

# ENSURING THE CONSENT OF THE GOVERNED:

## AMERICA'S COMMITMENT TO FREEDOM OF INFORMATION AND OPENNESS IN GOVERNMENT

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

*Declaration of Independence, July 4, 1776*

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

*Letter from James Madison to W. T. Barry, August 4, 1822*

For the last two decades, I have been blessed with the opportunity to serve my fellow Texans in a variety of government positions across all three branches of government. Yet these years of service in a diverse range of offices share some common and important threads. For example, as a former state attorney general, I continue to revere the rule of law as the bedrock of a civilized society. As a former judge, my belief in the fundamental importance of maintaining a proper relationship between the three branches still drives me to champion a restrained and independent judiciary and to oppose judicial activism. But as an American, my belief in the fundamental importance of maintaining a proper relationship between the government and the governed has driven me to champion openness in government.

Our nation's most beloved statesmen shared the common and core belief that a free society cannot exist without an informed citizenry and an open and accessible government. Patrick Henry, famously de-

### JOHN CORNYN

*John Cornyn was elected to the United States Senate in 2002. He is the first U.S. Senator from Texas since 1961 to serve on the Senate Judiciary Committee, which has jurisdiction over federal government information laws. He is also chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights. Senator Cornyn has previously served as Attorney General of Texas, Texas Supreme Court Justice, and state district judge in Bexar County. In 2001, the Freedom of Information Foundation of Texas presented him with its James Madison Award for his efforts to promote open government.*

voted to liberty, well understood that "the liberties of a people never were, or ever will be, secure when the transactions of their rulers may be concealed from them." John Adams noted that "liberty cannot be preserved without a general knowledge among the people, who have a right . . . an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers." U.S. Supreme Court Justice Louis Brandeis once wrote: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." But perhaps no one put it better or more succinctly when our beloved 16th President, Abraham Lincoln, said: "Let the people know the facts, and the country will be safe."

Grasping and realizing the lofty ideals of our nation's founding fathers and leading statesmen remains the promise of America. Our national commitment to democracy and freedom is not merely some abstract notion. It is a very real and continuing effort, and an essential element of that effort is an open and accessible government.

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The cause of open government has been a top priority throughout my career in public service. The Attorney General of Texas is responsible for ensuring that Texas government is open and accessible to all citizens. And the state of Texas, I am proud to say, boasts one of the strongest open government laws in the nation. But just as our democracy is meaningless without an informed and vibrant citizenry, the open government laws on our books are meaningless without universal respect and robust enforcement. As Attorney General of Texas, I accepted the responsibility of enforcing Texas's Public Information Act with great enthusiasm.

When I took office, I immediately wanted to learn what the Office of Attorney General could do to facilitate the cause of open government in Texas. So I convened an Open Government Leadership Summit and invited the best and brightest minds to participate in that discussion. Three priorities emerged from those meetings: speed up the process of opening government to public scrutiny, be more aggressive in taking open government violators to court, and provide education and outreach to prevent violations of the Public Information Act from occurring in the first place.

I am pleased to say that the hardworking men and women of the Office of Attorney General rose

to the challenge. I immediately allocated greater resources to the Open Records Division. As a result, we issued over 20,000 open records rulings, and we dramatically reduced turnaround times on requests to ensure that all record requests receive a response within the statutory deadlines. My office also brought the first open records enforcement action Texas had seen in years.

In addition, we established a toll-free open records hotline, 877-OPEN-TEX, to facilitate inquiries and resolve open records matters quickly. Today, that hotline handles approximately 10,000 calls per year. We also convened dozens of well-attended open government conferences and seminars around the state, and trained countless local government officials on how to comply with open records laws. We worked closely with public interest organizations devoted to open government, such as the Texas Freedom of Information Foundation. Our office's record of success in opening government, I am pleased to say, received international recognition when the legislature of Mexico called upon us to provide technical assistance during drafting and passage of an historic open government act enacted in 2002.

As a result of these efforts, Texas government is more open and accessible today than ever. Texans have always been proud of their state, of course, and with good cause to be sure. Our state's commitment to open government provides an additional, important, and uniquely American source of Texas pride.

