ADVOCATES OF OPENNESS:
THE FREEDOM OF INFORMATION MOVEMENT

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The undersigned, appointed by the Dean of the Graduate Faculty, have examined a thesis entitled Advocates of Openness: The Freedom of Information Movement

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INTRODUCTION

This is a partial history of the efforts of a handful of Americans to open to the public the closed doors behind which much of the business of government is conducted. The history is only partial because, first, it has arbitrarily chosen beginning and ending dates. This study begins in 1945, when the end of World War II left both a legacy of unprecedented governmental secrecy and a government structure of unprecedented size and complexity. It ends with the passage 30 years later of the Sunshine Act, which seems likely to be the last anti-secrecy legislation of such scope for some time to come. This history is limited, too, because it covers only the drive for openness at the national level. In terms of numbers, if not of importance, anti-secrecy efforts at the state and local level dwarf those at the national level. Their very numbers and diversity dictate their exclusion from this study. It also has been true, in this as in other areas of nationwide concern, that the outcomes of battles fought in Washington have helped to lay the ground rules for battles in state and local arenas. Those are the geographical and temporal boundaries of this work.

The philosophical boundaries of the freedom of information movement are less easily defined. No comprehensive

description of them is feasible within the scope of this study. However, it seems both feasible and desirable by way of preface to sketch at least the chief contemporary views of governmental secrecy versus public access.

Max Weber, in his classic early twentieth century study of bureaucracy, noted a bureaucratic imperative toward secrecy, rooted partly in a rational effort to enhance efficient administration but motivated more by the desire to enhance the bureaucrat's own power and prestige.

"Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of 'secret sessions:' in so far as it can, it hides its knowledge and action from criticism."[1]

Within narrow limits, Weber believed such bureaucratic secrecy permissible: "If it is to be successful, the management of diplomacy can only be publicly controlled to a very limited extent. The military administration must insist on the concealment of its most important measures; with the increasing significance of purely technical aspects, this is all the more the case."[2]

But such narrow limits are not adhered to, he observes:

> The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "official secret" is the specific invention of the bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude,

> which cannot be substantially justified beyond these specifically qualified areas. In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament -- at least in so far as ignorance somehow agrees with the bureaucracy's interests.[3]

His 1904 visit to the United States convinced Weber that the advent of European-style bureaucracy would be hastened in this country "the greater the zones of friction with the outside and the more urgent the needs for administrative unity at home become..."[4]

Outside friction and the demands of internal administration worked more slowly in the United States than Weber may have expected. The conditions for bureaucratic secrecy he described in pre-1920 Germany did not come to pass in the United States for another quarter-century. As Edward Shils noted, the problem of governmental secrecy is part of the legacy of World War II.[5] The war bequeathed not only a continuing involvement in international politics to an extent previously unknown to this country but an unprecedented range of domestic activities, many of which required, or at least lent themselves to, secrecy.

The political scientist Francis Rourke summarized post-1945 conditions:

Expanded regulation of economic activities required secrecy both to protect the rights and reputations of those who may be investigated and to ensure against premature

disclosure of governmental enforcement efforts.

Expanded files of information on individuals and companies, if disclosed, would have constituted unwarranted invasion of privacy and might have produced economic damage as well, in the case of trade secrets, for example.

Expanded efforts to stimulate and control the economy demanded secrecy surrounding decisions such as prime lending rates and monetary valuations to prevent speculation.

Expanded size of the governmental establishment itself, with vast amounts of confidential personnel data on its employees and vast numbers of memoranda, tentative proposals, advisory opinions and the like, inspired administrators to claim the privilege of secrecy.[6]

All of these factors add up to what Rourke called "the legitimate public and private interests served by the practice of withholding information..."[7]

With particular pertinence to this study, Rourke noted the "paradoxical fact" that Congress, while sporadically pressing for increased openness, "itself is responsible in no small measure for the extent to which the practice of withholding information has become a characteristic feature of executive operations."[8]

Writing in 1960, he drew a conclusion about the congressional attitude toward executive secrecy that the events of 15 years have proved to be well-founded. The Congress, he observed, "is unwilling to write a general statute requiring disclosure without at the same time

making ample provision for those occasions when the public interest will demand that executive officials keep certain communications confidential."[9]

Those provisions have seemed to many advocates of openness to be more than ample. The question of just how much confidentiality is in the public interest remains unsettled. There is, however, widespread agreement that at least some secrecy some of the time is justifiable and even desirable.

Political scientists Thomas Franck and Edward Weisband conducted a symposium, the contributors to which included legislators, executive branch officials, scholars and journalists. Franck and Weisband found "a large measure of agreement" on both the costs and benefits of secrecy. The chief of these agreed-upon benefits was "the maintenance of the minimal defense security that is still essential in a world of national rivalry."[10] An almost equally important benefit is that secrecy "preserves a certain flexibility among advisers and members of the Government negotiating with each other prior to reaching an official policy decision... Positions that do not have to be taken publicly can be compromised without loss of prestige."[11] Secrecy also "makes it easier for opponents of a policy to oppose it from inside the government without having their loyalty questioned."[12] Finally, secrecy "makes possible a higher level of candor in the routine exchange of confidences among governments."[13]

Like many others, Rourke shared this consensus:

> Even apart from security considerations, the case for retaining some measure of privacy in the conduct of governmental affairs is, as already suggested, a strong one, whether such privacy is designed to stimulate candor on the part of officials participating in executive deliberations or to shield the affairs of private citizens from needless public exposure. (Certainly the most famous of all resorts to privacy occurred in the framing of the Constitution itself.)[14]

The costs, to both government and public, of secrecy seem equally clear to these students of the problem.

Those costs include, first, "the threat to the internal balance of power." Insofar as it is true that information is power, the concentration of information within one branch of government -- usually the executive -- or within one section of that branch -- the Department of Defense, for instance -- means that those denied the information are rendered powerless. As a result, "the system will be permanently tilted in one direction."[15]

A second cost of secrecy is the "loss of public support for government policy, such as occurs when there is a real or imagined 'credibility gap' based on evidence of frequent non-disclosure by a government."[16] The Vietnam War offers one striking example.

A third cost of secrecy is that, while it may foster candid discussion and free debate during the course of policy-making, "it obscures from the public the divisions and dissensions comprising the administrative history of most important Executive decisions. This means that when things go wrong there can be no heroes, only villains. And when

things go seriously wrong, the surfeit of villains and paucity of heroes place a profound strain on the entire system."[17]

A fourth cost of excessive secrecy is "excessive leaking of confidential information -- with its possible threat to national security."[18]

To these, Rourke adds another cost, perhaps the most serious. "Insofar as secrecy in government seriously impedes the free flow of communications among citizens, it constitutes a real threat to the informed public discussion that is at the core of democracy."[19]

The costs, the benefits and the essential dilemma of governmental secrecy were summed up succinctly by a president whose downfall was precipitated largely by his own penchant for withholding information. Promulgating a new executive order on security classification March 8, 1972, Richard Nixon wrote:

> Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and -- eventually -- incapable of determining their own destinies.
>
> Yet since the early days of the Republic, Americans have also recognized that the Federal Government is obliged to protect certain information which might otherwise jeopardize the security of the country. That need has become particularly acute in recent years as the United States has assumed a powerful position in world affairs, and as world peace has come to depend in large part on how that position is safeguarded. We are also moving into an era of delicate negotiations in which it will be especially important that governments be able to communicate in confidence.
>
> Clearly, the two principles of an informed public and of confidentiality within the Government are

> irreconcilable in their purest forms, and a balance must be struck between them.[20]

A universally acceptable balance remains to be struck. The difficulty may be illustrated by the sharply differing views of two of this country's most influential twentieth century thinkers on the question of where the balance properly lies.

Walter Lippmann, in his analysis of the malaise of Western society, finds the root cause in mass opinion.

> Where mass opinion dominates the government, there is a morbid derangement of the true functions of power. The derangement brings about the enfeeblement, verging in paralysis, of the capacity to govern. This breakdown in the constitutional order is the cause of the precipitate and catastrophic decline of Western society.[21]

Reciting the litany of mistaken decisions that helped lead to both world wars and the Cold War, Lippmann concludes that "the prevailing public opinion has been destructively wrong at the critical junctures."[22] That problem is incapable of solution, he says, because so much time is required to inform the public that its opinion on any significant issue is doomed to be outdated and thus inaccurate. Government, for Lippmann, must be free to govern. Such freedom clearly implies the freedom from any necessity to inform its constituents and await their will.

Writing at the same time that others were discerning an ominous growth in the executive branch of government, Lippmann oddly insists that "the executive has become enfeebled, often to the verge of impotence, by the pressures

of the representative assembly and of mass opinions."[23] The "public philosophy" that must be rediscovered if Western society is to survive depends on a kind of contractual arrangement between rulers and the ruled, in which the rulers, having been freely chosen, lead, and the ruled, having given their consent, follow. The alternative, Lippmann concludes, is continued "misrule of the people."[24]

Peter Bachrach terms Lippmann's a "neo-Natural Law position" and lumps him with the group of thinkers whose view of Western political culture can be called "democratic elitism."[25] Bachrach criticizes the view as anti-democratic.[26]

Though Lippmann takes pains to describe himself as a liberal democrat, the central role in his scheme of governance is played by the elites, whom he calls "public men."

Public men are, and must be, possessed of a higher quality of information than are the masses, whose ill-informed views must not be given undue weight in policy formation.

> For their opportunities of judging great issues are in the very nature of things limited, and the statistical sum of their opinions is not the final verdict on an issue. It is, rather, the beginning of the argument. In that argument their opinions need to be confronted by the views of the executive, defending and promoting the public interest.[27]

Here, then, is a view of the public interest as something quite distinct from the public's interests.

> Put this way, we can say, I suggest, that the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted

disinterestedly and benevolently.[28]

The men best suited so to choose, Lippman makes clear, are the public men of the government's Executive branch, somewhat insulated from the clamor of the public they serve.

It must not be forgotten that Walter Lippmann was for 50 years, until his retirement in the late 1960s, one of the most widely read and most influential commentators on public affairs in the United States. His thoughts were conveyed to public and private men alike through newspaper columns, magazine articles and books. He was an unofficial adviser to presidents from Woodrow Wilson to John F. Kennedy.

John Dewey held a markedly different view of the nature of politics and of the importance of freely flowing information to the political process.

Like Lippmann, Dewey detects decay in modern society. But unlike Lippmann, he does not find its cause in misrule by the people, nor does he find its cure in strengthening the hand of the enfeebled Executive. To the contrary. The problems of what he calls "the Great Society" are rooted, Dewey argues, in the misunderstanding and misuse of technology by its manipulators, including those in the news business.[29] We have confused the material products of technology--which we call "science"--with the rigorous process of inquiry that truly is science. What is required is the application of that method throughout all the fields of social relationships so as to replace the apathethic, ill-informed and misled mass society with a series of "publics,"

organized and articulate associations of people seeking to direct and control the forces affecting their lives.

And what is the role of information in this transformation?

> There can be no public without full publicity in respect to all consequences which concern it. Whatever obstructs and restricts publicity, limits and distorts public opinion and checks and distorts thinking on social affairs.[30]

Unlike Lippmann, Dewey regards the formation of an intelligent and informed public opinion as both possible and necessary to the achievement of a functional democracy. Elites in the deplorable Great Society possess more information than do the masses. But Dewey regards that as part of the problem rather than as part of the solution. A thing is fully known, he says, "only when it is published, shared, socially accessible."[31] Public opinion approaches the ideal of being a rational judgment only when it follows organized and effective inquiry. Effective inquiry, for Dewey, presupposes freely flowing information.

Knowledge will not always produce agreement, Dewey notes, even when the same sets of facts are shared. But, he insists, "Genuinely public policy cannot be generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record."[32]

The basic problem of modern democracy, as posed by Lippmann, is the overweening power of the ill-informed and unintelligent masses. His solution is to provide the leaders

with a higher quality of information and insulate them from the pressure of the led. Dewey's solution to that problem would seem equally clear: provide the public with the information it needs to form intelligent opinions on the issues of the day. Then, instead of insulating the governors, remove every obstacle to free communication between them and the people. Only then, says Dewey,

> Democracy will come into its own, for democracy is a name for a life of free and enriching communion. It had its seer in Walt Whitman. It will have its consummation when free social inquiry is indissolubly wedded to the art of full and moving communication.[33]

Throughout the three decades of the freedom of information movement, its spokesmen have argued the indissolubility of that wedding with as much passion--if less poetry--as Dewey did in 1926.

This brief preface has sketched the range of contemporary scholarly views of what Francis Rourke called "the dilemma of democracy." For the activists of the freedom of information movement, the issue of secrecy versus publicity is a dilemma only in the sense that it remains unsolved. Certainly, those activists have never regarded the two prongs as being of equal length or weight.

While according to publicity every benefit cited by any scholar, the freedom of information movement's leaders have called into question most of the benefits attributed to secrecy. Samples from just two of the earliest and most eloquent spokesmen will serve to place the freedom of information movement clearly in its philosophical context.

James Russell Wiggins, newspaper editor and one of the first chairmen of the Freedom of Information Committee of the American Society of Newspaper Editors, wrote:

> The information of the people is the foundation of our whole political system. Secrecy threatens that foundation, on whatever pretext or for whatever good reason it is invoked. Citizens must have the right to get information, the right to print it or otherwise publish it without prior restraint, the right to print without punishment for harmless publication, and the right to distribute. When they do not have these rights they cannot choose their public officials wisely or judge their policies intelligently.[34]

Harold L. Cross, a legal scholar and counsel to that ASNE committee, was even more succinct:

> Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.[35]

What follows is an account of the struggle to claim that heritage.

FOOTNOTES

[1]H. H. Gerth and C. Wright Mills, eds., From Max Weber: Essays in Sociology (New York: Oxford University Press, 1946), p. 233.

[2]Ibid.

[3]Ibid.

[4]Ibid., p. 211.

[5]Edward Shils, The Torment of Secrecy (Glencoe, Ill., 1956), p. 42.

[6]Francis Rourke, Secrecy and Publicity (Baltimore: The Johns Hopkins Press, 1961), pp.32-37.

[7]Ibid., p. 40.

[8]Ibid., p. 47.

[9]Ibid., p. 58.

[10]Thomas M. Franck and Edward Weisband, eds., Secrecy and Foreign Policy (New York: Oxford University Press, 1974), p. 6.

[11]Ibid.

[12]Ibid.

[13]Ibid.

[14]Rourke, p. 217.

[15]Franck, p. 8.

[16]Ibid.

[17]Ibid., p. 9.

[18]Ibid.

[19]Rourke, p. 226.

[20]Quoted in Franck, p. 99.

[21]Walter Lippmann, The Public Philosophy (Boston: Little, Brown & Company, 1955), p. 21.

[22]Ibid., p. 20.

[23]Ibid., p. 55.

[24]Ibid., p. 179.

[25]Peter Bachrach, The Theory of Democratic Elitism (Boston: Little, Brown & Company, 1967), p. 54 passim.

[26]Ibid., pp. 93-106.

[27]Lippmann, p. 42.

[28]Ibid.

[29]John Dewey, The Public and its Problems (Chicago: The Swallow Press, 1927), pp. 164-169.

[30]Ibid., p. 167.

[31]Ibid., p. 176.

[32]Ibid., p. 179.

[33]Ibid., p. 184.

[34]James Russell Wiggins, Freedom or Secrecy (New York: Oxford University Press, 1956), p. 226.

[35]Harold L. Cross, The People's Right to Know (New York: Columbia University Press, 1953), p. xiii.

CHAPTER I

IN THE BEGINNING (1945-54)

Like many of the other forces that shape contemporary American life, the freedom of information movement was born in the turbulent period following the end of World War II. Unlike most of those forces, however, the freedom of information movement has no discernible roots in the pre-war period. Indeed, even as they began it in the period 1945-47, the movement's founders had their attention focused on problems far different--and far distant--from those that would shortly consume their energies. This chapter begins, appropriately enough, in the beginning. It pauses for a brief setting of the post-war scene, then introduces the continuing themes of the movement, traces its early steps and concludes with two developments, one hopeful and one ominous, that shaped its course for years to come.

The official history of the American Society of Newspaper Editors credits ASNE founder Casper Yost with having "planted the seed" of the freedom of information movement by urging at the society's 1923 convention that it "defend the rights of the profession when attacked or threatened by legislative or administrative powers."[1] If that were the seed, and there is nothing in the record to suggest that it really was, it lay dormant for more than two decades. A search of

the pre-1945 archives and official records of journalism's major professional organizations discloses no mention of, let alone serious concern, with any withholding of information by governmental bodies at the local or national level.[2]

There was a strong, if sporadic, concern about problems of the flow of information across national boundaries. Aroused by the censorship of World War I, American journalists and others worked with limited success through the period of Versailles Treaty negotiations and for several years thereafter in an effort to assure the free and uncensored transmission of news, particularly from the nations of Europe and Latin America. Kent Cooper, general manager of Associated Press, a worldwide newsgathering cooperative organization, was a leader in this effort and may have been the first to use the phrase "right to know," employing it in this international context.[3] Interest in the freedom of information worldwide was intensified by World War II. Beginning in 1943, the American Society of Newspaper Editors (ASNE) determined to do something to advance this cause. Those efforts included the dispatching of a three-man committee on a trip around the world to survey the status of press freedom in early 1945, even before the war ended. ASNE leaders also pushed in the immediate post-war period, as Cooper and others had in 1918-19, for inclusion of some kind of guarantee of press freedom in the United Nations charter. The effort failed.[4]

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One legacy was a "statement of policy" adopted by the ASNE at its 1944 convention, urging "reciprocal declarations by the United States government and all other governments, press, radio and other media of information, embracing the right of the people to read and hear news without censorship..."[5]

The statement pledged that "the ASNE never will relax in its campaign until freedom of information becomes a living reality everywhere in the world." It added that Americans "and their newspapers" favored removal of all barriers to the free flow of information and concluded by urging the United States government and other domestic and foreign organizations to "join us in a program to further freedom of information."[6]

The focus in 1944 was on impediments to information flow worldwide. It was several years before that focus narrowed to the domestic obstructions that have occupied the freedom of information movement ever since.

In order to understand those domestic obstructions, a brief setting of the scene is in order. This is so because the world into which journalists, government officials and all other Americans emerged with the end of the Second World War in 1945 was vastly different in a variety of important aspects from anything any of them had known before. Some of those differences called into question for the first time in American history principles on which government, press and people had acted by custom and without examination.

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Certainly, for freedom of information, the ten years beginning in 1945 were, as historian Eric F. Goldman has termed them, "the crucial decade."[7]

Goldman's impressionistic introduction captures the flavor of the time.

> That taut Thursday when Franklin Roosevelt died and the first sickening fall of an atom bomb, the heartfelt roar when Jackie Robinson trotted out in a Dodgers uniform, the meat you couldn't buy and the apartment you couldn't rent, high prices and boom, boom, boom, a brilliant young man named Alger Hiss, Harry Truman now fumbling, now making the bold decision to go into Korea, Arnold Toynbee and Mickey Spillane, Ezio Pinza singing "Some Enchanted Evening" and the bloody wastes of the Changjin Reservoir, "We like Ike," "We LIKE IKE," "WE LIKE IKE," pyramid games, the poodle bob, chlorophyll toothpaste, chlorophyll chewing gum, chlorophyll dog food, "Point of order, point of order, Mr. Chairman," a President of the United States direct and earnest before the Geneva delegates, stirring the world with a simple plea for peace--these and a thousand memories flood back from the frightening, heartening, whirligig years since the end of World War II.[8]

There was much of grim substance behind the flavor of change. The fact that underlay the substance was given a name by Herbert Bayard Swope in 1946. Some friends thought his term too strong, and it was a year before it was uttered in public for the first time, in Columbia, South Carolina on April 16, 1947. Bernard Baruch used it then to describe the relations between wartime allies the United States and the Soviet Union. "Cold War," he called it.[9]

America's post-war foreign and defense policies represented "the first fundamental break" with the isolationism of her first 150 years.[10] The first four years after the war

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saw the birth of the containment policy toward Russia, adoption of the Marshall Plan and Point Four, creation of the North Atlantic Treaty Organization.

Another historian, Walter Johnson, summed up Americans' radical departures from tradition in the areas of economic planning, an activist foreign policy and military alliances. As a result, he concluded, "Their taxes assumed new proportions; the machinery of government was greatly expanded; and military expenditures claimed an unprecedented proportion of the national income."[11]

On August 6, 1945, President Truman announced the symbol of a new age--the dropping of the atomic bomb. After sketching the history of its development, the president said, "It has never been the habit of the scientists of this country or the policy of this Government to withhold from the world scientific knowledge." That habit was about to change. He added that "under present circumstances it is not intended to divulge" details of the bomb's construction or military uses "pending further examination of possible methods of protecting us and the rest of the world from danger of sudden destruction."[12]

That fateful change was destined to be echoed in many other areas of government policy. It evoked the first dispute within the press over how to deal with government withholding. The Atlantic Monthly complained that the newspaper press seemed to have "lost its voice" because no

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protests had been raised against the proposed censorship. Editor & Publisher, leading trade journal of the newspapers, responded that a temporary form of voluntary censorship would be acceptable. But Editor & Publisher warned, "Let's not start passing laws providing penalties for publication or broadcast of any material for any reason."[13]

The threat of destruction by atomic weapons was far from the only one that obsessed government policy makers in the immediate post-war years. The Cold War struggle with the Soviet Union raised the threat of internal subversion, of disloyalty. On March 21, 1947, President Truman issued an executive order creating a federal loyalty program. The program provided for the firing of any federal employee found to be disloyal. Among the activities that, the order said, "may be considered in connection with the determination of disloyalty," was

> D. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States.[14]

A Security Advisory Board was formed by the State, War and Navy departments to draft regulations implementing the program. The Veterans Administration adopted a directive that became the first battleground in the struggle for freedom of information.

The directive classified as confidental "information the unauthorized disclosure of which, although not

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endangering the national security, would be prejudicial to the interests or prestige of the nation, any governmental activity, or an individual, or would cause administrative embarrassment or difficulty."

Led by the ASNE, journalists protested strongly. An ASNE resolution objected that the "effect would be to place even the ordinary affairs of federal agencies beyond public scrutiny."[15] The ASNE urged the president to "nullify the Veterans Administration gag rule...," noting that if it were adopted by other agencies, "no person in the federal government could give information to the press without fear of grave reprisals from his superiors."[16] The editors argued that the regulations would permit any government employee to conceal from press and public any bit of information that could cause him embarrassment or difficulty. "In other words, an effective screen would be thrown about governmental operations behind which many evils could flourish without detection."[17]

Truman let it be known that the regulations were objectionable to him,[18] and they were modified. A State Department spokesman hastened to explain that the rules were never intended to cover functions other than those involving security, anyway. The revised version left out the protections against embarrassing officials or damaging the prestige of the government. Still, as redefined, the first system for prohibiting the release of government information ever

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proposed in the United States in peacetime would have been no insignificant barrier. It provided four levels of protection from disclosure: Top Secret, Secret, Confidential and Restricted. The latter was something of a catch-all category, its protective shield hiding any information "which requires security protection, other than that information which has been determined to be Top Secret, Secret, or Confidential...."[19]

Though the regulations were not adopted at that time, clearly, the free flow of information was being threatened not just by foreign governments or hostile ideologies.

In 1948, Erwin Canham, president-elect of the ASNE, came to the society's annual convention direct from Geneva, where he had been an American delegate to the United Nations Conference on Freedom of Information. His lengthy report reflected the group's continuing focus on worldwide problems. But the only paragraph he devoted to the domestic scene provided the slogan for those who were shortly to change that focus. "Preservation of freedom here at home is still our first task," Canham said. "We have prevented efforts at encroachment in the last few months and weeks. We must keep the watch on the Potomac."[20]

Earlier that year, the national journalism fraternity, Sigma Delta Chi, had appointed its first Committee on Advancement of Freedom of Information.[21] In its first few years, that committee, too, concentrated on international

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problems.[22]

Canham appointed the ASNE's first Committee on World Freedom of Information late in 1948. Basil L. (Stuffy) Walters, its first chairman, interpreted its role broadly. It was a committee "that would devote attention to the court houses, the state houses, city councils, school boards, etc., as well as federal establishments and press relations with other countries."[23]

Twenty-five years later, Walters recalled that, while individual newspapermen had fought individual battles over isolated instances of local secrecy, this was "the first unified effort by a newspaper organization to develop a general philosophy about freedom of information."[24]

Since the committee was made up of working journalists rather than philosophers, the "philosophy about freedom of information" it developed was much more practical than theoretical. When the committee reported to the 1949 ASNE convention on its first year of operation, it spelled out that philosophy. In a change of emphasis from earlier discussions, the report noted that the committee was assuming a domestic as well as an international role. It complained of a "growing tendency" of bureaucrats high and low "to forget they are stewards of the people and to act instead as though taxpayers were their servants." The report assumed for journalists the duty "to act as the eyes of the American people and keep the eternal spotlight of publicity on all

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servants of the people, including the military."[25] It was an assumption that would not remain unchallenged.

A brief survey of the committee's efforts that first year may give some idea both of the seriousness with which it took its self-imposed responsibility and of the scope of the problems that presented themselves.

In a case that is mentioned again and again in the early annals of the freedom of information movement, the committee went to the aid of a young editor in Moose Lake, Minnesota, who found himself denied access to some of his county's vital statistics. He objected in print and the county clerk filed a libel suit. The editor won, Walters wryly recalled, "with the personal financial assistance for the employment of a lawyer from ASNE's freedom of information chairman. The internal revenue agent termed the chairman's generosity commendable but not deductible."[26]

The five-page report of the committee's activities in the 1949 Proceedings ranged around the world, with an emphasis on the filing of protests and only a few instances of active intervention. The committee protested restrictions on American correspondents in Argentina, corresponded with the State Department and the military in objection to censorship in occupied Japan, and complained, with admitted lack of effect, of "a very bad censorship condition" in Guatemala. On the home front, the committee surveyed Washington correspondents on a bill intended to protect the secrecy of codes,

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and--in a rare direct action--hired a lawyer to intervene in a Baltimore case in which a court had prohibited publication of news between the time of arrest and trial.[27]

With the exception of the last, all these activities were a variety of public relations. The principal target was the bureaucracy, members of which were, the editors hoped, being convinced of the value of openness, the product being promoted. There was another target audience, however. That was the public. The press had, after all, what one scholar called a "very tangible self-interest"[28] in the free flow of news. Erwin Canham followed Walters' report with one version of that interest. "The true nature and necessity of the press," he said, are not well enough understood. The committee's activities would "drive home" this understanding "to public officials, to private citizens, to pundits and professors and to all others who have so greatly misunderstood the significance of the people's right to know."[29]

Canham was alluding to the press' interest, no different from the interest of any other industry or institution, in having its importance properly appreciated by the public at large. Francis Rourke's definition of self-interest is somewhat narrower. He notes that "the press itself makes a living off the news."[30] From its earliest days, the freedom of information movement was fueled by self-interest as well as concern for the public interest. Describing the motivation

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of the ASNE in first exploring the subject in 1943, the society's official history records, "On top of all was the ambition of a number of the Society's leaders to make ASNE better known to the United States itself."[31] As we shall see, self-interest was not absent from important allies the journalists picked up as the movement progressed. As in other reform movements, self-interests and the public interest have usually coincided in the struggle for freedom of information.

In 1950, at the annual convention of the ASNE, Walters read his colleagues an excerpt from the letter typically sent by the World Freedom of Information Committee to public officials withholding information. The excerpt reveals several aspects of the movement in its early days.

> This committee is not interested in gaining or preserving any special privilege for newspapers as such. It is interested only in preserving all the precious liberties of the American people, to make certain they do not slip away by default.

The letter went on to remind the recipient of "the American citizen's right to know" and assured that "your editor is not pushing this matter for selfish reasons." It closed with a plea for open-minded understanding.[32]

Note the stress on public interest,the denial of any plea for special standing by the newspaper and the identification of the request for access with the "precious liberties" of Americans--one of whom, obviously, was the recalcitrant official. It was to become characteristic of the spokesmen

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for freedom of information to insist that their unprecedented pressure for access was aimed at preserving a traditional right rather than at creating a new one. In fact, of course, the pressure was new, as were the circumstances that generated it.

Note, too, the absence of any reference to legal sanctions against secrecy. That omission was deliberate, too. There were few such sanctions to be cited. There was not, and would not be for 17 years, a federal public records law. Fewer than half the states had any such laws, and those that existed were often weak and ambiguous.[33] A year after Walters' report, Harold Cross conducted the first comprehensive research into the legal status of openness. His conclusion was that, in general, newspapers had more access to government records "by means of the sugar of voluntary processes than they could hope to get by the vinegar of compulsion under the present state of the law."[34]

The "sugar of voluntary processes" drips from every line of the sample letter.

Walters' report shows that the early freedom of information movement retained a healthy regard for some areas of secrecy. He noted, without challenge, the classification of most information about atomic energy, a classification system so strict that an entire issue of "Scientific American" was destroyed after having been found in violation of the rules.[35] And he endorsed the necessity of the ASNE's cooperation with

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other journalists and defense authorities in arriving at a "well thought out program of voluntary censorship" to be put into effect if the cold war should turn hot.[36]

Much later, critics of the Freedom of Information Act were to complain that broad exemptions from disclosure were written into it, permitting secrecy to cloak virtually the entire area of national security, as well as some other areas. Without seeking to vitiate that later criticism, we must note that the national security, at least, was treated in gingerly fashion from the very beginnings of the anti-secrecy movement.

In those beginnings, the movement was, as one of its leaders later termed it, "scatter-shot." Within two years after the creation of the first two freedom of information committees, the shots began to concentrate. After its 1950 convention the ASNE dropped the "World" from the title of its committee.[37] Sigma Delta Chi, without changing titles, shifted its attention to the domestic front the following year.[38]

But the force that, more than any other, concentrated the shots of the freedom of information movement into an effective barrage came disguised, that year of 1950, as a mild-mannered, semi-retired legal scholar. His recruitment was no accident. Years later, James S. Pope recalled that, when he succeeded Walters in the ASNE committee chairmanship, "about all I had was strong weakness. I was ignorant, but

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mad." Pope told his fellow directors of the ASNE that the movement was "stymied." "The mystery of the law had us fogbound; who could pierce it?"[39]

Harold L. Cross could and did.

Cross came uniquely equipped for the job. A senior partner in a New York law firm, he had served for years as chief counsel to the New York Herald Tribune. He had been a lecturer in the law of the press at Columbia University's Graduate School of Journalism, and had been associate dean of that school. Then in his late 50s, he was being forced by ill health to go into semi-retirement on his farm near Skowhegan, Maine.[40]

More than anything, though, Cross had a zest for the battle. In July 1950, he wrote Pope that he was disturbed at the "growing trend" of withholding information by public officials.[41]

After his death in 1959, his widow wrote Pope that his freedom of information work "was the very fulfillment of his desire.... He gave everything he could for the principles he stood for." The gift, Pope noted, very likely included his life itself.[42]

On behalf of the board of directors of the ASNE, Pope invited Cross to pierce the fog. The invitation included a capsuled status report on the freedom of information movement, circa 1950.

Leaders of the press, Pope wrote, were only beginning

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to realize "the extent of the dangers" of withholding of information. They were also beginning to suspect that their own "complacency" had something to do with the problem. Ignorance, though, was a bigger immediate difficulty. It just wasn't possible to combat news suppression "haphazard and without adequate intelligence." Intelligence, in the form of legal research into the state of the law and the antecedents of existing policies, was the mission proposed. "I believe it will reveal some startling developments," Pope concluded, prophetically.[43]

Cross, the editor recalled, "knew much better than I how much work lay ahead. He liked the prospect. So he pretended to fall cheerfully into our trap. Happy day."[44]

What the ASNE asked its counsel-to-be to produce appeared at first glance to be relatively modest: "a summary of recent statutes and court decisions which supported official secrecy."[45] What it got was to become the bible of the freedom of information movement, the scholarly foundation for every major piece of federal legislation in the field, and a scrupulously researched but passionately written sourcebook for advocates of freedom of access at local, state and national levels.

The People's Right to Know is a 405-page study of the legal status of secrecy and access at all levels of government. Though best known for its role as "a call to battle," in Cross' words, fully half the work is devoted to

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state and local law. And, though its most influential readers were those who pushed through the federal legislation he advocated, Cross made clear that his book was "aimed primarily at the needs of news editors and reporters," especially those in small communities for whom it might "serve as a weapon in itself, not merely as a route map to some distant arsenal."[46]

Since the scope of this dissertation is limited to the freedom of information on the national level, Cross' work on the problems of that level is pertinent here. In any case, as noted above, it was at the national level that the book had its greatest impact.

> The dismaying, bewildering fact is that in the absence of a general or specific act of Congress creating a clear right to inspect--and such acts are not numerous--there is no enforceable legal right in public or press to inspect any federal non-judicial record.[47]

He was unquestionably dismayed, but Harold Cross was not really at all bewildered by the fact he documented. Instead, he laid bare the causes and proposed what eventually became at least the partial cure.

Cross found 10 causes. Five later came to be subsumed under the general claim of "executive privilege." Four arose from actions of Congress. The last was a lack of court decisions modifying the first nine.

Five legal doctrines were found to lend weight, if not sanctity, to claims of nondisclosure.

The first was the doctrine, untested in court, that the

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president has the right to withhold records at his discretion, and that the courts have no power to compel him to act.

A closely related doctrine was that the courts will not order heads of Executive departments to perform actions or produce withheld records.

Another was that the courts may refuse to act in any case, if they choose, even if no other remedy exists.

Fourth was the doctrine that internal Executive documents are privileged.

Finally came the line of attorneys general opinions that production of Executive records cannot be compelled.[48]

Taken together, these constituted the barrier that later was labelled "executive privilege," the barrier that has proved most resistant to assault.

Cross also isolated the statute that later came to be called the "germ of secrecy," the federal statute, dating from 1789, that provided merely for department heads to prescribe regulations governing "the custody, use and preservation of the records, papers and property" of each department.[49]

The amendment of this "housekeeping" statute in 1958 was to be the first legislative fruit of the freedom of information movement, and the least significant. But the statute, before amendment, was not insignificant. Its impact was, Cross found, that "records (or most records) may be withheld from public inspection in the exercise of

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official discretion."[50]

Finally, Cross dissected the Administrative Procedure Act of 1946, 5 United States Code Sections 1001-1011. More than a decade later, the Freedom of Information Act began the process of opening some of the records that had been withheld under the sweeping exclusions of the Administrative Procedure Act. Ironically, as Cross noted, one purpose of the 1946 act was to provide for "more, better and regularized 'public information'" concerning the burgeoning administrative rules and regulations of the federal government.[51]

The weakness of the act was that "several qualifications in that Act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose."[52] It was a weakness that the Freedom of Information Act was to shore up, but not eliminate.

Having dealt with an ineffective Congressional attempt to improve the flow of public information, Cross turned to the much more effective Congressional attempts to deny specific kinds of information to the public. He cited 54 statutes cloaking in secrecy matters ranging from records of postal savings deposits to diplomatic codes. "The foregoing examples are not presented as exhaustive in respect of any of the stated categories...," he emphasized.[53]

Most of this legislated secrecy was proper and even desirable, Cross concluded. Many of the protected records

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were really private materials with no official function or materials properly confidential, the latter ranging from highly personal data to national security secrets.[54]

Even in the category of statutes appearing to favor freedom of information, Cross found little cause for rejoicing. The reports and statistics required to be open to inspection tended either to be of "routine, stylized character" or to permit the public release only of such information as the reporting official "thinks advisable."[55]

Finally among the causes of federal secrecy Cross complained of:

> Negatively, the almost total dearth of those fine, resounding court decisions which, whether declaring common law or construing statutes, have done so much to make the public business the public's business at state and municipal levels.[56]

Neither he nor his allies were to have much success in remedying that lack.

The details of Cross' analysis will be explored in later chapters, as the seeds he planted begin to bear legislative fruit. Those seeds were widely scattered. "The book moved into law offices, newspaper offices, Washington and Stathouse and municipal offices, libraries and universities."[57] Wherever it moved, it inspired its readers to move, too. Pope summed up its impact: "Mankind has contrived some fancy weapons to turn against his fancied enemies. ASNE took a book in hand. It worked."[58]

It did not work in a vacuum. During the two years prior

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to the book's publication in 1953, the major journalism organizations had become steadily more aggressive in combatting threats to the domestic flow of information. By 1951, the freedom of infomation committees of ASNE, Sigma Delta Chi and the Associated Press Managing Editors Association (APME)--among which there was a considerable overlap of membership--were cooperating informally and concentrating on problems at home rather than abroad.

The 1951 report of Sigma Delta Chi's committee added a target to the usual criticism of government officials--the press itself. The report noted a variety of ways in which journalists were erecting or perpetuating barriers to free information. Because this kind of self-criticism was uncommon, then or later, it deserves some attention.

One such "loose practice" was described as "...basking in the glow of the off-the-record routine," and thereby becoming "the unwitting accomplices of those who seek to color or suppress news."[59] (The"off-the-record routine," the committee explained, was the practice of high officials' providing selected reporters with information that was either not for publication or not to be attributed to its source. The practice, still prevalent throughout government, was criticized by the committee as a form of "indirect censorship."[60])

"Acceptance of gifts and gratuities by members of the working press," which usually are "nothing more than attempts

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to buy the favor of the press," was another failure. Sports departments were described as the "chief offenders."[61]

The committee also decried "...the easy guidance of news through friendship." Friendship usually is considered a virtue, "but the journalist is on dangerous ground who has such close friendships with news sources that he may not be able to evaluate or write his news impartially and objectively."[63]

Finally, the committee feared "...a possibility that some newspapers may be doing less than their best in presenting information because they are intimidated." The chief means of intimidation was the libel suit by public officials. Several had been filed recently "with the clear purpose of frightening newspapers so they won't dare to publish any more news gathered through aggressive investigation." Such suits must be fought lest other newspapers, "fearful of being the next target for a nuisance libel suit, will deprive their readers of controversial news which should be published." Going beyond mere lawsuits, a grand jury in Lake Charles, Louisiana, had indicted five newspapermen on charges of defamation after the paper "had the temerity to criticize law enforcement officers for not curbing gambling in the city."[64]

All the practices complained of led the committee to conclude, "Journalistic freedom is threatened from within as well as from without."[65]

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The Sigma Delta Chi report also complained of unhealthy secrecy by the Congress. Such criticism of closed-door committee meetings, executive sessions and other exclusions of public and press frequently was levelled during the early days of the freedom of information movement.[66] Beginning in the later 1950s, criticism of Congress was somewhat muted, as that branch became the ally of the press against executive secrecy. By the early 1970s, Congress itself became a prime target of the pro-access forces.

The report described just one of the numerous instances of congressional secrecy. At a closed committee meeting, Sen. Homer Capehart, a Republican of Indiana, voted against price controls on meat. The next day, however, Capehart delivered a speech on the Senate floor in which he attacked President Truman for not freezing prices earlier. Sen. Blair Moody, a Michigan newspaperman before his appointment to the Senate, broke the rules of secrecy and asked Capehart publicly about the conflict in positions. Capehart was described as "red-faced."[68]

After detailing these barriers and others, including examples from state and local levels, the report called for counter-attack not in the form of legislation but in the form of a "daily crusade for the right to obtain and present the news as the reporter and editor see it."[69] The committee thought it necessary to remind its colleagues that "the professional status claimed for journalism demands acceptance

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of the obligation to render public service by seeking out energetically and with determination the information needed by the people...."[70] Finally, the report called for a long-term educational campaign to teach future journalists to recognize and combat "the influences which try to distort or conceal news." The educational effort would seek to inculcate a healthy suspicion of secrecy-minded officials and to inspire the young to question "why such people want to censor or distort or classify."[71]

The call for a campaign to indoctrinate prospective journalists in the evils of secrecy is of special significance since Sigma Delta Chi, alone among the professional organizations active in the freedom of information movement, had and continues to have a large and active membership at many of the nation's journalism schools. But despite the obvious potential long-term benefits of such an educational effort, the annals of the movement contain no evidence that this or any other group ever really carried out the proposal.

Two other features of the report's conclusion are of even more significance for the early stages of the movement.

First, the reminder that journalists bear a special responsibility to free the flow of information is also a reminder that the freedom of information movement was not a mass movement even within the craft of journalism. Every report of the freedom of information committees contains similar reminders or exhortations to join the fight.

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The 1951 report of the ASNE committee, for example, observes that "some of you"--meaning local editors--enjoy such freedom of access in individual communities that the scope of the national problem may not be apparent. "To such, we suggest that you may be simply unaware."[72] The report goes on to remind even those editors living in blissful ignorance that "every single episode affects you."[73] And, in keeping with the crusaders' predeliction for the authority of the Founding Fathers, Patrick Henry is quoted as having pronounced secrecy "an abomination in the eyes of every intelligent man."[74]

Less elegantly, the 1953 report of the Sigma Delta Chi committee includes as one of the causes of government secrecy "the refusal of certain segments of the press and radio, because of selfish or other reasons, to live up to the obligations which a free people confer upon a free press."[75]

In the first 10 years, at least, the movement got its impetus from the efforts of a tiny handful of men. That handful included, most prominently, the first three chairmen of ASNE's Committee on Freedom of Information--Basil Walters of the Chicago Daily News, James Pope of the Louisville Courier-Journal, and J. Russell Wiggins of the Washington Post--and the most vocal chairman of Sigma Delta Chi's Committee for Advancement of Freedom of Information, V. M. Newton Jr. of the Tampa Tribune. It included one reporter, Clark Mollenhoff of the Des Moines Register-Tribune.

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Perhaps the most important of all was the non-journalist, Harold L. Cross.

Even the proliferation of freedom of information committees did not mean as widespread an activism as the number might imply. To a great extent, the same little group was represented. Wiggins, for example, was a member of the Sigma Delta Chi committee as well as chairman of ASNE's. Newton was an active member of ASNE as well as Sigma Delta Chi. William Steven of the Minneapolis Star-Tribune, first chairman of the APME committee, also served on ASNE's committee. Norman Isaacs, a charman of Sigma Delta Chi's committee, was active in both the other groups. Hugh Boyd of the New Brunswick, New Jersey, Home News was a spokesman in freedom of information matters for the NEA, the organization of weekly newspapers, and served as liaison with the American Newspaper Publishers Association.

Unlike genetics, inbreeding in freedom of information yielded greater vigor.

That vigor was not yet harnessed for the pursuit of legislative remedies. The second most notable point in the 1951 Sigma Delta Chi report is that it contains no mention of legislation. The access advocates had not yet realized the extent to which they were, in Pope's words, fogbound in the law. They were still relying on persuasion, public relations and education. Though open records legislation had been on the books in several states for years, leaders

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of the national movement were wary of that course.

