days later, upset the juridical

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273. S. REP. NO. 94-1011, at 4, 6; Dowdell v. Apopka, 698 F.2d 1181, 1191 (11th Cir. 1983) (quoting S. REP. NO. 94-1011, at 4, 6); *see also* Kay v. Ehrler, 499 U.S. 432, 436 (1991) ("[T]his section was no doubt intended to encourage litigation protecting civil rights[.]"); Heath Hooper & Charles N. Davis, *A Tiger With No Teeth: The Case for Fee Shifting in State Public Records Law*, 79 MO. L. REV. 949, 951–54 (2014) (summarizing some of the reasons for such provisions); Brian J. Sutherland, *Voting Rights Rollback: The Effect of* Buckhannon *on the Private Enforcement of Voting Rights*, 30 N.C. CENT. L. REV. 267, 274–76 (2008) (faulting *Buckhanonn* for severely curtailing the private enforcement of important public policies); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088–89 (2007) (setting forth the reasons why fee-shifting statures are integral to the civil rights enforcement system in the United States). These arguments have become more pressing as federal courts began narrowly construing federal civil rights statutes and as public enforcement of these laws waned. *See* Steven Andrew Smith & Adam Hansen, *Federalism's False Hope: How State Civil Rights Laws are Systematically Under-Enforced in Federal Forums (and What Can Be Done About It)*, 26 HOFSTRA LAB. & EMP. L.J. 63, 66 (2008).

274. Farrar v. Hobby, 506 U.S. 103, 111–12 (1992).

275. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)).

276. 21 F.3d 49 (4th Cir. 1994).

consensus over the meaning of § 552.[277] Divided seven-to-six, this most cordial of appellate courts extended *Farrar*'s narrow reading of § 1988 to FOIA's fee-shifting paragraph, a transposition that compelled the obviation of the dominant catalyst theory.[278] Under *Farrar*, a prevailing party must "obtain[] an enforceable judgment, consent decree, or settlement giving some of the legal relief [it originally] sought."[279] Accordingly, "[t]he fact that a lawsuit may operate as a catalyst for postlitigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party"; the catalyst theory was "no longer available."[280] In response to this deviation from the pre-*Farrar* consensus, one appellate court opted to leave the question unanswered,[281] and others explicitly affirmed the unaffected viability of their respective versions of the catalyst theory.[282] Ultimately, "an analysis of the case law show[ed] that most Courts of Appeals still support[ed] the catalyst theory in civil rights litigation."[283]

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277. *See* Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598, 626–27 (2001) (Ginsburg, J., dissenting) (summarizing the doctrine's history before and after this opinion).

278. *S-1 & S-2*, 21 F.3d at 51; *cf.* Stanton v. S. Berkshire Reg'l Sch. Dist., 197 F.3d 574, 577 n.2 (1st Cir. 1999).

279. *S-1 & S-2*, 21 F.3d at 51; *see also* Trotter, *supra* note 251, at 1446–48.

280. *S-1 & S-2*, 21 F.3d at 51; *see also* Am. Council of the Blind v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 66, 71 (D.D.C. 2001); *cf.* Richardson v. City of Boston, 135 F. Supp. 2d 60, 64 (D. Mass. 2001) (canvassing the appellate divide); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 288–89 (1994) (assessing opinion's reasoning).

281. Foreman v. Dallas Cty., 193 F.3d 314, 320 (5th Cir. 1999). After *Farrar* but before 1999, the Fifth Circuit had applied the catalyst test. *See, e.g.*, Milton v. Shalala, 17 F.3d 812, 814–15 (5th Cir. 1994); Watkins v. Fordice, 7 F.3d 453, 456 (5th Cir. 1993); Pembroke v. Wood Cty., 981 F.2d 225, 231 n.27 (5th Cir. 1993).

282. *E.g.*, Kilgour v. City of Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1999); Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1194 (10th Cir. 1999); Morris v. City of West Palm Beach, 194 F.3d 1203, 1207 (11th Cir. 1999); Brown v. Local 58, IBEW, 76 F.3d 762, 772 n.7 (6th Cir. 1996); Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995); Zinn v. Shalala, 35 F.3d 273, 276 (7th Cir. 1994); Beard v. Teska, 31 F.3d 942, 951–52 (10th Cir. 1994); Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 549–51 (3d Cir. 1994); Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 17 F.3d 260, 262, 263 N.2 (8th Cir. 1994); Paris v. U.S. Dep't of Hous. & Urban Dev., 988 F.2d 236, 241 (1st Cir. 1993).

283. Doucet v. Chilton Cty. Bd. of Educ., 65 F. Supp. 2d 1249, 1257 (M.D. Ala. 1999); *accord* McLaughlin by McLaughlin v. Boston Sch. Comm., 976 F. Supp. 53, 59 (D. Mass. 1997); *see also Baumgartner*, 21 F.3d at 547; Trotter, *supra* note 251, at 1446; Sisk, *supra* note 280, at 288–89.

The Court, however, had not yet spoken. When the issue first arose in 2000, a majority avoided settling the dispute.[284] Less than two years later, a five-justice majority definitively struck down the viability of the catalyst theory as a permissible basis for an award of attorney's fees under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA).[285] The majority detected a "clear meaning" of the term "prevailing party" used in these two statutes;[286] the dissenters, lead by Justice Ruth Bader Ginsburg, "recogniz[ed] that no practice set in stone, statute, rule, or precedent . . . dictate[d] the proper construction of modern civil rights fee-shifting prescriptions" and saw catalytic recovery as harmonious with both "a fair reading of the FHAA and ADA provisions in point" and Congress' purpose "to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal."[287] Regardless, while the ADA and FHAA did not mimic the FOIA's "substantially prevailing" language,[288] their fee provisions were nonetheless sufficiently similar[289] to prompt two circuits to extend *Buckhannon*'s holding to FOIA fee recovery.[290] As these jurists (and others) recognized, "[e]very

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284. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 194–95 (2000).

285. 532 U.S. 598, 626–27 (2001).

286. *Id.* at 610.

287. *Id.* at 633–35 (Ginsburg, J., dissenting). The dissenters also urged "respect and approbation" to case law "[d]eveloped over decades and in legions of federal-court decisions" and contended that "Congress appears to have envisioned that very prospect." *Id.* at 628, 637 (citing to S. REP. NO. 94-1011, at 5 (1976), and H.R. REP. NO. 94-1558, at 7 (1976), which cited to Parham v. Sw. Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970)).

288. 42 U.S.C. § 3613(c)(2) (2012) ("The court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs[.]"); 42 U.S.C. § 12205 ("The court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs[.]").

289. *See, e.g.*, Bennett v. Yoshina, 259 F.3d 1097, 1100 (9th Cir. 2001) ("There can be no doubt that the Court's analysis in *Buckhannon* applies to statutes other than the two at issue in that case."); Crabill v. Trans Union, L.L.C., 259 F.3d 662, 666–67 (7th Cir. 2001) (recognizing the Supreme Court's emphasis on "the similarity of most federal fee-shifting statutes" and suggesting that *Buckhannon*'s rejection of the catalyst theory applies to the fee-shifting provision contained in the Fair Credit Reporting Act); Kendall, *supra* note 243, at 585–86 (endorsing the extension of *Buckhannon* to all fee-shifting statutes).

290. Union of Needletrades v. U.S. INS, 336 F.3d 200, 205–08 (2d Cir. 2003); Oil, Chem. & Atomic Workers Int'l Union v. U.S. Dep't of Energy, 288 F.3d 452, 456–57 (D.C. Cir. 2002); *see also* J. Douglas Klein, Note, *Does* Buckhannon *Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENVTL. L. & POL'Y F. 99, 131 (2002) (discussing the meaning of substantive success).

one of the Court's criticisms of the 'catalyst theory' c[ould] be applied in the 'substantially prevailing' context."[291] Because of this line of precedent, stretching from *Farrar* through *Buckhannon* and beyond, the general status of the catalyst theory, once so assured, grew unsettled.[292] With *Buckhannon*'s facially appealing ratiocination[293] thusly spreading, the end of catalytic recovery in FOIA cases appeared nigh.[294]

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291. Klein, *supra* note 290, at 119.

292. *See, e.g.*, N. Cheyenne Tribe v. Jackson, 433 F.3d 1083, 1085 (8th Cir. 2006) (extending *Buckhannon* to fee recovery under the Religious Land Use and Institutionalized Persons Act and the Religious Freedom Restoration Act); Smyth v. Rivero, 282 F.3d 268, 274 (4th Cir. 2002) (extending *Buckhannon* to the Civil Rights Attorney's Fees Awards Act of 1976); Richardson v. Miller, 279 F.3d 1, 4–5 (1st Cir. 2002); N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester Cty. Taxi & Limousine Comm'n, 272 F.3d 154, 158 (2d Cir. 2001) (same). Not all courts concurred, however. *Compare* J.C. v. Reg'l Sch. Dist. 10, 278 F.3d 119, 123 (2d Cir 2002), *with* T.D. v. La. Grange Sc. Dist. 102, 222 F. Supp. 2d 1062, 1064–65 (N.D. Ill. 2002). Some federal courts, for example, strove to limit *Buckhannon* to fee-shifting statutes imposing a "prevailing party" standard. *See, e.g.*, Sierra Club v. EPA, 322 F.3d 718, 725 (D.C. Cir. 2003) (declining to extend *Buckhannon* to 42 U.S.C. § 7607(f)); Ctr. for Biological Diversity v. Norton, 262 F.3d 1077, 1080–81 n.2 (10th Cir. 2001) (doing the same as to 16 U.S.C. § 1540(g)(4)); Lucia A. Silecchia, *The Catalyst Calamity: Post-*Buckhannon *Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 4 (2004) ("[S]everal appeals courts have ruled that *Buckhannon* should not apply in certain environmental contexts."); Klein, *supra* note 290, at 126–28 (discussing several such cases); at least one appellate court was unconvinced by this sophistry, Crabill v. Trans Union, L.L.C., 259 F.3d 662, 666–67 (7th Cir. 2001). State courts, in turn, quickly split. *Compare* Graham v. DaimlerChrysler Corp., 101 P.3d 140, 151–52 (Cal. 2004), *with* Tibbets v. Sight 'n Sound Appliance Ctrs., Inc., 77 P.3d 1042, 1053 (Okla. 2003); *see also* Hooper & Davis, *supra* note 273, at 960–61 (providing examples). Scholars fought *Buckhannon*'s extension based on FOIA's text, purpose, and history. *See generally* David Arkush, Note, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of* Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 37 HARV. C.R.-C.L. L. REV. 131 (2002). In general, courts proved indifferent to these varied laws' unique attributes. *See, e.g.*, Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 65 OHIO ST. L.J. 357, 372–78 (2004).

293. Silecchia, *supra* note 292, at 59; *cf.* Kendall, *supra* note 243, at 597–603 (detailing three policy arguments in *Buckhannon*'s favor).

294. *E.g.*, Summers v. U.S. Dep't of Justice, 477 F. Supp. 2d 56, 62–63 (D.D.C. 2007); Roberts v. Principi, No. 2:02-CV-166, 2006 WL 1696726, at *11 (E.D. Tenn. June 16, 2006); Hooper & Davis, *supra* note 273, at 958–59. FOIA, many feared, would prove particularly "vulnerable to strategic capitulation" by federal entities after *Bukchannon*. Albiston & Nielsen, *supra* note 273, at 1106.

### 3. Backlash to *Buckhannon*: 2007–2017

#### i. Congressional Action

The Senate, a famously sluggish institution,[295] first considered a legislative response to *Buckhannon* as early as 2005.[296] In due course, in a rare display of bipartisanship, Congress enacted eleven substantive amendments to FOIA via the OPEN Act on December 31, 2007.[297] While all these emendations "restate[d] FOIA's presumption in favor of disclosure,"[298] Section 4 specifically contained the "so-called *Buckhannon* fix,"[299] described by its sponsors as a response to this case's elimination of "the 'catalyst theory' of attorney fee recovery under certain [f]ederal civil rights laws."[300] *Buckhannon* had established "that a party suing the government is not entitled to attorney's fees under the standard fee-shifting statutes if the government voluntarily changed its position and gave the plaintiff what he wanted"[301] and thereby "preclude[d] FOIA requesters from ever being eligible to recover attorneys fees under circumstances

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295. ROBERT CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON xix, 306 (2009).

296. S. REP. NO. 110-59, at 5 (2007); *cf.* Silecchia, *supra* note 292, at 77. As a historical matter, congressional overrides of Court statutory interpretation have grown increasingly rare in recent years. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 251 (2013).

297. Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. 110–75, 121 Stat. 2524; Apfelroth, *supra* note 187, at 220. The OPEN Act would be the third bill that Senators Patrick Leahy, Democrat of Vermont, and John Cornyn, Republican of Texas, introduced in 2006. *Id.* at 226; *see also* John Cornyn, *Ensuring the Consent of the Governed: America's Commitment to Freedom of Information and Openness in Government*, 17 LBJ J. PUBC. AFF. 7, 7 (2004). As to the issue of government disclosure, such congressional bipartisanship is not uncommon. *See, e.g.*, Cameron, *supra* note 5, at 881–82; Kitrosser, *Leaks*, *supra* note 14, at 894–96.

298. S. REP. NO. 110-59, at 6 (2007); *cf.* Chiquita Brands Int'l, Inc. v. SEC, 805 F.3d 289, 294 (D.C. Cir. 2015) ("'Because FOIA establishes a strong presumption in favor of disclosure . . . requested material must be disclosed unless it falls squarely within one of the nine exemptions carved out in the Act.'" (quoting Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996))).

299. S. REP. NO. 110-59, at 6; *see also* Brayton v. Office of U.S. Trade Rep., 641 F.3d 521, 526 (D.C. Cir. 2011) (concluding that the OPEN Act's legislative history suggests no more than that "Congress intended to reinstate the pre-*Buckhannon* rule for fee eligibility").

300. S. REP. NO. 110-59, at 6; *see also* Davis v. U.S. Dep't of Justice, 610 F.3d 750, 752 (D.C. Cir. 2010).

301. S. REP. NO. 110-59, at 14; *see also* Judicial Watch, Inc. v. Bureau of Land Mgmt., 562 F. Supp. 2d 159, 166 (D.D.C. 2008) (citing 153 CONG. REC. 15701–04 (daily ed. Dec. 14, 2007) (statement of Sen. Patrick Leahy)).

where an agency provides the records requested in the litigation just prior to a court decision that would have been favorable to the FOIA requestor."[302] It therefore raised "serious and special concerns within the FOIA context," for "[u]nder *Buckhannon*, it is now *theoretically* possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests."[303] Indeed, such fears had already materialized, to the documented consternation of FOIA-minded petitioners and litigators.[304]

Targeting *Buckhannon*, Congress now split FOIA's new fee provision, once but a sentence, into two paragraphs. Weathering no tinkering, the first restates the former rule: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[305] It is the second paragraph that is wholly new: "[A] complainant has substantially prevailed if the complainant has obtained relief through either-- (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if

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302. S. REP. NO. 110-59, at 4; *accord* 153 CONG. REC. 14853 (daily ed. Dec. 6, 2007) (statement of Sen. Patrick Leahy); *see also* Mobley v. U.S. Dep't of Homeland Sec., 908 F. Supp. 2d 42, 48 (D.D.C. 2012) (quoting both the report and the Vermont senator's statement).

