What does the American public have the right to know about the federal government? The answer to this question has varied since the founding of the nation; both in the collection of information and information policy. This paper explores the evolution of government information policy and examines the effect each of the three branches of government – legislative, executive and judicial – has had on public access to government information. The collection and dissemination of government information created by each branch has changed greatly over the life of the nation, and each branch has regulated public access to information. The legislative branch has passed laws that provide access to some types of information and restrict access to others. The executive branch controls access through executive orders and the exercise of executive privilege. The judicial branch hears cases in which access issues are disputed and provides the third element in the balance of power. At times, the branches disagree. To illustrate what can happen when all three branches become involved in an information policy issue, the Watergate scandal of the 1970’s is discussed as evidence that the balance of powers created by the founding fathers operates as it should.
THE BALANCE OF POWERS IN GOVERNMENT INFORMATION POLICY

by
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Introduction – The Public’s Right to Know

“[A] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Madison’s words are often quoted in discussions of public access to government information; they are evidence of the intent of the founding fathers to engage in an open government. However, from Revolutionary times to the present day, information access has been the subject of much dispute. Just how open should government be? How can it balance the right of the public to know how it is being governed with the need for secrecy in the name of national security? This paper explores access to government information and the various means used by the three branches of the United States government to regulate or even restrict access. It is intended to be a primer on the evolution of information policy in the United States.

Literature Review

Locating government information can be a challenge, especially for older documents. Three works are helpful in locating the best sources of information for all three branches of government. Tapping the Government Grapevine: The User-Friendly Guide to U.S. Government Information Sources provides a well-organized approach to finding desired information. It is also instructive in helping the user to understand the

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1 Letter from James Madison to W.T. Barry, August 4, 1822, quoted in In re Sealed Case, 121 F. 3d 729 (1997), at 749.
largely decentralized manner in which government information has been collected over the years. *United States Government Information* provides similar material, and also explains the policy issues that govern the operations of institutions such as the Government Printing Office. *Finding the Law* is a useful guide to finding legal documents and information, such as court opinions, legislation and regulations. All three have rapidly fallen behind in the latest changes in electronic government information, but they remain accurate sources for printed materials and contain sufficient detail on web-based access to provide the user with a strong background.

The separation of powers dictated by the Constitution provides citizens with the assurance that no single branch of government can rule the country without restraint. This separation has also meant that throughout its short history, the information policies of the country have been affected by all three branches. Hoffman examines the issue from an historical standpoint, noting that the Constitution was intended to be a flexible document, adaptable to future generations and the issues they would face. From the signing of the Constitution forward, politicians in the executive and legislative branches often disagreed on matters of information policy, from what information would be shared with the public to what would be shared between branches. As is true even today, the third branch, the judiciary, was often left the task of sorting out who had rights to government information.

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Robertson attributes much of the dispute over the power to govern information to a simple fear of granting too much authority to the executive branch. Relyea is more convincing; he allows each branch its ability to regulate information based on the doctrine of separation of powers, and explains the variations in information policy over time by looking to current events and world politics. He reminds us of Franz Kafka’s description of a people ruled by nobles who will not reveal the content of the laws, and reminds us that secrecy, while often required, should be accepted “[…]only in limited instances and on a momentary basis […]”

Turning to purely executive branch information policies, Cooper offers an illuminating review of presidential power exercised through executive orders, proclamations and other directives. He examines the use of older devices, such as the executive order, and newer ones, such as signing statements, to reveal the influence on national policy that can be exercised by a single person. Rozell addresses the assertions of executive privilege by presidents from George Washington to George W. Bush. In addition to analyzing why executive privilege exists and to what ends its assertion is proper, he also shows how the other two branches of government have played a role in reining in excessive claims of privilege.

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8 Phillip J. Cooper. By Order of the President: The Use & Abuse of Executive Direct Action (Lawrence, KS: University Press of Kansas, 2002).
The judicial branch is often the final arbiter of inter-branch disputes, and the history of the Supreme Court as told by Irons is an educational and often entertaining look at the beginnings of the Court and the challenges faced by its first justices.  

**Method and Scope**

Primary sources were examined whenever possible in order to analyze the impact of the various laws, executive documents and court decisions discussed in this paper, as it is important to understand the context of these records.

Following a brief background of the United States Constitution and its effect on information policy, each branch of government will be examined. A brief history of the information activities of the branch will be provided, the government information created by each branch will be explored, and sources of that information will be provided. The methods by which the separate branches control each other’s information will then be discussed. Finally, a case study will be used to illustrate the interaction of the three branches of government on a particular point of information policy.

Beyond the scope of this discussion are State government information, international information policies and current issues that remain unresolved.

**Background - the United States Constitution**

The United States Constitution has served as the fundamental source of our nation’s laws since its signing on September 17, 1787. In this short document, the powers and duties of each branch of the federal government – executive, legislative and judicial – are outlined. Although its references to government information are few, hints can be seen of the framers’ intent to create an open government.

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The legislative branch is described in Article I. The listing of specific powers is extensive, and culminates with the power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”\(^{11}\) The provision of information to the public by the legislative branch is mandated: “Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.”\(^{12}\)

The powers of the executive branch are described in Article II, and the provision of information is mentioned but once: “He shall from time to time give to the Congress information of the state of the union [...]”\(^{13}\)

In Article III, the federal judiciary is given jurisdiction over specific types of cases. Most pertinent to the discussion of public access to government information are cases arising under the Constitution and laws of the United States and cases to which the United States is a party.\(^{14}\)

With this limited guidance, each branch of the government has been instrumental in developing federal information policy since the signing of the Constitution. In the pages that follow, each of the three branches will be explored, and the methods by which each has provided or restricted public access to information will be discussed. Included

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\(^{11}\) U.S. Constitution, art. 1, sec. 8.
\(^{12}\) Ibid., art. 1, sec. 5.
\(^{13}\) Ibid., art. 2, sec. 3.
\(^{14}\) Ibid., art. 3, sec. 2.
in the discussion will be not only the information created by each branch, but also the boundaries placed on each branch by the others.
Part One - The Legislative Branch (Congress)

By virtue of the power to make law granted to it by the Constitution, Congress wields power over all aspects of governance, and laws made by this body affect all citizens. Laws are also long-lived. They remain in effect indefinitely, unless subsequently amended by Congress, interpreted by the executive branch, or overruled by the courts.

Public Access to Congressional Information

During the formation of our government, secrecy prevailed. Members of the first Continental Congress were sworn to secrecy for legitimate reasons – they were engaged in a daring and dangerous endeavor. The final form of government, however, was to be one of openness and transparency, a government by and for the people, one that could be trusted by the people.

Before there was a Constitution, the Articles of Confederation addressed the public nature of government activities, but the audience in mind was the community of States rather than persons: “The Congress of the United States [...] shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to
lay before the legislatures of the several States.”¹⁵ This provision underwent several drafts before it was included in the Constitution, as the framers tried to attain the perfect balance between open government and the secrecy necessary for national security.

The Constitutional Convention itself was likewise held in secret, and delegates who were careless with information were sternly reprimanded. George Washington, in chastening a fellow delegate, pled for care, “least our transaction get into the News Papers, and disturb the public repose by premature speculations,” and James Madison asserted that the Constitution would never have been adopted if the proceedings of the convention were public.¹⁶ In the final product, the intent of the framers for the new government was clear – the public would know how decisions were made, and by whom.

The House and the Senate each formulated rules of procedures, and today each Congress promulgates its own version of the rules. In the House of Representatives, these rules are formally known as the Constitution, Jefferson’s Manual and Rules of the House of Representatives. The disposition of records is found in Rule VII. It defines “record” as “any official, permanent record of the House,” and includes records made or acquired by an official of the House. The Rule sets forth procedures for archiving non-current records with the Archivist of the United States, and for the release of records. Records already made public by the House can be immediately accessed by the public, records which contain personal information acquired during an investigation may be released after 50 years, and other records are made public after 30 years. There is a process for determining on a case-by-case basis whether or not to release records which

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¹⁵ Articles of Confederation, sec. IX.
¹⁶ Hoffman, 14.
may be “detrimental to the public interest or inconsistent with the rights and privileges of the House.”

The Senate records procedures are found in Senate Resolution 474. Rules are similar in scope; previously published records may be immediately accessed by the public, and records with personal information or of executive nominations are closed for fifty years. Most of the other Senate records may be accessed after 20 years have passed. In the case of records created by joint committees of Congress, the rules of the chamber submitting the records to the Archives are applied. It is important to note that although unpublished congressional records are deposited with the National Archives and Records Administration, legal custody of those papers remain with the chamber that created them.

