

Freedom of Information Statutes: The Unfulfilled Legacy

Laura Schenck(1)

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

—James Madison(1)

Introduction

At first glance, statutes like the federal Freedom of Information Act (FOIA)(2) and its state equivalents appear to help the governed "oblige" the government.(3) In essence, freedom of information statutes restrict governmental power by forcing administrative agencies to disclose potentially damaging

information.(4) The purpose of the federal freedom of information statute "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.(5) Thus, the statute provides an opportunity for the citizenry to "oblige" at least part of the government to control itself.

Although the federal and state freedom of information statutes(6) provide a meaningful check against corruption in administrative agencies, the statutes contain a fatal flaw: generally, they do not subject the legislative branch to their provisions.(7) Ironically, while legislators serve as the actual "governors" of the country, they are not susceptible to checks from the other branches. Further, legislators compose the branch that most comprehensively represents the will of the people. That they are not subject to the provisions of the FOIA constitutes a perverse shortcoming in the scope of many freedom of information statutes. *State ex rel. Masariu v. Marion Superior Court*,(8) a recent Indiana Supreme Court decision, best illustrates this shortcoming.

When members of the Indiana House of Representatives debated and voted on controversial amendments to the state budget, the legislative clerk, without explanation, denied access to a record of the roll call votes to reporters from the *Indianapolis Star*. Although the members' votes flashed on an electronic board in the House Chamber, a momentary glimpse did not allow the reporters to mentally record how each representative voted. In the subsequent lawsuit, the *Indianapolis Star* argued that the records of the roll call votes were "public" pursuant to the Indiana Access to Public Records Act.(9) The newspaper argued that the public had a right to know how its representatives cast their votes, particularly in a vote about issues concerning how the General Assembly intends to allocate taxpayer monies.

In a one-page decision, the Indiana Supreme Court disagreed. The court held that any judicial involvement in such a matter constituted a violation of the separation of powers clause of the Indiana Constitution. Or, as the court explained it: "If the legislature wishes to authorize sanctions against itself upon a claim by press or public alleging improper legislative secrecy, such sanctions would have to be determined and imposed solely by the legislative branch itself, without recourse to the courts.(10) In essence, the court handed the legislative branch a virtually unrestricted license to engage in legislative secrecy.

Because most freedom of information statutes fail to cover the legislative branch, constituents at both the state and federal levels are not legally entitled to know how their representatives have voted. Consequently, when members of a legislature, such as the Indiana General Assembly, wish to protect themselves from the backlash of a politically unpopular vote, they can do so without sanction. Of course, legislatures do not regularly hide their voting records in an archive far from public view. However, without the inclusion of voting records in freedom of information statutes, the potential exists for legislative secrecy. The electorate cannot assert a legally enforceable right to access voting and

other records which symbolize exactly the type of information individuals in a democratic state should be able to access. The absence of access to such records undermines the core of a representative government.

This Note asserts that the legislative exemptions from the FOIA are fundamentally inappropriate in a democratic society and should be eliminated at both the state and federal levels. Part I of this Note sets forth the development of freedom of information statutes and demonstrates that the purpose and legacy of these statutes remain unfulfilled. It also discusses basic policy considerations that weigh in favor of extending the scope of freedom of information acts to include the legislative branch. Part II demonstrates that at the state level, the judiciary could require disclosure of voting records. It employs the *Masariu* decision and the Indiana Access to Public Records Act to illustrate that inclusion of the legislative branch does not transgress constitutional principles. Part III focuses on legislative reform at the federal level and the problematic issue of creating an effective enforcement mechanism.

I. The Unfulfilled Legacy of Freedom of Information

A. Historical Underpinnings

The predecessor to the FOIA originated in 1958, when Congress amended a 1789 "housekeeping" statute that gave federal agencies the right to regulate their business and to keep records.⁽¹¹⁾ That statute had been relied upon "as authority to withhold certain types of information from the public."⁽¹²⁾ As a result, the one-sentence amendment provided: "This section does not authorize withholding information from the public or limiting the availability of records to the public."⁽¹³⁾ Thus, as far back as 1958, there was an articulated effort to discourage governmental secrecy and promote disclosure of the records of administrative and executive officials. However, Congress did not design the 1958 amendment to confront the emergence of massive administrative agencies, and the original FOIA evolved as an amendment to Section 3 of the Administrative Procedure Act of 1946.⁽¹⁴⁾ The FOIA became necessary when functional inadequacies in Section 3 gave rise to loopholes that prevented disclosure,⁽¹⁵⁾ and agencies continued to randomly deny information to the public.⁽¹⁶⁾

President Lyndon B. Johnson signed the FOIA into law on July 4, 1966. The Act has been lauded as milestone legislation because it provided access to information that agencies had long prevented the public from seeing.⁽¹⁷⁾ In his bill-signing statement, President Johnson remarked:

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.⁽¹⁸⁾

The FOIA required disclosure of agency documents and demanded that agencies and courts liberally construe all provisions in favor of disclosure. Agencies trying to avoid disclosure had to satisfy one of nine narrowly drawn exceptions.⁽¹⁹⁾ States that subsequently enacted freedom of information legislation seemed to follow Congress's lead by exempting the legislature.⁽²⁰⁾

B. Freedom of Information Statutes Fail in Principle

Freedom of information statutes uphold the principle that an informed electorate is one of the keys to a successful democracy.⁽²¹⁾ However, once the legislative exemption is taken into account, this principle loses much of its meaning. At the federal level, at least, the legislative branch is explicitly exempted.⁽²²⁾ Citizens are not fully "informed" when they are denied access to information about the decisions of their representatives. At least one member of Congress has argued that the statutes appropriately cover only appointed officials, because elected representatives remain accountable to the public at election time.⁽²³⁾ However, this argument actually favors extension of the statutes to elected officials and exposes the absurdity of the statutes' failure to cover the legislative branch.

The only direct authority the people retain in a representative democracy is the chance to vote for or against elected

officials. However, citizens cannot cast informed votes if they are denied access to the very records that enable them to evaluate their representatives. In addition, human nature and recent scandals committed by representatives demonstrate that elected officials are as capable of secrecy and poor decision making as are unelected officials. Therefore, to ensure the people's ability to cast an informed vote, it is just as important, if not more important, for the public to have access to the decisions of elected officials. Because of the legislative exemption, the statutes represent a disingenuous attempt to "ensure an informed citizenry" and fail to provide a meaningful opportunity for the "governed" to hold the elected "governors" accountable.(24)

One can argue, however, that information about the legislative branches is sufficiently available. For instance, debates on the floors of most state legislatures are open to the general public. Votes are eventually published in legislative journals.(25) Most congressional proceedings are televised, and anything that is not published is often leaked to the public. These arguments are unconvincing because, in principle, the legislative exemption offends basic democratic ideals. At the core of representative government lies the concept that representatives are answerable to their constituents. As a matter of principle, the legislative exemption from freedom of information statutes legally debases the public's right to know how its interests are represented.

C. Public Policy Considerations

The fundamental failure of most freedom of information statutes to honor the stated purpose of the legislation provides a compelling reason for legislatures throughout the nation to eliminate the legislative exemption. As a matter of general public policy, there are several additional reasons.

First, the efficacy of representative government not only depends on an informed electorate but also on an electorate that actively participates in the democratic process. Currently, less than half of all adults typically vote in elections.(26) Although there are multiple reasons for voter apathy, one significant factor is the inability of voters to access objective information about candidates.(27) In the past, candidates developed a bond with their constituents by using merely their "voting records and walking shoes,(28) whereas now, voters have a substantially more difficult time judging an incumbent's decisions. Instead, voters are barraged with negative campaign techniques that obscure the candidates' substantive platforms. If voters are truly motivated, they can go to the legislative clerk to examine the legislative journal; however, those journals are not frequently updated.(29) This problem is compounded by the media's tendency to superficially address actual issues and focus on the "game dimension" of politics.(30)

Ultimately, the electorate is not given the opportunity to judge incumbents solely on the basis of their voting records. While it is important for voters to have exposure to facets of candidates beyond their voting records, in some ways, a voter's knowledge of a candidate's voting record is all that is needed to cast an informed vote. Currently, access to a candidate's voting record is too cumbersome. To institute a meaningful opportunity for the electorate to participate in the political process, legislators could, first, include themselves and most of their records within the scope of freedom of information statutes, and, second, take the spirit of "open government" a step further by publishing their voting records daily on the Internet.(31)

The failure of the legislative branch to subject itself to the same disclosure requirements as faced by the executive branch is problematic for other reasons. The exemption diminishes the trustworthiness and overall stature of the legislature as a respectable governing body. For instance, voters already have a general mistrust of their representatives' motives,(32) and most are not even aware that the legislature has exempted itself from statutory disclosure requirements.(33) Upon discovery of this, the average voter reacts with "surprise or disgust.(34) It follows that the legislative exemption would fuel further mistrust of the legislative branch if the public understood that they do not have a legally enforceable right to access the voting records of representatives.

Additionally, the omission of the legislative branch from the FOIA has upset the balance of power between the branches. Because of the exemption, legislative bodies are untouchable. While the executive branch is subject to legislative inquiries for documents, it cannot in turn check the secrecy within the legislative branch. For instance, pursuant to Rule 76 of the Indiana Rules for the Government of the House of Representatives, the legislative clerk is required to make an original and three duplicates of any vote taken by the recording equipment.(35) One of these

duplicates is to be earmarked for the use of the media.(36) Yet, when a legislative clerk violated this rule, the judiciary considered itself powerless to sanction the behavior, deeming it an "internal function of the legislature.(37)

For these reasons, the legislative branches must subject themselves to the FOIA, at least with respect to their voting records. Until this reform occurs, it is a misnomer to call the statutes "freedom of information" acts. The following sections propose a potential judicial response at the state level and a legislative approach at the federal level to remedy the problems posed in *Masariu*.

