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PROTECTING THE WATCHDOG: USING THE FREEDOM OF INFORMATION ACT TO PREFERENCE THE PRESS

Erin C. Carroll*

I. INTRODUCTION

The fourth estate is undergoing dramatic changes. Its economic model has been disrupted and, as a result, many newspaper reporters are surrounded by a growing number of empty desks. They are shifting their focus away from costly investigative reporting and toward amassing Twitter followers and writing the perfect "share line." About one hundred million unique visitors each month get their news from the Huffington Post—a company that needs no printing press—and on whose home page Kim Kardashian may be as frequent a presence as Mitch McConnell.[1]

This busier and noisier media world may have a desirable democratizing effect—more of us are able to participate in analyzing, debating, and perhaps even making the news. Yet, digital-only media has not succeeded in filling a role that print journalists have traditionally played well: government watchdog. As print journalism withers and dies, the investigative reporting that it supported is doing the same. Given the changes in the media industry, the very nature of the fourth estate is in question. It is unclear whether it is still worthy of its title.[2]

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[1] PEW RESEARCH CTR., STATE OF THE NEWS MEDIA 2015, page 11 (2015), http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf [http://perma.cc/R46J-R73U] (ranking Huffington Post fourth among top digital news entities with the most traffic in January 2015 behind Yahoo-ABC News (127,995,000 unique visitors), CNN Network (101,540,000 unique visitors), and NBC News Digital (101,145,000 unique visitors)). As an example of how the line between celebrity and political news has blurred, a November 2014 headline on Huffingtonpost.com was "Newt Gingrich and Jay Z Came Together on Sentencing Reform. Maybe There's a Lesson for Congress." *See* Lenore Anderson & B. Wayne Hughes, Jr., HUFFINGTON POST: HUFF POST POLITICS, THE BLOG (Nov. 11, 2014, 7:18 PM), http://www.huffingtonpost.com/lenore-anderson/newt-gingrich-and-jay-z-c_b_6142454.html [http://perma.cc/H4BF-WHCM].

[2] Numerous scholars have identified, as their starting point, problems associated with the decline of the newspaper industry. For example, RonNell Andersen Jones, in *Litigation, Legislation, and Democracy in a Post-Newspaper America*, describes how historically "newspapers and traditional media companies have played a critical role as legal instigators and enforcers" and how they are no longer able to play this role. 68 WASH. & LEE L. REV. 557, 559 (2011). She notes that newspapers were essential to the passage of FOIA and then

To perpetuate its historical role as government watchdog, the fourth estate needs fortification. Legal preferences for the press would make it a more effective check on the government. Today, with limited exceptions, no area of law treats journalists differently than other citizens or news organizations differently than other businesses.[3] Yet, what if this changed and we supported investigative journalism in a more significant way, as we do other public goods?[4]

There is precedent for giving preferences to the press.[5] For example, government has long provided postal subsidies to newspapers. Yet today, when news can be disseminated worldwide with a keystroke, such a subsidy is antiquated and ineffective. The nature of the preferences needs to change and expand. Academics, politicians, and some journalists have proposed ways to preference news organizations and reporters, including publicly subsidizing them.[6] Perhaps

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engaged in "FOIA activism"—using the law to expose major issues. *Id.* at 606. Her article goes on to suggest ways in which other entities can take on the "instigator" and "enforcer" roles. *See id.* at 559. Adam Cohen, in his article, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, describes the failure of laws to keep up with changes in journalism—including the demise of the fourth estate and rise of the fifth estate. 85 S. CAL. L. REV. 1, 3–4 (2011). He discusses the need for the law to treat members of the fourth and fifth estates equally and proposes a broader First Amendment-based "right of equal treatment or of access to government information" that would involve, in part, the government being more proactive about releasing information, including under FOIA. *Id.* at 65, 69. Cohen defines the fifth estate as "[i]nternet-based" and "including solo blogs, group-discussion websites, Twitter news bulletins, crowd-sourced news research, and WikiLeaks disclosures." *Id.* at 3.

[3] *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434–36 (2014) ("The underlying problem journalists face is that they are treated by the law as being no different than the subjects they are covering, or perhaps, mere curious bystanders.").

[4] *See* FED. TRADE COMM'N, DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 4 (2010), https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf [https://perma.cc/X5NX-6MDA] ("The news is a 'public good' in economic terms. That is, it is non-rivalrous (one person's consumption of the news does not preclude another person's consumption of the same news) and non-excludable (once the news producer supplies anyone, it cannot exclude anyone). Because free riding is usually easy in these circumstances, it is often difficult to ensure that producers of public goods are appropriately compensated.").

[5] *See* Bree Nordenson, *The Uncle Sam Solution*, COLUM. JOURNALISM REV., Sept.–Oct. 2007, http://www.cjr.org/feature/the_uncle_sam_solution.php?page=all [http://perma.cc/PN7G-QPP5]; Robert W. McChesney & John Nichols, Opinion, *Robert W. McChesney and John Nichols on Federal Subsidies for Journalism*, THE WASH. POST, Oct. 30, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102203960.html [http://perma.cc/2L84-F42G].

[6] *See* ROBERT W. MCCHESNEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN xxv (2011) ("In our view the evidence is overwhelming: If Americans are serious about reversing course and dramatically expanding and improving journalism, the only way this can happen is with massive public subsidies.").

unsurprisingly, many other journalists are skeptical; being on the dole jeopardizes the very nature of a free press.[7] Still others have argued that we should not interfere with the market by propping up an industry that cannot seem to adapt to the information age.

There is, however, another way to preference the press. It is one that does not involve money changing hands or discriminating between old media and new. Instead, it would give journalists a commodity that is fundamental to the public good they produce: information. Providing faster and better access to information about government activity would feed investigative journalism and give the press the heft it needs to better serve as a check against government at a time when the private sector seems far less willing than in the past to support it, and it has proven unable to adequately support itself.[8]

To give this needed preference to the press, this Article proposes overhauling provisions of the Freedom of Information Act ("FOIA")—the law governing when and how the executive branch discloses information to the public.[9] Virtually since it was passed in 1966, with significant lobbying by the newspaper industry, the law has been a disappointment to journalists. While in theory FOIA facilitates the press's access to vast amounts of information in the hands of the executive branch, implementation of the law has been chronically fraught. Agencies routinely take months and even years to respond to journalists' requests. With a news economy that demands immediacy, and media organizations both new and old less financially able to wage fights over access, transparency is eroding. An overhaul that would include preferences aimed at transparency is especially appropriate given the near-universal agreement that FOIA is dysfunctional.[10]

Some of the groundwork for FOIA preferences for journalists is already present. FOIA includes a provision for expedited processing of requests, and this provision allows for quicker disclosure when there is an "urgency to inform the public concerning actual or alleged Federal Government activity" and the request is "made by a person primarily engaged in disseminating information."[11] Courts have regularly found, and some agency regulations explicitly indicate, that professional journalists are such "person[s]."[12] Yet, being a journalist is no guarantee of quicker access to records. Agencies reject requests under this provision more than 80% of

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[7] *See id.* at xxvii.

[8] *See* Nordenson, *supra* note 5; Cohen, *supra* note 2, at 4–5.

[9] *See* 5 U.S.C. § 552 (2012).

[10] *See* Jim Snyder & Danielle Ivory, *Obama Cabinet Flunks Disclosure Test with 19 in 20 Ignoring Law*, BLOOMBERG NEWS (Sept. 27, 2012, 7:01 PM), http://www.bloomberg.com/news/2012-09-28/obama-cabinet-flunks-disclosure-test-with-19-in-20-ignoring-law.html [http://perma.cc/M5TK-YYZ8]; H.R. REP. NO. 113-155, at 6 (2013).

[11] 5 U.S.C. § 552 (a)(6)(E)(v)(II).

[12] *See, e.g.*, 32 C.F.R. § 286.4 (d)(3)(ii) (2014); Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 373, 376–77 (S.D.N.Y. 2007).

the time, and courts' application of it has been inconsistent and insensitive to the realities of the news business.[13]

This Article proposes revising the expedited processing provisions to prioritize journalists' requests over those of other citizens, expedite agency fulfillment of them, and ease the press's ability to challenge late, incomplete, or otherwise unsatisfactory disclosures. In other words, a request made by any journalist—or, in the words now used in the statute, "a person primarily engaged in disseminating information"—would presumptively go to the front of the queue. The medium in which the journalist publishes would be irrelevant. At that point, there would be firm deadlines (where none exist now) for providing the journalist with the information requested. These small but significant changes to an already established provision of FOIA could serve as a testing ground for enhancing the press's power at a time when the boost is needed.

Beyond this introduction, this Article proceeds in four parts. Part II provides an overview of the press's historical role as both a facilitator of the "marketplace of ideas" and as a government watchdog. It also examines how changes in the media landscape are impeding print journalists' ability to continue to fulfill these roles in as robust a way as they have in the past. Part III briefly discusses the history of FOIA, its shortcomings, and agency failures in implementing it. This section also notes how, while journalists have used FOIA as a tool, it has too often been a source of frustration for them. Part IV outlines the various options—other than changes to FOIA—for giving preferences to the press and explains why FOIA is fertile ground for such preferences. Finally, Part V proposes ways in which FOIA could be amended to preference the press and enhance the press's ability to watchdog government.

II. THE ROLE OF THE PRESS

A. The Press's Historical Role as Marketplace and Watchdog

Among journalists, *The* (Toledo) *Blade* is known as a survivor. A scrappy, small-city daily, it managed to beat out the *The New York Times* and *The Washington Post* when it won the 2004 Pulitzer Prize for Investigative Reporting.[14] At the same time, its circulation numbers, like most newspapers of its size, were in free fall.[15] It

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[13] *See* FOIA.GOV, UNITED STATES DEP'T OF JUSTICE (Oct. 26, 2105), http://www.foia.gov/data.html [http://perma.cc/NW2H-HDVY] (go to FOIA.gov; click on the "Data" tab; then click "Create an Advanced Report" in the top, right-hand corner of the screen; select "Expedited Processing" on the "I'd like a report on" dropdown menu; then create the report for all agencies for fiscal year 2014).

[14] *The 2004 Pulitzer Prize Winners*, THE PULITZER PRIZES (Oct. 22, 2015), http://www.pulitzer.org/citation/2004-Investigative-Reporting [http://perma.cc/9YHX-AQUS] (indicating that *The Blade* won the award for a series of stories on atrocities committed during the Vietnam War by the "Tiger Force," an elite U.S. Army platoon).

[15] Julie Ryan, Blade *Circulation Numbers Down 42,700 since 2014*, TOLEDO FREE PRESS, May 14, 2009, http://www.toledofreepress.com/2009/05/14/blade-circulation-

was perhaps apropos then that President Barack Obama, a self-professed "newspaper junkie," was speaking to *The Blade* when he said in 2009 that maintaining the viability of "serious investigative reporting" is "absolutely critical to the health of our democracy."[16] The former constitutional law professor has said: "Government without a tough and vibrant media is not an option for the United States of America."[17]

Obama was only the most recent president to speak of the importance of the press to our democracy. In a quote that journalists like to invoke, Thomas Jefferson said: "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[18] When Jefferson wrote these words in 1787, the concept of the "fourth estate" as an autonomous press that is critical of the government was not new.[19] In fact, about a dozen years earlier, the Continental Congress indicated that it recognized the press as a free and independent check on government.[20] Its Address to the Inhabitants of Quebec of 1774, which outlines the fundamental rights demanded by the colonists, emphasized the importance of a free press not only because of its "advancement of truth, science, morality, and arts in general," but because, as a result of the press's actions, "oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs."[21]

By the time the First Amendment was drafted, the role of the press as a fourth estate had been cemented.[22] In his seminal history of the freedom of the press, *Emergence of a Free Press*, Leonard W. Levy wrote that a "free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power

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numbers-down-42700-since-2004/ (on file with author) (indicating that *The Blade's* Sunday circulation dropped from 178,274 in December 2004 to 135,567 in March 2009).

[16] Dave Murray, *Newspaper Journalism Gets Words of Praise; Print Media's Role Vital, Obama Says*, THE BLADE (Sept. 22, 2009), http://www.toledoblade.com/local/2009/09/20/Newspaper-journalism-gets-words-of-praise-Print-media-s-role-vital-Obama-says.html [http://perma.cc/6S7W-SWAH].

[17] McChesney & Nichols, *supra* note 5.

[18] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* THE FIRST AMENDMENT: FREEDOM OF THE PRESS 73, 74 (Garrett Epps ed., 2008). Jefferson wrote these words in a letter to Edward Carrington in 1787, fourteen years before he became president. *Id.*

[19] LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 233–34 (1991) (explaining that the term "Fourth Estate" is attributed to Edmund Burke, an eighteenth-century member of the British House of Commons, and that it is distinguished from the other estates—"Lords Spiritual, Lords Temporal, and Commons, which have in modern times been subsumed into one: the government"); BERNARD SCHWARTZ, CONSTITUTIONAL ISSUES: FREEDOM OF THE PRESS 131–33 (1992).

[20] *See* SCHWARTZ, *supra* note 19, at 132.

[21] *Id.*

[22] *See id.*

fragmented, manageable, and accountable."[23] This fourth estate was critical, he added, as it was "part of the matrix for the functioning of popular government and the protection of civil liberties."[24]

In addition, at this time, the press was viewed as a vehicle for promoting our fledgling democracy through the widespread sharing of information. This concept was behind the founding of the postal system. Government officials saw the postal system as a "tool for promoting the ideas of a republic in which the people were sovereign" and viewed newspapers, which were delivered through that system, "as one of the principal means to strengthen the republican foundations of the young nation."[25]

These two historical concepts—the press as facilitator of the "marketplace of ideas" and thus, promoter of democracy, and the press as "watchdog" scrutinizing government—are both cited by legal scholars to justify why it is critical that the press remain free and autonomous.[26] The first model is described in Justice William Brennan's majority opinion in the 1964 Supreme Court case *New York Times v. Sullivan*.[27] The rationale for the second model—never clearly adopted by the Supreme Court, but nonetheless rooted in history and the raison d'être of countless journalists—is found in a speech given by Justice Potter Stewart a decade later.[28]

Sullivan is a bedrock case for free speech rights. In it, the Supreme Court unanimously held that the First Amendment protects the press from liability for the publication of statements about public officials except when those statements are made with actual malice.[29] The police commissioner of Montgomery, Alabama, brought the case against the *New York Times* over an advertisement appealing for funds to defray the legal fees of the Reverend Martin Luther King, Jr.[30] The police commissioner alleged that some statements in the advertisement were libelous.[31] The Court rejected this claim in an opinion that, according to one scholar, "assembles a Hall of Fame of quotes about freedom of expression."[32] Among these are that freedom of expression is "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[33] and that there exists "a profound national commitment to the principle that debate on

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[23] LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 273 (1985).

[24] *Id.*

[25] Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 677 (2007).

[26] *See* Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, *in* FREEING THE PRESSES 1, 3 (Timothy E. Cook ed., 2005); Regina G. Lawrence, *Daily News and First Amendment Ideals*, *in* FREEING THE PRESSES, *supra*, at 87.

[27] *See* Cook, *supra* note 26, at 3; 376 U.S. 254 (1964).

[28] Cook, *supra* note 26, at 3.

[29] *Sullivan*, 376 U.S. at 279–80, 292.

[30] *Id.* at 256–57.

[31] *Id.*

[32] Cook, *supra* note 26, at 4.

[33] *Sullivan*, 376 U.S. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[34]

Under this "marketplace of ideas" model, the media provides citizens the information they need to debate the myriad of issues being acted upon by their representatives. It facilitates a "public sphere" that allows us to share information among ourselves and create public opinion. This process then, as Robert C. Post has said, "preserve[s] the democratic legitimacy of our government."[35] In other words, a good newspaper is, as playwright Arthur Miller once said, "a nation talking to itself."[36]

Post-*Sullivan*, the Supreme Court has reaffirmed the need for this model and its centrality to democracy. For example, in the 1975 case *Cox Broadcasting Corp. v. Cohn*[37] the Court wrote that:

> in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.[38]

The Court found this function so critical that it went on to say that it is the press's "responsibility" to report on "events of legitimate concern to the public."[39]

The focus on the media not only as the facilitator of a marketplace, but of a marketplace where issues of "legitimate" concern are the primary commodity, bleeds into the second model for the press as a bedrock of democracy—that of watchdog. As suggested by the Supreme Court's *Cox Broadcasting* opinion, this model posits that it is the job of the press to serve as a check on government.[40]

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[34] *Sullivan*, 376 U.S. at 270.

[35] Robert C. Post, *A Progressive Perspective on Freedom of Speech*, *in* THE CONSTITUTION IN 2020, 179, 182 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[36] Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER, Mar. 31, 2008, *reprinted in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT 7 (Robert W. McChesney & Victor Pickard eds., 2011) [hereinafter WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS].