Both the House and the Senate Rules also provide guidance for secrecy. Few would argue that from time to time secrecy may be required in government for reasons of national security, and both the House and the Senate have rules that permit secrecy. In the House, Rule XVII, Section 9, “Secret Sessions,” and in the Senate, Rule XXI, “Session with Closed Doors” and Rule XXIX, “Executive Session,” allow for meetings to take place in secret when it is deemed necessary. No formal procedure is necessary for either chamber, save the requirement of making a motion.

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18 U.S. Senate. Senate Resolution 474 (1980)
Sources of Legislative Branch Information

True to their Constitutional mandate, members of Congress kept journals of floor activities. Both the House Journal and the Senate Journal have been kept since the first session of the first Congress, but the Journals are brief notes of the minutes of meetings, rather than verbatim accounts of floor debates.\textsuperscript{21}

The first recorders of floor activity in Congress were newspapers. Coverage was inexact and sometimes erroneous, but lawmakers were initially not interested in incurring the costs of publishing their activities. This task was eventually given to the firm of Gales & Seaton, noteworthy for their willingness to allow members to correct proofs before publication. Gales & Seaton published the Register of Debates, covering the years 1824-37, and compiled the Annals of Congress, covering the first Congress in 1789 through 1824. The Congressional Globe then gained popularity with the Congress, and became the quasi-official reporter from 1833-73. Until the Globe, published accounts of congressional activities were limited to abstracts and condensations, with fuller coverage given to what appeared to be more interesting topics. The Globe, however, made the first attempt at verbatim transcription in 1851.\textsuperscript{22}

In 1860, the Government Printing Office (GPO) was created to handle Congressional printing, and the GPO began printing the Congressional Record as the

\textsuperscript{21} In the first House Journal, travel difficulties were evident. Although the first Congress convened on March 4, 1879, members met each day until April 1 only to record that a quorum was not present and they would adjourn until the next day. U.S. House. Journal of the House of Representatives of the United States, v. 1 (Washington: Gales & Seaton, 1826), 3-6, accessed 6 March 2004, http://memory.loc.gov/ammem/amlaw/lwhj.html.

official congressional gazette in 1873.\textsuperscript{23} Publication continues to this day, along with the official daily records of Congress, the House and Senate Journals.

Other legislative documents from 1789 until 1831 were not published in any organized fashion. Most papers were kept in the respective archives of the House and Senate. After a fire destroyed the Capitol in 1814, it became apparent that there needed to be an official means of publishing government information. In 1831, a law was passed to contract with the firm of Gales & Seaton for the publication of congressional documents from the first thirteen Congresses.\textsuperscript{24} These volumes, the \textit{American State Papers}, cover the period from 1789 to 1838, and include a variety of documentation on the workings of the government, not limited to Congressional materials. In addition to committee reports, bill information and treaties, the papers also contain materials from the executive branch and miscellaneous non-governmental materials.

Since 1817, the \textit{U.S. Congressional Serial Set} (the “Serial Set”) has been the source of House and Senate reports and documents. The \textit{Serial Set} is published by Congressional session, and contains all reports ordered to be published by Congress, as well as reports of executive departments and non-governmental organizations.

Currently, Congressional action is recorded and published in a variety of formats. The advent of the Internet has been a boon for citizens interested in the workings of the government. The \textit{Congressional Record} is available both in print and on-line (since 1994) by the Government Printing Office via its GPO Access web site.\textsuperscript{25} Also available on GPO Access are public and private laws, pending bills, calendars, reports, and much more.

\textsuperscript{23} Hernon, et. al., 2-3.
more. Early volumes of the *American State Papers*, the *Serial Set* and many other historical publications are available through the Library of Congress.\(^{26}\) Finally, citizens interested in the day-to-day workings of both the Senate and the House of Representatives can watch the action live on cable television stations C-SPAN (House of Representatives) and C-SPAN2 (Senate).\(^{27}\)

**Congressional Power Over Executive and Judicial Information**

Under its Constitutional mandate to make laws, Congress has the power to affect access to government information in all branches of the government.

**Printing laws**

The first public printing law was enacted on March 3, 1795, during the third Congress. It provided for the printing of 4,500 copies of the laws of the United States, including “the constitution of the United States, the public acts then in force, and the treaties, together with an index of the same.” Five hundred copies were reserved, and the rest were distributed to the states and territories.\(^{28}\)

In 1813, the number of authorized copies was increased, and distribution was expanded to insure that copies were allocated throughout the states and territories. For the first time, colleges and universities in every state were added to the distribution list.\(^{29}\) The 1813 Act has been hailed as the “first freedom of information act,”\(^{30}\) and the provided the groundwork for future government information policy. By providing


\(^{28}\) Act of March 3, 1795, ch. 50, 1 Stat. 443.

\(^{29}\) Act of December 27, 1813, 3 Stat. 140.

college and university libraries with copies of these federal documents, the law implied public access to government information. 31

In 1846, the Joint Committee on Printing was established, and the printing of certain government documents, such as bills, resolutions, reports and executive documents was standardized. 32 The next law established the Government Printing Office in July of 1860, allowing for the first time the Superintendent of Public Printing to hire staff, order supplies, and furnish a plant to handle all government printing. 33

The Printing Act of 1895 created the Federal Depository Library Program (FDLP), and streamlined government printing. It moved the Superintendent from the Department of the Interior to the Government Printing Office, and specifically included executive department documents as part of the FDLP’s distribution list. It also brought executive branch libraries and those of military academies into the depository system. 34

Government printing law is now contained in Title 44 of the United States Code, Public Printing and Documents. This title covers the Government Printing Office, the Federal Depository Library Program, the National Archives and Records Administration, and specifies the preparation, distribution and sale of government documents.

Defining records and early restrictions on access

In 1950, Congress passed the Federal Records Act, which completed the bureaucracy surrounding government records. This Act, which can be found at 44 U.S.C. 3101 et. seq., requires each agency to create official procedures regarding the creation, use, security and disposal of records. The law resulted in the establishment of records

34 Act of January 12, 1895, 28 Stat. 615.
centers and retention schedules under which records are categorized and managed. The Act has been amended from time to time to reflect changes in governmental structure and technological advances, but it has retained its original meaning – government agencies must take seriously their responsibilities over the records they create.

Provision of information is one aspect of information policy; restricting access to information is another. Tensions over the volatile European state of affairs in 1911 led to the first law that formally restricted access to government information.\(^{35}\) The Defense Secrets Act of 1911 penalized any government official who “[…] willfully and without proper authority, communicates or attempts to communicate […] to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time.”\(^{36}\)

This Act was repealed in 1917 by the Espionage Act, which added penalties for official negligence and for failure to produce information demanded by “an officer or employee of the United States entitled to receive it.”\(^{37}\) These two acts were the first attempts at classifying government information, but they were vague as to what information was subject to secrecy. Much was left up to interpretation. For example, how is the best interest of our national defense defined? How does one determine who is entitled to receive secrets? The War Department dominated the field of secrecy until the administration of Harry S. Truman,\(^{38}\) when, as discussed below in Part Two, the executive branch commandeered the subject, and continues to regulate secrecy to this day.

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\(^{35}\) Robertson, 121.
The Defense Secrets Act and the Espionage Act were broadly written, perhaps intentionally so in order to maintain flexibility, or perhaps due to the need for haste in the face of impending war. Since that time, laws that regulate access to information have been specific, sometimes excruciatingly so. Several examples follow to illustrate the types of information in need of protection and the efforts of Congress to balance the often conflicting demands of open government, national security and historical preservation.

The Atomic Energy Act, 1946

The end of World War II saw not only the culmination of active hostilities, but also the beginning of the Cold War. Having proven the destructive power of the atomic bomb, the United States turned to protecting its atomic secrets in order to prevent future devastation. The Atomic Energy Act of 1946 provided the framework for a program that would foster scientific progress while safeguarding sensitive information.39 Amended and updated since then, the Act remains codified at 42 U.S.C. 2011.