303. S. REP. NO. 110-59, at 4 n.3 (emphasis in original); *see also* Apfelroth, *supra* note 187, at 228 (describing the threat of forcing requesters to incur substantial attorney's fees before obtaining documents to be "one of the government's strongest weapons in deterring people from making FOIA requests and appealing agency decisions"); *cf.* Graham v. DaimlerChrysler Corp., 101 P.3d 140, 153 (Cal. 2004) ("[W]hat is objectionable about elimination of the catalyst theory is not only that in a given case an attorney will be unjustly deprived of fees, but that attorneys will be deterred from accepting public interest litigation if there is the prospect they will be deprived of such fees after successful litigation.").

304. S. REP. NO. 110-59, at 4 n.3; *cf.* Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897. 906 (E.D. Wis. 2007) (contending that if the *Buckhannon* definition of "prevailing party" was adopted for purposes of the Equal Access to Justice Act, the potential for bullying by the government would greatly heighten); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 32–33 (2008) (ascribing five negative consequences to *Buckhannon* to Section 1983 cases); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 244–45 (2003) (quoting one commentator's dismay at *Buckhannon*'s effect); Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 8 ENVTL. LAW. 589, 609–18 (2001) (catalouging the dangers posed by *Buckhannon* to enforcement of environmental laws).

305. 5 U.S.C. § 552(a)(4)(E)(i) (2012); *see also, e.g.*, Edmonds v. FBI, 417 F.3d 1319, 1321 (D.C. Cir. 2005) (quoting the text of § 552(a(4)(E) prior to December 31, 2007).

the complainant's claim is not insubstantial."[306] Subparagraph (I) of § 552(a)(4)(E)(ii) installs the *Buckhannon* rule;[307] subparagraph (II) systematizes its rebuke.[308] With the latter clause, Congress seemingly attempted to "clarif[y] that *Buckhannon*'s holding does not and should not apply to FOIA litigation."[309]

### ii. Judicial Construction

Taking the foregoing snippets at face value, at least four circuit courts have reached the same conclusion: the OPEN Act's fourth section overruled *Buckhannon* on FOIA cases.[310] This section, one explained, "abrogated the rule of *Buckhannon* in the FOIA context and revived the possibility of FOIA fee awards in the absence of a court decree."[311] "The purpose and effect of this law, which remains in effect today, was to change the 'eligibility' prong back to its pre-*Buckhannon* form"; consequently, "plaintiffs can now qualify as 'substantially prevail[ing],' and . . . become eligible for attorney fees, without winning court-ordered relief on the merits of their FOIA claims."[312] The Fifth Circuit similarly concluded that the OPEN Act

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306. 5 U.S.C. § 552(a)(4)(E)(ii)(I)–(II); Von Grabe v. U.S. Dep't of Homeland Sec., 440 F. App'x 687, 688 (11th Cir. 2011) (quoting new statutory language).

307. *E.g.*, Justice v. MSHA, No. 2:14-cv-14438, 2017 WL 1230852, at *3 (S.D. W. Va. Mar. 31, 2017); Judicial Watch, Inc. v. Bureau of Land Mgmt., 562 F. Supp. 2d 159, 172–73 (D.D.C. 2008).

308. *E.g.*, Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008); *see also* Browder v. Fairchild, No. 3:08CV-P15-Hf, 2009 WL 2240388, at *1 (W.D. Ky. July 24, 2009) (applying the catalyst theory without explicit reference to either *Buckhannon* or the OPEN Act).

309. S. REP. NO. 110-59, at 6; *see also* Davis v. U.S. Dep't of Justice, 606 F. Supp. 2d 1, 2 (D.D.C. 2009) (although not applying new standard, holding that OPEN Act did not apply retroactively, nonetheless explains that through OPEN Government Act Congress "codified the 'catalyst theory'").

310. Or. Nat. Desert Ass'n v. Locke, 572 F.3d 610, 615–16 (9th Cir. 2009).

311. Brayton v. Office of U.S. Trade Rep., 641 F.3d 521, 525 (D.C. Cir. 2011); *see also* Cornucopia Inst. v. U.S. Dep't of Agric., 560 F.3d 673, 677 (7th Cir. 2009) (The OPEN Act "eliminated the requirement set forth in *Buckhannon* that a plaintiff receive some form of judicial relief in order have 'substantially prevailed' under FOIA.").

312. *Brayton*, 641 F.3d at 525; *see also, e.g.*, Davis v. U.S. Dep't of Justice, 610 F.3d 750, 752 (D.C. Cir. 2010) ("Congress enacted the OPEN Government Act of 2007 to establish that the catalyst theory applied in FOIA cases."); Thomas v. U.S. Dep't of Agric., No. 08-CV-534-JHP-TLW, 2009 WL 3839463, at *2 (N.D. Okla. Nov. 12, 2009) ("The legislative history of the 2007 OPEN Government Act makes clear Congress's intent to remove the attorney fee provisions of the FOIA from the holding in *Buckhannon* but also the intent to reinstate the catalyst theory."). The OPEN Act did not, however, "have any effect on the standard for fee entitlement, which has remained essentially unchanged since the days of the catalyst theory." *Brayton*, 641 F.3d at 525.

"codified the catalyst theory in FOIA cases" via § 552(a)(4)(E)(ii)(II) and *Buckhannon* in § 552(a)(4)(E)(ii)(I),[313] with the Second Circuit[314] and the Eighth Circuit[315] concurring with the former interpretation. Based on these nearly uniform cases, the catalyst theory presently reigns as the only viable way for plaintiffs to prove their eligibility for attorneys' fees under FOIA.[316] The interchangeable *Church of Scientology* and *Vermont* Tests again control,[317] the OPEN Act being understood to have done no less and no more than revive the catalyst theory interdicted by *Buckhannon* in § 552(a)(3)(E)(ii)(II) and otherwise ratify *Buckhannon* in § 552(a)(3)(E)(ii)(I).[318] In suggestive, but ultimately unrewarding language, only one trio of judges has ever suggested differently.[319]

### *C. The Reality of FOIA's Golden Age: 1966–2017*

Since 1966, two new realities have taken hold. One reflects the reach of the government's typical operations; the other represents the abandonment of a venerable rule. During the same span, certain patterns have taken shape. Two reveal the stubborn survival of older predilections, filaments of thoughts whose seeming cogency has strangely not been dimmed by Congress' recurrent efforts to expand the scope of information encompassed by FOIA and its ilk.[320] Of a more recent vintage, two others reflect the influence of a modern communications revolution, one beyond the ken of FOIA's creators. The former two have deformed FOIA into a more "cumbersome and

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313. Batton v. IRS, 718 F.3d 522, 525 (5th Cir. 2013); *see also, e.g.*, Dasilva v. U.S. Citizenship & Immigration Servs., Civ. No. 13-13, Section I, 2014 WL 775606, at *2 (E.D. La. Feb. 24, 2014) (applying *Batton*).

314. Warren v. Colvin, 744 F.3d 841, 845 (2d Cir. 2014); *see also, e.g.*, Knuckles v. Dep't of the Army, No. CV 115-077, 2016 WL 3947615, at *4 (S.D. Ga. July 19, 2016) (applying the new standard).

315. Zarcon, Inc. v. NLRB, 578 F.3d 892, 894 (8th Cir. 2009); *see also* Strunk v. U.S. Dep't of Interior, 752 F. Supp. 2d 39, 45 (D.D.C. 2010) (collecting cases so holding, including *Zarcon*).

316. *See, e.g.*, Simon v. Bureau of Prisons, No. 16-cv-00704-ADM-KMM, 2016 WL 5109543, at *6 (D. Minn. Aug. 29, 2016); Kemmerly v. U.S. Dep't of Interior, Civ. No. 07-9794, 2010 WL 2985813, at *6 (E.D. La. July 26, 2010); Waage v. IRS, 656 F. Supp. 2d 1235, 1239 (S.D. Cal. 2009).

317. *See, e.g.*, Hiken v. Dep't of Def., 836 F.3d 1037, 1043 (9th Cir. 2016); Yonemoto v. Dep't of Veterans Affairs, 549 F. App'x 627, 630 (9th Cir. 2013).

318. Oregon Nat. Desert Ass'n v. Locke, 572 F.3d 610, 615–19 (9th Cir. 2009); Regalia, *supra* note 132, at 106.

319. *See supra* Part II.

320. Public access demands can be predicated on more than FOIA. *See* Samaha, *supra* note 128, at 912–13.

limited mechanism"[321] than its original supporters likely dreamed, and the latter twosome threaten to accelerate this deformation and ensure FOIA's future insignificance.

### 1. New Facts: The Rise of Private Attorney Generals & Government's Gathering Capacity

An assumption, widely known as the "American Rule," girds modern civil litigation in the United States: in most common cases, plaintiffs and defendants must choose and pay their own lawyers, regardless of their ultimate sucess.[322] "[F]irmly entrenched" within the common law,[323] this oft-critiqued norm dates to 1796[324] and received resounding affirmation as recently as 2015.[325] When certain public rights or broad public norms are implicated, however, this presumption has often been modified.[326] In particular, so as to encourage "private attorney generals," an expansive phrase likely coined in 1943,[327] to police government misconduct without creating another rigid bureaucracy, much civil rights and environmental legislation regularly requires that successful plaintiffs' lawyers be

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321. Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 120 (2011).

322. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Pacold, *supra* note 216, at 1009–10; Mark R. Brown, *A Primer on the Law of Attorney's Fees Under § 1988*, 37 URB. LAW. 663, 663 (2005); Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 323–24 (2005). Arguably, sound policies underlie the rule. Fischbach & Fischbach, *supra* note 322, at 324–26; *see also* Maryland Access to Justice Commission, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. BALT. L.F. 38, 40–41 (2011) [hereinafter MAJC, *Fee-Shifting*].

323. Fox v. Vice, 563 U.S. 826, 832 (2011); *see also, e.g.*, Labotest, Inc. v. Bonta, 297 F.3d 892, 894 (9th Cir. 2002) (citing rule and one exception); Fischbach & Fischbach, *supra* note 322, at 326–30 (summarizing rule's drawbacks); Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 281 n.2 (1977) (collecting critiques).

324. Arcambel v. Wiseman, 3 U.S. 306, 1 L. Ed. 613 (1796); *see also* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (providing a historical overview of the colonial approach to attorneys' fees).

325. Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2164 (2015).

326. *See* City of Burlington v. Dague, 505 U.S. 557, 562 (1992); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005).

327. Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943); *see also* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004).

paid by governmental defendants.[328] As the historical record piercingly attests, a particular recognition—that many civil rights plaintiffs seeking purely equitable relief or expecting small monetary awards have often found locating competent counsel to be prohibitively difficult, making them less likely to engage in litigation to protect constitutional or statutory rights even when those prerogatives have been plainly violated—and a specific desire—to embolden lawyers to pursue such cases and thereby both enable and encourage private enforcement of these statutes and thereby secure realization of certain hallowed values—have prompted such repeated repudiations of the common law's hoarier preference.[329] In the words

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328. *Burlington*, 505 U.S. at 568–69 (Blackmun, J., dissenting); Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968); MAJC, *Fee-Shifting, supra* note 322, at 42; Elizaebth D. De Armond, *A Dearth of Remedies*, 113 PENN. ST. L. REV. 1, 45–47 (2008); Brown, *supra* note 322, at 666; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1429–30 (2000); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205, 209 (2003); Morrison, *supra* note 326, at 599–607; David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1691–95 (2005); Jeremy A. Rabkin, The Secret Life of the Private Attorney General, 61 LAW & CONTEMP. PROBS. 179, 179–80, 195, 203 (1998); Reingold, *supra* note 304, at 11–12, 16–18; Rubenstein, *supra* note 327, at 2142, 2146–55. The doctrine technically emerged from the merger of the common-fund and substantial benefit doctrines. *See* Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1931 (1985). Criticisms of this nation's army of "private attorney generals" abound. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218, 221–23 (1983).

329. *See, e.g.*, Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REVIEW 219, 248–50 (2003); Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS 761, 763 (2009); Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976*, 37 URB. LAW. 653, 654 (2005); Fischbach & Fischbach, supra note 322, at 332–34; Heath Hooper & Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law*, 79 MO. L. REV. 949, 951, 953 (2014); Randall S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 BROOK. L. REV. 281, 313 (2003); Ugalde, *supra* note 304, at 597–99; Karlan, *supra* note 328, at 205; Morrison, *supra* note 326, at 608–10; Pacold, *supra* note 216, at 1011–12; Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 233 (1984); Reingold, *supra* note 304, at 44–45; Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 539, 541 (2001); Kathryn A. Sabbeth, *What's Money Got to Do With It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 488 (2014); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 198–99 (2000); Ugalde, *supra* note 304, at 610–11; Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 187 (1984). Other rationales for these statutes

of one congressional committee, because "the citizen who must sue to enforce the law has little or no money with which to hire a lawyer," failing to allow for an award of attorneys' fees "would be tantamount to repealing the [civil rights statutes] by frustrating [their] basic purpose" in an exponential number of cases.[330] Within the field governed by such statutes, Congress has barred the American Rule's application[331] by "authoriz[ing] the award of 'a reasonable attorney's fee,' 'fees,' or 'litigation costs,' and usually referring to a 'prevailing party' in the context of an adversarial 'action.'"[332] As a matter of legal evolution, then, the statutory prevailing party doctrine evolved from the common law "private attorney general" creed, invoked by courts to prevailing parties in suit in which an individual's rights were vindicated and all other similarity situated plaintiffs were benefited. By one count, as of 1995, these laws numbered more than 150,[333] civil rights enforcement in the United States greatly dependent on fee-shifting legislation.[334]

As Congress has thusly legislated, technology has improved. At one time, regulators appeared "poorly positioned to gather

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beyond the private attorney general idea have been offered. *See* MAJC, *Fee-Shifting*, *supra* note 322, at 44–48; Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653 (1982). Naturally, numerous policy objections have been advanced, *see, e.g.*, Baier, *supra* note 205, at 19; Morrison, *supra* note 326, at 610–18, while fee-shifting statutes can engender several discrete problems, *see* Cheng, *supra* note 328, at 1939; Fischbach & Fischbach, *supra* note 322, at 335–40.

330. S. REP. NO. 94-1011, at 2–3 (1976).

331. *Fox*, 563 U.S. at 832; *see also, e.g.*, Klein, *supra* note 290, at 101; Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act,* 69 U. CHI. L. REV. 1347, 1349 (2002).

332. *Baker Botts L.L.P.*, 135 S. Ct. at 2164; *see also, e.g.*, Hardt v. Reliance Std. Life Ins. Co., 560 U.S. 242, 253 (2010); Fischbach & Fischbach, *supra* note 322, at 334.

333. *E.g.*, Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 866 (1992); Percival & Miller, *supra* note 329, at 233; *see also* Pacold, *supra* note 216, at 1010–11 n.22 (giving examples). The number may now be closer to 200. Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1232 (1988).

334. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 695 (2008); *cf.* Sabbeth, *supra* note 329, at 482 ("[F]act-intensive civil litigation requires siginicant resources[.]"). Even within this field, "[t]he absence of a uniform fee-setting system for calculating reasonable attorneys' fees presents courts with a number of challenging problems." Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys' Fees: Combing Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 MD. L. REV. 228, 228 (2006); *cf.* MAJC, *Fee-Shifting*, *supra* note 322, at 51–53 (identifying some proposed elements of a well-crafted definition of prevailing party), 54–55 (summarizing the courts' predominant approach).

information" about others' operations; even if they could, the expense was often great.[335] However, "[p]ost-September 11 statutory innovations have provided [various agencies with] new authority to demand information without judicial supervision or probable cause."[336] "[W]here acquisition of information is unconstrained, the exponential increase in the capacity to aggregate and analyze information obtained by non-coercive and non-surreptitious measures has given the government the opportunity to acquire vastly" more data regarding and from this nation's citizens.[337]

2. Legal Patterns: Judicial Deference & Executive Persistence

To this day, although FOIA retains its unique position as "a mechanism essential to protecting [constitutional and/or fundamental] rights,"[338] federal courts continue to prefer a relatively hands-off approach to its application.[339] This deference effectively permits agencies to defeat FOIA requests by raising any conceivable evidence that an exception applies, a particularly effective tactic in national security cases, and blunts the practical import of FOIA's de novo standard of judicial review.[340] For example, the mosaic theory, long invoked as justification for classifying documents at higher levels of confidentiality and withholding documents requested through FOIA or pretrial discovery, has exacerbated the judiciary's reticence

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335. Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 278 (2004).

336. Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, 160 (2004) [hereinafter Kreimer, *Surveillance*].

337. Kreimer, *Surveillance*, *supra* note 336, at 161.

338. Cameron, *supra* note 5, at 878.

339. *See, e.g.*, Regalia, *supra* note 132, at 92; Mart & Ginsburg, *supra* note 20, at 738, 743–44, 746–49.

340. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099, 1118 (2017) [hereinafter Pozen, *FOIA*]; McCraw, *Freedom*, *supra* note 177, at 240; Regalia, *supra* note 132, at 111–12; Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 239 (2013) [hereinafter Kwoka, *Deferring*]; Pozen, *Mosaic*, *supra* note 167, at 637, 672–73; Samaha, *supra* note 128, at 937–38; Davis, *Power*, *supra* note 128, at 1759–62; Nathan Slegers, Comment, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 232, 236 (2006); *cf.* Erwin Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security?*, 81 DENV. L. REV. 759, 764–65 (2004). This problem is compounded by the fact that the pertinent agency often controls both the disputed information and, though Exemption 1's reliance on executive orders, the definition of national security. Pozen, *Mosaic*, *supra* note 167, at 637.

to publicize government-controlled information since 9/11; the United States District Court for the District of Columbia has been a frequent offender.[341] Partially as a result, the principle that FOIA's exemptions should be "narrowly construed" became "a formula to be recited rather than a principle to be followed,"[342] and plaintiffs have rarely won in national security-related FOIA cases.[343]

The temporal consequences of this habit have been magnified by another circumstance: even in this age in which information can be more cheaply and widely disseminated,[344] federal agencies have retained their historical ambivalence to much information's easy release.[345] To this day, even though substantial evidence supports the need to withhold certain information from the public, the media, and even Congress,[346] much more than such narrowly-circumscribed provinces of data remain "generally inaccessible to the [American] people,"[347] as was true under the common law and despite FOIA's

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341. *See* McCraw, *Freedom supra* note 177, at 237; Pozen, *Mosaic*, *supra* note 167, at 630–32, 652, 655; Sullivan, *supra* note 11, at 79–83. *But see* Mart & Ginsburg, *supra* note 20, at 773 (rejecting this characterization of the D.C. Circuit's FOIA jurisprudence). The mosaic theory broadly refers to the basic precept of intelligence gathering that disparate items of information, though individually of limited or no utility to their possessor, can assume added significance when combined with other items of information. Pozen, *Mosaic*, *supra* note 167, at 630; *see also* CIA v. Sims, 471 U.S. 159, 178–79 (1985) (endorsing its use).

342. John Doe Agency v. John Doe Corp., 493 U.S. 146, 160–61 (1989) (Scalia, J., dissenting); *see also* McCraw, *Freedom*, *supra* note 177, at 235; Sullivan, *supra* note 11, at 18–20, 74; Shapiro & Steinzor, *supra* note 11, at116–18. Justice Scalia, it cannot be forgotten, vigorously opposed FOIA's passage and questioned its worth in a seminal 1982 essay. *See* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 15; Sullivan, *supra* note 11, at 67–68.

343. Mart & Ginsburg, *supra* note 20, at 728–29; *see also* Pack, *supra* note 14, at 827–37 (noting this pattern).

344. *See* Herz, *supra* note 4, at 596–97 (endorsing a new model of information distribution consistent with recent technological developments). Open data technologies are not the culprits here, for such tools can be used by opaque regimes as well as transparent ones. *See* Yu & Robinson, *supra* note 4, at 182. Still, the conceptual underpinnings of the term "open data" arguably align with those of "open government." *See* Yu & Robinson, *supra* note 4, at 187, 189, 194–95.

345. *See, e.g.*, McCraw, *Freedom*, *supra* note 177, at 232–33; Yu & Robinson, *supra* note 4, at 198; Mart & Ginsburg, *supra* note 20, at 734, 773; Pozen, *Mosaic*, *supra* note 167, at 646–48; Adam Candeub, Transparency in the Administrative State, 51 HOUS. L. REV. 385, 392–93 (2013); Slegers, *supra* note 340, at 218–19; Wells, *supra* note 14, at 452–61, 480–81; Ackerman & Sandoval-Ballesteros, *supra* note12, at 111; *cf.* Rozell, *Law*, *supra* note 127, at 923–27 (highlighting presidential attempts to construe executive privilege expansively).

346. White, *supra* note 6, at 1109.

347. Ryan Fairchild, Comment, *Giving Away the Playbook: How North Carolina's Public Records Law Can be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2172 (2013); *see also* Candeub, *supra* note 345, at 393 ("Much of the dissatisfaction

codification, due to "long processing delays and inadequate responses,"[348] as well as habitual overclassification.[349] On occasion, Congress itself has issued contradictory commands, thereby augmenting the bases for resistance by the craftiest agencies.[350] The tension between accountability and secrecy thus persists,[351] with many federal constructs exhibiting no favor for the former virtue and an affection for the latter frequent vice[352] and many bureaucrats and

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with FOIA stems from its lack of real-time transparency."); Cox, *infra* note 348, at 393–99 (enumerating the various problems, from "relatively little oversight" to "chronic understaffing," that have "seriously hampered" FOIA's administration). Admittedly, some agencies have gotten better over time. *See generally* Tai, *supra* note 64, at 425, 436–39; Dorit Rubinstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J.L. & POL'Y 611 (2011). Others are stymied in their compliance efforts by conflicting mandates. *See* Catherine J. Cameron, *Jumping Off the Merry-Go-Round: How the Federal Courts Will Reconcile the Circular Deference Problems Between HIPAA and FOIA*, 58 CATH. U. L. REV. 333, 335–36 (2009). All labor under severe underfunding., Pozen, *FOIA*, *supra* note 340, at 1104–05; and nuisance requests bedevil many, Noveck, *supra* note 4, at 273 (citing to Pozen, *FOIA*, *supra* note 340). Still, timeliness remains an issue, Martin & Lanosga, *supra* note 5, at 627; Kwoka, *Chenery*, *supra* note 20, at 1117, and some of the most important agencies, including the Department of Justice and the Department of Homeland Security, boast large backlogs, Tai, *supra* note 5, at 465; *see also* Noveck, *supra* note 4, at 273; *cf.* Pustay, *supra* note 20, at 259–61 (faulting the internet for the proliferation of agency records).

348. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 CUNY L. REV. 387, 389 (2010); *see also* Noveck, *supra* note 4, at 273; Regalia, *supra* note 132, at 92; Herz, *supra* note 4, at 583; Davenport & Kwoka, *supra* note 5, at 386; Samaha, *supra* note 128, at 918–19; *cf.* Cameron, *supra* note 5, at 868.

349. Pozen, *FOIA*, *supra* note 340, at 1121; *see also*, *e.g.*, Mart & Ginsburg, *supra* note 20, at 730, 752–64, 785; Rachel Harris, Note, *Conceptualizing and Reconceptualizing the Reporter's Privilege in the Age of Wikileaks*, 82 FORDHAM L. REV. 1811, 1827–28 (2014); Sullivan, *supra* note 11, at 75–78; Aftergood, *supra* note 6, at 400, 404.

350. *See, e.g.*, Pozen, *Mosaic*, *supra* note 167, at 649; Cameron, *supra* note 5, at 859–60.

351. *See* Devin S. Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L.Q. 1, 40–47 (2010) (discussing the need for balance in cases touching upon national security and proposing a novel test); Samaha, *supra* note 128, at 910 ("American law has yet to reach a satisfying conclusion about public access to information on government operations."); *cf.* Aftergood, *supra* note 6, at 415–16 ("The alternative to indiscriminate secrecy is not indiscriminate openness."); Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1164 (2007) (arguing that the Bush Administration's defense of the NSA surveillance program "suggests a false choice between complete secrecy and complete openness").

352. *See* Mart & Ginsburg, *supra* note 20, at 750; Vladeck, *supra* note 20, at 1799–1814; Setty, *supra* note 11, at 256–60.

politicians unmotivated to permanently sustain such transparency efforts.[353]

3. Economic Motifs: Old Media's Fall & New Media's Ascendance

As the Court once enthused, "an untrammeled press" stands as "a vital source of public information,"[354] an educator, dialogue builder, and watchdog.[355] Nonetheless deemed to be bereft of any unique

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353. Candeub, *supra* note 345, at 406.

354. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936); *see also, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) ("[P]eople now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975) ("Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."); RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1228–31 (2013) [hereinafter Jones, *Privilege*] (discussing the judiciary's views of the media in the 1960s and 1970s).

355. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 256–59 (2014) [hereinafter Jones, *Court Thoughts*]; *see also, e.g.*, Harris, *supra* note 349, at 1853–54; Kines, *supra* note 6, at 748–49; Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of "The Press" Can Help*, 91 OR. L. REV. 527, 556 (2012); Ugland, *supra* note 130, at 166; *cf.* Schwartz, *supra* note 124, at 652–55 (pointing to the democratic importance attributed to newspapers by the Founders). In spite of such encomia, the Court has recognized the press as constitutionally unique from non-press speakers only implicitly and in dicta. West, *Stealth*, *supra* note 10, at 731, 736–41; *see also* RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 715 (2014) [hereinafter Jones, *Dangers*] (pointing out this pattern); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 987–1010 (2007) (same); Ugland, *supra* note 130, at 127 ("The Supreme Court has largely, but not entirely, rejected the idea of special rights for the press."); Harris, *supra* note 349, at 1819–21 (outlining the circuit split over the existence of a federal reporter's privilege engendered by dicta in *Branzburg v. Hayes*); O'Brien, *Reassessing*, *supra* note 130, at 58–59 (unearthing expressions of support for a first amendment right to know remain solely in dicta and dissenting opinions). Even so, as late as 1977, some espied the emergence of such a distinction. *See* Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 750–51, 781–85 (1977). Revealingly, the Court's recent descriptions of "the press" suggest a shift in perspective. *See, e.g.*, Jones, *Court Thoughts*, *supra*, at 261–62; Jones, *Dangers*, *supra*, at 719. The late Justice Antonin Scalia's opinions both evidenced this shift and hinted at his probable role in this rhetorical transformation. *See generally* RonNell Andersen Jones, *Justice Scalia and*

constitutional protection, a result partially traceable to Court majorities' stubborn refusal to recognize any right or protection as emanating from the Press Clause, this nation's reporters have often relied on FOIA to obtain the data for their exposes of government malfeasance or incompetence.[356] By most accounts, journalists would have (and once had) a far more difficult time carrying out this role as the government's Fourth Estate in FOIA's absence.[357] Practically speaking, however, to request a document and litigate an agency's likely resistance demands a vast expenditure of upfront costs, tabulated in dollars and in minutes. FOIA's invocation, simply put, is a lavish undertaking, requiring investments of time and money, for entities large and small.[358] Appeals, in particular, have proven to be "time consuming, expensive, and usually unsuccessful."[359]

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*Fourth Estate Skepticism*, 15 FIRST AMEND. L. REV. 258 (2017). In 2010, a bare majority finally embraced the Justice's acerbic characterization. *See* Citizens United v. FEC, 558 U.S. 310, 352 (2010); Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1832 (2012). Regardless, whether the press' daily comportment aligns with this ideal is contestable. *See generally* Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343 (2012); Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994).

356. *See, e.g.*, Pozen, *FOIA*, *supra* note 340, at 1131–32, 1143; Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2440–41, 2446 (2014) [hereinafter West, *Exceptionalism*]; Jake Linford, *The Institutional. Progress Clause*, 16 VAND. J. ENT. & TECH. L. 533, 536 & n.12 (2014); Folami, *supra* note 130, at 276–77; Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028, 1035–36, 1042, 1045–46 (2011) [hereinafter West, *Awakening*]; Paul Hortwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 471 (2005); *Mass Media*, *supra* note 132, at 912. Lying has also helped. *See* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1454–61 (2015).

357. Cameron, *supra* note 5, at 856; West, *Awakening*, *supra* note 356, at 1029; *cf. Mass Media*, *supra* note 132, at 910 ("Government is the preeminent newsmaker in American society."). At the same time, it cannot be denied that the bulk of requests under FOIA appear to come from businesses seeking to further their own commercial interests. *See* Pozen, *FOIA*, *supra* note 340, at 1103, 1113–17. Indeed, some have attacked FOIA for being "a regressive tool that serves corporate and crusading agendas while hobbling relatively visible efforts to regulate health, safety, the economy, the environment, and civil rights." Pozen, *FOIA*, *supra* note 340, at 1111.

358. *See* Danielson, *supra* note 22, at 1004–06; Vladeck, *supra* note 20, at 1789.

359. Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 472 (2014); *accord* Vladeck, *supra* note 20, at 1791–92; *cf.* Noveck, *supra* note 4, at 280 ("FOIA is contentious, giving rise to litigation when the government refuses a request and perversely reinforcing a culture of closed-door governing."). Outside of FOIA's limited sphere, the cost of litigation stands as a great hurdle for many would-be litigants in civil rights cases. Rabkin, *supra* note 328, at 196.

Traditionally, as a byproduct of their cultivation of investigative journalism and facilitated by the profits earned due to their near monopolistic control over certain markets, large media organizations have borne the expenses involved in undertaking these exertions by their salaried reporters.[360] Indeed, the daily newspapers published within this nation's largest metropolitan regions, among others, proved to be remarkably effective instruments for producing and disseminating high-quality accountability journalism at their height, with FOIA utilized as an investigative journalist's tool of trade.[361] Subject to increasingly stringent financial constraints in this internet period, however, these institutions' modern decline threatens to sharply reduce the number of entities both willing and able to bear these initially uncompensated outlays.[362] Capable of summoning far

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360. RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 559–60, 591–92 (2011) [hereinafter Jones, *Post-Newspaper America*]; *see also* Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 210, 225–26, 234 (2016); McCraw, *Freedom*, *supra* note 177, at 235–36; James T. O'Reilly, *"Access to Records" Versus "Access to Evil": Should Disclosure Laws Consider Motives as a Barrier to Records Release?*, 12 KAN. J.L. & PUB. POL'Y 559, 561 (2002-03); DAVIS, *supra* note 65, at ix; *cf.* Ugland, *supra* note 130, at 176 ("There is . . . a long tradition of investigative journalism in the United States."); Meri K. Christensen, Note, *Opening the Doors to Access: A Proposal for Enforcement of Georgie's Open Meetings and Open Records Law*, 15 GA. ST. U. L. REV. 1075, 1077 (1999) ("Media efforts spawned much of the development of open meeting laws."). Of course, these large and wizened entities were monopolies of questionable societal value, *see, e.g.* William C. Pate & Alan M. Winterhalter, *Monopoly Newspapers: Troubles in Paradise*, 7 SAN DIEGO L. REV. 268, 278–81 (1970); Keith Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 322–24 (1968), and arbitrarily dictated the range of information that the public could even consider, *see* Balkin, *supra* note 131, at 439. Even so, American history is replete with praises for newspapers' democratic utility. *See, e.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 111–14 (Francis Bown & Phillips Bradley eds., Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1840). For example, America's exuberant and unrestrained press held a special fascination for de Tocqueville. LEO DAMROSCH, TOCQUEVILLE'S DISCOVERY OF AMERICA 53–54 (2010).