[37] 420 U.S. 469 (1975).

[38] *Id.* at 491–92.

[39] *Id.* at 492.

[40] *See id.* at 491–92; Cook, *supra* note 26, at 3.

The most fervent expression of this model was not in an opinion, but a speech by Justice Potter Stewart at Yale Law School in 1974.[41] Stewart began by noting that the Watergate scandal had made many citizens "deeply disturbed by what they consider to be the illegitimate power of the organized press in the political structure of our society," and then argued that the First Amendment foresaw an adversarial role between government and the press and therefore granted the press a unique and privileged status.[42] Distinguishing between freedom of speech and freedom of the press (references to each of which are found in the First Amendment), Stewart argued that "[t]he primary purpose of the constitutional guarantee of a free press was to create a fourth institution outside the government as an additional check on the three official branches."[43] According to Stewart, "a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government."[44]

As noted earlier, however, the Supreme Court has never adopted Justice Stewart's vision for the free press clause. It has never held that the First Amendment (under the free press or free speech clause) privileges the press over any other business or the journalist over any citizen. Nonetheless, many journalists still trumpet their watchdog role and note its historical roots. For example, the ombudsperson for the *New York Times*, Margaret Sullivan, has said, "A real journalist is one who understands, at a cellular level, and doesn't shy away from, the adversarial relationship between government and press—the very tension that America's founders had in mind with the First Amendment."[45]

Thus, since its inception, our democracy has relied on the press to act as a fourth estate—to be both a facilitator of the marketplace of ideas and a watchdog. The press has willingly taken up that yoke and performed. Yet, today it is faltering.

B. The Neutered Press

While a "real journalist" may still envision herself a watchdog of government, it has been increasingly difficult in recent years for her to fulfill this role. Even in the last decade, the media landscape has undergone significant changes. Take, for example, a journalist at a metropolitan, daily newspaper. Today that journalist likely works amid empty desks. She has fewer editors shaping her stories and even fewer copyeditors flyspecking them. Her articles are shorter. There isn't the space (if the story is slotted for the print edition) or the reader attention (if the story is slotted for

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[41] *See* Cook, *supra* note 26, at 5. Justice Stewart has been credited with, through this speech, "legitim[izing] the Fourth Estate model of the press." *See* POWE, JR., *supra* note 19, at 260–61.

[42] Cook, *supra* note 26, at 5; POWE, JR., *supra* note 19, at 260–61.

[43] SCHWARTZ, *supra* note 19, at 132.

[44] *Id.*

[45] Margaret Sullivan, *Who's a Journalist? A Question with Many Facets and One Sure Answer*, N.Y. TIMES, June 29, 2013, http://publiceditor.blogs.nytimes.com/2013/06/29/whos-a-journalist-a-question-with-many-facets-and-one-sure-answer/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1 [http://perma.cc/7ARY-NT26].

print or online). She has to turn her copy out faster, perhaps rewriting it for the web multiple times during the day. She must supplement her articles with blog posts and tweets. The actual newspaper that carries her stories (which, if she is like most of her readers, she will not ever pick up) is physically smaller and thinner than it was a decade ago. It may be delivered to readers fewer days a week or, if those readers are too far from the printing plant, not at all.

The demise of dead-tree journalism is a well-known phenomenon. But the speed and pitch of the downward slide are still remarkable. In 2012, there were 33% fewer newsroom employees than in 1989.[46] Most of the loss was in the last six years of that time period, and it is continuing.[47] Newspapers have retrenched, slashing foreign coverage, and shuttering Washington, D.C. and state capitol bureaus. For example, in 2006, reporters in the Washington, D.C. bureau of *The San Diego Union-Tribune* won a Pulitzer Prize for their coverage of the corruption of a California congressman.[48] Today that bureau no longer exists.[49]

This contraction has coincided with the internet's expansion. As we shift our focus to our screens, so too do advertisers—the subsidizers of news.[50] Total newspaper advertising revenue was down 52% in 2012 from 2003.[51] This loss totaled $22 billion—an amount not offset by the $3.4 billion growth in digital advertising during the same time period.[52]

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[46] PEW RESEARCH CENTER, KEY INDICATORS IN MEDIA AND NEWS 13–14 (2014), http://www.journalism.org/files/2014/03/Key-Indicators-in-Media-and-News-2014.pdf [http://perma.cc/4BG9-CARC]; *see also* Jessica Bruder, *Is the Death of Newspapers the End of Good Citizenship?*, THE CHRISTIAN SCIENCE MONITOR (Nov. 11, 2012), http://www.csmonitor.com/USA/Society/2012/1111/Is-the-death-of-newspapers-the-end-of-good-citizenship [http://perma.cc/38BR-T6BD] (stating that from 1940 to 2011 the number of American daily newspapers fell from 1,878 to 1,382).

[47] KEY INDICATORS IN MEDIA AND NEWS, *supra* note 46, at 13; *see also* STATE OF THE NEWS MEDIA 2015, *supra* note 1, at 28 (charting the decline); Press Release, American Society of Newspaper Editors, 2014 Census (July 29, 2014), http://asne.org/content.asp?pl=121&sl=387&contentid=387 [http://perma.cc/SZW9-FJKD].

[48] Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption): Why American Politics and Society Are About to Be Changed for the Worse*, THE NEW REPUBLIC, March 4, 2009, *reprinted in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 26.

[49] *Id.*

[50] *See* Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REV., Oct. 19, 2009, *reprinted in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 56–57 ("[A]bundant advertising revenue during the profitable last decades of the century gave the historically large staffs of many urban newspapers an opportunity to significantly increase the quantity and quality of their reporting.").

[51] KEY INDICATORS IN MEDIA AND NEWS, *supra* note 46, at 9.

[52] *Id.* This trend is continuing. *See* STATE OF THE NEWS MEDIA 2015, *supra* note 1, at 27 ("For the past five years, newspaper ad revenue has maintained a consistent trajectory: Print ads have produced less revenue (down 5%), while digital ads have produced more revenue (up 3%) – but not enough to make up the fall in print revenue.").

And yet, the news business is not dead. There has been an explosion in online or "digital-native" news sites: Huffington Post, Vox.com, Mashable, and BuzzFeed, to name a few. Cable television news channels, like newspapers, are losing audience,[53] but, according to recent data, powerhouses like CNN and Fox News are still experiencing revenue growth, and CNN and MSNBC are increasing newsroom investment.[54] Of late, journalists, a cynical group by necessity, have openly expressed some optimism about the path forward. "Even as challenges of the past several years continue and new ones emerge, the activities this year have created a new sense of optimism—or perhaps hope—for the future of American journalism," the Pew Research Center declared in its 2014 report on the *State of the News Media*.[55]

While the business forecast may be brightening, the clouds have not parted on all fronts. Despite the growing number and readership of digital-native news sites and the money they are beginning to generate, these sites are not supplanting (or even significantly complementing) newspapers in an important way: generating actual news. Studies demonstrate that print media still largely does the journalistic "heavy lifting" even while digital-native companies may reap more of the profit.[56] While BuzzFeed has lured pedigreed journalists to its ranks including Janine Gibson, an editor at *The Guardian* who supervised articles based on the leaks of former National Security Agency contractor Edward J. Snowden,[57] a most viewed article on its site was titled: *After a Girl Was Sent Home in Tears Because Her Dress Was Too*

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[53] STATE OF THE NEWS MEDIA 2015, *supra* note 1, at 32.

[54] *Id.* at 33–34.

[55] PEW RESEARCH CENTER, STATE OF THE NEWS MEDIA 2014: OVERVIEW (2014), http://www.journalism.org/2014/03/26/state-of-the-news-media-2014-overview/ [https://perma.cc/J26X-UMCU].

[56] *Id.* at 2–3 ("[T]he vast majority of bodies producing original reporting still comes from the newspaper industry."); *see* CLAY SHIRKY, NEWSPAPERS AND THINKING THE UNTHINKABLE: SHIRKY.COM (2009), *reprinted in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 42 ("Print media does much of society's heavy journalistic lifting, from flooding the zone—covering every angle of a huge story—to the daily grind of attending the city council meeting, just in case."); STATE OF THE NEWS MEDIA 2015, *supra* note 1, at 7 ("While new relationships have been struck between news organizations and tech companies like Facebook, the tech companies still control more of the arrangement and reap most of the financial benefit. Facebook now pulls in roughly a quarter (24%) of all display ad revenue and more than a third (37%) of mobile display.").

[57] Ravi Somaiya, *Janine Gibson, a Former* Guardian *Editor, Will Head BuzzFeed's British Operation*, N.Y. TIMES, June 16, 2015, http://www.nytimes.com/2015/06/17/business/media/former-guardian-editor-janine-gibson-to-head-buzzfeeds-british-operation.html?smid=nytcore-iphone-share&smprod=nytcore-iphone&_r=0 (on file with the Utah Law Review); Dylan Byers, *BuzzFeed Hires Second Investigative Reporter from* Los Angeles Times, POLITICO (April 23, 2014, 4:22 PM), http://www.politico.com/blogs/media/2014/04/buzzfeed-hires-second-investigative-reporter-from-187305.html [http://perma.cc/R7E8-3KJW].

Short, Her Mom Wore it to Graduation.[58] As Princeton professor and Pulitzer Prize winner Paul Starr put it: "Online there is certainly a great profusion of opinion, but there is little reporting, and still less of it subject to any rigorous fact-checking or editorial scrutiny."[59] A 2009 study by the Pew Research Center in Baltimore looking at news appearing in newspapers and online in a single week found that more than 95% of the content on the "new" media platforms came from stories generated by "old" media, like newspapers.[60] It is a great irony of today's media landscape, according to Daniel Hallin, a media scholar at the University of California, San Diego, that "[i]n this so-called information age, we actually have fewer reporters now gathering the basic information on which the whole information society operates."[61] He added that "[t]he amount of serious information-gathering is actually going down . . . [d]ramatically so."[62] Thus, the problem is not necessarily the dearth of trained and competent journalists; the problem is that there is less money to hire them and pay them to do their jobs.[63]

This is especially true for the brand of journalism that aims to uncover government or corporate corruption. Called by a variety of names—watchdog, accountability, and investigative journalism—this type of reporting is costly. According to venture capitalist and journalism philanthropist Marc Andreessen, investigative journalism is "widely believed to be the least commercially viable type of news."[64] As newspaper staffs and budgets have shrunk, so too has the amount of

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[58] Ryan Broderick, *After a Girl Was Sent Home in Tears Because Her Dress Was Too Short, Her Mom Wore It to Graduation*, BUZZFEED (June 16, 2014, 9:04 AM), http://www.buzzfeed.com/ryanhatesthis/mom-wears-too-short-dress-code-graduation#.gpN3BoGdj [http://perma.cc/QE47-S77N].

[59] Starr, *supra* note 48, at 20.

[60] Robert W. McChesney & John Nichols, *Down the News Hole*, *in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 104–05. In the second article of a three-part series in *The New York Review of Books* attempting to assess the quality of web-based journalism, Michael Massing wrote: "When it comes to impact, traditional news organizations retain an overwhelming edge. It's hard to think of Web-based stories that have produced as big a bang as Jane Mayer's report on the Koch brothers in *The New Yorker*, Dana Priest's exposés on Walter Reed Hospital and CIA rendition sites in *The Washington Post*, Alan Schwarz's stories about football concussions in *The New York Times*, *The Guardian*'s baring of the British phone-hacking scandal, and Peter Beinart's analysis in this publication of the failure of the American Jewish establishment. Even the revelations of WikiLeaks and Snowden, while involving leaks of digital information, were delivered to the public via print-based outlets." Michael Massing, *Digital Journalism: The Next Generation*, N.Y. REV. OF BOOKS, June 25, 2015, http://www.nybooks.com/articles/archives/2015/jun/25/digital-journalism-next-generation/ [http://perma.cc/W5B65N74].

[61] Nordenson, *supra* note 5.

[62] *Id.*

[63] Cohen, *supra* note 2, at 4 ("Old media is not retreating because it is failing journalistically, but rather because its business models are in decline.").

[64] Marc Andreessen, *Why I'm Bullish on the News*, POLITICO MAGAZINE, May/June 2014, at 58, available at http://www.politico.com/magazine/story/2014/05/marc-andreesen-why-im-bullish-on-the-news-105921.html#.Va5fUqa-u3A [http://perma.cc/EV4L-WL5U].

content they have produced overall—and perhaps investigative reporting has been the hardest hit.[65] As of now, digital-native news sites are not generating the revenue necessary to support the newsrooms necessary for investigative reporting.[66] More than half of the total revenue used to fund news reporting is still coming from traditional print and television advertising.[67] Thus far, creating the business model online that will support a robust reporting operation on the scale newspapers were once able to do has proved elusive.[68]

Moreover, digital-native news sites generally seek to attract large audiences. To do so, they want stories that have broad appeal.[69] Investigative reporting does not always fit that bill. In the past, when individuals or families owned many media companies, those companies provided more accountability reporting than was perhaps financially wise because it gave the owners "the warm glow of altruism and the satisfaction of providing a public good."[70] A digital-native news site that is

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Stanford economist James T. Hamilton, in a 2009 paper on subsidizing the news business, suggested that funding a beat reporter for a year in North Carolina would cost $61,500, while funding an investigative reporting unit (including an editor, three reporters, research, travel and legal expenses) that might produce two or three investigative series per year, would cost $500,000. *See* James T. Hamilton, *Subsidizing the Watchdog: What Would It Cost to Support Investigative Journalism at a Large Metropolitan Daily Newspaper*, *in* THE ROAD AHEAD FOR MEDIA HYBRIDS: REPORT OF THE DUKE NONPROFIT MEDIA CONFERENCE, MAY 4–5TH Appendix 1, page 4 (2009), http://www2.sanford.duke.edu/nonprofitmedia/documents/DWC_Conference_Report.pdf [http://perma.cc/JW3M-N4KY]. In a biting critique of "citizen journalism," Michael Massing writes: "Reporting, it turns out, is expensive and time-consuming and not something readily performed between shopping and the laundry." Massing, *supra* note 60.

[65] Nordenson, *supra* note 5 ("[W]ith the business model for news in transition, mainstream media owners are cutting staff and reducing content, particularly hard-news coverage, in order to maintain the high profit margins newspapers have historically enjoyed."); Downie, Jr. & Schudson, *supra* note 50, at 59–60.

[66] Starr, *supra* note 48, at 20; Alterman, *supra* note 36, at 13 (noting that websites like the Huffington Post share in the benefit of the costs expended by newspapers, but don't shoulder any of the costs and stating that "no Web site spends anything remotely like what the best newspapers do on reporting").

[67] STATE OF THE NEWS MEDIA 2014: OVERVIEW, *supra* note 55.

[68] McChesney & Nichols, *Down the News Hole*, *supra* note 60, at 110 ("Great journalism, as Ben Bagdikian put it, requires great institutions. Like any complex undertaking, it requires a division of labor: copy editors, fact-checkers, and proofreaders in addition to the handful of well-known investigative superstars. It requires institutional muscle to stand up to governments and corporate power. It requires competition, so if one newsroom misses a story, it will be exposed by someone else. None of that is happening online.").

[69] At least one high-profile effort to create a network of websites focusing on hyperlocal news—AOL's "Patch" sites—has failed. While at one time it employed about one thousand reporters and editors, in early 2014 it had fewer than one hundred, and AOL sold off its majority ownership. *See* KEY INDICATORS IN MEDIA AND NEWS, *supra* note 46, at 14, 18.

[70] *See* James T. Hamilton, *What's the Incentive to Save Journalism?*, *in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 278.

owned by a publicly traded company, however, is unlikely to be influenced by warm and fuzzy feelings.[71] And while investigative reporting does perhaps lend a reputational boost to a news organization, for a digital-only news site that boost may not outweigh the significant cost of producing it.

Digital-only news sources may also face impediments in doing investigative work. Many digital-only news sources have not achieved the kind of gravitas that newspapers once had and arguably still have, and this gravitas significantly helps newspapers serve as a check on government. "Institutional authority or weight often guarantees that the work of newsrooms won't easily be ignored," wrote Leonard Downie, Jr., the former executive editor of *The Washington Post*, and Michael Schudson, a professor at Columbia University's Graduate School of Journalism.[72] "Something is gained when reporting, analysis, and investigation are pursued collaboratively by stable organizations that can facilitate regular reporting by experienced journalists, support them with money, logistics, and legal services, and present their work to a large public."[73] Until recently, newspapers have provided a powerful means of leverage over government, something that the multitude of blogs, citizen journalists, and digital-only websites have not yet been able to muster.[74]

Certainly investigative reporters still exist, and they continue to publish stories that topple politicians and expose malfeasance. Yet, it is also hard to argue that they are fulfilling their watchdog role as vigorously as they could and should when their numbers have shrunken dramatically, and the fat bankroll that sustained them has dwindled to a small billfold. "Journalism cannot lose 30 percent of its reporting and editing capacity," veteran media watchers Robert W. McChesney and John Nichols have said, "and continue to provide the information needed to maintain a realistic democratic discourse, open government and the outlines of civil society at the federal, state and local levels."[75] Fewer journalists means fewer public meetings attended, fewer documents reviewed, and fewer questions asked. It also means the loss of sources and institutional knowledge. Today, many public officials—

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[71] *See id.* at 278–79.