In this Act, a new category of information was established, “Restricted Data.” Unlike classified data, there was no need to determine in advance whether certain information was restricted. It needed only to fall within one of the definitions provided by the Act. Another unique feature of restricted data was the fact that it did not apply only to data created by the government. An individual could create restricted data, then not be allowed to possess it.40

The 1946 Act severely restricted atomic information; the only access allowed was for purposes of national security. In 1954, the Act was amended to loosen the restrictions

so that commercial use of nuclear power could be explored, adding, “The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding […]”\textsuperscript{41} This language opened the door to commercial exploration of atomic energy while the Act protected misuse of the information through strict licensing guidelines.

The Freedom of Information Act, 1966

Although many Americans take free access to government records as a right on a par with the right to vote, it was not until 1966 that the public’s right to know was made law. There did exist a common law right\textsuperscript{42} to inspect and copy public records, but until this time, there was no law that addressed the right in any comprehensive fashion. The Freedom of Information Act (FOIA) provides for public access to much of the information created by agencies of the United States government.\textsuperscript{43} It is, however, a limited right. As perhaps the major law affecting access to government information, the FOIA warrants a broader discussion.

In the United States Code, the FOIA is found in section 552 of Title 5, “Government Organization and Employees.” It provides generally that agencies will make available to the public several listed types of information, including organizational schemes, the location of offices, formal and informal procedures, forms used and where they may be obtained, policies, rules and interpretations of rules.\textsuperscript{44}

\textsuperscript{41} 42 U.S.C. § 2161 (2000).
\textsuperscript{42} Common law refers to the body of case law that addressed the public right to know. Cases referring to the common law right to public records are discussed in Part Three.
\textsuperscript{43} Pub. L. 89-554, 80 Stat. 381 (September 6, 1966).
In addition to the types of information that agencies must make available to the public, they are required to be responsive to requests for information from the public on final opinions of the agencies resulting from the adjudication of cases, statements of policy that are not published in the Federal Register, staff manuals and instructions that affect a member of the public.\footnote{5 U.S.C. § 552(a)(2) (2000).}

Fees charged for searching and copying must be reasonable and reflect the actual costs of retrieving a document requested under the Act.\footnote{5 U.S.C. § 552(a)(4) (2000).} The Act also specifies remedies for violations of the Act and imposes time limits on agency responses to requests.

There are two important limitations on freedom of information in this law. The first is the definition of “agency.” Agency is defined as “each authority of the Government of the United States,”\footnote{5 U.S.C. § 551 (2000).} which includes nearly all executive branch departments, but not the court system and not Congress. Nor does it apply to U.S. territories, courts martial, military tribunals, military authority exercised on the field in time of war or occupation, or certain aspects of mortgage insurance or war contracts.

The second limitation of the law is found in the exemptions, listed at 5 U.S.C. 552(b). There are nine exemptions in all. The Act does not apply to matters that are: (1) kept secret by Executive order in the interest of national defense or foreign policy and properly classified, (2) relating to internal personnel rules and practices, (3) exempted from disclosure by statute, (4) privileged or confidential trade secrets and commercial or financial information, (5) privileged inter- or intra-agency memoranda or letters, (6) personal information that would violate the privacy of an individual, (7) records or
information compiled for law enforcement purposes, (8) records of financial institutions created as a by-product of regulation or supervision by an agency, and (9) geographical and geophysical information concerning wells.

As is the case with most laws of any long duration, the FOIA has been amended from time to time. Two such amendments have made the law more favorable to the public by increasing access and by accommodating new technology. The first was passed in 1976, and added the provision that meetings of government agencies and of congressional committees will be open to the public. This amendment, also known as the Government in the Sunshine Act[^48], paved the way for similar laws at the state and local level across the country. The smoke-filled rooms, where the real decisions were traditionally made, are now furnished with public seating.

The second amendment that guarantees greater access was passed into law as the Electronic Freedom of Information Act in 1996. Not simply an acknowledgement that government information was increasingly “born digital,” this Act made changes throughout the FOIA. Indexes of agency information, previously required to be made available for inspection and copying, are now required to be available electronically. A member of the public can request a particular format when asking for information and the agencies must comply if possible. Further, agencies must affirmatively search for electronic formats that would be responsive, and must tell a requester how much of a record has been deleted.

The Act also imposed stricter and more voluminous reporting requirements regarding FOIA requests, including not only numbers of requests but also analytical statistical information in order to determine efficiency. In order to lessen the impact on

agency caseloads, the time period for responding to a FOIA request became 20 days rather than 10. An interesting procedure was added to allow an individual and an agency to work together to solve problems attending a voluminous or time-sensitive request. In signing the law, President Clinton emphasized his administration’s desire for continued and increasing openness that he hoped would decrease the need for many FOIA requests.\(^49\)

Indeed, in recent years there has been an enormous output of government information on the Internet, from the federal budget to electronic reading rooms to statistics on FOIA requests themselves freely available at any time.

**Presidential Records Act, 1978**\(^50\)

Until the passage of this Act, records of former Presidents were considered to be their personal property. This law was enacted in response to assertions of executive privilege by President Richard M. Nixon during the infamous Watergate scandal, and provided that presidential records became the property of the United States when a president left office. A previous law, the Presidential Recordings and Materials Preservation Act of 1974, dealt solely with the disposition, preservation and access to the records of the Nixon administration.\(^51\)

President Nixon’s assertions of privilege, the historic court cases that followed, and the passage of these laws are discussed in Part Four as an example of the interaction of the three branches of government relative to the accessibility of government information.

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State Department Historical Records Act, 1991

This act deals specifically with the publication, *Foreign Relations of the United States*, and is more bureaucratic procedure than a substantive change in the law. The series presents major U.S. foreign policy decisions and diplomatic activity, and the statute is an example of Congress doing some “housekeeping” in order to streamline a process or prescribe a standard. Here, the Historian of the Department of State is made responsible for publishing the series, and an Advisory Committee is established to make recommendations. The series is required to publish events within 30 years of their occurrence. There were apparently some problems in past publications regarding classified documents, as the Act takes some pains to describe what to do with these records. For example, if classified records can be redacted, then that is the course prescribed, and if the redaction interferes with the sense of the record, explanations must be given to render the document sensible.\(^52\) This Act is codified at 22 U.S.C. 4351 (2000).

John F. Kennedy Assassination Records Collection Act

The assassination of President Kennedy in 1963 has been the subject of intense public interest for decades, and has sparked numerous conspiracy theories. Did shooter Lee Harvey Oswald act alone? Was there a shot heard from the infamous grassy knoll? What did the emergency room doctors fail to disclose?\(^53\) In 1992, President George H.W. Bush signed the John F. Kennedy Assassination Records Collection Act (now codified at 44 U.S.C. 2107, note). This Act designated the National Archives and Records


Administration as the sole depository for these records and opened most of them to the public. It also created the Assassination Records Review Board to oversee the release of the documents, and contained some limitations on providing access, such as items that may reveal Secret Service methods still in use or items that would compromise the identity of intelligence sources.\textsuperscript{54}

\textbf{USA PATRIOT Act}

Shortly after the terrorist attacks of September 11, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.\textsuperscript{55} The Act amends several other laws in order “\textit{to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.}”\textsuperscript{56} It has become the subject of much debate, especially in the library community, for its threat to personal privacy.

For purposes of this paper, Section 215 of the Act is notable. It provides that “No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.”\textsuperscript{57} This marks a departure in government information policy from regulating what government officials can disclose to regulating what private citizens can say about government activities. It is reminiscent of the provisions of the Atomic Energy Act, discussed above, in which a private citizen could

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{54} Pub. L. 102-526, 106 Stat. 3443 (October 26, 1992).
\item\textsuperscript{55} Pub. L. 107-56, 115 Stat. 272 (October 26, 2001).
\item\textsuperscript{56} U.S. House. H.R. 3162 (October 24, 2001).
\item\textsuperscript{57} Pub. L. 107-56, sec. 215.
\end{itemize}
\end{footnotesize}
accidentally create classified information and thereby not be entitled to possess his or her own creation.

