Methods and Materials in Constitutional Law

Some Thoughts on Access to Government Information as a Problem for Constitutional Theory and Socio-Legal Studies*

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Abstract

To be subject to law, Hobbes argued, is to be deprived of liberty, as we understand it. In this respect, democratic governments are no different from others. Hobbes's insight has not caused us to abandon our commitments to democracy, but it still challenges us to think hard about the nature of representative government, the nature of citizenship in a democratic society, and the conditions necessary for fulfilling the promise of democratic citizenship. Two recent trends are evident. Some citizens have embraced a more active sense of citizenship, which necessarily entails a more insistent need for information, while governments have insisted on the need for greater concentration of governmental power and a higher degree of secrecy. Much is to be learned from the approaches that various national and transnational regimes have taken with respect to this problem. This essay will consider the problem of access to government information from a comparative perspective and as a problem for constitutional theory and socio-legal studies.

Keywords: Citizenship, democracy, government information, representative government, secrecy.

Introduction

Thomas Hobbes was no friend of democracy. It was not that Hobbes did not think about democracy. He thought a great deal about it. He simply could not see the point in it. And his objections to democracy still challenge us today. In Hobbes's view, to be subject to law is to be deprived of liberty, as we understand it, because, apart from the inalienable right to life, a subject's liberty is limited to what the

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sovereign or the "silence of the Law" allows.[1] It makes no difference whether the sovereign is a monarch or a democratic body. The alienation of liberty, as we understand it, is the same. From that perspective, the argument for democracy can be no more powerful than arguments for any other form of government.[2] Moreover, democracies also fail on their own terms, Hobbes tells us, because "though the right of sovereignty be in the assembly, which is virtually the whole body; yet the use thereof is always in one, or a few particular men".[3] Nor would mixed government be an improvement: "if [it] could exist, it would not advance the liberty of the people at all. For as long as [the branches or estates] are all in agreement with each other, the subjection of individual citizens is as great as it could possibly be; but if they disagree, civil war returns, and the right of the *private Sword*, which is worse than any subjection."[4]

Hobbes thought monarchy preferable to democracy, but that view has not attracted many followers in recent times. Nonetheless, for those committed to the project of democratic or representative government, Hobbes's reflections still challenge us to think hard about our own constitutional structures. What kind of democratic or popular government do we have? What role do our constitutional structures envision for 'the people', and how are the people to fulfill that role? How active a role are the people to play? If the role of the people is to be relatively

1 *See* T. Hobbes, *Leviathan* in C.B. MacPherson (Ed.), 270-271 (1968). In Hobbes's view, the subject has already authorized the actions of the sovereign as his own, and cannot therefore have any claims against the sovereign.

2 In *Leviathan*, Hobbes writes: "There is written on the Turrets of the city of *Luca* in great characters at this day, the word LIBERTAS; yet no man can thence inferre, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in *Constantinople*. Whether a Commonwealth be Monarchicall, or Popular, the Freedome is the still the same." Hobbes, *Leviathan* 266. *See generally* Q. Skinner, 'Hobbes and Republican Liberty' (2008).

3 T. Hobbes, 'The Elements of Law: Natural and Politic', *in* J.C.A. Gaskin (Ed.), 120 (1994). In 'The Elements of Law', Hobbes was particularly concerned with the disproportionate influence that orators would wield in a body that was not only the domain of all, but one in which decisions were made in the round by all, where "there is no means … to deliberate and give counsel what to do, but by long and set orations". *Ibid.* But Hobbes was also interested in the inherent instability of democracy and its tendency to concentrate power in the hands of the few, at the expense of individual liberty: "When the particular members of the commonwealth growing weary of attendance at public courts, as dwelling far off, or being attentive to their private businesses, and withal displeased with the government of the people, assemble themselves to make an aristocracy; there is no more required … but putting to the question … the names of such men as it shall consist of, and assenting to their election; and by plurality of vote, to transfer that power which before the people had …." *Ibid.* at 120-121.

4 T. Hobbes, 'On the Citizen', *in* R. Tuck & M. Silverthome (Eds.), 93 (1998). In 'De Cive', Hobbes also argues that monarchy is preferable to democracy on the very practical ground that, "…one of the disadvantages of sovereign power is that the sovereign may exact other monies apart from those needed for public expenses", including "monies at his pleasure to enrich his *children, relatives, favourites and even flatterers*", and that such exactions are common to all forms of government, but democracy is the most oppressive in this respect because there are so many "orators who have influence with the people", and they all have "*children, relatives, friends and flatterers* to be enriched". *Ibid.*, 119. According to Hobbes, "Because a *Monarch's* ministers, slaves and friends are not numerous, he can more or less satisfy them without expense to the citizens, by conferring on them the offices of war and peace; in a *Democracy* where there are many to satisfy and always new ones coming along, it cannot be done without exploiting the citizens." Ibid.

passive, their need for information may not be great or immediate. If the people are to be actively involved in government, however, they will need information, some of which may be accessible only through the government, and they will need it on a timely basis. But government cannot function entirely in the round. How can political and legal systems most effectively ensure that citizens have access to the information they need, while also protecting the effectiveness of government? Government secrecy presents a critical set of issues for representative government.

The purpose of this essay is not to try and answer those questions, but to suggest how we might profitably think about them. They can be approached, of course, from the perspectives of political philosophy and constitutional theory, but this essay will be more concerned with whether, how, and why specific constitutional and legal arrangements may work in practice. Montesquieu, after all, did not teach us that theoretical principles apply equally in all circumstances, or that one set of constitutional arrangements will be equally appropriate for all nations.[5] On the contrary, Montesquieu recognized that law is a part of culture, and that the success of law depends not only on its rationality, but also upon its relationship to other components of culture, including, most importantly, "the humour and the disposition of the people in whose favor it is established".[6] In Montesquieu's view, laws "should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another".[7] To be effective, law must fit the circumstances.

Joseph Story, the nineteenth century jurist and scholar, followed Montesquieu in this respect when he passed judgment on John Locke's Carolina constitution of 1669: "Perhaps in the annals of the world there is not to be found a more wholesome lesson of the utter folly of all efforts to establish forms of governments upon mere theory; and of the dangers of legislation without consulting the habits, manners, feelings, and opinions of the people, upon which they are to operate."[8] Like Montesquieu, Story thought that legal arrangements should suit

5 *See* C. Montesquieu, 'The Spirit of Laws', *in* D. Carrithers (Ed.) (1977). Montesquieu wrote that, "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied." *Ibid.*, 104.

6 *Ibid.*

7 *Ibid.*, 104-105.

8 J. Story, 'Commentaries on the Constitution of the United States', *in* R. Rotunda & J. Nowak (Eds.), 58 (1987). Locke acted as a classical legislator or lawgiver with respect to the framing of this constitution. In this respect, it is important to note the distinction between constitutionalism and democracy, as well as the distinction between the adoption of a constitution through democratic procedures and the provision for democratic procedures within the constitution. *See, e.g.,* W. Murphy, 'Constitutions, Constitutionalism, and Democracy', *in* D. Greenberg, S. Katz & M. Oliviero (Eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, at 3 (1993).

the circumstances.[9] Even then, there is room for debate about the effectiveness of law. Adam Podgorecki, the great sociologist of law, described two opposite views of law; one view takes law to be an omnipotent agent of social change, while the other view assumes that law can only "sanction the existing state of affairs".[10] In fact, as Professor Podgorecki suggested, law is neither impotent nor omnipotent. Moreover, we know that law is not static, but changes as society changes.[11]

Constitutional law, like law generally, is a part of culture and necessarily interacts with other parts of culture.[12] Law changes culture, and culture changes law. After several centuries of experience with written constitutions, quasi-constitutional statutes, and ordinary public law legislation at the national level, as well as an increasing volume of constitution-like law at the regional and international levels, we have much data, and much theory, to work with. There is much to be learned from looking at these questions through the lenses of comparative law and socio-legal studies.

Part I

Unlike Hobbes, the American founders did not think that mixed government was unattainable or unworkable; they believed that such a government could be constructed on principles of representation, federalism, and separated powers.[13] They were less enthusiastic about giving a strong or central role to the people. In

9 Justice Story may have had a different view with respect to the common law. *See Swift v. Tyson*, 41 US 1, 19 (1842) ("[T]he true interpretation and effect [of contracts and other instruments of a commercial nature] are to be sought, not in the decisions of the local tribunals, but in the general principles of commercial jurisprudence [...] The law respecting negotiable instruments may be truly declared [...] to be in a great measure, not the law of a single country only, but of the commercial world.")