The 1952 report of the ASNE Committee on Freedom of Information quotes Alfred Crowell, head of the journalism department at the University of Maryland, as urging that it was "high time" that journalists launch a drive to match on the federal level the guarantees won at state and local levels.[76]

The committee added that Harold Cross had already isolated the "germs of the secrecy epidemic" in the housekeeping statute and the Administrative Procedure Act.[77] It noted the beginnings of congressional interest, centered, as would continue to be the pattern, in the opposition party. The early supporters were Republican Senators Albert Jenner of Indiana and Francis Case of South Dakota.[78]

But the report concluded that "for many reasons, we do not believe that the Committee on Freedom of Information should become a legislative committee...."[79] The committee's proper role was outlined as that of finding and exposing "the flaws and the evils." To go beyond might jeopardize the broad support given the committee by editors nationwide, "without which we would be helpless."[80] It was a caution that would not endure.

The author of that report would, within two years, be playing a central role in introducing Congressman John Moss to freedom of information. In three years, the report's author would be the lead-off witness at Moss' hearings that

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began in earnest the legislative phase of the movement. Not even the leaders always know quite where they are heading.

In 1952, James Pope and his committee were heading for what he recalled 25 years later as "our first major victory, which brought home to every newspaper in the land how much muscle we had if we really used it...."[81] That first victory is worth recounting. It offers a good view of the ground on which the movement's early battles were fought and a good benchmark for measuring how far freedom of information has come.

The issue was the extent to which military authorities could impede newsgathering at the scene of a crash of a military aircraft in civilian territory. After a conflict, one of many, between military police and newspaper photographers near Port Clinton, Ohio, the military cited its controlling regulation: "Outside military reservations, guards will prohibit photographing of classified equipment only."[82]

The ASNE committee responded, "We say, nonsense. Military guards have no earthly right on civilian territory to prohibit anything."[83]

The committe's report concluded, "We stated this opinion in a letter to the Military Establishment on March 12, asking for citations which would prove us wrong. We have not had a reply."[84]

A year later, the committee reported, "Our relations with the military, once a troubled field, have shown some

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definite improvement this year."[85] The Air Force had asked the Department of Justice whether, as the journalists had complained, its regulations on the coverage of crashes were illegal. The answer was that they were. New regulations were issued, requiring the protection of any classified equipment in a crash and permitting officers to warn journalists that publicizing such equipment might be in violation of the Espionage Act. "But they cannot forbid anything. This is as it should be," the report exulted.[86] Then, in the cautionary tone that marks every foray of the freedom of information movement into the area of national security, the report reminds, "Success in this sometimes difficult relationship depends too upon the understanding and cooperation of newsmen, and that is our responsibility."[87]

There was a victory for openness. It was one of many in the skirmishes fought by journalists, individually and collectively, in the opening campaigns of the freedom of information movement.[88] But with the publication of The People's Right to Know, the battle lines began to broaden as the forces of openness grasped the idea that legislative solutions must be sought. The 1953 report of ASNE's committee observed, "It is quite likely that national legislation will develop...aimed at establishing the people's right to know about all their public affairs without dependence on official grace and generosity."[89]

The report added that the committee "will have a

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vitally important task in watching all such legislation, in exposing dangers that may lie in the best intentioned bills, in keeping high officials of the National Government constantly reminded of the limits of their control over information."[90]

The next chapter explores the much greater role of the committee--and of the press as a whole--in shaping and promoting the legislation.

The other professional group most active as an advocate of openness, Sigma Delta Chi, was in 1953 already urging legislative action, but at the state level. Its freedom of information committee launched campaigns that year for passage of open records laws in the 26 states without them, and for open meetings laws in all states.[91]

The committee also called for creation of "a national council for the Advancement of Freedom of Information to be composed of representatives of all recognized national press and radio organizations, including publishers as well as editors..." to allow the profession to speak with a united voice.[92]

Such a council had been proposed earlier in the year by the Associated Press Managing Editors Association (APME), which was also working vigorously on the state and local levels.[93] Though the idea was endorsed by leaders of other press organizations and several meetings were held to discuss it over the next two years,[94] no formal council ever

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developed. Informal cooperation, however, was close.

Even as the effort to press for legislation at state and national levels was getting under way, so was disagreement among editors about how best to advance the cause. Illustrative is the argument in print between two of the best-known editors of the period, William R. Mathews, editor and publisher of the Tucson, Arizona, Daily Star, and V.M. Newton Jr.[95]

Mathews, describing himself as a proponent of "moderation in contrast to an extremism that may defeat greater progress," argued that the freedom of information movement should concentrate on just one target at a time. The target of the moment was Executive secrecy. Therefore, he reasoned, if made no sense for the press to risk alienating the Congress, its ally against the Executive, by demanding congressional openness as well. "Most legislators will resent such extreme demands," he wrote.

The ASNE should seek passage of a federal law opening most records to inspection by "responsible parties," Mathews propsed. Regarding the answer as self-evident, he asked, "As a matter of getting such a law through Congress, should we threaten that body by demanding that all committee meetings be open?"

In support of his position, he described several instances in which he had obtained information through friendly persuasion and the use of friends in Congress rather

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than by confrontation.

Newton, as always, responded sharply. Mathews' recitation, he wrote, "is the perfect example of the back-scratching and political privilege that today characterizes the gathering of all our news in Washington."

Newton advocated instead of moderation an effort to "force" federal officials to stop the kind of cooperation Mathews practiced, which Newton scornfully termed "doling out" information "to a privileged few in the newspaper profession, perhaps, in exchange for favored treatment...."

J. Russell Wiggins, then chairman of the ASNE's freedom of information committee and later president of that organization, came down on Newton's side. Of course, he wrote, "any great campaign ought to be carried on with moderation." But he added the observation that public officials on all levels "think every campaign to open up the proceedings they would like to conduct in secret is 'immoderate'."[96]

Years later, Wiggins recalled arguments such as Mathews' as the "counsels of many conservative members," and concluded that the organization had been wise to pursue a middle course, broadening support for freedom of information among editors as well as among public officials and the public at large.[97]

As it unfolded over the next two decades, the strategy of the journalists and later-arriving allies was, after first broadly attacking all aspects of government secrecy, to join

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forces with the Congress against the Executive, soft-peddling for several years criticisms of congressional secrecy. After the Freedom of Information Act was won in 1966 and strengthened in 1974, attention shifted again to the closed doors of Congress. So both Newton and Mathews were, in time, vindicated.

In the early 1950s, however, the secrecy battle was by no means one-sided. Governmental actions in Washington were closing doors and hiding records while the campaign for openness was getting organized.

In what Harold Cross called "by far the most sweeping, dramatic and provocative" of these actions,[98] President Harry S Truman issued on September 24, 1951, Executive Order 10290. This order authorized the heads of executive departments or their designated subordinates to classify in one of the four categories first proposed by the Veterans Administration in 1947 "official information which requires safeguarding in the interest of the security of the United States."[99] The categories were Top Secret, Secret, Confidential and Restricted. A total of 45 agencies, civilian as well as military, was given classification authority.

Coming as it did at the height of the Korean War, the order did not draw widespread opposition immediately, even from journalists. Several months later, Sigma Delta Chi's freedom of information committee did register a brief, though strongly worded, protest: "We feel that this order cannot

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be allowed to stand without drastic modification."[100] There were other protests, including a Senate investigation, but the order stood unchanged for two years.

The most detailed criticism of Executive Order 10290 came not from the press or Congress but from an officer of the Executive. Herbert Brownell, attorney general in the Republican administration that followed Truman's, found four great flaws in the order and its implementing regulations:[101]

Their "vague and broad descriptions" allowed withholding of much material not essential to security.

The term "national security" was used "indiscriminately" to hide information previously open to the public.

Overclassification actually promoted carelessness in the handling of truly sensitive information.

The restrictions "tended to build up a barrier between Government and the press, which is inimical to traditional freedom of the press."

President Dwight Eisenhower, after first releasing a draft for comment by press and public, issued a replacement order, Executive Order 10501. Eisenhower's order eliminated many of the most objectionable features of the Truman order. The "Restricted" classification was abolished. The requirements of "defense" rather than the vaguer "security" were made the basis for classification. An improved system for review of classifications was established. More importantly, the number of agencies with classification power was reduced from 45 to 16. Losing their power to classify were such

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agencies as the American Battle Monuments Commission, the Commission of Fine Arts, the National Capital Housing Authority and the Smithsonian Institution.[102]

Response of freedom of information advocates to the Eisenhower order, which took effect December 15, 1953, was enthusiastic. Wiggins of ASNE called it a "welcome fresh start on the security problem" and said it evidenced a "healthier psychology and a more liberal attitude."[103] Norman Isaacs, president of APME, termed it a "healthy step in the right direction" and said it indicated a more cooperative attitude on the part of the new administration.[104] The only cautionary note in the euphoric reaction was sounded by Wiggins, who warned, "Experience and study may prove the new order objectionable in some details."[105]

In a speech to the APME convention in Chicago, Brownell won a resolution of praise from the journalists and invited them to continue "to seek out and oppose any operation of government which places a barrier in the way of free flow of information."[106]

Three years later, Wiggins' warning was borne out and Brownell's invitation was accepted. The same group that had praised him for its drafting urged the president to rescind the order as restricting the flow of government information. After a second plea, a presidential aide wrote the organization that its request was being denied. The order, he wrote, "represents the minimum protection necessary to the

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defense interests of the nation."[107] The president of APME, no longer euphoric, replied that the refusal left the editors with no choice but to "schedule this subject as a continuing topic of discussion, editorialization, and public debate."[108]

The discussion, editorialization and public debate were to continue for 16 years, until President Richard Nixon issued Executive Order 11652 on March 8, 1972. Despite Nixon's introductory remarks, quoted earlier, the new order would only shift the ground of the debate, not end it. No end is in sight.[109]

Controversial though it has been, the classification system never was really the central issue in the struggle for freedom of information. From the beginning, the advocates of openness have generally exempted defense information from their demands for access. The Freedom of Information Act codified that exemption. Only when it has been extended to non-defense material has the classification system usually come into contention.

The early 1950s also saw, however, the emergence of an issue that has been very close to the center of the freedom of information battle ever since. It is the issue of "executive privilege." It will be given more extensive treatment later, but it must be introduced here.

In order that both the introduction and the early press response may be understood, another bit of scene-setting may be in order.

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That scene, for observers of national affairs in the United States, was dominated by one man, a Republican senator from Wisconsin, Joseph R. McCarthy. He gave his name to a movement and to a five-year period in American history. Richard Rovere, a journalist of great distinction, described McCarthy as "in many ways the most gifted demagogue ever bred on these shores. No bolder seditionist ever moved among us--nor any politician with a surer, swifter access to the dark places of the American mind."[110]

Of McCarthy's role and importance, Rovere wrote:

> He walked, then, with a heavy tread over large parts of the Constitution of the United States, and he cloaked his own gross figure in the sovereignty it asserts and the powers it distributes. He usurped executive and judicial authority whenever the fancy struck him. It struck him often.
>
> He held two Presidents captive.... Harry S. Truman and Dwight D. Eisenhower, from early 1950 through late 1954, could never act without weighing the effect of their plans upon McCarthy and the forces he led, and in consequence there were times when, because of this man, they could not act at all. He had enormous impact on American foreign policy at a time when that policy bore heavily on the course of world history.... In the Senate. . . he assumed the functions of the Committee of the Whole; he lived in thoroughgoing contempt of the Congress . . . of the rules it had made for itself, and--whenever they ran contrary to his purposes--of the laws it had enacted for the general welfare.[111]

For many, the term "McCarthyism"--coined by the cartoonist Herbert Block--became a "synonym for the hatefulness of baseless defamation, or mudslinging."[112]

One of the targets of McCarthy's Communist-hunting forays was the U. S. Army. He found no Communists there, but he found a dentist, one Major Peress, whose promotion

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sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the nation." He wrote that this position was based on the necessity of secrecy to assure candor in discussions among "employees of the Executive branch" of "official matters." He described his order as being essential "to maintain the proper separation of powers" and "to preclude the exercise of arbitrary power by any branch of the Government."[114]

The letter was accompanied by a memorandum from the attorney general setting forth what were claimed to be the historical and constitutional precedents for the Executive's right to withhold information from the Congress. (The term "executive privilege" was used nowhere in either letter or memorandum. Indeed, the term appears not to have been coined until 1958.[115]) The memorandum traced the claim of the right of the Executive to withhold back to 1796, to George Washington. It found numerous instances of similar claims in nearly every administration since. It concluded, "Upon this firm principle our country's strength, liberty, and democratic form of government will continue to endure."[116]

Library of Congress researchers later determined that the memorandum was drawn entirely from a journal article written in 1949 by a lawyer in the Department of Justice under the Truman Administration.[117]

Ironically, the research on which the article was based was ordered as officials of the Truman Administration

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sought ways to protect information from a Senate investigating committee whose counsel was William P. Rogers, later an attorney general under Eisenhower and a strong advocate of broad executive withholding powers.[118] The research was discarded by the Truman aides as "too insubstantial to use," reported Mollenhoff, who was during this period the Washington correspondent most interested in freedom of information matters.

The Library of Congress study reported that the Eisenhower letter "brought a new dimension to the interactions between the Executive and the Congress. "His letter. . . became the basis for an extension of the claim of 'executive privilege' far down the administrative line from the President."[119]

Despite its significance, it drew little notice outside the subcommittee to which it was presented. One reason, no doubt, was that May 17, 1954, also was the day the Supreme Court issued its momentous decision in Brown v. Board of Education. Another probably was that the letter, and the dispute it touched off, seemed to most a mere sideshow in the political circus of the Army-McCarthy hearings.

Those newspapers that commented on the letter at all praised it. The New York Times, 20 years later the Executive's adversary in the historic Pentagon Papers case, endorsed this withholding and criticized McCarthy for intruding "in complete disregard of the historic and Constitutional division

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of powers that is basic to the American system of Government."[120]

The Washington Post, whose managing editor was then chairman of the ASNE's freedom of information committee, called the memorandum supporting Eisenhower's letter "an extremely useful document" and concluded that the president's authority to withhold "is altogether beyond question."[121] Years later, that editor, after first pointing out that he did not then have authority over the paper's editorial page, explained the Post "was so upset over McCarthy that we applauded this as a blow at him." He soon persuaded the editorial writers of the error of their ways, he said, and the paper toned down its enthusiasm.[122]

This was the state of the freedom of information movement as its first decade drew to a close: On the side of openness were a handful of editors and reporters, angry, frustrated and increasingly militant; an aging, ailing lawyer; and a book. On the side of secrecy were the bureaucracy, the newly elaborated though not yet named doctrine of executive privilege, and the law.

And starting his second term in the U.S.House of Representatives was an ambitious young Democrat from Sacramento, California, a real estate dealer by profession, named John Emerson Moss.

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FOOTNOTES

[1]Alice Fox Pitts, Read All About It! (Easton, Pa., American Society of Newspaper Editors, 1974), p. 169.

[2]Uncatalogued archives of Sigma Delta Chi, 35 E. Wacker Drive, Chicago, Ill.; uncatalogued archives of ASNE, 1350 Sullivan Trail, Easton, Pa.; catalogued archives of American Newspaper Publishers Assn., Box 17407, Dulles International Airport, Washington, D.C.

[3]Herbert Brucker, Freedom of Information (New York: The MacMillan Company, 1949), pp. 200-219.

[4]Pitts, pp. 174-181.

[5]"Statement of Policy," in uncatalogued files of ASNE, Easton, Pa.

[6]Ibid., p. 2.

[7]Eric Goldman, The Crucial Decade (New York: Alfred Knopf, 1956).

[8]Ibid., p. v.

[9]Ibid., p. 60.

[10]Ibid., pp. 114-115.

[11]Walter Johnson, 1600 Pennsylvania Avenue (Boston: Little, Brown and Company, 1960), p. 200.

[12]Speech by President Harry S Truman, reprinted in Oscar Barck, ed., America in the World (Cleveland: World Publishing Company, 1961), p. 360.

[13]Editor & Publisher, October 27, 1945, p. 48.

[14]Barck, p. 375.

[15]Bulletin of the American Society of Newspaper Editors, November 1, 1947, p. 3.

[16]Ibid.

[17]Ibid.

[18]Editor & Publisher, October 25, 1947, p. 13.

[19]Editor & Publisher, November 1, 1947, p. 5.

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[20]American Society of Newspaper Editors, Proceedings, 1948, pp. 150-157.

[21]The Quill, January, 1949, p. 3.

[22]See, for example, The Quill, January 1951, p. 12.

[23]Basil Walters, unpublished draft of chapter for ASNE history, in ASNE files.

[24]Ibid.

[25]Proceedings, 1949, p. 34.

[26]Walters, p. 5.

[27]Proceedings, 1949, pp. 34-39.

[28]Francis E. Rourke, Secrecy and Publicity (Baltimore: The Johns Hopkins Press, 1961), p. 217.

[29]Proceedings, 1949, p. 40.

[30]Rourke, p. 217.

[31]Pitts, p. 174.

[32]Proceedings, 1950, pp. 55-56.

[33]Sigma Delta Chi, "Interim Report of the Committee for Advancement of Freedom of Information," March 31, 1953, pp. 1-4.

[34]Harold L. Cross, The People's Right to Know (New York: Columbia University Press, 1953), p. 5.

[35]Proceedings, 1950, p. 57.

[36]Ibid.

[37]Ibid., p. 58.

[38]"Report on Freedom of Information," The Quill, January 1952, p. 10.

[39]James Pope, unpublished draft of chapter for ASNE history, in ASNE files.

[40]Pitts, pp. 192-193.

[41]Quoted in Pope letter to Cross, October 27, 1950, ASNE files.

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[42]Pope, unpublished draft.

[43]Pope letter to Cross.

[44]Pope, unpublished draft.

[45]Pope letter to Cross.

[46]Cross, p. xvi.

[47]Ibid., p. 197.

[48]Ibid., p. 199-200.

[49]5 USCA 22, quoted in Cross, p. 200.

[50]Cross, p. 215.

[51]Ibid., p. 224.

[52]Ibid., p. 228.

[53]Ibid., pp. 231-34.

[54]Ibid.

[55]Ibid., p. 235.

[56]Ibid., p. 201.

[57]Pope, unpublished draft, p. 5.

[58]Ibid.

[59]"Report on Freedom of Information," p. 10.

[60]Ibid., p. 17.

[61]Ibid., p. 10.

[62]Ibid.

[63]Ibid., p. 17.

[64]Ibid.

[65]Ibid., p. 10.

[66]Cf. ASNE Committee on Freedom of Information, "1953 Report," p. 3, and Sigma Delta Chi Committee, "1953 Report," p. 5.

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[67]Ibid., p. 17.

[68]Ibid., p. 18.

[69]Ibid., p. 21.

[70]Ibid.

[71]Ibid.

[72]ASNE Committee on Freedom of Information, "Interim Report," April 21, 1951, p. 1.

[73]Ibid.

[74]Ibid., p. 8.

[75]Sigma Delta Chi, "Report of Committee for Advancement of Freedom of Information," November 1, 1953, p. 3.

[76]ASNE Committee on Freedom of Information, "Report," April 18, 1952, p. 8.

[77]Ibid., p. 9.

[78]Ibid.

[79]Ibid.

[80]Ibid., p. 10.

[81]Pope letter to the author, January 30, 1978.

[82]Quoted in ASNE Committee on Freedom of Information "1951 Report," p. 5.

[83]Ibid.

[84]Ibid., p. 6.

[85]1952 "Report" of ASNE Committee, p. 7.

[86]Ibid., p. 8.

[87]Ibid.

[88]For one partial listing and assessment, see Sigma Delta Chi, "Report of the Committee for Advancement of Freedom of Information," 1954.

[89]ASNE Committee for Freedom of Information, "Report," 1953, p. 7.

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[90]Ibid.

[91]Sigma Delta Chi 1953 "Report," pp. 14-15.

[92]Ibid.

[93]Editor and Publisher, May 3, 1953, p. 5.

[94]Hugh Boyd letter to Cranston Williams, September 28, 1954, in files of American Newspaper Publishers Assn.,Reston,Va.

[95]Bulletin of ASNE, November, 1954, pp. 3-6

[96]Ibid., p. 6.

[97]Wiggins, unpublished draft of chapter for ASNE history, p. 8.

[98]Cross, p. 206.

[99]Quoted in ANPA "B Bulletin 5-1952," January 30, 1952, p.13.

[100]Sigma Delta Chi 1952 "Report," p. 17.

[101]Brownell statement to Eisenhower, quoted in Editor & Publisher, June 20, 1953, p. 10.

[102]Editor & Publisher, June 20, 1953, p. 10.

[103]Ibid.

[104]Ibid.

[105]Ibid.

[106]Editor & Publisher, November 14, 1953, p. 11.

[107]Gerald D. Morgan letter, quoted in ANPA "Federal Laws Bulletin #18," April 17, 1957.

[108]Ibid.

[109]See discussion in Franck & Weisband, pp. 93-113.

[110]Richard H. Rovere, Senator Joe McCarthy (Cleveland: World Publishing Company, 1960), p. 3.

[111]Ibid., pp. 5-6.

[112]Ibid., p. 7.

[113]Ibid., p. 207.

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[114]President Eisenhower letter to Secretary of Defense Charles E. Wilson, May 17, 1954, reprinted in Clark Mollenhoff, Washington Cover-up (New York: Doubleday & Company, 1962), pp. 210-211.

[115]See Raoul Berger, Executive Privilege (Cambridge: Harvard University Press, 1974), p. 1.

[116]Quoted in full in Mollenhoff, pp. 211-221.

[117]"The Present Limits of Executive Privilege," a study by the Government and General Research Division of the Library of Congress, Congressional Record House 2243-2246, March 28, 1973.

[118]Mollenhoff, p. 53.

[119]"The Present Limits. . .," p. 2243.

[120]New York Times, May 18, 1954, p. 28, quoted in "The Present Limits. . .."

[121]Washington Post, May 18, 1954, p. 14, quoted in "The Present Limits. . .."

[122]Wiggins, interview with the author, May 26, 1977.

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CHAPTER II

THE MOSS COMMITTEE (1955-64)

At 10:30 a.m. on Monday, November 7, 1955, the legislative chapter of the freedom of information movement opened. It opened, appropriately enough, with the press. In the months following that first informal panel discussion, the Special Subcommittee on Government Information of the House Committee on Government Operations--which came to be called the Moss Committee--in a series of hearings laid the foundation for all the congressional action of the next two decades. The first decade ended on the verge of the passage of the Freedom of Information Act. During that decade, the press played an unaccustomed role as lobbyist[1] and actor on the legislative stage, rather than front-row critic. Activism accentuated the disagreements and hesitations within the ranks of the journalists. The information-holders in the Executive were not cowed. And freedom of information became a political issue.

It is not really clear just how or why the Special Subcommittee was created, or how a second-term congressman with no special background in the subject came to head it.

John Moss traces the origins to his first term in the House, the Eighty-third Congress, when, as a member of the Committee on the Post Office and Civil Service, he was

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refused information by the Civil Service Commission. "My experience in Washington quickly proved that you had a hell of a time getting any information," Moss said.[2]

In the early days of the 84th Congress, in 1955, Moss recalls, he persuaded Congressman William Dawson, chairman of the Committee on Government Operations, to back a study of "the general availability of information not only to the Congress but to the general public." A subcommittee was created to conduct the study and, as is the custom, the man whose idea it was was given the chairmanship.[3]

Rep. Dante B. Fascell, a Florida Democrat who was an original member of the subcommittee together with Republican Clare Hoffman of Michigan, recalls the force behind its creation as "a very, very strong drive by the news media."[4] Fascell explains simply the handing of what was to be an important and publicity-rich subcommittee to a junior member. Freedom of information "didn't have much sex appeal as far as most guys were concerned."

Leaders of the "very, very strong drive" by the press regard the creation of the Moss Committee as a beneficial confluence of political ambition with a worthy cause.

James Pope, president of the ASNE in 1955 after his service as chairman of its freedom of information committee, recalls that his first contact with Moss came in 1953, Moss' first year in Congress. "Moss is a very smart politician. He saw this thing snowballing."[5] Meanwhile, journalists

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convinced by Harold Cross that legislative action was required "were probing around to see who we could find in Congress who had the guts to help us."[6] Moss was the man. "We formed a lasting alliance."[7]

Though Pope's assessment is that "John Moss was not inherently imbued with a desire to break down news barriers," J. Russell Wiggins, who succeeded Pope as ASNE committee chairman, observes, "Moss was emotionally and intellectually attracted to this issue."[8]

A behind-the-scenes campaign for establishment of a subcommittee also was carried out over several months by Wallace Parks, a longtime member of the staff of the Committee on Government Operations.[9] Parks sent memoranda proposing its creation and suggesting topics for investigation to committee chairman Dawson, to John McCormack, then majority leader of the House, and to Moss. A colleague has suggested that Parks was trying to have the subcommittee formed primarily so he could serve as its counsel.[10]

Still another factor, this one also combining elements of politics and principle, may have contributed to the subcommittee's creation. In November 1954, Secretary of Commerce Sinclair Weeks announced the formation of an Office of Strategic Information, a kind of quasi-censorship bureau intended to suppress information that, though not classified, might have strategic value. The press reacted strongly, criticizing the office for "adding a new classification over

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which the government is to exert control" and for "the inference that a system of information control is not censorship if it is voluntary."[11] The impact of that criticism was revealed a year later, when the Moss Committee forced the release of previously classified minutes of the OSI. In those minutes, OSI director R. Karl Honaman was quoted as decrying "the inevitable editorial protest from a small but highly vocal segment of the press."

The "flurry," Honaman complained, could be traced "directly or indirectly" to the ASNE and its freedom of information chairman. A mere "suggestion" that editors cooperate in protecting American "strategic interests" was being read as a call for censorship. Honaman also objected that the "many editors" sympathetic to his "practical attempt to find reasonable answers to real problems" were muffling their typewriters because that viewpoint had "less dramatic appeal."[12]

Honaman stepped from OSI into another conflict with the press and Congress. Now deputy assistant secretary of defense for public affairs, he wrote a letter in June 1955 to the ASNE freedom of information committee attempting to explain Secretary of Defense Charles Wilson's directive that information activities in the department be limited to those making a "constructive contribution" to the department's interests. He wrote that, while the public was "eager to be informed" of defense activities and needed the information, many demands

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for information "take up the time of people with busy schedules" without being "useful or valuable, nor yet very interesting to the public."[13]

Wiggins, chairman of the ASNE committee, noted, "Newspapers objected to this interpretation of the order and asserted it was up to the press and to the public to decide what is 'interesting' and 'useful'."[14]

In mid-1955, then, there existed a security-conscious Republican administration actively seeking to restrict the flow of at least some kinds of information, outraged journalists already seasoned in freedom of information battles, and a Democratic-controlled Congress with one of its junior members an ambitious man who already had personal experience with the frustration of executive withholding.

On June 25, 1955, Editor & Publisher, a trade magazine of journalism, reported, "Protests against the news brownout in official Washington have resulted in a congressional investigation."[15]

Much later, Pope added, "We had not really expected to get such political clout so early; it was like gaining a fleet of nuclear subs."[16]

The fleet was launched with a letter of appointment from Dawson to Moss dated June 9, 1955. In it, Dawson wrote that "charges have been made" that Executive agencies had withheld information from journalists, researchers and the Congress itself. The veteran of machine-ruled Chicago politics added, "An informed public makes the difference between mob rule

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and democratic government." He instructed Moss to "ascertain the trend in the availability of government information" and "scrutinize the information practices" of Executive branch officials. Moss' subcommittee, was, he concluded, to "seek practicable solutions for such shortcomings, and remedies for such derelictions" as uncovered.[17]

Moss' staff began its scrutiny with a questionnaire to 63 Executive departments and agencies inquiring into their information practices and asking for the legal bases on which information was denied. Then, the spadework done, hearings were convened.

First came what was called a panel discussion with a group of journalists on November 7. Those invited constituted a roster of the early leadership of the freedom of information movement. There were Pope and Wiggins of ASNE, Newton and Mollenhoff of Sigma Delta Chi, Guy Easterly and Hugh Boyd of the National Editorial Association, Theodore Koop of the Radio-Television News Directors Association, Richard Slocum of the American Newspaper Publishers Association, William Beale of the Associated Press, James Reston of the New York Times, syndicated columnist Joseph Alsop, and Harold L. Cross.

This was not the first time the subcommittee had heard from the press. The ASNE had proffered some early advice, in a letter from Pope to Moss only two months after formation of the subcommittee. Pope wrote that, while he liked Moss'

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proposal of getting from each Executive agency a statement of policy on the release of information, that didn't go far enough. "If the people of the country are to be fully informed, they should not be dependent on voluntary releases." Journalists were concerned, he added, "with the attitude of officialdom, not only toward 'releases,' but toward inquiries."[18]

Noting that "I don't expect you to read all of it," Pope said he was sending along the reports of his freedom of information committee. "One other document you should have," he wrote--Harold Cross' book.[19]

He sent Cross, too. Samuel J. Archibald, staff director of the subcommittee, filed in October "Notes on Discussion with Harold L. Cross, October 17, 1955."[20]

"Cross said there are two possible fields for legislative action on freedom of information," Archibald noted. One was the amendment of 5 U.S.C.A. 22 to limit its misuse as a justification for withholding. The second field was the passage of "positive legislation flatly directing that records are to be open to the public," either by means of a general act or a series of acts aimed at specific cases. Cross advised that Congress "must speak on the general subject" before taking action in specific cases. "General legislation might state that all records should be open except as otherwise provided by law."

Cross also suggested that the subcommittee staff contact

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Jacob Scher, professor of journalism at Northwestern University, a newspaperman and lawyer who was to serve briefly on the subcommittee staff himself and who succeeded Cross as the legal mind behind freedom of information legislation.[21]

There, before the subcommittee had held its first hearing, was a plan of action--very close to the one followed over a decade--and, in one sentence, a model freedom of information law.

The activist journalists, following part of their counsel's advice, already had begun pressing for the inclusion of access provisions in specific bills. Spokesmen for both the ASNE and the American Newspaper Publishers Association (ANPA) had launched a letter-writing campaign to their senators and congressmen urging such provisions.[22]

At least one of those spokesmen, however, saw the danger inherent in Cross' more sweeping proposal.

The danger was, wrote Wiggins, "that the alternative outcomes are not just the passage of the bill or its failure to pass." Instead, the Congress might approve an "access" bill with a lengthy list of exceptions, in effect sanctifying secrecy. "Such a measure would leave us in worse shape than we are." Bad as the "housekeeping act" was, it left open a plausible argument that its use to justify withholding was a distortion. Such an argument could not be made against a law that clearly and specifically authorized withholding. Wiggins added that he wasn't pressing his argument publicly "because I suspect that Dr. Cross does not entirely agree with me."[23]

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In retrospect, Wiggins appears to have been prescient. But Cross was by no means sanguine about the prospects for general legislation, either. "There are enormous advantages in a general bill--if it could be had," he wrote Wiggins. "It would--or at least might--open up a vast quantity of records now closed. . . ."[24]

He added, however, "It would bring down upon us an avalanche of bureaucrats from almost every office shouting objections and demanding exceptions. . . . I would love to have it--if it could be had without a host of barnacles."

So the journalists were not entering naively this legislative arena with which even Cross professed himself unfamiliar. They entered it formally that morning of November 7. Leading the way was James Pope.

Pope thought it necessary early in his opening statement to warn the politicians on the subcommittee that freedom of information held little promise as a partisan issue.

Pointing out that journalists already had fought against secrecy under a Democratic and a Republican administration, he invited either party to claim political rewards if it could demonstrate a real commitment to the cause. Failing such a demonstration, Pope warned, the party seeking credit for openness "is going to run afoul of at least 560 editors. . . who know better and will tell the people about it."[25]

Then he repeated the journalists' standard disclaimer of any proprietary interest in freedom of information. "This is not primarily a newspaper fight. It should never so be

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considered. The right to know is the right of the people."[26]

He answered the charge, raised before and since, that the interest of the press in freedom of information is a selfish one. "I have never sold a nickel's worth of paper based on something that happened in the Civil Service Commission. . .." If he ever did, he promised, "I will donate the proceeds to the Community Chest."[27]

Pope addressed himself, too, to the divisions within journalism over the wisdom of joining a legislative effort. The opponents of cooperation, he said, possessed "a very obtuse and shortsighted and silly attitude." Any journalist with "information of value" to the committee should produce it.[28]

Of course, Pope knew well that he was not engaged simply in giving information. He admitted as much a few moments later in a parenthetical comment: ". . .and I think you will be able to change some laws and give us some legal rights we think we have as a matter of principle. . .."[29] The journalists were partners in this enterprise.

Pope concluded with his "favorite comment," one he still quotes with relish. The comment came in a letter bearing the letterhead of "C.E. Sodness, president, Farmers & Merchants Bank, Wimbeldon, Barnes County, North Dakota." The message said simply, "Freedom of information--I am in favor of the above." Pope liked to believe, he said, that "Mr. Sodness speaks for most Americans."[30]

The next witness was Wiggins, who complained of misuse

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of the security classification system. Newton took his opportunity to attack c ongressional secrecy, despite his acknowledgement that the subcommittee's jurisdiction did not include that area. Slocum, after adding the ANPA's support for freedom of information, went on to complain of Department of Justice actions in an anti-trust suit against the publishers. Joseph Alsop, in a striking preview of another administration that would be headed by the then-vice president, described government investigations of overly-inquisitive reporters--including the use of wiretapping. James Reston talked of news manipulation, especially in foreign affairs. Koop, of CBS, bemoaned the special restrictions placed on broadcasters. Mollenhoff, the lone investigative reporter in the group, described bipartisan abuses the secrecy of which he had pierced.[31]

The heart of the press' case against secrecy in government was laid bare that morning in time for a 12:45 p.m. lunch break.

These hearings were not an unalloyed love feast, however. Early in the proceedings, Rep. Hoffman, the Republican and by far the senior in both age and service on the subcommittee, raised the issue perhaps most often--and most effectively--used against the press in this and other battles.

> MR. HOFFMAN. I take it also that you gentlemen contend that the right to know has coupled with it the right to accurate information?[32]

Pope agreed.

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> MR. HOFFMAN. Then, Mr. Pope, if it should be so unfortunate that numbered with those seeking information there is an individual who is, shall we say, a chronically inaccurate individual, should he have the same right to information when his past record indicates that he has consistently misstated the facts that were given him as do those who have been accurate in transmitting to the public the information they receive from the departments.
>
> MR. POPE. Yes; I would say he has the same right.[33]

Pope and Newton argued briefly the philosophical and historical bases of press freedom, concluding that the enforcer of press responsibility is the people who freely give or withdraw their patronage. Hoffman was unconvinced.

> Your argument is all right, but with the right to get information from a Government agency my argument is that there should be coupled with it an obligation on the part of those who receive that information to print the fact accurately.[34]

The disagreement was left hanging, and still hangs.

It would be inaccurate to suggest that all of this first series of hearings, held in November 1955 and in March, May and July, 1956, was conducted on the lofty plane of philosophical discourse and legal argument. Much of it was, of course, but there were explorations, too, of the actual workaday flow and constriction of information.

A closer look at one such exploration may yield some insight into both the mid-1950s status of access to information and the functioning of the Moss Committee. In at least one close observer's judgment of the subcommittee's value, "The statutory changes were a minor part. . .. The biggest part was getting hold of the agencies and bureaucrats when some reporter ran into problems."[35]

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One of the first agencies to be gotten hold of was the Civil Service Commission. In the record of the hearings of November 8, 1955, more than 20 pages are devoted to a discussion of, and arguments over, the commission's newly adopted policy that the names of finalists for appointments as local postmasters were no longer made public.

Commission chairman Philip Young began by saying that his commission was merely acceding to a request of the Post Office Department, which really didn't even want the names of any post master applicants released. Jacob Scher, on temporary assignment as subcommittee counsel, asked, "Is there a public policy reason for this?"

> MR. YOUNG. The public policy reason is that many times people who want to apply for a Civil Service examination do not want it known. You can very well do the applicant a disservice. His employer may not know that he wants to change jobs.[36]

After several further questions and answers, Moss responded, speaking of his small-town constituents:

> They want the names of the possible postmasters and they want all of the facts concerning the applicants. And I think the more information there is the better a public purpose will be served. I think here is a case where the public interest is paramount to the individual interest, and the individual interest should not be placed above the public good. I think this is an attitude which has a definite bearing upon the scope of the study of this commission.[37]

The point was to be made again and again in other hearings in other years: the public's interest in information was competing against the bureaucracy's interest in the comfort, the convenience, the protection of secrecy. The rules, as interpreted by the bureaucracy, were clearly on the side

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of secrecy.

Fascell asked, "What is your legal authority for issuing the operating instructions (to withhold candidates' names)?"

MR. MELOY (general counsel to the commission): Of course, we do have legal authority.

MR. FASCELL. Suppose I question it?

MR. MELOY. You could question it but we do have legal authority.

MR. FASCELL. What is it?

MR. MELOY. The Civil Service Act, rules and regulations.

MR. FASCELL. Can you tell me specifically the provision of the Civil Service Act?

MR. MELOY. No.

MR. FASCELL. Or the general statute?

MR. MELOY. No; there is no specific provision.

****

MR. MOSS. Mr. Meloy, can you give us the specific section of the act?

MR. MELOY. There is not any section of the act which speaks about publication or withholding of information. It would be inherent within the act.

****

MR. MOSS. What are the inherent powers?

MR. MELOY. The inherent power, the same as the inherent powers of any other agency, to protect itself. . . ."[38]

Through all of one morning the subcommittee and the commission disputed the secrecy surrounding postmasterships and, more broadly, the bases of the secrecy surrounding government.

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The particulars were argued again, in another session, with top officials of the Post Office Department.[39] The subcommittee won this skirmish, as it was to win many others. In a letter to Moss dated April 2, 1956, the Post Office's counsel reported that, "since you feel so strongly about the matter. . .a decision has been made to reverse the position heretofore taken."[40] The names of candidates for postmasterships were again public.

The war, however, had hardly begun.

When the first round of hearings was over, Moss concluded, "I believe that a clear need for correct legislation has been established."[41] It was less clear just what "correct legislation" was.

Harold Cross had some answers. His first was, amend 5 U.S.C.A. 22.

Back in 1951, about a year after Cross had begun his researches, Pope wrote that the ASNE committee, "searching blindly for the fountainhead of secrecy," regarded Cross' discovery of the statute with feelings "not unlike those of a doctor who has been observing the ravages of some kind of disease, and finally identifies the germ."[42]

Like many germs, this one looks simple enough. On the books in several forms since 1789, it is customarily referred to as the "Housekeeping Act." It provided merely that each department head might prescribe regulations governing the conduct of his department "and the custody, use and preservation of the records, papers and property appertaining to it."[43]

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Both Cross' research and the subcommittee hearings led to the inescapable conclusion that "custody, use and preservation" were almost invariably interpreted by the executive departments to mean that "records (or most records) may be withheld from public inspection in the exercise of official discretion."[44]

But Cross argued that the language of the statute does not require, nor is there any evidence that Congress intended, such a broad interpretation or "such sweeping refusals of access to official information."[45] Indeed, he noted, where Congress has intended to legislate withholding of information, it has done so with clear and specific language. The housekeeping statute has, he concluded, "been tortured into a barrier against the public interest."[46]

How should this torture be relieved? On May 8, 1956, the subcommittee convened another two days of hearings. Present this time was a panel of lawyers. One was Harold Cross. Each submitted a lengthy statement analyzing the statutes most often cited as bases for withholding (chiefly 5 U.S.C.A. 22 and 5 U.S.C.A. 1002) and the doctrine of executive privilege. Each concluded that the flow of information was being improperly and unconstitutionally abridged. But only one of the seven proposed a specific legislative remedy. Congress should, Cross said, "prohibit regulations which in terms purport or effect deny access by Congress, public, and press to public records except as such denial is authorized by law."[47]

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That should, and later did, solve the problem of the Housekeeping Act. Cross already knew, though, that this was a small part of the total problem. He had a solution for the bigger one, too. The Congress should, he wrote, define the term "public records," declare that the public has a right to examine them "except as otherwise provided by law" and provide a mechanism for enforcement.[48]

That would take a little more doing.

Not only was the creation of a fullblown "public records law" a more ambitious undertaking than the relatively simple amending of a minor existing statute, but there already was in the federal code a "public information" law. Section Three of the Administrative Procedure Act of 1946 (5 U.S.C.A. 1002) would have to be rewritten. Fierce opposition could be expected.[49]

The act provided that, except for matters "requiring secrecy in the public interest" or involving solely the internal management of an agency, all rules, orders, opinions, statements of policy and operating guidelines were "public records." These records were open to "persons properly and directly concerned except information held confidential for good cause found."[50]

The Senate's declaration of legislative intent emphasized that the records covered "are public property which the general public, rather than a few specialists or lobbyists, is entitled to know. . . ."[51]

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Five years after its adoption, something else was equally clear. The American Law Section of the Library of Congress concluded, "Several qualifications in that Act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose."[52]

Those qualifications, Cross noted, included the two exemptions in the introductory clause, a lack of definition of the term "official records," the limitation of access to "persons properly and directly concerned," and the final, catch-all phrase "held confidential for good cause found." He told Moss' subcommittee, "To whatever extent, if at all, this act was intended as a 'public records act' it is an abject failure."[53]

As usual, he had a remedy to propose. Congress should, he said "repeal all the exceptions or qualifications stated." Distinctions between the "public" and "persons properly and directly concerned" should be abolished. The statute should simply "make all public records and proceedings subject to public inspection and attendance except as otherwise provided by law."[54]

The record of those first hearings amply supports Cross' assessment of the Administrative Procedure Act as a public records law. In its answer to the subcommittee questionnaire, for example, the Department of Agriculture asserted that the application of the qualifications in 5 U.S.C.A. 1002 would be a "matter of administrative discretion" and that "Congress appears to have recognized that agencies may withhold informa-

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tion where authority for such withholding is not specifically conferred by statute."[55] The Treasury Department also listed both 5 U.S.C.A. 22 and 5 U.S.C.A. 1002 as authorities for withholding.[56] The Civil Service Commission did the same.[57]

The removal of these barriers would occupy most of the energies of the freedom of information movement for nearly 20 years.

Although the movement's leaders in the press have generally, and justifiably, credited John Moss, his subcommittee and its successor with being their leading legislative allies, the drive for openness was joined early by another legislator who lent it greater prestige if lesser energy. This was Thomas C. Hennings Jr., senior senator from Missouri. From 1956 until his death in 1960, he was the chief Senate sponsor and spokesman for freedom of information. Even after his death, the staff he bequeathed his successor was largely responsible for carrying on the Senate side of the legislative struggle.