**E-Government Act 2002**

The E-Government Act was passed for several reasons, among them to promote the use of the Internet to provide “citizen-centric” government information, to provide access to government information across multiple channels, and to make government operations more transparent.\(^{58}\) Congress believes that increasing use of the Internet to provide information will save money as well as heighten citizen awareness and participation.\(^{59}\)

The Act is much more comprehensive than the E-FOIA amendments discussed above. Under the direction of the Office of Electronic Government created by this law, agency websites will follow protocols that will make searching across agency sites easier. An Advisory Board reviews existing on-line information standards and makes recommendations for cataloging and preserving government information and maintaining easy accessibility. The federal court systems must provide information on dockets, opinions, and local rules of court.\(^{60}\)

The law also takes into account the requirements of other laws that mandate handicapped accessibility and protections for individual privacy, and requires the establishment of a federal Internet portal from which all government information can be accessed.\(^{61}\)

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59 Ibid., 2901.
60 This last requirement could have a great impact on electronic access to court information. Currently, most of the information about federal court cases is accessible through the PACER system, a database of federal cases that imposes a fee for use. Under this Act, the PACER system could be transformed into a free site.
The Act makes the ambitious effort to make as much information as possible electronically available. It will take some time to accomplish, but already changes are being seen on federal government sites. For example, those searching for federal grants once had to search across several agency sites; these have now been collected at http://www.grants.gov. Federal benefits programs, whether offered by Social Security, Health and Human Services, Housing and Urban Development or another agency, can be found collectively at http://www.govbenefits.gov.

**Congressional Regulation of Information, Concluding Remarks**

Congressional regulation of government information falls into three distinct types: the regulation of government printing, the restriction of access to sensitive information, and the promotion of transparency in government operations.

Some congressional action is inspired by the need for consistency and legitimacy, as was the case in the early days of the nation, when the various printing acts were passed into law. Others are evidence of the need to act swiftly in order to respond to current events and threats to national security, such as the Espionage Act and the Atomic Energy Act. Still others responded to the public’s need to know; the John F. Kennedy Assassination Records Act dealt with an isolated chapter in American history, while the E-Government Act addresses information policy for the future.

Although the passage of laws seems to be a comprehensive and logical method of developing a national information policy, it will be seen that the two other branches of our government also play a significant role in policy development.
Part Two: The Executive Branch

The executive powers of the government are granted to the President by the Constitution. Enumerated powers include the power to make appointments and enter into treaties, with the advice and consent of the Senate. Presidential duties include serving as Commander in Chief of the armed forces and to see that the laws of the United States are faithfully executed. The provision of information is mentioned only once: “He shall from time to time give to the Congress information of the state of the union. [...]”

There is no Constitutional provision that gives a President power to regulate information in any way. Given this silence, presidents over the years have developed a variety of means to limit access or to establish secrecy when they felt it was warranted.

Public Access to Executive Branch Information

Executive Privilege

The first president to articulate an executive privilege was George Washington. In 1791, a military expedition led by General St. Clair resulted in an embarrassing loss of troops and supplies. Congress pressed the President for details during their investigation of the incident, and the President complied, but only after determining that he did, in fact, have the right to withhold information, so long as it was in the public interest.

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62 U.S. Constitution, Art. 2.
63 Ibid., sec. 3.
When requested by the House of Representatives to reveal details of a treaty negotiated by John Jay with Great Britain, Washington responded differently: “It is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.” Unfortunately for Washington’s position, some members of the Senate felt his stance was wrong, and they leaked details of the treaty to the press.  

Withholding information in service to the public interest became a presidential power that, while used infrequently, was acceptable to Congress over many years. It was not until the twentieth century that this power was used more often and to more controversial ends.

President Dwight D. Eisenhower exercised the power on no fewer than forty occasions, and it was during his administration that the term “executive privilege” began to be used. Eisenhower’s exercise of the privilege was not limited to the withholding of information, however. He interpreted the power to include others in the White House, and refused to allow White House officials to testify as to advice they had given him, and believed that the privilege applied to the entire executive branch.

Perhaps the best-known controversy over executive privilege occurred during and after the Nixon administration, when President Richard M. Nixon attempted to use executive privilege as a shield against congressional investigations into his conduct. The Nixon controversy is discussed in more detail in Part Four.

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65 Orman, 34.
66 Rozell, 923.
After the Nixon debacle, presidents became loathe to invoke privilege, until the administration of President William J. Clinton. President Clinton made an unfortunate attempt at invoking privilege, however, which only reinforced the beliefs of many that executive privilege is an inappropriate exercise of presidential power. When seven members of the White House travel office were fired, Congress investigated and demanded access to information about the firings. Claiming privilege, President Clinton at first refused to comply, then made some of the documentation available. The content of the documents did not approach the threshold of national security or public interest that had been the traditional reasons for invoking privilege; instead, they contained matters embarrassing to the administration.  

While it is arguable that congressional inquiry into White House staffing was itself overstepping for political reasons, the invocation of privilege over a relatively trivial matter was also inappropriate.

President Clinton again invoked executive privilege during the investigation of Mike Espy, his Secretary of Agriculture. Espy was accused of accepting illegal gifts, and the White House conducted its own investigation into whether he should be relieved of his post. When Congress requested the records surrounding that investigation, the administration balked, claiming privilege. This incident is noteworthy, as it resulted in a court decision that distinguished the privilege attached to presidential communications from the privilege that protects confidential discussions in the executive branch – the “deliberative process” privilege. The Espy case (In re Sealed Case) is discussed in Part Three.

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67 Mark A. Rozell, Executive Privilege, 125-126.  
68 Ibid., 128-130.
There remain several arguments for and against the assertion of executive privilege. Among the arguments against the practice are the fact that the Constitution did not provide for such a privilege, that the public and the other branches of government need to know how the government operates, and the fact that presidents have abused the privilege. Proponents of the privilege argue that there are historical precedents, that national security often demands that secrets be kept, that the other branches need to be limited, and that other branches also have secrecy practices.\textsuperscript{69}

It can hardly be argued that the framers intended for a more open and accountable government, nor can it be argued that national security concerns require secrecy in order to protect the country. The fact that the privilege has been abused, however, is not a valid argument against privilege, since abuses can be corrected by legislative action or punished by the court system. Nor does the argument that the other branches have secrets carry much weight; it suggests an image of schoolchildren begging to do something because everyone else is doing it. Administrations would be better served by returning to the original bases for claiming privilege – national security and preserving the public interest.

**Executive Orders**

It has been said that the American public is not generally aware of the presidential power to govern by decree, and that if they were, “many would most likely be aghast that the president could, in effect, write law without benefit of the normal constitutional processes.”\textsuperscript{70} This is certainly the case with executive orders.

\textsuperscript{69} Ibid., 7-53.
\textsuperscript{70} Cooper, 15.
Executive orders originate from the president and are directed at government officials; they are a means by which the president can manage the executive branch. They have had a direct effect on public access to government information in two situations: the classification of documents, and the interpretation of the Presidential Records Act.

In the early twentieth century, classification of documents for reasons of national security was the domain of the War Department. During World War I, the department created different levels of secure information, and after the war, issued Army Regulation 330-5, which defined the levels and applied them to peacetime information as well. Drawing upon the Espionage Act, the classifications consisted of “Secret,” “Confidential,” and “For official use only.”

The Regulation underwent some modifications over a period of years, but control of security documents remained with the armed forces.

In 1940, President Franklin D. Roosevelt issued Executive Order 8381, which authorized security markings on several different types of documents. Entitled “Defining Certain Vital Military and Naval Installations and Equipment,” this order was limited to the Army and the Navy.

President Harry S. Truman issued the first executive order that officially removed classification of documents from the armed forces to the office of the president. Executive Order 10290 created four levels of security: Top Secret, Secret, Confidential and Restricted. The order was succinct yet comprehensive, and covered the system to be used, by whom (all personnel in the executive branch), and established rules for the

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72 President. Executive Order 8381, 5 Fed. Reg. 1147 (March 26, 1940).
73 President, Executive Order 10290, 16 Fed. Reg. 9795 (September 27, 1951).
storage, dissemination and destruction of classified documents. It also directed sparing use of the “Top Secret” classification, and established the principle that the lowest possible classifications were to be used when marking materials.

In 1953, President Dwight D. Eisenhower issued Executive Order 10501, which omitted the “Restricted” class and better defined the remaining categories by use of examples. For example, “Top Secret” meant unauthorized disclosures that could have exceptionally grave consequences; this order cites examples of these consequences, such as a break in diplomatic relations or an armed attack. The elimination of “Restricted” information made for a better fit with the existing Atomic Energy Act, which also described restricted information.

Eisenhower’s order remained in place until the administration of Richard M. Nixon, who issued Executive Order 11652. This order acknowledged the public interest in government information, and made favorable references to the FOIA. While keeping the same categories for classification, this order also specified which officials could assign the classifications. Only the president could give an official the authority to classify a document as Top Secret. Finally, the order gave the Archivist of the United States the authority to declassify presidential papers pursuant to the terms of the donor’s deed (this was prior to the enactment of the Presidential Records Act), in consultation with interested departments, and following declassification guidelines.