[72] Downie, Jr. & Schudson, *supra* note 50, at 59.

[73] *Id.*

[74] *See* David Simon, *Build the Wall*, COLUM. JOURNALISM REV., July/August 2009, http://www.cjr.org/feature/build_the_wall_1.php [http://perma.cc/KGS5-XLFX], ("A blog here, a citizen journalist there, a news Web site getting under way in places where the newspaper is diminished—some of it is quite good, but none of it so far begins to achieve consistently what a vibrant newspaper, staffed with competent, paid beat reporters and editors, once offered. New-media entities are not yet able to truly cover—day after day—the society, culture, and politics of cities, states, and nations. And until new models emerge that are capable of paying reporters and editors to do such work—in effect becoming online newspapers with all the gravitas this implies—they are not going to get us anywhere close to professional journalism's potential."); Starr, *supra* note 48, at 37; Jones, *supra* note 2, at 559 (discussing the declining role of newspapers as "legal instigator and enforcer").

[75] MCCHESNEY & NICHOLS, *supra* note 6, at x.

especially at the state and local level—know they are not being watched as carefully as they once were.[76]

Take, for example, public officials in the Los Angeles suburb of Bell (population 37,000) who stole about $5.5 million from taxpayers over a period of at least four years before the *Los Angeles Times* exposed the corruption in a series of articles that later won the Pulitzer Prize for Public Service.[77] Regarding the length of time it took the story to be reported, one community activist said, "A lot of residents tried to get the media's attention, but it was impossible."[78] She added: "The city of Bell doesn't even have a local paper; no local media of any sort."[79] While the *Los Angeles Times* eventually got the story, perhaps it would have had it even sooner if the Tribune Company, the owner of the newspaper, had not declared bankruptcy in 2008 and gutted its newsroom staff.[80]

How many other Bells are out there? As Tom Rosenstiel, the former director of the Pew Research Center's Project for Excellence in Journalism, told a congressional committee at a hearing on the future of the news: "More of American life now occurs in shadow. And we cannot know what we do not know."[81]

The economic challenges faced by traditional media are significant and unrelenting. The impact on newspapers' investigative reporting is correspondingly

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[76] *See id.* at xii (pointing out that with fewer reporters at work, "corrupt public officials' transgressions will be less and less likely to be reported"); Tony Biasotti, *A Veteran California Reporter on Why She's Excited to Join* Politico, COLUM. JOURNALISM REV. (Oct. 5, 2015), http://www.cjr.org/united_states_project/carla_marinucci_politico_california.php [http://perma.cc/HWG5-DLH6] (indicating that because of a shrinking press corps in California, "[t]he elected officials feel like they're not being watched anymore").

[77] Steve Outing, *Journalism's Impact: Is It Becoming Less Than That of Social Media?*, MEDIA DISRUPTUS BLOG (March 24, 2012), http://mediadisruptus.com/2012/03/24/journalism-impact-and-social-media/ [http://perma.cc/WT3E-KYWH] ("Of course, the LA Times' Bell-corruption investigation points to the reason that journalism has less impact today than a few years ago, before thousands of journalists across the U.S. took buyouts or were laid off. Municipal officials' corruption in Bell had been going on for years, but a weakened press and no strong local news organizations allowed it to continue uncovered for a good long time."); *see* STEVE WALDMAN, FED. COMM. COMM'N, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 12 (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf [https://perma.cc/T2AU-8YLP] (suggesting that if even one journalist had regularly covered Bell city government, taxpayers may have saved the money taken by government officials).

[78] Jessica Bruder, *supra* note 46.

[79] *Id.*

[80] *See* Richard Pérez-Peña, *Tribune Company Seeks Bankruptcy Protection*, N.Y. TIMES (Dec. 8, 2008), http://www.nytimes.com/2008/12/09/business/media/09tribune.html?pagewanted=all (on file with the Utah Law Review).

[81] Tom Rosenstiel, *Where the News Comes From—And Why It Matters*, PEW RESEARCH CENTER (Sept. 25, 2009), http://www.pewresearch.org/2009/09/25/where-the-news-comes-from-and-why-it-matters/ [http://perma.cc/93DK-Z9GN]. At the time of the hearing, Rosenstiel was director of the Pew Research Center's Project for Excellence in Journalism. He is now the executive director of the American Press Institute.

great, and the newest watchdogs—digital-only outlets—are not yet making up for the shortfall.

III. THE FREEDOM OF INFORMATION ACT: THE HOPE AND THE REALITY

This year, FOIA celebrates its fiftieth anniversary. Pushed through Congress with the help of the press, the law theoretically opens the inner workings of government to inspection. And yet, the implementation of FOIA has long been fraught with delays, backlogs, and denials. Journalists' frustration with it today is perhaps more palpable than ever.

A. FOIA's History

Shining light on shadow was surely an aim of those who pushed for FOIA. In 1966, when it was passed, FOIA was groundbreaking. Only two other countries—Sweden and Finland—had anything like it, and neither country's law was as broad.[82] Under FOIA then, as today, any person could request agency records on any topic.[83] The person could be an individual or a corporation.[84] They did not even need to be a citizen. And they did not need to provide any explanation or justification for their demand. The law required agencies to promptly respond to requests for information unless disclosure would harm a recognized interest.[85] Those interests are codified in a series of exemptions.[86]

The law was, in part, a reaction to government secrecy during the Cold War.[87] In 1953, when John Moss, a freshman Congressman from Sacramento arrived in Washington, D.C., he determined that "[y]ou had a hell of a time getting any information."[88] Moss pushed for the formation of a congressional subcommittee to investigate government transparency, and for the next dozen years he advocated for what became FOIA.[89] Key to the passage of FOIA was the support of the newspaper industry.[90] In her article *Litigation, Legislation, and Democracy in a Post-Newspaper America*, RonNell Jones argues that a "review of FOIA's legislative history makes unmistakably clear that it was ushered into existence by a

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[82] *See* WENDY GINSBERG, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES 3 (2014).

[83] *Id.* at 1.

[84] 5 U.S.C. § 551(2).

[85] *Id.* § 552(a)(3)(A).

[86] *Id.* § 552(b).

[87] *History of FOIA*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/transparency/history-of-foia [http://perma.cc/L3PY-KJZW] (last visited Aug. 4, 2015).

[88] George Kennedy, *How Americans Got Their Right to Know: Getting Congress to Guarantee Access to Federal Information Through FOIA 30 Years Ago Was a Press Triumph*, JOHN E. MOSS MEMORIAL WEBSITE, www.johnmossfoundation.org/foi/kennedy.htm [http://perma.cc/H3CK-G57W] (last visited Aug. 4, 2015).

[89] *Id.*

[90] *Id.*

conglomeration of newspapers" that spent "immense amounts of energy, money, and persuasive influence" on the legislation.[91] This included everything from newspaper trade groups (like the American Society of Newspaper Editors) to wire services (like United Press International) to journalists from newspapers large (like *The Washington Post*) and small (like the *Oak Ridge Oakridger* and *Wenatchee Daily World*).[92] The bill's chief drafter, Jacob Scher, was a former journalist and professor at Northwestern University School of Journalism.[93]

Since even before FOIA became law, the executive branch has demonstrated its distaste for it. Not a single executive branch department or agency head supported the legislation.[94] President Lyndon B. Johnson signed it on his Texas ranch, without any of the legislators, lawyers, or journalists who had fought for it in attendance.[95] "LBJ had to be dragged kicking and screaming" to the signing ceremony, Bill Moyers, his press secretary at the time, has said.[96] According to Moyers, Johnson "hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality."[97]

While the original law lacked mechanisms to force agency compliance, in 1974, after the Watergate scandal, Congress added deadlines and related sanctions.[98] Under the amendments, an agency had ten working days to respond to FOIA requests and a one-time, ten-day extension in "unusual circumstances."[99] Congress also added fee waivers when the requested information could be viewed as "primarily benefitting the general public."[100] Also significant was the addition of an

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[91] Jones, *supra* note 2, at 600–02.

[92] 112 CONG. REC. 13,641–43 (1966) (statement of Rep. John E. Moss); Michael Doyle, *The Reporting Tool That Reporters Don't Use*, JOHN E. MOSS MEMORIAL WEBSITE, www.johnemossfoundation.org/foi/doyle.htm [https://perma.cc/8Y8G-GRTY] (quoting former Moss staffer Michael R. Lemov as saying "Moss' greatest allies were the press associations . . . . Without the press, he never would have gotten that bill").

[93] Jones, *supra* note 2, at 602.

[94] GINSBERG, *supra* note 82, at 3; Doyle, *supra* note 92 (stating that representatives of twenty-seven federal agencies testified in opposition to Moss's bill).

[95] Paul McMasters, *FOIA: It's Always There: Debated, Disliked, Sometimes Scorned, It Remains the Cornerstone of Openness*, QUILL, Oct. 1996, http://www.spj.org/foiabout.asp [http://perma.cc/TQ7C-874V]; *see also History of FOIA*, *supra* note 87 (noting that President Johnson did not hold a public event for the signing as he had for other major bills).

[96] Bill Moyers, *NOW Politics and Economy*, PUBLIC BROADCASTING SERVICE (Apr. 5, 2002), www.pbs.org/now/commentary/moyers4.html [http://perma.cc/39SN-V5EM].

[97] *Id.*

[98] *Veto Battle 30 Years Ago Set Freedom of Information Norms*, THE NAT'L SECURITY ARCHIVE (Nov. 23, 2004), http://nsarchive.gwu.edu/NSAEBB/NSAEBB142/index.htm [http://perma.cc/36NK-UVGN] [hereinafter *Veto Battle*].

[99] *Id.*

[100] *A Memorandum for the Executive Departments and Agencies Concerning the Amendments to the Freedom of Information Act (5 U.S.C. 552, Sometimes Referred to As Section 3 or the Public Information Section of the Administrative Procedure Act) Effected By P.L. 93-502, Enacted November 21, 1974 and Effective February 19, 1975*, U.S. DEP'T

attorneys' fees provision that awarded fees and costs to a party who had "substantially prevailed" in its FOIA litigation.[101]

Despite running on a platform of greater openness, President Gerald Ford vetoed the FOIA amendments at the recommendation of advisors, including Donald Rumsfeld (his chief of staff) and Antonin Scalia (head of the Justice Department's Office of Legal Counsel).[102] In his veto message he called the legislation "unconstitutional and unworkable."[103] He added that the ten-day deadline on agencies to determine whether to provide documents was "simply unrealistic in some cases" and that it was "essential that additional latitude be provided."[104] A short time later, after hundreds of newspapers editorialized for an override, Congress overrode Ford's veto.[105]

In repeated efforts to improve the disclosure process, Congress has amended FOIA five times since then, with the more recent amendments being the most significant.[106] In 1996, President Bill Clinton signed the Electronic Freedom of Information Act amendments.[107] These made clear that FOIA applied to records kept in an electronic format and required records to be made available in electronic format and digitally distributed.[108] Yet, due to "huge backlogs of requests" and "limited resources," the amendment doubled to twenty days the timeframe in which an agency must inform a requester of whether it will fulfill its request.[109]

Then, in 2007, finding that FOIA "has not always lived up to [its] ideals," Congress passed and President George W. Bush signed the OPEN Government

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OF JUSTICE, Feb. 1975, http://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia [http://perma.cc/6VUD-J8EB].

[101] An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub. L. 93-502 (1974).

[102] *Veto Battle*, *supra* note 98.

[103] 10 WEEKLY COMP. PRES. DOC. 1318, at 3 (Oct. 17, 1974), http://nsarchive.gwu.edu/NSAEBB/NSAEBB142/101774%20Veto%20Message.pdf [http://perma.cc/JTT6-4Z3B].

[104] *Id.*

[105] *Veto Battle*, *supra* note 98; COMM. ON GOV'T OPERATIONS, ET AL., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 441–47 (1975) (containing, as exhibits, numerous examples of such editorials).

[106] *See* H.R. REP. NO. 113-155, *supra* note 10, at 5 ("Since its enactment, FOIA has been amended multiple times in efforts to increase agency compliance with the requirements of the act and improve the process. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010.").

[107] Presidential Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 32 WEEKLY COMP. PRES. DOC. 1949 (Oct. 2, 1996), http://nsarchive.gwu.edu/nsa/foia/presidentstmt.pdf [http://perma.cc/Q293-2F2S] [hereinafter Presidential Statement].

[108] *Id.*; *History of FOIA*, *supra* note 87.

[109] Presidential Statement, *supra* note 107.

Act.[110] This amendment established the Office of Government Information Services, which serves as the FOIA "ombudsman," and imposed numerous reporting requirements on agencies to help assess their compliance with the law.[111] The amendments also provided a broader definition of the news media—one that could include freelance journalists and bloggers.[112]

And so, as FOIA was conceived as a tool that would be useful to journalists, as well as other citizens, Congress has attempted over the years to keep the law relevant and useful. Yet, frustration persists.

B. FOIA's Flaws

Open-government supporters, including many members of the press, feted an announcement that came on the first day of President Obama's first term.[113] In a memorandum to heads of executive departments and agencies, the President ordered that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."[114] Calling FOIA "the most prominent expression of a profound national commitment to ensuring an open Government," the President said that documents should not be withheld because "public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."[115] He also emphasized that disclosures should be "timely."[116]

The content of the announcement was perhaps not surprising; under President Clinton, a memo issued by Attorney General Janet Reno had also set forth a "presumption of disclosure."[117] Yet, it was still significant that this was one of President Obama's first official acts. At the time, in an interview with the *Los Angeles Times*, the general counsel for the National Security Archives, an open-government group, said of the directive: "This is big . . . . No president has done so

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[110] Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, § 2(5), 121 Stat. 2524, 2524.

[111] *Id.* §§ 8, 10.

[112] *Id.* § 3 ("Moreover, as methods of news delivery evolve . . . such alternative media shall be considered news-media entities.").

[113] *See* Hope Yen, *Advocates Praise Obama Move On Gov't Disclosure*, THE SAN DIEGO UNION-TRIB. (Jan. 21, 2009, 4:13 PM), http://www.sandiegouniontribune.com/news/2009/jan/21/obama-freedom-information-012109/ [http://perma.cc/DCF4-FN6W]; Clint Hendler, *Day One: New FOIA Rules*, COLUM. JOURNALISM REV. (Jan. 21, 2009), http://www.cjr.org/campaign_desk/day_one_new_foia_rules.php [http://perma.cc/7KNZ-7DQX].

[114] Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009), http://www.whitehouse.gov/the_press_office/FreedomofInformationAct [http://perma.cc/DC4A-A2DV].

[115] *Id.*

[116] *Id.*

[117] Attorney General Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act* 1 (Oct. 4, 1993), http://www2.gwu.edu/~nsarchiv/nsa/foia/reno93.pdf [http://perma.cc/WFS3-XB44].

much on the first day in office to make his administration transparent."[118] Yet today, open-government advocates are not so sanguine about this administration's follow-through. In its "History of FOIA," the Electronic Frontier Foundation writes: "Unfortunately, the Obama administration has fallen far short of the goals stated in the January 2009 memo, and in many ways has made the government more secretive."[119] Similarly, Daniel Metcalfe, director of the Department of Justice's ("DOJ") office monitoring the government's compliance with FOIA requests from 1981 to 2007 has said, "When it comes to implementation of Obama's wonderful transparency policy goals, especially FOIA policy in particular, there has been far more 'talk the talk' rather than 'walk the walk.'"[120]

The evidence substantiates this. Delays and backlogs persist.[121] Denials are routine.[122] Agencies have failed to keep up with the advancements in the law.[123] While between fiscal years 2010 and 2011, FOIA requests increased by 7.8%, agency backlog leaped to 20.8%, or 83,490 unanswered requests.[124] According to one congressional report, "[a]gencies have made efforts to reduce FOIA backlogs, but they continue to be a consistent problem."[125] This is, in part, a problem of resources. For example, after the Electronic Freedom of Information Act amendments were passed, funding to agencies was not measurably increased and so, many agencies do not have the funding they need to respond to routine requests much less comply with the requirements of those amendments.[126]

Ironically, some of the technological updates to the implementation of FOIA have made it possible to tell precisely how behind agencies are. For example, at the time of this writing, a search on Foia.gov (a site sponsored by the DOJ), indicated that the National Archives and Records Administration had ten pending FOIA

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[118] Peter Nicholas & Christi Parsons, *Obama to Start Tackling Economic, Military Issues*, L.A. TIMES (Jan. 22, 2009), http://articles.latimes.com/2009/jan/22/nation/na-obama22 [http://perma.cc/54V3-9J8M] (quoting Meredith Fuchs, general counsel of the National Security Archive).