In 1955, when the Constitutional Rights Subcommittee of the Committee on the Judiciary was created at his request, Hennings already enjoyed a national reputation as a leading member of the liberal bloc in the Senate.

Henning's papers, on file in the University of Missouri's Western Historical Manuscripts Collection, disclose, for example, a deep involvement in early efforts to pass a civil rights bill and continuing concerns about freedom of expression.

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The latter led to the creation of the subcommittee, whose chief early activity was an investigation of the conduct and abuses of the federal security program.[58] An interest in freedom of information was a natural development. Equally naturally, though, neither the senator nor his staff devoted the almost single-minded attention to information issues that characterized Moss and his staff during this period.

The Senate side of the freedom of information movement got started later than the House's. In February 1956, after Moss already had completed two sets of hearings, a Hennings aide noted that the Senate subcommittee's proposed investigation of information suppression "has not passed the stage of being an idea." He added:

> I suspect its date of birth was over the weekend when the staff director (of the subcommittee) was informed that Senator Hennings considered this to be an area in which the Subcommittee might legitimately interest itself. I say this because no planning or background work has been done at all.[59]

The background work began forthwith. Another memorandum on the first results of that work sheds some light on the practical political considerations involved in congressional pursuit of even lofty goals.

Subcommittee staff director Benjamin Ginsburg observed that "sensational results" seemed unlikely, adding, "It will be very difficult even after months of preparation to do something better than the Moss subcommittee is doing."[60] Ginsburg then proposed that the Hennings subcommittee "make a deal" with Moss to divide up the areas to be explored. He

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recalled that Moss had asked Hennings' help with the security problems of some consituents "on which so far we have done nothing." Perhaps action on those requests would incline Moss to share the background material his staff had already compiled.[61]

Should such a "quid pro quo" arrangement prove unattractive, Ginsburg was ready with another suggestion to help get Hennings into the field pre-empted by Moss. The Senate subcommittee could seek to win the favor of the leading journalists whose support Moss enjoyed. Hennings could, his aide wrote, introduce a bill "meeting some of the demands of the newspaper people for freedom of information in certain fields. . .." The bill would create a commission "composed largely of newspapermen" with the authority to review and declassify documents no longer required by security interests to be secret.[62]

No such bill was introduced, and there is no evidence that any deal was struck with the Moss subcommittee. Indeed, the recipient of Ginsburg's memorandum responded sharply that, as a duly constituted subcommittee of the U.S. Senate, the Hennings subcommittee didn't have to make deals with anybody in order to pursue legitimate legislative goals.[63]

It is also true, however, that when the Hennings subcommittee finally swung into action with a survey and hearings in the spring of 1957, it chose an area--denial of information by the Executive to congressional committees--the Moss subcommittee had covered only in passing.

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And, while there is no reason to doubt the sincerity of Hennings' interest in freedom of information, there is some reason to believe that the subcommittee's actions were aimed at least partly at achieving maximum favorable publicity. When, for example, Moss prepared to introduce the amendment to 5 U.S.C.A. 22 early in 1957, the staff director of the Senate subcommittee proposed that Hennings sponsor the companion bill with the suggestion that "you would receive good press and editorial attention" by so doing. The bill, he added, "is in accordance with your expressed interest in the people's right to know what's going on in their Government. . .." He quoted another staff member as observing that ASNE members "are keenly interested. . .and therefore should naturally comment favorably on your interest. . .." The memorandum concluded that, if Moss were informed promptly of Hennings' sponsorship, "his press release will refer proudly" to it.[64]

In other words, the public interest was good politics, too. Just how realistic this assessment was is reflected in a letter written six months later by one of the press' leading activists to another. The freedom of information movement had reached a "plateau," wrote James Pope, a plateau "supported at the moment by twin peaks: Moss and Hennings."[65]

"We still have to argue and yell and shoot and snarl; the work of an ASNE committee will never end," he wrote. But he urged more support of "the really atomic allies we've acquired." In some ways, "what the Moss Committee has done in

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a year and a half is. . .more tangibly important than what we could do in a decade." Somehow, he added, journalists must be made to realize "what a weak job most of us are doing" in explaining and supporting freedom of information. Journalists should realize, too, how important Moss and Hennings were to their cause. "We should be giving them all the awards we can lay hands on, instead of taking them ourselves."[66]

In 1957, the first federal law intended to advance freedom of information was still a year away, but journalists were crediting the Moss Committee with a great many achievements along the way. One, of course, was the publicity generated by the hearings of 1955-56. There were small but concrete gains for openness, too.

The Civil Service Commission and the Interstate Commerce Commission, for example, had agreed to stop using 5 U.S.C.A. 22 as a basis for withholding. The Bureau of Customs had decided to make public penalties and compromises in import violation cases. The Treasury Department had supported legislation making public the applications for tax-exempt status of nonprofit groups. The Defense Department had withdrawn its "constructive contribution" requirement for press releases. The Office of Strategic Information had been abolished. And there were more.[67]

In all of these gains, the journalists credited the Moss Committee with "a significant part."[68]

Meanwhile, the yelling and shooting and snarling by

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newspapermen continued.

The ASNE's Freedom of Information Committee issued a 15-point platform in April 1956. It advocated amendment of both 5 U.S.C.A. 22 and 1002; the opening of more congressional committee meetings to the public; dropping the Defense Department's "constructive contribution" directive; support by both the judiciary and the bar of greater public access to judicial proceedings; presidential action to limit the use of the May 17, 1954, letter for concealment of information from Congress and the public; modification of Executive Order 10501 to provide a continuous review of security classifications; adoption of pledges of openness in the platforms of both political parties.[69]

The Associated Press Managing Editors organization (APME), although conceding that its role in the freedom of information movement was "more of a guerrilla action than a full-fledged war,"[70] strongly if fruitlessly urged the rescinding of Executive Order 10501 in favor of a narrower, less restrictive, order.[71]

Sigma Delta Chi, in convention in 1957, resolved that it "deplores and condemns the general secrecy so prevalent throughout Federal Government today. . . ."[72]

That convention also endorsed Moss' and Hennings' bills to amend both 5 U.S.C.A. 22 and 1002.[73]

Journalists, however, directed much of their yelling and snarling over freedom of information matters at each other. J. Russell Wiggins, who was involved in the front ranks of the

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movement for years, recalled that most disputes were conducted privately and not reflected in any written records. "There were a lot of conversations over drinks and on the convention floor. This by no means had the unanimous support of newspapers. Many papers never caved in until the bitter end."

Wiggins conceded that the merits were not all on one side. "Many argued that legislation implies more control by Congress than it should have. There's an argument to be made."

Other editors, though, just weren't excited about the issue one way or the other. "The New York Times was never enthusiastic about it. I had a lot of good friends who thought this was all a waste of time."[74]

Not all the disagreements were private. Wiggins himself was moved to wrath in writing when David Lawrence, a conservative leader of the profession and publisher of U.S. News & World Report, questioned whether ASNE officers should claim to speak for the organization when testifying before the Moss Committee. James Pope suggested that Wiggins write Lawrence a mollifying note, explaining that he had spoken only for himself. Wiggins angrily refused, adding, "I think the members of the ASNE had better make up their minds whether they are really for freedom of information or against it. If they are not for it, what in hell do they have a committee for?"[75]

Lawrence was not the only prominent journalist with reservations. Lester Markel, Sunday editor of the New York Times, wrote that he suspected the initials ASNE "really stand

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for 'American Society for Nonrestrictions Enywhere'." Markel advanced some qualifications to what he perceived as this unduly libertarian view. First, he argued, "The press must be responsible as well as free. . .." Second, he saw a need for restrictions on information at times--"and the present might well be one of those times." Finally, he insisted that "the be-all and end-all" of government was not the providing of "scoops for journalists in general and columnists in particular."[76]

Even a president of ASNE thought some of his colleagues were going, or trying to go, too far. Jenkin Lloyd Jones, editor of the Tulsa Tribune, told an audience at the University of Kansas that he disagreed with those of his colleagues who had "leaped to the conclusion" that all public affairs other than those concerned with national defense should be conducted in public. "For it is only behind closed doors that most politicians--yea, even statesmen--honestly express their views and try to get at the meat of the question. . .."[77]

One of the most thoughtful challenges to the prevailing assumptions of the freedom of information movement came from the same journalist-historian who chronicled the abuses of Senator Joseph McCarthy. Richard Rovere, after attending the opening of Hennings' subcommittee hearings on secrecy and science (the Moss subcommittee had held similar hearings in March 1956), wrote that there was little evidence to support Wiggins' claim of a "raging impulse to secrecy" in government affairs.

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Rovere questioned the "article of faith" that "something in contemporary life and politics breeds in public officials a passion for secrecy and concealment that was unknown when democracy was younger and purer."[78] He argued that, to the contrary, it was "at least possible" that the government was hiding more information because it had more than ever before that needed to be hidden in the interests of national security. He noted that science and the military were the two chief areas of secrecy, and pointed out that governmental involvement in both was a recent phenomenon--as was the secrecy being complained of.[79] Rovere challenged as "astounding" Harold Cross' assertion before the Moss Committee that the people have a constitutional right to information about their government. Though Cross had said then and elsewhere that the right arises "from the basic nature of our Government and of the Constitution and from the provisions of the First, Fifth, Ninth and Fourteenth Amendments,"[80] Rovere argued that "it could rest upon nothing but the First Amendment, which provides only that Congress may pass no laws abridging freedom of the press." Rovere also noted that the access of American reporters to government officials and information far exceeds that afforded journalists even in other democratic nations. He wrote that "a good deal of evidence" could be produced that secrecy was on the decline rather than on the increase. But he didn't produce any.

The questioners of the freedom of information movement were a tiny minority among journalists. The movement's

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advocates, who far outnumbered their critics, worried more about the vast number of those who just didn't care.

Mason Walsh, chairman of the Associated Press Managing Editors' committee, complained, for instance, that "maintaining a standing army to battle for freedom of information is almost impossible." Editors will take up arms for individual skirmishes, he admitted, but they are quick to return to "peaceful pursuits." A few remain vigilant, he concluded, but "the rank and file fight fitfully, and some seem to be permanent pacifists where FOI is concerned."[81]

Despite it all--despite the pacifists and dissenters in their ranks, despite the strong opposition of the Executive--the battlers for freedom of information scored their first concrete legislative victory at the federal level in 1958, with the amendment of 5 U.S.C.A. 22, the Housekeeping Act.

Unlike the process that produced it, the amendment was simplicity itself. "This section does not authorize withholding information from the public or limiting the availability of records to the public," it read.[82] It was adopted without a dissenting vote in either house.

First, though, it had to overcome the opposition of all 10 Cabinet departments. Attorney General William P. Rogers, representing the Executive, urged its defeat on seemingly contradictory grounds. On the one hand he argued that the existing statute was "a legislative expression and recognition of the Executive privilege."[83] Executive privilege could not be restricted by legislation, so the amendment would be null.

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But he also argued that the House and Senate bills "can serve only to. . .confuse the Constitutional lines of demarcation and responsibility among the three separate branches."[84]

Moreover, Rogers said, "it could have a very mischievous effect by confusing and clouding those Executive privileges and responsibilities."[85] He concluded that "in the interest of efficient and effective government," some Executive branch records must be kept secret. The decision about which to withhold and which to release would be made by the president "in his sound discretion."[86]

As they would when another freedom of information bill was threatened by the recalcitrance of another administration, journalists came to the aid of their legislative allies.

James Pope asked Clark Mollenhoff's boss to assign him "to write you a strong story on 5 U.S.C. 22 and pass it around to other papers that are interested for simultaneous release."

Pope added, "I'd like to see Clark, from his experience with this thing, be a little bit subjective and not pull his punches."[87]

The president of ASNE circulated a memorandum to his board cataloging the bills' support from ASNE, ANPA, the Southern Newspaper Publishers Association, and reporting that he had written to state and regional press associations to enlist their support.[88]

Herbert Brucker informed the members of ASNE's committee

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that Hennings' office had called to say the bill was nearing a Senate vote and "it might help if every Senator heard from back home in support of S. 921." Brucker asked the committee members to "drop a note to, wire, or otherwise buttonhole your own Senators."[89]

The House passed the amendment on April 16; the Senate followed on July 21. President Eisenhower signed it into law on August 12.

So, more than ten years after its beginning, the freedom of information movement had produced the first federal statute specifically defending a public right to know. Its impact was hardly perceptible.

Within a year, the Moss Committee was forced to report that every department that previously had cited the House-keeping Act as authority to withhold now reported that the 1958 amendment "did not limit executive power to restrict information."[90] Senator Hennings' staff even found that five agencies were continuing to cite the statute as a basis for withholding despite the specific directive by Congress not to do so.[91]

Not even the amendment's strongest proponents were overly enthusiastic. Hennings termed it a "step in the right direction."[92] Moss, even more modestly, referred to it as merely "a first step."[93] James Pope was moved to admonish the editor of Editor & Publisher that "an unwarranted magnification of what was expected. . .has made it appear that this historic enactment was a failure." Pope pointed out that none of its

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advocates had claimed, as the editor did, that the amendment appeared "to be an admirable cureall." What made the amendment "historic," Pope wrote, was obvious: "Congress has gone into action."[94]

From the vantage point of two decades later, Rep. Fascell agreed. "We were navigating uncharted waters. I don't think anybody had any illusions about that statute. Our whole point there was to turn the thrust around. We knew the rest would be a long, arduous process."[95]

That process had already begun in 1958. One measure of just how long and arduous it would be was provided by the president in his statement upon the signing of the amendment:

> In its consideration of this legislation the Congress has recognized that the decision-making and investigative processes must be protected. It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an executive department to keep appropriate information or papers confidential in the public interest. This power in the executive branch is inherent under the Constitution.[96]

The barrier of executive privilege raised again in the statement would remain the most difficult for advocates of access to surmount.

The assault on a more vulnerable barrier, which itself would require 15 years, had been launched with the filing of identical bills by Moss and Hennings. These bills, which were refiled in each of the next several congresses, had been drafted with the cooperation of the American Bar Association. The bar was pursuing a thorough redrafting of the Administrative Procedures Act of which 5 U.S.C.A. 1002 was only one

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section.[97] At first, the freedom of information amendment was included as part of the total rewrite. Later, as it was analyzed and toughened, the information section came to be treated separately, with the bar's endorsement.

As introduced (and much later it would seem ironic that the introduction was by Senator Lyndon Johnson, at the request of the ailing Hennings), this first version of a public records law did away with the vague qualifications and grants of administrative discretion that had made the 1946 act a haven for withholders. It defined "public records" as "all records, files, papers and documents submitted to and received by the agency" as well as "every individual vote and official act." It provided a sanction for unlawful withholding by making unenforceable any rule, order or action taken in violation of the access requirements. It provided only three exemptions: material made secret by law, material required to be secret to protect national security, or material that would invade in a "clearly unwarranted" way someone's personal privacy.[98]

Moss and Hennings set out to generate press support. Hennings, for example, mailed an "open letter to all newspaper and magazine publishers and editors" in which, after recalling their "invaluable support" in passage of the 1958 amendment, he urged the same support for the new bill.[99] He got it.

Sigma Delta Chi provided an immediate endorsement, noting that administration opposition demanded "the full weight of

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the SDX, other newspaper organizations, and various bar organizations. . .to push this legislation through the Congress."[100]

Brucker of ASNE wrote a Moss Committee staff member asking for a variety of documents to be used "as the time comes to get going on 5 USC 1002."[101]

While the newspapermen endorsed the bills uncritically, others had reservations. One who did was Harold Cross. Cross was bothered, first, by the addition of two exceptions to the single "except as specifically exempt from disclosure by statute" exception he had advocated before the Moss Committee and elsewhere. He wrote Hennings that he thought the only exceptions "should be those sanctioned by law--the Constitution, acts of Congress and court decisions. . .." He also thought, he added, that the final decision on withholding should be the "subject of judicial rather than official determination."[102] He feared that the national security exemption would extend the power to classify materials to all Executive agencies, since all were covered by the bill. And the exemption protecting privacy, while having "laudable aspects," seemed to Cross to set up "a wide area of secrecy" previously unsanctioned.[103] Cross urged that the words "national security" be changed to "national defense," pointing out that even the Executive had adopted the narrower phrase when Executive Order 10501 replaced Truman's order. "The term 'security' is susceptible of a very broad interpretation," he warned.[104]

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Finally, he wrote, the law needed some teeth. "There should be included a specific and affirmative provision for judicial review of administrative action withholding information or records."[105]

Harold Cross died in 1959, but his cause did not. Jacob Scher, who ranks second only to Cross in his contribution to the legal arsenal of the freedom of information movement, took on a temporary assignment as counsel to the Moss Committee and, with it, the task of strengthening the still-pending legislation. At Scher's hands, the draft law gained teeth and breadth.

Scher wrote in a provision that any person denied inspection of a public record could sue in any federal district court, seeking a writ of mandamus or an injunction compelling inspection.[106] And he tightened the exemptions. Following Cross' advice, "security" became "defense," with a proviso that the exemption must be required by statute or Executive order. The "unwarranted invasion of personal privacy" exemption was untouched, but a clause was added to the section reading, "nor shall this subsection be authority to withhold information from Congress."[107]

Scher admitted the possibility that the judge in any case brought under the bill might fall victim to "fuzzy thinking" and construe the exemptions too broadly, but he insisted that the new draft for the first time provided for an enforceable legal right to access and provided the means of enforcement.

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The change from national "security" to "defense" followed exactly Cross' reasoning, he said. The third exemption, by contrast, still "gets in a great deal of difficulty," Scher admitted. The difficulty was the unresolved problem of balancing the legitimate right of privacy against the real possibility that the provision could be used to hide wrongdoing. He noted that V.M. Newton had advocated addition of the qualifying "except when matters of public policy demand disclosure." But, he asked, what is 'public policy'?[108]

Scher made clear that the revised draft's intent was to impose a limit as well on the abuse of executive privilege. The addition of the final clause, he said, was intended to emphasize that "the Congress has the right to anything it wants from the executive department, except that which the President himself. . .wants to withhold on his personal order."[109] That represented Scher's idea of the only legitimate area of executive privilege.

After explaining his effort, Scher thought it necessary, perhaps since he was addressing a conference of freedom of information advocates, to defend the existence of limitations and exemptions. His defense was clearly a rebuke to those who held what Scher and others involved in the legislative process regarded as the "extreme position." The "general principle of access as a constitutional right" remains "inchoate" without specific legislation, he said. And specific legislation cannot merely codify the general principle, " as some Sigma Delta Chi people say," Scher argued. Exemptions

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were essential.[110]

To officials of the Executive, even the carefully circumscribed access sought by the original bill seemed extreme. In response to a questionnaire from the Hennings subcommittee, at least 20 departments and agencies had cited 5 U.S.C.A. 1002 as grounds for withholding.[111] None, of course, wanted to give it up. There was also the concern, stirred first by the 1958 amendment, about encroachment on executive privilege. As the government's lawyer, the Department of Justice argued the opposition case. The preservation of "any orderly system of government" requires the secrecy of such documents as "interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers" and the like, the argument ran.[112]

"This may be quite frustrating to the outsider at times," the attorney general conceded. However, he argued, "government could not function" if anyone could demand to know every piece of advice that went into every decision. Admitting that "from time to time" information might have been improperly withheld, he insisted nonetheless that "the correction of any such errors in judgment. . .does not lie in a purported invasion by the Legislative Branch into the performance of the functions of the Executive Branch" as the bill would require.[113]

Then the attorney general concluded with a friendly warning. If Congress should create a "right to know" the Executive's business, "it must expect that a similar slogan. . .

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will be raised with respect to . . . every detail of the transaction of its business." Logic would impel a similar legislative outcome.[114]

Although it perhaps overstated the force of logic in determining congressional decisions, the warning was to prove well-founded.

Other warnings about the long and arduous nature of the struggle were also, as the 1950s ended, proving equally well-founded. The 1960s brought a change in tone, if not in substance.

Looking back, James Pope wrote, "This was one of the great, really important contributions to American freedom made by Dwight Eisenhower--by being in office he provided a ready and uninhibited battleground for John Moss."[115]

The inauguration in 1961 of a Democratic administration created some inhibitions, but it also signalled some gains.

Robert O. Blanchard, probably the closest and most critical student of the Moss Committee, has argued that the subcommittee became less aggressive and more accommodating toward the Executive once that branch was headed by a fellow Democrat. He has argued also that the press groups most active in freedom of information became too dependent on Moss for leadership and were not sufficiently demanding of him.[116] Blanchard found support for his thesis in the decline in the number of subcommittee hearings and public statements, and in the weaknesses of the Freedom of Information Act of 1966.

Not surprisingly, both Moss and the press groups have

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responded strongly to the criticisms.[117] The gist of the response, stripped of angry rhetoric, was that altered circumstances required changes in approach. The Kennedy administration was more open, less given to reliance on executive privilege than the Eisenhower administration, the responses said. On the other hand, the Kennedy style ran more to attempting to manage news, and Moss addressed himself to that problem, in hearings and otherwise. Moss and his defenders asserted, too, that the 1960s brought no let-up in the committee's "watchdog" activities of combatting withholding on a case-by-case basis.

It seems likely that in this, as in many other disputes, truth lies somewhere in between, with differences in perspective and in expectation accounting for many of the contradictory observations. Certainly the freedom of information movement made less noise in the 1960s than in the 1950s. Part, at least, of that is attributable to the fact that, while the incoming leaders of the press forces may have been equally zealous, they have lacked the vitriol of Newton and the eloquence of Pope and Wiggins. There is no question but that the press has played a less dominant role after the movement's first decade. But that can be interpreted either as a decline in activism or as a fulfillment of the long-expressed philosophy of the journalists that they were merely acting as surrogates for the people, who now have gained additional spokesmen. And it is beyond question that the law passed in 1966 was seriously flawed. Those flaws and some

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possible explanations will be explored in the next chapter.

When the Kennedy administration had been in office only about a month, Moss in an interview pointed out that several forces should operate to the benefit of openness in the new regime. For the first time, freedom of information had been something of a campaign issue, with the Democratic candidates for president and vice president pledging greater openness. He also observed that, in contrast to its beginnings, the issue "is developing a bit of sex appeal." Third,"the press is far more aware" than ever before of freedom of information. And not least, the press, largely hostile to his candidacy, "is going to be even more critical of the Kennedy Administration than it was of the Eisenhower administration."[118]

Two months later, Moss found himself in a bind. The president he had campaigned for had aroused the ire of the press that was Moss' special constituency with a call for a kind of voluntary censorship of news that might be of aid to an adversary. Moss had to say something. So he promised to investigate Kennedy's assertion that information damaging to national security had been published. But he warned that "we must not use the excuse of cold war dangers to weaken the critical self-appraisal which is a basic ingredient in our democratic government."[119]

When new Secretary of Defense Robert McNamara ordered an investigation of "leaks," Moss wrote him a letter cautioning of the "grave danger" that such action might result in "excessive restriction" and censorship. "I hope you will not

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repeat the mistakes of previous administrations which, in their zeal to protect possible critical information, often violated the people's right to know the facts of government."[120]

Yet a month later, Moss made a speech in which he said secrecy was decreasing in Washington and praised Press Secretary Pierre Salinger for "the new administration's concern with freedom of information."[121]

A few months after that, Sigma Delta Chi, an old ally, reported that "it was a gentle Moss who chided the Democratic bureaucrats for their secrecy instead of the old fire-eating Moss of 1955-1960. . . ."[122]

Still, there was some chiding. In a defense of his Kennedy-era efforts, Moss noted in 1962 that, of 83 complaints his committee handled in the first 14 months of the Kennedy administration, 33 were initiated by the subcommittee itself or by its staff. By comparison, of the 29 complaints in the last six months of the Eisenhower administration, only four were subcomittee-initiated. The comparison, he said, "proves that the issue of whether or not the government will take the public into its confidence is not a partisan issue. Since the Kennedy Administration took office, the Subcommittee has been doing more work to remove restrictions on government information--and with greater success."[123]

Moss had some advice for the press, too. Refusals of information, he said, should not be weighed according to the party of the withholder, but according to the legitimacy of the withholding. "When a good, strong majority of the nation's

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press exercise that kind of responsibility, freedom of information will become synonymous with freedom of the press."[124]

Internal memoranda from the Moss Committee shed some light on the problems of a Democratic watchdog watching a Democratic administration. The relationship was not always an adversary one. In October 1961, for example, Sam Archibald of the subcommittee staff offered two pages of public relations advice to a presidential assistant on how to take advantage of the administration's "great accomplishments" in freedom of information.[125]

But cooperation wasn't always easy. An unsigned memorandum to Archibald ticks offeight "failures" of the administration to cooperate and eight "subcommittee efforts" to be cooperative. Among the "failures" were listed Kennedy's call for press restraint, "about which the less said the better;" the president's "failure yet for responsive reply" to a month-old Moss letter about access problems at the White House; and the White House announcement of an agreement to release information Moss had been seeking before Moss himself had been told of the decision. The latter pill was all the more bitter, the memorandum complained, because Moss' letters to the Executive had been checked in advance with the recipient and not released to the press "for several days as courtesy." The subcommittee, by contrast, had helped the White House prepare its reply to an ASNE query about information policies, "which reply got lots of good mileage." And departments had been furnished advance copies of letters "on numerous

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occasions"--including the basic letter with which Moss began subcommittee activities in 1961.[126]

Rocky relations between subcommittee and White House were the subject of more than one letter. For example, Archibald wrote the same Salinger whom Moss had praised a month earlier to complain bitterly of the failure to answer Moss' February letter on information problems in the White House. "Some serious points were set forth in the letter. They deserve serious answers."[127] Archibald noted rather plaintively that "we have been trying awfully hard to cooperate" and added, "I hope you will instruct your staff to show us the same courtesy." In another letter, Archibald instructed Salinger in the subcommittee's necessarily watchful attitude toward the administration, adding that he found its information policies "much, much better" than its predecessor's. "If I don't think so at any time, I'll let you know. That's my responsibility. What you do about it is your responsibility."[128]

To an old friend, Archibald summed up the gains and the strains of two years under Kennedy. "I get damn tired," he wrote, of complaints that the subcommittee was soft on fellow Democrats. "At the same time, Moss and I catch hell from some administration officials and from powerful Democrats in Congress for being too rough on the administration." The subcommittee had been more effective, though less publicized, since 1961, he insisted. The difference was that now the top policy-makers were both accessible and amenable to suggestion. "Under the Eisenhower administration, the only way we could

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reach the policy-makers was through the press. . .. Now, there are fewer stories, but there are more restrictions removed."[129]

If there weren't as many public hearings as in the Eisenhower days, there were some. In mid-1962, the subcommittee held hearings on U.S. information policy in Vietnam. In 1963, the subcommittee held hearings on the withholding of information about Soviet space acitivities. In 1966, the ASNE report found the Moss Committee active "on all major fronts: the White House, the Pentagon, Vietnam, the Dominican Republic, and many federal agencies. . .."[130]

The record, then, of 1961-65 is a mixed one. "Pick and shovel work," as Moss called it, had succeeded the fiery assaults of earlier years. The political realities of required cooperation were mixed with the policy gains of added influence.

The 1965 report of ASNE's freedom of information committee even has a weary air. "It has not been an encouraging year for Freedom of Information," it began. There followed a status report on federal legislation--bogged down; an update on information at the Defense Department--gloomy; and a distinctly unhopeful "expression of hope" that more editors would become more active in the struggle.[132]

The author could not have known that the movement was about to come back to life.

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FOOTNOTES

[1]The role of the press as lobbyist is so unusual that the major studies of pressure groups and lobbying do not discuss the press as such a participant in the political process. The activities described in this study, however, fit the patterns described for other groups in other studies. See, as a recent and comprehensive work, Carol Greenwald, Group Power: Lobbying and Public Policy (New York: Praeger Publishers, 1977). The classic in the field is David Truman, The Governmental Process: Political Interests and Public Opinion (New York: Knopf, 1971).

[2]John Moss, interview with the author, June 1, 1977.

[3]Ibid.

[4]Dante Fascell, interview with the author, June 2, 1977.

[5]James Pope, interview with the author, February 18, 1978.

[6]Ibid.

[7]Pope letter to the author, January 30, 1978.

[8]J. Russell Wiggins, Interview with the author, May 31, 1977.

[9]Robert O. Blanchard, dissertation, Syracuse University, 1966, pp. 33-40. This is the most intimate study of the internal workings of the Moss Committee. Its data were acquired mainly while its author served as a member of the subcommittee staff as an American Political Science Association fellow in 1965. A copy of the dissertation was loaned to the author by Blanchard.

[10]Samuel Archibald, quoted in Blanchard, p. 36.

[11]Wiggins, Freedom or Secrecy, p. 103.

[12]Quoted in Blanchard, p. 43.

[13]Quoted in Wiggins, p. 109.

[14]Ibid.

[15]Editor & Publisher, June 25, 1955, p. 5.

[16]Pope letter.

[17]"Hearings before a Subcommittee of the House Committee on Government Operations," 84th Congress, First Session, 1956, p. 2.

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[18]Pope letter to Moss, in John E. Moss Papers, Archives, California State University, Sacramento. "Program" file.

[19]Ibid.

[20]Moss papers, "Hearings--Plans" file.

[21]Ibid.

[22]Wiggins letter to Cranston Williams, September 22, 1955. In ASNE files.

[23]Ibid.

[24]Cross letter to Wiggins, September 16, 1955. In ASNE files.

[25]"Hearings," p. 5.

[26]Ibid.

[27]Ibid., p. 6.

[28]Ibid.

[29]Ibid.

[30]Ibid.

[31]Ibid., pp. 7-35.

[32]Ibid., p. 38.

[33]Ibid., pp. 38-39.

[34]Ibid., p. 41.

[35]Wiggins interview.

[36]"Hearings," p. 87.

[37]Ibid., p. 90.

[38]Ibid., pp. 95.

[39]Ibid., pp. 159-192.

[40]Abe Goff letter to Moss, Exhibit 11, "Hearings," Ibid., p. 409.

[41]"Hearings," Ibid., p. 303.

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[42]Pope, "The Cult of Secrecy," Nieman Reports, October 1951, p. 9. Quoted in Cross, The People's Right to Know, p. 214.

[43]5 U.S.C.A. 22. Quoted in Cross, Ibid.

[44]Cross, Ibid., p. 215. Also see, for example, memorandum dated January 13, 1956, from Civil Service Commission to Moss Committee, Exhibit 4, "Hearings," pp. 398-403.

[45]Cross, p. 221.

[46]Ibid., p. 222.

[47]Statement of Harold L. Cross to Moss Committee, May 8, 1956, in "Hearings," p. 437.

[48]Ibid.

[49]For a detailed treatment of the background and legislative history of this rewrite, see Blanchard dissertation, and Blanchard, "A History of the Federal Records Law," FOI Center Report #189, November, 1967.

[50]5 U.S.C.A. 1002, Chap. 324, 60 Stat. 238.

[51]"Administrative Procedure Act, Legislative History," Senate, 79th Congress, Second Session, 1946, p. 198.

[52]Letter of American Law Section, Library of Congress, to Senator Francis Case, November 8, 1951. Quoted in Cross, p. 228.

[53]Cross statement, "Hearings," p. 446.

[54]Ibid., p. 448.

[55]Exhibit 15, "Hearings," pp. 420-421.

[56]"Hearings," Ibid., pp. 204-205.

[57]Ibid., p. 104.

[58]Thomas C. Hennings Jr. Collection 1934-1960, Western Historical Manuscripts Collection, University of Missouri-Columbia.

[59]Thomas Guilfoil memorandum, February 13, 1956, Hennings papers.

[60]Benjamin Ginsburg memorandum to Guilfoil, March 12, 1956, Hennings papers.

[61]Ibid.

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[62]Ibid.

[63]Guilfoil memorandum to Ginsburg, March 14, 1956, Hennings papers.

[64]Charles Slayman memorandum to Hennings, January 8, 1957, Hennings papers.

[65]Pope letter to Herbert Brucker, June 13, 1967, in uncatalogued Brucker papers, FOI Center.

[66]Ibid.

[67]Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1956 and 1957.

[68]1957 "Report," Ibid., p. 6.

[69]Press release, April 20, 1956, in ASNE files.

[70]Committee on Freedom of Information, APME, August 21, 1956, "Report," p. 1. FOI Center Files.

[71]Editor & Publisher, November 23, 1957, p. 11.

[72]1957 "Report," p. 19.

[73]Ibid.

[74]Wiggins interview.

[75]Wiggins letter to Pope, August 14, 1956, ASNE files.

[76]Lester Markel, "Are We Forgetting Something?", ASNE Bulletin, March 1956, p. 7.

[77]Time, February 24, 1958, p. 47.

[78]Richard Rovere, "Letter from Washington," The New Yorker, May 16, 1959, p. 92.

[79]Ibid.

[80]Cross statement, "Hearings," p. 68.

[81]"APME Report."

[82]S. 921, 85th Congress, First Session. HR 2767 was the identical bill introduced by Moss.

[83]William P. Rogers letter to Hennings, March 13, 1958, FOI Center files.

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[84]Ibid., p. 3.

[85]Ibid., p. 4.

[86]Ibid., p. 6.

[87]Pope letter to Bill Steven, August 23, 1957, Brucker papers.

[88]Virginius Dabney memorandum, January 31, 1958, Brucker papers.

[89]Brucker memorandum, June 13, 1958, Brucker papers.

[90]"Availability of Information from Federal Departments and Agencies," Report of House Subcommittee on Government Information, House Report 1137, September 3, 1959.

[91]M. MacNaughton memorandum to Charles Slayman, February 12, 1959, p. 4. Hennings papers.

[92]Press release, January 11, 1957. Hennings papers.

[93]Congressional Record House, April 16, 1958, p. 5887.

[94]Pope letter to Robert U. Brown, December 9, 1958. Brucker papers.

[95]Fascell interview.

[96]Statement by the president, August 12, 1958. Quoted in "Freedom of Information Legislation during the 85th Congress," House Committee on Government Operations Committee Print, October 30, 1958.

[97]For detailed analysis of the bar's efforts, see Blanchard dissertation.

[98]S. 2148. Hennings papers.

[99]Hennings, "Open Letter. . .," October 27, 1958, FOI Center Files.

[100]Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1958, p. 8.

[101]Brucker letter to John Mitchell, June 4, 1958. Moss papers, "Misc. corres." file.

[102]Cross letter to Hennings, July 20, 1957. Brucker papers.

[103]Ibid.

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[104]Cross letter to Hennings, April 22, 1958. Brucker papers.

[105]Ibid.

[106]"Draft Public Records Law," FOI Center Publication #45, December 1960.

[107]Ibid., pp. 1-2.

[108]Ibid., pp 2-3.

[109]Ibid., pp. 3-4.

[110]Ibid., p. 4.

[111]MacNaughton memorandum, p. 4.

[112]Lawrence Walsh, acting attorney general, letter to Hennings, May 9, 1958, p. 10. FOI Center files.

[113]Ibid., p. 11.

[114]Ibid., p. 12.

[115]Pope letter to Robert Blanchard, September 12, 1966, furnished to the author by Blanchard.

[116]See especially Blanchard, "A Watchdog in Decline," Columbia Journalism Review, Summer, 1966; and Blanchard, "New Watchdog in Congress," The Quill, August, 1971.

[117]See, for example, Moss letter in Columbia Journalism Review, Fall 1966; Noel Greenwood, Wendell Phillippi and Samuel Archibald letters in same issue; and "Unwarranted Attack on the Moss Committee," 1966 Report of the Freedom of Information Committee, ASNE.

[118]Broadcasting, February 13, 1961, p. 50.

[119]Moss press release, April 29, 1961, in FOI Center files.

[120]Moss letter to Robert McNamara, March 7, 1961. FOI Center files.

[121]Quoted in Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1961, p. 1.

[122]Ibid.

[123]Moss Speech to New Mexico Press Association, June 29, 1962. FOI Center files.

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[124]Ibid., p. 9.

[125]Archibald letter to Ed. Bayley, special assistant to the president, October 10, 1961. Moss papers, "Info. Availability - White House" file.

[126]Undated memorandum to Archibald. Moss papers, "Info. Availability - White House" file.

[127]Archibald letter to Pierre Salinger, May 26, 1962. Moss papers, "Info. Availability - White House" file.

[128]Archibald letter to Salinger, June 4, 1962. Moss papers.

[129]Archibald letter to Paul Fisher, February 28, 1963. FOI Center files.

[130]Committee on Freedom of Information, ASNE, "Report," 1966.

[131]ASNE "Report," 1965.

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CHAPTER III

THE FREEDOM OF INFORMATION ACT (1965-66)

The status of the freedom of information movement as it entered its second decade in Congress illustrated the truism that the more things change, the more they stay the same. The changes were many. The Special Subcommittee on Government Information was no more. Its place had been taken in 1963 by a permanent Subcommittee on Foreign Operations and Government Information, with expanded membership and responsibilities. John Moss was no longer a junior congressman in search of an operating base. After serving on the national Democratic campaign committee that helped elect John F. Kennedy in 1960, he had been awarded a spot in the power structure of the House, as deputy majority whip, the bottom rung on the leadership ladder. In the Senate, Thomas Hennings had died in 1960. His successor from Missouri, Edward V. Long, had succeeded as well to the role as chief Senate sponsor of freedom of information legislation. In the White House, Lyndon Baines Johnson was at the height of his power and popularity, not yet eroded by Vietnam. Johnson in 1965 and 1966 enjoyed an almost unprecedented influence in Congress, especially in the House, where longtime allies occupied nearly all the strategic positions. But the goals of the freedom of information advocates had not changed; nor

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had their legislative strategy--the amendment of the Administrative Procedure Act to make it a tool for access rather than for denial. The interest of the press' leadership remained constant. Most enduring of all was the conflict between the forces pressing for access, centered in the press and the Congress, and the forces protecting withholding, concentrated in the executive agencies and the presidency. This chapter takes a look at the interplay of those forces and the legislation thus produced.

The first bills intended to amend the Administrative Procedure Act (5 U.S.C.A 1002) were introduced by Moss and Hennings in 1957. Rep. Dante Fascell, a co-sponsor of that legislation and of the House version of the amendment finally enacted nine years later, explained the delay this way: "It's like so many things around here--it just grew."[1] Benny L. Kass, who served as counsel to both the Moss and Long subcommittees, had a more pointed explanation: "Politics, pure and simple."[2]

The politics that slowed and shaped the growth of the Freedom of Information Act was of a different and more complex kind than the partisan conflict of the 1958 amendment or of the 1974 modifications of the FOI Act. The politics of freedom of information in 1965-66 was intraparty, Democratic managers of the legislation against a Democratic administration. It was a politics of backstage in-fighting and front-stage dissembling.

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Moss, opening House debate before final passage of the bill in 1966, told his colleagues that he had "read stories that President Johnson is opposed to this legislation." To the contrary, Moss said. Cooperation from the president and "his able assistants" had been "excellent." The issue was "very sensitive to the institution of the presidency," he said. "Despite this, I can say to you that no chairman could have received greater cooperation."[3]

No chairman could have survived greater opposition, he might more candidly have said. Much later, he spoke more frankly about the pressure-filled months that preceded passage. "The negotiations were very rough. I recall that the assistant attorney general would walk out and say, 'All right, there'll be no bill, then.'"[4] He added, "Johnson was not enthused about this legislation, and his Department of Justice worked against it."[5]

Moss' position was made even more delicate by another fact never mentioned publicly at the time: "I knew and he knew I didn't have two-thirds to override a veto."[6]

One result of this peculiar situation was that, while the chief sponsor and longest-standing advocate of the legislation was forced into public silence, the role of outspoken advocacy fell to Republicans. Sounding not unlike the John Moss of ten years earlier, Rep. Donald Rumsfeld of Illinois told the Inland Daily Press Association in early 1966 that, during hearings on the bill. "Every witness who testified for the executive branch was against it; but every

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other witness was in favor of the legislation." Rumsfeld added, as Moss could not and would not say, that White House opposition had "resulted in a stalemate in the House of Representatives last year." The Executive branch was pressing for "a complete revision" that would have written into law "congressional support for executive secrecy under the concept of executive privilege. . .," he said. The congressman urged his journalist listeners to lobby for passage of the bill, warning that, although Moss would get it out of his sub-committee, it still had to pass the full Government Operations Committee and the House, where administration opposition made the outcome doubtful.[7]

The accuracy of Rumsfeld's observation about the effects of White House opposition was certified by Clark Mollenhoff. Mollenhoff occupied a unique position during this period, being both a leading advocate of freedom of information (he then held the chairmanship of Sigma Delta Chi's committee on the subject) and a veteran reporter with well-placed sources in the Congress and the Executive (his skills already had won him several of journalism's most prestigious awards, including the Pulitizer Prize). In August, 1965, Mollenhoff reported that the administration was trying to force the Moss Committee to rewrite its access bill into a "'closed government' bill that would give the president the right to decide what government information should be made public."[8]

The administration-backed version being "suggested" to Moss by the House leadership would, Mollenhoff reported,

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permit withholding of any information "by the direction of the president," a sweeping affirmation of executive privilege.[9]

The administration also proposed in May 1965 a change to permit withholding of information by any agency head if he interpreted it as "related solely to internal management operations and proprietary functions of the United States."[10]

Moss "had indicated" that the administration's substitute bill "is the only legislation that can be put through the Johnson-dominated House this year," Mollenhoff reported. Republican members of the subcommittee argued that no bill was preferable to one so watered down, and Moss agreed to stand firm. Mollenhoff noted that officials of Sigma Delta Chi--of whom he was one--"have informed Chairman Moss that the Johnson Administration proposals are objectionable and that they will oppose them."[11]

A week later, the Associated Press reported that the bill "has stalled in the face of White House opposition. . . ."[12] The report added that, since hearings ended in April, the bill had been revised eight times in an effort to reach agreement between legislators and the administration. Moss explained that the major difficulty was the insistance of "people at the Justice Department" that the bill protect executive privilege. Moss said he "will not agree to any language that grants statutory recognition to executive privilege." He would not say whether any progress was being made in the negotiations with the Executive. But he said

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he thought the problems would be worked out and the bill approved.[13]

Few of those involved at the time were aware of what the "solution" to those problems was or of the new problems it would create for advocates of openness.