President James E. Carter’s executive order of 1978 made radical changes in the classification system. Executive Order 12065 listed specific types of information that could be classified, such as military plans or operations, foreign relations materials,
intelligence activity and scientific, technical and economic information related to national security. It set specific durations for classification – an initial term of six years, 20 years for Top Secret information, and 30 years for Top Secret information concerning foreign governments. A systematic review process for declassification was created, and the Information Security Oversight Office was established to oversee compliance with this order.

1982 saw the issuance of Executive Order 12356 by President Ronald W. Reagan. This time, new categories were added, including vulnerabilities or capabilities of systems important to national security, cryptology, and confidential sources. The duration was now to be set by the agency classifying the information, and the order required additional reviews for items scheduled for declassification by the Carter order. New levels of bureaucracy were added to the oversight office, and while the Archivist retained the authority to declassify presidential records, an appeal structure for such declassification was established.

With the order issued by President William J. Clinton, the pendulum swung back on the duration of classification. Executive Order 12958 still allowed responsible agencies to name the duration, but it could not exceed 10 years. Duration could be extended incrementally by ten-year periods if needed, but nothing of permanent historical value could exceed 25 years. In fact, if a record was more than 25 years old and had permanent historical value, declassification was automatic. The Clinton order expanded further the list of records to be classified; information on weapons of mass destruction was now on the list.

The current order on classification is that of President George W. Bush. Executive Order 13292\textsuperscript{79} removes the exhortation against overclassification that had been in existence since the Truman order. It inserts concerns over terrorism, and expands the authority to extend Top Secret classification to the vice president as well as the president. Automatic declassification is changed from a set number of years to a requirement that agencies determine a date for declassification at the time a document or other information is classified. The order also takes into consideration the fact that much information is not always in a paper format.

Two things become apparent when reviewing the history of classification. First, the issue has grown increasingly complex over the years. The Truman order covered a scant nine pages, while the Bush order weighs in at 21 pages. This complexity has been a result of new threats, increasing bureaucracy and new technologies that required attention. Second, it is clear that the focus of each order has changed. Some, such as those of Presidents Carter and Clinton, favor more openness, while others, such as those of Presidents Reagan and Bush, give freer rein to those restricting the information.

Another area of information affected by executive orders is that of presidential records. As discussed in Part One, records of the presidents were considered to be personal property prior to the passage of the Presidential Records Act. Former Presidents often donated their papers for public use, but no law required them to do so. Since the implementation of the Act, it has been interpreted by two executive orders.

The first order was signed by President Reagan in 1989, and provided procedures for the management of presidential records. It established a process for the invocation of executive privilege, and outlined the rules to be followed when records are to be

disclosed.\textsuperscript{80} It did not substantively change the Presidential Records Act, but rather outlined the steps to be taken, and by whom, when presidential records were disclosed.

In 2001, the Reagan order was supplanted by Executive Order 13233, signed by President Bush. Unlike the Reagan order, the Bush order did change the substance of existing law. It increased the length of time a president or former president had to review materials that were pending disclosure, named several executive privileges that could be applied to prevent disclosure, and gave power over presidential records not only to incumbent and former presidents, but also a president’s heirs. It further expanded the circle of authority to include vice presidents, to whom such privileges are not extended by the Presidential Records Act.\textsuperscript{81} The Bush order has been challenged, but no determinations have been made either legislatively or judicially; it remains in force as written.\textsuperscript{82}

It is tempting to link the content of executive orders directly to the agendas of the political parties in power at the time, but care should be taken to also consider world events when analyzing these orders. One needs only look to the Nixon order and its generous view of public access to see that party affiliation alone cannot fully predict the openness or restrictiveness of any particular administration. It should also be remembered that, unlike laws, which take acts of Congress to amend or federal lawsuits to overturn, presidential executive orders can be supplanted by a stroke of a pen in a subsequent administration. They are powerful tools, but potentially short-lived ones.

\textsuperscript{82} There have been numerous articles written in response to the order; see, for example: Marcy Lynn Karin. “Out of Sight, but Not Out of Mind: How Executive Order 13233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records,” 55 Stan. L. Rev. 529 (2002).
Other Presidential Actions

Unlike executive orders, which are directed at officials within the executive branch, presidential proclamations are directed outside the branch to the public. Proclamations are a common means used by presidents to commemorate certain dates, such as Religious Freedom Day\textsuperscript{83}; these types of proclamations are considered hortatory. They can also create substantive law. For example, President Reagan issued a proclamation in 1988 that restricted immigration by persons connected with Panamanian president Manuel Noriega.\textsuperscript{84} His was not the first to address immigration; President Truman issued a proclamation affecting the Canal Zone and American Samoa in 1953.\textsuperscript{85} Both proclamations had the effect of law.

Other methods used by presidents to affect the operation of the government include presidential memoranda and signing statements. Memoranda are similar to executive orders, but are more informal in structure and issuance; they are still evolving as a means of establishing policies and procedures.\textsuperscript{86} Signing statements are often short expressions of opinion that presidents release when signing laws. They can either indicate unequivocal support for the law, or they can jump start the interpretation of the legislation by rendering presidential opinion as to how the law should be implemented.\textsuperscript{87}

Agency Interpretations of Access Laws

The executive branch includes not only the office of the President and Vice President, but also many offices within the White House, such as the Office of Management and Budget and the National Security Council. The President’s Cabinet and

\textsuperscript{84} President. Proclamation 5829, 53 Fed. Reg. 22289 (June 10, 1988).
\textsuperscript{85} President, Proclamation 3004, 18 Fed. Reg. 489 (January 17, 1953).
\textsuperscript{86} Cooper, 81-142.
\textsuperscript{87} Cooper, 203-206.
the Executive Departments (State, Defense, Agriculture, etc.) also fall within this branch of government.

The executive branch is far larger than many citizens may think; others that fall under the executive umbrella include independent agencies and government corporations, such as AMTRAK and the Central Intelligence Agency, quasi-official agencies, such as the Legal Services Corporation, and a variety of boards and commissions, some of which are commonly known, such as the Nuclear Regulatory Commission and the National Park Foundation, and some few have heard of, such as the Joint Board for the Enrollment of Actuaries. Some, like the Department of Justice, exist perpetually, while others, like the U.S. Centennial of Flight Commission, are of limited duration. As of January 1, 2004, there were 146 executive offices, agencies, boards and commissions.88

Agencies are often directed to develop regulations in order to comply with statutes, which may require them to interpret the statutes they are implementing. Again, the Freedom of Information Act is instructive in understanding how agencies in the executive branch handle information policy.

Given a casual reading, the FOIA may seem to be straightforward in describing what can be publicly released and what documents or other information is subject to one of the nine exemptions. There is, however, room for interpretation. The Act requires the Attorney General to submit an annual report of FOIA activity, including the exemptions asserted and the number of requests received. S/he must also include in this report “a description of the efforts undertaken by the Department of Justice to encourage agency

compliance with this section.”\textsuperscript{89} This requirement has been fulfilled by a string of Attorney General FOIA memoranda.

Much ink was spilled over the release of Attorney General John Ashcroft’s FOIA Memorandum of October 12, 2001, especially regarding the exhortation to carefully consider the implications of disclosure, and the assurance that any decision to assert an exemption would be defended by the Department of Justice unless the decision lacked a “sound legal basis.”\textsuperscript{90} This memorandum has been criticized as ignoring the FOIA’s presumption that the public has a right to access in favor of applying exemptions wherever possible,\textsuperscript{91} and cited as part of a framework of a “government guided by secrecy rather than openness.”\textsuperscript{92} One author cited it as a “secret memo,” in spite of the fact that it was posted shortly after its distribution in October of 2000.\textsuperscript{93} Is it as alarming as it seems?

Certainly the Ashcroft memo differs greatly from that of Janet Reno, issued October 4, 1993. In the Reno memo, “a presumption of disclosure” standard was to be applied, and discretionary disclosures were encouraged.\textsuperscript{94} The Reno memorandum, however, supplanted one issued by William French Smith, Attorney General during the Reagan administration.

\textsuperscript{91} Relyea, Government Secrecy, 409.
Smith’s memorandum reads much like Ashcroft’s. It promises to defend nondisclosures that have a substantial legal basis, encourages agencies to freely consult with the Department of Justice on disclosure issues, and, more alarming, promises to solicit legislative proposals for amending the FOIA, “[s]ince experience in administering the Act has demonstrated various problems.” When the memorandum was issued, Smith was quoted as saying that “years of experience have made it clear that many persons are using the Act in ways that Congress has not foreseen.”