[119] *History of FOIA*, *supra* note 87.

[120] Snyder & Ivory, *supra* note 10.

[121] H.R. REP. NO. 113-155, *supra* note 10, at 6.

[122] *See Testimony of Karen Kaiser, General Counsel, the Associated Press, on Behalf of the Sunshine in Government Initiative Before the Committee on the Judiciary United States Senate on "Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government,"* May 6, 2015, at 5, http://www.judiciary.senate.gov/imo/media/doc/05-06-15%20Kaiser%20Testimony.pdf [http://perma.cc/LXH8-7PXV].

[123] *See* Meredith Fuchs & Kristen Adair, *On the Sidelines of the Information Revolution: How the Freedom of Information Act Amendments of 1996 Failed to Transform Public Access*, 33 ADMIN. & REG. L. NEWS 12, 13–14 (Fall 2007).

[124] H.R. REP. NO. 113-155, *supra* note 10, at 6.

[125] *Id.*

[126] *See* Fuchs & Adair, *supra* note 123, at 13–14 (Fall 2007) (noting that "FOIA has been marginalized, underfunded, and at times ignored at many federal agencies"); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1027 (2008) (noting that "the stock of FOIA requests always exceeds the available resources to process them").

requests more than twelve years old.[127] The Department of Defense and the Central Intelligence Agency had ten requests more than eight and seven years old, respectively.[128] These agencies are not outliers. Nearly eighteen of the one hundred federal agencies listed have at least one request that has been pending for more than three years.[129] An examination of processing time for even requests categorized as "simple" shows that while certain agencies responded to such requests relatively quickly—in, for example, nine days for the Department of Commerce—twenty-six agencies were, on average, taking about three months to nearly seventeen months to respond.[130] Requests for expedited processing fared worse. Of the twenty-three agencies with expedited requests deemed "pending" at the time of this writing, only four had an average processing time of a month or less and eleven had average times of six months or more.[131]

In a demonstration of how delay can impact requests, Bloomberg News requested from fifty-seven agencies records related to the cost of travel in fiscal year 2011 for cabinet secretaries and top officials.[132] Only eight of those agencies (and one of the twenty cabinet-level agencies) responded to the request within the permitted twenty-day deadline.[133] The State Department told reporters that it would take more than a year to fill the request with respect to the travel records of Susan Rice, then-U.S. Ambassador to the United Nations.[134] Yet, the vast majority of reporters cannot wait a year to file a story. Beyond delay, agencies routinely and increasingly rely on exemptions to withhold documents.[135] A 2012 study of FOIA

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[127] *See* FOIA.gov, *supra* note 13 (go to FOIA.gov; click on the "Data" tab; then click "Create an Advanced Report" in the top, right-hand corner of the screen; select "Processing Time—Ten Oldest Requests" on the "I'd like a report on" dropdown menu; then create the report for all agencies for fiscal year 2014).

[128] *Id.*

[129] *Id.*

[130] *See id.* (select "Processing Time—Pending Requests" on the "I'd like a report on" dropdown menu; then create the report for all agencies for fiscal year 2014).

[131] *Id.* The longest average expedited request processing times for pending requests were from the U.S. Trade and Development Agency (one request processing for 1,084 days) and the Central Intelligence Agency (one request processing for 834 days). *Id.* Other agencies had far more numerous requests that were also taking significant amounts of processing time. For example, the Environmental Protection Agency had seventeen requests processing for an average of approximately 373 days and the Department of Treasury had twenty-two requests processing for an average of approximately 316 days. *Id.*

[132] Snyder & Ivory, *supra* note 10.

[133] *Id.* To be fair, while the article accuses agencies of "ignoring" the law, it is unclear whether the agencies failed to make a determination of whether the request would be fulfilled and to inform the requester of that determination or whether they failed to fulfill the request. Only the former is required within the twenty-day deadline. 5 U.S.C § 552 (a)(6)(A)(i) (2012). Regardless, the article indicates that in some instances, there were significant delays in fulfillment of the request. *See* Snyder & Ivory, *supra* note 10.

[134] Snyder & Ivory, *supra* note 10.

[135] Jack Gillum & Ted Bridis, *FOIA Requests Being Denied More Due to Security Reasons Than Any Time Since Obama Took Office*, HUFFINGTON POST, Mar. 11, 2013,

requests by the Associated Press showed that agencies' use of exemptions to deny requests outright had increased 22% from the previous year.[136]

In journalism circles there are more stories of FOIA requests delayed or unanswered. These delays or denials can have a serious impact. In 2008 Bloomberg News requested information related to the Federal Reserve's emergency loans to troubled banks.[137] When the Fed finally released the documents in 2011, after losing a lawsuit filed by the news organization, the documents revealed that the Fed had provided billions to Bank of America, JPMorgan, Citigroup, and others.[138] In the meantime, unaware of the Fed's support, Congress passed legislation benefitting the banks.[139] After learning what the records revealed, Senator Sherrod Brown (D-OH) said, "There are lawmakers in both parties who would change their votes now."[140]

And while FOIA is implemented through regulations promulgated by federal agencies,[141] numerous federal agencies still have not updated their regulations to comply with the OPEN Government Act of 2007.[142] It is perhaps not surprising then that in a 2014 evaluation of the performance of the fifteen federal agencies that receive the greatest number of FOIA requests, the Center for Effective Government gave "passing grades" to only eight of the agencies.[143] None received an overall "A" grade, and seven received an "F."[144] Putting the findings in context, the organization wrote that "[t]he low scores are not due to impossibly high expectations" since "[i]n each of three performance areas, at least one agency earned an A, showing that excellence is possible."[145]

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http://www.huffingtonpost.com/2013/03/11/foia-request_n_2851980.html [http://perma.cc/MY8Q-ZWKV].

[136] *Id.*

[137] GAVIN BAKER & SEAN MOULTON, CTR. FOR EFFECTIVE GOV'T, MAKING THE GRADE: ACCESS TO INFORMATION SCORECARD 2014 SHOWS KEY AGENCIES STILL STRUGGLING TO EFFECTIVELY IMPLEMENT THE FREEDOM OF INFORMATION ACT 15 (2014), http://www.foreffectivegov.org/files/info/access-to-information-scorecard-2014.pdf [http://perma.cc/QQ2Y-34TP].

[138] *Id.*; Bob Ivry et al., *Secret Fed Loans Gave Banks $13 Billion Undisclosed to Congress*, BLOOMBERG, Nov. 27, 2011, http://www.bloomberg.com/news/2011-11-28/secret-fed-loans-undisclosed-to-congress-gave-banks-13-billion-in-income.html [http://perma.cc/7BMS-54YP].

[139] Ivry et al., *supra* note 138.

[140] *Id.*

[141] *See, e.g.*, 5 U.S.C. § 552(a)(4)(A)(i) (2012).

[142] *National Security Archive FOIA Audit Highlights Delinquent Agencies; Praises Congressional and White House Plans for Updated Regulations*, NAT'L SEC. ARCHIVE (Mar. 14, 2014), http://nsarchive.gwu.edu/NSAEBB/NSAEBB460/ [http://perma.cc/XRE8-JYVP]. The 2014 audit by the National Security Archive, an open government group, found that three of the seventeen agencies examined had regulations that predated the 1996 Electronic Freedom of Information Act Amendments. *Id.*

[143] BAKER & MOULTON, *supra* note 137, at 1.

[144] *Id.* at 7.

[145] *Id.* at 1.

In addition to journalists, politicians have bemoaned FOIA's inability to deliver. [146] A recent congressional report stated that despite amendments, "significant problems persist."[147] Regularly, legislators introduce bills attempting to enhance agency accountability, empower those who oversee FOIA, and generally streamline the process. [148] For example, a bill that passed the House of Representatives in 2014, but did not become law, would have, among other things, required agencies to post more information online in accessible formats, strengthened the office of the FOIA ombudsman, placed deadlines on agencies to update their FOIA regulations, and codified the presumption of disclosure that President Obama and then-Attorney General Eric Holder have said should be the standard.[149] In addition, President Obama has proposed various reforms aimed at reducing backlogs and processing times and increasing efficiency. [150] Yet, no recently proposed overhauls have passed, and FOIA-watchers have said that thus far, "changes in administration policy actually have little effect on agency practice."[151]

The frustration with FOIA and its implementation is longstanding and chronic. "My experience is that the FOIA simply doesn't work most of the time for journalists," said Max Jennings, the editor of the *Dayton Daily News*, in an interview twenty years ago related to his paper's lawsuit in response to a denial of records from the Department of Defense. [152] He continued: "There are few news organizations and reporters who have the patience, money and determination to work through what seems an inevitable series of appeals, requests and other roadblocks."[153] Today, journalists are saying much the same thing. In 2014, the president of the Society for Professional Journalists, David Cuillier, told the Senate Judiciary Committee that he had "never seen journalists so frustrated, cynical, and angry when it comes to accessing federal records. And for good reason . . . [a]gencies are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy, not openness."[154] In 2015, the

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[146] *See* H.R. REP. NO. 113-155, *supra* note 10, at 5.

[147] *Id.*

[148] *See, e.g.*, FOIA Improvement Act of 2014, S. 2520, 113th Cong. (2014).

[149] *Id.*; *see* H.R. REP. NO. 113-155, *supra* note 10, at 3.

[150] THE OPEN GOV'T P'SHIP, SECOND OPEN GOVERNMENT PLAN FOR THE UNITED STATES OF AMERICA 3–4 (Dec. 5, 2013), http://www.whitehouse.gov/sites/default/files/docs/us_national_action_plan_6p.pdf [http://perma.cc/NTN6-6B2Y].

[151] Amy Bennett, Editorial, *President Obama Can (and Should) Embrace the FOIA Improvements Act*, ROLL CALL, July 2, 2014, http://www.rollcall.com/news/President-Obama-Can-and-Should-Embrace-the-FOIA-Improvements-Act-Commentary-234413-1.html [http://perma.cc/DPQ6-JV5Y].

[152] McMasters, *supra* note 95.

[153] *Id.*

[154] *Testimony of Dr. David Cuillier, Director, Associate Professor The University of Arizona School of Journalism, President, Society of Professional Journalists, on Behalf of the Sunshine in Government Initiative on "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age" Before the United States Senate Judiciary Committee*, Mar. 11, 2014, at 4,

general counsel for the Associated Press, Karen Kaiser, told the same committee: "Non-responsiveness is the norm. The reflex of most agencies is to withhold information, not to release, and often there is no recourse for a requester other than pursuing costly litigation."[155] She added, "This is a broken system that needs reform. Simply stated, government agencies should not be able to avoid the transparency requirements of the law in such continuing and brazen ways."[156] And, as technology speeds ahead and the news cycle spins faster, journalists' frustration with the law is likely only to grow.

In some senses, the frustration with FOIA is inevitable. As it is written, FOIA contains no deadlines by which agencies must turn over information. Rather, agencies have twenty business days from the receipt of a request to "determine . . . whether to comply."[157] This time period may be extended in "unusual circumstances."[158] Even if agencies were to comply with the twenty-day provision and provide information shortly thereafter, journalists could still be waiting, optimistically, a month. This is a journalistic eternity. The news may become stale. A competitor may find a faster way to obtain the same information. An editor may not want the reporter to commit to waiting around for something and may push them on to the next thing. The reporter may decide herself that simply drafting and sending the request—or doing enough reporting on the story to even know what to ask for in the request—is not worthwhile given how long it is likely to take the agency to respond. And it is not solely a matter of impatience, but, as noted, cost. The more time that is sunk into a story, the more expensive it likely is to produce. Relying on FOIA can be an expensive proposition.

And so, while in 1966 FOIA may have been groundbreaking, today it no longer is. As a sign of just how antiquated it has become, in a recent assessment of the strength of right to information laws in nearly one hundred countries, the United States came in at forty-fifth—behind countries like Yemen, Kyrgyzstan, and Tunisia.[159] When several years ago President Obama received an award for his commitment to open government, the presentation of the award was closed to the press.[160]

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http://www.fas.org/sgp/congress/2014/031114cuillier.pdf [http://perma.cc/2UB8-U5MA].

[155] Kaiser, *supra* note 122, at 4.

[156] *Id.*

[157] 5 U.S.C. § 552(a)(6)(A)(i).

[158] *Id.* § 552(a)(6)(B)(i).

[159] Ctr. for Law and Democracy and Access Info, *Global Right to Information Rating: Country Data*, http://www.rti-rating.org/country-data [http://perma.cc/E4RM-ELHC] (last visited Oct. 22, 2015); Ctr. for Law and Democracy and Access Info, RTI Rating Data Analysis Series: Overview of Results and Trends 1–2 (Sept. 28, 2013), http://new.rti-rating.org/wp-content/uploads/2014/12/Report.13.09.Overview-of-RTI-Rating.pdf [http://perma.cc/9PMN-ATYT] (noting that the study is limited to measuring the legal framework and does not measure quality of implementation).

[160] Snyder & Ivory, *supra* note 10.

IV. HOW TO PREFERENCE THE PRESS: PRECEDENT AND PROPOSALS

While journalists are chronically frustrated and disappointed with aspects of FOIA, the law is neither useless nor beyond repair. As will be argued later in this Article, FOIA provides a unique means of preferencing the press.

While there is some historical basis for such preferences outside the context of FOIA, they are limited. The law—be it constitutional, tort, criminal, or other area—generally does not treat journalists or news organizations differently than citizens and other businesses. Recognizing that the fourth estate needs fortification, many proposals have been put forth, but they are flawed. They rely in large part on throwing money at the problem or reinterpreting constitutional doctrine.

A. History of Preferences

The relationship between the American press and government has always been, in part, a symbiotic one. While investigative reporters might bristle at this assertion, the "free" press has never been wholly free. Rather, the federal government has played a role in bolstering it almost since the founding of the Republic.[161] This is how it was intended, according to John Nichols and Robert W. McChesney, cofounders of the nonprofit organization Free Press: "The first generations of Americans never imagined that the market would provide sound or sufficient journalism. The notion was unthinkable."[162] Instead, government helped ensure that there was journalism and that it found its way to the people. This notion was grounded in sound economic theory. Economists would say that the market never produces public goods in sufficient quantities.[163] Accountability journalism is just one example.[164]

One method by which government ensured that news was getting to the people was the establishment of a federal postal system. A key function of the early post office was as a conduit for getting newspapers to newly minted American citizens. Legislators knew that key to the success of a fledgling democracy was sending out word of what was happening in the capital.[165] And so, when Congress passed the Postal Service Act of 1792 it included postal subsidies for newspapers so generous that it was far cheaper to mail a newspaper than it was to send a letter.[166]

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[161] Nordenson, *supra* note 5 (noting that certain journalists and academics point out that "government has *always* played a role in American journalism") (emphasis in original).

[162] McChesney & Nichols, *supra* note 5.

[163] *See* Hamilton, *What's the Incentive to Save Journalism?*, *supra* note 70, at 280.

[164] *See id.* at 278.

[165] *See* KEVIN R. KOSAR, CONG. RESEARCH SERV., R40162, POSTAGE SUBSIDIES FOR PERIODICALS: HISTORY AND RECENT DEVELOPMENTS 3 (2009) (stating that at the time of the Postal Office Act of 1792, newspapers were seen as a "means to provide information to the geographically dispersed members of the public so they might ably discharge their duties as citizens").

[166] MCCHESNEY & NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM, *supra* note 6, at 124–25.

Remarkably, postal subsidies for the press continue to this day—a sure sign that the federal government needs to rethink the means of its support of the press.[167]

In addition to postal subsidies, since the eighteenth century the government has found other ways to subsidize the press. These include requiring certain paid public notices,[168] providing copyright protections,[169] granting state sales-tax exemptions and other tax breaks,[170] and permitting news organizations to attain nonprofit status.[171] The federal government also provides some other subsidies for the news. It (as well as state and local governments and public universities) funds public broadcasting (including the Public Broadcasting Service and National Public Radio) at a cost in 2010 of approximately $1.1 billion.[172] Yet, while the government does continue to provide these subsidies, there is significantly less public financial support of the press than there has been at other times in our history. If the United States government were subsidizing journalism today at the same level of gross domestic product that it did in the 1840s, it would be spending approximately $30 billion to $35 billion annually.[173]

And beyond these limited benefits that it provides to the press, federal law generally does not grant the press as an institution, or reporters as its members, special rights or privileges. Rather, a news organization is treated as any other business and a journalist as any other citizen.[174] Take, for example, constitutional law. The late constitutional law scholar Bernard Schwartz wrote that Chief Justice Earl Warren, before deciding a 1965 case regarding television in courtrooms, told his law clerk that the "right of the news media . . . is merely the right of the

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[167] *Id.* at xxviii (noting that those subsidies "have diminished in real terms to only a small fraction of their nineteenth-century levels").