II.State Judicial Reform

In contrast to the federal level, the states possess some leeway for judicial intervention on behalf of voters' rights to access voting records.(38) In Indiana, for example, the Access to Public Records Act does not specifically exclude the General Assembly but defines a public agency as "[a]ny . . . instrumentality or authority by whatever name designated, exercising any part of the executive, administrative, judicial, or *legislative power* of the state.(39) Although the *Masariu* court did not choose to interpret Indiana Code Section 5-14-3-2 in this way, a court in Florida did attempt this reading, albeit unsuccessfully. Florida had a statute analogous to Indiana's in that the definition of "agency" was not restricted to any particular branch, and this statute was interpreted by the Florida court to include Florida's General Assembly.(40)

Whether the right to voting records can pass constitutional muster depends on the court's interpretation of the statute. Part II (A) of this Note argues that state courts could interpret freedom of information statutes to include the legislative branch. Because courts would engage in statutory interpretation, there is not a separation of powers issue contrary to the holding in *Masariu*. In addition, Part II (B) addresses the Speech or Debate Clause arguments raised by subjecting the legislative branch's voting records to a freedom of information statute.

A. Separation of Powers Principles

It is a well-established concept that separation of powers concerns are only triggered when one branch usurps the functions of another branch.(41) In most cases, the judicial entity would be merely construing a statute the legislature passed. For instance, instead of deciding the case on a declaratory writ, the Indiana Supreme Court could have remanded *Masariu*. By using the "plain meaning" method of statutory interpretation, the court could have found that Indiana Code Section 15-4-3-2 applied to the legislature because on its face, the unambiguous language of the act clearly applies to the legislative branch.(42)

Alternatively, the court still could find Ind. Code Sec. 15-4-3-2 applies to the legislative branch by employing a standard rule of statutory interpretation which recognizes what a statute does not say is as important as what it does say.(43) In other words, if the Indiana General Assembly really wanted to exclude itself, it could have unambiguously done so as Congress did in the FOIA. Because courts are required to look to the "general purpose of the statute, objects to be attained, and evil to be remedied(44) when interpreting an ambiguous provision, it follows that the stated purpose of the FOIA includes the legislative branch. For instance, the stated purpose of Indiana Code Section 5-14-3-1 is to protect the public's right to "full and complete information regarding the affairs of government *and the official acts of those who represent them*.(45) Obviously, subjection of the legislative branch to the FOIA effectuates this end.

It is more difficult to prevail on the separation of powers argument as the Indiana Supreme Court framed it. Since the court did not find that Indiana's Access to Public Records Act applied to the legislative branch, it concluded that any inquiry into the branch's internal management constituted an impermissible invasion into the functions of the legislature. While this argument is clearly meritorious, it is not persuasive.

The court's rigid view of separation of powers overlooks an important point: separation of powers principles require only independence of the branches, not supremacy of one branch over the others. Currently, as the *Masariu* court noted, the legislative branch can engage in "legislative secrecy" without any checks from the other branches, thus, rendering the legislative branch supreme. Furthermore, recent separation of powers cases such as *Morrison v. Olson*(46) have relaxed the distinct divisions between branches. In *Morrison*, the United States Supreme Court held a

branch breaches separation of powers doctrine when it encroaches upon another branch's "core functions."⁽⁴⁷⁾ Following *Morrison's* lead, the Indiana Supreme Court could have acknowledged that while the act of voting itself is a "core function," the publication of voting records is not. As a matter of constitutional law, while the publication of voting records is a legislative function, it is not a core function and, therefore, is not constitutionally protected from intrusions by the judicial branch.

B. Speech or Debate Clause

The Speech or Debate Clause presents another constitutional question with respect to the inclusion of voting records in a freedom of information statute.⁽⁴⁸⁾ Although it was not a key issue in the *Masariu* decision, future courts should consider the constitutional question more thoroughly. If Congress and state legislatures subject themselves to freedom of information provisions, they may try to invoke the privilege more frequently. This part of the Note demonstrates that the historical rationales and modern interpretations of the speech or debate privilege do not validate the legislative exemption from freedom of information statutes with respect to voting records.

1. Underlying Principles of Speech or Debate Clause

United States v. Johnson⁽⁴⁹⁾ was one of the first United States Supreme Court decisions that articulated the reason for the Speech or Debate Clause. According to *Johnson*, fear of the Crown's attempts to deter legislators from making objectionable statements about the Crown in Parliament inspired creation of the clause. With the Crown's tyranny in mind, the Court stated that the purpose of the clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary."⁽⁵⁰⁾ Other interpretations emphasized that an ancillary goal of the privilege was to avoid the interruptions of legislators' duties caused by a need to defend themselves in court.⁽⁵¹⁾

Although both of these concerns are valid, they simply do not apply to the disclosure of voting records through a freedom of information statute. The "accountability" the Court refers to in *Johnson* does not mean that the privilege completely prohibits judicial review of legislative conduct. In fact, *Kilbourn v. Thompson*,⁽⁵²⁾ the first case interpreting the range of the privilege, still stands for the settled proposition that the Court is periodically empowered to review legislative conduct. Thus, the freedom the Framers seemed to envision for legislators was autonomy to represent their constituents without the fear of being hauled into court for their beliefs and comments, not absolute immunity from judicial review.