It is clear from the string of Attorney General memoranda that information policies of the executive branch can change with the executive. Each administration has the opportunity to interpret access laws broadly or narrowly, and each new administration has the power to supplant the interpretations of the previous officeholder.

Sources of Executive Branch Information

Presidential Papers

Presidential papers have been irregularly collected and preserved, and there are a variety of places to find records from previous administrations. When President Washington left office, he took his papers with him. Every president after him did the same, until President Nixon’s actions spawned the passage of the Presidential Records Act. No concerted effort to preserve these records existed until the Library of Congress began collecting presidential papers in the early twentieth century. The Library now maintains the records of most of the presidents through President Calvin Coolidge.

In 1939, President Franklin D. Roosevelt created the first presidential library; in 1955, the Presidential Libraries Act created a formal system whereby the papers of the

presidents would be collected and preserved. Until the Nixon administration, deposits into these libraries remained voluntary; although most former presidents were willing to donate papers, there were no controls over how complete these donations were.\textsuperscript{96}

Since 1978, presidential records have become public records, safeguarded by the National Archives and Records Administration. Access is regulated by the provisions of the Presidential Records Act and by Executive Order 13233; generally, records do not become available until twelve years after a president leaves office.

Collections and compilations of presidential papers have attempted to bring order from the chaos. Presidential records from the earliest days were collated and published in 1896 and 1897 as a ten-volume set, \textit{A Compilation of the Messages and Papers of the Presidents, 1789-1897}. The \textit{Statutes at Large} contain proclamations since 1791, but not executive orders. Executive orders were not collected and numbered until 1907, when the State Department undertook the task. Since 1936, executive orders and proclamations have been published in the \textit{Federal Register}, then codified in Title 3 of the \textit{Code of Federal Regulations}. Finally, the \textit{Public Papers of the President} has published presidential documents, covering the administration of President Hoover, then skipping to President Truman and continuing to the present day.

Agency Information

Basic information about government agencies can be found in the \textit{United States Government Manual}. This publication contains current information about the agencies, boards, commissions and offices of the executive branch, including addresses and phone numbers. Published by the Office of the Federal Register, this manual is also available

\textsuperscript{96} Robinson, 128-129.
electronically, with editions from 1995 through the current year presented in a searchable format.  

In order to implement federal laws, agencies interpret the laws and create regulations that govern their operations. These regulations are found in two official sources, the Federal Register, and the Code of Federal Regulations. Published since 1936, The Federal Register lists agency rules and regulations, proposed rules and notices of hearings, and notices of meetings subject to the Sunshine Act. There are numerous finding aids provided to help the public negotiate the vast amounts of information contained in each issue. The Code of Federal Regulations contains agency regulations grouped by subject, rather than in the chronological order offered by the Federal Register. Both publications are freely available on the internet at the Government Printing Office’s GPO Access site: http://www.gpoaccess.gov/index.html.

Many agencies, especially the regulatory agencies such as the Internal Revenue Service and the National Labor Relations Board, also exercise a quasi-judicial power over cases that arise from their operating laws. Access to the decisions of these agencies has historically been a matter of locating the appropriate reporter, such as the United States Tax Court Reports or the Decisions and Orders of the National Labor Relations Board. Research into older cases still require resort to printed materials, but many agencies now post recent decisions on the Internet, and as the E-Government Act is implemented, more information will be electronically available.

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Executive Power Over Legislative and Judicial Information

It has been seen that powers of the executive branch to limit information through claims of executive privilege can prevent the disclosure of government information to other branches of government, and thereby to the public. Executive orders to government officials can also limit public access, but only to executive branch materials. While Congress can regulate information of the executive branch by passing laws such as the Freedom of Information Act, the executive branch cannot regulate the information produced by Congress. By the same token, the federal courts can overrule executive branch interpretations of the law when cases are brought before them, but the executive cannot, for example, rule that the Supreme Court must deliberate openly, or decide that certain court decisions will not be published.

Executive Regulation of Information, concluding remarks

The power of the executive branch to regulate its own information and records is vast, given the considerable mass of information produced by the various departments, agencies, and offices. The limitations on executive power to regulate information produced by the other two branches are minor by comparison.

As is evident from the varying degrees of openness prescribed by executive order or agency interpretation across administrations, public access to information is never a static concept. It shrinks and grows like Lewis Carroll’s Alice, depending on factors as diverse as administrative goals, world politics, and domestic issues of the day. As will be seen in Part Three, the third branch of government exists to prevent either of the first two from going too far in any direction.
Part Three: The Judicial Branch

The Supreme Court was created not only to settle disputes between states and to interpret statutes passed by Congress, but also to serve as the third post in the balance of powers envisioned by the founding fathers, to act as a control on the other two branches in order to keep them restrained within their legitimate areas of power.\(^98\)

The first session of the Supreme Court was held on February 1, 1790, and no cases were heard in that session. In fact, no cases were heard at all until 1792, when the court issued its first opinion in a case involving money owed to British subjects for property confiscated during the Revolution. The first Chief Justice of the Supreme Court was John Jay, the same gentleman who was the subject of the treaty controversy over which President Washington tried to assert executive privilege. Chief Justice Jay, however, did not serve long enough on the court to actually hear a case. He resigned to become governor of New York, having spent much of his tenure running for that office.\(^99\) Once the new nation gained its footing, however, the federal court system became a powerful and respected branch of government.

Public Access to Judicial Branch Information

The Federal court system is made up of District Courts, federal Courts of Appeals, and the Supreme Court. The types of information produced by the federal courts include rules of court and opinions issued in the cases they hear. In addition, most


\(^99\) Irons, 85-90.
court hearings are public, and any person can sit in the courtroom and observe justice being pursued. There is no statute that requires open courts, but this is the practice of the federal court system.\textsuperscript{100} There can be cases in which a party moves for a closed hearing or to seal records, but these are generally decided on a case-by-case basis, and turn upon the need for confidentiality to protect witnesses or for security reasons.

In 1789, the Judiciary Act gave Federal Courts the power to “[…] make all necessary rules for the orderly conducting [of] business in the said courts […].”\textsuperscript{101} The current congressional authorization is codified in the United States Code at 28 U.S.C. 2071-2077 (2000). Rules cover the procedures to be used when proceeding with cases before the courts, rules of evidence, and the steps necessary for admission to practice before the courts. Specialized rules exist for the Court of Claims, the Bankruptcy Courts and for local practice. Attorneys and those serving as their own counsel must consult and follow these rules in order to avoid adverse rulings.

Authority for printing the reports and opinions of the federal court system is likewise found in the United States Code. 28 U.S.C. 411-414 (2000) authorizes the printing, distribution and sale of court reports. Court opinions build upon each other, forming the case law upon which future decisions are made by all three branches of the government. It is therefore of the utmost importance that these cases be made publicly available.

\textsuperscript{100} Supreme Court Rule 4 provides that “Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October[…]” There is no specific court rule addressing closed sessions. \textit{Rules of the Supreme Court of the United States} (2003), accessed 26 March, 2004 at http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf.

\textsuperscript{101} Act of September 24, 1789, 1 Stat. 73, at 83.
Sources of Judicial Branch Information

The official source for rules of court is the United States Code. The rules for civil procedure are contained in an appendix to Title 28, Judiciary and Judicial Procedure; the rules for criminal procedure are located in an appendix to Title 18, Crimes and Criminal Procedure. Court rules are also published by a variety of private publishers, who add commentary, such as case citations that interpret the meaning of particular rules and other historical references. These privately published rule books tend to be more up to date than the official Code volumes, as new volumes from private publishers appear annually and are often updated quarterly.102

The first Supreme Court opinions were collected and reported upon by individual reporters as private ventures. The volumes that were published were named for these reporters, and current volumes of reporters still refer to them by name while incorporating them into the current numbering scheme. For this reason, Supreme Court cases reported from 1790 to 1874 will often be cited as “Dallas,” “Cranch,” “Wheaton,” or other private reporter of the time. The official reporter for the Supreme Court is now the United States Reports.103 As is the case with court rules, there are also private publishers who offer annotated versions of court opinions. One, Thomson-West, has a notable history.