10 A. Podgorecki, 'Law and Society' 247 (1974).

11 E.H. Levi presented the classic demonstration of this fact more than 60 years ago. *See* E. Levi, 'An Introduction to Legal Reasoning' 46-47 (1948). As Professor Levi shows, this process of change characterizes statutory and constitutional interpretation as well as common law development. Statutory and constitutional text may channel and direct the flow of legal change, but they cannot prevent it. *Ibid.*

12 *See generally* L. Rosen, 'The Anthropology of Justice: Law as Culture in Islamic Society' (1989); P. Kahn, 'The Cultural Study of Law: Reconstructing Legal Scholarship' (2000).

13 The framers were conscious, of course, of the magnitude of the challenge they faced. In Federalist 1, Publius wrote: "It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." A. Hamilton, J. Madison & J. Jay, 'The Federalist', *in* J. Cooke (Ed.), at 3 (1961). The framers adopted Montesquieu's doctrine of separation of powers, whereby the power of government is divided and the branches of government are set against each other to protect individual liberty. *See* Montesquieu, *supra* note 6, 201-214. In the United States, the powers of government are further separated and divided by the institution of federalism. So strong was the American founders' faith in federalism and the separation of powers that many of them thought that a separate bill of rights was unnecessary. In Federalist 84, Publius argues that, "The truth is [...] that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS." Hamilton, Madison & Jay, *supra* note 14, at 581.

Federalist 51, for example, Publius wrote that, "a dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions".[14] Indeed, too great a dependence on the people presented its own problems. Thus, in designing "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".[15] In truth, this was not to be a system of government that depended greatly on the oversight of the people. The principal protection of liberty was to be found elsewhere: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[16]

This model recognizes the people as the ultimate source of government; it also ensures that certain political rights, such as freedom of speech, press, religion, assembly, and petition, will not be abridged by the national government, and it specifically preserves the rights to *habeas corpus*, to be free from cruel and unusual punishments, and to be tried by a jury of one's peers in criminal cases. As Publius emphasized in Federalist 63, however, the government created by the Constitution was not to be a democracy in the ancient sense; it was to be a representative government.[17] The rule of the people was to be largely indirect, and the franchise would be limited in various ways.[18] The president was to be elected by an electoral college, and the method for choosing the electors was left to the state legislatures.[19] The members of the Senate were to be chosen by the state legislatures,[20] and, although the Federal Convention eventually decided that the lower house should be elected directly by the people,[21] some delegates favored indirect

14 *Ibid.* at 349. It is far from obvious which of these controls is to be 'primary', and which 'auxiliary'. Moreover, a control may be 'ultimate', but not 'primary'.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*, 427-428.

18 The Constitution essentially left to the states the power to determine qualifications for the franchise. *See* U.S. Const. Art. I, para. 2, cl. 1 ("the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"). On the other hand, representation was apportioned based on total population, including slaves, who were counted as three-fifths of a person. *Ibid.* at Art. I, para. 2, cl. 3. It was the latter feature that caused the abolitionist William Lloyd Garrison to call the Constitution "a covenant with death, and an agreement with hell". R.F. Wallcut, 'Selections from the Writings and Speeches of William Lloyd Garrison' 140 (1852). More recently, Justice Thurgood Marshall bluntly reminded us that "the government [the founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and the human rights, that we hold as fundamental today". T. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, at 2 (1987).

19 U.S. Const. Art. II, para. 1, cl.2-3.

20 *Ibid.* at Art. I, para. 3, cl.1.

21 *Ibid.* at Art. I, para. 2.

election for both Houses.[22] The Executive could negate the work of the legislative branch, subject to reversal by supermajorities in both Houses.[23] The Constitution made no provision for any power of popular initiative or referendum or recall, as some later constitutions would. In other words, lawmaking at the national level belonged to the two political branches, which were insulated in important ways from too great a dependence on the people.

It does not overstate the point to suggest that there was not much for the people to do, at least at the national level of government, under this scheme.[24] Indeed, one is reminded of Roger Cotterrell's summary of Max Weber's account of the citizen's role in bureaucratic society: "to obey law and perhaps, in periodic elections, to confirm the choice of leaders whose election gives them the power to enact into law whatever policies they see fit".[25] Professor Cotterrell adds: "In so doing leaders are guided only by expediency, personal vision, and the legal restraints of the constitution which, if adhered to, confer unchallenged legitimacy on their acts."[26]

Given the limited role envisioned for the people, the limited mandate given to the federal government, and the founders' emphasis on the diffusing and checking of governmental power as the principal means of controlling government, it is not surprising that the Constitution contained no express provision concerning access to government information,[27] as some later constitutions would.[28] The framers did their own work behind closed doors, but they also lived in an age when governments did not produce or gather (or have the kind of monopoly over) the massive amounts of information they now do. Perhaps it is

22 *See* A. Koch, 'Notes of Debates in the Federal Convention of 1787'. Reported by James Madison, 38-45 (1966). For example, Madison reported that "M[r.] Sherman opposed the election by the people, insisting that it ought to be by the State Legislatures. The people he said, immediately should have as little to do as may be about the Government. They want information and are constantly liable to be misled". *Ibid.*, 39.

23 *See* U.S. Const., Art. I, para. 7, cl. 2.

24 Of course, the founders also contemplated that the national government would be a government of limited powers, with most powers – although not those relating to defense, foreign policy, and commerce – remaining with the states.

25 R. Cotterrell, 'Law's Community: Legal Theory in Sociological Perspective' 149 (1995).

26 *Ibid.*

27 The phrase 'government information' is meant here to include information about the government as well as information held by the government. The two categories will often overlap, and some information 'about the government' will have originated as 'information held by the government'. The distinction is worth keeping in mind, however, because the two categories present discrete legal problems. If information remains secret, the legal issues will involve access. If information originated with the government, but subsequently was made public, the legal issues may involve the possibility of 'prior restraint', but are more likely to involve questions relating to the criminal culpability of the source and the publisher. *See, e.g., N.Y. Times Co. v. United States*, 403 US 713 (1971).

28 The Constitution does require each House of Congress to keep a journal of its proceedings, U.S. Const. Art. I; para. 5, cl. 3, and the President is required "from time to time to give to the Congress Information of the State of the Union". *Ibid.* at Art. II, para. 3. Sweden, on the other hand, apparently provided a right of access to government information in the eighteenth century. *See* D. Rowat, *The Right to Government Information in Democracies*, 48 International Review of Administrative Sciences 59, at 61-62 (1982).

anachronistic to expect otherwise, but the founders do not appear to have been greatly concerned about the problem of excessive government secrecy. Of course, members of the House would face election every two years, and some early members regularly communicated with their constituents through circular letters, which sought to explain the members' views on selected matters of public concern.[29] Subsequent changes in text and jurisprudence have greatly increased the constitutional role of the people, but the original understanding retains much of its power. For example, some US scholars, like Thomas Emerson and Alexander Meiklejohn, have endeavored to find a broad right to political freedom, including a right of access to information, in the First Amendment,[30] but others reject that view on the ground that no such interpretation of the First Amendment can be squared with the limited role assigned to the people in the US form of representative government.[31]

Until the early twentieth century, there was not much First Amendment litigation in the US.[32] Nor was there much litigation over access to government information. Just as the US Constitution contained no express provision relating to popular access to information, there also was little ordinary law on the subject. To the extent that the government released information to the public, it was largely because a particular release suited the government's political purposes. Similarly, congressional access to Executive branch information was largely determined through political interactions between the two branches. The US was in no way exceptional. It was only in the second half of the twentieth century that access to government information became an issue of general concern in the US and elsewhere.

Unlike the First Amendment, which speaks only in terms of the right to speak freely,[33] certain international instruments, such as the Universal Declaration of

29 *See* 'Circular Letters of Congressmen to their Constituents, 1798-1829', *in* N. Cunningham, Jr. (Ed.) (1978). The use which members made of this practice apparently differed significantly by region and was most popular among members from the south and west. *See ibid*. at xxiii.