[168] GEOFFREY COWAN & DAVID WESTPHAL, PUBLIC POLICY AND FUNDING THE NEWS 9–10 (January 2010) (indicating that in 2000, the National Newspaper Association estimated that public notices accounted for 5 to 10% of all community newspaper revenue).

[169] FED. TRADE COMM'N, *supra* note 4, at 6 (explaining that "news stories as written and news images are protected by copyright, but the information reported in the news stories is not").

[170] *Id.* at 16 ("Federal tax law allows newspapers to deduct their expenditures to 'maintain, establish or increase circulation' in the year these expenditures are made . . . . Print publications' ability to deduct these costs as a current expense increases cash flow and provides approximately $100 million in tax subsidies to newspapers and magazines.").

[171] Downie, Jr. & Schudson, *supra* note 50, at 81.

[172] MCCHESNEY & NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM, *supra* note 6, at xxviii.

[173] *Id.* at xxvii. The federal government spends about $420 million per year, or $1.43 per person, on public media. Craig Aaron, *Public Media to the Rescue?*, *in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 340, 346. Finland spends more than seventy times this amount and Denmark more than eighty times it. *Id.*

[174] *See* West, *Press Exceptionalism*, *supra* note 3, at 2436.

public."[175] The sentiment that the press holds no privileged status has been repeated in numerous decisions in the last fifty years.[176]

One of the most significant of these is *Branzburg v. Hayes*.[177] In *Branzburg*, the only time the Supreme Court has considered whether newsgatherers should be permitted to protect the confidentiality of their sources, the Court found no constitutional basis for such a privilege.[178] The Court determined that reporters have no greater claim to the benefits of the free speech clause than any other citizen.[179] Subsequent to *Branzburg*, some federal circuit courts have created qualified privileges for reporters,[180] but others have refused to provide such protections.[181]

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[175] SCHWARTZ, *supra* note 19, at 30.

[176] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."). In another case decided the same year, *Houchins v. KQED, Inc.*, the court reversed a Ninth Circuit decision enjoining prison officials from denying news media representatives reasonable access to a prison and the ability to interview inmates. 438 U.S. 1, 9 (1978). Chief Justice Burger wrote in an opinion joined by Justices White and Rehnquist that "[t]he public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Id.* at 3, 9. Yet, a concurrence written by Justice Stewart that was the controlling opinion in this 4-to-3 case, gave the press, in effect, an enhanced right of access over the public. *See infra* note 203 and accompanying text. (Justices Marshall and Blackmun did not participate in deciding the case. *Houchins*, 438 U.S. at 16.)

[177] 408 U.S. 665 (1972).

[178] *Id.* at 667; RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1222 (2013).

[179] 408 U.S. at 703–05; SCHWARTZ, *supra* note 19, at 136.

[180] *See, e.g.*, Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 35 (2d Cir. 1999) (noting that journalists have a qualified privilege that protects both confidential and nonconfidential materials); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (finding that a reporter may "claim his privilege in relationship to particular questions which probe his sources").

[181] *See, e.g.*, United States v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013) ("There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source."); McKevitt v. Pallasch, 339 F.3d 530, 532–33 (7th Cir. 2003) (rejecting a federal common law reporter's privilege, saying: "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist") (citations omitted).

Congress has likewise generally refused to extend special protections beyond the limited ones noted above to news organizations or reporters. Again, the absence of a federal shield law serves as a prime example. While forty-nine states and the District of Columbia have some form of reporter's privilege that protects a reporter from being required to disclose confidential information, there is no statutory federal reporter's privilege.[182] This means that there is no uniform standard for the level of protection a reporter would receive if subpoenaed by a federal entity. Despite strong support from news agencies,[183] and even the support of the Obama administration,[184] efforts to pass such legislation have failed.

And so, while there is some history of granting preferences to the press, it is limited. Although a free press is important enough to democracy that Joseph Pulitzer (the founder of the journalism prize that bears his name) said, "Our Republic and its press will rise or fall together,"[185] journalists are still, in the eyes of the law, largely given no greater protections than those they cover.[186]

B. Proposals for Protecting the Watchdog

As part of the conversation that has evolved in the last two decades about how to save newspapers, many academics, journalists, and politicians have discussed the potential role of government in the rescue. A large number of these proposals have focused on how government can subsidize public-accountability journalism. Some call for direct government funding.[187] For example, one proposal would have the federal government give citizens a $200 voucher annually that citizens could then pass along to news organizations to pay for news.[188] Another proposal calls for a consumer electronics tax, the proceeds of which would be put into a public trust to

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[182] John Meyer, *Sources and Secrets – Background Brief* (Mar. 21, 2014), https://s3.amazonaws.com/s3.documentcloud.org/documents/1088951/sources-and-secrets-background-brief-unabridged.pdf [https://perma.cc/ZJP5-QQX3].

[183] Press Release, Newspaper Ass'n of Am., *75 Media Companies and Journalism Organizations Call for a Senate Floor Vote on the Federal Shield Bill to Protect Journalists' Confidential Sources* (June 11, 2014), http://www.naa.org/News-and-Media/Press-Center/Archives/2014/Shield-Law-Senate-Vote-Coalition-Letter.aspx [http://perma.cc/QY6T-DVT2].

[184] Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES (May 15, 2013), http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html [http://perma.cc/R9DW-KRM7].

[185] Seymour Topping, *Pulitzer Biography*, THE PULITZER PRIZES, http://www.pulitzer.org/page/13988 [http://perma.cc/P4D2-MBNN] (last visited Oct. 22, 2015).

[186] West, *Press Exceptionalism*, *supra* note 3, at 2436.

[187] *See, e.g.*, McChesney & Nichols, *Down the News Hole*, *supra* note 60, at 111–12; MCCHESNEY & NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM, *supra* note 6, at 201–06.

[188] *See* MCCHESNEY & NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM, *supra* note 6, at 201–02.

be administered by the Corporation for Public Broadcasting.[189] Bruce Ackerman has suggested an "internet news voucher."[190] Under this proposal, "[i]nternet users click a box whenever they read a news article that contributes to their political understanding."[191] The votes would then "be transmitted to a National Endowment for Journalism, which would compensate the news organization"—the more clicks, the more money.[192]

Beyond direct funding, others have suggested tax benefits. For example, one proposal is for "a tax credit to news organizations for every journalist they employ."[193] The money would then be used to help pay for the salaries of those journalists.[194] Others propose making it easier for news organizations to get nonprofit status.[195] Currently, practicing journalism is not an activity that confers nonprofit status on an organization under section 501(c)(3) of the Tax Code. Journalism organizations instead must convince the Internal Revenue Service that their primary activity is education.[196] Some, like Leonard Downie, Jr., the former executive editor of *The Washington Post*, have argued for the law to be changed so that it is clear that "any independent news organization substantially devoted to reporting on public affairs" could become a nonprofit or low-profit limited liability corporation serving the public interest.[197] Legislation that would have made it easier for news organizations to get nonprofit status—the Newspaper Revitalization Act of 2009—died in committee.[198]

Common to all of these proposals is the problem of conflict of interest. The government is paying for the press that is supposed to be watchdogging it. One of the most convincing opponents of such proposals is Harvard Law professor Yochai Benkler who, in reacting to the voucher proposal and Ackerman's click-and-fund

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[189] Aaron, *supra* note 173, at 346–48.

[190] Bruce Ackerman, *One Click Away: The Case for the Internet News Voucher*, *in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 299, 303.

[191] *Id.*

[192] *Id.* Ackerman further argues that "there *is* a specially compelling constitutional case for *public* funding for journalism" since, he says, "the future of journalism depends on its capacity to make the case for a vibrant fourth estate as a means for safeguarding the integrity of public opinion in a system dominated by a powerful presidency." *Id.* (emphasis in original). Yet another proposal involves throwing federally-funded manpower at the problem. In a 2010 report by the Federal Trade Commission, the agency noted the possibility of establishing a "'journalism' division" within AmeriCorps, a federal program that places young people in community-based organizations. FED. TRADE COMM'N, *supra* note 4, at 17.

[193] *See* FED. TRADE COMM'N, *supra* note 4, at 18.

[194] *Id.*

[195] *See* Downie, Jr. & Schudson, *supra* note 50, at 81.

[196] Justin Ellis, *A Change in the IRS Process for Granting Tax-Exempt Status Could Be a Boon to Nonprofit News*, NEIMAN LAB (July 16, 2014, 2:26 PM), http://www.niemanlab.org/2014/07/a-change-in-the-irs-process-for-granting-tax-exempt-status-could-be-a-boon-to-nonprofit-news/ [http://perma.cc/LT36-VRNW].

[197] Downie, Jr. & Schudson, *supra* note 50, at 81.

[198] S. 673, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/senate-bill/673/all-actions [https://perma.cc/KK8R-AL4M].

proposal, wrote that "[a] solution that relies as its core strategic anchor on government funding of media risks, to a very high degree, finding itself in bed with an incumbent-protection regime."[199] For this reason, even though there has always been some government support of the "free" press,[200] it is preferable to look for a solution that does not have such a strong potential for conflict of interest. "A financially compromised press," says Paul Starr, a Pulitzer Prize-winning author and professor at Princeton, "is more likely to be ethically compromised."[201]

Beyond legislative or executive branch action, judges and scholars have proposed ways in which the courts could preference the press. This would involve a reinvigoration of the free press clause of the First Amendment and a constitutionally privileged position for the press.[202] As noted, Justice Stewart advocated for this in his 1974 Yale Law School speech in which he argued that "the Free Press Clause extends protection to an institution."[203] Four years later, in *Houchins v. KQED, Inc.*,[204] Justice Stewart returned to this idea and his concurring opinion in that case—which was, in effect, the controlling opinion in the 4 to 3 decision—is perhaps the closest the Supreme Court has come to providing any constitutional preference for the press.[205]

In *Houchins*, the Court reversed a Ninth Circuit decision enjoining a county sheriff from denying journalists the ability to inspect and photograph a prison where an inmate had recently committed suicide. Framing the question presented as "whether the news media have a constitutional right of access to a county jail, over and above that of other persons . . . ."[206] the Court concluded that it did not.[207] In his opinion joined by Justices White and Rehnquist, Chief Justice Burger wrote that nothing in the Court's precedents established that the news media had any "special privilege of *access* to information."[208] Justice Stewart began his concurring opinion by agreeing that "[t]he Constitution does no more than assure the public and the press equal access once the government has opened its doors."[209] Yet, importantly, in Justice Stewart's view, providing "equal access" meant taking into account the "practical distinctions between the press and the general public" and the mission of

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[199] Yochai Benkler, *Giving the Networked Public Sphere Time to Develop*, *in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, *supra* note 36, at 225, 234.

[200] Nordenson, *supra* note 5.

[201] Starr, *supra* note 48, at 21.

[202] West, *Press Exceptionalism*, *supra* note 3, at 2450–53, 2462–63; U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, *or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

[203] SCHWARTZ, *supra* note 19, at 131.

[204] 438 U.S. 1 (1978).

[205] *See id.* at 17–18 (Stewart, J., concurring).

[206] *Id.* at 3.

[207] *Id.* at 15–16.

[208] *Id.* at 10 (emphasis in original).

[209] *Id.* at 16.

the press to enlighten citizens.[210] As a result, according to Justice Stewart, access restrictions that would not be objectionable if imposed on ordinary members of the public could be unreasonable if applied to journalists "who are there to convey to the general public what the visitors see" if those restrictions "impede effective reporting without sufficient justification."[211] Accordingly, he agreed with the district court's finding that the press should have been given access to the jail "on a more flexible and frequent basis" than other members of the public "if it was to keep the public informed" and that journalists should have been permitted to use cameras and recording equipment.[212]

The sentiment that the press might be due special protection under the First Amendment was recently resurrected in Justice Stevens's dissent in *Citizens United v. Federal Election Commission*.[213] There, he stated that the textual and historical evidence behind the press clause "suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status . . . ."[214] Justice Scalia countered: "It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish."[215] Yet, the debate about the press clause went no further, and the Court has not revisited it since.

Some scholars, however, continue to advocate for a reinvigoration of the press clause. Sonja R. West argues in her articles *Awakening the Press Clause* and *Press Exceptionalism* that the Court should cease regarding the press clause as superfluous to the speech clause and instead recognize that it was "designed to protect speakers who fulfill specific and important 'press' functions that differ from garden-variety speech values."[216] As such, she argues, the press clause could serve as a fount for enhanced newsgathering protections, including rights of access and protection from

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[210] *Id.* at 16–17. Justice Stewart went on to write that the existence of separate speech and press clauses is "no constitutional accident, but an acknowledgement of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." *Id.* at 17.

[211] *Id.* at 17.

[212] *Id.* at 18.

[213] 558 U.S. 310 (2010); *see* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1026 (2011) (describing the debate in *Citizens United* between Justices Stevens and Scalia).

[214] *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

[215] *Id.* at 390 n.6 (Scalia, J., concurring).

[216] West, *Press Exceptionalism*, *supra* note 3, at 2442; *see also* West, *Awakening the Press Clause*, *supra* note 213, at 1034 ("One seemingly reasonable way to read the two clauses as having different meanings is to conclude that the Speech Clause and the Press Clause together provide that 'individuals have the right to disseminate their views as well as to voice them.'") (citation omitted) (internal quotation marks omitted).

searches and forced testimony.[217] Yet, there is little sign that the Court is poised to interpret the First Amendment in this way.

Thus, while precedent for preferencing the press exists, and there are theories about how best to do it, these theories have significant shortcomings.

V. USING FOIA TO PREFERENCE THE PRESS

While FOIA may be a perpetual source of aggravation and disappointment to many journalists, it also contains the seed for giving the press something that it needs: the ability to get government records faster. FOIA provides for expedited processing. Yet, as it stands, agency implementation of the expedited processing provision suffers from much of the same dysfunction as the implementation of FOIA generally. And as with the broader law, there are some fundamental problems with the expedited processing provision itself. Here, the Article proposes several ways of revising and reinterpreting FOIA and its expedited processing provision to provide a tangible benefit to the press.

A. Why the Focus Should Be on FOIA

Providing legal preferences to journalists through FOIA has certain advantages that the proposals from academics, journalists, and politicians described earlier do not. First, it would not require a shift in constitutional jurisprudence. We need not convince the Supreme Court that the free press clause needs reinvigoration and that the First Amendment confers preferences on the press and journalists.

Second, animating FOIA is the belief that government action must be exposed and subject to scrutiny to preserve a healthy democracy. As the Third Circuit has held, "the enduring beliefs underlying freedom of information laws" are "that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens."[218] These are the same principles and goals that underlie accountability journalism and the concept of the fourth estate.

Third, it is old news that FOIA is in need of an overhaul.[219] Giving journalists preferences under the law might jumpstart change. The law was intended as a way

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[217] *See* West, *Press Exceptionalism*, *supra* note 3, at 2445; West, *Awakening the Press Clause*, *supra* note 213, at 1043–45. Schwartz similarly says it is possible that the First Amendment was intended to memorialize the Fourth Estate conception of the press and that "[i]f that is true, freedom of the press is not limited to the freedom of expression otherwise guaranteed by the First Amendment." *See* SCHWARTZ, *supra* note 19, at 134. Instead, he says, "[t]he press becomes a protected institution and the First Amendment becomes the instrument that enables the press to perform its institutional role." *Id.* As Schwartz also points out, "[i]f this was the intent behind the First Amendment, it has in large part been frustrated by the Supreme Court decisions." *Id.*

[218] Pansy v. Borough of Stroudsburg, 23 F.3d 772, 792 (3d Cir. 1994).

[219] *See supra* Part III.B for a discussion of long-standing complaints about FOIA.

to shine light on the inner workings of government,[220] and we know public records are a critical means for journalists to get information to further their investigative reporting.[221] FOIA regularly makes important investigative work possible. Yet, as has been described, despite the promise of FOIA, journalists also routinely avoid using it because of agencies' repeated and known failures to disclose information quickly and completely.[222] There are an unknown number of stories that never get investigated or written because agencies would simply take too long to provide the requested information or would never provide it at all. Thus, if FOIA could be updated in a way that would improve transparency, it might help finally bring the law closer to achieving the goals that John Moss and journalists had when they pushed for its passage.[223]

Fourth, an improved preference for the press through FOIA could be tailored such that it would benefit those journalists who are engaging in the fourth estate's traditional role as watchdog. Those journalists who are requesting government records through FOIA and planning to disseminate what they learn are almost always engaging in accountability journalism.

Fifth, it is possible that this proposal would be cheaper than the others outlined above. Of course, subsidies could vary wildly in cost, but, as noted, some Scandinavian countries spend seventy to eighty times what the United States does

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[220] GINSBERG, *supra* note 82, at 2.