John B. West founded the West Publishing Company in the nineteenth century in order to respond to a need by attorneys for timely access to case law. He was not a lawyer or librarian, but a salesman who worked earnestly to fill this need. Not only did he found a legal publishing empire that provided quick access to opinions, he also

102 Berring and Edinger, 274-275.
103 Ibid., 34-35.
invented the West Key Numbering System, a classification system by which attorneys could research discrete topics of the law in an organized fashion. He was hugely successful, and the company remains vital today as Thomson-West. West is also the publisher of the court opinions of the lower federal courts. Cases decided by the United States Courts of Appeal are published in the *Federal Supplement*, and the District Courts have their opinions collected in the *Federal Reporter* series.

West’s rival, the Lawyer’s Co-operative Publishing Company, now known as LEXIS, also published cases and utilized a similar organizational scheme to aid research. Today, both Thomson-West and LEXIS offer fee-based online databases that provide a sophisticated means of accessing information not only for the federal court system, but for state courts; they also include a huge variety of legislative and executive information at both the federal and state levels.

There are also many free Internet sites that provide judicial information. Two of the best are the Legal Information Institute offered by Cornell Law School,\(^{104}\) and FindLaw, an independent division of Thomson-West, which offers not only links to laws and cases, but also resources for and about attorneys, business information and news articles pertaining to the law.\(^ {105}\)

The E-Government Act of 2002 will have a great impact on the court system, as it requires the courts to post their case dockets and other information on the Internet. Information that is currently only available through a personal visit to the federal courthouses or via the courts’ fee-based PACER (Public Access to Court Electronic Records) database will be freely available once the law is implemented.


Judicial Power Over Legislative and Executive Information

The United States is home to a litigious society, and many aspects of government information policy have been litigated in the federal court system. The cases described in this section illustrate how the courts perform their dual duties of interpreting law and confining the legislative and executive branches to their respective domains.

Early Cases

The earliest cases dealt not with public access to information, but with inter-branch cooperation. In the landmark case of Marbury v. Madison, 5 U.S. 137 (1803), the Supreme Court found itself at odds with a president who did not wish to allow a former Secretary of State (then Attorney General) to testify as to what had happened to certain judicial commissions that had mysteriously disappeared. These commissions represented nominations of former President Adams to the judiciary. James Madison, currently in office, did not care to see the commissions fulfilled and fought against testimony that could uncover them. The court ruled that, while a Secretary of State could not be forced to testify to confidential matters, the disposition of the commissions were not confidential, and he must testify. Unfortunately for Marbury, even though the court found that he had been wronged, it did not grant him the relief he sought. The case did, however, establish that the court was willing to decide issues of privilege.

When Aaron Burr was tried for treason in 1807, once again the president, this time Thomas Jefferson, was asked to produce exculpatory documents. President Jefferson at first refused, then released parts of one letter requested. The district court ruled that a president could be forced to produce documents, but allowed that there may

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be good reason for withholding them. In the words of Justice Marshall, “[…] the occasion for demanding it ought, in such a case, be very strong[…]”\(^{107}\)

In both of these cases, there was some negotiating over the production of documents. In *Marbury*, the Attorney General did testify, but not to the ultimate fate of the commissions, and in *Burr*, parts of the requested document were redacted. This incremental production of documents remains a strategy in cases where there is disagreement over how much information should be provided.

**National Security and Classification**

During the Civil War, President Lincoln engaged William Lloyd as a secret agent, and sent him to spy on the enemy. This he did for the duration of the war, expecting a fee of $200.00 per month. At the end of the hostilities, he was only reimbursed for expenses, so he filed suit to enforce his secret contract. He died before the suit was completed, and it was pursued by the administrator of his estate, Totten. Unfortunately for Lloyd’s estate, and for others in a similar situation, the court ruled against the claim. It held that the existence of the contract itself was a fact not to be disclosed, and that a decision otherwise would risk all such secret services to the government any time an agent felt he was due greater compensation.\(^{108}\)

In 1953, government secrets again frustrated plaintiffs seeking damages for the loss of their husbands’ lives in a plane crash. The flight was testing certain secret electronic equipment, and the plaintiffs sought access to the accident report prepared by the Air Force. The Air Force claimed privilege, as the report contained secret information vital to the national defense, and the court agreed, noting the importance of

\(^{107}\) Hoffman, at 253.

air power during wartime and its importance in World War II. In this case, however, the plaintiffs were not left with a total loss, as the court remanded the case back to the trial court, where the plaintiffs would be allowed to use other evidence, such as the testimony of surviving crew members, in order to prove their case.\(^{109}\)

The case of *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), involved a request for classified material after the passage of the Freedom of Information Act. Patsy Mink, serving in Congress at the time, requested information concerning certain plans for underground nuclear tests at Amchitka Island, Alaska. The EPA refused, asserting that the information fell within the exemptions of the FOIA. The court agreed. President Richard Nixon had issued an executive order requiring that the details of the tests remain secret, and the court found that a sufficient basis for exempting the information under FOIA exemption 1. The lower court had held that non-secret components of the documents could be disclosed, but the Supreme Court disagreed, ruling that it was not necessary to examine each document for non-secret, separable, information.

In *Mink*, it can be seen that the FOIA works not only as an access tool for government information, but also as an authority for denying access in appropriate situations.

**Common Law Right to Public Records**

The Freedom of Information Act did not replace the common law right to public records. As discussed in Part One, the FOIA applies only to the executive branch, but courts have held that the common law right has far broader coverage, extending to Congress and the Judiciary. Two cases illustrate the attitude of the courts in this area.

When commercial television networks sought to obtain copies of White House tapes that were played during the criminal trials of John Mitchell and other top aides of President Nixon, the district court hearing those cases refused to allow copies to be made. The ostensible reason was that the appeals of the defendants were not yet complete. The National Broadcasting System and Warner Communications appealed, and won. In its holding, the appeals court included judicial records as part of the common law right to public records. It noted that some records can be sealed in appropriate circumstances and by using proper methods, but refused to allow a wholesale ban on copying records that had already been introduced as evidence and had become part of the trial’s public record.\(^\text{110}\)

Unfortunately, on appeal, the Supreme Court reversed this decision. It did not disturb the appellate court’s opinion as to the public nature of court records, but relied on the existence of the Presidential Recordings and Materials Act as the basis for its decision. Since Congress enacted a statute to handle the recordings of President Nixon, it reasoned, the media can access the tapes through this alternative means.\(^\text{111}\)

The common law right was recognized as including all branches of government in *Schwartz v. United States Department of Justice.*\(^\text{112}\) In this case, the plaintiff sought records from the Department of Justice under the FOIA, and records from a congressional committee under the common law right. Representative Peter Rodino resisted providing records from his committee, claiming simply that Congress is exempt. The court disagreed. Noting that although Congress had specifically exempted itself from the FOIA, it was not exempt from the common law right to access.

It is important to note that these cases also underscore differences between the requirements of FOIA and the common law right to access public records. The FOIA applies only to the executive branch, and includes all records, published or not, that fall outside the listed exemptions. The common law right only applies to public records, but does apply to all three branches of government.

**Freedom of Information Act**

No law is so perfectly worded that it will escape challenge, and the FOIA is no exception. Three cases illustrate the types of issues raised in cases brought under this law. First, in *Kissinger v. Reporters Committee for Freedom of the Press*, the court was asked to determine if the failure to release the notes of Henry Kissinger was improper. The notes in question were made while Kissinger was serving as National Security Advisor, but were requested by the reporters as agency records from his service as Secretary of State. The court held that the notes made when not in a cabinet position were not agency records, and the State Department’s failure to produce them was not an improper withholding, since the notes were in Kissinger’s possession. The FOIA does not have the ability to require agencies to retrieve information from other sources.

The dissent by Justice Stevens in this case worries that the court has gone too far in equating simple possession of records with the ability to produce them. His more rational view preferred the use of the words “custody and control” rather than “possession,” as such language would protect information from being wrongfully removed from agency files.114

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114 Ibid., at 159.
The FOIA contains the provisions of the Government in the Sunshine Act, and a 1980 case provided instruction to those in agencies who wish to hold closed meetings. In *Pacific Legal Foundation v. The Council on Environmental Quality*, the Council admitted it was generally covered under FOIA as an agency, but claimed it did not function as an agency when advising the president. The court recognized the folly of this assertion, and held that the meetings in question were in fact covered. The court further chastised the Council for its ignorance of the methods freely available to it to close meetings if certain formalities are observed.