Sam Archibald, Moss' staff director throughout the gestation period of the bill, publicly recalled for the first time more than a decade later the scene that determined the final shape of the Freedom of Information Act.[14]

Moss was summoned from a hearing on the bill to a meeting with House Speaker John McCormack and Majority Leader Carl Albert. He returned from that meeting and called one of his own staff. There, he told the staff that McCormack and Albert had discussed the bill with President Johnson. More precisely, they had listened while Johnson discussed it, in language that Moss bowdlerized before repeating its gist. "What is Moss trying to do, screw me?" the president had asked his leaders in the House. "I thought he was one of our boys, but the Justice Department tells me his goddam bill will screw the Johnson Administration!" The message, Archibald recalled, "came through loud and clear to Moss and his staff. . .. If President Johnson felt strongly enough about the issue, there would be no FOI Act."[15]

Like McCormack and Albert, Government Operations Committee Chairman William Dawson was a strong Johnson man. Moss and his staff spent some time discussing "the facts of political life which the president's comments implied," and then

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they went to work crafting "a compromise between the best possible Freedom of Information Act and no law at all." The course eventually decided on was that the House would accept the version of the act already passed by the Senate and the Justice Department lawyers would be allowed to help draft the House report on the bill.[16]

The implications of that decision were substantial.

In the normal course of events, the Senate version of the bill would have been amended in the House, where most of the expertise built up over a decade lay. Any differences would be resolved in a House-Senate conference committee. But once the decision was made to accept the Senate bill, for fear the amending process would give Johnson's House allies the chance to kill it, the sponsors were stuck with a draft that, Archibald recalled, they recognized as inadequate.

In the normal course of events, too, the House report on the bill would have explained the legislators' intent, offering administrators and the courts some guidelines for interpreting the necessarily sweeping language of the act itself. But in this case, with the Justice Department lawyers who bitterly opposed the bill participating in the drafting of the report, those guidelines would wind up in every instance seeking to narrow and weaken the bill. The result was to be confusion and undercutting of the true intent. The impact of that decision was reflected in the first scholarly analysis of the newly adopted act:

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> In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure. The Attorney General's Memorandum consistently relies on such remarks by the House committee.[17]

The bill bore other scars of Executive branch opposition. Already, the two exemptions acceptable to Harold Cross had grown to three in the bill drafted in 1960 by Jacob Scher. In succeeding sessions, those were reworded, but the number remained constant. By 1964, the exemptions protected material that was required by executive order to be kept secret for the protection of the national defense or foreign policy, that was solely the internal personnel rules and practices of any agency, or that was already protected by statute.[18]

Before that bill, S. 1666, was passed by the Senate, five more exemptions were added. Incorporating the areas already protected by other statutes, the added exemptions actually added little to existing areas of secrecy. But the agencies wanted the protections spelled out in this "access" bill. Now the bill protected from disclosure "trade secrets and other information obtained from the public and customarily privileged or confidential," intra-agency or inter-agency memoranda, personnel and similar files, investigatory files, and information related to operating and condition reports of financial institutions.[19]

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The committee report's explanation of the exemption for agency memoranda is revealing of both the attitude toward disclosure of the executive agencies and of the committee's willingness to accomodate them whenever possible. The exemption, the report explained, was added at the "strong urging of virtually every government agency." The agencies argued that efficient administration cannot be carried out "in a goldfish bowl," since the threat of later publicity would inhibit the essential exchanges of "frank and conscientious opinion. . .." The committee found merit in the argument.[20]

The new exemptions were written into the bill by Bernard Fensterwald, staff director of the Senate subcommittee headed by Long. Archibald later described the addition as Fensterwald's "greatest contribution" to the legislation, adding that the greater specificity blunted the agencies' continual attacks on the three exemptions included in the Scher draft. Fensterwald did Moss a great political favor by giving the agencies the protection they sought, which Moss himself could not yield "after having committed ourselves with the press groups to limit them to the original three in Scher's draft," Archibald said.[21]

The immediate result of Fensterwald's contribution was that, after seven years of effort, the amendment to the Administrative Procedure Act was passed by the Senate on July 28, 1964. The House leaders, whose coolness toward the bill already has been noted, referred it to the Judiciary Committee, instead of to Moss' parent committee, Government

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Operations. There it died. One press supporter noted sourly that too many House members were "running for office this fall to hope that anything might be accomplished in trying to pry the Long bill out of committee."[22]

Nearly identical bills were introduced by Long (S. 1160) and Moss HR 5012) when the new Congress convened. The Senate again passed its version on October 13, 1965. Still another exemption was added.

The House report on the bill as sent over by the Senate noted that protection was added for "geological and geophysical information and data (including maps) concerning wells" after "witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of present laws."[23]

Benny Kass, who was intimately involved in the drafting and maneuvering of the bill, recalled a different impetus for the new exemption. It was added, he said, at the insistence of Senator Everett Dirksen, Republican of Illinois. Dirksen insisted that the exemption was a "must" if the bill was to pass.[24]

Moss, noting that Dirksen was an intimate of Johnson during the president's Senate career, concluded that the inclusion was pushed by Dirksen at Johnson's behest, for the benefit of the oil industry that wielded great influence in Johnson's native Texas.[25]

But, two exemptions or nine, the agencies of the Executive branch remained deadset against the bill, in private and in

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public. Norbert Schlei, assistant attorney general, was the chief spokesman for the administration in hearings before Moss' subcommittee. He was not alone; twenty-seven departments and agencies offered their views during the hearings of 1965 and 1966. All were opposed. Schlei set the tone.

The release of government information, he said, is "just too complicated,too ever-changing" to be covered by a single bill. "If you have enough rules, you end up with less information getting out because of the complexity of the rule system you establish. . .," he warned. The agencies opposed the bill mainly because of its attempt to set up rules "federal governmentwide," he said.[26]

Fred Burton Smith, acting general counsel for the Treasury Department, elaborated on the probable negative impact of the bill. If it were to pass, he predicted, "the Executive branch will be unable to execute effectively many of the laws designed to protect the public" and would be unable as well to protect the privacy of those "whose records have become government records."[27]

Like many other administrative witnesses, Smith objected to the bill's removal of the previous requirement that a person must be an "interested party" in order to obtain information. He complained of the inadequacy of the exemptions, the arbitrariness of the provision for court enforcement and the dubious constitutionality of the whole approach.[28]

Schlei, however, rested the case against the bill most heavily on its alleged intrusion into the preserve of

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executive privilege. There must be, he said, "preservation of the constitutional executive prerogative. . . ."[29]

Moss objected to this position as overly broad. He then described the limits of the bill's encroachment into executive discretion. "Now, we are not trying to reach executive privilege. I do not know what it is," he said. The purpose of the bill, he added, was simply to require departments and agencies to "set forth very clearly the rules and regulations governing access to information and that they make information available unless it is withheld in the interest of national defense or by some statutory authority given by the Congress."[30]

Schlei insisted that there was "a residual Executive prerogative to withhold despite any legislation in a situation where the national interest demands it in the considered judgment of the Executive."[31]

During his exchange with Schlei, Moss outlined with uncommon clarity the practical necessity of the bill. Unlike much of the argument of both supporters and opponents, which consisted either of philosophy or of politics, this view, educated by 10 years' experience, reveals something of how government information policy really works:

> Now, if I knew that the President of the United States or even the Attorney General was going to look at each instance where refusal was the final result, I would not be as worried as I am when I know that rarely is it ever going to get up to the President or the Attorney General or you. Many times information is controlled rigidly at very low echelons in Government, and the only way we can change that is to impose some requirement under the law.

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> Obviously the Executive is not going to do this. They have not done it. And I think something must be done. We cannot just continue to drift and rely on the good faith of people or the good judgment of people who inherently, when they are in a safe spot in Government, do not want to start any controversy, and the easiest thing in the world is to sit on that information.
>
> And you never have any difficulty--and that is why I did not put it in this bill--in finding that it is "in the public interest" to withhold. Because each person who has the first chance to withhold is part of that public, and he knows darn well it is in his interest to withhold.[32]

The administration, of course, was not swayed. With the issue very much in doubt, but with at least the possibility at last of legislation they had sought for years, the leaders of the press began mobilizing their forces as they had in 1958.

The 1964 report of the ASNE committee concluded with "a plea for participation in one FOI fight by every newspaper represented in the Society--support of S. 1666." The bill's only chance of passage, the report added, lay in "a vigorous campaign by the American press."[33]

A year later, the committee's report began, "It has not been an encouraging year for Freedom of Information."[34] After recording the death of S. 1666, the committee described the status of the successor bills and urged action to improve it by editors' "interesting themselves--and their own senators and congressmen. . . ."[35]

As had been the case in the 1950s, the journalists worked closely with Moss' staff. In March, 1965, Archibald and Kass met with Theodore Serrill of the National Editorial Association to plan NEA's testimony at the forthcoming

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hearings. Serrill began by saying, "I will say whatever you write."[36] Later in the conversation, he added, "We are getting to our members and tell(sic) them to get to their congressmen. What do you want us to say?" Kass suggested, "Since this will be an NEA statement, you should make some mention of the fact that most of the states have public records statutes." Serrill concluded, "I'm going to alert our members in the states where you have committee members."

That strategy did not produce victory in 1965. The cooperative lobbying effort continued. Hu Blonk, chairman of the APME committee, wrote a colleague in January 1966 that he had been prepared to the point of having a letter drafted asking editors "to bring pressure on congressmen on the committee living in their area, but Archibald indicated this might be premature." Archibald would tell the editors when and how to act.[37]

The allies knew they had a bigger problem than individual congressmen. That problem was the president. They laid plans to try to solve it, too. Again, Moss' staff took the lead. Blonk wrote that Archibald had suggested that "an attempt be made--at a press conference or through personal contacts--to make sure President Johnson knows of the importance of the legislation and takes a position on it." Archibald even picked the editor to "work on the president." That was Gene Patterson, a personal friend of Johnson's adviser, Bill Moyers. Blonk added that Archibald would advise later whether an Associated Press reporter would be needed to question the

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president during a press conference about his sentiments toward freedom of information.[38]

If any doubt remains about the relationship between the APME, at least, and the congressional side of this partnership, it should be dispelled by Archibald's letter to Blonk less than three months later. In it, the former reporter told the national organization of editors just what to do and why. Whatever their faults, Moss and his staff did not suffer from any lack of assertiveness or imagination in the crucial months of maneuvering their bill to passage. Archibald wrote that Congressman Dawson probably would react against pressure from the press. "Therefore, he should be given a chance to get the bill out of committee following normal procedure." If he failed to act, "we can then call out the troops." Archibald closed with an invitation to call "if you have any questions. . . ."[39]

Blonk's troops presumably remained in quarters, since the bill was approved by the Government Operations Committee within the month.

The press' efforts did not end there, as Editor & Publisher noted with a touch of self-congratulation. "The fight is still uphill," the magazine's editor wrote, reminding readers that he had urged journalists previously to "exert a little pressure on our own." He added, "So far, so good! Let's keep it up."[40]

Not all press support was either induced or uncritical. Clark Mollenhoff, reporter-lawyer-advocate, urged members of

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Sigma Delta Chi to support the bill by endorsing it editorially and lobbying with their congressmen. His analysis, however, included some cautionary notes that were to prove prophetic. "This is basically a good bill," he wrote. "It is so worded, however, that there will undoubtedly be need for interpretation and follow-through after it is signed into law." Mollenhoff conceded the necessity of allowing some secrecy for the protection of national security and "certain other clearly confidential areas." But he warned that "this discretion can be abused." Careful policing will be required after passage of the bill "to make certain that it is not distorted by bureaucratic interpretation," he wrote.[41]

On June 20, 1966, nearly ten years after the first bill was introduced and thirteen years after Harold Cross published his call for action, the House passed S. 1160 by a vote of 308 to none.

Only one hurdle remained.

In its report of the bill's passage, the New York Times said, "President Johnson is expected to sign the bill. . .."[42] Many of the bill's advocates were not so sure. Shortly after its passage, word reached Capitol Hill that the president might kill the bill after all.

"There was concern that he might not sign it," Moss recalled.[43] Members of the congressional and White House staffs met "constantly," he said, discussing the bill's practical and political impact.

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Kass and Archibald got busy contacting, again, their friends in the press.[44] Support from broadcasters was particularly sought, since Johnson was known to believe in the great impact of television. There wasn't much response from broadcasters, Kass recalls, but newspapers generated a flood of editorials to show grassroots support for the bill. Eugene Patterson, whom Archibald had described earlier as "the proper man to work on the President," made a "last-minute" call to the LBJ Ranch and was "assured a pocket veto was the farthest thing from LBJ's mind."[45]

Congress adjourned for its Fourth of July recess, and Moss left for California not knowing whether Johnson would sign his bill or kill it. He received no invitation to a signing and didn't know what happened until July 6.[46]

Johnson signed the bill on July 4, the last day before a pocket veto would have taken effect. He signed it with a rhetorical flourish:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . ..
>
> I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[47]

In view of what had gone before and what was to come, two other facets of the presidential statement might be more significant. In between those glowing opening and closing paragraphs, more than half the statement was devoted to detailing the bill's limitations. Johnson pointed out that

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the national security or other factors, such as protection of individual privacy and the need for officials "to communicate with one another fully and frankly without publicity," demanded secrecy. He added:

> I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people.
>
> Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality with the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.[48]

The other, less important, aspect was that the White House, after issuing the statement, attempted to withhold it from publication when Johnson decided on some last-minute changes.[49] Other withholdings were to prove more successful.

The journalists who had editorialized, lobbied and otherwise striven for an open records law greeted its adoption with a mixture of glee and caution. The ASNE committee chairman at the time looked back ruefully from the vantage point of 1973 at "the self-congratulation we indulged in. . . ."[50] But self-congratulation was not the only reaction. Sigma Delta Chi's 1966 report on freedom of information, for instance, sounded a distinctly skeptical note. "Even this gain must be viewed as only a potential bright spot until the press has had time to examine how it is administered by the Johnson Administration." The report characterized administration policies as being surrounded by "an atmosphere of censorship and

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secrecy. . .." It warned that the attitudes of leaders of the administration might well be translated into "efforts to twist the open records law into a closed records law."[51]

Another press spokesman, while terming the adoption "a signal triumph," added that "the old and scarred FoI warriors, whom I surveyed for an appraisal, agreed that the whole battle for open federal records will have to be fought again unless great care is taken in implementing S. 1160."[52]

So realism rather than euphoria was the order of the day. The object of all this discussion, and of more to come, was codified as 5 United States Code Section 552. Its effective date was July 4, 1967. The new law provided, in essence, that--with stated exceptions--"each agency, on request for identifiable records made in accordance with published rules... shall make the records promptly available to any person." It offered recourse for denial by the filing of a suit in federal court, specifying that "in such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action." Noncompliance with a court order could result in in a citation for contempt against the official responsible.[53]

Criticism of the Freedom of Information Act began even before it took effect.

The most detailed and most scathing critique was produced by Kenneth Culp Davis, a professor of law at the University of Chicago. Davis began, "The Act is difficult to interpret, and in some respects it is badly drafted."[54] He went on to demonstrate the truth of both observations.

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The trade secrets exemption, especially, moved Davis to scornful sarcasm. "Obedience to its rather clear words would be extremely injurious," he wrote. "Some escape from the plain meaning of the statutory words is essential."[55]

The attorney general's memorandum purporting to explain the act also failed miserably in this, and other, instances, Davis complained. He found "especially fascinating" this sequence: "The Attorney General (1) says the statute is susceptible of several readings, (2) he lists those readings and (3) he then reaches a conclusion different from any he lists!" The problem, though, was much more in the act than in the attorney general. "No reading of which the Act is susceptible can feasibly govern what the agencies will do."[56]

Davis found fault with every exemption.

The first, he wrote, actually "strengthens the president's hand" in concealing national defense information by spelling out a simple procedure for agency heads to use--the securing of an executive order.[57]

The second, exempting personnel rules, "seems to me opposed to the basic push to let the public know what the government is doing."[58]

The third, exempting information protected by other statutes, he found vaguely worded.[59]

The fourth, as already noted, was a grammatical and practical monstrosity that, depending on the reading, exempted far too much or not nearly enough.[60]

The fifth, exempting intra- and inter-agency memoranda,

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was both unduly vague and troublesome because of legal questions about the phrase "a party. . . in litigation. . .."[61]

The sixth alone was "not seriously faulty," although the word "files" was subject to varying definitions.[62]

The seventh opened the broad and unanswered question of what are "law enforcement purposes" and what aren't. "The committee reports shed no light. . .," he noted grimly.[63]

The eighth, exempting bank regulation records, was clear enough, but wrongheaded. Such secrecy is unjustified, Davis argued.[64]

The ninth, exempting oil exploration data, actually was more restrictive than existing regulations.[65]

Davis' conclusions were prophetic. The press, "which was the principal political force behind the enactment, will benefit only slightly," he predicted.[66] The bar, however, "though it played a minor role in getting the Act enacted," "would be the main beneficiary, along with the lawyers' clients."[67]

The reason for this seemingly contradictory result was that, although the new law was so vaguely worded as to be largely unenforceable in its provisions for public access, it did clearly open a category of administrative orders, opinions, policy statements and other information of great interest to specific private parties and often withheld under the old Administrative Procedure Act.

Davis also foresaw the probability of widespread evasion and misinterpretation of the act by agencies, with little

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likelihood of effective recourse.

But most discouraging to the scholar was "that the Congress of the United States, after more than ten years of hearings, questionnaires, studies, reports, drafts, and pulling and hauling, should wind up with such a shabby product. . . ."[68]

Four years later, a study for the Administrative Conference of the United States found that many of Professor Davis' forebodings had been justified. Still other problems were found in the wording and implementation of the act. The study found that the "broad and ambiguous exemptions" had contributed to inconsistent administration by the agencies.[69]

Such criticism did not go unanswered. At least some of those who helped draft and pass the act were moved to defend it from attacks by legal analysts and onetime allies in the press. Sam Archibald, Moss' chief aide on information matters for more than 10 years, argued that the statute was a useful, if largely unused, tool. "It can solve press access problems if it is used properly, and therein lies the problem," he wrote.[71] Archibald complained that too many reporters and editors had not taken the trouble to learn the provisions of the law. Others, he wrote, were too lazy or too pressed for time to use it. Those who had tried it had found it effective. "The more the Law is used the better it will work, for each case is reported along the bureaucratic grapevine and may prevent a similar information barrier in another bureau," he concluded.[72]

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Benny Kass, who served as counsel to both the House and Senate committees during the law's creation, said the problems lay less in the drafting than in the implementation. "We didn't think it would be so perverted," he said.[73] With its legislative history making Congress' intent clear, the drafters did not expect their law to be used instead as justification to withhold information. And, Kass pointed out, few could have foreseen some of the problems that were to prove most troublesome. They had nothing to do with the exemptions--problems such as high costs, long delays in response and cumbersome agency procedures and requirements.[74]

In retrospect, John Moss is candid about the shortcomings of the act that was his more than anyone else's. The exemptions, he agreed, were a problem.

"Probably two of them were valid," he said.[75]

Those two were the protections for military plans and diplomatic secrets. The other exemptions were largely the products of political pressure, most of it from the executive agencies and the interest groups each serves. "Each one of them has a constituency and each convinced Justice, which carried on the negotiations. They were hard negotiations. We had to yield to the Johnson Administration to get a presidential signature."[76]

Still, Moss maintained, the Freedom of Information Act, as he passed it, was an effective discovery tool.[77]

But was it? Could it be?

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FOOTNOTES

[1]Dante Fascell interview with the author, June 2, 1977.

[2]Benny Kass interview with the author, June 3, 1977.

[3]Congressional Record, House, June 20, 1966. p. 13,007.

[4]John Moss interview with the author, June 1, 1977.

[5]Ibid.

[6]Ibid.

[7]Donald Rumsfeld speech before the Inland Daily Press Association, February 21, 1966, reprinted in Congressional Record, House, March 29, 1966, p. 6865.

[8]Des Moines Register, August 2, 1965, p. 1.

[9]Ibid.

[10]Ibid.

[11]Ibid.

[12]St. Louis Post-Dispatch, August 9, 1965, p. 6.

[13]Ibid.

[14]Samuel Archibald, speech delivered at the University of Missouri, April 7, 1978.

[15]Ibid.

[16]Ibid.

[17]Kenneth Culp Davis, "The Information Act: A Preliminary Analysis," 34 University of Chicago Law Review 761 (1967), p. 763.

[18]Report of the Committee on the Judiciary, to accompany S. 1666, 88th Congress, Second Session, July 22, 1974, p. 12.

[19]Ibid.

[20]Ibid.

[21]Archibald interview with Robert Blanchard, November 9, 1965, quoted in Blanchard dissertation, Syracuse University, 1966, p. 182.

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[22]Robert U. Brown, "Shop Talk at Thirty," Editor & Publisher, August 29, 1964, p. 72.

[23]Report of Committee on Government Operations, to accompany S. 1160, 89th Congress, Second Session, p. 11.

[24]Kass interview.

[25]Moss interview.

[26]Hearings on Federal Public Records Law (Part 1), House Subcommittee on Foreign Operations and Government Information, 89th Congress, First Session, March 30, 1965, p. 6. Quoted in Blanchard.

[27]Ibid., p. 48.

[28]Ibid., pp. 47-80.

[29]Ibid, p. 11.

[30]Ibid., pp. 13-14.

[31]Ibid.

[32]Ibid., p. 32.

[33]ASNE Freedom of Information Committee, "Report," 1965, p. 8.

[34]ASNE Freedom of Information Committee, "Report," 1965, p. 1.

[35]Ibid.

[36]Quoted in Blanchard, pp. 188-189. Blanchard, as an American Political Science Association fellow assigned to the subcommittee, sat in on the meeting March 18, 1965.

[37]Hu Blonk letter to William Dickenson, January 21, 1966.

[38]Ibid.

[39]Archibald letter to Hu Blonk, April 4, 1966. In FOI Center files.

[40]"Keep up the Pressure," Editor & Publisher, May 21, 1966, p. 6.

[41]Mollenhoff memorandum, May 24, 1966, in Sigma Delta Chi files.

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[42]New York Times, June 21, 1966, p. 1.

[43]Moss interview.

[44]Kass interview.

[45]Read All About It, p. 213.

[46]Moss interview.

[47]New York Times, July 5, 1966, p. 47.

[48]Ibid.

[49]Ibid.

[50]Eugene Patterson in Read All About It, p. 213.

[51]Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1966, p. 5.

[52]J. Edward Murray in ASNE Bulletin, August 1966, pp. 3-4.

[53]Reprinted in Freedom of Information Sourcebook, Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 93rd Congress, Second Session, 1974, pp. 11-12.

[54]Davis, p. 761.

[55]Ibid., p. 787.

[56]Ibid., p. 788.

[57]Ibid., p. 784.

[58]Ibid., p. 786.

[59]Ibid., p. 787.

[60]Ibid., pp. 787-793.

[61]Ibid., pp. 794-797.

[62]Ibid., pp. 797-799.

[63]Ibid., pp. 799-800.

[64]Ibid., p. 801.

[65]Ibid.

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[66]Ibid., p. 803.

[67]Ibid., p. 804.

[68]Ibid., p. 807.

[69]Donald Giannella, "Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations," 23 Administrative Law Review 217 (1971), p. 220.

[70]Joan Katz, "The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act," 48 Texas Law Review 1261 (1970), p. 1262.

[71]Samuel Archibald, "Whose FOI Law?" ASNE Bulletin, December, 1969, p. 10.

[72]Ibid., p. 12.

[73]Kass interview.

[74]Ibid.

[75]Moss interview.

[76]Ibid.

[77]Ibid.

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CHAPTER IV

FILLING SOME HOLES (1967-74)

Although the Freedom of Information Act did not bring the operations of the federal government shuddering to a halt, as its most vocal opponents had predicted, neither did it open those operations fully to public scrutiny, as its most ardent advocates had hoped. The advocates, who seemingly had won a great victory, soon were expressing disillusionment and dismay. The opponents, presumably defeated, quickly mastered the new rules and fought on. John Moss, though he remained chairman of the subcommittee until 1971, held no more hearings and passed no more bills on freedom of information. The subcommittee, under a new chairman, came back to life in 1971-72. The press made little use of the law it had sought so long. Journalists, uncomfortable even while successful in their unaccustomed role as lobbyists, were replaced after 1966 in that role by a new coalition of citizen activists who did not spare the press from their criticism. Meanwhile, back in the bureaucracy, concealment continued.

In a review after the act's first ten months, the Senate subcommittee found "cause for optimism" in the implementing actions of some agencies. The report observed cautiously, however, "The record of the agencies in this regard is far from clear."[1]

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It soon became clearer. The following year, the agencies and the act were put to the test by an aggressive, well-organized band of students who gloried in the nickname "Nader's Raiders." Ralph Nader had been concerned about freedom of information since his days at the Harvard Law School, when the law review on which he was an editor got Moss to write an article on the subject.[2] As a young lawyer practicing in Connecticut, he had written Moss a letter of complaint in 1963 about the slow and uncertain response of both bureaucrats and congressmen to requests for information.[3] Now a nationally known consumer advocate, he undertook in the spring of 1969 the first broadscale exploration of the effectiveness of the Freedom of Information Act. One hundred students under his direction descended on dozens of federal offices, seeking information of all sorts, some routine and some sensitive. After three months, the task force reached what it called "a disturbing conclusion:"

> Government officials at all levels in many of these agencies have violated systematically and routinely both the purpose and specific provisions of the law. These violations have come so regularly and with such cynicism that they seriously block citizen understanding and participation in government. There is prevailing an official belief that these federal agencies will not stand for searching inquiries, or even routine inquiries that appear searching because of their rarity, from its citizens.[4]

The inquiring citizens found some officials and agencies living up to the spirit and the letter of the act. The National Air Pollution Control Administration was rated the most open.[5] But openness was the exception. Concealment was

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the rule.

Most often used as grounds for nondisclosure were the act's exemptions for investigatory files, internal memoranda and trade secrets. The Department of Labor, for example, refused access to records of violations of an act setting minimum wage and working conditions even though the records were as much as 15 years old. The department refused to separate and release non-investigative records comingled in those files. The Interstate Commerce Commission refused to release a six-year-old study of ICC operations performed by the Civil Service Commission. The Federal Water Pollution Control Administration denied access to copies of research proposals rejected by the agency.[6]

Another "typical tactic," the explorers reported, "is to delay replying for several weeks and then state that the request for information was not specific enough. This tactic has enormous potential and agencies like it."[7] Without access, of course, no high degree of specificity was possible in many cases.

The students even found officials who simply lied. The Food and Drug Administration first denied the existence of a brand name list of drinks containing cyclamate. After the existence of such a list was demonstrated independently, one was produced.[8]

Fees charged ranged from nothing to $1 per page for copying, and from nothing to $7.20 per hour for searching.[9]

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The Nader group proposed a series of remedies for the problems discovered. Most of the remedies were to be adopted over the next five years.

The remedies were: the pursuit of legal appeals to produce "authoritative and concrete interpretation by the courts," congressional oversight hearings, creation of a reviewing body within the Executive branch to establish uniform regulations and to assure compliance, amendments to require that agencies respond to all requests within seven days, establish adequate facilities for public access and maintain readily available sets of the most commonly sought information, and imposition of sanctions against officials deliberately violating the act.[10]

Nader's Raiders were not alone in perceiving a substantial distance between the promise and the performance of the act.

The Federal Trade Commission refused, a year after the act took effect, to release a report on deceptive automobile warranties, although the report was given to the auto manufacturers. Paul Rand Dixon, chairman of the FTC, said, "The freedom of information act doesn't require us to give it out. We'll make it public when we're ready."[11] The Bureau of Indian Affairs refused to say which tribes held shares in a $229 million trust fund. The Department of Defense refused to tell the public which contractors were barred from doing business with the Pentagon, though many had been convicted of fraud. The Internal Revenue Service refused to identify persons and

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Johnson, the report concluded, "is leaving office with perhaps the worst record for credibility of any president in our history."[17] This produced information problems beyond the capacity of Moss, the press, or anyone else to solve.

These were predictable, perhaps inevitable, problems. The act's loopholes were recognized even by many of its advocates as they worked it through the political maze to adoption. The footdragging, lack of enthusiasm and outright evasion by agencies were consistent with the history recited by Archibald and the very nature of bureaucracy. The diminished activism by Moss followed more than a decade of almost constant effort and the achievement of a landmark act over great opposition. It was true, too, that Moss had moved into a leadership role in the House and that his subcommittee, whose information activity had been the focus of attention, had jurisdiction over other substantive areas as well.

But there was another, a more surprising, problem. A few analysts, such as Kenneth Culp Davis, had surmised that the act would be of more value to lawyers than to journalists. Still, this was, to a great extent, the press' law. The whole freedom of information movement had been given its start by a handful of newspapermen. With publicity and pressure and lobbying, journalists and their organizations had played a major role in the legislation of 1958 and 1966. As self-styled surrogates for the public, journalists were to be--and saw themselves as--prime beneficiaries of the Freedom of Information Act. Within a year of its effective date,

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evidence was mounting that things weren't working out as expected.

The freedom of information committee of the ASNE, long-time leader of the press' campaign, reported with obvious consternation that the Freedom of Information Act was not having the impact its backers had hoped it would. "And the reason it is not having such an impact is more the fault of the press than anyone else."[18]

The report went on, "Indeed, there is much evidence that many reporters do not even know of its existence."[19] A committee survey of editors, reporters and government officials revealed that not a single editor outside of Washington had made use of the law and few in Washington had enough experience to offer any firm opinions.[20]

The committee asked Archibald, by then an independent observer as head of the Washington office of the University of Missouri's Freedom of Information Center, for an assessment. It quoted with approval his reply: "As a public records law it is working well. Dozens of categories of government documents have become public records since the law went into effect. . .." But he added, "As a press access law it is about as useful as breasts on a banana. . .." Reporters, he said, "fail to use the appellate procedures. . .. They fail to put a request for a government document in writing and follow through. . .." He concluded emphatically, "Worst of all, the press fails to use the one major weapon at its command: publicity.. .."[21]

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The committee agreed, ". . .it is certainly true that the press has not been using it to its full advantage. If the faults of the law are to be corrected by legislative action in the future, then full use of the law's benefits must be made now."[22]

The press' failure to make such full use did not go unnoticed by non-journalists. Ralph Nader complained publicly that news organizations were not pushing hard enough to free government information.[23] He said he suspected that the reluctance sprang at least in part from a fear of alienating agencies from which the organizations got preferential treatment. The report of Nader's band of inquiring students found it "shocking" that, nearly two years after the act's effective date, only 40 suits had been filed in federal court, and none by news organizations.[24]

Even the Moss Committee registered a mild criticism. A spokesman agreed with Nader that journalists had a responsibility to pursue freedom of information denials in court.[25] It only cost $10 to file a suit in the District of Columbia, he noted. But he told of one correspondent who urged his home office to sue the Department of the Interior. The editors refused, commenting, "If we sue the Department, it will make them mad at us and dry up our news sources."[26]

Despite the urging of ASNE leaders, outside critics and their old ally, journalists continued to make little formal use of the act.

In 1971, nearly four years after it had gone into effect,

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the Associated Press Managing Editors committee on freedom of information surveyed APME members on their experience with the act. The survey found that only 16 of 123 editors responding had ever used the law or threatened to use it in order to pry loose government information.[27] Sixty percent of those surveyed said they had no difficulty in obtaining information from agencies in their communities. That finding moved the editor who conducted the survey to suggest that reporters for those papers weren't asking sufficiently critical questions. More significant, though, was that fewer than one-third of those newspapers that had encountered problems had used the Freedom of Information Act to try to solve them.[28]

Another survey led similarly to the conclusion that the act "has turned out to be a boon for lobbyists and an infrequent formal weapon for journalists."[29] This study was based on information requests made to the departments of labor and commerce and three independent agencies in one year. More than half the requests came from private law firms, nearly one-quarter from corporations, and only 9 percent from journalists.

A few journalists did use the act.

The Phoenix, Arizona, Republic, for example, tried unsuccessfully for six months to get from private insurance companies and local Medicare officials cost figures for administering the federal insurance program. Then the paper wrote to the Social Security Administration's regional supervisor, reminding her of the act's provisions and of the legal remedy

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it provided. Prominently displayed at the bottom of the letter was the notation that carbon copies were being sent to both of Arizona's U.S. Senators. The appeal to law and politics produced the information.[30]

Clark Mollenhoff, who had worked hard for passage of the act as an officer of Sigma Delta Chi, used it effectively as Washington correspondent for the Des Moines, Iowa, Register.

Mollenhoff asked the Post Office Department for the promotion record of a Post Office employee who doubled his salary in a short period while working under his brother-in-law. The Civil Service Commission advised postal officials that the Freedom of Information Act forbade the disclosure. Mollenhoff wrote a story about the denial, pointing out that the act contained no such prohibition. Within 24 hours, the commission reversed its decision and the information was released.[31]

The undisputed leader both in using the act and in being frustrated by it was Jack Taylor, a reporter and later editor of the Oklahoma City Daily Oklahoman and Times. Between 1969 and 1973, Taylor and his newspaper made more than 400 requests for information under the act from the Department of Defense and its subagencies. Late in 1973, he reported that 120 of those requests had been denied, 100 granted in full and 42 granted in part, with 152 still pending. Taylor took appeals in 57 cases, losing 19 and winning six, with the rest undecided.[32]

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Besides these, and other, formal uses by journalists, the act no doubt served reporters in less formal ways. Some of those ways were suggested by Peter Miller, Washington editor for Chilton Publications. In how many instances, he asked, "was information released, in whole or in part, when an individual threatened to use formal procedures provided by the FOI Act but did not?" And how much material was classified more carefully, or not classified at all, for fear of legal challenge?[33]

Miller's questions were rhetorical, the answers unknown and unknowable. There is another, shorter, question, though, that had to be answered--at least in part--before anything could be done about strengthening the act. That question about refusal or inability of journalists to use the act was simply, why?

A reporter who asked it of more than two dozen colleagues came up with one plausible answer:

> Perhaps it is simply the perversity of newsmen, but reporters who once complained about government secrecy and passionately demanded that Congress pass Freedom of Information laws now proudly proclaim that they really don't need any law for their work, and that any good reporter worth his salt will drag it out of the bureaucrats.[34]

One answer, then, might be found in the nature of reporters, confident craftsmen preferring to rely on their guile, or their influence, rather than the law.

Mollenhoff made two related observations, neither particularly flattering to his colleagues. "Most reporters are so damn short-sighted. They don't look beyond getting

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their story to see what the real problem is--what the law is." Of the unenthusiastic attitude of some of the best-known editors and reporters, he said "The New York Times and the Washington Post don't need a law. They've got clout. I need a law."[35]

Another answer has to do more with the nature of the news business. It was offered by a politician, Rep. Donald Rumsfeld, a Republican member of the Moss Committee. "Busy reporters are trying to dig out the news of the moment on a deadline. Too few of them have the time to dig deeper for the government records which may--or may not--make a future story." Few reporters would have challenged that assessment, but Rumsfeld wasn't quite through: "This situation partly explains the failure of the general press to use the Freedom of Information law as a weapon to guard the public's right to know. But it does not justify that failure."[36]

An Associated Press reporter in Washington provided a third answer, or a third part of the overall answer. His, like the others, explained. It also partly justified. Gaylord Shaw explained to the APME committee:

> Instead of walking into an office and getting an answer from a press relations officer, a written request must be submitted. It gets shuffled off to the counsel where a lawyer may let it set in his pending basket for a week--or month--and then somebody else gets the assignment of trying to locate the material. No matter how many times you prod them, the bureaucrats never seem to sense the urgency of our business.
>
> We also have found that one of the biggest stumbling blocks is the requirement that the information be identified as fully as possible by date, title and

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> description. Obviously, if the material has been kept from the public, it is quite difficult to meet this requirement. Thus, for the agencies, the existing non-disclosure becomes a device that helps them continue secrecy.37

Shaw was saying something about the nature of reporting, but he was saying even more about the nature of bureaucracy. He also was pointing out two major flaws in the act--the absence of any time limits and the requirement of precise identification. It was beyond the power of Congress--and perhaps the power of editors--to alter the nature of reporters or the time pressures of daily journalism. It was within Congress' power, however, to regulate if not alter the nature of bureaucrats. And it was within Congress' power to repair flaws in the law. That would come.

Two other aspects of the act's early years come first, though.

The stress so far has been on problems of the Freedom of Information Act, particularly those that prevented its use by the press. It already has been noted that, in the act's first two years, only 40 suits were filed in federal court seeking to enforce it, and that none of those was filed by a journalist. During the next three years before the first round of hearings that led to amendments, however, many more legal actions were taken. Some, though not many, were taken by journalists. In the course of these proceedings, many of the ambiguities pointed out by Kenneth Culp Davis and other critics were resolved. Some of the obstacles that had baffled early users of the act were removed. Others were reinforced. One

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major obstacle not imposed or intended by the act was, advocates of access insisted, erected by the Supreme Court. A brief look at the Freedom of Information Act in court is in order.

After five years of experience, a survey by the Library of Congress produced several general observations about the direction the courts were taking in interpreting the act. Most important were the trends in defining the scope of the nine exemptions.

The survey found that "the courts have been generally reluctant to order the disclosure" of information protected by the first exemption--"specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"--and the seventh--"investigatory files compiled for law enforcement purposes. . . ."[38]

By contrast, the courts usually ruled against the government, requiring disclosure of information sought to be concealed under the fourth exemption--"trade secrets and commercial or financial information. . . ."--and the fifth exemption--"interagency or intra-agency memorandums or letters. . . ."[39] (Kenneth Culp Davis had declared that the fourth exemption alone was so badly drafted as to mean that "the Act governs disclosure of only a small portion of all government information."[40] He had forseen grave problems with the fifth as well. Prediction is a chancy art even for legal scholars.)

The other exemptions were cited less often, and no clear

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pattern of court interpretations had emerged. Several other patterns of court behavior were discernible, however: The courts were complying with the legislative intent that the burden of proof be borne by the withholder, and had not been reluctant to order disclosure when that burden was not met. The courts usually were refusing to permit the government to use as an excuse for withholding the argument that the records were not adequately identified, since precise identification often was impossible to anyone not within the agency holding the material. The courts also were disallowing government claims that all of an otherwise public record could be withheld because a portion was exempt under the act.[41]

These patterns were significant not only in themselves, but because they showed that the courts were far more willing to grant access than were the agencies. Such willingness offered hope to persistent and affluent information-seekers. It also demonstrated anew the relative disadvantage of requesters without the time and money to pursue their requests in court. Two attorneys testifying at the 1972 hearings reinforced that point.

Harrison Wellford observed, "Those who can afford legal challenge are those special interests who need the FOIA least of all."[42]

Reuben B. Robertson III, of Nader's Center for the Study of Responsive Law, elaborated. Filing a suit, he said, requires hiring a lawyer, expense and delay. "Most people, I think, when they are confronted with this kind of an approach

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do tend to go away." But often, he said, "we have found that just the filing of a suit is enough to get the Government to release the information."[43]

That may explain why, of the 2,195 denials of information reported by 29 major executive agencies, only 99 were taken to court. Of the 55 cases decided, the government was upheld in only 23. Many of the other 44 were dropped when the information was provided.[44]

One of the few cases filed by a newspaper illustrates something of the act's power and something of why few news organizations legally invoked that power.

The Nashville Tennessean, suspecting that a blind homeowner had been swindled on the basis of an FHA appraisal of his home, asked for a copy of the appraisal. It was refused. The paper sued. The government lawyers took 60 days even to file their answer. Once a hearing was gained, the federal court ordered that the appraisal be released. The copy turned over to the paper was illegible. The paper went back to court and obtained an order for a legible copy. The court, however, allowed the government to delete the name of the appraiser. The newspaper appealed the ruling. Eventually, after the government's lawyers again took every delay available, the court of appeals ordered the production of a legible copy of the appraisal, including the name of the appraiser.[45]

Most court tests of the act were filed by private parties and public interest groups. A compilation by the American Civil Liberties Union lists 14 ways in which legal action was

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used under the act. Only one involved news organizations. The others ranged from the pursuit of historical research to obtaining health or safety information to seeking commercial advantage.[46]

Even in the most spectacular legal victory by a journalist under the act, the reporter was represented by Nader's public interest law firm rather than by his network's attorneys. That was NBC reporter Carl Stern's suit that forced the FBI to reveal the existence of "COINTELPRO," the secret program established in the late 1960s to harass leftist organizations.[47] It was March of 1972 when Stern invoked the act in a formal request. It was December of 1973 when a district court judge ruled that the FBI could not withhold the information under the "law enforcement file" exemption. Even then, Stern's lawyer complained that, "There's some indication that not all the documents we want are there."[48]

Some of the most important cases did not result in disclosure, as Stern's did. They served instead to point out areas of weakness or ambiguity in the act, the first step toward the shoring up and clarifying amendments of 1974.

Some of those productive losses were suffered by members of Congress. Moss himself, together with Rep. Ogden Reid of New York and Paul Fisher of the Freedom of Information Center, sued Secretary of Defense Melvin Laird in 1971, seeking release to Congress of the 47-volume Pentagon Papers. Rep. Les Aspin sued the Department of Defense in 1973, seeking release of the Peers Report on the cover-up of the My Lai

massacre.[49] The grounds on which both suits were denied were limited sharply by the 1974 amendments.

The Aspin case and several similar suits are worth a closer look. They demonstrate differing judicial views of the act and provide a backdrop for much of the dispute over the amendments.

In early cases, and in some judicial circuits, the "investigatory files" exemption was interpreted narrowly, as the act's sponsors intended. In the first case under the act to reach the Supreme Court, for example, the high court refused to review a court of appeals decision that released information compiled for a law enforcement investigation that was dropped without prosecution. That was in 1970.[50]

By 1973, however, the same court of appeals refused to give an historian access to documents containing an analysis of the bullet that killed John F. Kennedy on the ground that the information had been compiled for law enforcement purposes. The fact that the investigation had long since been closed was given no weight this time. Again, the Supreme Court refused to review the holding.[51]

Then the Aspin suit, which sought the same material requested--also unsuccessfully--by Oklahoma newspaperman Jack Taylor, met the same fate in the same court.[52]

A year later, as the Senate prepared to vote on Senator Philip Hart's amendment limiting the kinds of records covered by exemption seven, Senator Edward Kennedy asked whether it was intended to override the Aspin and similar court decisions.

Hart replied, "That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this."[53]

So the legal appeals belatedly accomplished indirectly at least part of their purpose. The amendment was approved, over the veto of President Gerald Ford.

Even more important, and even more controversial, was the case of E.P.A. v. Mink[54] and its legislative repercussions. Rep. Patsy Mink of Hawaii, with 33 of her House colleagues, attempted to use the act to gain access to information that would, she thought, help her force a halt to the planned test of an atomic warhead on Cannikin Island in the Aleutian chain.