361. *See, e.g.*, McCraw, *Paper Tiger*, *supra* note 65, at A2; Davis, *Power*, *supra* note 128, at 1748; Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 4 (2011) [hereinafter Cohen, *Media*].

362. *See, e.g.*, Carroll, *supra* note 360, at 193–94, 200–07; David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 332 (2013) [hereinafter Anderson, *Dialogue*]; Harris, *supra* note 349, at 1825; Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1537–40, 1556–64 (2012); Jones, *Post-Newspaper America*, *supra* note 360, at 594–98, 606, 616–17; Cohen, *Media*, *supra* note 361, at 7–13; *cf.* Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 654–59, 670–75, 678–80 (2015) [hereinafter Levi, *Faust*] (contending that the spread of advertisements seamlessly integrated into editorial content, prompted by many newspapers' precarious finances, may weaken journalism's role in holding

fewer resources in either offense or defense, a lone journalist's or a single website's demands may be more effortlessly rebuffed than those advanced by a reporter backed by a relatively secure conglomerate with revenues in the millions, even billions,[363] especially as the

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governmental power accountable). This problem has dogged many newspapers before. *Cf.* SUSAN E. TIFFT & ALEX S. JONES, THE TRUST: THE PRIVATE AND POWERFUL FAMILY BEHIND *THE NEW YORK TIMES* 32 (1999) (discussing the shift towards editorial writing and away from newsgathering that took place at the *New York Times* during the 1890s as a result of the decreasing financial advertising). Of course, other negative ramifications unrelated to old media's FOIA exploitation may follow. *See* Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501, 504 (2015); Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 237 (2014); Folami, *supra* note 130, at 271–72; Balkin, *supra* note131, at 431; Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 22–41 (2006).

363. *See, e.g.*, Cohen, *Media*, *supra* note 361, at 58, 65–67; Jones, *Post-Newspaper America*, *supra* note 360, at 594–98, 606, 616–17. Indeed, it was newspapers' proliferation that lay behind the great reforms of the Progressive Era. RICHARD HOFSTADTER, THE AGE OF REFORM 185–96 (1955). Yet, according to other scholars, old media's fall may actually lead to true accountability. Noveck, *supra* note 4, at 277–84 (discussing the potential benefits of open data); West, *Now*, *supra* note 10, at 97 (discussing the lowered barriers to entry attributable to the internet's spread); Harris, *supra* note 349, at 1825–26 (same); Balkin, *supra* note 131, at 436–39 (contending that the internet facilitates participation by a large number of different people in a variety of issues and denouncing the rise of concentrated ownership in old media); O'Reilly, *supra* note 360, at 565 (depicting the modern media landscape as subject to less control); Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1520–22 (2007) (detailing some of the reasons why digital media possesses the superior capacity to fulfill certain First Amendment values); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1250 (2003) ("The Internet . . . is the first modern communications medium that expands its reach by decentralizing the distribution function."); Fiss, *supra* note 128, at 1412–13 (observing that the pre-internet media market ensured no more than that views "advocated by the rich" would be heard); Barron, *supra* note 128, at 1642, 1644–47 (discussing the dangers posed by the ability of mass communications media to suppress information); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–88 (1987) (describing the oligopolic nature of old media); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984) (discussing how sophisticated and expensive communication technology, monopoly control of the media, and access limitations suffered by disfavored or impoverished groups ensure only elite viewpoints were ever broached in the public sphere in the pre-internet age). For these reasons, whether online organizations will displace existing civic and political institutions without effectively replacing the democracy-promoting roles that these institutions currently play will continue to be an open but crucial question. *See, e.g.*, Cohen, *Media*, *supra* note 361, at 5, 13–19, 24–31; Robert Faris & Bruce Etling, *Madison and the Smart Mob: The Promise and Limitations of the Internet for Democracy*, 32 FLETCHER F. WORLD AFF. 65, 72 (2008); *cf.* Pustay, *supra* note 20, at 254–59 (discussing how agencies have employed new technologies so as to improve access to government documents); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression*

determination of who is or is not the press is still contested.[364] Hence, though this newest of an ancient breed may be uniquely nimble,[365] the lonely, if internet savvy, pamphleteer, logic suggests, will be more easily defeated or discouraged when no constitutional provision protects him or her and no financial benefaction despite official resistance can be assumed.[366] This chilling effect is heightened by many professional journalists' disinclination to make of one more dilatory entreaty to one more obstreperous agency.[367] Accordingly, though old and new media equally benefit from the First Amendment's protections, the former's financial withering may soon lead to "a drastic reduction of legal instigation and enforcement, and therefore a significant void in efforts for open government and public accountability," its dispersed successors enjoying far less "lobbying clout and monetary backing."[368]

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*for the Information Society*, 79 N.Y.U. L. REV. 1, 6–9 (2004) (discussing how the digital age provides a technological infrastructure that greatly expands the possibilities for individual participation in the growth and spread of culture); Travis, *supra* note 363, at 1564–66, 1573–75 (highlighting the information suppression potentially practiced by the oligopolistic owners of digital media infrastructure).

364. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972) (declining to extend the reporter's privilege under First Amendment partly due to the difficulty involved in determining who qualified as a reporter); West, *Awakening*, *supra* note 356, at 1029 (discussing case); Harris, *supra* note 349, at 1830–31 (same). The fight over a definition of "the press" continues to this day. *See, e.g.*, Anderson, *Dialogue*, *supra* note 362, at 331–34; West, *Exceptionalism*, *supra* note 356, at 2453–54; West, *Awakening*, *supra* note 356, at 1029, 1047–48, 1052–56, 1062–68; Edelson, *supra* note 355, at 542–61; Ugland, *supra* note 130, at 136–39.

365. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 352 (2010); *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156 (D.C. Cir. 2006); West, *Exceptionalism*, *supra* note 356, at 2437; Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 46 (2006).

366. Jones, *Post-Newspaper America*, *supra* note 360, at 561–62, 571–80; *cf.* West, *Exceptionalism*, *supra* note 356, at 2443–45, 2455–63 (proposing and adumbrating a functional definition of "the press" so as to safeguard such citizens' investigatory efforts); West, *Awakening*, *supra* note 356, at 1054–55, 1061, 1069–70 (same); Jones, *Privilege*, *supra* note 354, at 1239–42. *But see* Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 545–46 n.87 (2016) (giving three reasons to support the assumption that print newspapers and their digital variants will continue to serve as important democratic tools); Pack, *supra* note 14, at 818 ("[M]any FOIA requests are currently unnecessary due to the spread of twenty-four-hour news networks and the expansion of the Internet[.]").

367. *See, e.g.*, Pozen, *FOIA*, *supra* note 340, at 1135, 1139; Noveck, *supra* note 4, at 279; Davenport & Kwoka, *supra* note 5, at 386–87; Vladeck, *supra* note 20, at 1789.

368. Jones, *Post-Newspaper America*, *supra* note 360, at 627, 636; *see also* Levi, *Faust*, *supra* note 362, at 678–80, 712.

## III. PROPER APPROACH TO DETERMINING ELIGIBILITY UNDER THE OPEN ACT

### *A. Overview of Pendent Principles*

Regardless of whether a rule or a statute is at issue, the task of interpretation always starts with the relevant provision's explicit terms,[369] as a text's definite import, a congruence of denotation and connotation,[370] is sought.[371] In the first stage of this "holistic endeavor,"[372] two oft-mingled yet discrete attributes—unambiguity and plainness[373]—are dissected via the use of a plentitude of tools, reference made "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[374] As the Court has often advised, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the

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369. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 235, 243, 245–46 (2010); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 953 (9th Cir. 2009).

370. *See* Stern v. Am. Home Mortg. Servicing, Inc. (*In re* Asher), 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013) ("[A]mbiguity only exists so long as several plausible interpretations of the same statutory text, specific and different in substance, can be advanced."); *cf.* Medina v. Catholic Health Initiatives, 147 F. Supp. 3d 1190, 1199 (D. Colo. 2015) (observing that the term "church" has numerous "rich[] and . . . meaningful denotations and connotations" which can be equally classified as "plain meanings"); Barbee v. United States, 392 F.2d 532, 535 n.4 (5th Cir. 1968) ("It could be contended perhaps that, because denotations and connotations in legal expression often defy the rules of logic and syntax, no statute has a 'plain meaning.'").

371. United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

372. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988). Frequently quoted, this phrase's precise import is less than clear. *See* Morell E. Mullins, *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 11 n.39 (2003).

373. Amir Shachmurove, *Sherlock's Admonition: Vindicatory Contempts as Criminal Actions for Purposes of Bankruptcy Code § 362*, 13 DEPAUL BUS. & COMM. L.J. 67, 75 (2014) ("Analytically, plainness and ambiguity are thus disparate, albeit closely-related, concepts, and it is context that determines which of many plain denotations most impeccably fits the statutory scheme, the text thereby shown to be both plain and unambiguous."); Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing "Cause" under Rule 3018(a)*, 89 AM. BANKR. L.J. 511, 530 n.142 (2015) [hereinafter Shachmurove, *Claims*] (explicating the distinction between connotation and denotation and ambiguity and plainness in the context of the Federal Rules of Bankruptcy Procedure).

374. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992), and McCarthy v. Bronson, 500 U.S. 136, 139 (1991)); *see also, e.g.*, L.S. Starrett Co. v. FERC, 650 F.3d 19, 25 (1st Cir. 2011) ("'In determining congressional intent, we employ the traditional tools of statutory construction, including a consideration of the language, structure, purpose, and history of the statute.'" (quoting Stornawaye Fin. Corp. v. Hill (*In re* Hill), 562 F.3d 29, 34 (1st Cir. 2009))).

statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[375] Bound by the mossy tenets of English grammar, an interpreter must first invoke the familiar semantic rules[376] and the common syntactic canons,[377] deconstructing not just the language of the relevant subsection but also the terms and the structure of the pertinent section and statute.[378] In this focused analysis, "the statutory text, including the [c]ongressional statement of purpose and other statutory provisions within the same regulatory scheme, are not extrinsic to the statute,"[379] the only material properly

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375. *United Sav. Ass'n of Tex.*, 484 U.S. at 371 (internal citation omitted); *see also, e.g.*, Roberts v. Sea-Land Servs. Inc., 566 U.S. 93, 101–02 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989) (same).

376. *See, e.g.*, State v. C.M., 154 So. 3d 1177, 1180 (Fl. Ct. App. 2015) (defining the "omitted-case canon" as "meaning nothing is to be added to what the text states or reasonably implies" (internal quotation marks omitted)); IBEW, Local #111 v. Pub. Serv. Co. of Colo., 773 F.3d 1100, 1108 (10th Cir. 2014) ("Under . . . [the ordinary-meaning] canon, if context indicates that words bear a technical legal meaning, they are to be understood in that sense."); United States v. Porter, 745 F.3d 1035, 1042 (10th Cir. 2014) (referring to "the so-called general-terms canon that holds that [g]eneral terms are to be given their general meaning" (alteration in original) (internal quotation marks omitted)); United States v. Curbelo, 726 F.3d 1260, 1277 (11th Cir. 2013) ("The negative implication canon, often expressed in the Latin phrase *expressio unius est exlusio alterius*, . . . applies where items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." (internal quotation marks omitted)); Rogan v. U.S. Bank, N.A. (*In re* Partin), 517 B.R. 770, 773–74 (Bankr. E.D. Ky. 2014) ("When encountered in a statute, 'and' is typically construed in its ordinary conjunctive sense . . . . Deviation from this rule (i.e., changing 'and' to 'or'), only occurs when required 'to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of the statute.'"); United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1115 (D.C. Cir. 2009) (explaining that the word "includes" is usually considered "non-exhaustive").

377. *See, e.g.*, United States v. Ron Pair Enters., 489 U.S. 235, 241–42 (1989) (finding support for a particular reading in the statute's "grammatical structure").

378. *See* Planned Parenthood Gulf Coast, Inc. v. Kliebert, 141 F. Supp. 3d 604, 638–40 (M.D. La. 2016) (employing this interpretive paradigm); *cf.* Amir Shachmurove, *Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—yet Problematic—Construction*, 37 N. Ill. U. L. REV. 202 (2017) (applying framework to the Federal Rules of Civil Procedure); Amir Shachmurove, *Disruptions' Function: A Defense of (Some) Form Objections*, 12 SETON HALL CIR. REV. 161, 194–97 (2016) (same).

379. Broderick v. 119TCbay, LLC, 670 F. Supp. 2d 612, 616 (W.D. Mich. 2009).

considered at first light.[380]

In contrast, when interpreting an ambiguous statute, extrinsic data may be weighed. Indeed, when confronting such miasma, courts should freely, if carefully, "consider the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it as to effectuate and not destroy the spirit and force of the law and not to render it absurd."[381] Reliable legislative history hence has some interpretive significance when a "statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant."[382] For example, congressional overrides of the Court's statutory decisions, if such an intent can be gleamed from these extrinsic sources, have often been accorded much respect.[383] In all other cases, such records should play no role,[384] courts devoid of any "authority to enforce a principle gleaned solely from legislative history that has no statutory reference point."[385]

### *B. Appropriate Analysis of FOIA's Post-2007 Fee Provisions*

#### 1. Linguistic Analysis

##### i. Relevant Paradigm

In interpreting a statute like § 552(a)(4)(E)(ii)(II), "a court should always turn first to one, cardinal canon before all others": "[A] legislature says in a statute what it means and means in a statute what it says there."[386] Courts thus disfavor "interpretations of

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380. *See* City of Cookeville v. Upper Cumberland Elec. Membership Corp., 484 F.3d 380, 390 n.6 (6th Cir. 2007).

381. Lambur v. Yates, 148 F.2d 137, 139 (8th Cir. 1945), *cited in, e.g.*, Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998); *see also, e.g.*, Broderick v. 119TCbay, LLC, 670 F. Supp. 2d 612, 616 (W.D. Mich. 2009); Ugland, *supra* note 130, at 150–51.

382. United States v. Gayle, 342 F.3d 89, 94 (2d Cir. Aug. 27, 2003); *see also* Cashman v. Dolce Int'l/Hartford, 225 F.R.D. 73, 88 (D. Conn. 2004) (citing *Gayle*, 342 F.3d at 93–94).

383. *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2461–62 (2013) (Ginsberg, J., dissenting).

384. *See, e.g.*, Ratzlaf v United States, 510 U.S. 135, 147–48 (1994); Accu-Spec Elec. Servs. v. Cent. Transp. Int'l, 391 F. Supp. 2d 367, 373 (W.D. Pa. 2005).

385. Shannon v. United States, 512 U.S. 573, 584 (1994) (internal quotation marks omitted); Gibson v. PS Grp. Holdings, No. 00-CV-0372 W (RBB), at *15, 2000 WL 777818, at *5 (S.D. Cal. Mar. 8, 2000).

386. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992); *see also, e.g.*, United States v. Lewis, 554 F.3d 208, 214 (1st Cir. 2009) (invoking maxim).

statutes that render language superfluous"[387] and strive to construe any enactment "so that no words shall be discarded as meaningless, redundant, or mere surplusage."[388] As a logical extension of the foregoing rule, "a drafter is presumed to act purposely in the inclusion or exclusion of disparate language."[389] Relatedly, because a statute's history forms part of its context, certain bits of such background may normally be considered, a presumption from which two tenets follow. First, though Congress may amend "merely 'to make what was intended all along even more unmistakably clear,'"[390] "a change in the language of a prior statute presumably connotes a change in meaning."[391] In a Minnesotan's more dated lingo, "[t]he deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."[392] Second, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts . . . , they are to be understood according to that construction."[393] "To change the meaning of language in an already enacted law," Congress has one option: "[P]ass a new law amending that language."[394] Congress is "presumed to know the [existing] law, including judicial interpretation of that law,

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387. *Conn. Nat'l Bank*, 503 U.S. at 253; Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012).