Finally, the case of *Armstrong v. Executive Office of the President* may well hold the record for the number of court opinions emanating from a FOIA case. No fewer than fifteen opinions were filed on various issues. In one opinion, the issue of whether the National Security Council was an agency subject to the FOIA was raised. The government urged that, due to the nature of the work of the Council, it should be awarded a wholesale exemption from the FOIA. The court disagreed, pointing out that the FOIA contains provisions for exempting security information, and noted that Presidents Carter, Ford, Reagan and George H. W. Bush had no problem subjecting the Council to FOIA requests.

In another *Armstrong* opinion, the issue concerned the production of certain e-mail correspondence. The requested e-mails bore enticing subject lines, such as “Saudi Arms,” “S-W-P Breakfast: Syria,” and “Smoking Gun?” (the latter had been produced, but redacted in its entirety save the subject line and the author, Oliver North). The court

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refused to order their release, holding that the government had shown with reasonable specificity why these messages contained sensitive information throughout.\(^\text{117}\)

If any trends can be discerned from FOIA cases, it is that the federal courts will look to the statute itself and conduct a reasoned inquiry into whether it applies, and how.

**Presidential Records Act**

At the end of his presidential tenure, President George H.W. Bush entered into an agreement with the Archivist of the United States regarding certain of his records that would soon become the property of the United States under the Presidential Records Act. The agreement provided that certain identified materials that were to be transferred would remain the personal property of President Bush and that he would retain exclusive legal control over these items. In the ensuing lawsuit, the court soundly denounced the agreement as being in violation of the Presidential Records Act and cast a skeptical eye on the Archivist’s assertion that he believed the agreement to be legal.\(^\text{118}\)

**Federal Records Act**

The Federal Records Act contains language that authorizes the Archivist of the United States to develop records schedules for the disposal of records that do not have sufficient value to warrant preservation.\(^\text{119}\) In 1996, Public Citizen sued over this schedule, alleging that the Archivist had exceeded his authority by allowing the deletion of electronic records no longer needed after they had been copied to a record-keeping system. After a review of what the record-keeping system retained, the court sided with the Archivist, finding his rules to be reasonable.\(^\text{120}\)

\(^\text{120}\) Public Citizen v. Carlin, 184 F. 3d 900 (1999).
Executive Privilege

Perhaps the most famous case involving executive privilege was *U.S. v. Nixon*, 418 U.S. 63 (1974), which will be discussed in more detail in Part Four. In the *Nixon* case, the court held that executive privilege was not absolute, but limited, and the courts possessed the power to resolve disputes between the other two branches.

In 1997, the United States Court of Appeals for the District of Columbia had occasion to revisit executive privilege in the case of *In re: Sealed Case*. The case involved the prosecution of former Secretary of Agriculture Mike Espy for accepting improper gifts and other alleged misdeeds. At this point, Espy had resigned, and President William Clinton was refusing to disclose information gathered in a separate White House investigation. *Sealed Case* is important for the court’s definitions of two types of executive privilege. It is also an example of the court’s ability to seal records in the interest of security, and to subsequently unseal them.

First discussed in the case is the “deliberative process privilege.” This refers to materials that would reveal advisory opinions, recommendations and deliberations that comprise the decision-making process. In order to qualify for this privilege, “the material must be predecisional and it must be deliberative.” In other words, it does not apply to simple announcements of decisions.

The second type of privilege is “presidential communications privilege,” which was the type of privilege Thomas Jefferson was asserting in the *Burr* case. In the Espy case, the court clearly acknowledged a president’s power to assert this privilege over “documents and other materials that reflect presidential decisionmaking and deliberations

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121 In re Sealed Case, 121 F. 3d 729 (1997)
122 Ibid., at 737.
and that the president believes should remain confidential.”\textsuperscript{123} The privilege is not absolute. It can be overcome by an adequate showing of need, at which point the court can conduct an \textit{in camera} review of the materials in question to determine if privilege should apply, and to which portions. In this case, the court held that the presidential communications privilege applied, even to subordinates of the president, but that here the office requesting the materials had established sufficient need to overcome the privilege.

It is clear from the decisions that have issued from the federal courts on executive privilege that the issue will continue to be determined on a case-by-case basis. It is the only way to assure that the decisions will continue to be made considering the context and relative importance of each case.

\textsuperscript{123} Ibid., at 744.
Part Four: Rock, Paper, Scissors, or, How the Branches Interact

It may seem thus far that there is neither rhyme nor reason to the information policy activities of the various government entities, or that the branches of government continually engage in a fight for supremacy in information policy. However, the separation of powers envisioned by the founding fathers has been effective in ensuring consistency. An excellent example is provided by the Watergate scandal of the 1970’s, in which all three branches of government became embroiled in an incident that threatened not only the public’s right to know, but also the integrity of the presidency.

The President

On June 17, 1972, burglars broke into the offices of the Democratic National Committee at the Watergate complex in Washington, D.C. During the investigation of this crime, it became apparent that corruption existed even into the president’s office.\textsuperscript{124} Testimony before the Senate Watergate Committee in July of 1973 revealed that President Nixon possessed many tape recordings relating to the break-in. When asked to produce them, the president asserted executive privilege over these materials.

The Courts

When the issue came before the courts, an historic decision was rendered. In a thoughtfully reasoned opinion, the Supreme Court in \textit{U.S. v. Nixon}\textsuperscript{125} held that:


- There is no absolute presidential power to executive privilege.
- The president does not have ultimate authority over all executive branch information.
- The judicial branch has the right to decide disputes between the political branches of government.
- While executive privilege is constitutionally based, and appropriate in many instances, the need for information in this criminal case outweighed privilege.

The tapes were turned over.

The Congress

As a result of the Watergate incident, Congress acted quickly to preserve the rest of the records of the Nixon administration. In 1974, presidential records were still considered the personal property of presidents; this situation would likely have assured that the Nixon papers would never become public. To remedy this, the Presidential Recordings and Materials Act was passed on December 19, 1974. The Act requires the Archivist of the United States to collect, preserve and make available the presidential materials of President Nixon.126

Back to Court

The day after the Presidential Recordings and Materials Act was signed into law, now-former President Nixon continued to attempt to assert privilege by filing a lawsuit challenging the law. In Nixon v. Administrator of General Services,127 the Supreme Court dealt with many objections raised by President Nixon, including the charge that

Congress had passed the law to punish him. In finding the law to be constitutional, the court noted the protections contained within the Act to protect any materials that were sensitive, and pointed out that the Archivist had been extremely adept at dealing with such issues when examining the papers of other former presidents for public release.

**Congress, Part Two**

In 1978, Congress ensured that future papers of the presidents would be preserved for the public by passing the Presidential Records Act.\(^\text{128}\) This Act provides not only for the preservation of presidential records, but also gives presidents the option to keep materials out of the public eye for up to twelve years after the president leaves office. It contains safeguards to protect classified information, and places the authority to manage the records with the Archivist of the United States. The Act, as amended by Executive Order 13233, remains in effect.

The battle over the Nixon papers was decided definitively in favor of public access to government records. The laws that were passed and the court opinions rendered during that time have had an enduring impact on government information policy.

**Conclusion**

In striking the tender balance between national security issues and the public’s need to know how its government operates, all three branches of government have played important parts. In reviewing the history of our nation’s developing information policy, the wisdom of the founding fathers is evident; when one branch overreaches its authority, the other two are there to rein it in. The balance of power created by the Constitution works. We have not seen the end of the issue, as it is the very nature of our government that the laws will change with the needs of its people. Administrations, Congresses and

judicial panels will continue to change and evolve, ensuring that mistakes made by one can always be remedied by a successor.
Works Cited

Legal Resources, Legislative:


http://memory.loc.gov/ammem/amlaw/lwhj.html.

U.S. Congress. Senate. “Reporters of Debate and the Congressional Record,” accessed 6 March 2004,


Laws

Articles of Confederation, Section IX.

United States Constitution


**Acts**

Atomic Energy Act, 60 Stat. 755, August 1, 1946.


Judiciary Act of 1789, 1 Stat. 73, at 83, September 24, 1789.


Printing Act of 1813, 3 Stat. 140, December 27, 1813.


Legal Resources: Judicial

Court Rules

Rules of the Supreme Court of the United States (2003), accessed 26 March 2004,


Cases


In re Sealed Case, 121 F. 3d 729 (1997)


**Legal Resources: Executive**


**Articles, Books and Internet Resources:**