[221] For example, the Society for Professional Journalists posts a roundup of stories generated by FOIA or state open records laws at http://blogs.spjnetwork.org/foi/ [http://perma.cc/7QGR-G4VR] (last visited Nov. 15, 2015). *See* FEDERAL COMM. COMM'N, *supra* note 77, at 205 (noting that in 2001, the Society for Professional Journalists looked at four thousand individual news stories in twenty different news outlets and found that one out of five print stories was based on public records).

[222] *See Response Times*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, at http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times [http://perma.cc/A623-S9X6] ("Time and again, requesters find that their greatest obstacle to successfully using FOIA is delays in processing requests. Although the statute has always required agencies to respond to FOIA requests by granting or denying them (not just acknowledging them) within a short time frame, few agencies have consistently adhered to the time limits. For journalists, the nearly routine failure of agencies to provide timely access to records has triggered the need to go outside the Act and get information from sources who may have seen the records in question.").

[223] John E. Moss, *Clarifying and Protecting the Right of the Public to Information* (June 20, 1966), http://www.johnemossfoundation.org/foi/cr_JEM.htm [http://perma.cc/YA58-2NWP] (referencing statement by Honorable John E. Moss at Congressional Record on June 20, 1966). In urging his fellow representatives to pass FOIA in 1966, Moss said to them that "[i]nherent in the right of free speech and of free press is the right to know. It is our solemn responsibility as inheritors of the cause to do all in our power to strengthen those rights—to give them meaning. Our actions today in this House will do precisely that." *Id.* Moreover, in a 2011 report, the Federal Communications Commission acknowledged that greater transparency would allow journalists to better to their job and to inform citizens. *See* FEDERAL COMM. COMM'N, *supra* note 77, at 350 ("Greater openness by government—at all levels—can make it easier for Americans to inform themselves and for both citizen and professional reporters to hold institutions accountable.").

to support the media.[224] Rather than providing money, this proposal would provide information, another key element in the news equation.[225] Certainly, agency efforts to provide more requesters with expedited access to information would have a cost, and these efforts may take resources from other agency activities. Yet, it is still possible that doing so would be less expensive than subsidizing the entire news industry

Finally, as is described in detail in the next section, FOIA already has the seed of preference for journalists. Rather than requiring a shift in First Amendment jurisprudence, codifying a preference—presumptively expedited access for the press—would merely require members of Congress to amend the statute and require agencies to amend their regulations. As has been demonstrated, Congress has repeatedly shown itself willing to overhaul FOIA, and many officials still publicly acknowledge how much more work must be done to make the law function better.[226] Thus, for all of these reasons—policy, history, economics, workability—FOIA is a good vessel for a preference.

B. A Basis for Preference Within FOIA

In two small ways, FOIA already arguably provides journalists with preferences. One of these, which will not be discussed in any detail here, is a fee waiver for duplication of documents.[227] The other is potentially far more significant. It is a provision for granting expedited processing of requests.[228] Under FOIA, a reporter may be able to obtain information faster if she can demonstrate a "compelling need" for that information.[229] FOIA defines "compelling need" as occurring when:

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[224] *See* Aaron, *supra* note 173, at 346.

[225] *See* FEDERAL COMM. COMM'N, *supra* note 77, at 352. In discussing how to supplement the lack of "accountability reporting" being done by journalists, the Federal Communications Commission advocates helping nonprofit news operations. In doing so it says that the "main focus of government policy should not be providing the funds to sustain reporting but rather helping create conditions under which nonprofit news operations can gain traction." *Id.*

[226] *See* Press Release, U.S. Sen. Patrick Leahy, Conryn & Leahy Introduce FOIA Legislation (Feb. 2, 2015), https://www.leahy.senate.gov/press/cornyn-and-leahy-introduce-foia-legislation [https://perma.cc/G6VW-VXNP] (quoting Sen. Charles Grassley as saying "federal agencies continue to find creative ways to avoid the level of transparency that FOIA was designed to foster. This bill takes an important step to ensure that agencies won't be able to hide behind an exemption solely to protect their public image").

[227] 5 U.S.C. § 552 (a)(4)(A)(ii)(II). Agencies need not provide records to reporters free of charge, but if the requester is a "representative of the news media," and the "records are not sought for commercial use," the law mandates that "fees shall be limited to reasonable standard charges for document duplication." Journalists are not alone, here; educational or "noncommercial scientific institution[s]" also are eligible for a fee waiver. *See id.*

[228] *Id.* § 552(a)(6)(E).

[229] *See id.*

> a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;" or . . .
> *with respect to a request made by a person primarily engaged in disseminating information*, [there is] urgency to inform the public concerning actual or alleged Federal Government activity.[230]

In other words, where a journalist is engaged in public-accountability journalism—at least with respect to a federal government issue—and something pressing is afoot, she should have expedited access to documents.

Yet, in order to make this possible, agencies need an efficient means of determining which requests are compelling and urgent and who is a "person primarily engaged in disseminating information."[231] Agency regulations elaborate on the standards and perhaps help to provide some answers. For example, the DOJ and several other agencies' regulations provide for expedited processing when there is "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."[232]

Agencies have also taken the opportunity to describe what would qualify as a compelling or urgent need for the information.[233] For example, the State Department indicates that the information is needed urgently if it:

> has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. Information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the breaking nature of the story.[234]

The Departments of Defense and Interior have regulations with almost identical language.[235] Other agency regulations are narrower. For example, the Internal Revenue Service states:

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[230] *Id.* § 552(a)(6)(E)(v) (emphasis added).

[231] *See id.*

[232] 28 C.F.R. § 16.5(e)(1)(iv) (2014); *see* 28 C.F.R. § 802.8(a)(2) (2014) (regulation for the Court Services and Offender Supervision Agency for the District of Columbia); *see also* 12 C.F.R. § 1202.10(a)(4) (2014) (regulation for the Federal Housing Finance Agency, which, in pertinent part, is virtually identical to the DOJ's regulation).

[233] FOIA requires a "compelling" need. Some agency regulations, like the Department of State and Department of Defense go on to indicate that a "compelling need" exists where a requester can demonstrate the information is "urgently needed." The regulations then define "urgently needed." *See* 22 C.F.R. § 171.12(b) (2011); 32 C.F.R. § 286.4(d)(3)(ii) (2014).

[234] 22 C.F.R. § 171.12(b)(2)(i) (2011).

[235] 32 C.F.R. § 286.4(d)(3)(ii)(A) (2014); 43 C.F.R. § 2.20(a)(2)(iii–iv) (2014).

> The standard of urgency to inform requires that the records requested pertain to a matter of current exigency to the American public, beyond the public's right to know about government activity generally, and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public.[236]

Some agency regulations further preference journalists who are full-time employees of a news organization by presuming they qualify as a "person primarily engaged in disseminating information to the public."[237] For example, under the Environmental Protection Agency regulations, only someone who is "*not* a full-time member of the news media" needs to establish that her "primary professional activity or occupation is information dissemination."[238] Other agencies have very similar presumptions, albeit worded in a slightly weaker fashion.[239] For example, the State Department's regulations indicate that "[n]ews media requesters would normally qualify" as "an individual primarily engaged in disseminating information" but that "other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public . . . ."[240]

Yet, while this provision for expedited processing exists, it has been of little use to anyone, much less journalists. As noted, the same dysfunction that exists in the administration of FOIA generally and was discussed in Part III.B also exists in the administration of this specific provision. In 2008, federal agencies denied 53% of the requests made for expedited processing.[241] By 2013, of the 7,818 requests made, 6,689 were denied. That is 86% of the requests.[242] In 2014, 87% of requests were rejected.[243] In one recent example of a denial, the Centers for Disease Control

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[236] 26 C.F.R. § 601.702(c)(6)(B) (2015).

[237] *See, e.g.*, 40 C.F.R. § 2.104(e)(3) (2009). Similarly, the Department of Interior regulations state: "If you are not a full time member of the news media, to qualify for expedited processing here, you must establish that your main professional activity or occupation is information dissemination, although it need not be your sole occupation." *See* 43 C.F.R. § 2.20(a)(2)(ii) (2014).

[238] 40 C.F.R. § 2.104(e)(3) (2009) (emphasis added).

[239] *See* 22 C.F.R. § 171.12. Regulations for the Departments of Defense and Agriculture both state that members of the news media "would normally qualify as individuals primarily engaged in disseminating information." S*ee* 32 C.F.R. § 286.4 (d)(3)(ii); 7 C.F.R. § 1.9 (b)(2).

[240] 22 C.F.R. § 171.12.

[241] *See* FOIA.gov, *supra* note 13 (go to FOIA.gov; click on the "Data" tab; then click "Create an Advanced Report" in the top, right-hand corner of the screen; select "Expedited Processing" on the "I'd like a report on" dropdown menu; then create the report for all agencies for fiscal year 2008, which indicates that 3,436 of 7,385 requests were granted. That means that 3,949 (or 53%) of requests were rejected.).

[242] *Id.*

[243] *See* FOIA.gov, *supra* note 13. That relevant report indicates that 1,286 of 9,981 requests were granted. That means that 8,695 (or 87%) of requests were rejected.

told a reporter at the *Charlestown* (West Virginia) *Gazette* that there was no "urgent need" to inform the public about the public health effects of chemical contamination of the Elk River drinking water supply.[244]

Even when the requests are being granted, it is unclear that requesters are actually getting information faster. Nothing in FOIA requires it. While the "imminent threat" language might suggest agencies must act with haste, that suggestion is not borne out in the explicit language of the statute. Rather, under the expedited processing provision, instead of having twenty business days to decide whether to comply with the request and notify the requester (as an agency would have with the typical request),[245] the agency has ten days to determine whether to provide expedited processing and provide notice.[246] It is also directed to provide "expeditious consideration of administrative appeals" of denials of expedited processing.[247]

Yet, the law does not quantify "expedited" and the ten-day deadline does not mean that a requester will receive records in ten days.[248] Rather, if a requester can demonstrate a compelling need, the practical effect is that he moves to the front of the agency's request queue.[249] As to when the agency must fulfill the expedited request, there is no deadline. FOIA merely indicates that "[a]n agency shall process *as soon as practicable* any request for records to which the agency has granted expedited processing . . . ."[250]

"Expedited" surely has a different meaning in the news business. Today there is a 24/7 news cycle. Readers have access to a "constant fire hose of information."[251] No longer are they waiting for the morning newspaper. Thanks to the internet and

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[244] *See* Cuillier, *supra* note 154, at 4; *SEJ, SPJ Say Agency Media Obstacles Hurt Public Confidence in Water, Safety*, SOC'Y OF ENVTL. JOURNALISTS, http://www.sej.org/sej-spj-say-agency-media-obstacles-hurt-public-confidence-water-safety [http://perma.cc/7C9D-87C3] (last updated Jan. 29, 2014). This also includes a letter from several journalism groups to heads of the Centers for Disease Control and Prevention and Environmental Protection Agency asking for more transparency on effects of water contamination in Charleston, West Virginia.

[245] § 552(a)(6)(A)(i).

[246] § 552(a)(6)(E)(ii).

[247] *Id.*

[248] *Five Things Journalists Should Know About FOIA (in No Particular Order)*, OFFICE OF GOV'T INFO. SERVS., (June 2012), https://ogis.archives.gov/Assets/Requester+Best+Practices-+Five+Things+Journalists+Ought+to+Know+about+FOIA.pdf [https://perma.cc/7DVS-3MHW] ("Agencies have 10 calendar days to grant or deny requests for expedited processing. That doesn't mean that you'll get the records you requested in 10 days: if an agency grants expedited processing, your request generally moves to the top of a queue and is processed 'as soon as practicable.'").

[249] *Id.*; Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 542 F. Supp. 2d 1181, 1184 (N.D. Cal. 2008) (noting that expedited processing allows a requester to "move immediately to front of the agency's processing queue").

[250] § 552(a)(6)(E)(iii) (emphasis added).

[251] Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 457 (2013).

Twitter, our appetite for news is fed constantly. The pressure on journalists to be first has not gone away. If anything, it has intensified in this media environment.[252] Journalists cannot afford to wait for requests for information, and there is increasing frustration with the federal government's inability to respond to requests faster.[253]

Government officials and the courts have agreed that speed is critical. For example, in a March 2009 memo, then-Attorney General Eric Holder called the timeliness of a response to a FOIA request an "essential component of transparency."[254] The federal district court in the District of Columbia, where most of the country's FOIA cases are heard,[255] agreed in a 2006 opinion indicating that "stale information is of little value" and that delay in complying with a FOIA request is "tantamount to denial."[256]

Thus, for journalists, the FOIA expedited processing provision is like the compelling news tip that when examined closely, falls apart. Even though the provision promises journalists speedy processing when there is an "urgency to inform the public," given the rate of agency rejection and the law's lack of teeth, it is of little practical use.

C. Interpreting and Applying the Expedited Processing Provision: The Courts' Flawed Understanding of Urgency

Seeking judicial review of agency rejections of expedited processing requests has also proven to be problematic. A review of some of the key decisions on expedited processing shows that courts misunderstand the nature of the news business and have a flawed understanding of what information needs to be urgently shared with the public. For example, the courts' interpretation of how expedited processing should function discourages any original reporting by requiring that there already be significant media interest in a story. To make things worse, the courts have been wishy-washy about just how much evidence media plaintiffs need to present to demonstrate such interest.

The key case interpreting the media's ability to obtain expedited processing under FOIA is *Al-Fayed v. Central Intelligence Agency.*[257] In it, the U.S. Court of

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[252] *See id.* at 457–58.

[253] *See* Snyder & Ivory, *supra* note 10.

[254] Office of the Attorney General, *Memorandum for Heads of Executive Departments and Agencies: The Freedom of Information Act (FOIA)* (Mar. 19, 2009), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf [http://perma.cc/Y4CZ-MDN7].

[255] *Geographic Distribution of FOIA Cases*, THE FOIA PROJECT, http://foiaproject.org/foia-map/ [https://perma.cc/34M7-29WM] (last visited Aug. 4, 2015); *FOIA Cases Up in D.C., Federal Courts Nationwide*, THE BLT: THE BLOG OF THE LEGAL TIMES (Oct. 6, 2011), http://legaltimes.typepad.com/blt/2011/10/foia-cases-up-in-dc-federal-courts-nationwide.html [http://perma.cc/Y277-ZTDL] ("The bulk of FOIA cases come through D.C. federal court, making up nearly half of all FOIA cases nationwide.").

[256] Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 40 (D.D.C. 2006).

[257] 254 F.3d 300 (D.C. Cir. 2001).

Appeals for the D.C. Circuit denied a request for expedited processing by Mohamed Al-Fayed and *Punch*.[258] Al-Fayed is the father of Dodi Al-Fayed, who died with Diana Spencer, Princess of Wales, in a car crash in Paris in 1997, and *Punch* is a now-defunct British political satire magazine owned by Mohamed Al-Fayed. Mohamed Al-Fayed and *Punch* argued that they had a "compelling need" for documents from numerous federal agencies, including the CIA, related to allegations that the National Security Agency taped the Princess's phone calls and that the United States denied entry to an informant who allegedly had information about the involvement of MI6, the British intelligence agency, in the car accident.[259]

In analyzing the claim, the court interpreted the portion of the expedited processing provision that defines "compelling need" as occurring when a request is "made by a person primarily engaged in disseminating information" and there is an "urgency to inform the public concerning actual or alleged Federal Government activity."[260] In *Al-Fayed*, the government did not contest that *Punch* qualified as an entity "primarily engaged in disseminating information."[261] Drawing from the legislative history of the expedited processing provision, the court established the test that has been used subsequently to analyze whether a plaintiff had shown an "urgency to inform" and, so, a "compelling need."[262] It found that courts must consider: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity."[263] The court noted that the "credibility of a requestor" is also a "relevant consideration."[264]

Applying this test to the facts of the *Al-Fayed* case, the court got no further than the first factor, "current exigency," finding that plaintiffs' claim "founder[ed]" on it.[265] It determined that the deaths of Princess Diana and Dodi Al-Fayed in 1997 and related incidents were not "a matter of a current exigency to the American public."[266] Interpreting this language, the court acknowledged that "[a]lthough these topics may continue to be newsworthy," they were not "the subject of a *currently unfolding*

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[258] *Id.* at 301.

[259] *Id.* at 302, 310.

[260] *Id.* at 309 (quoting 5 U.S.C. § 552(a)(6)(E)(v)).

[261] *Id.*

[262] *Id.* at 310. The court quotes from and discusses the legislative history of the "urgency to inform" standard. Specifically, it quotes language from a relevant House of Representatives Report that states, "The standard of 'urgency to inform' requires that the information requested should pertain to a matter of a current exigency to the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public's right to know, although a significant value, would not by itself be sufficient to satisfy this standard." *Id.* at 310 (quoting H.R. REP. No. 104-795, at 26 (1996)).