The Indiana General Assembly's ability to represent its constituents is not inhibited by a judicial ruling that voting records are not protected by the speech or debate privilege. For instance, in *Masariu*, the court did not hold the legislators accountable. Instead, it held the legislative clerk responsible, but only to the House leadership.⁽⁵³⁾ The legislators in the *Masariu* case were not involved in the litigation and did not have to neglect their legislative duties to defend their actions in court. Ultimately, a requirement that the legislative clerk must disclose voting records pursuant to a freedom of information statute does not realistically threaten to control the conduct of a legislator which, as Supreme Court precedent dictates, must occur to invoke the speech or debate privilege.

The publication of voting records obviously occurs after the legislators have completed the legislative process. However, there still is an indirect impingement upon legislative communications. One could argue that the essence of the speech or debate privilege still bars inclusion of voting records in the FOIA. The legislators' awareness that voters are guaranteed instant access to voting records could "chill" debate and their ability to vote freely. This is comparable to a court holding legislators accountable for what they have done or said during the legislative process, which is clearly contrary to the speech or debate privilege.

This argument, however, is immaterial from the standpoints of both the speech or debate privilege and public policy. The Speech or Debate Clause does not altogether restrict intimidation of legislators. Rather, the privilege was narrowly designed to protect legislators from intimidation by the other branches, not by voters. While voters have no similar mandate as to the judiciary, they have a public mandate to hold legislators accountable for their actions. Voters are supposed to pressure legislators with the threat of voting against them. Therefore, the argument that instantaneous availability of voting records could "chill" the legislative process is not a meritorious use of the speech or debate

analysis.

Secondly, reminding legislators of their obligation to their constituencies is consistent with public policy goals. A legislator's awareness of voter access to voting records does not impinge on legislative voting strategies, but instead encourages a higher quality of work. If the legislators involved in the vote in *Masariu* knew that the *Indianapolis Star* reporters could gain instantaneous access to voting records, it is more likely that the legislators would attend and cast an informed vote. Immediately, they would be forced to defend their decisions about the expenditure of taxpayer monies rather than abstain from a vote or cast a vote they know their constituents do not support. This incentive is lost when legislators can prevent reporters and the public from accessing voting records.

2. Scope of the Speech or Debate Clause

Clearly, *Masariu* does not present the dangers the Speech or Debate Clause was designed to resist. Despite this, it is still necessary to consider whether current case law defining the practical scope of the privilege extends to the publication of voting records. Most of the analogous United States Supreme Court decisions address the question of whether the Speech or Debate Clause protects legislators and their aides in the context of criminal or ethical breaches of the law. The cases are still germane to questions about voting records because they all adopt a more or less uniform definition of the Speech or Debate Clause.

Literally, the clause only provides for the protection of "Senators and Representatives,(54) which technically should suggest that legislative clerks cannot invoke the privilege. However, the Supreme Court has enlarged the scope of immunity to include legislative employees and aides in limited circumstances.(55) Generally, the Speech or Debate Clause treats members and aides "as one.(56) If a legislative act is protected when a legislator performs it, that member's aide vicariously enjoys protection.(57)

Furthermore, the Supreme Court has not limited the speech or debate privilege to comments made during the course of debates on the House floors. The Court has consistently interpreted the clause to include acts within the sphere of legislative activity.(58) As the Court in *Powell v. McCormack*(59) explained:

it would be a 'narrow view' to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the *act of voting* are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'(60)

Although the Court has not limited the clause to in-house debates, subsequent decisions still intimate that the Court would not extend the privilege to the publication of voting records or to the voting records themselves. In several decisions, the Court emphasized the principle that the clause does not protect "all things in any way related to the legislative process.(61) The Court voiced concern that a broad reading of the speech or debate privilege would invite legislators to find a way to relate virtually everything they do to the legislative process.(62) Consequently, the Court has upheld inquiries into activities that are incidentally related to the legislative process (*e.g.*, the publication of voting records) but not into activities that represent core legislative functions.

Thus, as framed by Supreme Court precedent, the central question in *Masariu* becomes whether the publication of voting records is a core legislative function as opposed to only relating incidentally to the legislative process. If the publication of voting records is not a core function, then the legislative clerk in *Masariu* cannot claim speech or debate protection. *Gravel v. United States*(63) is the seminal case defining "core function." In that case, Senator Gravel claimed that his speech or debate privilege should also immunize his aide from testifying in a federal grand jury proceeding.(64) Senator Gravel argued his aide should be protected for his assistance to Gravel as he prepared for and conducted a committee hearing, and when the aide facilitated the Senator's desire to privately publish confidential government documents.(65) In this decision, the Court drew a bright line between protected and unprotected legislative activity.