Considering the longtime involvement of the press in the freedom of information fight, it seems fitting that this crucial battle began with a newspaper story. Rep. Mink later recounted her version of the events.[55] Seeking a way to halt the test, Rep. Mink saw a story in the Washington Star, reporting that federal agencies were divided on its wisdom. After failing to persuade Congress to block the project, she sued under the Freedom of Information Act to get those negative recommendations.

The suit cited, among other arguments, the act's provision that none of its exemptions limited Congress' power to obtain any information it needed.[56] The Justice Department claimed exemption on the grounds that the material fell within both the "national defense" provision and the "inter-agency memorandum" provision.[57]

The plaintiffs lost in the district court, won a partial

victory in the court of appeals and then were dealt a landmark defeat in the Supreme Court. Despite the act's requirement of court hearings "de novo" and despite urgings to do so by the plaintiffs, none of the three courts was willing to examine the information for which protection was claimed.

E.P.A. v. Mink was the first Freedom of Information Act case to be considered fully by the Supreme Court. The decision focussed on the first exemption, protecting material "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

The court held that exemption to be sweeping, indeed, ruling that it provided "no means to question any Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."[58]

The court held that it was barred from examining such documents, even in private, to determine whether any should be released.[59]

But it extended an invitation of sorts to Congress to undo what the act's sponsors insisted they never did in the first place:

> Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures--subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.[60]

In 1974, the Congress accepted, on its own terms, the court's invitation. The acceptance was somewhat grumpy, though, as members insisted that the court had misread their

intent in imposing on itself a blanket prohibition from inspection.

Moss, for example, told the House, "I thought we had made it abundantly clear that the courts would have the power to examine classified documents in camera and determine whether they had been properly classified."[61]

Rep. Mink, who had urged the court to rule otherwise, termed its decision "somewhat tortuous in this regard."[62]

Whether to applause or jeers, the courts had discharged the duty of interpretation placed on them by the act. Their decisions, some of them contradictory as they were, played an essential role in the implementation and perfection of the act.

Other roles in that process were played by the Congress itself and by interested parties outside the government, including the press and--increasingly--the new public interest groups. Before considering the outcome of the process, the amendments of 1974, attention is due the converging forces.

First, the Congress.

Sam Archibald's criticism of his former employers' lack of immediate follow-up on the act was echoed by other critics, including Ralph Nader. The record--or, more precisely, the absence of any record--shows clearly a drop-off in congressional action on the freedom of information front. The House subcommittee that had spearheaded the movement since 1955 held no hearings and released no formal reports until 1971. Then,

under a new chairman, it was revitalized. Similar inattention characterized the Senate subcommittee after its ten months' review, published in 1968.

In part, at least, the legislative lethargy may have resulted from the fact that the key staff members who had carried the workload through the passage of the act--Archibald for the House subcommittee, Benny Kass and Bernard Fensterwald for the Senate subcommittee--left their posts not long after the fight was won. In part, the explanation may lie in the Congress' and the nation's absorption after 1967 in Vietnam and the broad social disquiet it generated. In part, the change may be explained by the loss of interest in legislation by the press once that legislation had been adopted and its problems emerged.

Clearly, the issue that had been lacking in "sex appeal," in Dante Fascell's phrase, in 1955 lacked it again after 1966.

It would not, however, be accurate to say that congressional attention was completely lacking. Moss and his staff did not desist from the "pick and shovel work" they had begun a decade earlier. Journalists continued to turn to the subcommittee for aid in gaining access. Individual instances of withholding continued to be attacked, under Democratic and Republican administrations.

The chairman of the ASNE freedom of information committee, after visiting Moss in Washington, wrote that "the Moss Committee is as militant as ever, it seems to me, in running down separate instances of news supression in the federal

government."[63]

In Johnson's last year as president, the subcommittee reported that it had, for example, helped a reporter win access to a list of names and salaries of consultants hired by the Office of Economic Opportunity. It had intervened with the Department of Defense to gain a reversal of a rejection of a television station's request to send reporters to the Navy base at Guantanamo Bay, Cuba. It had made an "inquiry" after which the State Department agreed to make public captured Japanese films shot of the aftermath of the Hiroshima bombing. And acting on a complaint of the American Public Power Association, it persuaded the Department of the Interior not to bar reporters for weekly newsletters (such as the association's) from press conferences.[64]

The following year, the first of Richard Nixon's presidency, the subcommittee had a few matters of greater consequence to report and some that were no greater.

"At the direction of the chairman," it investigated complaints that the Defense Department was using its public information offices to promote the planned Sentinel missile defense system. After inquiries by the subcommittee, the department made public a previously classified plan for glorifying the system and announced that the plan would not be implemented. It also protested a Defense Department "secret" stamp on a batch of published newspaper stories, after which the department issued new regulations designed to prevent future abuses.[65]

Of less magnitude were activities important to individual members of Moss' nationwide journalistic constituency, if not the world at large. The subcommittee persuaded the U.S. attorney for the Eastern District of Texas to rescind an order cutting off information releases by branch offices. It prevailed on the U.S. Marine Corps to allow television reporters closer to the center of the action at a landing exercise in Puerto Rico. And it convinced the Office of Economic Opportunity to order its Wilmington, Delaware, agency to open its executive committee meetings to the press.[66]

In the only failure reported by the subcommittee to its journalistic allies, Moss confessed himself unable to get the Department of Health, Education and Welfare to release names and fees of doctors and dentists receiving Medicare payments. A staff member said Moss "wished some newspaper or television station would sue HEW to force the disclosure of this information."[67]

As little as the Congress did about the freedom of information between 1966 and 1971, it seemed to satisfy the press groups interested in the issue. Nowhere in the records of the major journalism organizations does there appear any criticism of the absence of hearings or strengthening amendments.

The 1970 report of the ASNE committee hinted that the long struggle had sapped the enthusiasm of the journalist-combatants no less than that of those in Congress.

"But is the situation any better?" the report asked itself.

"Maybe so. Maybe not," it answered. "Just as last year, the major problems have not gone away, and they demand continued attention."[68]

The report concluded, with a mixture of discouragement and determination, "The fight for freedom of information for the public is not going to be waged by the public. It's going to continue to be the press' challenge--and a mighty big one."[69]

Even as that report was being submitted, a new force was entering the fight. Independent of--and critical of-- both press and Congress, self-appointed "public interest" lobbyists began in the late 1960s to speak up for what they conceived to be the unrepresented clients of big government and big business. High on their priority list was increased responsiveness by the Executive and the Congress.

Ralph Nader, the most famous and the most aggressive of the new crusaders, spelled out his view of the ordinary citizen's relationship with his government in an early statement. It was a view shared by the other major new campaigner for freedom of information--Common Cause. Nader complained that "most agencies have a two-pronged information policy--one toward citizens and one toward the special interest groups that form the agency's regulatory constituency." For the special interests, he wrote, "a pattern has emerged of preferential access and treatment over the years."[70]

Given that analysis, the question was what to do about it. The answer came naturally to an aggressive organization whose activists included many young graduates of the nation's best law schools, as Nader's organization did. The answer was, litigate.

Nader raised money from several foundations and created, in April 1972, what became the Freedom of Information Clearinghouse. Its first lawyer was an intense young New Yorker named Ronald L. Plesser. Its goal, Plesser recalled five years later, was "to test the Act as much as we could to try to countervene some of the bureaucratic gains."[71]

In its first six months, the Clearinghouse filed six Freedom of Information Act cases. By October 1972, access had been won for a trade magazine reporter to nursing home inspection reports, the Department of Agriculture was appealing a court order to open meatpacking plant inspection records, and more cases were in the works.[72]

A somewhat more ambitious goal was emerging, too: "a nationwide effort towards opening up the availability of information through the Freedom of Information Act. . .." The goal was to educate and "to litigate select cases which we believe present particularly important issues."[73]

"We were a resource for journalists and others," Plesser recalled. "There was no one else doing this at all."[74]

Although that assertion may have been somewhat exaggerated,[75] the Clearinghouse has been described as "the single most important group currently doing the broad range of FOIA

litigation."[76]

In January 1973, the National Press Club and the Nader organization formalized the alliance with the formation of a joint Press Information Center under Plesser. The announcement described the center as "attempting, on behalf of the press community, to make available the tools necessary to challenge the withholding of information."[77]

The tools were put to work within two weeks, with the filing of a suit on behalf of NBC reporter Carl Stern against the FBI seeking documents describing the FBI's COINTELPRO operation. Plesser called the resulting order for disclosure his "blockbuster case."

There were others, though less spectacular. In his two and one-half years with the Clearinghouse, Plesser estimated that it handled more than thirty lawsuits. The lawyers found time as well to draft a model state access law and "put a lot of pressure" on agencies to ease their procedures for the granting of access to ordinary citizens.[78]

Nader himself lobbied the Congress.

Drawing on the experiences of the student group he led in 1969 and the frustrated information-seekers his lawyers had represented since, Nader told a Senate subcommittee hearing that individual government officials should be held legally accountable for abuses of their power to withhold.[79] He told of Department of Agriculture demands for prepayment of search and copying fees ranging up to $91,840. He told of the trade magazine editor who sued and won access to nursing home

inspection reports. But when the editor asked the Social Security Administration for an identical report on another home, it was denied. He was forced to sue again.

Nader contrasted the criminal penalties to which any official releasing information improperly could be liable with the Freedom of Information Act's failure to "hold federal officials accountable for not disclosing information."[80] He proposed sanctions to include suspension, discharge, or even, "in severe circumstances, where actual harm to health or safety has resulted," criminal penalties.

A watered-down version of accountability was eventually written into the amendments of 1974.

Besides the press and the Congress, Nader and his associates lobbied another power center as well--the bar. Most congressmen are lawyers. Most of their chief aides are lawyers. The Freedom of Information Act, even more than most, was a lawyer's law, enforceable only by litigation, capable of interpretation only by the courts. So, in the public interest, this special interest, too, was courted.

The courtship was conducted with less passion than the others, in learned journals heavy with citations of precedent and copious footnotes.

A young Nader associate only a year out of law school undertook in 1970 to urge her fellow lawyers to fill in the act's "string of loopholes" with "rational disclosure policies. . .."[81] Joan Katz asserted, "After three years of operation, the Freedom of Information Act has not fulfilled

its advocates' most modest aspirations." She called for "narrow interpretations" of the act's exemptions by legal advocates and by the judges ruling on freedom of information cases. The required approach to the act, she wrote, is one "that tolerates only rational and necessary limitations on the overriding principle of access to government information."[82]

Particularly in need of narrowing through court interpretation, Ms. Katz argued, were the exemptions for trade secrets, inter-agency memoranda and investigatory files. After proposing the limited remedies available through judicial action, she conceded, "In all likelihood, the ambiguities and deficiencies of this statute will be remedied, if at all, only by the passage of new and improved legislation."[83]

Ms. Katz' efforts succeeded, at least, in gaining the attention of even some of her legal colleagues who did not share her anti-bureaucratic sentiments. Two years later, for example, a member of the legal staff of the Federal Trade Commission, in an article that defended agencies' responses to the act, numbered Ms. Katz' among the "very learned critiques" of the act.[84]

Nader himself, whose utterances on the subject were usually more polemical, published a polished version of his 1969 report on the student investigation of agency attitudes toward information requests in the same Harvard review in which John Moss' article had appeared more than a decade earlier.[85] Nader called for "authoritative and concrete" interpretation by the courts, "comprehensive" oversight

hearings by Congress, a presidential "review group" to eliminate inconsistencies in agency response, time limits for responses and appeals and "sanctions from the White House" against officials subverting the act.[86]

He was to get much of what he wanted from the courts and the Congress, if not from the Executive. By 1973, as noted earlier, he realized that any sanctions were likely to be applied only by the Congress and not the White House.

Nader and his associates were not the only ones who pressed for improvement in the Act. Common Cause, another reformist organization born in the latter 1960s, joined the freedom of information fight as part of its broader concern with creating a more politically effective citizenry. Although lacking, perhaps, the almost fanatical investigative zeal of Nader's Raiders, Common Cause could claim a broader organizational base and more well-known names, the best-known being that of its founder, former HEW secretary John Gardner.

Common Cause's major role in the campaign for access was yet to come, in the push for "government in the sunshine." But it lent its weight to the tightening of the Freedom of Information Act first.

Of greatest interest to Common Cause was the adoption of a requirement of "item-by-item reports by every agency on how it dealt with the Act in the previous year."[87]

Common Cause's assessment of the problems with enforcement of the act led to the conclusion that the "central problem" was "the spirit in which the law is administered."

The organization's solution was "an accounting of each refusal to disclose information requested." This would, its advocates believed, "give Congress the basic tool to breathe life into the law."[88]

It seemed, by comparison to the remedies prescribed by Nader and others, a rather mild form of resuscitation.

Somewhat stronger medicine was advocated by a group not usually considered a lobbyist for the public interest. In this case, as in others fortunate for freedom of information, the public interest coincided with the private interest already best served by the act; so the Administrative Law Section of the American Bar Association joined the amending effort. A similar confluence of interests, it will be recalled, had made the bar an ally of the press, temporarily, in the adoption of the original act. In 1966, the bar supported freedom of information as part of its overall effort to rewrite the old Administrative Procedure Act. The alliance of the 1970s with Ralph Nader and Common Cause must have been equally uncomfortable.

This time, the bar urged inclusion of an amendment specifically overriding the Supreme Court's decision in the Mink case. The courts, said a spokesman for the bar, should be told explicitly that it was permissible to inspect government documents to determine if they were properly classified before allowing them to be withheld.[89]

The first result of the new pressures from the new advocates was not the strengthening of the Freedom of Information

Act itself, although that was the stated goal of most of their effort. Instead, in 1972, a legal requirement of public access was extended for the first time to the hundreds of quasi-public appointed groups that offered advice and pressed their influence on agencies throughout the government.

These advisory panels ranged in significance from the International Screw Thread Commission to the Industry Advisory Council of the Defense Department. The Industry Advisory Council was, in 1970, made up of 27 members--the deputy secretary of defense as chairman and 26 industry representatives. A dozen of those industrialists represented companies that held among them $6.1 billion in military contracts.[90] The Council's stated purpose was to provide for "direct and regular contact" between the secretary of defense and the defense industry. It met, as did nearly all such committees, behind closed doors.

The effort to open those doors was led by Senator Lee Metcalf, a Montana Democrat. The struggle followed the typical pattern of freedom of information efforts. Committees of both houses held hearings and heard of abuses of secrecy, the complaints coming from public interest groups and private parties who thought they were being left out. The Executive, under Republican control this time, objected strenuously to required openness, chiefly on the grounds of inefficiency and the loss of candid advice. The bill started out strongly worded and was watered-down, requiring after a few years an attempt at amendment. A brief examination of the familiar

scene is in order.

A consultant to Metcalf's Subcommittee on Intergovernmental Relations, E. Winslow Turner, sketched for the Senate the background of the critics' concern:

> Viewed in its best light, the advisory committee draws on the experience of leaders in industry, finance, social action, and science at an exceedingly low cost to the government for the wisdom obtained. . ..
>
> Viewed in its worst light, the federal advisory committee can be a convenient meeting place for special interests seeking to change and preserve a federal policy for their own ends. Such committees stacked with giants in their respective fields can overwhelm a federal decision maker, or at least make him wary of upsetting the status quo. The federal advisory committee can be, and has been, used for political purposes to confer prestige on individuals who may have little or nothing to contribute. It can be, and has been, used to obtain inside information about what government is doing as well as to convey to government information which is not necessarily accurate or objective.[91]

The subcommittee studied the operations of a number of major advisory committees from 1969 to 1971. One was the Financial Advisory Committee to the Civil Aeronautics Board. It was made up of officials of major banks, insurance companies and other institutions holding debts of the major airlines. The group's first meeting, which was closed, was held at the Chase Manhattan Bank, a major creditor of five local service airlines and a major stockholder in five of the largest. The second meeting, also closed, was held at the Equitable Life Assurance Society, the third-largest holder of long-term airline debt. Present were committee members, CAB members and CAB staff. The agendas, which were not made public, included discussion of rates, subsidies, financial condition of

airlines, competition and other matters of great importance.[92]

The CAB's response to the subcommittee investigation was reminiscent of agency responses to the Moss Committee's early inquiries.

The advisory committee minutes, previously confidential, were opened to inspection; and a little more than a month after the hearing, the advisory committee was disbanded.[93]

The subcommittee and its House counterpart turned up a variety of similar examples showing, in the words of one consumer advocate, "the growing influence of industry lobbyists and executives on Government decision-making."[94]

Metcalf offered a series of bills, beginning in the 1969 session of Congress, that would include public representatives on all advisory committees, require that all meetings except those dealing with national security and intelligence be open to the public, and require a verbatim transcript of all meetings.[95]

As has been the case with every freedom of information bill ever pushed through Congress, the Executive agencies objected. In the case of the Defense Department's Industry Advisory Council, for example, Deputy Secretary of Defense Barry J. Shillito said that the necessity of "free and open discussion" prevented the keeping of transcripts. Anyway, he said, the council made no decisions. If its meetings were required to be public, he doubted that it would be worth continuing the council.[96]

Bills giving the agencies more leeway were introduced by Republican Senators Charles Percy and William Roth.

The compromise adopted did not include the provision for public representation. It also broadened the grounds for closed meetings to include all the exemptions set out in the Freedom of Information Act. Like the act, however, it did permit anyone to sue to open meetings or obtain transcripts.[97]

A final similarity between the Advisory Committee Act and the Freedom of Information Act was their results, which in both cases included major steps toward openness, some evasion by the agencies, and ample demonstration of the weaknesses written into the acts.

A status report on the operation of the Advisory Committee nearly a year after it took effect noted that "more federal advisory committees appear to be opening their doors to the public and the press. . . ."[98] But the report also complained of a guideline issued by the Office of Management and Budget permitting any meeting to be closed if it included an exchange of views that, if written, would fall within the Freedom of Information Act exemption for intra-agency memoranda. The guideline allowed the closing of such meetings "to protect the free exchange of internal views and to avoid undue interference with agency or committee operation. . . ."[99]

The openness advocates were able to provide an object lesson in the perils of excess secrecy when the National Industrial Pollution Control Council, created by President Nixon to provide industry's views to the Environmental

Protection Agency, was killed by Congress' refusal to appropriate its $1.3 million budget. The council had met regularly in secret for three years, continuing to do so after passage of the new law.[100]

More typical, however, was the evidence of evasion uncovered by Metcalf more than two years after passage of the act. He obtained a transcript of a discussion at the organizational meeting of a subcommittee of the National Advisory Committee on Criminal Justice Standards and Goals. One of the law enforcement officials suggested, "We could have all our good, honest-to-goodness discussions over the lunch hour while the stenographer is gone." There was general laughter. A colleague replied, "I hate to be talking about how the hell we get around this because that puts me in a rather difficult position." But he suggested that "henceforth you have dinner meetings which can be picked up as a result of the grant and which do not have to have minutes and are not of public record. That's what we did with one group already. . . ."[101]

The man offering the advice on circumventing the law was William T. Archey, acting director of the Policy Analysis Division of an office of the Law Enforcement Assistance Administration (LEAA).[102]

Inserting the dialogue into the Congressional Record, Metcalf noted dryly that his subcommittee "will be holding oversight hearings on advisory committees in the near future, and that it may be possible to give LEAA a first-hand example of what advisory committee oversight is all about."[103]

As had been the case with the Freedom of Information Act, the Advisory Committee Act got some help from the courts. In one notable ruling, a federal court--acting on a suit filed by a weekly trade paper--ordered the Treasury Department's Bureau of Alcohol, Tobacco and Firearms to open to the press informal sessions between officials and representatives of distilling companies at which labeling requirements for beer and liquor were being discussed. The court concluded that, even though the officials and lobbyists did not constitute an official advisory committee, they were functioning as one.[104] Judge Charles Richey's reasoning echoed that of the act:

> The government's consideration of such sensitive issues must not be unduly weighted by input from the private commercial sector, lest the government fall victim to the devastating harm of being regulated by those whom the government is supposed to regulate in the public interest.[105]

Still, like the Freedom of Information Act, the Advisory Committee Act proved in practice to fall far short of the ideal. The perfecting process began.

Ralph Nader's Freedom of Information Clearinghouse urged a series of strengthening amendments. They provided for an independent agency to be assigned oversight responsibilities; sanctions to be enacted; modification of Freedom of Information Act exemptions to fit advisory committees; verbatim transcripts to be made of closed meetings; "ad hoc" and subgroups to be included in the definition of "advisory committee;" 30 days advance notice of all meetings to be required except in

specified emergencies.[106]

On February 6, 1976, Metcalf introduced a bill incorporating several of those changes and others aimed at improving administration of the law and improving access under it. The amendments were designed to extend the act's coverage to several previously exempt areas, provide public notice of and public rules for selection of advisory panels, create a system of administrative review and court appeal of closures patterned on the Freedom of Information Act, and remove the inter-office memorandum exemption as a ground for closure.[107]

Metcalf told the Senate that, despite withdrawal of the guideline stretching the application of that exemption, it continued to be cited improperly as a basis for closing meetings. Even a court decision that the exemption was inapplicable had not halted its use.[108]

The hearings on the amendments followed the pattern of all previous hearings on access legislation. While witnesses from the public urged strengthening and cited abuses and shortcomings of the existing act,[109] officials of the executive agencies unanimously opposed any tighter restrictions. For example, James T. Lynn, director of the Office of Management and Budget, testified that any problems could be cleared up administratively, without new legislation. Mary C. Lawton, deputy assistant attorney general, opposed the deletion of the inter-agency memoranda exemption, despite her admission that its citation was generating numerous lawsuits. Marjorie Lynch, under-secretary of the Department of

Health, Education and Welfare, expressed her department's opposition as well.[100]

Metcalf's death stalled progress on the amendments, at least temporarily, and they remain in limbo at this writing.

Even as the Congress was acting to open the activities of advisory committees, it was beginning the process of tightening the Freedom of Information Act. Presiding over the effort were two men new to the access campaign. In 1971, John Moss gave up the chairmanship he had held for 16 years to take the chair of an investigative subcommittee. His successor was William Moorhead, a wealthy Pennsylvanian who had more seniority than Moss had had when he got the subcommittee but who was scarcely better known. The same could not be said of the new chairman of the Senate subcommittee. Edward Long, mired in scandal, had been defeated for renomination by young Thomas Eagleton in Missouri. Long's subcommittee was now headed by Edward M. Kennedy.

The House took the lead. In four sets of hearings beginning in June 1971, the subcommittee took up the long-neglected oversight of the 1966 act. During 41 days of hearings, 142 witnesses testified. In addition, an analysis of the operations of the act was provided by the Congressional Research Service of the Library of Congress. That analysis was supervised by Sam Archibald, formerly staff director of the subcommittee.[11]

The hearings turned up six "major problem areas." Agencies took an average of 33 days to answer a request for

information, and another 50 days to respond to an appeal. Excessive charges by some agencies constituted an effective barrier to individual requestors. Despite eventual victory by the information seeker in most court cases, the time and money required limited the use of litigation as a tool. Journalists were using the act very rarely. The agencies' professional information specialists usually had little to say in decisions to withhold, despite their expertise. In the absence of demonstrated concern by their bosses, many lower-level officials withheld more than the act allowed.[112]

The subcommittee's report called for a number of reforms by the agencies in their administration of the act. These included the drafting of coherent and consistent guidelines, improved training of employees in the purpose and function of the act, stronger leadership by the department of Justice as the lawyer for the executive, and the reduction and standardization of fees.[113]

But more importantly, since the power of Congress to persuade or coerce executive agencies in their internal functions is limited, the report also proposed several amendments. These were: time limits for responses to requests and for acting on appeals, clarification of the phrase "identifiable record," which was being used by some agencies to refuse information on the ground that requesters' descriptions weren't clear enough, deadlines for agency responses in lawsuits under the act, a requirement for annual reports by the agencies to Congress on their activities under

the act, changes in the exemptions to clarify vague wording, narrow some loopholes and overcome conflicting court decisions.[114]

The hearings produced another useful result: fourteen agencies announced revisions in their regulations just before or during the hearings, two of them releasing new guidelines within 24 hours before testifying.[115]

In March 1973, bills reflecting the conclusions of the House investigators were introduced in the House and Senate. Over the next three months, three subcommittees in the Senate held a series of joint hearings on all aspects of the information issue, including the operations of the act, executive privilege and the classification system.[116]

Some indication of the broadened interest in freedom of information is provided by the list of witnesses at those hearings. In addition to representatives of major press groups and the bar, witnesses came from public interest groups--Common Cause, Consumers Union, Center for the Study of Responsive Law and American Civil Liberties Union--from organized labor; and from the Congress itself.[117] It was no longer a lonely struggle.

The bills that emerged from these two sets of hearings differed substantially in their attempts to solve the problems brought to light.

The House bill dropped the phrase "identifiable records" in favor of a requirement that a request "reasonably describe" the records sought. It set a limit of 10 working days for

response to a request and 20 working days for ruling on appeals. It overrode the Supreme Court's Mink decision by providing specifically that a court may conduct a private investigation of any record claimed to be exempt under the national defense exemption, including a determination of whether the material was properly classified in the first place. And it allowed the assessment of attorney fees against the government when a requester sues successfully.[118]

The Senate bill, while including those provisions, added several: a procedure for establishing uniform fees and for waiving fees altogether when that was in the public interest; a provision that anyone could sue in the federal court for the District of Columbia as an alternative to suing in his own district court; and a penalty to be assessed against the person responsible for any unlawful withholding, up to 60 days' suspension from the job.

One veteran of the freedom of information campaigns referred to the last as the "Ralph Nader Memorial Amendment." It had indeed been Nader's idea, and one of the changes he urged most vigorously. During the House subcommittee hearings, he testified, "The great failure of the Freedom of Information Act has been that it does not hold federal officials accountable for not disclosing information."[119] Ronald Plesser, a Nader associate, added, "If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information."[120]

Before adopting its bill, the Senate added two substantive amendments from the floor. One, by Senator Edmund Muskie, strengthened slightly the wording of the provision permitting court inspection of classified documents. The other, by Senator Philip Hart, sought to tighten up the exemption for investigative files. Its purpose, as described earlier, was to narrow the broad interpretation given that exemption in a series of court decisions.

In one of the strange twists that mark the course of freedom of information, however, the "tightening" was followed by a dramatic increase in agency usage of the exemption. The most recent figures show that the exemption was the basis of 14 percent of denials during the period 1967-71. In 1976, after the amendment took effect, it was cited in 35 percent of the denials. Sam Archibald, who conducted both surveys, concluded, "The Congress, which had intended to narrow the investigatory files excuse, actually broadened its use by spelling out the conditions under which investigatory records can be withheld."[121]

Despite considerable opposition to the Muskie and Hart amendments, both were adopted; and both houses passed their bills. Then the real battle began.

While differing bills lay in conference committee, Richard Nixon resigned as President and Gerald Ford succeeded him, pledging as he did so a more open administration. Within a few days of his swearing in, Ford asked the conferees to delay action on the bills until he could react to them. On

August 20, 1974, he sent chairmen Moorhead and Kennedy a letter outlining several "concerns."[122] He feared, he said, that the provision for court inspection of classified documents did not give adequate weight to a presumption in favor of proper classification. He thought the provision for court-imposed penalties on individual employees for unreasonable withholding was overly harsh. He said the rewording of the investigative files exemption did not give adequate protection to confidential informants or to individual privacy. The waiver of fees, he suggested, might serve as a subsidy to corporations using the act to seek competitive benefits. And the time limits imposed for agency response were unduly rigid.[123]

Ford at least was stating his objections openly, unlike Lyndon Johnson's style in 1966. Ford concluded,

> I have stated publicly and I reiterate here that I intend to go more than halfway to accomodate Congressional concerns. . .. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

The conferees were equally accomodating. Several of the points raised by Ford were points of difference in the two bills anyway. In others, the lawmakers found no real difference between what the President wanted and what they were doing. So, a month later, a joint letter went down Capitol Hill to the White House describing substantial compliance with the President's wishes. The conferees said they had included language in the Statement of Managers that explained the legislative intent of the bill spelling out that court review

of classified documents is permitted but not required, and only in cases in which the agency cannot otherwise satisfy the court of the legitimacy of the classification. That was the intent of the bill before Ford's request, the chairmen insisted. They had weakened the sanction provision to allow the Civil Service Commission to make the final determination, a change endorsed by the government employees union. They had changed the investigative files amendment to protect the information from a confidential informant as well as the identity of the informant. They had added to the Statement of Managers a reminder that the fee waiver was not intended to be automatic, but to be based on customary considerations, including the public benefit involved. They had adopted the Senate provision giving agencies an extra 10 days to comply with requests in unusual circumstances and added authorization for the court to grant an additional extension if it is justified.[124]

Both houses adopted the compromise bill. On October 17, Ford vetoed it.

The veto message said that the President remained unsatisfied with the provision for determining the propriety of classification, feared confidential law enforcement files would be subject to disclosure and thought the time requirements still too inflexible.[125]

In each case, the objection in the veto message was more strongly worded than the original objection in the August 20 letter. In the case of the law enforcement files, the

objection cited in the veto message had not been mentioned in the letter that purported to set forth Ford's concerns. No evidence was cited in either communication to support the assertion that the time limits were unreasonable. And there is no appreciable difference between what Ford said he wanted to protect classified information and the protections provided in the bill and accompanying Statement of Managers.[126]

Why, then, the veto?

Probably the best explanation came from J.F. terHorst, a newspaper columnist with the unique perspective of having been a long-time friend of Ford and his White House press secretary before quitting over the Nixon pardon.[127]

TerHorst recalled having a premonition of trouble when, at the first meeting of the new President with his holdover cabinet, Attorney General William Saxbe warned Ford that he might have to veto the amendments. After terHorst and another new aide argued against a veto, Ford agreed to request the delay so a compromise could be worked out.

> Despite the grace period that the congressional managers of the bill extended to Ford as a personal courtesy, no serious efforts to work out a compromise were made by the Justice Department, the FBI, the Domestic Council or other administration agencies whose leaders supposedly were now responsive to Ford.
>
> It amounted to stonewalling, some actually preferring that Congress pass a bill which Ford would veto. At a meeting of the White House Senior Staff several weeks later, William Timmons, the White House congressional liasion chief retained by Ford, urged that the staff recommend to Ford that he veto the FOI legislation. And Ford, assuming Congress and not the administration was being stubborn, finally did just that last week. . ..

> The lesson for Ford is that there still remains an excessive amount of anti-media zeal among the Nixonites in government, despite his own desire that federal agencies make more, not less, information available to the public.[128]

Lending credence to that analysis was the report of a staff member of the House subcommittee that a White House aide said to him, "Who gives a damn except The Washington Post and The New York Times whether he vetoes them?"[129]

That phrase came back to haunt the White House. Press groups that had been absent from the front rank in urging the amendments sprang into action to lobby for an override of the veto.

"Your FOI committee proposes that we demonstrate who gives a damn. We ask your immediate, personal, priority attention to this matter," ASNE committee chairman William Hornby wrote his fellow editors.[130]

Ralph Otwell, national president of Sigma Delta Chi, asked all chapter presidents to "quickly assign members to contact all representatives and senators in your area to seek a firm commitment in support of the FOI amendments and a pledge to help override the President's veto."[131]

ASNE officers did not stop with Congress. A delegation called on President Ford October 25. After departing, society president Howard Hays wrote Ford urging a "second look" at the freedom of information situation. Hays warned, "Our society hopes to help persuade the Congress to override this veto. We do this in the conviction that the several years of legislative effort in framing these amendments have already

met the legitimate concerns of the Executive Branch."[132]

Editorials calling for an override were inserted in the Congressional Record from papers in Tucson, Sacramento, Kansas City, Des Moines, Chicago, Louisville, Detroit, Charlotte, Washington, D.C., and elsewhere.[133]

Every major press organization joined the campaign--except one. The American Newspaper Publishers Association sided with the President. Senator Metcalf capitalized on the split. "The representatives of the business side of the news industry. . .do not want us to override President Ford's veto. . .," he said. The editors urged overriding. "The ASNE is interested in the people's right to know, not the publisher's desire to make a profit."[134]

The vote to override was 371-31 in the House, and 65-27 in the Senate. The Senate vote was only three more than the minimum two-thirds required.

ASNE committee chairman Hornby, offering his members a "fervent thank you," credited them with being "a principal factor" in the outcome.[135]

At least one editor, however, wasn't so sure the end justified the means. Wilbur Elston, editorial page editor of the Detroit News, conceding that he had supported Ford on the issue, raised the question that had troubled some journalists throughout the campaign for access: should they double as lobbyists? Elston wrote:

> In short, I believe we ought to let our editorials and news stories speak for themselves on FOI as well as other public issues, use our own ASNE staff to lobby

> for or against specific legislation we're especially concerned about--if we feel we must go that far--and avoid personal, self-serving and demeaning appeals to elected representatives to vote our way.[136]

But the elected representatives had voted the press' way, again. Nearly 20 years after John Moss started work, the Congress had come as close as it was likely to get to producing a workable freedom of information law. Some loopholes remained--and still remain. Not every record was attainable nor every bureaucrat brought to heel. Still, the barriers of delay and cost had been lowered, if not removed. The exemptions had been clarified and, for the most part, narrowly interpreted, although the exclusion of investigatory material and information protected by other statutes would become more troublesome.

After the amendment of the Freedom of Information Act, two great obstacles to access remained. They were the Congress' secrecy in its own affairs and executive privilege. The problem of Congress was soluble. Executive privilege was not.

FOOTNOTES

[1]"The Freedom of Information Act (Ten Months Review)," Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, 90th Contress, Second Session, pp. 1-2.

[2]Ralph Nader letter to Rep. John Moss, April 25, 1963. In Moss papers, "Correspondence-N" file.

[3]Ibid.

[4]Ralph Nader and others, "A Status Report on the Responsiveness of Some Federal Agencies to the People's Right to Know about Their Government," reprinted in Congressional Record, House, September 3, 1969, pp. 7480-7483.

[5]Ibid., p. 7480.

[6]Ibid., p. 7481.

[7]Ibid.

[8]Ibid., p. 7482.

[9]Ibid.

[10]Ibid.

[11]The Wall Street Journal, October 23, 1968, p. 1.

[12]Ibid.

[13]Samuel Archibald letter to A.L. Hewitt, July 3, 1968, in FOI Center files.

[14]Ibid.

[15]Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1968, p. 7.

[16]Ibid.

[17]Ibid.

[18]Freedom of Information and Press-Bar Committee, American Society of Newspaper Editors, "Report," 1968, p. 9.

[19]Ibid.

[20]Ibid.

[21]Ibid., p. 10

[22]Ibid., p. 14.

[23]The Washington Post, February 29, 1968, p. D 20.

[24]"A Status Report. . . ," p. 7482.

[25]Committee on Advancement of Freedom of Information, Sigma Delta Chi, "Report," 1969, p. 10.

[26]Ibid.

[27]Editor & Publisher, June 26, 1971, p. 12.

[28]Ibid.

[29]Editor & Publisher, July 8, 1972, p. 20.

[30]The Arizona Journalist, Spring 1970, p. 20.

[31]1969 "Report," pp. 12-13.

[32]Publisher's Auxiliary, November 24, 1973, p. 6.

[33]Editor & Publisher, July 8, 1972, p. 24.

[34]Roy Parker Jr. of the Raleigh, N.C., News and Observer, quoted in 1968 "Report," p. 11.

[35]Clark Mollenhoff, interview with the author, May 28, 1977.

[36]Editor & Publisher, November 18, 1967, p. 9.

[37]Editor & Publisher, June 26, 1971, p. 12.

[38]"Administration of the Freedom of Information Act," Report of the House Committee on Government Operations, 92nd Congress, Second Session, p.78.

[39]Ibid.

[40]Kenneth Culp Davis, "The Information Act: A Preliminary Analysis," 34 University of Chicago Law Review 761,(1967), p. 803.

[41]"Administration of the FOI Act," pp. 71-72.

[42]"U.S. Government Information Policies and Practices," Hearings, House Committee on Government Operations, 92nd Congress, First and Second Sessions, (Parts 4-6), p. 1257.

[43]Ibid., p. 1252.

[44]"Administration of the FOI Act," p. 72.

[45]John Seigenthaler, Nashville Tennessean publisher, in Hearings, pp. 1302-1310.

[46]Christine Marwick, ed., Litigation Under the Amended Federal Freedom of Information Act, Project on National Security and Civil Liberties of the ACLU Foundation, Washington, D.C., 1976, pp. 72-75.

[47]Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973).

[48]The Columbia Missourian, December 7, 1973, p. 1.

[49]Marwick, p. 55.

[50]Bristol-Myers Co. v. FTC, 424 F. 2d 935 (D.C.C.), certiorari denied, 400 U.S. 824 (1970).

[51]Weisberg v. Department of Justice, 489 F. 2d 1195 (D.C.C. 1973).

[52]Aspin v. Department of Defense, 491 F. 2d 24 (D.C.C. 1973).

[53]Congressional Record, Senated, May 30, 1974, p. 9336.

[54]Enviornmental Protection Agency v. Mink, 410 U.S. 73 (1973).

[55]Patsy Mink, "The Cannikin Papers," in Thomas Franck and Edward Weisband, eds., Secrecy and Foreign Policy (New York: Oxford University Press, 1974), pp. 114-131.

[56]EPA v. Mink, quoted in Mink, Ibid., p. 121.

[57]Ibid.

[58]EPA v. Mink, opinion of Justice Potter Stewart, concurring, quoted in Marwick, p. 14.

[59]Ibid.

[60]Ibid.

[61]Quoted in Freedom of Information Act and Amendments Sourcebook, House Committee on Government Operations, 94th Congress, First Session, p. 257.

[62]Ibid., p. 259.

[63]J. Edward Murray letter to Robert Notson, March 13, 1967, FOI Center files.

[64]Listed in 1968 "Report," pp. 7-8.

[65]Listed in 1969 "Report," p. 10.

[66]Ibid., pp. 11-12.

[67]Ibid.

[68]Freedom of Information and Press-Bar Committee, American Society of Newspaper Editors, "Report," 1970.

[69]Ibid.

[70]"A Status Report. . .," p. 7480.

[71]Ronald Plesser, interview with the author, May 28, 1977.

[72]Plesser letter to Paul Fisher, October 24, 1972. In FOI Center files.

[73]Ibid.

[74]Plesser interview.

[75]The American Civil Liberties Union Foundation, for example, provided counsel in a number of freedom of information cases.

[76]Marwick, p. 3.

[77]The Kansas City Times, January 15, 1973, p. 2.

[78]Plesser interview.

[79]The Washington Post, April 13, 1973, p. A 4.

[80]Ibid.

[81]Joan Katz, "The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act," 48 Texas Law Review 1261 (1970), p. 1284.

[82]Ibid, pp. 1261-1262.

[83]Ibid., p. 1284.

[84]Charles H. Koch Jr., "The Freedom of Information Act: Suggestions for Making Information Available to the Public," 32 Maryland Law Review 189 (1972), p. 190.

[85]Ralph Nader, "Freedom from Information: The Act and the Agencies," 5 Harvard Civil Rights-Civil Liberties Law Review 1 (1970), pp. 1-15.

[86]Ibid., pp. 14-15.

[87]"Common Cause Report," Des Moines Register, May 21, 1972, p. 23.

[88]Ibid.

[89]The Washington Post, June 12, 1973, p. A 7.

[90]St. Louis Post-Dispatch, June 20, 1971, p. 1.

[91]E. Winslow Turner, "Advisory Committees: The Fifth Branch of Government," Congressional Record, Senate, September 12, 1972, p. 14651.

[92]Ibid.

[93]Ibid.

[94]Reuben Robertson III, chairman of the Consumers Advisory Committee of the Civil Aeronautics Board, quoted in the St. Louis Post-Dispatch, June 20, 1971.

[95]Congressional Record, Senate, September 12, 1972, p. 14652.

[96]St. Louis Post Dispatch.

[97]Congressional Record, Senate, Sept. 12, 1972.

[98]Editor & Publisher, September 15, 1973, p. 11.

[99]Ibid.

[100]Ibid.

[101]Congressional Record, Senate, June 20, 1975, p. 9414.

[102]Ibid.

[103]Ibid.

[104]Milwaukee Journal, August 23, 1974, p. 1. The case was Food Chemical News v. Davis, 378 F. Supp 1048 (D.D.C. 1974).

[105]Ibid.

[106]Access Reports, April 9, 1975, p. 12.

[107]Congressional Record, Senate, February 6, 1976, p. 1455.

[108]Ibid., p. 1456. The case was Wolfe v. Weinberger, 403 F. Supp. 238 (D.D.C. 1975).

[109]Access Reports, March 22, 1976, p. 5.

[110]Ibid.

[111]"Administration of the FOI Act," p. 7.

[112]Ibid., p. 8.

[113]Ibid., p. 10.

[114] Ibid., pp. 10-11.

[115]Ibid., p. 12.

[116]"Amending the Freedom of Information Act," Report of the Senate Committee on the Judiciary, 93rd Congress, Second Session.

[117]Ibid., p. 4.

[118]"Amending Section 552 of Title 5, United States Code," Report of the House Committee on Government Operations, 93rd Congress, Second Session, pp. 10-11.

[119]Quoted in Senate Report, p. 20.

[120]Ibid., p. 21.

[121]Samuel J. Archibald, "The Freedom of Information Act Revisited: Have the 1974 Amendments Helped," paper prepared for delivery at the 1978 Association for Education in Journalism Convention, p. 8.

[122]Gerald Ford letter to Edward Kennedy and William Moorhead, reproduced in "FOI Amendments--Conference Report," Report No. 93-120, October 1, 1974, pp. 2-4.

[123]Ibid.

[124]Kennedy and Moorhead letter to Ford, Ibid.

[125]"Veto Message," reproduced in Sourcebook, p. 398.

[126]Compare the "Veto Message" with the letters between Ford and Kennedy and Moorhead.

[127]J.F. terHorst, Washington Star, November 1, 1974, p. 15.

[128]Ibid.

[129]New York Times, October 18, 1974, p. 1.

[130]William Hornby letter to ASNE members, October 18, 1974. In ASNE files.

[131]Ralph Otwell letter to Sigma Delta Chi chapter presidents, October 21, 1974, in Sigma Delta Chi files.

[132]Howard Hays letter to Gerald Ford, October 25, 1974. In ASNE files.

[133]Reproduced in Sourcebook, pp. 441-447.

[134]Congressional Record, Senate, November 21, 1974, p. 19818.

[135]William Hornby letter to ASNE committee members, November 22, 1974. In ASNE files.

[136]ASNE Bulletin, February 1975, p. 24.