30 *See, e.g.,* T. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 Wash. U. L. Q. 1 (1976); A. Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245 (1961); A. Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461 (1953). *See also* H. Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 Sup. Ct. Rev. 191 (1964); A. Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 Sup. Ct. Rev. 1 (1980). For a brief time, the Supreme Court spoke in such terms as well. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (Brennan, J.) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (White, J.) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged by Congress or by the FCC.")

31 *See, e.g*., L. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 Cal. L. Rev. 482 (1980).

32 In an early case, Justice Holmes, then Chief Justice of Massachusetts, trenchantly observed that a man had the right to talk politics, but not to be a policeman. *See McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

33 Of course, the First Amendment also protects such other rights as the right to petition the government, the right to religious freedom, freedom of the press, and freedom of assembly.

Human Rights and the European Convention on Human Rights, give explicit textual recognition to the right to receive information.[34] From that beginning, access to government information has come to be re-conceptualized in many legal contexts as a problem for resolution by law, rather than simply as a matter for political bargaining; it has also come to be seen as a problem involving the people directly, rather than simply their representatives. Many constitutional democracies, such as Canada, Ireland, and the US enacted ordinary legislation to ensure greater public access to government information.[35] Similar concerns in some of the newer democracies of Eastern and Central Europe, such as Poland and Hungary, and in South Africa, led to the explicit inclusion in new constitutional texts of broad constitutional guarantees relating to access to information, with statutory provisions being adopted to elaborate on those constitutional provisions.[36]

Part II

Notwithstanding recent developments, access to government information remains uneven. In recent years, for example, the US has embarked on at least one devastatingly expensive and possibly unnecessary war based on information which the Executive knew to be false, but nonetheless chose to disseminate to the nation and the world community.[37] In the aftermath of that debacle, a new US administration has spoken frequently about the need for greater transparency, while acting as if important information should be protected from the people, not made available to them.[38] In recent months, important information about the conduct of the wars in Iraq and Afghanistan has been made available to the pub-

34 The Universal Declaration provides that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, Art. 19. The European Convention provides that, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." ECHR Art.10.

35 *See* Access to Information Act, R.S.C. 1985, c. A-1 (Canada); Freedom of Information Act, 1997 and Freedom of Information Act, 2003 (Ireland); 5 U.S.C. para. 552(b) (US). Australia and New Zealand also enacted such laws in 1982. *See* Freedom of Information Act 1982 (as amended) (Australia); Official Information Act 1982 (New Zealand). In 2000, the UK enacted the Freedom of Information Act 2000. Executive officials have sometimes come to regret their acquiescence in such measures, as Tony Blair did with respect to the Freedom of Information Act 2000. *See* T. Blair, *A Journey: My Political Life* 129, 305 (2010).

36 *See* Constitution of Republic of Hungary, Ch. XII, Art. 61; Constitution of Republic of Poland, Ch. II, Art. 51; Constitution of Republic of South Africa, Ch. 2, para. 32.

37 *See* J. Mearsheimer, 'Why Leaders Lie: The Truth About Lying In International Politics' 49-55 (2011) (describing the 'deception campaign' waged by the Bush Administration to overcome resistance to war with Iraq). *See also* H. McGee & K. Murray, *Blair Says Stretching the Truth for Greater Good is Common Sense*, Irish Times, 4 September 2010, <www.irishtimes.com/newspaper/frontpage/2010/0904/1224278206258.html>.

38 *See, e.g.*, B. Ivry, *Treasury Shielding Citigroup with FOIA Deletions*, Bloomsburg News, 25 October 2010, <www.bloomberg.com/news/2010-10-25/u-s-treasury-shielding-of-citigroup-with-deletions-make-foia-meaningless.html>.

lic, not by the government, but by a shadowy organization called WikiLeaks, which has published vast quantities of purloined documents, apparently based on the absolute belief that no amount of government secrecy can ever be justified.[39] In addition, an emergent popular movement, mainly characterized by a deep distrust of government and a strong sense of alienation from it, has had a significant impact on recent US congressional elections and appears ready to exercise a similar influence on the work of Congress.[40] There are many possible explanations for the sense of alienation and distrust that many Americans feel towards their government. One reason is the sharp split that exists in the country over specific questions of public policy, such as health care, economic recovery, and immigration reform. One suspects, however, that another, not insubstantial reason is the seemingly incorrigible penchant for secrecy among those responsible for government.

Recent years have witnessed an important, ongoing process of adaptation and transformation in democratic institutions, especially with respect to the growth of executive power and government secrecy. These adaptations have been particularly dramatic and significant in the US, especially since the attacks of 11 September 2001, but one should not therefore be tempted to view these developments as peculiar to the US, to its particular form of representative government, or to the demands of the period. Developments in the US are not simply related to the increased sense of vulnerability and fear of terrorism that followed the September 11, 2001 attacks; some of these developments were manifest long before the beginning of the last decade.[41] The growth of presidential

39 *See* B. Keller, *Dealing With Assange and the Secrets He Spilled*, New York Times, 26 January 2011, <www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?_r=1&ref=global-home>. During 2010, WikiLeaks released a 2007 video showing Iraqi civilians and journalists being killed by US forces, more than 76,900 documents concerning the Afghan war, almost 400,000 documents relating to the Iraq war, and thousands of pages of US diplomatic cables. *See, e.g.*, S. Ellison, *The Man Who Spilled The Secrets*, Vanity Fair, February 2011, <www.vanityfair.com/politics/features/2011/02/the-guardian-201102>. *See also* G. Newey, *Diary: Life With WikiLeaks*, London Review of Books, 6 January 2011, at 39, <www.lrb.co.uk/v33/n01/glen-newey/diary> ("Previous whistle-blowers like Ellsberg and Clive Ponting acted as lone individuals, opening cans of worms that had come to their notice while in official employ. WikiLeaks institutionalizes such acts of individual conscience, as a kind of anti-Ministry of Truth."). Some members of Congress have responded to WikiLeaks by proposing legislation to criminalize the 'knowing and willful' dissemination of classified information concerning the "human intelligence activities of the United States", thus providing a means of prosecuting those who disseminate such information as well as those who steal or otherwise acquire it in the first instance. *See* G. Stone, *A Clear Danger to Free Speech*, New York Times, 4 January 2011, <www.nytimes.com/2011/01/04/opinion/04stone.html?>

40 *See, e.g.,* E.J. Dionne, *Conservative Advice for a Congress of Professors*, Washington Post, 6 January 2011, <www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503918.html?wpisrc=nl_most>.

41 *See* B. Sullivan, 'The Irish Constitution: A View from Abroad' in O. Doyle & E. Carolan (Eds.), *The Irish Constitution: Governance and Values*, 1 at 30 (2008); B. Sullivan, 'Justice Jackson's Republic and Ours' in H.J. Powell & J.B. White (Eds.), *Law and Democracy in the Empire of Force*, 172, at 188-189 (2009).

power in the US is an old story.[42] Abraham Lincoln certainly took an expansive view of his powers during the Civil War,[43] but, as one US historian has recently noted "[t]he tendency toward presidential aggrandizement accelerated during the 20th century".[44] Gary Wills, a prominent commentator, has emphasized the secrecy surrounding the development of the atomic bomb and Congress's subsequent determination, in the Atomic Energy Act of 1946, to provide the president with an unreviewable discretion to deploy the bomb.[45] Wills argues that the magnitude of that grant of authority was so enormous as to transform the nature of the presidency.[46]

The increased dominance of the executive branch has not been restricted to the US, however; the formal and informal aggrandizement of executive power and the newly insistent demands of government secrecy are widespread and seem evident in representative governments of various types.[47] In the UK, for example, Gordon Brown, during the long run-up to his succession to the leadership, acknowledged this accretion of power and asserted the need for a "new constitutional settlement" that would give more power to Parliament with respect to such things as declarations of war and ministerial appointments.[48]

These trends toward greater secrecy and concentration of governmental power run contrary, of course, to the previously-discussed trends, namely, the growing demand for greater access to government information and the wide-

42 *See, e.g.,* E. Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); C. Sunstein & L. Lessig, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994): S. Calabresi & S. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541 (1994).

43 *See, e.g., Ex parte* Milligan, 71 US 2 (1866).