According to the Court, a protected legislative act is one that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation(66) Therefore, the aide's involvement with the committee was protected from grand jury inquiry because committee hearings are integral to the legislative process.(67) Conversely,

the aide's role in private publication of the documents was not protected from inquiry because publication is not inherently part of the legislative process.(68) Furthermore, the Court found that distribution of information to the public did not constitute an "integral part of the deliberative and communicative process.(69)

Although the *Gravel* facts are distinguishable from those of *Masariu*, there is no question that according to the Court's analysis, publication of the voting records is not part of the legislative process. Rather, voting records represent the *ex post facto* outcome of the legislative process. In another case, the Court upheld the general rule that the publication and distribution of materials constitutes a nonlegislative function.(70)

One could argue that although the publication of records is incidental to the legislative process, voting records themselves constitute a deliberative document, thus, commanding speech or debate protection. However, this argument also fails. In general, a deliberative document is one that reflects the "give and take" of the thought processes of legislators.(71) Voting records do not indicate why legislators voted the way they did, but show merely how they voted.

III. Legislative Reform

Over the past several years, Congress has begun to realize the need to subject itself to the laws it passes. As vaguely noted in one bill, "It is the sense of the Congress that Congress . . . should govern itself according to the laws that apply to the private sector and the other branches of the Federal Government.(72) In fact, during the first session of the 103d Congress, no fewer than seven bills were proposed that would make the FOIA apply to both houses of Congress.(73) In 1995, Congress passed the Congressional Accountability Act,(74) subjecting Congress to many of the employment laws that apply to the private sector.(75)

Congress's attempts to rein itself in are encouraging, but the reforms do not address the issue of enforcement. For instance, the Congressional Accountability Act uses an internal enforcement unit, the Office of Compliance, that is educational in nature.(76) Yet, acts that appoint legislators to monitor other legislators are not much different from the status quo. For example, as *Masariu* illustrates, internal controls are meaningless when the legislature decides not to enforce them.(77) In terms of access to voting records, it is essential for the legislative branch to concede enforcement to one of the other branches. Thus, in contrast to current practice, Part III demonstrates that subjecting the legislative branch to executive branch enforcement does not violate separation of powers principles.

A. Separation of Powers Principles and Enforcement of the FOIA

In his article, *Applying Federal Open Government Laws to Congress*, Professor James T. O'Reilly states that executive enforcement of freedom of information statutes against the legislative branch poses constitutional problems.(78) Relying on cases such as *INS v. Chadha*(79) and *Bowsher v. Synar*,(80) he correctly argues that members of the legislative branch cannot retain legislative oversight of the execution of a law and cannot wield any executive powers.(81) In order to ameliorate this enforcement problem, O'Reilly supports the use of a board of directors for the Office of Compliance that would consist of nonexecutive branch members.(82) Members of the board would have only the power to mediate disputes, much like an ombudsman, and would not enforce freedom of information against the legislative branch.(83)

While O'Reilly's proposal is constitutionally sound, it overlooks a more aggressive approach to enforcement that is also constitutionally feasible. Cases such as *Chadha* and *Bowsher* merely stand for the general separation of powers rule that the legislative branch cannot reserve legislative power over the executive once a law has been passed. They do not speak to the issue of whether the legislative branch can subject itself willingly to executive enforcement of a freedom of information statute.

The underlying purpose of the separation of powers doctrine is to prevent any one branch of government from aggrandizing its power by assuming functions of another. In particular, the Framers were concerned that the legislature

would overreach its power.(84) In fact, some argue that the Framers tried to create not only a strong executive, but one that was strong enough to "counteract overreaching legislatures.(85)

Another integral part of the separation of powers principle is that the Framers never intended for the three branches to work in isolation. Instead, as James Madison wrote, separation of powers does not mean that "these departments ought to have no partial agency in, or no control over, the acts of each other.(86) Instead, constitutional principles are compromised when "the whole power of one department is exercised by the same hands which possess the whole power of another department(87)

With these underlying principles of separation of powers in mind, it becomes clear that Congress can subject itself to the FOIA without appointment of legislative members to manage enforcement. By amending the FOIA to include itself, Congress would not usurp the power of another branch but instead would voluntarily relinquish it. Furthermore, by doing so, each branch would exercise its constitutionally assigned function. Surely, it is not against separation of powers principles for the executive branch to implement a law that the legislature passed. The fact that the executive branch could be "intrusively involved" with the affairs of the legislature does not present a separation of powers obstacle, as long as the legislature authorizes the intrusion.