CHAPTER V

EXECUTIVE PRIVILEGE

After three decades of the freedom of information movement, one barrier to access stands uniquely unaffected. Legislation has not limited it. The courts have not defined it. The press and public interest advocates have not brought effective pressure to bear on it. It is both the oldest and the least understood of the justifications for withholding. It remains the most inclusive of secret-keepers despite the facts that its constitutional basis is vague, its historical precedents are questionable, and its legitimacy is hotly disputed by most of the legal scholars who have addressed themselves to it. This is the strange case of executive privilege.

A brief historical survey is essential before examining the contemporary struggle over the issue, a struggle that became a constitutional crisis.

A 1973 study explained its beginnings this way:

> The assertion of an "executive privilege" to withhold information from the legislature is rooted in the opening words of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America" and in the last clause of Section 3 of Article II: "He shall take care that the laws be faithfully executed."[1]

Note that neither the phrase itself nor any specific reference to it is contained in the Constitution. Two scholars

sympathetic to the executive drew a parallel:

> Concededly, the Constitution does not expressly confer upon the President or the Executive branch the power to withhold information the disclosure of which is contrary to the public interest. The Constitution, however, is equally silent with respect to the right of Congress to investigate. . ..
>
> The same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when the use of the power is necessary to exercise his Executive functions effectively. . ..[2]

Those Executive functions may require secrecy

> . . .for the proper conduct of the foreign affairs of the nation, or in the interest of military security, or, generally, for the furtherance of the efficiency and integrity of the Executive branch, such as the safeguarding of frank internal advice and discussion, of information received in confidence, of sources of confidential information, of methods of investigation, and of the reputation of possibly innocent persons from the disclosure of unreliable accusations.[3]

That enumeration, written in 1961, reads almost like a list of the exemptions approved by Congress from the disclosure required by the Freedom of Information Act, passed in 1966. The act, however, also specifically provided that none of its exclusions should be used as authority to withhold information from Congress itself. Although recognizing a need for secrecy, the legislators insisted on their own right to know even when the public should not. The 1961 analysis continued:

> The power of Congress to investigate and the power of the Executive to withhold information are complementary; they flow from the same Constitutional source, i.e., the recognition of the principle that each branch of the Government has the powers not belonging exclusively to another branch which are necessary to enable it effectively to carry out its constitutional duties and functions.[4]

The authors might better have said the powers were contradictory. The conclusion of the Library of Congress study in 1973 came nearer the point. "This Constitutional grant of power is both vague and complicated, the language raising more questions of how the power shall be exercised than it answers."[5]

Executive privilege was unveiled in its modern form in 1954. It has been under attack by the anti-secrecy forces virtually ever since. Three presidents have voluntarily limited its application, and each administration has violated its self-imposed restrictions. Only after its most blatant abuse did the issue reach the Supreme Court, and then the ruling was narrowly circumscribed and cautiously worded.

Throughout, the defenders of executive privilege have relied most heavily on a study made in 1948 by Herman Wolkinson, a lawyer in the Department of Justice. Indeed, the attorney general's memorandum offered in support of President Eisenhower's 1954 invocation of the doctrine was an almost exact reproduction of Wolkinson's article, though unattributed. An expanded version was the justification offered in 1958 by another attorney general to Senator Thomas Hennings.[6]

Its two most significant, and most disputed, conclusions were these:

> For over 150 years--almost from the time that the American form of government was created by the adoption of the Constitution--our Presidents have established, by precedent, that they and members of their Cabinet and other heads of executive departments have an undoubted privilege and discretion to keep confidential, in the public

> interest, papers and information which require secrecy. . ..
>
> Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, they will not interfere with the exercise of that discretion, and that Congress has not the power, as one of the three great branches of the Government, to subject the Executive Branch to its will any more than the Executive Branch may impose its unrestrained will upon the Congress.[7]

Then the memorandum traced the history of withholding based on that privilege to 1792, when the House of Representatives launched an investigation of a military expedition led by Gen. St. Clair that had ended in a massacre by Indians of much of St. Clair's command. Wolkinson quoted minutes of a cabinet meeting at which it was agreed that the investigators would be given "such papers as the public good would permit" and denied those "the disclosure of which would injure the public."[8]

Thomas Jefferson was cited as having sustained Washington's precedent by refusing to disclose to another set of House investigators some correspondence dealing with the Aaron Burr conspiracy case.[9]

Similar withholdings were found in the administrations of presidents Jackson, Tyler, Buchanan, Grant, Cleveland, Coolidge, Hoover, both Roosevelts and Truman.[10] (An aside: One of the refusals under Franklin Roosevelt relied on an opinion by Attorney General Robert Jackson that disclosure would not be in the public interest. Years later, then a justice of the Supreme Court, Jackson commented on his own opinion. A judge, he wrote, "cannot accept self-serving press statements of the

attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."[11])

After summarizing briefly the instances cited, the memorandum concluded:

> Thus, you can see that the Presidents of the United States have withheld information of Executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.[12]

Drafted but never used during the Truman administration, the analysis was resurrected six years later to justify a single instance of withholding. Its impact was to be felt for years. In 1955, responding to a questionnaire circulated by the Moss subcommittee, 19 Executive agencies and departments cited the May 17, 1954, letter based on the memorandum as authority to withhold information.[13] In 1957, a survey by the Senate subcommittee headed by Hennings turned up 25 instances in which information had been withheld at least temporarily from congressional committees since the 1954 letter.[14] Twenty years after its first use, Raoul Berger was obliged to devote a section of his exhaustive work on the subject of executive privilege to a refutation of Wolkinson.[15]

Because Berger's is the most exhaustive treatment, and because it draws upon the experience and analyses of two decades, his assessment must be given substantial weight.

The assessment is harsh, a mixture of painstaking scholarship and undiluted vitriol. The memorandum, Berger writes, "is a farrago of internal contradictions, patently slipshod

analysis, and untenable inferences."[16]

The first "internal contradiction" is that between the assertion that "courts have uniformly held" in favor of executive privilege and the admission later in Attorney General William P. Rogers' version that "There has been no Supreme Court decision dealing squarely with that question."[17] In Berger's view, "Rogers' opening broadside immediately betrays his undependability. . . ."[18]

Then Berger considers the first and most important "precedents" on which the memorandum relies to buttress its conclusions. Their use, he finds, is bad law and bad history.

In the St. Clair incident, Washington's secretaries of the treasury and of war testified in person before the House. Washington ordered all the requested documents turned over to the investigators, and they were. Berger concludes that the St. Clair incident is a "precedent," all right, but of a different sort than Rogers, et. al. claimed: "It teaches that Washington would not claim privilege to hide a shameful failure within his administration, a lesson that has been lost on several presidential administrations."[19]

The cabinet discussion quoted in the memorandum, Berger notes, was merely filed away by Jefferson in his papers and never relied on by himself or others "until it was exhumed by the Rogers memorandum. . . ."

In the case of Jefferson and the Burr conspiracy, Berger stresses what the memorandum passes over, that the House request was only for information "except such as he may deem

the public welfare to require not to be disclosed. . . ."[20] Berger points out that all the information requested was supplied, along with an explanation that was not demanded of the reasoning behind the withholdings allowed by the House request.[21]

The judicial "precedents" Berger finds no more convincing.

The memorandum relied, first on Marbury v. Madison, the classic ruling of Chief Justice John Marshall, as illustration of the "fundamental theory which justifies an uncontrolled discretion in the heads of executive departments."[22] Not so, responds Berger. At most, the decision would protect communications from the president to a cabinet member, not information held by a department head, and certainly not at the "uncontrolled discretion" of that department head. But Marbury really has nothing to do with the issue. Its concern is with the powers of individuals and of the courts, not the powers of the Congress. The "precedent" is "utterly irrelevant."[23]

Similarly, the memorandum cited "President Jefferson's refusal to comply with Chief Justice Marshall's subpoena in the trial of Aaron Burr."[24] Berger contradicts, "This is demonstrably wrong." And he demonstrates it. In fact, Jefferson supplied all the material sought, as Marshall ruled he must. It is the province of the court and not the president to decide what must be produced, Marshall held. Instead of supporting executive privilege, the case seems to support Berger's charge that Rogers demonstrated an "inveterate tendency to distort the cases."[25]

Berger was not the only scholar to point out that tendency. Jacob Scher, in a study prepared in 1960, wrote, "The memorandum cites a limited--not "countless"--number of instances of presidential withholding; but it fails to acknowledge the many thousands of instances when disclosure was made freely to Congress.[26] Scher added that the two subsequent statements submitted by Rogers to the Hennings subcommittee "contained gross exaggerations." For example, he wrote, "to prove congressional intention, the language of debates and reports were quoted out of context; only that language was chosen which made the point desired." One of the more remarkable distortions was the claim that a basis was laid for withholding by cabinet members and other department heads. In fact, Wolkinson himself in his original study had conceded, "None of the foregoing cases involved the refusal by the head of a department to obey a call for papers or information."[27]

Despite its evident shortcomings in accuracy and reasoning, the memorandum and its supporting arguments continued to be cited as a basis for withholding. Before looking at specific cases, it may be useful to consider briefly why a doctrine so flimsily supported should stand so firm.

One reason, perhaps the main reason, was the Congress.

While not legislating approval of executive privilege as claimed by Eisenhower and others, the Congress had by the mid-1950s adopted 100 or more statutes permitting or requiring executive withholding.

They fell into five broad areas: first, where premature disclosure creates an unfair advantage; second, where reports are compelled by the government for general statistical purposes; third, where the government compels the filing of trade secrets or processes; fourth, where the government compels the filing of business and financial records; fifth, where the government keeps records of personal matters that could violate rights of privacy.[28]

Then, with the passage of the Freedom of Information Act, these categories were made to apply generally as exemptions to disclosure of information. And another category, closer to the specific executive privilege claim, was written into the act as well. The first exemption covered material "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."[29]

Those were at least actions. If they provided grounds for a great deal of secrecy, they still set out limits, however ill-defined. Congress' greatest encouragement of the executive privilege doctrine was its repeated inaction. Time after time, motivated by fear of a constitutional crisis, by doubts of the merits of its claim, or by lethargy, the Congress permitted Executive refusals and assertions of privilege to go unchallenged.

Scher, while asserting that Congress had acted in a number of cases, admitted, "It is true that Congress, by default, has permitted this twilight zone to arise."[30]

Another legal scholar, Professor Bernard Schwartz,

testifying before the Moss subcommittee in 1965, said refusals of information to Congress do not prove that such refusals were legally justified. "It should not be forgotten that, in political, as in natural, science, nature abhors a vacuum. If the Congress is derelict in asserting any of its prerogatives, executive pretentions will rush in. . . ."[31]

Schwartz quoted a similar observation made still earlier by Justice Robert Jackson in his concurring opinion in the Supreme Court decision overturning President Truman's order seizing the steel mills in 1952. Jackson wrote, "We may say that power. . .belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[32]

The Eisenhower letter of 1954 did not move the Congress to assert its power. Ike, after all, was a national hero, and his withholding was seen as a blow at the villain Joe McCarthy. Only a handful of observers foresaw the threat to openness implied by the letter. One was Clark Mollenhoff, reporter-advocate. Mollenhoff later recalled being a lonely voice of alarm.[33]

The more typical attitude, in the Congress and in the press, was expressed by Telford Taylor in 1955:

> If President Eisenhower's directive were applied generally in line with its literal sweeping language, congressional committees would frequently be shut off from access to documents to which they are clearly entitled by tradition, common sense, and good government practice. It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it.[34]

Just such an "unlikely" result, in a politically explosive case, moved executive privilege into the public eye.

The case was Dixon-Yates. It became an old-fashioned partisan brawl as well as a test of constitutional principle.[35] The Eisenhower administration in 1954 signed a contract with a consortium of utility companies headed by Edgar Dixon and Eugene Yates to supply additional power to the Atomic Energy Commission. Opponents saw that as a move to undercut the public Tennessee Valley Authority, which supplied the power already being used. Reporters and Democrats in Congress caught wind of a conflict of interest: a government consultant on the contract was employed by a banking firm that had a direct financial interest in it. Then came hints that presidential assistant Sherman Adams and AEC Chairman Lewis L. Strauss were using improper tactics to push the contract on other federal officials who were opposed to it. Eisenhower promised full revelation of the facts. But on several occasions throughout 1955, Adams, Strauss, Budget Director Rowland Hughes and others denied information to congressional investigators, citing executive privilege and relying on the president's letter of May 17, 1954. Instances of untruthful testimony and altered documents were revealed. Committee chairman Senator Estes Kefauver wrote Adams, "In these circumstances a claim of privilege is tantamount to suppression of evidence of possible crime and corruption. Not even the privilege of attorney-client can be used for such a nefarious purpose."[36]

Adams, and the others, refused to yield. Their assertion of privilege stood. There were, however, a number of results, direct and indirect, of the battle. Adams, after first claiming privilege similarly when asked two years later about his relationship with Bernard Goldfine, changed his mind in the face of evidence suggesting impropriety. He testified before an investigating committee, but resigned under pressure in 1958. Strauss later was denied confirmation as secretary of commerce largely on the basis of his repeated claims of privilege in the Dixon-Yates affair. The contract itself was cancelled and the Supreme Court later ruled that there had indeed been a conflict of interests involved. And both press and Congress were put on notice that executive privilege was not going to go away.

Mollenhoff continued to be the most aggressive press critic. At a presidential press conference on September 27, 1956, he asked whether "all employees of the Federal Government, at their own discretion, can determine whether they will testify or will not testify before congressional committees when there is no security problem involved."[37] The ensuing dialogue with the president is worth recording. Eisenhower replied:

> Well, I believe that the instructions are clear, that when there is no question of security, national security, involved, that everybody is supposed to testify freely before congressional committees. I will have to look up the regulations, I mean the letters of instruction that have gone out. Primarily, I think this is a function of the department heads and the separate office heads--

Mollenhoff interrupted, "Well, Mr. President--" but Eisenhower continued:

> I don't believe that any individual who happens to be, let's say from a filing clerk on up can by themselves decide what is right for them to tell and what is not right.

Mollenhoff explained:

> Mr. President, they used the May 17, 1954, letter that you wrote to Secretary Wilson in the Army-McCarthy hearings as a precedent in this particular case. I wonder if you felt they were misusing it if they use it, say, a clerk or an assistant secretary?

Eisenhower, irritated now:

> Now, you give me a very long and involved and detailed question here at a place where I don't even remember what I wrote to Secretary Wilson at that time. I will have to look it up. If you will put your question. . . in to Mr. Hagerty so we can look it up, why, it will be answered.[38]

More advocate than reporter by this time, Mollenhoff lobbied for the answer he wanted. He recalled, "I made several trips to the White House to convince (White House counsel Gerald Morgan) of the wisdom of limiting the use of 'executive privilege' to cases approved specifically by the President."[39]

Morgan asked for a memorandum on safeguards against improper use of the privilege. Mollenhoff, who holds a law degree, obliged. He also reminded Morgan of a law review article Morgan had written while a lawyer with a House committee. In it, he had strongly upheld Congress' power to compel information from the executive.[40]

In the meantime, John Moss wrote to Eisenhower endorsing Mollenhoff's concern about the letter and "its misuse by a number of Federal departments and agencies."[41]

Morgan's reply reflected the change in perspective from Capitol Hill to the White House. "In the final analysis," he said, "information will be withheld only when the President or agency heads acting under the President's authority or instruction determine it is contrary to the public interest to disclose it."[42]

Throughout, it has been that phrase "or agency heads. . ." againstwhich the opponents of executive privilege have railed. The right of the president himself to withhold some kinds of information has seldom been questioned. Jacob Scher's analysis, for instance, concluded that the doctrine set out by Chief Justice Marshall in the Marbury and Burr cases was: "The President, personally, may hold secret those reports and communications which were made to him in confidence and which were not official records."[43]

Senator Joseph O'Mahoney told his colleagues in 1957 that it was "generally agreed" that the President has the constitutional right to decline to give out information that he thinks might impair the national security. "I am not dealing with that matter at all. A statute could not overrule a constitutional right." But where that power is exercised by subordinate officials, "then I want to be certain that the executive privilege is not extended to such persons."[44]

The Freedom of Information Act, after it had been toughened by the amendments of 1974, still allowed to be kept secret matters "specifically authorized under criteria established by an Executive order to be kept secret in the

interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."[45]

Even after Dixon-Yates, congressional efforts to enforce a narrow interpretation were unavailing on the Eisenhower administration. Witness the Mutual Security Acts of 1959 and 1960.[46]

The International Cooperation Administration, created in 1948, funded military and economic assistance programs in dozens of countries. A House subcommittee headed by Rep. Porter Hardy of Virginia set out to audit the ICA's activities. In instance after instance, investigators from the subcommittee and the Government Accounting Office, the independent auditing agency responsible to the Congress, were denied access to the reports of internal ICA inspections. Independently, the investigators dug up evidence of widespread waste and corruption, particularly in the aid program to Laos. After more than two years of investigation and frustration, Hardy introduced two amendments to the Mutual Security Act of 1959, which funded the ICA. One required the ICA to make available all information needed by Congress to evaluate the agency's performance. The second imposed the same requirement on the newly created inspector general of the State Department, adding that funds would be withheld from that office if the information were not forthcoming. The amendments were adopted.

But when Eisenhower signed the bill, he issued a statement insisting that the amendments "are not intended to alter and

cannot alter the recognized Constitutional duty and power of the Executive with respct to the disclosure of information, documents and other materials." He added that the Executive branch's policy would continue to be "to provide the Congress and the public with the fullest possible information consistent with the public interest."[47]

Press and Congress reacted angrily. Mollenhoff asked at Eisenhower's July 29, 1959, press conference whether the president considered the amendments "a criticism of the administration's secrecy policies." He described Ike's response:

> President Eisenhower turned red in the face at the reference to "secrecy" in his administration. "You start your question with an implied fact that is not a fact," he said. "You say the administration's secrecy policies. There has been no administration. . .
>
> I tried to amplify my question, but was cut off.
>
> "Please sit down," the President said sharply. I sat on orders from the Commander in Chief. . ..[48]

Such an admission by Mollenhoff speaks well for General Eisenhower's command presence. A burly man with the zeal of an evangelist, Mollenhoff sits at the command of very few. He sits meekly for none. By the time he sat, though, the issue had caught the attention of other journalists outside the capital.

V.M. Newton, Jr., himself an explosive character, fired off a letter to the president on behalf of Sigma Delta Chi. "Both the Congress, which votes the expenditures, and the American people, who pay the tax funds, are entitled to full

information," he argued.

The Richmond, Va., Times-Dispatch, edited by ASNE president Virginius Dabney, editorialized that "Somebody is going to have to explain to President Eisenhower" that executive privilege "is being perverted into a device for 'covering up' and denying the public the facts concerning the government."

The Wall Street Journal, a loyal supporter of the president, wrote that if Eisenhower would inquire into the true extent of administration secrecy, "we have an idea the President would be far more angered at some of his own bureaucrats than at the reporter who brought the secrecy to his attention."[49]

Rep. Hardy's response was more direct. He described the president's statement as "a three-paragraph statement aimed at nullifying the amendment solemnly adopted by the Congress."

"In light of the White House statement, the Congress has no alternative but to call upon its power of the purse in order to compel respect for its constitutional prerogatives," he concluded.[50]

Hardy proposed, and the House unanimously adopted, an amendment to the Mutual Security and Related Agencies Appropriation Act of 1960 providing for a cutoff of funds if information sought by congressional investigators were not supplied within 20 days.

Eisenhower, at a press conference, referred vaguely and inaccurately to the 1954 memorandum:

> . . .Now, with respect to the kind of amendment you were talking about, there was in 1954, I remember, an Attorney General's opinion given to the effect that this kind of a movement or attempt on the part of the Government is a direct invasion of Executive responsibility and authority and therefore could not be anything but unconstitutional.[51]

The Senate, under administration pressure, opened a loophole. Conservative Democratic Senator A. Willis Robertson of Virginia introduced, and the Senate approved, an amendment allowing withholding if the president certifies that "he considers the disclosure of such document. . .to be contrary to the public interest and has forbidden its being furnished pursuant to such request."[52]

The loophole proved wide enough. The first request made under the act--for a report on the ICA program in Vietnam--was refused on the ground that it would be contrary to the public interest, since disclosure could "tend to impair or inhibit essential reporting and decision-making processes...."[53]

Hardy tried again, getting House approval of a similar amendment to the Mutual Security Act of 1960. The Senate added the same loophole. Again, the conference committee accepted the Senate version. Its rationale was that "the separation of powers under the Constitution makes it impossible for the Congress to infringe the prerogatives of the Executive by legislative action. . .." Congress "could neither prescribe nor limit the constitutional powers of the Executive."[54]

Hardy, a stubborn and angry man, tried one more time. He attached the same fund-withholding amendment to the appropriations bill for 1961. The Senate ran through its

part again, and the watchdog remained toothless.

Mollenhoff, disgusted, lobbied unsuccessfully with House Speaker Sam Rayburn and Senate Majority Leader Lyndon Johnson, trying to win their support for a strong stand by Congress. Years later, still bitter, he said that Johnson was interested in using investigations only "to get something on somebody so he could use it."[55] He also complained that his journalistic colleagues never gave enough attention to the executive privilege issue. "The press for the most part has failed to recognize that our rights vis a vis the executive branch are contingent on the rights of the Congress and the courts. They're the ones with the power."

A final frustration concluded the Congress' struggle to assert those rights against the Eisenhower administration. A month before the Kennedy administration was to take office, the comptroller general invoked the fund cutoff against the State Department's inspector general, charging an improper refusal of information under the Mutual Security Act. Eisenhower turned to Attorney General Rogers, who produced the desired advice. The comptroller general was misreading the law, Rogers wrote. And "if this view of the Comproller General as to the meaning of the proviso is correct, the proviso is unconstitutional." Therefore, he concluded, the funding should continue.[56] It did.

During its first five years, the Moss subcommittee counted 44 instances of what it regarded as unjustified withholding based on the claim of executive privilege, more

than the withholdings on any other basis.[57] The change of faces in the White House in January 1961 brought a change of attitude on executive privilege.

Partisan conflict between the Executive and legislative branches often has worked to foster quicker passage and stronger provisions in freedom of information legislation than has the control of both branches by the same party. In the case of executive privilege, for which no legislative remedy has been found, the pattern has been precisely the opposite. Six years of partisan strife were succeeded by eight years of near-calm.

The accomodation began on a campaign train in the Central Valley of California in the summer of 1960. John Moss, chairman of the speakers' bureau for the national Democratic campaign, accompanied presidential candidate John F. Kennedy on his tour of Moss' home territory. Moss put on his other hat as chairman of the Government Information Subcommittee long enough to win from Kennedy a commitment to restrict to his personal use the claim of executive privilege.[58]

That commitment was not made publicly, however, until after an incident that seemed to the sensitive, at least, a troublesome echo of the Eisenhower era. A subcommittee of the Senate Armed Services Committee, chaired by John Stennis, a conservative pro-military Democrat from Mississippi, held hearings into charges that the Kennedy administration was "muzzling" such outspoken advocates of increased military spending as Admiral Arleigh Burke. Willis D. Lawrence,

assistant director of the Defense Department's office of security review, was asked to testify about specific speeches he had edited. On orders of Defense Secretary Robert McNamara, Lawrence refused. After a recess, McNamara appeared before the subcommittee and presented a letter from President Kennedy claiming executive privilege to support the refusal. The Kennedy letter closely paralleled the Eisenhower letter of eight years earlier.[59]

Both letters began with general assurances of cooperation. Both then stressed the necessity of preserving the confidentiality of candid advice within Executive departments and argued that disclosure would be contrary to the public interest. Both found justification in the constitutional separation of powers.

There was, however, one crucial difference. The Kennedy letter concluded with the qualification that the principle invoked "cannot be automatically applied to every request for information. Each case must be judged on its merits."[60]

Already, in another case, the merits--or the politics of unfavorable publicity--had produced a different outcome. In early 1961, a congressional committee looking into the conduct of an aid program in South America had summoned State Department witnesses. The State Department response was reminiscent of the ICA frustrations, but even more drastic. The witnesses were ordered not to talk at all. The refusal was front-page news. Moss, his partisan bias creeping into the

story, recounted the events. Permanent State Department employees, "who had effected a similar gag order on witnesses during the previous administration," proposed comparable policy for the new secretary. The Laos crisis was breaking and top-level officials were "a little hasty" in authorizing the gag order to be put into effect. "Fortunately, we now have a man in the White House who reads the news pages--instead of westerns and detective novels." Orders went out to lift the gag, and less than a week later witnesses were testifying. "It must be clear from this sequence the kind of influence that was brought to bear--it was the highest kind. . . ."[61]

After the McNamara refusal a year later, Moss and his staff were not so well pleased. Staff director Samuel Archibald commented bitterly on Senator Stennis' easy acceptance of the assertion.[62] Stennis, he noted, had discoursed on the history of the privilege, citing the instance of George Washington and the St. Clair investigation. The chairman left out the fact that the information was provided in that case.

"It looks like we have been had again," Archibald concluded.

It wasn't quite that bad.

A series of conferences between Moss' and Kennedy's staffs followed quickly, and an exchange of letters was arranged, in which Moss expressed congressional concerns and Kennedy sought to allay them.[63]

"I know you are aware of the results of President Eisenhower's letter," Moss wrote. He went on to summarize them. Then he got to the point:

> I am confident that you share my belief that your letter of February 8, 1962, to Secretary McNamara should not be seized upon by Executive Branch employees--many of them holding the same policy-making positions of responsibility they did under the Eisenhower Administration--as a new claim of authority to withhold information from the Congress and the public.[64]

Not surprisingly, Moss' confidence proved well-placed. Kennedy responded on cue:

> As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.[65]

That letter, together with similar ones from Kennedy's two immediate successors, was displayed like a hunting trophy on the wall of Moss' congressional office. The three are, in fact, trophies of the most successful effort yet made to negotiate limits to executive privilege. The record of the three administrations reflects both those limits and the limits of Moss' success.

After the exchange of letters, Kennedy never invoked the privilege. Three times, however, Executive agencies refused to provide information. In June 1962, the Food and Drug Administration denied a House committee files on an experimental drug. Later the same month, the State Department refused the Senate Foreign Relations Committee a copy of a working paper on Soviet attitudes. And in April 1963, General Maxwell

Taylor refused before a House committee to discuss the Bay of Pigs invasion.[66]

Library of Congress researchers concluded that those three refusals were "apparently without Presidential authority," although they suggested that the agencies may have had secret authorization.[67] No evidence was adduced to support the suggestion.

Moss won, after a long delay, a similar restriction on the use of executive privilege from Lyndon Johnson. Making full political capital of the differences, Moss summarized the records of Eisenhower and Kennedy, inviting Johnson to "reaffirm the principle that executive privilege can be invoked by you alone and will not be used without your specific approval."[68] Johnson replied that he had followed the Kennedy policy, adding, "Thus, the claim of executive privilege will continue to be made only by the President."[69]

The Library of Congress study found that, in practice, Johnson and his aides were even stricter than their predecessors. Johnson himself never claimed the privilege. His subordinates refused information under it only twice: The Department of Defense refused in April 1968 a copy of a study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee, and Treasury undersecretary Joseph Barr refused in September 1968 to testify before the Senate Judiciary Committee on the nomination of Abe Fortas to be chief justice.[70]

The Johnson Administration may have created the

"credibility gap" described earlier, but it didn't fall back on executive privilege. That may have been the only information problem Johnson didn't have.

Nixon went further than either Kennedy or Johnson in not only pledging limits on his use of the privilege but establishing a regularized procedure for its assertion.

Moss wrote the new president only a week after his inauguration. This time, there were no slighting references to Eisenhower, whose vice president Nixon had been. Instead, Moss noted that "some administrations in the past" had misused executive privilege to keep information from Congress. He found precedent for restricting the privilege in the administrations of Washington, a Federalist; Jefferson, a Democrat; and Theodore Roosevelt, a Republican.[71]

Nixon replied six weeks later:

> I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.
>
> I want to take this opportunity to assure you and your committee that this Administration is dedicated to insuring a free flow of information to the Congress and the news media--and, thus, to the citizens. . .. I want open government to be a reality in every way possible.[72]

Nixon also established a systematic policy for the determination to make a claim of privilege. The system had five steps:

First, a department head who thinks a congressional request raises a question of privilege should consult the attorney general.

Second, if the attorney general decides no privilege is

involved, the information will be provided.

Third, if the attorney general decides privilege is involved or thinks it is a close question requiring a presidential answer, the matter is submitted to the counsel to the president, who will relay the decision.

Fourth, if privilege is invoked, the department head shall advise the congressional body that such is the president's decision.

Finally, while a determination is being made, the department head should ask the inquiring party to hold the request, taking care that such a delay itself does not appear to be a claim of privilege.[73]

The application of that policy produced, in the first four years of the Nixon administration, four formal claims of executive privilege by the president and 15 other refusals that did not bear the presidential authority his memorandum seemed to require.[74]

Nixon's refusals were: a denial in November 1970 to a House subcommittee of FBI evaluations of scientists nominated for advisory boards, a Defense Department refusal of foreign military assistance plans to the Senate Foreign Relations Committee in August 1971, denial by the State Department of foreign aid evaluations for Cambodia in March 1972, and denial by the U.S. Information Agency of memoranda sought by the Foreign Relations Committee in March 1972.[75]

The lower-level refusals ranged from the Defense Department's denial of the Pentagon Papers to the Foreign Relations

Committee to the SEC chairman's refusal to release investigative files on ITT to an investigative subcommittee headed by Moss.[76]

The Library of Congress study was able to establish that the 15 cases never reached the attorney general's office, let alone the president. The study suggested that such evasions show that "the use of the claim of 'executive privilege' has been severely limited but the limitation has not opened new file drawers to Congress. In fact, the Presidential statements have been limitations in name only."[77]

The real test of executive privilege that was to dwarf all the others and was eventually to bring the issue into the Supreme Court began just after Nixon's second term began, in early 1973. The tangled skein of Watergate was beginning to unravel, and an increasingly desperate president found temporary shelter behind executive privilege.

On March 12, 1973, Nixon detailed his new views on the privilege. First, he took pains to stress that they were not new at all:

> The general policy of this Administration regarding the use of executive privilege during the next four years will the be same as the one we have followed during the past four years. . .: executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.[78]

Then he recited the record of the first four years, failing to mention the 15 non-presidential refusals. Finally, he raised the shield the existence of which he had just denied: "A member or former member of the President's

personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress."[79]

The fact that no such precedent could be found by his own staff did not faze the president.

Those whose appearances were barred by the new guidelines included John Dean and Dwight Chapin. Their testimony, when given, would prove not just embarrassing but incriminating.

Congressional response was, as before, hostile.

"There is no constitutional basis for the President's statement," said Senator Sam J. Ervin, a constitutional expert himself and chairman of the select committee investigating Watergate. "All good citizens should and will be expected to testify regardless of where or for whom they work."[80]

The Senate Democratic Caucus already had voted overwhelmingly to threaten with contempt citations any administration official refusing to testify.[81]

A month later, Attorney General Richard Kleindienst testified before two Senate subcommittees that Congress lacks the power to compel anyone in the Executive branch to appear or produce information if the president forbids it.[82]

Senator Edmund Muskie called that sweeping interpretation "frightening."

Kleindienst also repudiated earlier testimony by one of his subordinates that White House aides could not be prevented

from testifying by executive privilege if the purpose of the privilege was to impede an investigation of criminal activity. The attorney general said the only real limits on executive privilege were public opinion, the next election--and impeachment.

Rep. John B. Anderson, chairman of the House Republican Conference, reacted with "utter shock and dismay." He urged immediate action "to nullify the sweeping claim."[83]

On May 16, presidential counsel Leonard Garment, asked if he could offer assurances that executive privilege would not be used to cover up the Watergate affair, replied, "I think you can be sure of that."[84]

In the end, it was the Supreme Court, in the words of a chief justice appointed by Nixon, that made sure of that.

On August 29, 1973, U.S. District Judge John J. Sirica ordered Nixon to turn over to him the tape recordings subpoenaed by special prosecutor Archibald Cox so that Sirica could decide whether the tapes should be played for the grand jury.[85] Sirica explicitly followed John Marshall's decision in the Aaron Burr case of 1807, the only previous time a federal court had ordered a president to turn over personal records as evidence in a trial. Like Marshall, Sirica gave consideration to the presidential claim of privilege, but concluded that "the availability of evidence, including the validity and scope of privileges, is a judicial decision."[86]

"In all candor," Sirica wrote, "the court fails to perceive any reason for suspending the power of courts to get

evidence and rule on questions of privilege in criminal matters simply because it is the President of the United States who holds the evidence."

Nixon's immediate response was to hint that the ruling might be ignored.[87] It was not, however; and after an appeal failed, the tapes were produced. Round One to the judiciary.

The second, and decisive, round was fought a year later. In the meantime, one special prosecutor was fired and another commissioned. The grand jury investigated and indicted seven persons, including Nixon's closest aides, on charges including conspiracy and obstruction of justice. Impeachment proceedings were commenced in the House.

Another subpoena was issued for more tapes and other records in preparation for the trial. The Executive branch resisted. On May 20, 1974, Judge Sirica again ruled that the tapes and other subpoenaed matter must be produced for judicial examination. His reasoning was the same as before. Both sides agreed to take the appeal straight to the Supreme Court, which issued its decision July 24, 1974.[88]

The ruling, historic though it was, lay within narrow limits that left untouched the broadest issues:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials.[89]

Still, the language of the decision both lent judicial sanction to at least some form of privilege and suggested some limits beyond those raised by the case at bar. As to the need for some form of privilege, the court said:

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. Those are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.[90]

The argument of Berger and others that the privilege is a "myth" found no favor in the Supreme Court. The court also said:

> Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.[91]

But the court with equal firmness asserted its own right under the constitution to say what the privilege is and is not:

> The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison. . .that "it is emphatically the province and duty of the judicial department to say what the law is."[92]

And on the issue in the case:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[93]

One question was settled. Most of the questions, however, remained--and remain--unsettled. The executive privilege, save for its limits in the face of a demand for evidence in a criminal trial, remained--and remains--undefined. The power of Congress in a confrontation with the Executive on the question of privilege remained--and remains--untested.

There was one Watergate-era attempt to settle the larger questions by congressional action. That attempt took the form of a proposed amendment to the Freedom of Information Act that would have required all federal officials and employees, including the President, to supply any materials or answer any questions for congressional committees unless the president provided a written, specific claim of privilege, in detail. It would have required that all information, including material classified for national security and thus unavailable to the public, be made available to Congress on request. It would have authorized either house, when information was denied, to sue in federal court. And it would have required the courts to order the production of any information sought for a legitimate legislative purpose, unless the court found "a compelling national interest" to justify withholding.[94]

The bill passed the Senate, was reported out of the House Government Operations Committee over strong opposition, and died in the House.

Its proponents argued that its passage would make up for the historical fact that "the Congress has, in effect, acquiesced to the executive's power to restrict the flow of

information to the legislative branch. . . ."[95]

The opposition was divided. The Justice Department, of course, was strongly opposed, arguing that the Congress must not intrude into the constitutional prerogative of the president. Other opponents, however, argued that the bill would, for the first time, write executive privilege into the statutes. It would, some objected, hand to the courts the congressional right to decide what information the Congress should have.

Rep. John Culver of Iowa said, "The bill now before us. . . aims to render precise what has heretofore been left deliberately imprecise."[96]

Another opponent, arguing from painful experience that such a measure could have unintended results, was John Moss. The bill would recognize and possibly legalize presidential withholding from Congress, Moss warned.[97]

At least one salutary, if short-lived, effect on the presidential attitude toward Congress resulted from the whole Watergate mess. Gerald Ford, after his pardon of his predecessor aroused a storm of protest, volunteered to appear before a House judiciary subcommittee to answer any questions about the pardon. His aides explained that Ford's decision reflected his view that executive privilege was not an absolute. He also hoped, the aides said, to heal some of the wounds opened by Nixon's use of the privilege and by his own pardon of Nixon. "The President feels he has nothing to hide," said press secretary Ron Nessen.[98]

It is more fitting, however, to close a chapter on executive privilege with a more typical instance. The fit is particularly good in this case because one of the principals was John Moss and the story was reported by Clark Mollenhoff.

Moss, his old ally reported, found himself late in 1975 embroiled in an old-fashioned case of withholding. Secretary of Commerce Rogers Morton refused Moss' request for reports on Arab boycotts against American businesses with Jewish ties. He cited a confidentiality provision in the export-import law. Morton, like many withholders before him, was not using the phrase "executive privilege," but Moss insisted that was what it amounted to. Attorney General Edward Levi, like his predecessors, supported a position that Moss termed "against all common sense, all existing law, and would make congressional oversight meaningless."[99]

Moss charged that "the secrecy policies in the Ford administration are as bad or worse than under Nixon." He added, "The secrecy is just as broad and obstructive, and is even more insidious when any Cabinet officer can use it, and when President Ford stays above it and proclaims he has an open administration."[100]

One can almost hear the chairman of the House investigating committee in 1792 muttering the same complaint of George Washington.

FOOTNOTES

[1]"The Present Limits of 'Executive Privilege'," Government and General Research Division, Library of Congress, 1973, p. 3.

[2]Robert Kramer and Herman Marcuse, "Executive Privilege--A Study of the Period 1953-1960," The George Washington Law Review, April 1961, p. 899.

[3]Ibid.

[4]Ibid., p. 900.

[5]"The Present Limits. . .," p. 3.

[6]Ibid.

[7]"Memorandum" of the Attorney General to the President, May 17, 1954, reprinted in Clark Mollenhoff, Washington Cover-Up (New York: Doubleday & Company, 1962), pp. 211-221.

[8]Ibid., pp. 212-213.

[9]Ibid., p. 214.

[10]Ibid., pp. 214-221.

[11]Quoted in Raoul Berger, Executive Privilege: a Constitutional Myth (Cambridge: Harvard University Press, 1974), p. 164, footnote 6.

[12]"Memorandum," p. 221.

[13]John Moss letter to President Eisenhower, October 9, 1956, reprinted in Mollenhoff, Appendix B.

[14]Cited in Kramer, p. 638.

[15]Berger, especially pp. 163-208.

[16]Ibid., p. 164.

[17]Ibid., p. 166.

[18]Ibid., p. 167.

[19]Ibid., and see footnote 24.

[20]"Memorandum," p. 214.

[21]Berger, p. 179.

[22]"Memorandum," quoted in Berger, p. 185.

[23]Ibid., p. 187.

[24]Ibid.

[25]Ibid., p. 188.

[26]Jacob Scher, "The Executive Confidential Privilege," paper prepared for the convention of the Association for Education in Journalism, 1960.

[27]Ibid., p. 4.

[28]"Federal Statutes on the Availability of Information," House Government Information Subcommittee, Committee Print, 86th Congress, Second Session, quoted in Scher, p. 24.

[29]Freedom of Information Act, Exemption (b)(1).

[30]Scher, p. 5.

[31]Bernard Schwartz, in "Hearings," House Government Information Subcommittee, 84th Congress, Second Session, May 8, 1956, p. 457.

[32]Ibid., p. 461.

[33]Mollenhoff, p. 60.

[34]Telford Taylor, Grand Inquest (New York: Simon & Schuster, 1955), quoted in Scher, p. 3.

[35]For details, see Mollenhoff, pp. 62-78; and Kramer, pp. 689-717.

[36]Quoted in Kramer, Ibid., p. 702.

[37]Quoted in Mollenhoff, p. 106.

[38]Reprinted in Ibid., pp. 106-107.

[39]Ibid., p. 108.

[40]Ibid., p. 109.

[41]John Moss letter to President Eisenhower.

[42]Gerald Morgan letter to Mollenhoff, October 26, 1956, reprinted in Mollenhoff, pp. 223-224.

[43]Scher, p. 6.

[44]Quoted in Kramer, pp. 846-847.

[45]Freedom of Information Act as Amended, Exemption (b)(1).

[46]Details can be found in Kramer, pp. 844-860; and Mollenhoff, pp. 153-189.

[47]Quoted in Kramer, Ibid., p. 855.

[48]Mollenhoff, p. 162.

[49]Newton letter and editorials quoted in Ibid., pp. 162-163.

[50]Quoted in Kramer, p. 856.

[51]Ibid.

[52]Ibid., p. 857.

[53]Eisenhower letter to Senate Foreign Relations Committee, December 5, 1959, quoted in Ibid.

[54]"Report No. 1593," House of Representatives, 86th Congress, Second Session, p. 13, quoted in Ibid., p. 859.

[55]Mollenhoff interview with author, May 28, 1977.

[56]Letter from the Attorney General to the President, December 22, 1960, reprinted in Mollenhoff, pp. 233-235.

[57]"Progress of Study: Availability of Information," Report of House Government Operations Committee, 86th Congress, Second Session, p. 36.

[58]John Moss interview with author, June 1, 1977.

[59]"Comparison of President Kennedy's letter and President Eisenhower's letter," undated memorandum in Moss papers.

[60]Ibid.

[61]John Moss speech at University of Washington, April 14, 1961, reprinted in FOI Digest, March-April 1961, p. 7.

[62]Samuel Archibald, "Memorandum for the Record," February 8, 1962. Moss papers.

[63]Moss interview.

[64]John Moss letter to President Kennedy, February 15, 1962. In Moss papers and reprinted in Mollenhoff.

[65]President Kennedy letter to John Moss, March 7, 1962. In Moss papers and reprinted in Mollenhoff.

[66]"The Present Limits. . .."

[67]Ibid.

[68]John Moss letter to President Johnson, March 31, 1965. In Moss papers.

[69]President Johnson letter to John Moss, April 2, 1965. In Moss papers.

[70]"The Present Limits. . .."

[71]John Moss letter to President Nixon, January 28, 1969. In Moss papers.

[72]President Nixon letter to John Moss, April 7, 1969. In Moss papers.

[73]"Memorandum for the Heads of Executive Departments and Agencies," issued by President Nixon April 7, 1969. Reprinted in "Congressional Access to and Control and Release of Sensitive Government Information," Hearings, Senate Subcommittee on Separation of Powers, 94th Congress, Second Session, pp. 90-91.

[74]"The Present Limits. . .."

[75]Ibid.

[76]Ibid.

[77]Ibid., p. 11.

[78]Congressional Quarterly Weekly Report, March 17, 1973, p. 608.

[79]Ibid., p. 609.

[80]The Los Angeles Times, March 13, 1973, p. 1.

[81]Ibid.

[82]Congressional Quarterly Weekly Report, April 14, 1973, p. 862.

[83]Ibid., p. 863.

[84]Congressional Quarterly Weekly Report, May 19, 1973, p. 1203.

[85] New York Times, August 30, 1973, p. 1.

[86] Ibid.