388. United States v. Canals-Jimenez, 943 F.2d 1284, 1287 (11th Cir. 1991).

389. Shachmurove, *Claims*, *supra* note 373, at 524 (collecting sources).

390. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 201 (5th Cir. 2017) (quoting United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1995)).

391. BRYAN A. GARNER & ANTONIN SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012); *see also* DirecTV, Inc. v. Brown, 371 F.3d 814, 817 (11th Cir. 2004) ("[C]hanges in statutory language generally indicate an intent of Congress to change the meaning of the statute."); Chertkof v. United States, 676 F.2d 984, 987 (4th Cir. 1982) ("[T]he deletion of language, having so distinct a meaning, almost compels the opposite result when words of such plain meaning are excised.").

392. Brewster v. Gage, 280 U.S. 327, 337 (1930); *cf.* Pirie v. Chi. Title & Trust Co., 182 U.S. 438, 448 (1901) ("When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.").

393. GARNER & SCALIA, *supra* note 391, at 322; *see also, e.g.*, Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553**,** 563 (2017) ("Th[e prior construction] canon teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning."); Shook v. El Paso Cty., 386 F.3d 963, 970 (10th Cir. 2004) ("Congress is 'presumed to be aware' of a statute's interpretation when it amends another part of the same statute without addressing the part at issue." (quoting U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133 n.4 (2002))).

394. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2539 (2015) (Alito, J., dissenting).

when it legislates,"[395] and "[i]ntent that finds no expression in a statute is irrelevant."[396] In the first instance, these related rules must be employed.[397]

### ii. Application

On its face, § 552 offers up two unambiguous definitions of "substantially prevailed."[398] Per § 552(a)(4)(E)(ii)(I), the complainant's relief must take the form of "a judicial order, or an enforceable written agreement or consent decree."[399] Pursuant to § 552(a)(4)(E)(ii)(II), "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial," must take place.[400] Divided into discrete elements, the latter provision requires a plaintiff to show (1) a voluntary or unilateral change in position by the agency (2) that provides him, her, or it with relief (3) where the plaintiff's claim is "not insubstantial." Not a single term within this simple clause foists a causation requirement on the complainant, albeit such requirements litter the United States Code.[401] Instead, the sole hint at such a concept lies in the adverb "through" in § 552's prefatory clause: "a complainant has substantially prevailed if the complainant has obtained relief *through* either . . . ."[402] As a grammatical matter, however, that word refers to the government's decision to grant the relevant relief, a decision to cease or consent by the agency thereby made into a predicate element. Meanwhile, in accordance with the statute's commonly defined terms, the plaintiff need do nothing more than initiate a "not insubstantial" action that

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395. June Med. Servs. LLC v. Kliebert, 158 F. Supp. 3d 473, 532 (M.D. La. 2016) (alteration in original) (internal quotation marks omitted).

396. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2539.

397. *See, e.g.*, Woods v. Standard Ins. Co., 771 F.3d 1257, 1263 (10th Cir. 2014) ("[I]f the statutory language is clear, our analysis ordinarily ends." (quoting Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1245 (10th Cir. 2009))); CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1225 n.6 (11th Cir. 2001) (explaining that "clear language of a statutory provision holds a status above that of any other canon of construction, and often vitiates the need to consider any of the other canons").

398. 5 U.S.C. § 552(a)(4)(E)(ii); Citizens for a Strong N.H., Inc. v. IRS, No. 14-cv-487-LM, 2016 WL 5108035, at *1 (D.N.H. Sept. 20, 2016) (citing subsection).

399. 5 U.S.C. § 552(a)(4)(E)(ii)(I); DaSilva v. U.S. Citizenship & Immigration Servs., 599 F. App'x 535, 540 (5th Cir. 2014) (quoting clause).

400. 5 U.S.C. § 552(a)(4)(E)(ii)(II); United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars & Fifty-Six Cents ($32,820.56) in United States Currency, 838 F.3d 930, 935 (8th Cir. 2016) (invoking clause).

401. *See, e.g.*, 46 U.S.C. § 30302; 16 U.S.C. § 574; 39 U.S.C. § 2603.

402. 5 U.S.C. § 552(a)(4)(E)(ii) (emphasis added); Offor v. EEOC, No. 15-cv-3175 (ADS)(ARL), 2016 WL 3747593, at *5 (E.D.N.Y. July 11, 2016) (citing statute).

precedes an agency's germane change in position "without the agreement of another"[403] or another's compulsion.[404]

"[G]uides" rather than "mandatory rules,"[405] these precepts beget two compelling conclusions upon their application to the text of § 552. First, Congress could have enacted the catalyst test by the simple codification of the language employed by countless courts—but it did not do so. Second, Congress could have penned its own causal language—but it opted to input no synonym. Limned in dozens of opinions, the precise terminology was readily available; text enthroning the catalyst test could be uncovered with an easy search. Instead, Congress reenacted one paragraph—and manufactured an entirely novel one, a whole new standard entombed therein, in which no redolent phrase or familiar clause appears. As its history reveals, Congress may have intended to restore the catalyst theory.[406] In light of the absence of any causal language in § 552(a)(4)(E)(ii)(II), however, any practical reading of its actual terms automatically leads to an expanded set of eligible plaintiffs. Under the statute, no plaintiff with a substantial claim need point to more than a freely-made change in an agency's behavior to "substantially prevail";[407] nothing more is demanded, no other qualifier or caveat appended. Confronted by such clear terminology in a statutory scheme, the importation of a causal prerequisite into § 552(a)(4)(E) effectuates an impermissible rewriting of an otherwise plain statute.[408] To wit, the decision to enact *Buckhannon*'s terminology in § 552(a)(4)(E)(i)(I) but not to use language akin to the federal courts' consistent formulation of the catalyst theory in § 552(a)(4)(E)(i)(II), thereby failing to codify such a cause requirement, definitively suggests that Congress intentionally, even if inadvertently, eschewed this requirement.[409] Two more facts

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403. *Unilateral*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); *Unilateral*, WEBSTER'S UNABRIDGED DICTIONARY (2003).

404. *See, e.g.*, *Voluntary*, OXFORD ENGLISH DICTIONARY; *Voluntary*, WEBSTER'S UNABRIDGED DICTIONARY (2003); Hardy v. Ducote, Civ. Nos. 02-1520-A, 04-0789-A, 2007 WL 1378511, at *2 n.10 (W.D. La. May 9, 2007). The third opinion in *FAC* makes this point. *See* First Amendment Coal. v. U.S. Dep't of Justice, 869 F.3d 868, 879, 885–86 (9th Cir. 2017) (Berzon, J., concurring).

405. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

406. *See supra* Part III.B.3.

407. 5 U.S.C. § 552(a)(4)(E)(ii)(II).

408. Shachmurove, *Claims*, *supra* note 373, at 528–34; *see also, e.g.*, United States v. Sturm, 673 F.3d 1274, 1279 (10th Cir. 2012) (noting that courts must "'ordinarily resist reading words or elements into a statute that do not appear on its face'" (quoting Bates v. United States, 522 U.S. 23, 29 (1997))).

409. *Cf.* United States v. Burkholder, 816 F.3d 607, 617 (10th Cir. 2016) (reaching the same conclusion in regard to congress' failure to include proximate-cause language in its amendment of 21 U.S.C. § 841(b)(1)(E)).

clinch this conclusion: (1) as the legislative history unmistakably divulges, the OPEN Act's sponsors were cognizant of the catalyst theory's existence,[410] and (2) congressional use of causal language is neither uncommon nor unusual.[411] This larger ambit may have been unplanned, but the old presumption controls, and the old rule accords with no other exegesis. Accordingly, with judges barred from any form of creative augmentation by virtue of these directives and with Congress having exercised its prerogative to nullify a once hallowed standard's prior meaning, prevailing wisdom has overlooked a literal fact: as the sole measure of eligibility for attorneys' fees under FOIA, the catalyst theory is obsolete.[412] It does, in truth, still constitute a viable test, as it is now even more consistent with the statutory language and scheme, but it is not the only possible formula pursuant to the language of § 552(a)(4)(E)(i)(II), naturally apprehended.

### 2. Contextual Analysis

#### i. Relevant Paradigm

As many have noted, the law's preeminent interpretive schematic makes little use of legislative history.[413] Arguably, Congress uses such history "to enhance its statutory work product by avoiding both an unnaturally confining quest for linguistic precision and an unduly burdensome pressure on the legislative calendar";[414] even to those willing to recognize this verity, this history smarts from much juridical disdain.[415] Yet, as a practical matter, modern textualism abjures a "hypertechnical analysis,"[416] and courts "are not required to

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410. *See supra* Part III.B.3.

411. *See* NANCY M. MODESITT ET AL., WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 3–25 (3d ed. 2015).

412. Practically speaking, to overturn this apparent consensus will likely prove cumbersome. *See* Sovereign Military Hospitaller Order of Saint John v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint John, 809 F.3d 1171, 1184 (11th Cir. 2015) (faulting a line of decisions for not acknowledging a significant change in statutory language but emphasizing the panel's inability to "disregard precedent set by a prior panel, even though it conceives error in the precedent").

413. Koenig Sporting Goods, Inc. v. Morse Rd. Co. (*In re* Koenig Sporting Goods, Inc.), 203 F.3d 986, 988 (6th Cir. 2000) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper."); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 41–42 (1994) (summarizing theory).

414. Brudney, *supra* note 413, at 104.

415. *See* ROBERT A. KATZMANN, JUDGING STATUTES 40–42 (2014) (summarizing the textualists' four main critiques of legislative history).

416. Ltd., Inc. v. Comm'r, 286 F.3d 324, 333–34 (6th Cir. 2002).

interpret a statute 'in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose.'"[417] As such, with statutory purpose considered an invaluable tool of cupellation when multiple plausible readings can be posited, "clear evidence" of such intent should normally be considered,[418] and "unambiguous, clear, uncontradicted, and specific legislative history" can occasionally "serve as a reliable interpretive guide" to a statute's broader context.[419] In such cases, in accord with both past practice and present dogma,[420] "authoritative legislative history . . . can confirm an interpretation that is otherwise grounded in the text and structure of the act itself,"[421] thereby avoiding replication of the absurdity so repugnant to today's prevailing interpretive paradigm.[422]

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417. United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010) (citing Miller v. Amusement Enters., Inc., 395 F.2d 342, 350 (5th Cir. 1968)); *see also* Katzmann, *supra* note 415, at 29; *cf.* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) ("'[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.'" (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892))).

418. United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999); *see also* Katzmann, *supra* note 415, at 29.

419. McDow v. Smith, 295 B.R. 69, 78 n.18 (E.D. Va. 2003); *see also* Brudney, *supra* note 413, at 69. Of course, "legislative history is itself often murky, ambiguous, and contradictory." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 569 (2005). Even so, "[w]hen reviewing the legislative history of enacted legislation, official congressional reports are an authoritative source for the [c]ourt to consider." Silva-Hernandez v. Swacina, 827 F. Supp. 2d 1352, 1358 (S.D. Fla. 2011); *accord, e.g.*, Zuber v. Allen, 396 U.S. 168 (1969); Disabled in Action of Metro. N.Y. v. Hammons, 202 F.3d 110, 124 (2d Cir. 2011); Bingham & Taylor Div., Va. Indus., Inc. v. United States, 815 F.2d 1482, 1485 (Fed. Cir. 1987) ("Although not decisive, the intent of the legislature as revealed by a committee report is highly persuasive.").

420. *See* Brudney, *supra* note 413, at 42–45; Katzmann, *supra* note 415, at 29, 35–39.

421. Murphy v. United States, 340 F. Supp. 2d 160, 171 (D. Conn. 2004); *see also, e.g.*, Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1218 (11th Cir. 2015) (examining legislative history of unambiguous statute because history was consistent with a statute's plain meaning); Brudney, *supra* note 413, at 70–82 (endorsing consideration of certain kinds of history), 94–99 (providing one example); *cf.* Hadden v. Bowen, 851 F.2d 1266, 1268 (10th Cir. 1988) ("The weight given an item of legislative history, however, depends upon whether it is a contemporaneous expression of legislative intent and 'is sufficiently specific, clear and uniform to be a reliable indicator of intent.'" (quoting Miller v. Comm'r, 836 F.2d 1274, 1282 (10th Cir. 1988))).

422. *See* Brudney, *supra* note 413, at 105–06; *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and

Here, the case for the catalyst theory's demise finds further support in such sources.[423] While some contrary indicia can be discovered,[424] this result's cogency is further assured by its consonance with the pertinent texts and unanimity in sentiment.[425] Pursuant to this interpretive model, the medley of facts discussed in Part III.C—the executive branch's persistent efforts to restrict access, courts' traditional deference to administrative decisions implicating national security, ability of information to enhance security in some cases, and lessons gleaned from past affronts to civil liberties—can and, in fact, should now be brought into the interpretive equation.

### ii. Application

Prior to FOIA's passage, Section 3 was derided as "not a general public records law."[426] Afterward, "a true Federal public records statute" graced the statute books,[427] one intended "to establish a general philosophy of full agency disclosure" and to close the "loopholes which allow agencies to deny legitimate information to the public."[428] Admittedly, FOIA did not contain a fee-shifting provision

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looking over the heads of the guests for one's friends."). This quote appears in many judicial excoriations of legislative history's relevance. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 908 (2010) (Stevens, J., dissenting).

423. *Cf.* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. at 568 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory.").

424. *See infra* Part IV.B.4.

425. Arguably, at least as to FOIA's 1966 version, the legislative history is not as clear-cut as many contend. Mink, *supra* note 160, at 13; Davis, *Act*, *supra* note 177, at 763. Still, as to FOIA's general purpose, no ambiguity pollutes a single legislative report, and it is the Senate's more liberal variant which more faithfully adheres to the pertinent text and can thus be considered in accordance with modern tenets of interpretation. *See* Davis, *Act*, *supra* note 177, at 763; Salomon & Wechsler, *supra* note 187, at 153. As a result, the ambiguous and debatable construction of FOIA that appears in the House's 1966 report can be disregarded. *Cf.* Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1304 (D.D.C. 1973) ("[T]he House Report is not the prime authority for interpretation of the Freedom of Information Act. The House Report 'is characteristically broader and goes beyond the express terms of the statute . . . . The Senate Report is to be preferred over the House Report as a reliable indication of legislative intent." (internal quotation marks omitted); Stokes v. Hodgson, 347 F. Supp. 1371, 1373–74 (N.D. Ga. 1972) (rejecting this source due to its disconnect with the applicable language). For more on this report, see text accompanying notes 189–201.

426. H.R. REP. NO. 89-1497, at 1 (1966); *see also* S. REP. NO. 89-813, at 3 (1965).

427. H.R. REP. NO. 89-1497, at 1; Freeman v. Seligson, 405 F.2d 1326, 1339 n.70 (D.C. Cir. 1968) (quoting clause).

428. S. REP. NO. 89-813, at 3 (1965); *see also* John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); EPA v. Mink, 410 U.S. 73, 79 (1973); Clark, supra *note* 178, at

in 1966. Yet, one of FOIA's most fervent supporters, Senator Long, whose subcommittee had revealed several examples of invasive surveillance practices,[429] had already seen the adoption of such a fee-shifting provision as a necessity. As he had once explained, only such a law would ensure "that a private citizen or the press will be less prone to hesitate to use the remedy provided in . . . [FOIA] because of financial inability or risk."[430] Long's words proved prescient, as agencies "developed secrecy by delay, taking many weeks to answer an initial requested" and "secrecy by dollars, charting in excess of costs for copying public records" and impeded disclosure by forcing onto plaintiffs a choice between "expensive" litigation and an all-too-easy retreat.[431] In FOIA cases, the legal right of action to sue for information is essential,[432] and as Congress has recognized, "the possibility of recovering attorney's fees and costs plays a crucial role in the calculus of whether to go to court."[433]

Thus, in 1974, after the Missouri senator's fears had materialized and under the stewardship of new leaders, § 552(a)(4)(E) was enacted, its purpose clear: the minimization of the high cost of obtaining relief under FOIA, a reality recurrently stressed by "[m]any private attorneys and public interest organizations."[434] It was the "strong congressional policy" already epitomized by FOIA, and frustrated by executive branch dilatoriness, that had made such an adjustment "desirable."[435] In particular, in "strengthen[ing] the citizen's remedy

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742; Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1262 (1970).