[263] *Id.*

[264] *Id.* (quoting H.R. REP. No. 104-795, at 26 (1996)).

[265] *Id.*

[266] *Id.*

story."[267] To support this, the court focused on a request by plaintiffs related to the United States government's failure to prosecute a man who posed as a CIA agent and attempted to defraud Mohamed Al-Fayed.[268] The court concluded that the record did "not contain any news reports" on the subject, and there was "no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiffs' allegations."[269]

The result in *Al-Fayed* may have been the correct one. There may not have been any "urgency to inform" the public regarding incidents related to an accident that had occurred years earlier. Nonetheless, the *Al-Fayed* test itself is flawed in several respects. First, under the first prong of the test, for the request to concern a "matter of current exigency" it must pertain to the "subject of a currently unfolding story."[270] That is, there must already be news coverage of the issue that is the subject of the request, or it does not warrant expedited processing. That means that under this requirement there can be no "new" newsworthy information. The expedited processing provision cannot (at least if a court is ultimately deciding whether to honor the request) spawn original investigative or accountability journalism. Journalists can only use it to, at best, piggyback on stories already being widely reported.

As Seth Kreimer, a constitutional law scholar at the University of Pennsylvania has written, such a provision is severely at odds with transparency and accountability: "Processing of requests regarding a deep secret sufficiently securely held can be delayed because of a lack of current public controversy, while a sufficiently distracted or intimidated media can bar the way to immediate disclosure."[271] It is also at odds with the ethos of investigative reporting, which, at its core, is about exposing secrets.

This requirement that the request be the "subject of a currently unfolding story" has yielded strange results in court decisions over what is and is not entitled to expedited processing.[272] For example, courts have granted requests related to disclosures regarding the USA Patriot Act.[273] In contrast, they have rejected

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[267] *Id.* (emphasis added).

[268] *Id.* at 302, 310–11.

[269] *Id.* at 311.

[270] *Id.* at 310.

[271] Kreimer, *supra* note 126, at 1029.

[272] *See, e.g.*, ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 32 (D.D.C. 2004); ACLU of N. Cal. v. Dep't of Justice, No. C 04-4447 PJH, 2005 WL 588354, at *15 (N.D. Cal. Mar. 11, 2005).

[273] *ACLU*, 321 F. Supp. 2d at 32 (granting expedited processing of requests related to Patriot Act and stating: "Although plaintiffs presented only a handful of articles, they were published in a variety of publications, and repeatedly reference the ongoing national discussion about the Patriot Act and section 215. Their request for expedited processing, moreover, incorporated by reference their earlier Patriot Act FOIA request that cited over a dozen additional news articles describing the controversy surrounding the Act. As DOJ's 'media specialists,' OPA cannot simply turn a blind eye to the flurry of media attention (of which plaintiffs' articles are a representative sample) the Act has generated, nor can it turn a deaf ear to the Attorney General's acknowledgment of the 'troubling amount of public

expedited requests concerning FBI interrogation of Muslims and a secret data-mining program.[274] In the data-mining case, for example, the court rejected an expedited processing request by the Electronic Privacy Information Center, finding that even though there was media interest in data-mining programs generally, including articles in *The New York Times*, that the requester had not shown there was media interest in the particular data-mining software that was the subject of the request.[275]

Also problematic about the *Al-Fayed* reasoning and that of other courts relying on the decision is that urgency and compelling need seem based at least in part on the number of news articles circulating on the issue that is the subject of the request.[276] Yet, at the same time, it is not entirely clear how many articles are enough to demonstrate that an issue has crossed over from being of marginal interest to being, in the words of *Al-Fayed*, a "subject of a currently unfolding story."

On the one hand, when the American Civil Liberties Union ("ACLU") of Northern California, the *San Francisco Bay Guardian* (a defunct weekly newspaper), and other plaintiffs offered up "at least fifty-three separate articles" published in the "fifty-two days immediately prior" to their FOIA request to the Department of Defense regarding a federal government effort to gather intelligence on antiwar gatherings, the court granted expedited processing.[277] In another case

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distortion and misinformation in connection with Section 215.'") (citations omitted); Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at *4–5 (D.D.C. Nov. 16, 2005) (compelling the release of information related to the Patriot Act that should have been expedited but had been pending for eight months, although not noting news media attention specifically).

[274] *See* Kreimer, *supra* note 126, at 1028–29; *ACLU of N. Cal.*, 2005 WL 588354 at *2–3, *14 (denying expedited processing for inquiries regarding allegations that the FBI and Joint Terrorism Task Forces were improperly interrogating Muslims and noting that although articles submitted by plaintiffs from the *Los Angeles Times*, *The Washington Post*, and others described the FBI approaching Muslims or Arab Americans for interviews, they contained only a "few generalized references" to Joint Terrorism Task Forces); Elec. Privacy Info. Ctr. v. Dep't of Def., 355 F. Supp. 2d 98, 102–03 (D.D.C. 2004) (rejecting expedited processing of inquiries regarding data-mining program). A federal district court also denied expedited processing for a secret attempt to get U.S. Attorneys to lobby for funding for the USA Patriot Act and stating, "The appearance of thirty-one newspaper articles does not make a story a matter of 'current exigency.' The U.S. Attorney mobilization story apparently did not have 'legs.'" *See* Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, 322 F. Supp. 2d 1, 5 (D.D.C. 2003). The decision was later vacated by the D.C. Circuit on the joint request of the parties. *See* Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, No. 04-5063, 2004 WL 2713119, at *1 (D.C. Cir. Nov. 24, 2004).

[275] *Elec. Privacy Info. Ctr.*, 355 F. Supp. 2d at 101–03 ("[T]he Court is unwilling to construe interest in the larger concept to indicate interest in any one specific data mining program.").

[276] *See, e.g.*, *Al-Fayed*, 254 F.3d at 311 ("[T]he record does not contain any news reports on the subject.").

[277] ACLU of N. Cal. v. U.S. Dep't of Def., No. C 06-01698 WHA, 2006 WL 1469418, at *2, *6 (N.D. Cal. May 25, 2006).

brought by the ACLU where the court granted expedited access to documents related to a particularly controversial provision of the Patriot Act, far fewer articles—closer to a dozen—were sufficient.[278]

In contrast, in *Wadelton v. Department of State*,[279] the court found that the combination of a blog on the *Atlantic* magazine's website, the plaintiff's stated intention to write an article, and an ongoing Government Accountability Office investigation did not establish that there was an urgency to inform the public about a whistleblower's claim against the Foreign Service promotion process.[280] Echoing the language from the *Al-Fayed* decision, the court stated that "[a]lthough these topics may continue to be newsworthy, none of the events at issue is the subject of a currently unfolding story."[281]

Based on these cases, it would seem that the dividing line between a "currently unfolding story" and a story of marginal interest lies somewhere between a couple of articles and a dozen articles. Yet, in another case, one story *was* enough. In *Bloomberg, L.P. v. U.S. FDA*,[282] the court refused to stay Bloomberg's suit seeking expedited processing of a request for information about a potential association between anti-epileptic drugs and suicide, especially among children.[283] In addition to noting that the Food and Drug Administration had conceded the issue was one of importance, the court favorably noted that "at least one national news report" existed on a topic.[284] It then concluded that there was an "exigent need" for the Food and Drug Administration to turn over data received from various drug manufacturers as well as its own findings.[285]

Thus, there is no clear answer to how much coverage is enough. This is problematic not only because, as noted, there may be issues of urgent importance that have not yet been reported on at all, but also because the sheer number of published articles may have no correlation to just how urgent the issue is. Perhaps in the *Bloomberg* case, the court was right that the public needed to know about anti-

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[278] *ACLU*, 321 F. Supp. 2d at 29, 32. Here, rather than focus on the news articles, the court seemed to have already come to its own conclusion about the newsworthiness of the issue. It wrote: "Section 215, however, unquestionably implicates important individual liberties and privacy concerns which are of immediate public interest in view of the ongoing debate regarding the renewal and/or amendment of the Patriot Act." *Id.* at 29.

[279] 941 F. Supp. 2d 120 (2013).

[280] *Id.* at 121, 123–24.

[281] *Id.* at 123 (quoting *Al-Fayed*, 254 F.3d at 310) ("By way of contrast, courts have found a 'compelling need' to exist when the subject matter of the request was central to a pressing issue of the day, such as public debate over the renewal of the USA PATRIOT Act; a breaking news story about domestic surveillance of anti-war protesters; and an active debate over the reauthorization of certain Voting Rights Act provisions. The controversy that Wadelton suggests exists over the Foreign Service promotion process bears no resemblance to these matters of genuine widespread public concern.") (citations omitted).

[282] 500 F. Supp. 2d 371 (S.D.N.Y. 2007).

[283] *Id.* at 377–78.

[284] *Id.*

[285] *Id.*

epileptic drugs and suicide, but in making this decision it had to more or less disregard precedent that suggested far more existing news coverage was necessary.

Yet *Bloomberg* may suggest the possibility of a better approach—one in which the courts do not rely solely on existing news reports to satisfy the legislative history's guidance that the request "should pertain to a matter of current exigency."[286] Rather, in the absence of an agency's concession that the issue is important—as happened in *Bloomberg*—courts may rely on a wider variety of sources including academic studies, articles, reports, or books that would not be considered "news" to determine if a request might fulfill this standard. Courts could also consider relying on the expert testimony of veteran reporters and editors as to the public significance of a story. Currently, however, the *Al-Fayed* decision, by requiring that to show "compelling need" under FOIA the subject of the request must pertain to "a currently unfolding story," promotes a dangerous approach by letting public interest serve as a proxy for importance. Certainly there are stories that "go viral" and get vast amounts of interest. This does not mean that the stories are representative of the press acting in its watchdog function and serving as a check on government.

D. How to Use FOIA's Expedited Processing Provision as a Tool of Preference

Given the reality of investigative journalists' need for quick and plentiful access to government information and the problems with the expedited processing provision as it exists, the provision is a logical place to focus on a preference for the press. Some changes to the law and related regulations can help agencies and courts to implement the provision more effectively and, at the same time, assist the press in carrying out its watchdog function.

To use the expedited processing provision as a tool of preference for the press, this Article proposes three changes to it, each of which will be discussed in more detail below. First, the "compelling need" standard should be amended so that there is a presumption of expedited access for anyone who is "primarily engaged in disseminating information" where that person affirms there is an urgent need for the information. Second, there must be shorter deadlines under which agencies have to respond to expedited requests and, more importantly, hard deadlines for providing the requested information to the requester. Finally, there should be a fast-tracked appeal process for agency denials of expedited processing requests. In short, there should be quicker and more assured disclosure of public information to the press.

As it stands, whether a "compelling need" and an "urgency" to inform exist is a decision that is, at least at first, in the hands of the agency that receives the request and its FOIA officers. As was demonstrated, courts are not particularly good at making this determination, but are agencies? This is unclear. While the federal government provides agency-by-agency data indicating the total number of expedited processing requests made and rejected, it does not include their subject

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[286] *See Al-Fayed*, 254 F.3d at 310 (quoting legislative history of the 1996 FOIA Amendments).

matter or why they were rejected.[287] As a result, what types of requests an agency will find to satisfy the "compelling need" standard is uncertain. As explained, we do know from looking at the ensuing litigation that journalists and nonprofits have sought expedited processing of requests on issues of such importance as allegedly unwarranted questioning by the FBI of Muslims and Arab Americans and a government data-mining program and that agencies have rejected these requests.[288]

Courts have flatly stated that agencies are not particularly good at determining what should satisfy the "compelling need" standard. In *Al-Fayed*, the U.S. Court of Appeals for the D.C. Circuit indicated that it would give no deference to an agency determination of "compelling need" since "there is no reason to believe that the agencies have expertise on that subject."[289] While the court does not explain its statement, agencies do not have expertise in part because FOIA officers, like the courts, likely have no adequate guidelines to determine which issues the public must know about quickly and which can wait. This is not entirely the fault of the agencies. As the *Al-Fayed* court pointed out, the "compelling need" standard is a government-wide standard and not an agency-to-agency standard.[290] In fact, agencies are not permitted to define "compelling need" within their own regulations.[291] FOIA defines the term, and it needs to be interpreted uniformly. This is a difficult task for agencies. Instead, it is better for journalists themselves to make this determination. In this way, journalists are acting in their watchdog role. They, rather than the agencies themselves, should decide what needs "urgent" investigation and disclosure and make requests accordingly.

With this in mind, under this proposal, journalists would be required to submit an affidavit to an agency when making a request for expedited processing. It would have two significant parts. In the first, the journalist would need to confirm that he or she is, in fact, a "person primarily engaged in disseminating information." Numerous agencies already require this sort of affirmation. This could be subject to the review of the agency, and it would be able to determine whether the person did meet this definition. As noted earlier, certain agency regulations indicate explicitly

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[287] *See* FOIA.gov, *supra* note 13 (go to FOIA.gov; click on the "Data" tab; then click "Create an Advanced Report" in the top, right-hand corner of the screen; select "Expedited Processing" on the "I'd like a report on" dropdown menu; then create the report for all agencies for fiscal year 2014).

[288] *ACLU of N. Cal.*, 2005 WL 588354, at *2–3; *Elec. Privacy Info. Ctr.*, 355 F. Supp. 2d at 102–03.

[289] *Al-Fayed*, 254 F.3d at 306.

[290] *Id.* at 306–07 ("[W]hile each agency may be in a position to assess the urgency of a request relative to that of other requests it has previously received, no single agency is positioned to measure the urgency of a request relative to requests received throughout the government. Because 'compelling need,' like other FOIA terms, sets a government-wide rather than agency-specific standard, such agency-specific 'expertise' is of no significance . . . . Indeed, it is precisely because FOIA's terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute . . . .").

[291] *Id.* at 307.

that members of the news media qualify.[292] But the definition would seem to allow for an interpretation that sweeps broader than members of the traditional news media. For example, entities such as the Electronic Privacy Information Center and the Leadership Conference on Civil Rights have met this standard.[293] While the federal district court in the District of Columbia has said that the category should be "narrowly construed," it has also indicated that dissemination of information need not be the "sole occupation" of the requester.[294]

The strength of the current definition is that it benefits precisely who should receive a preference—not those who occasionally critique government—but those who are committed to systematically watching and checking government by disseminating news about government to the public.[295] Admittedly, deciding who qualifies as a member of the media is difficult at the margins. Scholars have noted that "gallons of ink" have been spilt in trying to settle on who should qualify as a member of the press—even calling it a seemingly "intractable" problem.[296] But recently, there has been more effort and perhaps even headway in drawing lines. In her article *Press Exceptionalism*, Sonja R. West argues that there is risk in not recognizing those "press speakers [who] devote time, resources, and expertise to the vital constitutional tasks of informing the public on newsworthy matters and providing a check on the government and the powerful."[297] That risk, she says, is the

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[292] For example, the Environmental Protection Agency regulations indicate that only someone who is "not a full-time member of the news media" needs to establish that her "primary professional activity or occupation is information dissemination." *See* 40 C.F.R. § 2.104(e)(3).

[293] *See Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 34 (suggesting that the Department of Defense did not contest that the Electronic Privacy Information Center was a "person primarily engaged in disseminating information"); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding that plaintiff's "mission is to serve as the site of record for relevant and up-to-the minute civil rights news and information" and so, qualified as being "primarily engaged in disseminating information"). Yet, courts have also suggested that a passion for investigating an issue does not necessarily make the investigator a disseminator of information under the statute. *See* Eakin v. U.S. Dep't of Def., No. SA-10-CV-0784 FB (NN), 2011 WL 5925570, at *6 (W.D. Tex. Nov. 28, 2011) (indicating that a requester with a passion for "searching for reports of aviation mishaps and mechanical difficulties" did not demonstrate that his "primary activity involves publishing or otherwise disseminating information to the public").

[294] *See* Landmark Legal Found. v. EPA, 910 F. Supp. 2d 270, 275–76 (D.D.C. 2012).

[295] *See* West, *Press Exceptionalism*, *supra* note 3, at 2443–44 ("The bottom line is that press speakers are those who fulfill the unique constitutional functions of the press, functions the Supreme Court has identified—often in dicta—as gathering newsworthy information, disseminating it to the public, and serving as a check on the government and powerful people. Occasional public commentators might at times serve these functions, but the press has a commitment to these roles that reaches far beyond sporadic or ineffective efforts.").

[296] *See* Jones, *Rethinking Reporter's Privilege*, *supra* note 178, at 1241; West, *Press Exceptionalism*, *supra* note 3, at 2453 (quoting Columbia University President Lee C. Bollinger, who has described the "definitional problem" of who constitutes "the press" as "seem[ingly] intractable").