[87] Ibid.

[88] United States v. Nixon 418 U.S. 683 (1974).

[89] Ibid., footnote 19.

[90] Ibid., p. 688.

[91] Ibid., p. 687.

[92] Ibid., p. 686.

[93] Ibid., p. 689.

[94] Congressional Quarterly Weekly Report, April 20, 1974, pp. 998-999.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] New York Times, October 2, 1974.

[99] Des Moines Sunday Register, October 5, 1975.

[100] Ibid.

CHAPTER VI

OPENING UP THE CONGRESS

Through the first two decades of the freedom of information movement, while laboring to open the records of the Executive branch to public inspection, the Congress itself remained secretive. Most of its own work was conducted in what are called, appropriately enough, "executive sessions," or closed meetings. As the ally of the press and public interest groups against Executive secrecy, the legislative branch had been spared intense outside pressure to open its doors. By the early 1970s, however, pressure began to build. Unlike the situation in the Executive, in the Congress much of the insistence on openness came from within its ranks. Some of it was part of a broader reform movement aimed at freeing many hidebound aspects of the lawmaking process. The drive for openness was led by two Floridians, one a veteran of the earliest days of the freedom of information movement, the other a junior senator who had begun political life as an opponent of the idea. While it opened its own doors, the Congress opened as well the doors of many of the Executive's most powerful agencies. In the process, a lately opened loophole in the Freedom of Information Act was plugged. But, as has been the case with every battle in this campaign, victory was not easily achieved. Nor was it total.

Secrecy was deeply ingrained in the legislative process. In 1953, the Congressional Quarterly, the most authoritative recorder of federal government activities, began keeping a yearly tally of closed meetings held by congressional committees. It is in committee, of course, that the real work of legislation is done--hearings held, bills drafted, compromises reached, disagreements between House and Senate resolved. The first year's secrecy count showed that 35 percent of all committee hearings were closed to the press and public.[1] As the count continued, the percentage stayed about the same. Over a 10-year period, the lowest percentage of secret meetings was 30 percent in 1959; the highest was 41 percent in 1954. In 1966, the year in which Congress ordered Executive openness by adopting the Freedom of Information Act, it closed 42 percent of its own committee meetings.[2]

In fact, those figures understate the degree of secrecy surrounding the making of law. One reason for the understatement is that some committees did not report their closed sessions in the Congressional Record, despite the fact that reporting was required by the Legislative Reorganization Act of 1946. The House Appropriations Committee, for example, met more than 300 times in 1957 and reported none of its meetings in the Record. Every meeting was closed.[3] Other key committees also held a high percentage of meetings behind closed doors. The 1957 analysis, which was typical, showed that the House Ways and Means Committee met in secret 73 percent of the time. The Senate Armed Services and House

Judiciary committees, 55 percent.[4]

The effect of secrecy was increased greatly, too by the fact that many of the committee meetings listed as open were public hearings and general discussion sessions, while virtually all the meetings at which bills were actually written or voted on were closed to the public. Also closed almost without exception were the "mark-up sessions" at which bills were reworded, amended and written in the form in which they would be submitted to the full houses.[5]

Senate-House conference committees, which President Nixon once described as "probably the most important legislative entities in our government,"[6] customarily excluded not only press and public but even other members of Congress from their sessions.[7] This meant that bills adopted by one house and then altered, often significantly, by a conference committee, would be returned for a second vote with changes frequently unexplained. The repassage could be maneuvered so quickly that detailed examination even by legislators was impossible.

In the House of Representatives, at least, secrecy was not restricted to committee sessions. Votes on legislation were often conducted by methods that made it impossible for observers to tell which members voted which way.[8] One common device was for the House to dissolve into the Committee of the Whole, in which only 100 of the 435 representatives constituted a quorum and in which rollcall votes were prohibited. In regular sessions, votes were frequently taken by

by having members line up and pass by tellers, who recorded only the vote and not the name of the legislator voting.

The justifications offered by legislators for their secrecy were little different from those offered to legislators by Executive branch officials in support of theirs.

Rep. Omar Burleson of Texas, whose House Administration Comittee met in secret 62 percent of the time, said in 1957 that such a record was "very reasonable." Closed meetings facilitate getting the House's work done, he said, and public sessions often turn into wastes of time.[9]

Ten years later, Senator Mike Monroney of Oklahoma, who served on a joint committee created to reform congressional procedures, defended secret mark-up sessions as allowing candor and compromise:

> Oft-times in order to get anything out it is necessary to compromise way below what the public stand of the member would be. To have them open to the public would greatly hamper, I am afraid, the successful reaching of a consensus by compromise which is the essence of the finalization of legislation.[10]

And four years after that, discussing another reform measure, Rep. George Mahon of Texas, chairman of the House Appropriations Committee said "it just isn't practical" to open to the public sessions held in meeting rooms "already stuffy and crowded with staff and members." Rep. Emanuel Cellar of New York, chairman of the Judiciary Committee, agreed with the adage that one one should watch too closely the making of either sausage or laws. "The public should not know every detail. The light of publicity should not be focused

on every nook and cranny," he argued. [11] Chairman L. Mendel Rivers of the Armed Services Committee echoed Burleson's assessment that open sessions were less efficient than closed ones. Besides, he said, he couldn't imagine why anyone who didn't have to would want to attend a committee meeting. They are, he said, "the most undramatic things on earth to sit in on. There's nothing glamorous about them."[12]

Critics of secrecy were less interested in glamor than in substance. The earliest criticism of the closed Congress that issued from the freedom of information movement was also the most scathing. In a special report in 1953, Sigma Delta Chi's freedom of information committee asked rhetorically, "How can we demand open legislative committee meetings in the states while we ignore the same secret committee meetings in Congress. . .?"[13]

Committee chairman Virgil M. Newton Jr., who certainly did not propose to ignore any threat to openness at any level of government, reported that he had asked the chairman of the House Appropriations Committee five sharply worded questions about the dangers to democracy of "the locked doors of committee meetings." The chairman, he added, "did not condescend to reply."[14] Newton's committee filed formal protests 28 times against closed congressional committee meetings.

After columnist Drew Pearson reported an apparent abuse during a closed committee meeting, the Newton committee again wrote Democratic and Republican leaders, asking: "Why are our Congressmen afraid of a record vote? When are the American

people going to be restored the right of being informed about their business so that they may retain control over the instruments they have crafted?"

The committee reported, "These questions, of course, went unanswered."[15]

After reciting a long list of secret congressional actions and ineffectual protests, the committee urged all journalists to "vigorously and actively exert their influence both on Congress as a whole and on individual Congressmen to abandon secret government. . . ."[16]

Those journalists who shared the committee's concern about secret government, however, were far more concerned with problems in the Executive than the legislative branch. Outbursts like Newton's, heavy with passion and detail, were exceedingly rare. Far more typical was this excerpt from the 1964 report of the ASNE's freedom of information committee: "Congress, despite the interest of some of its members in greater access to information about affairs of the executive department, continued to conduct an intolerable number of its own committee sessions in secret."[17]

That single paragraph was the only one devoted to congressional secrecy in an eight-page report.

The records of the journalists' organizations cited earlier demonstrated a similar stress on Executive secrecy. Many reports contain no mention at all of closed meetings in Congress. A major reason for the relative neglect of such a seemingly important area of abuse was the strong alliance

between advocates of Executive openness in press and Congress. Already quoted was the explicit advice from one ASNE leader to his colleagues to refrain from complaints about congressional secrecy in the interest of that alliance and from another editor who urged journalists to stop giving awards to each other and direct them to Rep. Moss and Senator Hennings.

Another reason for the press' concentration on Executive secrecy was that many journalists and Executive branch officials shared--even when they shared little else--the belief that the Congress was a sieve, leaking information from every pore. Some of the implications of that view were revealed by Moss, testifying before friends at a Senate hearing on the abuses of executive privilege: "Persons employed in the bureaucracies can routinely see that which the Congress should not even request the privilege of being familiar with. The charge is made that it leaks out of the Congress." Moss said that he made a study of leaks in the 1950s. "We found that the Congress was the safest repository of information, not the executive; that the executive had a regular pattern of formalizing leaks."[18]

The Executive stated it as a charge. The press, agreeing, did so with a collective sigh of relief. A sample of the press' attitude comes from an analysis of a bill designed to open access to information: "Every Washington correspondent knows that if a member of Congress can get information it is almost certain that the correspondent can get it from the Congressman."[19]

The need for formal guarantees of access, then, was less pressing as to the Congress. Information already was flowing through many informal channels.

An experienced Washington reporter, who has covered the Congress for years for a major newspaper, explained his own and others' lack of enthusiasm for legislation opening up congressional committees. He insisted that his name not be used. Open meetings, he said, have two drawbacks: first, they deprive the best reporters--those who have cultivated sources within key committees--of their competitive advantage; and second, when a meeting is open, a reporter feels that he must attend it, often sitting through dull and unproductive hours of technical wrangling instead of being able to seek out a source afterward to find out what had happened of importance.[20]

There were exceptions. Although the press was not nearly as aggressive in pressing for congressional openness as it was toward the Executive, its freedom of information spokesmen did not neglect the issue completely. Clark Mollenhoff testified in 1967 before a House committee in support of improved access. He said that journalists especially sought: salaries of members of the Senate and the House, salaries of staff members, expense accounts, committee staff payrolls and expenses, expenditures of so-called counterpart funds on foreign travel, financial interests of members of the Senate and House, radio and television coverage of hearing, standards on conflicts of interests, nepotism, and

outside legal practice.[21]

In an offer that probably generated no vote of thanks, he added, "I believe that the press can be helpful in aiding the Congress in policing itself."[22]

Ten years later, after adoption of legislation opening up both the Congress and meetings of Executive agencies, a congressional aide who had been deeply involved in the effort said with some bitterness that sponsors had received "not a damned bit of help" from the major press organizations.[23] The press, the "natural constituency" of openness, had been conspicuous by its absence from this campaign. Only the Radio and Television News Directors Association had even volunteered to testify in favor of the Government in the Sunshine Act, he complained.

That criticism, largely correct as to the immediate period of the bill's passage, understates the activities of its natural constituency in behalf of openness earlier. In addition to those above, press encouragement of access included the endorsement by the National Newspaper Association of a series of recommendations drafted in 1966 by the Joint Committee on the Organization of Congress. Senator Monroney, chairman of that committee, said the endorsement would be "of great assistance" to legislators trying to win adoption by the Ninetieth Congress.[24] The recommendations included opening most committee meetings to the public, disclosing all rollcall votes in committees, announcing hearings two weeks in advance, releasing to the public committee reports on

legislation at least three days before floor action on it, and permitting broadcast coverage of House committee hearings. (The Senate already permitted it.)[25]

Monroney was over-optimistic. The help of the press was not enough. The recommendations died.

In 1970, another access effort also had press support. Frank Angelo, national president of Sigma Delta Chi announced that organization's support not only of a reform bill but of efforts by a bipartisan coalition to strengthen it.[26] Angelo said he hoped the announcement "will induce SDX chapters to encourage their local members of Congress to support the effort, and will result in more news coverage and editorial endorsement for the campaign."[27] "Americans are entitled to have far more scrutiny of how their affairs are handled in the Congress they elect," he said.

Although the Freedom of Information Center at the University of Missouri formally eschewed lobbying, Sam Archibald, its Washington representative, was not inhibited. "In a few days the House of Representatives is scheduled to vote on legislation affecting almost all of the information industry and almost no one seems to give a damn," he led off a "Note to Editors."[28] He reminded his readers that "there has been very little news coverage" and "appears to be little knowledge of the important details of the legislation." He then described those details, noting that "representatives of the information industry" had helped a House committee develop the bill.[29]

Archibald's "note" observed that this freedom of congressional information movement followed a survey in 1968 of congressional candidates conducted by the ASNE and the Freedom of Information Center that showed broad support for increased openness.

The survey asked:

> Do you favor a change in the rules of the U.S. House of Representatives and Senate to require all committee and subcommittee meetings to be open to the public unless the committee or subcommittee, by a majority vote, determines that a specific meeting must be held in executive session to protect national security?

The responses showed that 70 percent of the successful candidates favored that proposal. Only 23 percent were opposed.[30]

The same survey showed that 60 percent of the successful candidates favored allowing photographing and televising of committee meetings except when forbidden by a committee vote.[31]

It is impossible to say whether the results of that survey helped cause the movement for openness that it preceded, but it must have helped if only by showing would-be sponsors that an effort would have wide support. So press encouragement of the drive to open the doors of Congress was not lacking.

There was other outside pressure, too. The efforts of Ralph Nader and, especially, of Common Cause already have been noted and will be seen again.

Still, unlike any other success of the freedom of information movement, the primary force for change in Congress came from within the institution itself. The drive to increase congressional openness was part of a reform effort, centered

in the House of Representatives, that began in the late 1960s and carried into the mid-'70s. Its leaders were junior members who, an aide to one explained, "have been here just long enough to grow dissatisfied with the system."[32] They were both Democrats and Republicans.

Ideologically, the reformers ranged from liberals Richard Bolling of Missouri and Donald Fraser of Minnesota to conservatives Philip Crane of Illinois and Charles Gubser of California. Somewhere in the middle, an "establishment reformer," by one assessment, was Thomas P. (Tip) O'Neill of Massachusetts.[33] Altogether, there were 50 or more.

Their motivations were varied, but they included at least restiveness under the rigid rules and aging leadership of the House and worry about the public's view of Congress.

Gubser said, "Congress as an institution is on trial today, and it's up to us to do something to reinstate Congress in the eyes of the people."[34]

The Democratic Study Group, a liberal coalition, concluded in a special study of Congress' fading image that "secrecy has a more debilitating impact on the House than its well-publicized companion, the seniority system."[35]

Introduced in 1969, the bills that became the Legislative Reorganization Act of 1970 provided for many of the reforms advocated unsuccessfully in 1966 and adopted by the Senate but killed by the House in 1967. The changes included open business meetings of committees, with disclosure of rollcall votes taken in committee; public notice of committee meetings and

provision for broadcast coverage; open hearings of appropriations committees of both houses, with mandatory rollcall votes on appropriation bills.[36]

In an effort to democratize the committee system, the bill also provided for a majority of any committee to call a meeting with or without the chairman's consent and banned proxy voting in committees.

Also included was a strengthened provision for the registration of lobbyists and disclosure of their activities.[37]

When the committee version of the bill reached the House floor in July 1970, the reformist coalition presented a list of amendments to toughen it.[38] The two most important amendments called for the recording of names on teller votes by requiring the teller to note the name of each member voting instead of just how he voted, as done under long-existing rules; and a separate rollcall vote in open session before closing any committee meeting. The bill itself didn't require a separate vote for each closing, nor did it require the recording of those votes.

Of all the changes proposed, the only major one to fail was the last. Opposed by Speaker John McCormack and virtually all the committee chairmen, the effort to restrict committee closures was defeated 132-112 on the kind of teller vote that would be eliminated two weeks later.[39]

The elimination of the anonymous teller vote was itself accomplished by voice vote, in which it also is impossible to tell who voted which way. By the time of that action, the

the House leadership had given way to the insurgents, and Democratic Whip Hale Boggs urged adoption of the change. O'Neill, who would become part of the leadership and then speaker, told his colleagues that their secrecy was a cause, with the Vietnam war, of young people's alienation from government.

"We say whether they go to war," he said. "We regulate taxes. We legislate against crime. But we don't tell the people how we vote. The thing I don't understand is how the Congress has gotten away with it all these years."[40]

After minor Senate amendments, the first major change in congressional procedures since 1946 was enacted. Its impact was less than revolutionary.

In 1971, the year in which the reforms took effect, 36 percent of all committee sessions were closed, just one percent less than the average for all the years between 1953 and 1970. In the Senate, 97 percent of all committee meetings at which the real business of legislating--organizing, marking up bills, voting, staff briefings--was conducted remained closed to press and public. In the House, under the new rules, 79 percent of business meetings were closed. And that figure does not include the Appropriations Committee, which opened just eight percent of its meetings.[41]

Even that record showed some shifts toward openness. The House Appropriations Committee's eight percent of public sessions was eight percent higher than before. On February 24, 1971, the committee held its first-ever public hearing.

Chairman George Mahone explained, "This committee has been in existence for 105 years, and we thought a little experimentation would not be out of order."[42]

A few other committees were even more daring. The House Interior and Insular Affairs Committee opened 30 of its 55 mark-up sessions in 1971. The Post Office and Civil Service Committee followed suit. Both trailed the Education and Labor Committee, which had started opening its mark-up sessions in 1967.[43]

In the Senate, rules prohibited open mark-up sessions even though the reform act of 1970 required other types of meetings to be open unless voted closed by a majority of the committee.

In 1972, the record of secrecy was even worse. Overall, 40 percent of all committee meetings were closed, a rate exceeded only four times in 20 years.[44]

But the tide began to turn that year. On August 4, a freshman senator named Lawton Chiles introduced S. 3881, "A bill to provide that meetings of government agencies and of congressional committees shall be open to the public."[45] Chiles preferred to call it the "Government in the Sunshine" bill.

Every successful piece of legislation has at least one "father." Many have multiple claimants to paternity. In the case of the Government in the Sunshine Act, Chiles was clearly the father. Unlike most laws, though, the sunshine law has an identifiable grandfather, too. His name is J. Emory (Red)

Cross.[46] The ancestry of the Government in the Sunshine Act bears recounting.

In the mid-1950s, Cross, a representative in the Florida legislature from Alachua County, was invited to a meeting of the Sigma Delta Chi chapter at the University of Florida, located in his county. Students and newspapermen at the meeting urged on him the need of a law to guarantee open meetings of governmental bodies at state and local levels. He agreed. Beginning in 1957, Cross introduced in every legislative session a bill requiring open meetings. In every session, the rural Pork Chop Gang that controlled the legislature killed the bill by referring it to several unfriendly committees. An early opponent was Lawton Chiles, representing conservative, citrus-rich Polk County.[47]

Finally, in 1967, after legislative reapportionment had broken the power of the Pork Chop Gang, and with Chiles now a convert, the Florida Legislature passed the nation's first law "to legally presume all meetings to be open."[48] The law had teeth, in the form of a fine and a jail term upon conviction.

Three years later, Chiles walked the length of Florida to upset favored opponents and win a seat in the U.S. Senate. He promised along the way to take some "Florida sunshine" to Washington with him. And he did.

Openness gained another strong ally in 1972. Common cause, the "citizens' lobby," which had spoken up on the issue before, now plunged into the fight in earnest. In September,

the organization launched a national campaign to question congressional candidates about their stands on secrecy.[49] The approximately 200,000 members of Common Cause were sent packets containing a list of questions to ask of candidates. Instructions included with the list urged the questioners not to accept evasive replies and to press for responses. Common Cause President Jack Conway promised that, after the election, the organization would begin to lobby for the reforms it was asking about. Like Chiles, it did.

The senator re-introduced his sunshine bill January 10, 1973. Other access efforts, focused on Congress only, were to overshadow it that year.

In December 1972, Senators Adlai Stevenson, an Illinois Democrat, and Chales Mathias, a Maryland Republican, had conducted hearings on congressional reform. A theme running through the testimony of political scientists and practical politicians alike was that secrecy in the conduct of its business was a major factor in declining public respect for Congress.[50]

Democrats in the House responded in February 1973 by adopting the anti-secrecy amendment that had been defeated in 1970.[51] Leading the move were Rep. Dante Fascell, who had been in the forefront of similar moves since 1955, and Bob Eckhardt, a liberal Democrat from Texas. Crucial to their success, though, was the support of the new House leaders, Speaker Carl Albert, the gravel-voiced little Rhodes scholar from Bug Tussle,

Oklahoma, and silver-haired, silver-tongued Majority leader Tip O'Neill.[52]

The new rule, approved by the Democratic caucus and then by the full House, required open meetings of all committees, including mark-up sessions, unless a majority of the committee voted before each session to close it. The only exceptions to the openness requirement covered sessions devoted to discussing national security matters or the personal character of individuals.

An amendment adopted over the strong opposition of the reformers permitted Executive branch officials to be present at closed mark-up sessions. The rationale for it was that members frequently needed expertise not otherwise available when drafting technical sections of bills.

Fascell argued, "I think it is wrong to have expert witnesses sit in on a mark-up session of a bill, just as if they were members of Congress, offering their opinions, knocking down ideas, and getting their expertise in the minds of the committee members."[53] He lost.

The Senate still was not ready to let the sun shine in. A bipartisan band of junior members, led by conservative Republican William V. Roth of Delaware and Chiles, pushed an amendment like the one approved in the House. An analysis of the vote by which the rule change was defeated shows that, in the Senate at least, secrecy was the companion of seniority. Of those senators with more than 15 years service, only two voted for the change; 19 were opposed. Of those with less

than three years service, 16 were for the change and only six against.[54]

Finance Committee Chairman Russell Long equated secrecy with patriotism:

> It is our duty to vote to hold a meeting behind closed doors when that becomes necessary either to protect national secrets or to reduce the power of an organized group to try to stampeded the committee. The Senate should not make it any more embarrassing and difficult than it needs to be to arrive at this result.

Republican Norris Cotton of the Appropriations Committee had a practical concern. Open mark-up sessions, he warned, would reveal that the Senate often set appropriation levels artificially high so as to be in a stronger bargaining position with the House. "Can my colleagues imagine what the newspapers would do with it?" he asked. "Can they imagine how it would be distorted?"[55] They could.

Lobbying on the losing side were Common Cause, the National Committee for an Effective Congress, the League of Women Voters and the United Auto Workers.[56]

The best measure of the strength of Common Cause's effort is that Senator Robert Byrd of West Virginia, a leading opponent of the change, took to the Senate floor for a sharply worded rebuttal of a Common Cause memorandum.[57] The memorandum criticized a resolution sponsored by Byrd and other leaders that took a much smaller step toward openness than did Roth's. They Byrd resolution, adopted 91-0 after the other was defeated, gave each committee the right to vote on whether to open or close its meetings. Common Cause saw that approach as enabling

"the most powerful Senate committess to continue to hold their legislative deliberations in secret."[58] Byrd called that assessment "unfair and misleading."

Events, however, bore out Common Cause rather than Byrd. In two years of operation under the revised rules, the House closed only 10 percent of its committee meetings in 1973 and just 8 percent in 1974. The Senate, by contrast, closed 25 percent in each year. Before the adoption of the rule changes, the House had closed 44 percent of its committee meetings in 1972 and the Senate 37 percent.[59]

Only three Senate committees exercised their new option to open mark-up sessions in 1973. The most secretive Senate committee was the Armed Services Committee, with 64 percent of its meetings closed. In the House, the Armed Services Committee was the most secretive, too--but only 34 percent of its sessions were closed.[60]

Even in the House, however, the three most influential committees--Armed Services, Appropriations and Administration--continued to close many mark-up sessions.

Fascell continued to press for still more openness in House business. At his urging, the Democratic caucus voted in December 1974 to repeal a weakening amendment attached to its rule change of the previous year. The amendment allowed votes to close sessions to be taken in advance of the session. The caucus agreed to require such votes to be conducted on the day of the session. Fascell also proposed, and the caucus agreed, that House-Senate conference committees should be open

unless a majority of either house's delegation voted to close them. Both changes subsequently were approved by the full House in time for the opening of the 94th Congress in 1975.[61]

Meanwhile, the sunshine law began working its tortuous way through Congress.

After the fight was won, Fascell would recall it as "about as tough as anything I've ever done--damn tough."[62] "It was the agencies against the Congress," he said, with the opposition aided in the House by a "backlash" against the aggressive reformism of Nader, Common Cause and others bent on telling congressmen to mend their ways. "It was that silent underground current that was killing you."

Before it finally was adopted, the bill went through the Rules, Government Operations and Judiciary committees of both houses. "I've never seen a more searching examination of any piece of legislation," Fascell said. "It was like pulling teeth to get it through subcommittee and committee."[63]

Despite the backlash, Common Cause was the most important outside force for passage, Fascell and Chiles' aides agreed.

And the most important assistance provided by the lobbying organization was an unusual session in February 1974, a "mock mark-up" of the bill. Its sponsors, academic experts and lawyers from the Executive agencies spent a full day going over its provisions, discussing many of the concerns raised formally later and talking about how the agencies really operate. All parties were well-acquainted with the

bill and with each other before formal proceedings even began.[64]

The bill they were discussing required open meetings of all federal agencies headed by more than one person--for example, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Reserve Board and similar bodies. Cabinet agencies were excluded. Meetings were required to be announced in advance. Enforcement was placed in the federal courts, through injunction or other civil remedy. No criminal penalties, and no individual liability, were provided. The bill also prohibited "ex parte" communications between any agency member or employee and any interested party in any proceedings before the agency. An "ex parte" communication is one that occurs privately, outside the hearing itself, and often is intended to influence judgements without an opportunity for the other side to offer a rebuttal. Ex parte communications were required to be put into the record immediately by the official receiving them. The agency was empowered, though not required, to consider such a communication ground for ruling against the party guilty of it.[65]

The ten exemptions to the open meeting requirement follow closely the exemptions of the Freedom of Information Act. The decision to use those exemptions despite the criticism of their broadness--but with some modifications--was made, Chiles' assistant explained, because they were widely known, understood and already interpreted by the courts. If a different

set of exemptions was used, he said, "you open up a new can of worms."[66] The exemptions protect: matters "properly classified" as secret in the interest of national defense or foreign policy; internal personnel rules and practices; material "specifically exempted from disclosure by statute," except that the existing Freedom of Infomation Act exemption was tightened to overcome a Supreme Court ruling; trade secrets or confidential financial information; accusations of a crime or formal censure of any person;"information of a personal nature,"the disclosure of which would be a "clearly unwarranted invasion of personal privacy; investigative records as defined by the 1974 amendments to the Freedom of Information Act; information about the regulation of financial institutions; other kinds of particularly sensitive information about currencies, stocks or financial institutions; information about subpoenas or pending lawsuits.[67]

Chiles held hearings on his bill in May and October 1974. He wasted no time in rolling out the heavy artillery to support his cause. He quoted Woodrow Wilson:

> Light is the only thing that can sweeten our political atmosphere--light thrown upon every detail of administration in the departments--light blazed full upon every feature of legislation--light that can penetrate every recess or corner in which any intrigue might hide--light that will open to view the innermost chambers of government.[68]

He quoted Justice Louis Brandeis' famous observation:

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.[69]

He even sought to take the edge off secrecy advocates' favorite bit of history, the secret drafting of the U.S. Constitution, by recalling Thomas Jefferson's complaint to John Adams about the drafters' closed sessions:

> I am sorry they began their deliberations by so abominable a precedent as that of tying the tongues of their members. Nothing can justify this example but the innocence of their intents and ignorance of the value of public discussion.[70]

Pollster Lou Harris was summonded to testify that, by 71 to 19 percent, the American public agreed with the statement that "a lot of the problems connected with government could be solved if there were not so much secrecy on the part of government officials."[71]

Chiles pointed out that 60 senators had voted for "openness" in one or another form during the 93rd Congress.[72]

None got the chance to vote on S. 260. Time ran out on the session, but with the 94th Congress, the sunshine bill was back, this time as S. 5. This time, there would be action.

The Senate Committee on Government Operations reported the bill, with several minor amendments, on July 9. Then it was referred to the Rules Committee, where the surgery was more drastic. When it emerged, Title I, the section covering congressional committees, was missing.

The removal itself was not significant, since the Rules Committee reported that a Senate resolution was the more appropriate vehicle for amending operating procedures. But the committee's treatment of the resolution, S. Res. 9, was

significant. Byrd and committee chairman Howard Cannon offered a substitute resolution that would merely maintain the status quo, imposing no requirement of openness but allowing committees to vote on the question. Chiles' version altered Senate rules to conform to the procedures already adopted by the House.[73]

While the Senate committees were mulling over the bill in private, Executive branch opponents were mauling it in public. A spokesman for the Justice Department, interviewed by the Wall Street Journal, sounded the common theme:

> In some cases, particularly when sharply conflicting interests must be accomodated, freedom from the pressure of public opinion may be desirable. Moreover, public scrutiny of the government's decision-making process might have an adverse effect on government decision-makers. Officials might be reluctant to request information lest they create a public image of ignorance.[74]

A Home Loan Bank Board spokesman had a little fun with the bill's title: "Sunshine can indeed be salutary; excessive exposure or inadequate protection against it can be harmful as well."[75]

Testifying on the House version of the sunshine bill, Roderick M. Hills, chairman of the Securities and Exchange Commission, argued that the bill would, in fact, impede rather than enhance the public interest. His testimony was representative of that offered by other agency spokesmen at all the House and Senate hearings over a two-year period.[76]

The bill's provisions, Hills said, would: erode the flexibility which is the essence of the SEC's administrative process; impede effective communication among Commission

members and between the Commission and its staff; cause whilly unjustified administrative delays; create a cloud of undertainty over agency rules and orders otherwise valid, if the agency should err in determining that a particular meeting should be closed. It is, therefore, in its broad brush application, contrary to the public interest and to the interest of investors.[77]

Hills also sought to trace a parallel that he must have thought would strike a sympathetic chord with his special audience:

> The process and deliberations, whether they be with his staff, constituents or fellow legislators, by which a Congressman arrives at his decision, is not made public. What is made public is his vote, and the reasons he gives for the vote he casts. The same publicity already is applicable to this Commission under existing law.[78]

That plea for understanding based on a similarity of interests was undercut, however, a week later when David Cohen, president of Common Cause, testified before the same subcommittee. Cohen produced a letter from Senator Edmund Muskie, chairman of the Senate's new Budget Committee, which had voted at its inception to open its deliberations even in the absence of any rule requiring openness. Muskie wrote, "We believe that Budget Committee meetings in the sunshine have added to the credibility of our Committee's proceedings and budget reform itself. We believe government in the sunshine should be expanded, not contracted."[79]

The objections of Hills and others, most notably Federal Reserve Board chairman Arthur Burns, were received more

warmly in the House than in the Senate, where the only fight was over the rules resolution, not the bill.

In autumn 1975, as the Senate prepared to act, Chiles' allies outside Congress acted too. Common Cause called on its members for "strong, steady pressure" to assure passage of the sunshine law and other "Open Up The System" bills.[80]

The California Newspaper Publishers' Association notified its members that the National Newspaper Association was requesting that they lobby California's senators. The CNPA notice complained that the Rules Committee had "so emasculated S. Res. 9 that it would be in its present form a step back into the shadows." It urged publishers to support Chiles' floor amendments to strengthen the committee version of the rules change.[81]

The internal and external pressures worked. By a vote of 77-16, the Senate rejected the views of senior members including Byrd and Cannon in favor of its young reformers.[82] As adopted, the new Senate rules required open committee meetings unless a majority votes to close a meeting dealing with one of six specified subjects. Those were: national defense; committee staff personnel; information charging an individual with a crime or damaging his reputation; disclosure of an informant or sensitive investigation into criminal matters; disclosure of trade secrets or confidential financial data; other areas required by law to be kept secret.

The resolution also required the keeping of a transcript of all meetings, and provided that conference committees be

open unless a majority votes to close.[83]

The next day, the Senate passed the Government in the Sunshine Act, 94-0.

The race was not yet run.

The House companion bill, H.R. 11656, was reintroduced on February 3, 1976, by Rep. Bella Abzug, chairperson of the subcommittee once headed by Moss and more recently by William Moorhead. Its chief advocate, however, was Fascell. As introduced, the House bill did not differ in substance from the one passed by the Senate. That would change.

One reason was Arthur Burns. Both the Senate and House bills contained broad exemptions covering the activities of the Federal Reserve Board. That was not enough for Burns. He found the very idea of the bill an insult, as he wrote in a letter to Senator Abraham Ribicoff seeking complete exemption: "The mere thought that an anti-corruption bill need apply to the Federal Reserve would cast doubt on the integrity of our Nation's central bank and would undermine confidence in the dollar and the future of our economy.[84]

The Senate heeded Chiles' urging not to add the exemption. The House was more receptive. It adopted, over the strong opposition of Fascell and Ms. Abzug, an amendment exempting the Federal Reserve Board and the SEC from the general requirement that transcripts be kept of all closed meetings. For those two, minutes are enough.[85]

"Arthur Burns is one hell of an adversary," Chiles' assistant recalled ruefully. "I've learned to respect his

toughness."[86]

The House adopted another weakening amendment, also over strong opposition, that would have narrowed the scope of the "meetings" covered by the bill. The amendment's sponsor, Rep. Frank Horton, a New York Republican, explained that he wanted to preserve for agency members the ability to engage in shop talk over the telephone or at social occasions without advance public notice. He cautioned his colleagues, "Neither complete confidentiality nor complete disclosure is desirable and we need to guard against the temptation to overcompensate for past secrecy in today's morbid climate of distrust and suspicion."[87]

Supporters of the bill as written argued that, under Horton's amendment, commissioners could stage "pre-meeting meetings" for informal discussion and then merely ratify in public decisions taken in private. They insisted, too, that conference telephone calls be considered "meetings," no matter how difficult they might be to police.[88]

Horton's amendment was approved, 204-180. Language close to the original was restored, however, in the conference committee.[89]

One House amendment strengthened, not the sunshine bill, but the Freedom of Infomation Act. Just as in 1974 Congress undid the effect of a Supreme Court decision by amending that act, in 1976 another Supreme Court ruling was nullified through the sunshine act. The case was Administrator, FAA v. Robertson, in which the court ruled that the Freedom of Information Act's

exemption for material protected by other statutes included even statutes giving bureaucrats broad discretion to withhold at will.[90] The sunshine act was amended to add stricter guidelines for exemption under that provision of the Freedom of Information Act.[91] Those guidelines authorize withholding only under statutes that require rather than merely permit it.

The final House vote on the bill was 390-5.

The conference committee, meeting in open session, agreed to the weakened House requirement on transcripts, restored the stronger Senate language defining meetings, and adopted the House amendment tightening the Freedom of Information Act.[92]

Sunshine had come to Washington. What of its effects?

In the Congress, the effects have been pronounced. Only 7 percent of committee meetings were closed in 1975, compared to 15 percent in 1974 and 40 percent in 1972. The most significant change occurred in mark-up sessions. The Senate, which had closed 72 percent of its mark-up sessions in 1974, closed only 29 percent in 1975. The House closed only 2 percent in 1975. After the Senate adopted its new rules, only one closed committee session did not concern foreign, military or intelligence affairs.[93]

Still, secrecy had not vanished from the Capitol.

Senator John Glenn, for example, said, "I wonder if we don't have a facade of open meetings while we create a series of closed meetings. . .rump sessions."[94]

And David Rosenbaum, a reporter for the New York Times,

wrote in early 1976 that "most decisions of consequence are made away from public view." Rosenbaum explained that he referred to "private conversations in the cloakrooms or in whispered huddles during quorum calls on the floor."[95]

An insider's view of the effect of openness on legislation was provided by Rep. Barber Conable of New York after participating in the first open conference committee drafting of a tax bill:

> The new way is better, though I wasn't sure at first that it would be. The attendance is better. Bad provisions could be exposed and defeated more readily. There was more focus on the subject. The lobbyists were there growling, but they were not allowed to pass us slips of paper all the time.[96]

Sure, there was some posturing. But not too much.

The Congress seems to be flourishing in the sunshine of its own creation. Congressional efforts to regulate Executive conduct, however, are proving to be consistent with the results of earlier attempts to open records. A Common Cause survey of agency activities during the first three months after the sunshine act took effect on March 12, 1977, was appropriately entitled "Shadows over the Sunshine Act."[97] The survey found that 39 percent of 591 meetings were entirely closed to the public. Twenty-four percent of the meetings were partially closed to the public; and only 37 percent of the meetings were fully open to the public. Exemptions relating to financial information were 38 percent of the exemptions used to close meetings.[98]

Common Cause noted that the Federal Reserve Board

followed its vigorous opposition to the act with an equally vigorous use of the expmptions won. Thirty of its 37 meetings during the three months were entirely closed. One of those closed meetings included a discussion of a proposed design for office furniture and a building renovation project. That, the survey said, "raises serious questions about the Fed's willingness to comply with the spirit and meaning of the Sunshine Law. . . ."[99]

At the other extreme, the Civil Aeronautics Board held 70 percent of its meetings in open session.[100]

The Common Cause report recommended that the president issue a directive "affirming the Administration's commitment to openness, establishing standards of openness, and requiring that agency regulations conform not only to the letter but also the spirit of the Act."[101]

It recommended as well that Congress hold "comprehensive and thorough oversight hearings on agency implementation of the Act."[102]

The authors of the report might take some comfort from the assurance of Chiles' chief aide that the senator plans to do just what the report recommended. "Oversight is going to be absolutely crucial," said George Patten. "As soon as the agencies see you don't care, they'll slip back to the old ways."[103]

Congressman Fascell said the next target of the in-house reformers will be a tightening of the requirements for closing conference committees. All should be open, he believes.

It would be a year or two before the next push, he said, while the working of the sunshine act is smoothed out.

"This is a continuous effort."[104]

FOOTNOTES

[1]Congressional Quarterly Weekly Report, July 8, 1957, p. 1.

[2]Weekly Report, April 21, 1967, p. 642.

[3]Weekly Report, July 8, 1957.

[4]Ibid.

[5]Weekly Report, February 12, 1972, p. 303.

[6]Christian Science Monitor, July 11, 1970, p. 5.

[7]Ibid.

[8]See descriptions in Ibid.; also in Detroit Free Press, July 28, 1970, p. 1; and New York Times, July 15, 1970, p. 25.

[9]Weekly Report, July 8, 1957.

[10]Hearings before the Joint Committee on the Organization of the Congress, 1965, quoted in Jane Lewis, "Access to Congressional Committees," Freedom of Infomation Center Report #252, November 1970.

[11]New York Times, July 15, 1970.

[12]Ibid.

[13]Sigma Delta Chi Committee for Advancement of Freedom of Information, August 15, 1953, p. 4.

[14]Ibid., pp. 5-6.

[15]Ibid., p. 7.

[16]Ibid., p. 16.

[17]American Society of Newspaper Editors, "Freedom of Information Report," April 16, 1974, p. 4.

[18]Hearings before the Senate Subcommittee of Separation of Powers, Marcy 11-12, 1976. 94th Congress, Second Session, p. 85.

[19]"Note to Editors," from Samuel Archibald, Washington Office of the Freedom of Information Center, July 6, 1970, p. 2.

[20]Interview with the author, May 29, 1977.

[21]Sigma Delta Chi Committee for Advancement of Freedom of Information, "Report," 1967, p. 10.

[22]Ibid.

[23]George Patten, legislative assistant to Senator Lawton Chiles, interview with the author, May 29, 1977.

[24]Publisher's Auxiliary, October 22, 1966.

[25]Ibid.

[26]Press release from Sigma Delta Chi, July 5, 1970. In Sigma Delta Chi files.

[27]Ibid.

[28]"Note to Editors."

[29]Ibid.

[30]Marla Cohen, "FOI Attitudes of the 91st Congress," Freedom of Information Center Report #214, November, 1969, p. 2.

[31]Ibid., p. 3.

[32]Christian Science Monitor, July 11, 1970.

[33]Ibid., and Detroit Free Press, July 28, 1970.

[34]Ibid.

[35]Ibid.

[36]Editor & Publisher, May 24, 1969, p. 28.

[37]Ibid.

[38]"Note to Editors."

[39]New York Times, July 15, 1970.

[40]Detroit Free Press, July 28, 1970.

[41]Weekly Report, February 12, 1972.

[42]Louisville Courier-Journal, February 25, 1971.

[43]Weekly Report, February 12, 1972.

[44]Weekly Report, March 10, 1973.

[45]Congressional Record Senate, September 9, 1972, p. 15672.

[46]The Miami Herald, September 15, 1976, p. 6E.

[47]George Patten interview.

[48]James T. O'Reilly, "Government in the Sunshine," Freedom of Information Center Report #366, January 1977.

[49]St. Louis Post-Dispatch, September 24, 1972.

[50]Weekly Report, March 10, 1973, p. 501.

[51]New York Times, February 22, 1973, p. 1.

[52]Weekly Report, March 10, 1973.

[53]Ibid., p. 503.

[54]Ibid., p. 502.

[55]Ibid.

[56]Ibid.

[57]Congressional Record Senate, March 6, 1973, excerpt in Freedom of Information files.

[58]Ibid.

[59]Weekly Report, January 11, 1975, p. 81.

[60]Ibid.

[61]Weekly Report, January 24, 1976, p. 153.

[62]Dante Fascell interview with the author, June 2, 1977.

[63]Ibid.

[64]Patten interview, and Common Cause Report, February 1974, p. 2.

[65]See Government in the Sunshine Act, codified as 5 U.S.C. 552b.

[66]Patten interview.

[67]5 U.S.C. 552b (c).

[68]Hearings before the Senate Subcommittee on Reorganization, Research and International Organizations, 93rd Congress, Second Session, p. 2.

[69]Ibid., p. 4.

[70]Ibid., p. 3.

[71]Ibid., p. 163.

[72]Ibid., p. 3.

[73]Patten interview, and Washington Post, October 29, 1975.

[74]Wall Street Journal, September 2, 1975, p. 1.

[75]Ibid.

[76]See, for example, Senate Hearings.

[77]Hearings, House Subcommittee on Government Information and Individual Rights, 94th Congress, First Session, p. 2.

[78]Ibid., p. 10.

[79]Ibid., p. 53.

[80]In Common, September 1975, p. 5.

[81]California Newspaper Publishers Association, "Governmental Affairs Bulletin #35," October 31, 1975, p. 135.

[82]Weekly Report, November 15, 1975, p. 19371.

[83]Congressional Record Senate, November 5, 1975, p.19371.

[84]Congressional Record Senate, November 6, 1975. p.19440.

[85]See U.S.C. 552b(f)(1).

[86]Patten interview.

[87]Congressional Record House, July 28, 1976, p. 7880.

[88]Access Reports, August 9, 1976, p. 3.

[89]Ibid.

[90]Administrator, FAA v. Robertson, 442 U.S. 255 (1975).

[91] See 5 U.S.C. 522b (c)(3).

[92]"Conference Report," to accompany S. 5, 94th Congress, Second Session.

[93]Weekly Report, January 24, 1976, pp. 152-153.

[94]Ibid.

[95]New York Times, January 25, 1976.

[96]New York Times, September 15, 1976.

[97]"Shadows over the Sunshine Act," Common Cause, 1977.

[98]Ibid., p. 16.

[99]Ibid., p. 19.

[100]Ibid., p. 18.

[101]Ibid., p. 24.

[102]Ibid., p. 25.

[103]Patten interview.

[104]Fascell interview.