429. *See, e.g.*, SAMUEL WALKER, PRESIDENTS AND CIVIL LIBERTIES FROM WILSON TO OBAMA: A STORY OF POOR CUSTODIANS 260–61 (1992); ALAN F. WESTIN, PRIVACY AND FREEDOM 196–98 (1967). Long's Missouri predecessor, Thomas C. Hennings, Jr., had been just as fervently interested in the issue. *See, e.g.*, Archibald, *supra* note 199, at 314; Halstuk, *supra* note 161, at 437. Long would later be accused of exploiting this same committee to protect the interests of Jimmy Hoffa. *See* RONALD KESSLER, THE BUREAU: THE SECRET HISTORY OF THE FBI 115 (2003); William Lambert, *A Deeper Debt of Gratitude*, LIFE, Nov. 10, 1967, at 38.

430. S. REP. NO. 88-1219, at 14 (1964); *see also* Archibald, *supra* note 199, at 316.

431. Archibald, *supra* note 199, at 316.

432. Noveck, *supra* note 4, at 282.

433. Vladeck, *supra* note 20, at 1815.

434. H.R. REP. NO. 92-1419, at 73 (1972); *see also* Regalia, *supra* note 132, at 106; Danielson, *supra* note 22, at 1030–31; Archibald, *supra* note 199, at 316; *cf.* Dixie Fuel Co. v. Callahan, 136 F. Supp. 2d 659, 661 (E.D. Ky. 2001) ("An award of attorney's fees is not a reward for successful claimants or a penalty against the government; it is merely designed to 'relieve plaintiffs with legitimate claims of the burden of legal costs.'" (quoting Falcone v. IRS, 714 F.2d 646, 647 (6th Cir. 1983))).

435. H.R. REP. NO. 93-876, at 7 (1974); *see also U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings Before H. Subcomm. of Comm. on Government Operations*, 92d Cong.

against agencies and officials who violate" FOIA by such means, its fee provision rectified a documented problem—"[T]he time it takes, the investment of many thousands of dollars in attorney fees and court costs, and the advantages to the [g]overnment in . . . [FOIA] cases [had] ma[de] litigation . . . less than feasible in many situations," with court costs and attorneys' fees often so "insurmountable" as to "allow[] the government to escape compliance with the law"—and helped "effectuat[e] the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the [a]ct's mandates."[436] Newly improved with such language, always intended to encourage individual action and not exact castigation,[437] FOIA had become a cheaper and thus a more effective tool for democratic government's enhancement and individual liberties' exercise,[438] the public interest requiring this particular improvement in its "primary vehicle for obtaining government-held information."[439] With the Fourth Estate seemingly falling, and with an internet-based "Fifth Estate," one consisting of the poorer citizen-journalists operating via solo blogs, group-discussion websites, Twitter news

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1375–76 (statement of Rep. William S. Moorehead); Engel, *supra* note 133, at 207 ("Observers have estimated that in 9 out of 10 cases where an agency refuses to give information, the reasons given for not releasing the information are invalid."). As the House noted, "[s]imilar provisions have been recognized in legislation in the past." H.R. REP. NO. 93-876, at 7; *see also* S. REP. NO. 93-854, at 18 (1974) (enumerating examples).

436. S. REP. NO. 93-854, at 3, 17 (1974); *see also, e.g.*, Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 959 (1974) (recommending such an amendment). In fact, in hearings held between 1972 and 1974, Congress was told that FOIA only worked when people resorted to costly litigation.

437. Robert G. Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, 25 AM. U. L. REV. 7, 18–19 (1975).

438. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652–54 (1984); Bodoh & Dempsey, *supra* note 11, at 232, 241; *see also* Ward, *supra* note 179, at 1003–07 (cataloguing the reasons behind the 1974 amendments); *cf.* Davis, *Power*, *supra* note 128, at 1749–50 (defending FOIA as a check against corruption and a means of holding government officials accountable); Tokar, *supra* note 64, at 103–04 (describing FOIA as "a key tool for both organizations and individuals who not only wish to learn more about the inner workings of the U.S. government, but also seek to participate fully in the democratic process"). As a famed jurist noted, FOIA and its state counterparts show that "Congress and many state legislatures have concluded that open deliberation often serves the public interest." B.H. v. McDonald, 49 F.3d 294, 303 (7th Cir. 1995) (Easterbrook, J., concurring). By one scholar's reckoning, over 400 federal statutes compel the dissemination of information about a variety of federal programs. Bodoh & Dempsey, *supra* note 11, at 243.

439. Kwoka, *Rejection*, *supra* note 181, at 1501; *see also, e.g.*, Sullivan, *supra* note 11, at 66; Danielson, *supra* note 22, at 986–87.

bulletins, crowd-sourced news research, and WikiLeaks disclosures, taking flight,[440] such effective reduction in the cost of FOIA's invocation only grows more important to disclosure's practical attainment.

In light of FOIA's extant limitations—it still does not provide for damages and envisions no other remedy than a one-time release of documents—*Buckhannon*, the latest example of the courts' ambivalence regarding FOIA's aggressive use,[441] threatened to curtail FOIA's use and its acclaimed progression towards greater and readier revelation of government information. Once extended to FOIA, *Buckhannon* could have enabled government defendants, entities readily able to resist plaintiffs with inferior resources, to "moot virtually all FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys."[442] Cognizant of both these patent evils and the salutary effects of FOIA's fee-shifting regime,[443] the OPEN Act's fourth section sought to "reverse" the unfortunate reality that *Buckhannon* had begot by "reinstat[ing] the so-called 'catalyst theory' for the reimbursement of FOIA litigation fees."[444] While averting *Buckhannon*'s deleterious consequences on FOIA's functionality might have been Congress' definite target,[445] that desire did not compel the catalyst theory's wholesale adoption, and the apprehensions voiced by this amendment's proponents throughout the legislative process stretched farther back, legislative

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440. *See, e.g.*, Lili Levi, *Journalism Standards and "The Dark Arts": The U.K.'s Leveson Inquiry and the U.S. Media in the Age of Surveillance*, 48 GA. L. REV. 907, 941 (2014); Carroll, *supra* note 360, at 193–94; Folami, *supra* note 130, at 292; Cohen, *Media*, *supra* note 361, at 3–4. Similar concerns had been raised decades before the internet's launch. *See Mass Media*, *supra* note 132, at 933; *cf.* DAVIS, *supra* note 65, at 389–401 (discussing the potential challenges confronting newspapers such as the *New York Times* as the Roaring Twentieis commenced).

441. *See* Sullivan, *supra* note 11, at 69–71, 73–84.

442. Arkush, *supra* note 292, at 138; *see also* Cohen, *Media*, *supra* note 361, at 58, 65–67 (emphasizing this danger and the consequent need for adopting a broader First Amendment right of access to government information). Relevantly, Justice Antonin Scalia seemed irked by the possible bullying of poor defendants by extortionist plaintiffs. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 616–21 (2001) (Scalia, J., concurring); Morrison, *supra* note 326, at 610–11 (noting the popularity of this argument).

443. *See* Albiston & Nielsen, *supra* note 273, at 1088–89.

444. S. REP. NO. 110-59, at 14, 20 (2007); *see also* Deininger & Wingfield, P.A. v. IRS, No. 4:08CV00500 JLH, 2009 WL 2241569, at *3 (E.D. Ark. July 24, 2009) (citing 153 CONG. REC. 15701–04).

445. *See, e.g.*, S. REP. NO. 110-59, at 6; 153 CONG. REC. 15704 (daily ed. Dec. 14, 2007) (statement of Senator Patrick Leahy); *cf.* Davenport & Kwoka, *supra* note 5, at 396–401 (recommending a *Buckhannon* fix to the District of Columbia's FOIA analogue).

cynosure placed on far more wrongs than a five-person majority's construction of a single section.[446]

As to this supposition, much convincing evidence exists. As Congress then stated, "the American people firmly believe that our system of government must itself be governed by a presumption of openness," but "in practice, . . . [FOIA] has not always lived up to . . . [these] ideals."[447] Such language, which included paeans to the need for "the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees,"[448] sweeps broad indeed, legitimated by nearly inextirpable mischiefs[449] and a largely supportive history dating to 1935.[450] Indeed, as many had ominously noted, even a plaintiff's marginal success in a FOIA action often takes place after any number of moneyed hurdles have been surmounted, open government dearly purchased by a devoted few[451] despite FOIA's superficially pro-disclosure bias.[452] To FOIA plaintiffs, like so many others who

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446. *See* Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RES. & ENV'T 139, 139 (2002).

447. Openness Promotes Effectiveness in our National Government Act of 2007 § 2, Pub. L. 110–75, 121 Stat. 2524; *see also* 153 CONG. REC. 15703–04 (2009); *cf.* Kwoka, *Inc.*, *supra* note 165, at 1371 (discussing the news media's role in securing FOIA's passage).

448. Openness Promotes Effectiveness in our National Government Act of 2007 § 2, Pub. L. 110–75, 121 Stat. 2524 (citing Barr v. Mateo, 360 U.S. 564, 577, 79 S. Ct. 1335, 1342, 3 L. Ed. 2d 1434, 1444 (1959)); *see also* Wiseman v. Massachusetts, 398 U.S. 960, 962, 90 S. Ct. 2165, 2166, 26 L. Ed. 2d 546, 547 (1970) (quoting language); 153 CONG. REC. H16791 (daily ed. Dec. 18, 2007) (statement of Rep. Lamar Smith).

449. *See* Kwoka, *Leaking*, *supra* note 181, at 1427–33 (summarizing the procedural problems that encumber FOIA's efficacy).

450. *See* Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* PUBLIC ACCOUNTABILITY: DESIGN, DILEMMA AND EXPERIENCES 6 (Michael W. Dowdle ed., 2006).

451. *See, e.g.*, Tai, *supra* note 5, at 456 (observing that FOIA has fallen far short of its goals, "with processing delays well beyond statutory time limtis and questionable denials of records"); Kwoka, *Secrecy*, *supra* note 68, at 156–57 (summarizing research showing excessive judicial reluctance to apply FOIA's *de novo* review standard in national security cases); Kwoka, *Deferring*, *supra* note 340, at 204–11, 220 (faulting the courts for effectively subscribing to a form of super-deferential review); Silver, *supra* note 180, at 757 (same); Cooper Cameron Corp. v. U.S. Dep't of Labor, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases[.]"); Cappabianca v. Comm'r, 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("[O]nce documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment.").

452. *See* Wickwire Gavin, PC v. USPS, 356 F.3d 588, 591 (4th Cir. 2004); Bowers v. U.S. Dep't of Justice, 930 F.2d 350, 353 (4th Cir. 1991).

encounter justiciable problems,[453] litigation is always a pricey endeavor, *Buckhannon*'s most acute influence falling upon such complex impact litigation against government actors,[454] for which the possibility of a sufficient return must be more than chimerical for the suit to be launched and maintained.[455] Any murky standard, most particularly one fully dependent on divining and proving causality on the part of a disembodied entity, could only further contribute to the uncertainty regarding recovery which has so often prevented the commencement of such cases—and more firmly cemented official secrecy.

In 1966, Congress had established "a national policy of disclosure of government information";[456] in 1974, Congress debugged FOIA—and rebuked a president—in the hopes of finally realizing this objective;[457] and in 2007, it sought to repair the damages caused by *Buckhannon* with the distinct goal of consolidating FOIA's effect.[458] To this day, FOIA's weaknesses are plain to see, from administrative inefficacy to excessive withholding of relevant information by intransigent actors;[459] now, as before, "[k]knowledge of where and how to request information is vital to success in obtaining information,"[460] with most individuals citizens simply bereft of the requisite

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453. *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 789 (2011) (explaining why merely authorizing private enforcement without an allowance of fees can impede effective efforts at private enforcement).

454. Sutherland, *supra* note 273, at 275; *cf.* Cohen, *Media*, *supra* note 361, at 58 (detailing the problems in obtaining access to government information commonly confronted by citizen journalists).

455. *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1323–24 (2012) (describing such a guarantee as essential to inducing private enforcement); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153–60 (2012) (discussing the functional roles played by private enforcement in the United States' regulatory state). Private enforcement, in the end, "is only as good as the mechanisms that enable it." Glover, *supra* note 455, at 1207.

456. S. REP. NO. 93-854, at 18; *see also* Sullivan, *supra* note 11, at 66 ("The objective of the Act was to require disclosure[]" and "not to balance the need for disclosure with the need for secrecy."); *cf.* H.R. REP. NO. 92-1419, at 72 (1972) ("Of the 2,195 denials of information reported in detail to the subcommittee by 29 major departments and agencies, . . . in only 99 cases where the requestor was finally denied information by an agency was court action initiated.").

457. S. REP. NO. 93-854, at 18; Kwoka, *Deferring*, supra note 340, at 199–200.

458. *Cf.* Lemos, *supra* note 453, at 795 ("Legislators vote for . . . procedural mechanisms," like fee shifting provisions, "in the belief that they will help promote the substance of the statute.").

459. Kwoka, *Inc.*, *supra* note 165, at 1363–64.

460. Engel, *supra* note 133, at 199.

resources;[461] and "abuses of power by government information sources on behalf of favored industry and special interest groups have been periodically documented."[462] Undeniably, the practical effect of § 552(a)(4)(E)(i)(II), as written, may be broader than its drafters envisioned.[463] Even so, it is not contrary to FOIA's longstanding intent, so amply evidenced over a span of decades, to find the catalyst theory to be irrelevant because the standard for eligibility for recovery is now both more expansive and easier to administer, not less so. Rather, the opposite is true. Expanding the potential class of persons who may collect fees from particularly recalcitrant agencies, such an interpretation corrects for some of FOIA's endemic flaws and aligns even more perfectly with this body of law's consecrated ends, further securing the right of "'the most affluent organizations'" as well as "the average citizen," now often forced to assume the investigative role of the old media's legion of reporters,[464]to pierce any federal agency's veil of secrecy.[465] By any fair measurement, such a capacious construal further fosters political accountability and democratic sovereignty and thereby hastens realization of FOIA's dominant hopes. "[A]n informed citizenry, vital to the functioning of a democratic society," now possesses a more tapered weapon, a better "means for citizens to know what their Government is up to,"[466] with which to check "corruption" and "hold . . . [its] governors accountable."[467] That resolution animated the FRA and Section 3, FOIA and its 1974

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461. Nader, *supra* note 186, at 14.

462. Engel, *supra* note 133, at 184.

463. *Cf.* Kwoka, *Inc.*, *supra* note 165, at 1372 (observing the discord between FOIA's "relatively distinct and narrow goal" and its "startlingly broad" provisions).

464. *See* Cohen, *Media*, *supra* note 361, at 24–31.

465. S. REP. NO. 93-854, at 18; *cf.* David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 144 (1977) (praising FOIA's "[r]ecent corrective amendments").

466. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004); *see also* Ackerman & Sandoval-Ballesteros, *supra* note 12, at 88–93.

467. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); *see also* Mark Louis Callister, Note, *The Freedom of Information Act Attorney's Fees Provision: Judicial Interpretation of the "Substantially Prevailed" Standard*, 1984 UTAH L. REV. 573, 591 (1984) (defending the pre-2007 standard as designed to "further[] the policy of open government by forcing compliance with the FOIA disclosure provisions").

amendments, and § 552(a)(4)(E)(i)(II)'s codification in 2007, propelling FOIA's first adjustments[468] and recent revisions alike.[469]

In short, considering district courts' seeming inclination to affirm FOIA cases "almost instinctively,"[470] frequent reliance on agency-prepared affidavits,[471] and loatheness both to authorize minimal discovery in spite of a typical complainant's limited ken[472] and to grant attorneys' fees,[473] the catalyst theory's partial overthrow in

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468. *See, e.g.*, Karla Karlson, Note, *Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks*, 60 AM. U.L. REV. 213, 224–27 (2010); Patrick Long, Note, *Can Government and Industry Conspire to Thwart FOIA?: A Critical Analysis of* Critical Mass III, 13 J. HIGH TECH. L. 136, 147–48 (2012); Robert Ratish, Note, *Democracy's Backlog: The Electronic Freedom of Information Act Ten Years Later*, 34 RUTGERS COMPUTER & TECH. L.J. 211, 218–22 (2007); Mart, *supra* note 20, at 24–26, 30–31.

469. *See, e.g.*, 155 CONG. REC. S3175 (daily ed. Mar. 17, 2009) (statement of Sen. Leahy) (introducing another amendment); Tai, *supra* note 5, at 458, 490–94 (discussing two 2015 bills); Editorial Bd., N.Y. Times, *A Stronger Freedom of Information Act*, N.Y. TIMES, Feb. 18, 2015 (endorsing the passage of two pending bills that would put into law a "presumption of openness" and a rule against withholding information absent "foreseeable harm" to protected government interests).

470. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002); *see also* Silver, *supra* note 180, at 749 (discussing the hurdles plaintiffs face when challenging an agency's denial).

471. *See, e.g.*, Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 20 (D.D.C. 2003). To be sure, blanket affidavits will rarely suffice. Miscavige v. IRS, 2 F.3d 366, 367–68 (11th Cir. 1993).

472. *See* Vaughn v. Rosen, 484 F.2d 820, 824–25 (D.C. Cir. 1973) ("This lack of knowledge by the party see[k]ing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true[.]"); Kwoka, *Deferring*, supra note 340, at 224 ("The courts' general failure to allow discovery in FOIA cases is itself a form of deference to the government."); Kwoka, *Leaking*, *supra* note 181, at 1430 ("Discovery opportunities typically afforded to litigants in other cases are routinely denied to plaintiffs in FOIA cases."); Kwoka, *Rejection*, *supra* note 181, at 1503 ("In FOIA cases, . . . the problem is . . . too little discovery."); Sullivan, *supra* note 11, at 77 ("Cases involving FOIA do not involve extensive discovery or live testimony. They generally stand or fall on affidavits, and much therefore depends on the willingness of a judge to engage and interrogate the government's representations."); Ward, *supra* note 179, at 1008–13 (highlighting this problem). Such deference, of course, simultaneously threatens to prevent disclosure of many agencies' flawed deliberative processes. *See, e.g.*, Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 627 (2015). The use of the popular "*Vaughn* index," a specialized affidavit with detailed explanation supporting any claims of exemption in FOIA litigation, originated in this case. *Nat'l Archives & Records Admin.*, 541 U.S. at 162; Ray v. Turner, 587 F.2d 1187, 1204–05 (D.C. Cir. 1978) (Wright, J., concurring); Kwoka, *Secrecy*, *supra* note 68, at 140– 41; Ward, *supra* note 179, at 1013–14.

473. Morrison, *supra* note 326, at 621–22; Pozen, *FOIA*, *supra* note 340, at 1099 & n.10 (citing Tai, *supra* note 5, at 478–80). This judicial reluctance about awarding

favor of a more comprehensible and capacious touchstone can be seen as a result consonant with not just FOIA's original goals.[474] It is just as surely congruous with nearly every subsequent recension.[475] Perhaps, one might say, even the Constitution,[476] the very notion of

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fees under fee-shifting statutes is not uncommon. *See, e.g.*, Sabbeth, *supra* note 329, at 488–92; *cf.* Luban, *supra* note 304, at 241–45 (describing how the Court has cut back on statutorily authorized attorneys' fees given to prevailing parties in civil rights and environmental cases since 1988).

474. *See* A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 141 (2d Cir. 1994); Founding Church of Scientology, Inc. v. NSA, 610 F.2d 824, 830 (D.C. Cir. 1979).

475. *See* Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 31–32 (D.C. Cir. 1988); RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 432 (4th ed. 2004); Dyk, *supra* note 182, at 959; Silver, *supra* note 180, at 734. While most scholars derive a right to access from the First Amendment's speech clause, others see it as equally implicit in the same Amendment's press clause. *See* Dyk, *supra* note 182, at 931–34 (so theorizing). *But see* O'Brien, *First Amendment*, *supra* note 5, at 612–14 (challenging this theory). This dispute may have arisen because the terms were used interchangeably for much of this nation's history, Anderson, *Origins*, *supra* note 132, at 456; *see also* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88 (1975); O'Brien, *Reassessing*, *supra* note 130, at 12, and FOIA's overwhelming use by media organizations, Danielson, *supra* note 22, at 989–93; *see also* West, *Awakening*, *supra* note 356, at 1038–40 (summarizing the scholarly debate).

476. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943); CROSS, *supra* note 130, at 132; THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 673 (1970); Bodoh & Dempsey, *supra* note 11, at 229–32; Kitrosser, *Secrecy*, *supra* note 6, at 517–18; Sullivan, *supra* note 11, at 35–37, 83–84. *But see* Ericson, *supra* note 127, at 22–26 (observing that, between 1774 and 1870, such practices as withholding information from the public, secret government committees, support by the Court for the executive branch's right to keep its secrets were put into place); O'Brien, *First Amendment*, *supra* note 5, at 592–603 (documenting quotes suggesting that the Founders espoused no such constitutional theory); O'Brien, *Reassessing*, *supra* note 130, at 8 ("[C]ontemporary constitutional developments do not support the existence of a first amendment right to know."); Mark J. Rozell, *In Defense of Executive Privilege: Historic Development and Modern Imperatives*, 59 INT'L SOC. SCI. REV. 67, 71–74 (1984) (contending that "executive withholding of information is clearly defendable in our constitutional system"); Ugland, *supra* note 130, at 170 ("[T]he Framers almost certainly did not anticipate the First Amendment being used as a vehicle for access to government records or proceedings."). In the end, the search for a constitutional absolute may be "misguided," for "[o]ur constitutional system cannot guarantee certitude with regard to how every informational policy will be resolved, nor should it." Rozell, *Balance*, *supra* note 9, at 578.

self-government,[477] and an agency's own self-preservation[478] in an age in which governmental actors openly—and furtively—accumulate a bevy of data[479] and, like their precursors, resist its disclosure by a privilege's assertion or a FOIA exemption's exploitation.[480] With FOIA

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477. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The Court has declared, however, that 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'"); H.R. REP. NO. 89-1497, at 33 (1966) ("A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) ("The principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); Cerruti, *supra* note 4, at 283–95 (explicating the theory, as espoused by Alexander Meiklejohn); Moon, *supra* note 123, at 1157–58 (attributing such a theory to the founding generation based on Madison's letter to Barry); O'Brien, *Reassessing*, *supra* note 130, at 59 ("[A] constitutional right to know appears plausible only on the basis of a policy argument that the recognition of such a right would entail beneficial consequences for the polity."); Perry, *supra* note 15, at 1194 (describing "the amplification" of freedom of expression—"government is presumptively disabled from refusing to disclose protected information within its possession"—as "inexorable"); Sherman, *supra* note 27, at 444 ("As a general matter, open government laws seek to enable an informed citizenry."); Sullivan, *supra* note 11, at 35–37 (detailing the rise of Madison's conception of "popular Government"); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923, 927–29 (1980) (articulating this defense); *cf.* Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 45 (1982) ("Any role for government either in limiting or in ordaining the content of a publication is antithetical to libertarian precepts."). *But see, e.g.*, BeVier, *supra* note 8, at 503–12 (contesting the theory that a right to know can be rooted in the democratic processes prescribed by the Constitution); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273–74 (1971) (contesting the notion that the founding generation believed in an inchoate right to know); O'Brien, *First Amendment*, *supra* note 5, at 586 (denying the existence of any "enforceable constitutional right to know").

478. *See, e.g.*, Ackerman & Sandoval-Ballesteros, *supra* note 12, at 92; Davis, *Power*, *supra* note 128, at 1762–64; Lee, *supra* note 6, at 234–42; Noveck, *supra* note 4, at 284; *cf.* Shapiro & Steinzor, *supra* note 11, at 113 ("[T]ransparency lies at the heart of reducing agency costs in the public sector . . . ."), 128 (characterizing judicial review as an essential tool for the reduction of agency costs in the public sector).

479. *See* Kreimer, *Surveillance*, *supra* note 336, at 154–62 (documenting the recent proliferation of government data-gathering); Kreimer, *Sunlight*, *supra* note 6, at 4–6 (observing that the government's accumulation of more personal data has been facilitated by changes in information technologies).

480. *See, e.g.*, Ericson, *supra* note 127, at 19–20, 44–50; Halstuk, *supra* note 161, at 434–35; Katz, *supra* note 428, at 1284; Moon, *supra* note 123, at 1187–88; Shkabatur, *supra* note 64, at 90, 114–15; Tai, *supra* note 5, at 465, 468–70, 500; William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 107–12 (2005); *cf. Ensuring Agency Compliance with the Freedom of Information Act (FOIA): Hearing Before the Committee on Oversight and Government Reform House of Representatives*, 114th Cong. 91 (2015) (statement of Rep. Chaffetz,

having yielded important successes between 1974 and *Buckhannon*'s publication,[481] and with private litigation inevitably raising "serious concerns about cost, delay, and quality of decision-making . . . [when] used as a step in the resolution of every denied request, as most media outlets can no longer afford the wait or the price tag,"[482] no other interpretation will ensure its purposes' eventual realization,[483] even if the ideal of (nearly) full disclosure perpetually retain a fantastical quality[484] and wars' alleged exigencies engender more restrictions.[485] This take's persuasiveness is only amplified by the slow decline of traditional media organizations better able to absorb the upfront costs of investigation and litigation than today's unaligned and lonely

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Chairman, H. Comm. on Oversight and Government Reform); Karin, *supra* note 246, at 531 (discussing misuse of the Presidential Records Act); Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 913–14 (1990) (pointing to the dangers of the executive's ability to classify and declassify at will). The federal government's overuse of the *Glomar* response is but one more bit of telling proof. *See* Danae J. Aitchison, Comment, *Reining in the* Glomar *Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 239–40 (1993); Becker, *supra* note 63, at 688. Congress' willingness to limit agency's misconduct waxes and wanes, *see, e.g.*, Setty, *supra* note 11, at 260–62; Kenneth E. Sharpe, *The Post-Vietnam Formula Under Siege: The Imperial Presidency and Central America*, 102 POL. SCI. Q. 549, 550 (1987–88), strengthens the case for a more generous yet plain construction of § 552(a)(4)(E)(i)(II).

481. *See, e.g.*, Columbia Packing Co. v. U.S. Dep't of Agric., 563 F.2d 495, 499–500 (1st Cir. 1977); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1054–59 (2008); Pustay, *supra* note 20, at 263–64; Wald, *supra* note 438, at 660–61; David Burnham, *Assessing Freedom of Information Act*, N.Y. TIMES, Aug. 29, 1985.

482. Danielson, *supra* note 22, at 995.

483. *See, e.g.*, Halstuk, *supra* note 161, at 431–32, 456; Nader, *supra* note 186, at 14; Ward, *supra* note 179, at 995, 1021–22.

484. *See* Nicholas Dias et al., *What Makes a Good FOIA Request? We Studied 33,000 to Find Out*, COLUM. JOURNALISM REV. (Jan. 30, 2017), https://www.cjr.org/analysis/foia-request-how-to-study.php (calculating a 23% full-grant rate for five federal agencies, including the Environmental Protection Agency and the Department of Commerce); Max Galka, *Transparent Censorship: An In-Depth Look at FOIA in 2015*, FOIA MAPPER (Apr. 11, 2016), https://foiamapper.com/annual-foia-reports-2015/ (faulting agencies for increasingly sending documents with pieces withheld or removed and for expanding their use of Exemption 7(e)).

485. *See, e.g.*, Davis, *Power*, *supra* note 128, at 1753–55 (providing evidence of the penchant for secrecy exhibited by the Bush administration); Haridakis, *supra* note 7, at 14–15, 21–24 (same); O'Reilly, *supra* note 360, at 569 (same); Pack, *supra* note 14, at 823–27 (same); Wells, *supra* note 14, at 480–81, 493 (same); Paul M. Schoenhard, Note, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH. 497, 508 (2002) (adducing historical examples of government wartime secrecy); Apfelroth, *supra* note 187, at 224–25 (documenting FOIA's constriction during the Bush era); Uhl, *supra* note 127, at 272–81, 285–87, 294–97 (same).

journalists, muckrakers almost always poorer in specie, if not in dedication.[486]

### 3. The Mysterious "Obtains"

The import of one linguistic feature of the newest section cannot be mechanically dismissed: as presently written, a complaint must "obtain" one of the two forms of relief specified in § 552 to be deemed to have substantially prevailed.[487] Undefined in the OPEN Act, this anodyne verb commonly means "procure," "get," or "acquire";[488] though these synonyms are subtly distinct, each linguistic sense of "obtain" implies the existence of a link between the person acting and the end achieved. With such connotations inputted,[489] § 552 could be read to call for some causal connection between the action at issue and any "voluntary or unilateral change in position by the agency";[490] superficially at least, such a construction is neither unreasonable nor unfair.[491] Yet, purely as a lexicographical matter, to secure the relief one seeks does not necessarily mean one's entreaties led to the relief's benediction; purely as a practical observation, a triumph's reality does not simultaneously establish a single victor's sole or even partial responsibility for his, her, or its success. Moreover, considering Congress' proven familiarity with the courts' various formulations of the catalyst theory,[492] its ignorance of the requisite magic word cannot even be reasonably conjectured, and its failure to employ such terms of art cannot be ignored as a mere drafting error.[493] True, § 552's "obtain" may have been intended to designate causality. Standing alone, however, this one word does not convey that condition with the

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486. *Cf.* Carroll, *supra* note 360, at 193–96, 234–43 (proposing an amendment to FOIA that would improve digital-only media's access to government information).

487. 5 U.S.C. § 552(a)(4)(E).

488. *Obtain*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

489. *Cf.* FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). Nothing in the text of FOIA or its amendments remotely hints at the possibility of a specialized meaning to which some deference would be owed. *See supra* Part IV.A.

490. 5 U.S.C. § 552(a)(4)(E)(II).

491. In an inexplicable stumble, the *FAC* court did not even mention this potentially dispositive verb.

492. *See supra* Part III.B.2.i.

493. *Cf.* Morissette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

precision required for such a construction's adoption in the face of the OPEN Act's plain language and specific context and FOIA's familiar ends.