44 *See* T. Surgrue, *Levittown to Laos*, London Review of Books, 22 July 2010, at 32 (attributing this acceleration to "the dramatic expansion of executive power during the first half of the century, the growth of the national security state during World War Two and the Cold War, and, most important, the ability of radio and then television to project the president's voice and image into nearly every home in the country".).

45 G. Wills, *Bomb Power: The Modern Presidency and the National Security State* 23, 45 (2010). *See also* J. Palfrey, *The Problem of Secrecy*, 290 The Annals of the American Academy of Political and Social Science 90 (1953) (describing challenge to democratic government posed by culture of secrecy surrounding atomic energy).

46 Wills, *supra* note 45, 46-47 ("Lodging the 'fate of the world' in one man, with no constitutional check on his actions, constituted a violent break with our whole governmental system. ... The nature of the presidency was irrevocably altered. ... The President's permanent alert meant our permanent submission. ... We were told that we must honor and protect 'our Commander-in-Chief' – the 'our' referring to the entire citizenry. ... [Under our Constitution, however, the] President has no power, as Commander-in-Chief, over any civilian."). *See Youngstown Tube & Sheet Co. v. Sawyer*, 343 U.S. 579, 643-644 (1952) (Jackson, J., concurring) (emphasis in original) ("There are indications that the Constitution did not contemplate that the title Commander-in-Chief *of the Army and Navy* will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.").

47 *See* Sullivan, *The Irish Constitution: A View from Abroad, supra* note 42, at 29-32 (2008).

48 *See, e.g., Gordon's Manifesto for Change*, The Sunday Times, 13 May 2007, at <www.timesonline.co.uk/tol/news/politics/article1782142.ece>. We also know that efforts to invoke access to information laws may exact great personal costs, even in democratic societies. *See* L. Polgreen, *High Price for India's Information Law*, New York Times, 22 January 2011, at <www.nytimes.com/2001/01/23/world/asia/india23.html>.

spread reconceptualization of the problem of access as one to be resolved by law, rather than politics.[49] One step towards understanding the interaction of these trends is to consider the specific form that new approaches to transparency and access to information have taken in various countries, that is, whether the problem has been left to legislation or raised to a constitutional level, and what difference, if any, that might make.[50]

Whether any particular right becomes enshrined in constitutional text or is left for legislative protection may depend on a number of factors, including both traditional practices and theoretical concerns about what sorts of matters may or should be taken up at a constitutional level, as well as contingent factors such as what rights seem particularly important at the time a new constitution is being framed or when important amendments are being proposed. Whether enshrinement in a constitutional text actually makes a difference is an interesting question, and the answer probably depends on numerous factors in addition to the decision to constitutionalize or not. The following sections of this essay will seek to investigate that question in a preliminary way by comparing several cases from the US and Canada, the European Court of Human Rights, and the Inter-American Court.

Part III

US courts have not construed the First Amendment to include a right of access to government documents. In 1966, however, Congress enacted the Freedom of

49 In 1982, one commentator attributed the widespread acceptance of government secrecy in democratic societies to its continuity from the period of absolute monarchy and the failure of parliamentary institutions and the public to challenge it because of the 'strong inherited tradition'. *See* D. Rowat, *The Right to Government Information in Democracies, supra* note 29, at 59 (1982). Sweden was the exception, having recognized a right of access to government information since the eighteenth century. *Ibid*. at 61-62.

50 One possible point of distinction between constitutions and statutes is that constitutions generally are assumed to be more permanent than statutes. Of course, constitutions come in many shapes and sizes. They may be amended with varying degrees of difficulty; they may be adaptable to change or uncertainty in other ways as well; they may hold various places in their respective societies; and their respective societies may treat them with varying degrees of seriousness or respect. In addition, they may provide authoritative answers to some questions, but not to others, either because a resolution could not be reached; because a resolution was reached but could not be properly verbalized; or because the problem was not one that the framers could or did foresee. *See* H. Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* 87, 105 (2008). *See also McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (Marshall, C.J.) (US Constitution was "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs".). Finally, as Jacek Kurczewski, the Polish sociologist of law, has observed, there may be circumstances in which "'illegal' legal transactions constitute the greater part of the legal life of the population". J. Kurczewski, *Living Sociology of Law* 53 (2010). That is true of constitutions as well. Constitutional cultures may manifest themselves as much through unconstitutional or extra-constitutional transactions as through transactions that comply with the written instrument. *See, e.g.,* J. Kurczewski & B. Sullivan, *The Bill of Rights and the Emerging Democracies*, 65 Law and Contemporary Problems 251 (2002).

Information Act (FOIA),[51] which created a statutory right of access to certain types of government information, subject to specific conditions and exemptions. And, while the US Constitution no longer contains many of the anti-democratic features it once did, and the role of the people is not formally bounded as it once was, the construction and application of FOIA continue to be influenced by the limited role originally envisioned for the people.

Indeed, there has been ambivalence about FOIA from the beginning, at least in part because it was not clear how the concept of arming citizens with government information fit into our basic theory of representative government. President Johnson, who signed the legislation in 1966, apparently thought that the idea was a terrible one and had to be taken "kicking and screaming" to the signing ceremony.[52] In 1975, Assistant Attorney General Antonin Scalia, together with Donald Rumsfeld and Dick Cheney, persuaded President Ford to veto certain amendments, although the veto was later overridden.[53] In 1982, then-Professor Scalia criticized strengthening FOIA on the ground that Congress, rather than the public or the press, was the proper party to insist on the production of information by the executive.[54]

Not surprisingly, this ambivalence about the people's 'right to know' often manifests itself with special force in cases involving 'sensitive' information. Two of the cases that the government has litigated since 9/11 – *Center for National Security Studies v. US Department of Justice*[55] and *ACLU v. Department of Defense*[56] – suggest the ease with which the right of access to government information may be overcome when such information is at stake.[57]

FOIA contains nine exemptions, which allow (but do not require) the government to withhold certain records or parts of records from mandatory disclosure. Exemption 1, the national security exemption, permits the withholding of matters that are "(A) specifically authorized under criteria established by [presidential] Executive order to be kept secret in the interest of national defense or for-

51 5 U.S.C. para. 552.

52 *See* B. Moyers, *Bill Moyers on the Freedom of Information Act*, Now with Bill Moyers at <www.pbs.org/now/commentary/moyers4.html>; W. Ginsberg, Freedom of Information Act (FOIA): Issues for the 111th Congress, 1 n.2 (Congressional Research Service, 12 August 2009).

53 *See Veto Battle 30 Years Ago Set Freedom of Information Norms: Scalia, Rumsfeld, Cheney Opposed Open Government Bill: Congress Overrode President Ford's Veto of Court Review, in* D. Lopez, T. Blanton & M. Fuchs (Eds.), National Security Archive Electronic Briefing Book No. 142, 23 November 2004, <www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/>.

54 A. Scalia, *The Freedom of Information Act Has No Clothes*, Regulation, Mar.-Apr. 1982, 15, at 19 (1982). Justice Scalia also suggested that the excellence of the original legislation consisted in the appearance it gave of affording access to government information without actually burdening the government with rigorous compliance requirements. *Ibid.*

55 331 F.3d 918 (D.C.Cir. 2003), *cert denied*, 540 U.S. 1104 (2004).

56 543 F.3d 59 (2d Cir. 2008), *vacated*, 130 S. Ct. 777 (2009).

57 Edward S. Corwin, the great scholar of the presidency, long ago remarked that the constitutional provisions relating to foreign policy were 'an invitation to struggle'. E. Corwin, *The President: Office and Powers* 1781-1984, at 201 (1984). More recently, Giorgio Agamben has argued that the 'struggle' implicitly endows the American executive with emergency powers similar to those expressly contained in European constitutions. G. Agamben, *State of Exception* 19 (2005).

eign policy and (B) are in fact properly classified pursuant to such order".[58] In neither of these two cases did the government formally invoke Exemption 1, but the government did rely on national security concerns to support its withholding of the requested information in both cases.