[297] *See* West, *Press Exceptionalism*, *supra* note 3, at 2437.

failure to "fulfill the promises of the First Amendment" as well as societal costs.[298] West proposes distinguishing between these press speakers and those that are only "occasional public commentators" and doing so by examining factors, such as: whether the person is recognized by others as a member of the press; whether she holds herself out as the press; whether she has training, education or experience in journalism; and whether she regularly publishes and has an established audience.[299]

An even more concrete approach can be found in the latest effort to pass reporters' shield legislation. The Free Flow of Information Act of 2013, which despite approval from the Senate Judiciary Committee[300] was never brought to the Senate floor for a vote, defines a "covered journalist" as a person who is an "employee, independent contractor, or agent of an entity or service that disseminates news or information" by means that include a wide variety of print and digitally-based mediums.[301] In addition, the person's "primary intent" must be "to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest."[302] This definition had been implicitly approved by the multitude of press entities that pushed for the bill's passage including NPR, *The Washington Post*, Fox News, and Bloomberg.[303] In amending FOIA, legislators could draw from this definitional approach. In order to put such an approach into practice, the Office of Government Information Services—FOIA's ombudsman—might consider forming a committee of journalists and agency FOIA officers to decide some of the tougher cases regarding who qualifies.

In addition to qualifying as a member of the press, the journalist would need to affirm that he or she is seeking the information because there is an "urgency to inform the public concerning actual or alleged Federal Government activity." On this prong of the affidavit, the agency would have no discretion. Provided the

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[298] *Id.* at 2437, 2456.

[299] *See id.* at 2437–38.

[300] *See* S. Rep. No. 113-118 (2013).

[301] Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11 (2013).

[302] *Id.* The Act would allow, within this definition of "covered journalist" anyone who "had substantially contributed, as an author, editor, photographer, or producer, to a significant number of articles, stories, programs, or publications" in any of the mediums set out, any "student participating in a journalistic medium at an institution of higher education" and anyone who met the definition during "any continuous one-year period within the 20 years prior to the relevant date or any continuous three-month period within the 5 years prior to the relevant date."

[303] Letter from numerous journalistic entities to Harry Reid and Mitch McConnell (June 11, 2014), http://images.politico.com/global/2014/06/11/senateshieldltr.pdf [http://perma.cc/G5XK-2QTA]. There are journalists who remain concerned about any effort to define themselves. Joel Simon, the executive director of the Committee to Protect Journalists, has said that "journalists in the US need to be cognizant that allowing the government to develop a legal definition of journalism has tradeoffs and political consequences." A definition, he says, "could easily be used as a basis for licensing" by a more oppressive government. *See* Joel Simon, *Identity Crisis*, COLUM. JOURNALISM REV., Sept. 3, 2013, http://www.cjr.org/cover_story/identity_crisis.php?page=1 [http://perma.cc/38PV-Y3Z8].

requester affirmed that the information was being sought for an "urgent" reason and the requester met the first prong, the agency would need to comply with the request. Of course, given that the nature of FOIA is such that a journalist cannot truly know what records are available until after she has received them, the most that could be asked of the journalist is that the affirmation of "urgency" be made in good faith. It may often be the case that once the journalist gets and reviews the information that she is requesting, she learns that the issue may not be as urgent as she might have believed. Of course, some could argue that a journalist acting under the demands of a 24/7 news cycle would readily label any request as urgent. This is not an unfair argument. Given this, it would be reasonable to cap journalists' requests at a given number per year absent a showing of compelling need for the records.[304]

This proposal to preference journalists has some precedent. Under the Utah Government Records Access and Management Act, a party requesting expedited processing must demonstrate that the request benefits the public rather than the individual requester.[305] Yet, if the requester is seeking the information "for a story or report for publication or broadcast," this burden is lifted because they are "presumed to be acting to benefit the public rather than a person."[306] Thus, while this section does not use the word "journalist," and the meaning of it has not been expounded upon in any published opinion, underlying this law seems to be the fundamental understanding that the press is acting in the public interest and, as a result, it should have quicker access to documents.

There are, of course, legitimate concerns that such a preference would lead to frivolous requests or a slew of requests. Yet, there are reasons to believe that this issue could be addressed. First, the requirement that journalists swear in an affidavit that the information is needed urgently would hopefully dissuade fishing for information. To further discourage any manipulation, as noted, a cap could be put on the number of requests that a journalist could make within any given time period. Yet again, because journalists cannot necessarily know ahead of time that an issue may not be as urgent as they first believe, some leeway should be afforded them in making requests.

There is also some evidence that this proposal would not result in a flood of requests. Requests by members of the media are a small percentage of the total FOIA requests made each year. While it is difficult to determine precisely how many FOIA requests are made by members of the media simply because of the volume of these requests generally, in 2005, the Coalition of Journalists for Open Government—an alliance of more than thirty journalism-related organizations—analyzed 6,439 FOIA

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[304] Arguably, any number chosen here would be somewhat arbitrary. Most journalists could also easily circumvent it by asking a colleague to make the request. Regardless, having a cap would force requesters to carefully consider when and whether to make an expedited request.

[305] *See* UTAH CODE ANN. § 63G-2-204(3)–(4) (West Supp. 2015).

[306] *Id.* § 63G-2-204(4).

requests made to eleven cabinet-level departments and six large agencies.[307] It found that news organizations accounted for only 6% of these requests.[308]

Even if this proposal resulted in an increase in the overall number of requests, this should not be a basis for rejecting it. FOIA already provides an escape hatch for the agency that is diligently trying to comply with a request, but simply cannot deliver records quickly. For example, if an agency is sued by a requester and it can demonstrate both that exceptional circumstances exist and that it is exercising due diligence in responding to a request, a court has discretion to stay the litigation.[309] Courts have granted such stays where agencies are deluged with requests on a level unanticipated by Congress,[310] where existing agency resources are inadequate to respond to requests within mandated time limits,[311] and where the agency can demonstrate it is acting with diligence in processing requests.[312] And, to the extent that an increase in the number of overall requests results in an increased cost to agencies, this cost needs to be weighed against, as Sonya R. West says, the "widespread societal costs arising out of reduced information flow and weakened government scrutiny."[313]

Related to the critique that the number of requests would soar, some might argue that the group that would qualify for presumptively expedited processing—any "person primarily engaged in disseminating information"—is too broad. This critique is largely addressed earlier in the discussion of ways in which to revise and narrow this definition by drawing from proposed reporters' shield legislation. Putting that discussion to the side, this critique would perhaps hold more weight if this Article proposed a reinvigoration of the press clause of the First Amendment. In that context there is little guidance and the stakes are higher. The First Amendment does not indicate who should or should not be deemed a member of the press, and were we to deem the press an institution worthy of constitutional preferences, there would be significant jockeying to fall into that category.[314]

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[307] *Media Making Fewer Challenges to Government Secrecy in Federal Court*, THE FOIA PROJECT (Mar. 14, 2013), http://foiaproject.org/2013/03/14/media-making-fewer-challenges-to-government-secrecy-in-federal-court/ [http://perma.cc/X7EZ-5WJ4].

[308] *Id.*

[309] *See* 5 U.S.C. § 552(a)(6)(C)(i) (2009).

[310] *See* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615–16 (D.C. Cir. 1976).

[311] *See id.*

[312] *See id.*; *cf.* Bloomberg, L.P. v. FDA, 500 F. Supp. 2d 371, 374–76 (refusing a request for a stay when diligence was not shown).

[313] *See* West, *Press Exceptionalism*, *supra* note 3, at 2437.

[314] *See* West, *Press Exceptionalism*, *supra* note 3, at 2436–37, 2453. West argues that "[o]ne of the primary reasons for this failure to distinguish between constitutional protections for speech and press is the problem of identification. In order to recognize unique press protections, the Court must figure out who or what 'the press' is." *Id.* at 2436. She adds, "We must recognize these speakers in order to consider and potentially protect their specific needs. A continuing refusal to do so, moreover, comes with risks. These risks include not only a failure to fulfill the promises of the First Amendment but also of widespread societal

In addition to providing a presumption for expedited processing for journalists, it is also necessary to put some deadlines on agencies to provide journalists with responsive material. "Expedited" has virtually no meaning without such deadlines. As it stands, the practical result of this provision is that a requester goes to the front of the queue of requesters. Yet, this does not guarantee the requester receives records in an objectively timely way. The courts have repeatedly indicated that delays in implementing the law are akin to denials of information.[315] And yet, as explained above, delays persist.

Under FOIA, agencies have ten days to indicate to a requester whether an expedited processing request has been granted.[316] Then there is no deadline by which the agency has to provide records in response to a request. Setting short deadlines with some escape hatches for requests that may present particular challenges for agencies would make "expedited" meaningful, while not unduly burdensome. For example, the initial deadline could be moved to five days. Then the agency could have an additional five days to actually provide the information requested. This is actually more generous than the Utah Government Records Access and Management Act.[317] Under it, if the request is approved, the government entity must provide responsive records within ten days for a normal request and five business days for an expedited request.[318] Some agencies that are granting expedited requests are already doing so on short timetables, and so there is some precedent for agencies being able to meet these deadlines.[319]

It is impossible to determine from the statistics on the DOJ's FOIA.gov website whether those requests that take longer than this amount of time to fulfill are delayed due to the complexity of the request, the substance of the records sought, or a lack of agency resources. Regardless, it is possible to address these issues. There could be provisions to toll this period in limited circumstances including 1) when the agency needs additional information from the requester to process the request, 2)

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costs arising out of reduced information flow and weakened government scrutiny." *Id.* at 2437.

[315] *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35 (quoting Payne Enters. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) to say, "'[T]he FOIA imposes no limits on courts' equitable powers in enforcing its terms' and 'unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses.'").

[316] 5 U.S.C. § 552(a)(6)(E)(ii)(I) (2009).

[317] *See* UTAH CODE ANN. § 63G-2-204(3) (West Supp. 2015).

[318] *Id.* Under the Utah law, however, the governmental entity may delay providing information if there are "extraordinary circumstances," which is defined broadly. *Id.* These may include that the entity is reviewing a large number of requests, that the information requested must be reviewed by counsel, or that the request seeks a large volume of information. *Id.* § 63G-2-204(5).

[319] *See* FOIA.gov, *supra* note 13. When visited at the time of this writing, results from an advanced report created for "Requests: Expedited Processing" in fiscal year 2014, showed that numerous agencies "adjudicated" those requests within ten calendar days or less. Yet, the majority of these adjudications were denials, which may help account for the speed of them. *Id.*

when the request relates to classified information, or 3) when a large amount of information is responsive to the request. In these situations, the agency would need to make clear why the request is being delayed and when responsive information will be provided, as well as give the requester the opportunity to narrow the request so as to speed the process.[320]

Of course, this proposal, as with many others that have sought to overhaul FOIA, would be aided by an increased financial commitment from Congress to making the law work effectively. Certainly, with more resources, agencies could do a better job of providing more information to the media and the public faster.

Finally, for those situations in which an expedited request is denied, untimely, or insufficient, there should be a similarly expedited review process. Currently, FOIA requires "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing," but again, there are no teeth to this provision.[321] Typically under FOIA, for a nonexpedited request, an agency must decide appeals within twenty business days of the receipt of the appeal.[322] Presumably, if this process were expedited, it would take less than twenty days. Again, for "expedited" to have any real meaning, it would seem reasonable to cut the standard amount of time—twenty days—in half and to make the appeals period ten days.

In addition to perhaps costing less than direct subsidies and avoiding the necessity for reinterpretation of the Constitution—benefits that have already been discussed—there is something else beneficial about this proposal. It circumvents the "old" versus "new" media or "fourth estate" versus "fifth estate" constructs that dominate the discussion of how to reinvigorate the news.[323] As journalist Thomas Frank has pointed out: "Quality journalism is not, of course, a function of newsprint."[324] It is true as well that sound investigative reporting or accountability journalism is not a function of the medium in which it is published. While newspapers have led the way until recently, and digital-native sites have not been

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[320] This proposition borrows from Model Federal FOIA Regulations devised by three open government groups: Citizens for Responsibility and Ethics in Washington; the Electronic Privacy Information Center; and the National Security Archive. *See Model FOIA Regulations* (July 15, 2014), http://www.modelfoiaregs.org/2014/07/model-foia-regulations-updated-7152014.html [http://perma.cc/4LAL-5ES9]. They propose that when a FOIA request is made (not an expedited request), if an initial response is going to be delayed for more than ten working days, the agency should provide the requester with the opportunity to modify his request. *Id.*

[321] 5 U.S.C. § 552(a)(6)(E)(ii)(II).

[322] *See id.* § 552(a)(6)(A)(ii).

[323] Cohen, *supra* note 2, at 3–5 ("What is clear is that the media ecology is now a mix of the Fourth and Fifth Estates, and that the Fifth Estate's role is growing . . . . As the Fourth Estate has fewer resources available to cover the federal government, state capitals, city halls, private enterprises, and other centers of power and influence, the Fifth Estate is increasingly stepping in to fill the gaps. This 'replacement journalism' is an important and growing part of the overall news ecology.").

[324] Thomas Frank, *Bright Frenetic Mills*, HARPER'S, Dec. 2010, *reprinted in* WILL THE LAST REPORTER TURN OUT THE LIGHTS, *supra* note 36, at 114.

able to make up for the losses, digital-native sites and their journalists possibly will be the primary conduits and practitioners of investigative journalism in the future.

The existing concept of a journalist in FOIA, and one that could be refined with reference to proposed reporters' shield legislation, is a functional one. It is "a person primarily engaged in disseminating information" and so, is not limited to newspaper journalists. The expedited processing preference this Article proposes would apply to anyone who could meet this definition, and nothing about the definition appears to exclude bloggers or others working for digital-native sites. There are, in fact, many reasons to include such journalists. One is that online journalism (practiced by journalists employed by digital-native publications, as well as newspapers) is finding new ways in which to promote transparency through FOIA. These include establishing clearinghouses for FOIA requests and information [325] and crowdsourcing the newsgathering effort. For example, some news organizations are posting large amounts of publically available data and then letting readers sift through it, along with journalists, to try to make meaning of it.[326] And so, this proposal is not a wholly backward-looking approach that attempts to resurrect newspapers and preserve the status quo.

Giving the press a preference under FOIA also does not necessarily mean disadvantaging—at least in any significant way—the public at large. Yes, those primarily involved in the distribution of information would jump ahead in the queue of FOIA requesters. Yet, this is true already under the expedited processing provision. This proposal would make it more certain that expedited processing requests would be honored and that they would be honored faster. Again, members of the press likely comprise a fairly small fraction of the number of requesters generally. In addition, the press is serving as a proxy for the public. Some have argued that having a professional "intermediary," such as a member of the media, is actually a way of making FOIA work more efficiently for everyone since media requesters have some of the "prerequisite knowledge" that allows for them to make a more effective request.[327] The information that journalists would obtain through making the requests should be distributed quickly into the public sphere for all to see. In this way, the benefits of the preference are reaped by all of us, as they should be.

Thus, by amending the law to include a presumption of expedited access, imposing shorter deadlines on agencies for expedited requests, and fast-tracking

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[325] *See* ABOUT FOIA MACHINE, https://www.foiamachine.org/about/ [https://perma.cc/HQF2-2P9V] (last visited Aug. 4, 2015).

[326] *See* FED. COMM. COMM'N, *supra* note 77, at 243 ("New media advocates argue that 'the crowd' is usually more effective at authenticating something than an editor. Instead of having two smart reporters poring over documents, have ten thousand citizens."); Jessica Weiss, *How ProPublica Invites Readers to Get Involved*, INT'L JOURNALISTS' NETWORK (Mar. 21, 2013), http://ijnet.org/en/stories/how-propublica-invites-readers-get-involved [http://perma.cc/Z22B-SCH7] (describing how nonprofit news website ProPublica has posted large amounts of public data and asked readers to help journalists review it).

[327] *See* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 89 (2012).

appeals, FOIA would provide the press with a meaningful preference and allow it to more vigorously pursue its role as watchdog. While this could result in an uptick in records requests and might place more demands on agency resources, as mentioned, this must be balanced not only against the journalist requesters' right to the information, but more generally against the public's right to know.

VI. CONCLUSION

Until the modern-day press can determine how to profit from investigative journalism and begin to provide the kind of accountability reporting traditionally practiced by newspaper reporters, it needs a legal boost. Providing legal preferences for the press is nothing new, but it has not been done meaningfully for too long. Preferences that account for an unrelenting news cycle and the possibilities for instantaneous distribution of the news are needed.

FOIA is a logical place to start. Its goal is the promotion of transparency and democracy. But it too has long faltered in achieving this goal and, by many measures, is in desperate need of an overhaul. Amending FOIA's expedited processing provision to create the presumption of "compelling need" for requests by journalists might finally give investigative journalists the quick and complete access to certain government information that they have long sought. In the process, journalists would be better able to serve their watchdog function and to continue barking loudly in the years to come.