The current approach to a more fluid distribution of branch functions further supports this analysis. Cases such as *Mistretta v. United States*(88) have broadened separation of powers principles by allowing branches to delegate some of their functions to other branches. For instance, in *Mistretta*, the Supreme Court permitted Congress to delegate some of its law-making power to members of the judiciary.(89) It went so far as to say that separation of powers principles "do not prevent Congress from obtaining the assistance of its coordinate Branches.(90) Moreover, most administrative agencies exercise functions originally entrusted to all three of the branches.(91)

In light of the diffusion of branch functions within the contemporary government structure, it is apparent that, if it so desired, Congress could subject itself to the FOIA and appoint the executive branch to enforce it. Consequently, any claim that separation of powers principles compel Congress to have its own internal enforcement mechanism amounts to a legislative subterfuge. As one congressman admitted, "whenever Congress appears to be in jeopardy of [a] Justice Department [investigation] . . . we all of a sudden find separation of powers.(92)

Conclusion

In Florida, voters felt so strongly about legislative coverage, 80 percent of them approved a referendum to amend Florida's Public Records Law and eliminate the legislative exemption.(93) If the reaction of Florida's voters is representative of the general public's sentiments, the legislative exemption is clearly illegitimate. As the voters in Florida must have realized, forcing the legislative branch to subject voting records in particular, to freedom of information statutes provides voters with all of the power they need to hold legislators accountable for their actions and voting patterns.

The potential for the public to take charge in the political arena is uncomplicated and unlimited. If voting records were published on-line pursuant to a provision in a freedom of information statute, or readily available to the media, voters could easily keep tabs on their representatives and, thereby, sidestep the need to pay attention to negative campaign advertisements or inane sound bites. Voters should have the legally enforceable option to demand this level of involvement from their representatives.

The first step toward creating this "superaccountability" is to amend freedom of information statutes to include legislative branches. Until the legislative exemption is abolished, the legislative branches will retain the option to exercise their statutorily protected right to engage in legislative secrecy. Ultimately, voters must "oblige" the legislative branch to disclose its voting records by abolishing the legislative exemption to freedom of information statutes.

(1)* B.A. Michigan State University, 1993; candidate for J.D. Indiana University School of Law—Bloomington, 1996.

- (1)1. The Federalist No. 51, at 160 (James Madison) (Roy P. Fairfield ed., 1981).
- (2)2. Freedom of Information Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (1994)).
- (3)3. See Claudia Rast, Case Note, 62 U. Det. L. Rev. 363, 369 n.33 (1985) (listing all of the fifty states' freedom of information statutes and suggesting that most follow the federal FOIA model).
- (4)4. See generally *Amolsch & Madden, Inc. v. FTC*, 591 F.2d 809 (1978).
- (5)" . *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
- (6). Also referred to as "Sunshine Acts" or "Public Records Acts."
- (7). 5 U.S.C. § 552 (1994). See generally Ala. Code § 36-12-40 (1975 & Supp. 1995); Alaska Stat. § 09.25.110 (1994); Ariz. Rev. Stat. Ann. § 39-121 (1985 & Supp. 1995); Ark. Code Ann. § 12-2804 (Michie 1992); Cal. Gov't Code § 6253 (West 1995); Colo. Rev. Stat. Ann. § 24-72-203 (West 1990 & Supp. 1995); Conn. Gen. Stat. § 1-19 (1988); Del. Code Ann. tit. 29, § 10003 (1974 & Supp. 1994); D.C. Code Ann. § 1-1522 (1981 & Supp. 1995); Fla. Stat. ch. 119.01 (1995); Ga. Code Ann. § 51-18-70 (1994); Haw. Rev. Stat. § 92F-11 (1993); Idaho Code § 9-338 (1990); Ill. Ann. Stat. ch. 5, para. 140/1 (Smith-Hurd 1993); Ind. Code 35-14-3-1 (1989 & West Supp. 1994); Iowa Code Ann. § 22.2 (West 1995); Kan. Stat. Ann. § 45-218 (1993); Ky. Rev. Stat. Ann. § 61.872 (Michie/Bobbs-Merrill 1993 & Supp. 1994); La. Rev. Stat. Ann. § 44:31 (West 1982 & Supp. 1995); Md. Code Ann., State Gov't § 10-612 (1993); Mass. Ann. Laws ch. 66, § 10 (Law. Co-op 1991); Mich. Comp. Laws Ann. § 15.231 (West 1994); Minn. Stat. Ann. § 13.02 (West 1988 & Supp. 1995); Miss. Code Ann. § 25-61-5 (1972 & Supp. 1995); Mo. Ann. Stat. § 109.180 (Vernon 1966 & Supp. 1996); Neb. Rev. Stat. § 84-712 (1994); Nev. Rev. Stat. § 239.010 (Michie 1992); N.H. Rev. Stat. Ann. § 91:A4 (1990); N.J. Rev. Stat. Ann. § 47:1A-2 (West 1989 & Supp. 1995); N.M. Stat. Ann. § 14-2-1 (Michie 1995); N.Y. Pub. Off. Law § 87 (McKinney 1988 & Supp. 1996); N.C. Gen. Stat. § 132-1 (1995); N.D. Cent. Code § 44-04-18 (1993); Ohio Rev. Code Ann. § 149.43 (Anderson 1994); Okla. Stat. Ann. tit. 51, § 24A.3 (West 1988 & Supp. 1996); Or. Rev. Stat. § 192.420 (1991); 65 Pa. Cons. Stat. Ann. § 661 (1959 & Supp. 1995); R.I. Gen. Laws § 38-2-2 (1990 & Supp. 1995); S.C. Code Ann. § 30-4-30 (Law Co-op. 1976 & Supp. 1995); S.D. Codi fied Laws Ann. § 1-27-1 (1995); Tenn. Code Ann. § 10-7-503 (1992 & Supp. 1995); Tex. Gov't Code Ann. § 552.021 (West 1994 & Supp. 1995); Utah Code Ann. § 63-2- 102 (1953 & Supp. 1995); Vt. Stat. Ann. tit. 1, § 315 (1985 & Supp. 1995); Va. Code Ann. § 3.1-341 (Michie 1995); Wash. Rev. Code Ann. § 42. 17.260 (West 1991 & Supp. 1995); W. Va. Code § 29B-1-2 (1995); Wis. Stat. § 19.31 (1986); Wyo. Stat. § 16-4- 201 (1977 & Supp. 1995).