In the first case, *Center for National Security Studies v. US Department of Justice*,[59] several NGOs, including the American Civil Liberties Union, sought information concerning hundreds of persons of Arab ethnic background and Muslim religious faith who were arrested and detained by the US government in the aftermath of the September 11, 2001 attacks. The NGOs sought details concerning the names and citizenship of the detainees, the times and locations of their arrests, the reasons for their arrests, the times and locations of their detentions, the times and places of their releases (if they were released), the names of their lawyers, and other similar information.[60] The government declined to provide any of that information to the requesters, relying on Exemption 7, but chose to release publicly the names of some of the detainees, as well as their alleged links with international terrorism.

Exemption 7 permits the government to withhold records compiled for law enforcement purposes to the extent that one of the six subparts of the exemption applies.[61] In denying the NGOs' FOIA request, the government relied on Parts A, C, and F of Exemption 7: Part (A) protects records from mandatory disclosure to the extent that they "could reasonably be expected to interfere with enforcement proceedings".[62] Part (C) permits withholding to the extent that production "could reasonably be expected to constitute an unwarranted invasion of personal privacy".[63] Part (F) permits withholding to the extent that production "could reasonably be expected to endanger the life or physical safety of any individual".[64]

When the NGOs sought judicial review of the administrative denial of their requests, the government defended its refusal to comply by submitting two very conclusory sworn statements.[65] The district court held that some of the material was exempt from disclosure, but most was not.[66] On appeal, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, by a two-to-one vote, held that everything – including the identities of the lawyers – was exempt from disclosure under Exemption 7(A) because any disclosure "could reasonably be expected to interfere with enforcement proceedings". The majority

58 5 U.S.C. para. 552(b) (1). Although Exemption 1 requires that the courts make a *de novo* determination as to the propriety of classification, the courts routinely defer to the government's affidavits. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (if agency affidavit contains "reasonable specificity" and "information logically falls within claimed exemption," court should not "conduct a more detailed inquiry to test the agency's judgment").

59 331 F.3d 918.

60 *Ibid.*, 922.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*, 923.

66 *Ctr. for Nat'l Sec. Studies v. Dep't. of Justice*, 215 F.Supp. 2d 94, 113 (2002), *rev'd*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

thought that courts should not be in the business of second-guessing the executive.[67] In addition, even though the government had not sought to show compliance with Exemption 1, the court thought that it should be mindful of the government's national security concerns, and should therefore defer to the government's determination, as if Exemption 1 had been formally invoked and its rigorous requirements satisfied. One judge dissented in a well-reasoned and hard-hitting opinion.[68] He noted that there might be some legitimate reason for withholding specific bits of information, but that "the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness that FOIA embodies".[69] The Supreme Court denied further review.

In the second case, *ACLU v. Department of Defense*,[70] the American Civil Liberties Union sought disclosure of certain photographic records that presumably showed the mistreatment of detainees being held at locations in Afghanistan and Iraq. Again, the government made no production. On judicial review, the government invoked several exemptions to justify its categorical nonproduction, including, among other things, Exemption 7(C), which authorizes the withholding of law enforcement records to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of person privacy".[71] As in *Center for National Security Studies*, the government did not specifically rely on Exemption 1, the national security exemption.

The government seemed in search of a theory to justify its determination and eventually also invoked Exemption 7(F), asserting that disclosure of the requested records "could reasonably be expected to endanger the life or physical safety of any individual". In a highly unusual move, the government did not mention Exemption 7(F) until after the case had been briefed, argued orally, and submitted for decision in the district court. At that point, the government submitted a supplemental brief, in which it argued that that the court should uphold its discretionary decision under Exemption 7(F).[72] Although the government asserted that disclosure of the requested photographic records "could reasonably be expected to endanger the life or physical safety of any individual", the government did not point to any particular individual whose life or physical safety might be put at risk. Instead, the government argued that publication of the requested photos would enflame the "Arab street", thereby endangering American and coalition forces and American civilians generally.[73] (By that time, the Abu Ghraib photos

67 Ctr. for Nat'l Sec. Studies, 331 F.3d at 932.
68 *Ibid.*, 937 *et seq*.
69 *Ibid.*, 937.
70 543 F.3d 59 (2d Cir. 2008), *vacated*, 130 S. Ct. 777 (2009).
71 *Ibid.*, 64.
72 *Ibid.*
73 *Ibid.*, 67.

had been released by third parties on the internet and were no longer at issue.)[74] The district court ordered disclosure of the records. The court rejected most of the government's arguments outright and specifically found that redaction would prevent any "unwarranted invasion of privacy".[75]

A three-judge panel of the United States Court of Appeals for the Second Circuit affirmed the decision of the lower court, and expressly rejected the government's broad reading of Exemption 7(C). The court found that the words "any person" could not be read as broadly as the government suggested. The court also rejected the view that, notwithstanding the government's decision not to rely on Exemption 1, a broad reading of Exemption 7(F) was nonetheless justified by national security considerations. The court's decision was announced a few weeks before the 2008 presidential election, and the Bush administration asked to have the case reconsidered by the full court. But that request was denied in early 2009, and the new administration announced that it would not seek Supreme Court review because the case was "hopeless" and unwinnable.[76]

Within a few weeks, the administration reversed course.[77] In a brief press appearance, with no opportunity for questions, President Obama announced that the government would seek Supreme Court review and do everything in its power to keep the photos secret. He emphasized that "these photos are not particularly sensational, especially when compared to the painful images we remember from Abu Ghraib", but that their release would nonetheless "impact on the safety of our troops".[78] The government petitioned for Supreme Court review, making far-reaching claims about the proper meaning and application of Exemption 7(C). Later, Congress passed a Freedom of Information Act amendment authorizing the Secretary of Defense to withhold any or all of the photographs, the president signed the bill, and the secretary withheld the requested photographs.[79] At the

74 *See, e.g.*, S. Hersh, *Torture at Abu Ghraib*, The New Yorker, 10 May 2004, <www.newyorker.com/archive/2004/05/10/040510fa_fact>; *The Abu Ghraib Files*, Salon.com, 14 March 2006, <www.salon.com/news/abu_ghraib/2006/03/14/introduction/index.html>; *New Abu Ghraib Images Broadcast,* BBC News, 15 February 2006, <news.bbc.co.uk/2/hi/middle_east/4715540.stm>.

75 *ACLU v. Dep't of Defense*, 543 F.3d at 91.

76 Press Briefing by Press Secretary Robert Gibbs, 24 April 2009, <www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-42409>.

77 The time was brief, but eventful. The president had recently released the Bush administration's torture memos, and he had announced his intention to close Guantanamo. *See* M. Mazzetti & W. Glaberson, *Obama Issues Directive to Shut Down Guantanamo*, New York Times, 22 January 2009, <www.nytimes.com/2009/01/22/us/politics/22gitmo.html>; E. MacAskill, *Obama Releases Bush Torture Memos,* Guardian, 16 April 2009, <guardian.co.uk/world/2009/apr16/torture-memos-bush-administration>. Some military officials and Senators were not happy.

78 Statement by the President on the Situation in Sri Lanka and Detainee Photographs, 13 May 2009, <www.whitehouse.gov/the-press-office/statement-presudent-situation-sri-lanka-and-detainee-photographs>.

79 President Obama signed the bill on October 28, 2009. *See* Department of Homeland Security Appropriations Act 2010, §565, Pub. L. No. 111-83, 123 Stat. 2142. The Secretary of Defense exercised his statutory discretion to withhold the photographs on November 13, 2009. *See* Supplemental Brief for Petitioners, at Appendix B, *Dep't of Defense v. American Civil Liberties Union*, 130 S. Ct. 777 (2009) (No. 09-160) 2009 WL 3824781.

government's request, the Supreme Court vacated the Second Circuit's decision, thereby depriving it of any precedential value.[80]

What can be said about the legislative response to the *ACLU* decision? Members of both Houses, over a period of several months, proposed various versions of the FOIA amendment that Congress eventually adopted, but there was virtually no floor discussion of the amendment in either house. Virtually the only explanation given by its sponsors was that the legislation was necessary to protect the safety of American troops and civilians. Senator Graham said: "There are a lot of mysteries in this world, but there is no mystery on what would happen if we release these photos. I can tell you, beyond a shadow of a doubt, that if those photos get into the public domain, they will inflame populations where our troops are serving overseas and increase violence against our troops."[81] One Republican member of Congress went so far as to say that there would be "blood on this Administration's hands" if it were to acquiesce in the release of the pictures.[82] Like the president, several senators asserted that the American people had nothing to learn from the photos, but they insisted on talking about "allegations" of misconduct, suggesting that there was indeed something more to be learned.[83]

Virtually no opposition was expressed. Not a single congressional voice was raised in support of the public's right to see the photographs for themselves and to make a judgment about whether the photographs added anything useful to their knowledge of what the government was doing – or allowing to be done – in their name. Would these events have played out as they did if the right of access to government information had constitutional stature? Would the president have capitulated so easily to the demands of a few key members of the Senate? Would other members of the House or Senate have been more willing to express their views on the desirability of suppressing this information?