#### 4. Answering Some Possible Objections

For all the force of the foregoing analysis, one obvious problem arises from two equally salient facts: according to extrinsic sources, § 552(a)(4)(E)(i)(II) was likely designed to revive the catalyst theory,[494] while the House always preferred a narrow construction of FOIA's original provisions.[495]

Yet, in relying upon this history, federal courts have flouted their traditional institutional duty. Undoubtedly, legislative history may help clarify ambiguity, but courts may not resort to it "to cloud a statutory text that is clear,"[496] and "[a]mbiguity is a creature not of definitional possibilities but of statutory context."[497] Thus, regardless of whatever congressional intent can be gleaned from speeches and reports, a statute's enacted text alone controls,[498] especially as indicia of contrary *intent* in one report do not amount to the kind of deviations from embedded *purpose* which otherwise merit juridical solicitude.[499]

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494. *See supra* Part III.B.3.i.

495. *See supra* Part III.B.1.ii.

496. Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994); *see also, e.g.*, Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

497. Brown v. Gardner, 513 U.S. 115, 118 (1994).

498. *See supra* Part IV.A.

499. In the context of statutory construction, the two terms, so closely related in common speech, are not synonymous. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1546 (1987) (distinguishing legislative purpose and legislative intent); Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 7–8 (1992) (observing that "intent," when used in the phrase "legislative intent," means "'meaning'—that is, 'what do the words of the statute mean?'" and thus differs from "purpose" as used in the phrase "legislative purpose" when issues of statutory interpretation arise); Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 278–79 (1988) (defining legislative purpose as what the statute aims to achieve and not as what the legislature necessarily wanted); Ronald F. Howell, Comment, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439, 449–52 (1961) (explaining why "[l]egislative motive is at best a fictional concept"); James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 888 (1930) ("Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning . . . ."); *cf.* Comm'r v. Engle, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"); Cuevas-

Per this binding tenet, whose application arguably produces an unenviable conflict between legislative history and language,[500] the catalyst theory's blanket enthronement necessitates the OPEN Act's rewording.[501] No court, of course, wields such power,[502] as only one *FAC* judge recognized.[503]

The possible oddity of reading a statute as broader than its authors seemingly envisioned, meanwhile, does not militate otherwise for three reasons. First, the relevant history is rather more ambiguous than most judges have acknowledged. The Senate, after all, rejected one senator's proposal to explicitly add catalytic language to FOIA, and the legislative history does not irrefutably establish a congressional preference for the catalyst theory's revival.[504] Second, in those rare instances in which a court consults such bits of history to reject an otherwise natural and hence mandatory construction, it can only do so when that apparent plain meaning contravenes the purpose of the statute as a whole; that connotation's inconsistency with a particular subsection's seemingly narrow purpose, in contrast, simply does not invalidate its cogency.[505] Here, at worst, the plain meaning of § 552(a)(4)(E)(i)(II) conflicts with the recorded intent of that text's sponsors, but fully coheres with FOIA's familiar ends, the latter consonance more significance than the former discordance. Third, as a general matter, no harsh, illogical, or even unexpected result can be deemed sufficiently absurd to justify rejecting a plain and harmonious meaning.[506] "There is a basic difference between

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Gaspar v. Gonzales, 430 F.3d 1013, 1022 (9th Cir. 2005) ("[W]e look to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to legislative purpose and intent."). Like many jurists and scholars, the court in *First Amendment Coalition v. United States* conflated the two concepts.

500. *Cf.* Design Strategy, Inc. v. Davis, 469 F.3d 284, 298 (2d Cir. 2006) (refusing to honor an advisory committee's "characterization" of a rule as it could not "be squared with . . . [its] plain language"); *see also* Martin v. Winn-Dixie La., Inc., 132 F. Supp. 3d 794, 807–08 (M.D. La. 2015) (adhering to the same course).

501. *See* First Amendment Coal. v. U.S. Dep't of Justice, 869 F.3d 868, 879–80, 885–86 (9th Cir. 2017) (Berzon, J., concurring in judgment).

502. *See, e.g.*, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 52 (2008) ("[I]t is incumbent upon the Legislature, and not the Judiciary, to determine whether [a statute] is in need of revision."); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

503. *See First Amendment Coal.*, 869 F.3d at 882.

504. *Id.* at 882–84.

505. *See* Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998).

506. *See, e.g.*, Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004); Iselin v. United States, 270 U.S. 245, 251 (1926). This argument also addresses an oft-overlooked problem: the sizable compliance costs incurred by various governmental entities when honoring

filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[507] With Congress having failed to exercise "greater clarity or foresight" in its design, the courts cannot "redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."[508] "The [absurdity] canon," in turn, "is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce."[509] In sum, "when words have a clear definition, and all other contextual clues support that meaning, the canons cannot properly defeat Congress's decision[s],"[510] and such statutes must be "'enforced as written even when they seem mistaken or pointless.'"[511] Section 552(a)(4)(E)(i)(II) is one such paragraph, its evisceration of the catalyst theory plainly and unambiguously effected.

### *C. Attempted Reconciliations*

Seemingly, then, the catalyst theory can no longer be said to endure as the exclusive test for eligibility for attorneys' fees under FOIA.[512] Section 552(a)(4)(E)(i)(II)'s plain terms compel as much;[513] its specific and broader context favors no other route; [514] and the few objections that can be hypothesized pale before these sources' weight.[515] However, two reconciliations between the language's import and extrinsic data can be advanced that are consistent with the well-settled principles so needlessly ignored by courts and scholars.

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FOIA requests. Apfelroth, *supra* note 187, at 222; Pall, *supra* note 22, at 600; Pozen, *FOIA*, *supra* note 340, at 1123; *cf.* Tai, *supra* note 5, at 460–61. Scholars have cited these expenses as a reason for some agencies to adopt a policy of affirmative disclosure, Kwoka, *Inside*, *supra* note 177, at 270–71, or adopt prelitigation appeals process, Danielson, *supra* note 22, at 984. Arguably, open government subjects the polity to other, less quantifiable costs. Pozen, *FOIA*, *supra* note 340, at 1123–28; Sherman, *supra* note 27, at 446; *cf.* William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12, 15 (criticising transparent procedures for paralyzing government).

507. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

508. United States v. Locke, 471 U.S. 84, 95 (1985).

509. United States v. Logan, 453 F.3d 804, 806 (7th Cir. 2006).

510. Yates v. United States, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting).

511. United States v. Johnson, 459 F.3d 990, 997 n.10 (9th Cir. 2006) (quoting *Logan*, 453 F.3d at 806).

512. *See supra* Part IV.B.

513. *See supra* Part IV.B.1.

514. *See supra* Part IV.B.2.

515. *See supra* Part IV.B.3.

First, the catalyst doctrine, as limned in *Vermont Low Income Advocacy Council* and *Church of Scientology*, can still serve as a viable method for ascertaining entitlement. The fact that it is no longer the exclusive alembic, then, does not automatically negate its utility. Certainly, if a party can prove causation, it satisfies the narrowest understanding of § 552(a)(4)(E)(i)(II) and has shown itself eligible for fees. Per the OPEN Act, while catalytic effect may not be the sole basis for eligibility as a statutory matter, it can still serve as an acceptable method for its establishment. The old cases, then, remain partly, if not exhaustively, germane.

Second, whether a party is *entitled* to attorneys' fees has always been deemed a separate issue, one untouched by *Buckhannon* or the OPEN Act and readily, if not necessarily, reducible to a causal formula. Before and after *Buckhannon*, the standard of "substantially prevailed" encoded in § 552(a)(4)(E) governed only eligibility;[516] the OPEN Act did not expand upon this doctrine's formerly delineated realm.[517] As such, § 552(a)(4)(E), even as amended, gives no direction as to how a court must determine a party's *entitlement* for fees and costs, an entirely distinct inquiry[518] whose resolution ultimately determines whether a party receives any monetary recompense for its fees and costs.[519] Traditionally, "[e]ven if a litigant is 'eligible' for fees," awards have been limited "to those instances where it would promote the purpose of the FOIA to encourage the dissemination of information that benefits the public and discourages agencies from withholding valuable information."[520] While courts have frequently considered four (and as many as twelve) factors in this entitlement analysis,[521] this normal test arose as part of federal common law, not statutory compulsion.[522] Thus, neither custom nor law now prevent the courts' adoption of another: that the complainant's "action had

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516. *See, e.g.*, Brayton v. Office of the U.S. Trade Rep., 641 F.3d 521, 524 (D.C. Cir. 2011); Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1495 (D.C. Cir. 1984).

517. Batton v. IRS, 718 F.3d 522, 525 (5th Cir. 2013).

518. Ajluni v. FBI, 947 F. Supp. 599, 609 (N.D.N.Y. 1996).

519. *E.g.*, Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); *Weisberg*, 745 F.2d at 1495; Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 870 (D.C. Cir. 1981).

520. Muffoletto v. Sessions, 760 F. Supp. 268, 274 (E.D.N.Y. 1991).

521. Texas v. ICC, 935 F.2d 728, 730, 733 (5th Cir. 1991); *Government Information and the Rights of Citizens*, *supra* note 22, at 1141–43; *see also* sources cited in note 214.

522. *Government Information and the Rights of Citizens*, *supra* note 22, at 1137–38; *see also* sources cited in note 215.

substantial causative effect on the delivery of the information."[523] By such simple shifting, the catalyst theory can be reincorporated into FOIA without the need to subject statutory prose to any linguistic prestidigitation, both text and history appropriately flattered.[524]

## CONCLUSION

For centuries, ever since George Washington's presidential ascent, secrecy veiled the content of many government documents from a largely indifferent public, national security almost reflexively invoked. The supposition that the survival of a democratic polity depended upon an open government and freedom of information may have enjoyed much rhetorical favor, but these values' achievement subsisted mostly as myth, the Constitution devoid of any unequivocal endorsement. Crises ever present, transparency's march has often been stopped, its victories nullified. FOIA, as passed in 1966 and amended in 1974 and 2006, pledged to change this verity. Even today, for all the apparent improvements in agency accountability over the last fifty years, FOIA can be critiqued for failing to honor its embedded promise, forever hindered by administrative inefficiency, over-withholding of information, and the courts' failure to act as meaningful checks on agency secrecy. In crucial ways, it remains "putty in the hands of government personnel,"[525] oftentimes but an ineffectual departure from "the long history of the government withholding information."[526] In such circumstances, "[o]nly constant pressure on agencies will result in sufficient information to monitor their operations successfully so as to ensure that the public interest is

523. Vt. Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976); *see also, e.g.*, Harrison Bros. Meat Packing Co. v. U.S. Dep't of Agric., 640 F. Supp. 402, 406 (M.D. Pa. 1986).

524. *Cf.* Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) (rejecting a particular interpretation as inconsistent with the statutory text and history).

525. Nader, *supra* note 186, at 14.

526. Engel, *supra* note 133, at 211; *see also* Fenster, *Opacity*, *supra* note 5, at 890–91.

upheld,"[527] such data "the currency of power"[528] in a republican state[529] and a digital age.[530]

With plaintiffs operating under unique disadvantages in FOIA cases, the appeal of an interpretation consistent with both the text and the purpose of its most recent fee-shifting provision only increases. *Buckhannon* imperiled private enforcement of certain valued rights; unmoored to the catalyst theory, § 552(b)(4)(E)(i)(II) instead threatens the government's power to resist information's release and control the marketplace of public knowledge, thus contributing to the constitutional scheme of self-government and accounting for FOIA's quiddity and history. Simply put, to realize the most hallowed benefits of free speech, regardless of the constitutional enforceability of any right of access, and thus stymie materialization of the Founders' great dread, all one must now do is follow an artless text—and thereby reclaim "a democratic tool."[531] Otherwise, in this

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527. Engel, *supra* note 133, at 220.

528. *See Efforts to Reduce Federal Paperwork: Hearing before the Subcomm. on Oversight Procedures and the Subcomm. on Reps., Accounting, and Mgmt. of the Comm. on Gov't Operations*, 94th Cong. 4 (1975) (statement of Sen. Lee W. Metcalf).

529. *See, e.g.*, Nowack v. Fuller, 219 N.W. 749, 750 (Mich. 1928) ("If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions."); Burton v. Tuite, 44 N.W. 282, 285 (Mich. 1889) ("I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record."); Cohen, *Government Information*, *supra* note 130, at 185 ("Closed circuits, locked doors, sealed files and bugged telephones do not define a democratic environment when they are part of our governmental institutions; when these exist it is no longer a democracy which is operating."); Uhl, *supra* note 127, at 309 (describing FOIA as a critical component of democratic government).

530. *See* Hooper & Davis, *supra* note 273, at 968. "The same digital technologies that have revolutionized our daily lives over the past three decades have also created ever more detailed records about those lives," records compiled and maintained by an ever-watchful government. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1936 (2013).

531. Kwoka, *Inc.*, *supra* note 165, at 1437; *see also, e.g.*, Apfelroth, *supra* note 187, at 233 (characterizing the OPEN Act as "in the spirit of continuing a tradition of improving FOIA"); Tokar, *supra* note 64, at 103 (using same expression); *cf. Executive Privilege: Hearing Before the Subcomm. on Separation of Powers of Comm. on the Judiciary*, 92d Cong. 31 (1971) (statement of Sen. J. William Fulbright); Hooper & Davis, *supra* note 273, at 954 (The Civil Rights Act of 1964 and the Civil Rights Attorney's Fees Act of 1976 "introduced the notion of a private attorney general who steps in to defend citizens' civil rights, a notion that has been crucial to the enforcement of civil rights statutes."); *Government Information and the Rights of Citizens*, *supra* note 22, at 1140–41 (articulating the reasons behind the "private attorney general" rationale).

time of persistent war, and as secrecy skulks anew, other "crimes" may yet be "committed in its name,"[532] misgovernment less promptly perceived and rectified and national security less ably ensured. In the end, the lifeblood of any viable democracy is unmediated data, not always eagerly surrendered by even the best of governments in the best of times.[533]

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532. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1951) (Jackson, J., dissenting); *cf.* Michael Traynor, *Citizenship in a Time of Repression*, 35 STETSON L. REV. 775, 788–89 (2006) (discussing Attorney General John Ashcroft's "assault on openness" and "insistence on secrecy"); Davis, *Power*, *supra* note 128, at 1775 ("The current climate favors secrecy . . . .").

533. Many mistakenly attribute this sentiment to Jefferson. *See* Roy Wyman, *Facebook v. Jefferson: How Our Emerging, Networked Society Undermines Ideas of Security and Privacy*, 67 S.C. L. REV. 521, 526 n.22 (2016) (tracing the quote to Ralph Nader, who attributed it to Jefferson); Vance K. Opperman, *Opening Comments on Electronic Commercial Filings and the National Information Infrastructure*, 79 MINN. L. REV. 771, 772 (1995) ("Thomas Jefferson called information the currency of democracy."). This longstanding error makes some sense: like Madison, his mentee, Jefferson consistently opposed governmental secrecy in his missives and speeches. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* 15 WRITINGS OF THOMAS JEFFERSON 278 (1904); *see also, e.g.*, Schwartz, *supra* note 124, at 649, 652, 654–55; Davis, *Power*, *supra* note 128, at 1742–43; *cf.* Martin & Lanosga, *supra* note 5, at 614–15 (noting that Jefferson advised Washington that a congressional committee had the right to request information from an executive agency); Rozell, *Law*, *supra* note 127, at 920–21 (same); Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 105–06 (1995) (discussing Jefferson's views of the legislative privilege established by Article I, Section Six, Clause One of the Constitution); HOFSTADTER, *supra* note 2, at 108–09 (noting Jefferson's support for a free press). In his actions, however, Jefferson was prone to fits of secrecy, *see* Rozell, *Law*, *supra* note 127, at 921–22, and retained many of his predecessors' programs, *see* HOFSTADTER, *supra* note 2, at 121–24.