Maine and Montana are the only states that subject the legislature to their Public Records Acts. Me. Rev. Stat. Ann. tit. 1, § 301 (West 1994); Mont. Code Ann. § 2-6- 101 (1995). Florida has amended its constitution to include the legislative branch. Fla. Stat. art. I, § 24.

- (8). *Masariu*, 621 N.E.2d 1097 (Ind. 1993).
- (9). Act of Jan. 1, 1984, No. 19, § 6, 1983 Ind. Acts 241, 253 (codified as amended at Ind. Code § 5-14-3-1 (1989 & West Supp. 1994)).
- (10)" . *Masariu*, 621 N.E.2d at 1098.
- (11). H.R. 2767, 85th Cong., 2d Sess. (1958); H.R. Rep. No. 1419, 92d Cong., 2d Sess. 2 (1972).
- (12)" . H.R. Rep. No. 1419, *supra* note 11, at 2.

(13)" . H.R. 2767, *supra* note 11.

(14). H.R. Rep. No. 1419, *supra* note 11, at 2.

(15). *Id.*

(16). *See* Harold L. Cross, *The People's Right to Know* (1953). *See also* H.R.

Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966).

(17). H.R. Rep. No. 1419, *supra* note 11, at 2.

(18). Statement by the President upon Signing the "Freedom of Information Act," 316

Pub. Papers 699 (July 4, 1966).

(19). 5 U.S.C. § 552(b)(1)-(9) (1994).

(20). *See* sources cited *supra* note 7.

(21). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); 139 Cong. Rec.

S17,056 (daily ed. Nov. 13, 1993) (statement of Sen. Leahy (D-Vt.)).

(22). 5 U.S.C. § 551(1)(A) (1994).

(23). 137 Cong. Rec. H10,811 (daily ed. Nov. 21, 1991) (statement of Rep. Wise (D-

W. Va.)).

(24). *NLRB*, 437 U.S. at 242.

(25). However, legislative clerks often have substantial periods of time before they must

publish the legislative journals. For example, in Arkansas the legislative clerk has up to six months to publish the general assembly's legislative journal. Ark. Code Ann. § 25-18-204 (Michie 1992). In Delaware, the clerk has two years. Del. Code Ann. tit. 29, § 905 (1974).

(26). Mark D. Uebeling, *All-American Apathy*, *Am. Demographics*, Nov. 1991, at 30,

30.

(27). *See generally* Jeff Greenfield, *The Press Ruined Presidential Campaigns . . . and*

Other Dubious Assumptions about the Media and Politics, *Wash. Monthly*, Jan.-Feb. 1994, at 54 (reviewing Thomas E. Patterson, *Out of Order: How the Decline of the Political Parties and the Growing Power of the News Media Undermine the American Way of Electing Presidents* (1993)).

(28)" . Kathryn Johnson, *Why So Many Lawmakers Are Calling It Quits*, *U.S. News &*

World Rep., Aug. 25, 1980, at 43, 44.

(29). *See* sources cited *supra* note 7.

(30). Greenfield, *supra* note 27, at 55.

(31). This proposal was first considered with the Electronic Freedom of Information

Improvement Act of 1994, an amendment to the FOIA, but it did not materialize. 140 Cong. Rec. S12,726 (daily ed. Sept. 12, 1994).

(32). James T. O'Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 Harv. J. on Legis. 415 (1994).

(33). 137 Cong. Rec. E4018 (daily ed. Nov. 22, 1991) (statement of then Rep. English (D-Okla.) quoting then President Bush).

(34)" . O'Reilly, *supra* note 32, at 416.

(35). One Hundred Seventh General Assembly of Indiana, Rules for the Government of the House 16 (1991) [hereinafter House Rules].

(36). *Id.*

(37)" . State *ex rel.* Masariu v. Marion Super. Ct., 621 N.E.2d 1097, 1098 (Ind. 1993).