Part IV

Canada enacted its Access to Information Act (ATIA)[84] in 1982, the same year that saw the adoption of the Canadian Charter of Rights and Freedoms, and the Canadian courts have treated ATIA as a "quasi-constitutional enactment".[85] The stated purpose of ATIA is to provide a right of access to government documents "in accordance with the principles that government information should be available to the public, that necessary exceptions ... should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government".[86] The effectiveness of the Act was questioned vir-

80 *Dep't of Defense v. ACLU*, 130 S. Ct. 777 (2009).
81 155 Cong. Rec. S5672 (20 May 2009).
82 155 Cong. Rec. H6548 (11 June 2009).
83 155 Cong. Rec. S6787, S6790 (18 June 2009).
84 R.S.C. 1985, c. A-1.
85 *See Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403.
86 R.S.C. 1985, c. A-1, s.2.

tually from the start,[87] and there have been many unsuccessful proposals for strengthening its disclosure requirements.[88] In the past decade, the effectiveness of the Act has been further compromised by the Canadian government's actions with respect to the 'war on terror'.[89] As one commentator has suggested, "Entirely legitimate concerns of national security have exacerbated an underlying issue that cannot be ignored; namely, the issue of commitment. ... Neither politicians nor public servants can honestly be said to enjoy the scrutiny that a well-placed access request can generate."[90] Canada, like the US, has seen challenges to its treatment of citizens and others, and has asserted bold claims concerning executive authority and secrecy.[91]

In two recent cases, the federal trial courts substantially upheld the government's invocation of ATIA exemptions to protect sensitive information related to the 'war on terror', although the judgment in one of the cases was later reversed on appeal because the government had failed to show that the minister had actually exercised discretion when she withheld the documents. In *Attaran v. Canada (Minister of Foreign Affairs)*,[92] the trial court upheld the minister's s. 15 (1) denial of a university professor's request for unredacted copies of the Department of Foreign Affairs' annual human rights reports for Afghanistan for 2002 through 2006. The court held that the government was required to "satisfy the Court on the balance of probabilities through clear and direct evidence that there will be a reasonable expectation of probable harm from disclosure of specific information", and that "specific detailed information" is necessary to "distinguish between confidentiality justified by the Act and that resulting from an overly cautious approach".[93] In fact, the government submitted affidavits which were quite similar to those submitted in the US cases and relied greatly on the purported knowledge and experience of the affiants.[94] Nonetheless, the court found in favor of the government, stating that it could not "ignore, discount, or substitute the Court's opinion for the clear evidence and opinion of a commander in the Canadian forces and a senior official at the Department of Foreign Affairs".[95] The appellate court reversed because the government's evidence was not sufficient to show that the minister understood that she had discretion under s. 15 (1), let alone that she

87 The government that sponsored ATIA was soon after voted from office, and the new government had much less enthusiasm for the Act. *See, e.g.,* M. Rankin, *The Access to Information Act 25 Years Later: Toward a New Generation of Access Rights in Canada, 21 Canadian Journal of Administrative Law and Practice* 323 (2008).

88 Rankin, *The Access to Information Act 25 Years Later*, *supra* note 88, at 325.

89 In Canada, as in the US, the government's response to the threat of terrorism has been controversial. *See, e.g.*, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (2006), www.ararcommission.ca .

90 Rankin, *The Access to Information Act 25 Years Later*, *supra* note 88, at 325-326.

91 *See, e.g.*, Craig Forcese, *Through a Glass Darkly: The Role and Review of 'National Security' in Canadian Law*, 43 *Alberta Law Review* 963 (2006).

92 2009 F.C. 339, rev'd, 2011 F.C.A. 182.

93 *Ibid.*, para. 43.

94 *Ibid.*, para. 37-42.

95 *Ibid.*, para. 47.

had exercised that discretion in a reasonable manner. In *Kitson v. Canada (Minister of Defence)*,[96] the trial court upheld the withholding of information relating to the prisoners taken by Canadian troops during Operation Medusa in September 2006, including the number of prisoners taken, the places where they were detained, and their current whereabouts. Based on open and ex parte affidavits, the court found that the government's withholding of the information was reasonable under the Act.[97]

In June 2010, the Supreme Court of Canada was required to consider whether the Charter of Rights and Freedoms itself encompasses a right to receive government information. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[98] the Canadian Lawyers' Association sought access to certain Ontario Provincial Police (OPP) reports concerning allegations of abusive conduct by local police and prosecutors in connection with a murder prosecution. A criminal trial judge had found "many instances of abusive conduct", but a later OPP investigation exonerated the local police and prosecutors, without giving any reasons for doing so. In response to the Lawyers' Association's request under the provincial Freedom of Information Act, the OPP invoked the solicitor-client and law enforcement privileges; the invocation of those privileges was not subject to

96 2009 F.C. 1000.

97 *Ibid.* A third case, which did not involve ATIA, also warrants brief mention. In *Minister of Justice v. Khadr* [2008] 2 S.C.R. 125, the Canadian Supreme Court held that Omar Khadr, a Canadian detainee who had been interrogated by Canadian officials at Guantanamo and was subject to US criminal charges, was entitled to have a judicial officer review the Canadian officials' notes to determine the extent to which they could be released, consistent with legitimate national security concerns. *Ibid.* If Khadr had been prosecuted in Canada, he would have had that right under the principle established in *Regina v. Stinchcombe* [1991] 3 S.C.R. 326. Since Khadr was not being prosecuted in Canada, he sought access to the information under Section 7 of the Canadian Charter of Rights and Freedoms. *See* Canadian Charter of Rights and Freedoms para. 7 (1982) ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"), <laws.justice.gc.ca/en/charter>. The Court found that para. 7 applied because Canadian officials had participated in processes that violated US and international law, as well as Canada's binding international human rights obligations. *Ibid.*, para. 27. In a later case, the Supreme Court declined, on separation of powers grounds, to affirm lower court orders directing the government to remedy its violations of Khadr's Charter rights in a specific way, that is, by requesting his repatriation. *See Prime Minister of Canada v. Khadr*, [2010] 1 S.C.R 40. The Court stated that, "in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution". *Ibid.*, para. 37. The Court found, however, that the lower court's remedy "gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs [...]". *Ibid.*, para. 39. Thus, "the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's para. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*". *Ibid.*

98 [2010] 1 S.C.R. 815.

"public interest review" under Section 23 of the Act.[99] Among other things, the Lawyers' Association maintained that the provincial parliament's failure to make those two exemptions subject to the public interest override rendered the override provision unconstitutional under Section 2(b) of the Canadian Charter of Rights and Freedoms, which provides that everyone has the fundamental rights to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".[100] The Supreme Court was therefore required to construe Section 2(b) to determine whether that section provided any right to government information.

The Canadian Court held that "§ 2(b) guarantees freedom of expression, not access to information", and that it does not therefore "guarantee access to all documents in government hands".[101] The Court emphasized that under the Canadian form of government, bureaucracy is accountable to elected officials, who, in turn, must "conduct their business in the context of public elections and legislatures and where the media [...] play a fundamental role".[102] Thus, it is "not possible to proclaim that § 2(b) entails a general constitutional right of access to all information under the control of government".[103] According to the Court, however, "[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government".[104] Thus, "the scope of the § 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints".[105]

A party seeking information must make out a *prima facie* case of 'necessity' by showing that "without the desired access [to documents held by the government], meaningful public discussion and criticism on matters of public interest would be substantially impeded".[106] If that showing is made, the party seeking access must then "show that the protection is not removed by countervailing considerations inconsistent with production".[107] Those "countervailing considerations" may be embodied in common law privileges or in the recognition that "a particular gov-

99 Section 23 of the Act authorizes the provincial Information Commissioner to reject the government's invocation of some (but not all) exemptions based on the public interest: "An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with over governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy], and 21.1 [species at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

100 Canadian Charter of Rights and Freedoms para. 2(b).

101 1 S.C.R. 815, para. 30.