CHAPTER VII

THE FREEDOM OF INFORMATION CENTER (1958 -)

Almost from the beginning of the freedom of information movement, its leaders felt a need for some kind of central rallying point, a mechanism for coordinating efforts, a joint repository for the lessons hard-learned in hundreds of individual struggles on local and national fronts. They never got it. Instead, they got a loosely knit, and sometimes unknit, coalition of forces perhaps better suited to the guerilla war of words than a tightly organized and centrally supplied task force would have been. Besides the major national journalistic organizations, and leaving aside the business and legal firms interested in prying loose government information for private ends, the most aggressive and important of these anti-secrecy battalions have been the Freedom of Information Clearinghouse affilitated with Ralph Nader and the Reporters Committee for Freedom of the Press. In addition, much of the burden of litigation under the access laws has been borne since the early 1970s by the American Civil Liberties Union.[1]

Behind and beyond has been, since 1958, the Freedom of Information Center at the University of Missouri. Reference library, archive, publisher, the Center has played a unique role in the campaign for openness. Far removed from the national centers of media and politics, perpetually short of both money and

staff, headed by a director who is neither lawyer nor newspaperman, the Center has been nonetheless an invaluable resource for the movement's activities. Perhaps its most important contribution has been its very endurance. Sometimes lost in the clamor of more powerful voices, sometimes breaking into an otherwise comfortable silence, the Center's has been a small voice insisting--even when few seemed to listen or care--that the people's right to know remains to be secured.

The voices of the Clearinghouse and the Reporters Committee have been much louder. The Clearinghouse, founded in 1972, has functioned as lobbyist, litigant and encourager of others, including the press. Nader and Clearinghouse attorneys Mark Lynch and Ronald Plesser constituted an effective force behind the 1974 amendments to the Freedom of Information Act. The Clearinghouse has filed numerous lawsuits under that act and the Privacy Act. It also has sought, through the Press Information Center and in other ways, to encourage more aggressive use of the law by the press.

The Reporters Committee, founded in 1970, has needed little encouragement. Created to help reporters defend themselves and work effectively in the face of growing pressures from the federal government, pressures that included investigations, wiretapping and many subpoenas, the committee's interests extend beyond the specific goals of the freedom of information movement. But its efforts to expand access have filled a void in the movement that had existed since its

beginning--the lack of involvement by the very Washington reporters who were among its presumed beneficiaries. Before the Reporters Committee, Clark Mollenhoff was for years the only Washington correspondent ranking in the movement's leadership. Although its membership extends outside the capital, the committee's executive director and usual spokesman is Jack Landau, like Mollenhoff a lawyer and a correspondent for the Newhouse newspapers until he resigned to work fulltime for the committee.

The Reporters Committee describes itself as "the only legal research and defense fund organization in the nation exclusively devoted to protecting the First Amendment and freedom-of-information interests in the working press in all media."[2] Its most visible activity is a newsletter in which are compiled reports on legal developments affecting access and freedom of the press. Like the Clearinghouse, the committee relies heavily on the services of minimally paid or unpaid lawyers.

Paul Fisher, director of the Freedom of Information Center, calls those two organizations the "cutting edge" of the movement.[3] With the environmental groups and a few other public interest activists, they have become, he said, the 1970s equivalents of the ASNE and Sigma Delta Chi in the 1950s as outspoken proponents of openness.

The development and function of the FOI Center has been different. It was an outgrowth of the never-realized goal of a freedom of information council. Although the idea had been

discussed several times before, the "first important step" toward the formation of such a council came in 1953, when the Associated Press Managing Editors formally offered its network of statewide committees as the basis for coordinating the efforts of APME with those of Sigma Delta Chi and the American Society of Newspaper Editors, the two journalism organizations most active at the national level.[4] Later that year, further discussions of creating some kind of freedom of information council included those three groups and the National Editorial Association, the organization of small daily and weekly newspapers.[5] Participants talked about, but made no decisions on, suggestions by an NEA spokesman that such a council could include among its activities the maintenance of a central information file, the exchange of case histories among concerned organizations and individuals, publication of a regular bulletin, assistance to researchers, the provision of legal aid upon request, and the formal lodging of protests with governmental bodies guilty of withholding.[6]

That a national council was never created is attributable mainly to the fact, noted by the participants in the 1953 discussions, that it would have cost a substantial amount of money. It is probably also attributable in part to the fact that the ASNE never embraced the idea. "Instead of one large organization," an ASNE leader wrote, the society favored "more of a clearing house for information."[7] ASNE had been first into the field. It had its own highly skilled attorney, spokesmen of national prominence, and ready access to the

congressional leaders of the movement. It had less to gain than the other organizations from a central council, and its pre-eminence to lose.

By the same standards, the NEA had the greatest need, since it had the least resources. So the small-town publishers were the first to turn to a university for aid. Beginning in 1954, Northwestern University journalism professor Jacob Scher, whose legal expertise would later help to shape the movement's legislative effort, compiled for NEA a freedom of information newsletter. That FOI Digest was to lead, circuitously, to the creation of the Freedom of Information Center.

Scher gave up the newsletter in 1956 under the pressure of other duties, which by then included service as counsel to the Moss subcommittee. The NEA contacted Earl English, Dean of the School of Journalism at the University of Missouri, who handed the assignment to Paul Fisher, a young member of the journalism faculty. Fisher later said his sole qualification for the job was his availability, since he had no experience as a working journalist and was not a lawyer. His field of expertise was typography.[8] It was an inauspicious beginning.

A year later, when the NEA resumed its quest for a central freedom of information headquarters, Missouri was a logical place to look because the newsletter was there. By another of those coincidences that have periodically benefitted the movement, the School of Journalism was preparing to celebrate its fiftieth anniversary. What better way to celebrate than by the creation of a center to advance one of

journalism's most important causes?

A conference in the spring of 1958 provided a forum for exposition of both the rationale for a center and the problems it would face. English set out the school's position:

"Is it not logical for a school of journalism to take more than academic interest in the day-to-day fight and the problems of access and freedom to communicate?"[9]

Equally rhetorically, English asked, "To what ends can knowledge and training be directed if the facts on which survival is based never become available for transmission?"

The answers to those questions were clear. Much less clear, however, were the solutions to problems posed by several of those taking part in the conference. A freedom of information center, some said, would have its greatest value as "a strong, no-strings-attached advocate" of openness. Others, including historian Walter Millis, who was present as an observer for the Fund for the Republic, pointed out the "anomalous position" of a state-supported school sponsoring advocacy directed against state agencies."[10] A counter-proposal was that "if the Center could give the tools of information to people in communications, then these people could do the job."

Another problem raised was that of the center's clientele. Should it seek to serve the media, other journalism schools, the general public, or all three? And if all three, then how

to reconcile the sometimes-differing positions that might be expected on controversial matters. Even the journalism groups were not always in agreement.

Finally, and always, the problem of money. Freedom of information has never been a monied cause. English and Fisher pointed out that the school had no money for such a center, and no prospect of any, though it could supply limited facilities and personnel.

One participant argued that money should not be accepted from media organizations, in the interest of independence. Another said funds from media sources should be limited. Another, more foresighted, suggested that "the necessity of limiting the amounts from media need not concern anyone since only the most limited gifts would in likelihood be made." No one would venture an estimate of the sums required, but it was suggested that a budget of $100,000 per year might not be too much.

In the end, the conferees endorsed the establishment of "a permanent Freedom of Information Center for the purpose of advancing the right of the people to know and be informed through all means of communication. . . ."[11]

Herbert Brucker, chairman of ASNE's freedom of information committee, had been invited but culd not attend the Missouri conference. While NEA had been stirring Missouri's interest in the subject, Brucker had been discussing the creation of some kind of access center with I.W. Cole, dean of journalism at Northwestern. In the fall of 1958, Cole

wrote to Brucker, offering as Northwestern's part of a joint venture the services of Scher and a supporting cast, and asking commitment and some money in return.[12] He was too late.

The FOI Center, as it is popularly called, opened for business with $175,000. Part was left over from the school's anniversary fundraising; the rest was raised specifically for the center. English recalled 20 years later, with remembered distaste for the work, that he went "door to door" soliciting funds from foundations, corporations and publishers, whom he described as "the worst people in the world" for parting with money.[13] The strain of the effort sent English to the hospital, suffering from exhaustion. Had he been able to foresee the problems to come, he might have stayed in bed.

Paul Fisher, who has directed the Center since its beginning except for a brief hiatus in the early 1970s, has observed that it "started on the general premise that small publishers faced with the need to open up government. . . didn't have anybody to turn to."[14] One reason they had no one to turn to was that they did not have, or would not devote, money to hire lawyers, as big publishers and broadcast companies did. Although that made the small publishers natural clients of the FOI Center, it also made them poor-paying ones. Neither the other journalism schools nor members of the public, also frequent users of the Center, were likely donors. That left as sources of financial support

the big publishers and broadcasters, foundations and the University of Missouri. And that meant trouble.

Repeated appeals to foundations proved fruitless. The Center's commitment to a continuing effort to foster the free flow of ideas and information did not promise the action nor the time limitations valued by the nonprofit donors, Fisher learned.[15] Another problem was the possibility of controversy. In 1962, James Pope, then retired from newspaper editing and serving as a consultant to the Ford Foundation, told Fisher that "many of the areas on which the Center expresses interest--for example, formal criticism of the presentation of the news--would frighten the Ford Foundation out. . . ."[16] The reason, Pope said, was that the foundation used the media in several of its projects and would not want to appear to be seeking to influence the carriers of its message.

The attitude of the big publishers had been discovered by English when he was seeking the start-up money for the Center. Once in operation, the Center further alienated the most powerful--and wealthiest--publisher's organization. One cause of irritation, Fisher said, was the journalism school's insistence that the Center concern itself with controls imposed on the media from within, as well as the obstacles raised by government. He remembers that one delegation from the group, the American Newspaper Publishers Association, was "livid" over a Center report on consumer groups' criticisms of newspapers.[17] Supporters of the Center were so concerned about the enmity of ANPA general manager Stanford Smith toward it

that one member of the Center's advisory board was moved to inquire about the possibility of bringing pressure "from ANPA stalwarts" to "change his attitude."[18] Nothing came of the suggestion.

Smith's attitude was said to be "that anything the Center can do, ANPA can do better; therefore, there is no need for it."[19] It was an attitude shared by a number of publishers. When the Center hired a professional survey firm to determine the prospects for a fund-raising drive in 1970, the report concluded that major publishers and broadcasters "do not find the Center serving their interest. Most of these rely on their own resources and those of professional associations."[20]

The professional associations most active in freedom of information affairs relied in turn on the FOI Center. The official history of the ASNE, for example, proclaimed that "no offspring of ASNE's efforts can compare with the Freedom of Information Center at the University of Missouri." The Center was described as "the most active day-by-day monitor of FoI affairs."[21] The freedom of information committee of Sigma Delta Chi called it "a central point. . .for background, suggestions and guidance in freedom of information problems. . .." The committee added that "there is need for broader support and more money from those of us who labor in the FoI fields."[22]

It was to be an unmet need. Labor in the FoI fields was not remunerative work. The organizations that did most of it,

and the center's other clients, had much to offer in the way of support but little in the way of money.

English, now retired, recalled the Center's struggles during his tenure as dean: "Our main problem was day-to-day, keeping the thing going. I sometimes almost despaired."[23] Despite his stated interest that the center be self-supportive, English found himself juggling university money to pay Fishers' salary, provide space and supplies, and hire graduate students to help with the Center's work. The journalism school's printing equipment, operated to train future newspaper printers, was used to produce the Center's publications. "Even then, we were always running in the red," English said.

By 1966, the Center was more than $6,700 in debt.[24] ASNE undertook to help in 1967 and 1968, generating some additional sustaining memberships from newspapers. That help was not enough, however, to come close to raising the estimated $1.5 million required for a building to house the center. Nor could the editors' efforts even produce the "last few thousand dollars" necessary to hire a much-needed lawyer for the Center's staff.[25]

Four years later, a similar study and effort to help was undertaken by Sigma Delta Chi. The report of that effort noted that outside support for the Center had dropped from a high of $30,000 annually to just $15,000 in 1971, leaving a $6,000 deficit for the year. The university was making up the difference. The report concluded, "It is unfortunate that Sigma Delta Chi itself cannot support and guide this

operation."[26]

The financial strain would be eased after 1972 by the aggressive fund-raising efforts of English's successor as dean, Roy Fisher, a former newspaper editor. Under a new general manager, ANPA began contributing to the Center's support. By 1977, the Center was actually operating in the black, barely.[27]

The FOI Center's financial problems have been exacerbated by its self-imposed abstention from overt advocacy of the cause it was created to serve. At the same time, a lack of money has reduced even the possibility of advocacy by precluding the employment of a lawyer and by forcing cancellation after ten years of the annual conferences at which those who were advocates were provided a forum. The position of non-advocacy was adopted mainly out of recognition by the Center's founders that the university would tolerate nothing else. As one noted at the organizational conference, "If we have an organization on university property, experience seems to indicate that the university would have quite a bit to say about what goes on there."[28]

Only rarely has the Center deviated from non-advocacy, and the university has, as predicted, had "quite a bit to say." Those occasions have illuminated with painful clarity what another founder called the "anomalous position" of a freedom of information center with restrictions on its own freedom of expression.

The first anomaly developed in 1968. Sam Archibald,

having left the Moss subcommittee, had joined the Center staff part-time as its Washington representative and was, for budgetary purposes at least, a member of the journalism faculty. One of his duties was to produce The Archibald Newsletter, which described itself as "an occasional communication" and which was intended to highlight developments in the field of information. In one issue, Archibald disclosed that an Army officer had officially solicited Washington-area liquor dealers for donations of liquor for a military Valentine's Day ball. The solicitation was countermanded, and the Army refused to release the correspondence on the ground that disclosure "would serve no useful purpose."[29] The report became front-page news, and the military was not amused. An emissary was dispatched to the university. English recalls that he received a "scathing" letter from the university president asking, in effect, "Just what did we think we were doing, criticizing the U.S. Military."[30] "I knew Sam would stir things up," English added, chuckling at the memory. But he and Paul Fisher both made clear that it was no laughing matter at the time, with the Center dependent upon university largesse for survival.

Three years later, it was Fisher himself who raised administrative eyebrows when he entered as co-plaintiff with Congressmen Moss and Ogden Reid in an unsuccessful suit for release of the Pentagon Papers. Fisher remembers being summoned to a conference with university counsel Jackson Wright. "There were no threats, just a reminder that, 'Mr.

Fisher, you do understand that only the Board of Curators can commit the univesity to legal action.'"[31] He understood.

Those incidents stand out in the minds of the participants because they were unusual. Much more usual were a variety of means of second-hand advocacy, or arming the advocates. When, for example, Ralph Nader and his associates began in the early 1970s to litigate under the Freedom of Information Act, one of the places they turned for information was to the Center. In one letter, a Nader lawyer asked for copies of the Center's files on citizen inquiries about the availability of government information. "I feel there is a great potential for us working together," the lawyer concluded.[32]

Earlier, while the act was still in the formative stages, Fisher had written to Senator Edward Long, a sponsor of the bill, urging that it be strengthened. "While S. 1666 strikes me as good, it is not as good as it should be," he wrote, warning that passage of a weak bill would blunt the thrust of the congressional movement for access.[33]

While Fisher took pains to point out that the sentiments he expressed were only his own, they probably had some influence. Several persons who knew him attributed Long's interest in freedom of information largely to the involvement of his homestate university and to the favorable publicity it would win him. Benny Kass, who served as counsel to the subcommittee headed by Long during the time of the act's passage, put that assessment most strongly: "There was no Senator

Long. . .. He did what we asked him to. Anything that would get him publicity. . .that was his game."[34]

If their efforts served to advance the special interests of Long or another ally, Fisher and English were not concerned, so long as the interests of freedom of information were advanced, too. When English testified before Senator Sam J. Ervin's subcommittee on Constitutional Rights in 1972, he did so as a spokesman for the National Newspaper Association, successor to the NEA. His argument was for an unhampered flow of information to and through an unregulated pres..[35] Such an argument suited both the journalistic and the economic needs of the publishers. It also suited the philosophy of the FOI Center. "Sure, they used us for their interested," English said later. "They were mutual interests."[36]

The Center's main interest, though, was not in providing spokesmen but in providing information to spokesmen--and to scholars, working journalists, lawyers, school children or anyone else. In Fisher's words, the greatest service of the Center has been as "a continuing record of the conflict that arises in a democratic society between demands for openness and legitimate needs for secrecy."[37]

That record is maintained in Room 223 of Walter Williams Hall. In that room are nearly 2,000 file folders stuffed with government documents, official and unofficial reports, correspondence and clippings from about 500 newspapers, magazines, journals and organizational bulletins. There are

files on the Pentagon Papers and on police reports, on access in the Middle East and on access to federal courts, the Moss subcommittee and mergers of newspapers. There is a set of files dealing with social controls on the media, a set dealing with legal controls, sets on access to each branch of government at all levels. even a set devoted to the climate of opinion on expression generally.

Into the room come daily letters and telephone calls, more than 2,000 per year, seeking information to help with lawsuits, legislation, learned articles, newspaper stories, term papers and teaching. Out of the room go, in addition to the answers to those queries, a bi-monthly FOI Digest of news on current issues, monthly reports on specific issues, and occasional longer analyses and opinion pieces. The subscription list is about 1,200.

Fisher presides over the Center, in addition to teaching a full schedule of journalism courses. He is aided by a fulltime administrative assistant, a fulltime clerk, and varying numbers of part-time student workers who clip, file, sort and mail.

Despite its workload and despite its close relationship with activists in the freedom of information movement, Fisher insists that the Center is "not much known and not much used," That is not all bad, he said; if it were better known and more heavily used, the tiny staff would be swamped.[38] This "anonymity," Fisher said, is traceable largely to his own

disinclination to engage in public relations. It is traceable, too, to the Center's self-imposed limitations on advocacy. If, as Dante Fascell said, there wasn't much sex appeal in freedom of information, there is even less in being a reference center devoted to freedom of information.

The question of the FOI Center's importance to the movement--like most such assessments--does not lend itself to a clearcut answer. Certainly, it never fulfilled the central role seen for it by some of its founders. But certainly, it has filled a role that needed to be filled, a role without which the successes of the central forces would have been more difficult.

James Pope, helping to celebrate the Center's twentieth anniversary in April 1978, told an audience that any freedom of information hall of fame would have to include English and Fisher in its front rank, along with John Moss and Harold Cross.[39] Fisher, at least, would much prefer a small room in the rear of the hall; ideally, one equipped with a filing system.

FOOTNOTES

[1]For a description of many of its cases and a useful analysis of the Freedom of Information Act exemptions, see Christine Marwick, ed., Litigation Under the Amended Freedom of Information Act (Washington:Project on National Security and Civil Liberties of the ACLU Foundation, 1976).

[2]New York Times, December 18, 1974.

[3]Paul Fisher, interview with the author, May 17, 1978.

[4]Editor & Publisher, May 2, 1953, p. 5.

[5]Hugh Boyd, letter to Cranston Williams, September 28, 1954. In ANPA files.

[6]"FOI Center Idea, 1952-58," Freedom of Information Center Publication No. 00, November 1958.

[7]Basil Walters, letter to Hugh Boyd, quoted in Ibid.

[8]Paul Fisher, interview with the author, May 4, 1978.

[9]"FOI Center Idea," p. 3.

[10]Ibid.

[11]Ibid., p. 6.

[12]I. W. Cole, letter to Herbert Brucker, October 13, 1958. Copy in Moss files, "Misc. correspondence."

[13]Earl F. English, interview with the author, April 24, 1978.

[14]Fisher interview.

[15]Ibid.

[16]Paul Fisher, undated memorandum in FOI Center files.

[17]Fisher interview.

[18]Dick Cardwell, letter, quoted in FOI Center "Advisory Committee Memo," September 8, 1966. In FOI Center files.

[19]Ibid.

[20]Robert Johnson Corporation, "Fund-Raising Feasibility Study for the Freedom of Information Center," January 1970, p. 19. Quoted in Charles Martin, "Earl English, Journalism Educator," (M.A. Thesis, University of Missouri, 1978) p. 122.

[21]Alice Fox Pitts, Read All About It! (Easton, Pa.: American Society of Newspaper Editors, 1974), p. 196.

[22]Sigma Delta Chi Advancement of Freedom of Information Committee, "Report," 1972, p. 25.

[23]English interview.

[24]FOI Center budget statement, 1966. Quoted in Martin, p. 122.

[25]Pitts, p. 215.

[26]"Report," p. 25.

[27]For elaboration, see Martin, Chapter VIII, footnote 14.

[28]"FOI Center Idea," p. 4.

[29]Quoted in Sigma Delta Chi Advancement of Freedom of Information Committee "Report," 1968, p. 8.

[30]English interview.

[31]Fisher interview.

[32]Ronald Plesser, letter to Paul Fisher, October 24, 1972. In FOI Center files.

[33]Paul Fisher, letter to Senator Edward Long, October 24, 1963. In FOI Center files.

[34]Benny Kass, interview with the author, May 29, 1977. John Moss, James Pope and English agreed in interviews that the university's activity and the prospect of publicity served to motivate Long.

[35]Earl English, "Statement before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the U.S. Senate." Undated copy in English's personal file. Loaned to the author.

[36]English interview.

[37]Fisher interview.

[38]Ibid.

[39]James Pope, speech delivered at Journalism Week ceremonies, University of Missouri, April 4, 1978.

CHAPTER VIII

SUMMARY AND OUTLOOK

Two questions remain to be considered, by way of summary. What is the status of the freedom of information movement after a little more than three decades? And where does it go from here? As to the first question, there are at least some data, though the facts do not fit perfectly into a coherent whole. There is clearly more access to more information about the federal government than was the case thirty, or even five, years ago. Freedom of information has a broader constituency than ever before. The journalists' organizations that led the campaigns of the 1950s and 1960s are in the late 1970s mainly support troops for the new cadre of public interest, and special interest, activists. It is equally clear that the gains for openness do not mean that all resistance has disappeared. Testimony before a Senate subcommittee overseeing implementation of the Freedom of Information Act and a study done for an Executive branch commission reveal that, ten years after the act took effect, many bureaucrats oppose and evade its requirements. And the act, despite tightening amendments, still leaves ample room for maneuver by those who would protect their secrets. The second question is even less susceptible of definitive answers. The commission that studied the full range of

federal paperwork has suggested the desirability of a comprehensive "Fair Information Practices Act" to impose a pattern on the existing patchwork of statutes--more than 200 by the commission's count--governing information policy. Legal efforts are under way both to ease access still further and, contradictorily, to force confidentiality of some kinds of information now being released. A fifth in the succession of executive orders covering classification of national security information is being drafted. And, though there is no sign of any major legislative initiative in the near future, congressional oversight activities are much more aggressive than they were a decade ago. Perhaps the only thing that can be said with certainty about the future of the movement is that the struggle is far from ended.

During the tenth anniversary year of the Freedom of Information Act, the Washington Post published a series of articles assessing its performance and prospects. One paragraph of that series captured the essence of the situation: "It is burdensome. It is costlier than expected. And it is working far better than anyone imagined when Congress enacted it. . . ."[1] The article included a tiny sampling of the kinds of information "dredged up," much of it only after lawsuits. The secrets, many of which had withstood previous efforts to get at them without the law, included the "pumpkin papers" from the Alger Hiss trial, details of the 1950s Julius and Ethel Rosenberg espionage case, the diplomatic maneuvering

before India's 1974 atomic explosion, Central Intelligence Agency records of assassination attempts, a special body of Federal Trade Commission law and hundreds of others.[2]

The burdens, real and imagined, have been detailed by distressed officials in legal arguments, legislative hearings and press releases. One of the most loudly complaining--and most complained of--agencies has been the Federal Bureau of Investigation. In the summer of 1977, the FBI fell so far behind in handling freedom of information requests that Director Clarence M. Kelly brought 400 agents to Washington from offices around the country for three months of ten-hour-a-day, six-day-a-week efforts to deal with the more than 7,000 pending requests. Kelly complained that the task--christened "Project Onslaught"--would cost about $6.5 million and would deprive the country of "about 85 man-years of investigative effort."[3] Critics in Congress and public interest groups contended that cost and disruption were exaggerated.[4]

The case of the FBI, though hardly typical, illustrates the problems an Executive agency can face due to increased access requirements, as well as the problems the agency can cause for those seeking such access. The FBI reported receiving 14,478 information requests in 1975. It spent $1.6 million and used the time of nearly 200 persons processing them. Despite that effort, the backlog developed, with the handling of routine requests taking as much as nine months. Testifying before the Senate Subcommittee on Administrative

Practice and Procedure late in 1977, Deputy Attorney General Peter Flaherty explained that the FBI's compliance with the law was complicated by the sensitive and complex nature of its files. Many records, he said, are such that "merely acknowledging their existence" would either constitute an invasion of privacy or reveal some important investigative secrets.[5] Thousands of requests are for files the FBI does not have, but finding that out takes time and money. And since so much of the bureau's information is sensitive, the job of deciding what can be released and what is exempt must often be done by agents rather than clerks.

Similar problems of sensitivity and complexity were related at that hearing by spokesmen for the State Department, Food and Drug Administration, Central Intelligence Agency, Federal Trade Commission and others.

The other side of the coin was revealed at the hearing, too. Senator James Abourezk, who presided, described the delay of more than a year and the apparently deliberate evasiveness he encountered in trying to get his own and his son's FBI files. Abourezk was so exasperated at his inability to get an FBI official even to discuss his case at the hearing that he demanded of a Justice Department official, "Do you believe that the Federal Bureau of Investigation should be a government unto itself. . .?"[6] The answer was, no. Other critics of the bureau argued that the FBI itself was inclined to answer that question in the affirmative. "They've got a

system that's guaranteed not to work within the time limits," said Mark Lynch, then director of the Freedom of Information Clearinghouse.[7] U.S. District Judge William B. Jones observed that the FBI, and other agencies, "don't like the Freedom of Information Act."

Whether because of legitimate or illegitimate concerns, the FBI's parent Justice Department continues to urge modification of the Freedom of Information Act, while insisting that its time deadlines cannot be met. That attitude is consistent with the department's position since the Eisenhower administration. It probably helps, at least, to explain the persistent problems in implementing the act, since the Justice Department is charged with enforcement and with advising other agencies on what the law means. In February 1975, issuing guidelines under the 1974 amendments to the act, Attorney General Edward Levi reminded his subordinates that "burden is no excuse for intentionally disregarding or slighting the requirements of the law. . . ."[9] But a year later, Deputy Attorney General Harold Tyler wrote that "reformulation" of the law, especially to relax the time requirements, was essential. And a year after that, acting Deputy Attorney General Benjamin Civiletti used almost the same wording Tyler had in complaining of the "adverse impact that the expenditure of such quantities of our resources is bound to have on the department's ability to carry out its assigned substantive missions."[10] In 1978, Civiletti was

back, objecting again to the "tremendous costs and administrative burdens" placed on the department by access requirements. This time, he added a warning that, because of the possibility of disclosure, "traditional sources of information are becoming unwilling, or at least less willing, to cooperate with us. . . ."[11] He urged a broadening of the exemptions permitted under the "investigative files" exception of the act. Another Justice Department official told the Abourezk subcommittee that the department was "shooting for" a response time of 30 days to information requests, despite the fact that the law provides a 10-day deadline for responses.[12]

While his subordinates pleaded the impossibility of living up to the mandates of the law, Attorney General Griffin Bell issued an unprecedented directive indicating that the spirit of openness finally might be infecting the upper reaches of the bureaucracy of justice. Pointing out that there were more than 600 freedom of information cases pending in federal courts, Bell announced that, henceforth, the Justice Department "will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act."[13] He also announced that he was ordering a review of pending cases that might result in decisions to drop some defenses of withholding. "Together I hope that we can enhance the spirit, appearance and reality of open

government," he concluded. Advocates of openness, recalling attorneys general before Bell, applauded and waited hopefully for results.

Already, however, the reality of open government was too much for a substantial number of government officials and businessmen who saw the Freedom of Information Act used in ways few of its supporters had expected or desired. Donald Baker, chief of the antitrust division of the Justice Department, said the act was being used by defense lawyers in government antitrust suits to seek information that would not be available under normal discovery rules in court cases. In 1976, he complained, his division spent more than $100,000 helping its adversaries defend themselves. Fewer than a dozen requests were received from reporters, public interest groups or researchers.[14]

By mid-1977, the roster of freedom of information suits included about 200 by companies seeking to force disclosure of commercially valuable information and about half that many by companies seeking to prevent such disclosures.[15]

These "reverse freedom of information" suits have placed government lawyers in the unaccustomed position of defending releases rather than withholdings against claims that publicity rather than secrecy is the evil. The suits arise under the act's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The difficulty is in

deciding what is a trade secret and what isn't.

Sherwin Gardner, deputy commissioner of the Food and Drug Administration, told the Abourezk subcommittee, for example, that more than 80 percent of the information requests to his agency consisted of "corporate" intelligence gatherings.[16] Gardner described a suit filed by the Pharmaceutical Manufacturers Association that sought to force the FDA to give any member of the association notice before disclosing any information obtained from it. The agency won that one.

Another "reverse" case, though, resulted in a ruling that the government could not disclose an affirmative action plan filed by the Westinghouse Electric Corporation. The government's lawyers argued that disclosure would help enforce the law requiring such plans. The court ruled for Westinghouse's argument that the plan was a "trade secret."[17]

A private attorney who handled many such cases told Abourezk that the exemption should be amended to provide for advance notice to a company whose secrets were about to be revealed. Anyone seeking such information should be required, he said, to demonstrate that he was seeking to learn about the functioning of his government and not his competitor.[18]

Mark Lynch responded to complaints about this alleged misuse of the information law by charging that the bureaucracy "is engaged in a very systematic attempt to discredit the act on the ground that corporations are using it more than anyone else."[19] Corporations are "persons" before the law and as

entitled to use it as any individual, he argued. The benefits still far outweigh any possible detriment, he said.

An analysis by a veteran of the movement shows that the effectiveness of the Freedom of Information Act has been enhanced by its 1974 amendments, though one of those amendments has had an unintended effect. From 1967 through 1971, agencies took an average of 70 days to complete action on requests. In 1976, the average was less than 11 days. Of the denials that were appealed in 1967-71, the agencies continued to refuse the information in 72 percent. In 1976, only 41 percent were refused on appeal. In the pre-amendment period, the trade secrets exemption was the one most often used as a basis for denial. In 1976, that had slipped to fourth place among the nine exemptions, falling from 24 to 13 percent of the refusals. Taking its place as the most often cited was the investigative files exemption, which accounted for 35 percent of all refusals in 1976, up from only 14 percent in the earlier period. Sam Archibald, who headed both studies, noted, "The Congress, which had intended to narrow the investigatory files excuse, actually broadened its use by spelling out the conditions under which investigatory records can be withheld.[20]

The agency reports for 1977, which have not yet been analyzed, show an increasing number of requests after a decline in 1976, when the Privacy Act took effect and many requests for individual records were filed under it instead of under

the Freedom of Information Act. The 1977 figures also show that, unlike the amendment of the investigative files exemption, Congress' tightening of the exemption for matters protected by other laws cut down the use of that exemption, which dropped by about half from 1976. In 1977, the investigative files exemption continued to be the most popular, with the departments of Defense, Justice, Labor and Treasury each citing it more than one thousand times. Although Justice Department spokesmen complained most loudly, the department got only 18,996 information requests in 1977. The Defense Department got 45,255; and the Department of Health, Education and Welfare got 42,197. Agencies are not required to keep track of their number of requests, so no totals are available. It seems clear, however, that the Justice Department spent--or claimed to spend--far more money on each information request than any other agency. Justice reported spending $12,959,573.93 on Freedom of Information and Privacy Act requests in 1977. Defense and HEW, with far more requests, each spent about $5.3 million.[21]

The Freedom of Information Act after a decade, then, is costing a great deal of money, causing a great many bureaucratic headaches and freeing a great deal of information. It has not fulfilled all its advocates' goals in opening public business to public view, but it has at least matched the realistic expectations of many. The costs and confusion it has generated have been less than those created by many

laws with less lofty aspirations and less significant achievements.

Some of the confusion has resulted from dubious interpretations of the act's relationship with the Privacy Act of 1974. The Privacy Act (5 United States Code 552a) has been described as "a congressional response to the public's fear of governmental overcollection and misuse of personal data."[22] It provides individuals access to records on themselves and permits the correction of such records. It also requires the government to protect personal records from unauthorized use, within or without the government. It includes a blanket exemption for records maintained by the CIA or law enforcement agencies. And it permits anyone whose rights are violated by "willful or intentional" actions to sue for damages.[23]

Even before the act took effect in 1975, the Justice Department issued an advisory opinion that the new law permitted the closing of some personal records previously available under the Freedom of Information Act. This restrictive view was in keeping with the department's general attitude toward openness requirements, but it was revised under congressional pressure. The final interpretation was that an applicant should get anything he is entitled to under either act.[24] The department's critics pointed out that the Privacy Act contains a specific provision that no exemption in it restricts access to material available under the Freedom of Information Act. They also pointed out that forcing

an applicant to rely on the Privacy Act deprives him of the time limits imposed on agencies by the FoI Act.[25]

Still, even after the re-interpretation, some agencies continued to deny records improperly on the basis of the Privacy Act.[26] John Moss was moved to threaten new congressional action to enforce the intent of the laws. He told the Federal Bar Association in Washington that the House Information Subcommittee was monitoring developments "with the greatest care."[27]

A more optimistic view of the working of the Privacy Act was provided by Franklin S. Reeder, an official of the Office of Management and Budget, which is charged with administering the act. He told a conference in mid-1976 that the act had not proved as burdensome as expected. The chief problem, he said, was that the penalties for improper disclosure engendered an overcautious attitude on the part of some officials, resulting in refusals of information that should be released.[28]

Predictably, the chief of the Justice Department's Information and Privacy Unit continued to argue that the administrative burdens of "this kind of garbage" were taking officials' time away from the "people's business." He proposed that, to ease the administrative workload, some offices be declared "closed" to the public and others be declared "open" for public inspection and copying of records. He would be glad, he said, to have his own office declared open and

his unit abolished for lack of work.[29]

A scholarly analysis of the "interface" of the two acts suggested, however, that their relationship is really much simpler than the Justice Department and others have made it appear: "Simply stated, the only reason information in an agency's possession can be denied upon a proper FOIA request is that the information falls within an FOIA exemption." The Privacy Act "is not even helpful" in specifying what records should be secret under the FOI Act's "clearly unwarranted invasion of personal privacy" exemption. "The overlap between the two acts is slight indeed."[30]

Despite that assessment, which is supported by the language of the statutes and the stated intentions of their sponsors, the history of the movement for access forces the conclusion that agency-induced complications and unnecessary difficulties will continue to hinder effective implementation of what should be compatible law.

By contrast, no assessment is possible yet of the workings of the other principal access law, the Government in the Sunshine Act. The Act, adopted in 1976, did not take effect until March 12, 1977. Congress' first hearings in oversight of the law were scheduled for mid-1978.[31]

And what of the future?

No new major access legislation is in prospect. The emphasis in the Congress is now on oversight of the landmark statutes already enacted. The Senate subcommittee has held

the first hearings on implementation of the Freedom of Information Act. Others are contemplated by that body and by the House Subcommittee on Government Information and Individual Rights.[32]

The pressure groups that have assumed the advocacy of openness in the 1970s are relying heavily on the courts for enforcement of the rights won in Congress. The Freedom of Information Clearinghouse, American Civil Liberties Union, Reporters Committee for Freedom of the Press and those groups with specialized interests all are focused on litigation rather than lobbying in mid-1978.[33] Remaining to be seen are the impact of the Bell Memorandum and the impact of the increasing number of "reverse" freedom of information suits, none of which has reached the Supreme Court yet.

These developments do not mean that the movement is over, or that no significant battles remain to be fought. There are indicators, at least, that a new issue may reach the legislative forum and that an old one will be renewed.

The proposals that could generate new congressional activity emerged in 1977 from the Commission on Federal Paperwork. The commission proposed creation of a new central agency to develop and coordinate information policies, monitor compliance and handle complaints. It also urged a recodification of all laws requiring secrecy, and called for several tightening amendments to the Privacy Act.[34] Its most controversial proposal, however, was that "changes should be enacted in law to create a body of consistent law, or perhaps a new

Fair Information Practices Act. . . ." A staff report to the commission had called for such a comprehensive law with no "perhaps," charging that "federal agencies continue to resist disclosure, either to the public or to other agencies."[35] The staff report described "widespread confusion and sometimes misunderstanding" in the bureaucracy of the many information laws. It urged careful redrafting and the addition of effective sanctions as essential to assure compliance.[36] The report was quashed and its author fired. One official involved said later that the disavowed version "pointed out too many warts. I don't think the staff of the commission wanted to make waves."[37] Waves were made anyway by the report's handling as well as its revised content. No legislation has emerged from any of the commission proposals so far, but Timothy Ingraham, the House information subcommittee's staff director, expects that a future session of Congress may see some version of a "Fair Information Practices Act."[38]

The old issue that may stir dispute as it has in the past is an executive order on security classification. The Carter administration is preparing a successor to Nixon's order, which was itself the fourth in a line that began with Harry Truman. A draft of the order[39] was made public late in 1977 to solicit public comment. The reaction of several civil liberties organizations was sharply critical. The organizations included the American Civil Liberties Union, Common Cause, Americans for Democratic Action, Nader's Public Citizen

Litigation Group and others. In a letter hand-delivered to one of the president's attorneys, the group urged major changes in the order, calling it "even worse" than "its seriously flawed predecessor" in several respects.[40] The order, the critics complained, does not substantially reduce either the kinds of information that may be classified or the number of those who may do the classifying. It makes no provision for weighing the public interest in disclosure against the possible harm from disclosure. It sets a six-year limit on the period of classification, but permits broad exemptions to the limit. It continues the use of secrecy agreements by government employees and does not specify penalties for overclassification. Noting that President Carter has committed his administration to greater openness, the critics called for "fundamental changes" in his draft executive order to meet that commitment.

The order was still "going through the mill" in mid-1978, said Ingraham. The subcommittee will hold oversight hearings on its operation after it has been in effect for three months, he said.[41] Based on the criticisms directed at the draft order, the critics and their congressional allies could be expected to provide the administration with a lot to hear. Classification and its related issue, executive privilege, might even wind up pitting Democrats against Democrats, one form of conflict that has been rare previously in the campaigns against Executive secrecy.

So no end can be written yet to the story of the freedom of information movement. Its fields of action seem certain to keep shifting, just as they have shifted for more than thirty years every time one barrier was overcome and another discovered. This study has examined the barriers, recounted the assaults--victorious and otherwise--and suggested the battles that may lie ahead.

The question that recurs is this: what has the movement accomplished? John Moss' answer is as good as any. Twenty-five years ago, when he first became interested in the availability of information, "vast amounts of material were routinely withheld," he recalled. "If you compare it with today, we've made vast progress. If you ask me if we've made enough, the answer is No."[42]

FOOTNOTES

[1]Washington Post, July 25, 1976, p. A4.

[2]Ibid.

[3]New York Times, March 18, 1977.

[4]Ibid.

[5]Peter Flaherty, statement before Senate Subcommittee on Administrative Practice and Procedure, in "Hearings on Oversight of the Freedom of Information Act," 95th Congress, First Session, p. 159.

[6]"Hearings," p. 133.

[7]Washington Post, July 26, 1976, p. A7.

[8]Washington Post, July 25, 1976, p. A4.

[9]Ibid.

[10]Access Reports, May 4, 1977, p. 7.

[11]Access Reports, May 2, 1978, p. 11.

[12]"Hearings," p. 135.

[13]Attorney General's memorandum, May 5, 1977, reprinted in "Hearings," p. 217.

[14]Access Reports, Feburary 8, 1977, p. 7.

[15]Kansas City Star, June 30, 1977, p. 15.

[16]"Hearings," p. 4.

[17]Kansas City Star, June 30, 1977, p.15.

[18]Burt A. Braverman, statement, in "Hearings," pp.293-307.

[19]Robert O. Blanchard, "First, the Good News. . .," The Quill, January 1977, p. 22.

[20]Samuel J. Archibald, "The Freedom of Information Act Revisited: Have the 1974 Amendments Helped?" paper submitted to the Association for Education in Journalism annual convention, August, 1978, p. 8.

[21]Access Reports, May 2, 1978, pp. 9-12.

[22]William Harader, "Interface of FOI and Privacy Acts," Freedom of Information Center Report #371, May 1977, p. 2.

[23]5 U.S.C. 552a 2.

[24]Congressional Record Senate, October 9, 1975, pp.18145-6; and Access Reports, November 3, 1975, p. 1.

[25]Christian Science Monitor, February 17, 1976, p. 14.

[26]Ibid.

[27]Access Reports, April 5, 1976, p. 7.

[28]Access Reports, June 1, 1976, p. 7.

[29]Ibid.

[30]Harader, p. 4.

[31]Access Reports, May 1, 1978, p. 12.

[32]Timothy H. Ingraham, interview with the author, May 18, 1978.

[33]See List of Exhibits in "Hearings," and see Christine Marwick, ed., Litigation Under the Amended Federal Freedom of Information Act (Washington: Project on National Security and Civil Liberties of the ACLU Foundation, 1976).

[34]Access Reports, August 23, 1977, pp. 5-6.

[35]Commission on Federal Paperwork, staff report, "Privacy and Confidentiality," July 1977, p. 111-2.

[36]Ibid., pp. III-3, 13, 51.

[37]For a detailed account, see Timothy Moore, "The Paperwork Papers--Now You See Them, Now You Don't," Potomac magazine, Washington Post, July 31, 1977.

[38]Ingraham interview.

[39]Reprinted in "Hearings," p. 458.

[40]Ibid., p. 469.

[41]Ingraham interview.

[42]John Moss, interview with the author, June 1, 1977.

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American Society of Newspaper Editors. 1350 Sullivan Trail, Easton, Pa.
The files are uncatalogued and incomplete. They do contain some correspondence and other unpublished material.

Freedom of Information Center. School of Journalism. University of Missouri. Columbia, Mo.
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George Kennedy was born June 29, 1941, in Marshall, Missouri. After attending public schools there, he studied at Tulane University and the University of Missouri, from which he received a Bachelor of Journalism degree in 1964. In 1966, he received a Master of Arts degree in political science from the University of Pennsylvania. In 1969-70, he was a Professional Journalism Fellow at Stanford University. From 1964 to 1974, he worked as a reporter and editor on newspapers in Wilmington, Delaware, and Miami, Florida. He returned to the University of Missouri in 1974 as an instructor in the School of Journalism and a doctoral candidate. He is presently on the faculty of the School of Journalism. He is married to Robin Clark Kennedy, a botanist. They have three children.