(38). *See* sources cited *supra* note 7.

(39)" . Ind. Code Ann. § 5-14-3-2 (West 1989 & Supp. 1995) (emphasis added).

(40). Hawkes v. Locke, 559 So. 2d 1202 (Fla. Dist. Ct. App. 1990), *rev'd*, 595 So. 2d

32 (Fla. 1992). Subsequently, the Florida legislature formally amended Florida's Public Records Act to include the legislative branch. Consequently, Florida voters now can rely on the state's constitution to enforce their right to view voting records. Fla. Const., art. I, § 24.

(41). Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61

U. Chi. L. Rev. 123, 125 (1994); *Mistretta v. U.S.*, 488 U.S. 361, 382 (1988).

(42). *Henderlong Lumber Co. v. Zinn*, 406 N.E.2d 310, 312 (Ind. App. 1980) (holding

that a fundamental rule of statutory construction is that the clear and unambiguous language of a statute is not subject to judicial interpretation).

(43). *Van Orman v. State*, 416 N.E.2d 1301, 1305 (Ind. App. 1981).

(44)" . *Standard Accident Ins. Co. v. Pet Milk Co.*, 78 N.E.2d 672, 674 (Ind. App. 1948)

(en banc).

(45)" . Ind. Code Ann. § 5-14-3-1 (West 1989 & Supp. 1995) (emphasis added).

(46). *Morrison*, 487 U.S. 654 (1988).

(47)" . *Id.* at 685.

(48). "The [representatives] shall in all Cases . . . be privileged from Arrest during their

Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech

or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

(49). *Johnson*, 383 U.S. 169 (1966), *cert. denied*, 385 U.S. 889 (1966).

(50)" . *Id.* at 181.

(51). *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

(52). *Kilbourn*, 103 U.S. 168, 199 (1881).

(53). *State ex rel. Masariu v. Marion Super. Ct.*, 621 N.E.2d 1097, 1098 (Ind. 1993).

(54)" . U.S. Const. art. I, § 6, cl. 1.

(55). *United States v. Brewster*, 408 U.S. 501 (1972).

(56)" . *Gravel v. United States*, 408 U.S. 606, 616 (1972), *reh'g denied*, 409 U.S. 902

(1972).

(57). *Id.* at 618.

(58). *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

(59). *Powell*, 395 U.S. 486 (1969).

(60). *Id.* at 502 (emphasis added) (quoting *Kilbourn*, 103 U.S. at 204 (1881)).

(61)" . *United States v. Brewster*, 408 U.S. 501, 516 (1972).

(62). *Id.*

(63). *Gravel*, 408 U.S. 606 (1972).

(64). *Id.* at 625-28.

(65). *Id.* at 609.

(66)" . *Id.* at 609-10.

(67). *Id.* at 625.

(68). *Id.* at 616.

(69)" . *Id.*

(70). *Doe v. McMillan*, 412 U.S. 306 (1973).

(71). *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

(72)" . H.R. Con. Res. 18, 102d Cong., 1st Sess. (1992).

(73). The Reporters Committee for Freedom of the Press, *Legislative Update*, *The News Media & The Law*, Spring 1994, at 2, 4.

(74). Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 301, 109 Stat. 3

- (1995) (codified at 2 U.S.C. § 1381 (1995)); Me. Rev. Stat. Ann. tit. 1, § 301 (West 1994); Mont. Code Ann. § 2-6-101 (1995).
- (75). Fla. Const. art. I, § 24.
- (76). 2 U.S.C. § 1381 (1995).
- (77). The Indiana General Assembly's legislative clerks are subject to a rule that requires them to distribute copies of voting records to the media. House Rules, *supra* note 35.
- (78). O'Reilly, *supra* note 32, at 417.
- (79). *Chadha*, 462 U.S. 919 (1983).
- (80). *Bowsher*, 478 U.S. 714 (1986).
- (81). O'Reilly, *supra* note 32, at 418-19.
- (82). *Id.* at 419.
- (83). *Id.* at 420.
- (84). 137 Cong. Rec. H10,810-06, H10,811 (daily ed. Nov. 21, 1991) (statement of Rep. Wise (D-W.Va.)).
- (85)" . Greene, *supra* note 41, at 125.
- (86)" . The Federalist No. 47, at 140 (James Madison) (Roy P. Fairfield ed., 1981) (emphasis omitted).
- (87)" . *Id.* (emphasis omitted).
- (88). *Mistretta*, 488 U.S. 361 (1989).
- (89). *Id.* at 371-74.
- (90)" . *Id.* at 372.
- (91). John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205 (1993) (explaining "administrative agencies typically exercise all three types of powers . . .").
- (92)" . 136 Cong. Rec. H5618, 101st Cong., 2d Sess. (daily ed. July 25, 1990) (statement of Rep. Walker (R-Pa.)).
- (93). *Florida Voters Pass Referendum Expanding State Public Records Law*, News Media & the Law, Winter 1993, at 14.