102 *Ibid.*, para. 35.

103 *Ibid.*

104 *Ibid.*, para. 30.

105 *Ibid.*, para. 31.

106 *Ibid.*, para. 37, 38.

107 *Ibid.*, para. 38.

ernment function is incompatible with access to certain documents".[108] Here, the Court concluded, the absence of a public interest override did not render Section 23 unconstitutional because the authority responsible for determining whether to release the requested records already was required to determine "whether disclosure could reasonably be expected to interfere with a law enforcement matter", and, if so, to decide "whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused".[109] According to the Court, those determinations "necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions".[110] The public interest override "would add little to this process".[111]

Notwithstanding the absence of specific constitutional language, the Supreme Court found a limited right of access in the Charter, but only to the extent that the requested information "is necessary for the meaningful exercise of free expression on matters of public or political interest".[112] Three points may be made with respect to that result. First, the decision obviously contemplates that most access to information will be resolved under ATIA (and its provincial counterparts), with invocation of the Charter being a matter of last resort for only the most exceptional cases. Second, the 'right' recognized by the Court is not an individual right in the way that we generally think of such rights. It is instrumental in nature; it does not exist for the sake of the individual, but for the common

108 *Ibid.*, para. 39, 40. The Court noted that, "Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well-settled, providing predictability and certainty to what must be produced and what remains protected." *Ibid.*, para. 39. To illustrate those government functions which are incompatible with public disclosure, the Court noted that, "it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access". *Ibid.*, para. 40.

109 *Ibid.*, para. 48.

110 *Ibid.* Indeed, according to the Court, "a proper interpretation of §14(1) requires that the [deciding authority] consider whether a compelling public interest in disclosure outweighs the purpose of the exemption". *Ibid.*, para .49. If the deciding authority "were to find that such an interest exists [he] would exercise the discretion conferred . . . and order disclosure". *Ibid.* In addition, the Court found that the same analysis was required with respect to the other provisions of Section 14. *See Ibid*., para. 50-52. In addition, the Court found that the same analysis applied, "perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege". *Ibid.*, para. 53. The Section 23 public interest override would have little to add, since Section 19, like Section 14, grants discretion to disclose notwithstanding the privilege. However, "the near-absolute nature of [the] solicitor client privilege" makes it difficult to see how disclosure could ever be justified. *Ibid.*, para. 54-56.

111 *Ibid.*, para. 49. The Court found that the statute passed constitutional muster, but remanded to the Information Commissioner for further consideration of whether the deciding authority had properly exercised his discretion under Section 14. *Ibid.*, para. 72.

112 *Ibid.*, para. 36.

good.[113] Third, the decision is respectful of the political branches, but also consistent with the particular Canadian conception of judicial responsibility under its distinctive 'living tree' doctrine, which emphasizes the organic quality of the basic law.[114]

Part V

This section will discuss two cases in which denials of access to government information were considered in a somewhat different context, namely, as challenges to alleged violations of transnationally-recognized rights raised in transnational courts. The first is a 2009 decision of the European Court of Human Rights; the second is a 2006 decision of the Inter-American Court of Human Rights. Cases like these add additional levels of rich description for the socio-legal study of constitutional law because of the sets of relationships that exist between domestic constitutional law and transnational law, which sometimes may use substantially the same language, but be subject to differing interpretations, as well as the structural and political relationships that exist between the transnational court and the nation-state and its courts and other organs of government.

In *Tarsasag A Szabadsagjogokert (Hungarian Civil Liberties Union) v. Hungary*,[115] the Hungarian Constitutional Court had denied a request of the Hungarian Civil Liberties Union (HCLU) for access to a pending complaint that a parliamentarian (and others) had filed in the Constitutional Court, seeking "abstract review" as to the constitutionality of certain recent drug-related amendments to the Criminal Code. The request had been denied on the ground that a pending complaint "could not be made available to outsiders without the approval of its author".[116] HCLU then brought suit in the Budapest Regional Court, arguing that the denial of access violated Article 61 of the Hungarian Constitution, which provides that "everyone has the right to express freely his/her opinion and, furthermore, to

113 This approach is reminiscent of Professor Meiklejohn's insistence that freedom of speech is not based on "a sentimental vagary about the 'natural rights of individuals', but on a reasoned and sober judgment as to the best available method of guarding the public safety". A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 59 (1965).

114 *See Edwards v. Attorney General of Canada* [1930] A.C. 124 ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention.").

115 ECHR (2009), no. 37374/05.

116 *Ibid.*, para. 10. The Constitutional Court never contacted the author, who had given a press conference about the complaint. *Ibid.*

access and distribute information of public interest".[117] Notwithstanding the completion of the "abstract review" case, the regional and appellate courts rejected HCLU's claims. Taking the case to the European Court of Human Rights (ECHR), HCLU claimed that the Hungarian courts had violated its rights under Article 10 of the European Convention.[118] Article 10 guarantees freedom of expression, which is defined to include "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

In its argument to the ECHR, Hungary acknowledged its interference with HCLU's Article 10 rights, but argued that the interference was justified under Article 10.2, which provides that the exercise of those rights

> ...may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[119]

According to Hungary, its legal regime "met the requirements laid down in the Convention, in that it was prescribed by law, it was applied in order to protect the rights of others and it was necessary in a democratic society".[120] The ECHR found that there had been a violation of Article 10. First, the Court noted its long-standing recognition of the principle that "that the public has a right to receive information of general interest", and held "the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the

117 *Ibid.*, para. 16. HCLU also challenged the denial under the Data Act 1992, but the Hungarian courts rejected those claims as well. When access is protected at the constitutional level, implementing legislation may also be required to guide the executive and the courts in enforcing the constitutional provision. Ironically, Hungary has recently enacted a law restricting press freedom that has been soundly criticized in other quarters, including the European Parliament. *See* S. Castle, *European Union Deputies Confront Hungarian Leader over Law on News Media*, New York Times, 20 January 2011, <www.nytimes.com/2011/01/20/world/europe/20hungary.html?>. South Africa, which also protects access to information at the constitutional level, also has been the object of much criticism regarding the curtailment of speech and press freedoms through legislation. *See, e.g.*, S. Moss, *Nadine Gordimer Goes Back Into Battle: Twenty Years After Helping Defeat Apartheid, the Eminent Writer is Fighting Government Plans to Muzzle South Africa's Press*, Guardian, 31 August 2010, <www.guardian.co.uk/books/2010/aug/31/nadine-gordimer-fighting-censorship>.

118 Art. 10 provides in relevant part that, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." ECHR Art. 10.1.

119 ECHR Art. 10.2. Hungary also specifically relied on the Court's 'margin of appreciation' jurisprudence.

120 *Ibid.*

public debate on matters of legitimate public concern".[121] Second, the Court noted that "the law cannot allow arbitrary restrictions which may become a form of censorship" if obstacles to information-gathering are created, and held that HCLU qualified as a 'watchdog' like the press for these purposes. Finally, the Court held that the Constitutional Court's "monopoly of information . . . amounted to a form of censorship" and "clearly impaired" HCLU's right to impart information.[122]

The ECHR also found that Hungary's interference with Article 10 rights could not be justified as "necessary in a democratic society". While recognizing that "it is difficult to derive from the Convention a general right of access to administrative data and documents",[123] the Court held that the present case "essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents".[124] According to the Court, "the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in matters of public interest, such barriers exist solely because of an information monopoly held by the authorities".[125] Thus, where the Hungarian courts found no right of access to government information under Article 61 of the Hungarian Constitution, the ECHR interpreted very similar language in Article 10 of the European Convention to provide such a right for the press and 'social watchdogs' in cases where the government's monopoly on information would otherwise create barriers to press freedom.

The second decision, *Claude Reyes v. Chile*,[126] comes from the Inter-American Court. The case originated when Chile's Foreign Investment Committee refused the request of several Chilean citizens (including a member of Congress) for access to foreign investment and other information concerning entities engaged in deforestation.[127] The then-effective domestic constitution "did not contain provisions concerning the right of access to State-held information and the principles of transparency and disclosure of the Administration".[128] The requesters filed a petition with the Inter-American Commission on Human Rights, invoking Article 13.1 of the Convention, which provides that, "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of

121 *HCLU v. Hungary*, ECHR (2009), no. 37374/05, para. 26.
122 *Ibid.*, para. 28.
123 *Ibid.*, para. 35. The Court also noted, however, that it had "recently advanced towards a broader interpretation of the notion of 'freedom to receive information'".
124 *Ibid.*, para. 36.
125 *Ibid.*
126 *Claude Reyes v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151 (2006), <www.oas.org/dil/access_to_information_human_right_Case_of_Claude_Reyes_et_al_vs_Chile.pdf>.
127 The Court noted that the case did not concern an absolute refusal to release information, because the state complied partially with its obligation to provide the information it held. *Claude Reyes*, para. 75.
128 *Ibid.*, para. 33.

one's choice."[129] Thereafter,[130] the Commission filed an application with the Inter-American Court, which upheld the right of access. Noting that Article 13 protected the right to 'seek and receive' information, the Court observed:

> This article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. ... The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.[131]

In addition, the Court observed, "Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds."[132] The Inter-American Court noted that Article 13.2 authorizes member states to impose restrictions on the right of access to government information, but that any such restrictions must be regularly established by law, necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals", "intended to satisfy a compelling public interest", and "proportionate to the interest that justifies it". The Court held that Chile had not satisfied those requirements in this case.[133]

As with the judgment of the European Court of Human Rights in *Tarsasag A Szabadsagjogokert*, the judgment of the Inter-American Court in *Claude Reyes* took a broad view of the language of the American Convention. In *Tarsasag A Szabad-*

129 American Convention On Human Rights, Art. 13.1. Section 2 of Article 13 further provides that, "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals." *Ibid.*, Art. 13.2. Finally, Article 13.3 provides that, "The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions." *Ibid.*, Art. 13.3.

130 The requesters filed their petition with the Commission in 1998, but the Commission did not file its application with the Court until 2005. *Claude Reyes* para. 1.

131 *Ibid.*, para. 77.

132 *Ibid.*, para. 87.

133 Moreover, Chile had not satisfied its obligation under Article 2 of the Convention to "adopt, in accordance with their constitutional processes and provisions of this Convention, such legislative or other measures as may be necessary to give the necessary measures to give effect to those rights or freedoms [referred to in Article I]". Convention. Art. 2.

sagjogokert, the European Court found a right of access to government information, at least in the case of a government monopoly of information, in the words of the Convention that guaranteed the general right "to access and distribute information of public interest". In *Claude Reyes*, the Inter-American Court found the same right in the language of the American Convention which guaranteed the "freedom to seek, receive, and impart information".

Conclusions

It is far too early to draw any firm conclusions from legal provisions and decisions such as those considered in this essay. In the US and Canada, the right of access to government information has been statutory, rather than constitutional. The effectiveness of those statutes in providing access to routine government information has been uneven. Even more problematic, however, has been their effectiveness in securing access to information that a government official with some degree of formal or informal authority has thought to be 'sensitive', for one reason or another.[134] That is particularly true, as the US cases show, where someone waves the flag of 'national security'. In such circumstances, the national courts have been reluctant to exercise an independent judgment. That is not surprising. For the courts to do more than they have done in policing the executive, and making sure that the executive has legitimate reasons for withholding information, necessarily subjects the courts to criticism for 'interfering' with the political branches.[135] The decision in *Ontario (Public Safety and Security)* suggests that the Canadian courts may be willing to go further, but only in a truly extraordinary case, where they believe that the democratic process is being frustrated in a fundamental way by the government's unwillingness to disclose information that citizens truly need to know to exercise their responsibilities as citizens.

As previously noted, the post-1989 constitutions have often provided for access to information as a constitutional right or value. That is hardly surprising. After all, most of those constitutions were adopted by nations that were emerging from some form of authoritarian regime, and those responsible for constitution-making were familiar with the instinct of governments to try and protect them-

134 *See*, Office of the Information Commissioner (Ireland), *The Application and Operation of Certain Provisions of the Freedom of Information Act 1997: Commentary of the Information Commissioner*, Dublin, Ireland, March 2003; E. Kenny, *Running Scared of Freedom of Information*, Irish Times, 13 February 2003; Office of the Information Commissioner (Ireland), *Freedom of Information: The First Decade*, Dublin, Ireland, May 2008; House of Commons, Parliament of Canada, *The Access to Information Act: First Steps to Renewal: Report of the Standing Committee on Access to Information, Privacy and Ethics*, 40th Parliament, 2nd Session, Ottawa, Ontario, June 2009; M. Lister & K. Baird, *Access to Information at 25 Years: New Perspectives, Creative Solutions?: Workshop Outcomes Report*, Public Policy Forum, Ottawa, Ontario, December 2008; B. Pack, Note, *FOIA Frustration: Access to Government Information Under the Bush Administration*, 46 *Arizona Law Review* 815 (2004); D. Pozen, *Deep Secrecy*, 62 Stan. L. Rev. 257 (2010).

135 *See generally* J. Waldron, 'Law and Disagreement' (1999); J. Waldron, 'The Dignity of Legislation' (1999); R. Ekins, *Judicial Supremacy and the Rule of Law*, 119 *Law Quarterly Review* 127 (2003); B. Ackerman, *At the Crossroads: Bruce Ackerman on the Surrender of Parliamentary Sovereignty*, 32 London Review of Books 33, 9 September 2010.

selves from the people.[136] These constitutional provisions are impressive. But there is not yet much case law relating to them, and the existing case law often involves relatively mundane matters such as access to court pleadings or hospital records, rather than politically sensitive and important information, such as that relating to foreign affairs and national security. If *Tarsasag A Szabadsagjogokert (Hungarian Civil Liberties Union) v. Hungary*[137] is representative, national courts may be reluctant to grant relief even in such relatively minor matters. Moreover, constitutional provisions, to be effective, often require legislative elaboration; but the record with respect to legislation is also mixed. *Tarsasag A Szabadsagjogokert* is instructive for yet another reason: HCLU eventually received relief, but that relief came from the European Court, which gave a different construction to the language of the European Convention, which was quite similar to the language contained in the Hungarian Constitution. A transnational court may have more freedom to "say what the law is",[138] but there may be danger in that too. If there is reason to be concerned with the 'political' role of national courts, there is also reason to be concerned when transnational courts take on that role.

As the European Court recognized in *Tarsasag A Szabadsagjogokert*, one of the great powers of modern government is the ability to create and collect information and control access to it. That circumstance presents a real challenge for the accountability of representative government, particularly, as Hobbes noted, where the political branches of government are aligned, as they may be more often than Publius supposed, either for legitimate reasons of state or because they share responsibility for failed policies.[139] The public may be able to discover information in the fullness of time. In important matters, however, timing is often crucial. In today's world, public access to government information is essential both to the workings of representative government and to public confidence in government. The conditions on which access to information is made available to the public are therefore critical.

We must be concerned with the shape that law takes in the world, and with the reasons that the law takes one shape or another. Traditional scholarship in constitutional law is incomplete without investigation into how law works on the ground and how it relates both to other elements of culture and to transnational legal cultures. Otherwise, it cannot begin to explain such phenomena as the informal migration of power from the legislative to the executive, despite constancy in the forms of law. Nor can it begin to understand the reality of the differences and similarities that exist among and between constitutional systems. And it cannot begin to explain why national and transnational courts may interpret the same language in different ways. Constitutional law, to build on the insights of Montesquieu and Story, necessarily involves contingent arrangements and requires an understanding of law in action. The truth of that fact will only become more obvi-

136 *See generally* J. Kurczewski, *Living Sociology of Law*, *supra* note 51.

137 ECHR, no. 37374/05 (2009).

138 *See Marbury v. Madison*, 5 US 137 (1803).

139 Hobbes, 'On the Citizen', *supra* note 5 at 93; Skinner, 'Hobbes and Republican Liberty', *supra* note 3, at 106.

ous as we have more and more experience observing the wide array of democratic constitutions we now see at work in the world.