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As I remarked on the campaign trail throughout the 2002 election cycle, the folks in Washington could use "a little Texas sunshine." As a member of the United States Senate, one of my top priorities is to work closely with our President from Texas, and with my colleagues in Congress, to bring Texas open government principles to Washington, D.C. And as a member of the majority party in Congress, I have a unique opportunity to play a leading role in championing the cause of openness in our federal government.

During my first two years in the Senate, I worked with Senators Corzine, Feingold, Leahy, Lieberman, and McCain to ensure that the institution of Congress itself is more open and accessible to the public. For our democratic system of government to function properly and robustly, the American people should have full and complete Internet access to legislation, voting records, and other Congressional

documents. The THOMAS Web site, which was launched in 1995 as a pet project of then-House Speaker Newt Gingrich, was a good start—but it can and should be much stronger. Too frequently, the current system is too confusing for the average person. It must be improved, and this bipartisan coalition of senators has worked closely with our colleagues on the Appropriations Committee and in the Senate as a whole, as well as with the Librarian of Congress, to make that happen.

I have also worked during the 108th Congress to reform our nation's broken system for classifying sensitive national security documents, to ensure that our government is not shrouded in excessive secrecy. As the recommendations of the 9/11 commission have made their way through Congress, I have fought to ensure that Congress maintains a strong oversight role over federal open government laws. Finally, one of my earliest acts as a member of the Senate Judiciary Committee was to cosponsor and aggressively promote bipartisan legislation (S. 554) to give federal judges greater flexibility to bring cameras into and otherwise expand media coverage of and access to federal courtrooms.

I have an ambitious open government agenda for the 109th Congress as well. It has been frequently remarked by members of the requestor community in Washington that, when it comes to openness in government, Texas law is stronger and better enforced than federal law. Toward that end, I plan to pursue an aggressive effort to examine and reform the federal Freedom of Information Act (FOIA). For example, I was amazed to learn that the Senate Judiciary Committee has not convened an oversight hearing to examine FOIA compliance issues since April 30, 1992. Moreover, the Senate Governmental Affairs Committee, which shares jurisdiction over federal government information laws with the Judiciary Committee, has not held an FOIA oversight hearing since 1980. The House record is better, but given the fundamental importance of openness in government to our nation's founding principles and ideals, both Houses should be more actively engaged in these issues. Indeed, it has been nearly a decade since Congress enacted the last series of substantive improvements to FOIA.

Accordingly, I plan to convene the first Senate hearing in over a decade to examine FOIA compliance, as early as possible during the 109th Congress. That hearing, in turn, will commence a comprehensive review of the federal FOIA law—leading up to, I hope, the first comprehensive upgrade and revision to that law in nearly ten years. A number of ideas for reform come quickly to mind, and I

plan to explore them all at the hearing. My ultimate goal is to shepherd legislation through the next Congress that will close loopholes in the law, help requestors obtain timely responses to their requests, ensure that agencies have strong incentives to act on requests in a timely fashion, and provide FOIA officials with the tools they need to ensure that our government remains open and accessible.

For example, government is outsourcing its functions at an increasing rate, and as a limited-government conservative, I certainly support measures that help make government function more efficiently. But as we undertake efforts to make government more efficient, we must also make sure that government remains open. Outsourcing should not be used as a justification for evading FOIA—yet there are numerous well-founded and well-reported fears that that very well may be occurring. If our laws need to be clarified to ensure that outsourcing does not place public records beyond public scrutiny, we should see to it.

In addition to closing loopholes, we must also ensure that the FOIA request process operates in a smooth and timely fashion. In an ideal system, requestors and government agencies should be able to work out timely and reasonable accommodations of all FOIA requests. To help make that happen, I have long supported the creation of an ombudsman to facilitate and expedite FOIA requests without having to resort to litigation. And when there is no choice other than to litigate, requestors must have the resources they need to litigate their cases in an effective and expeditious manner—and that includes the ability to recover reasonable attorney's fees whenever they prevail. Moreover, federal agencies face federal deadlines to comply with FOIA—just as Texas agencies face deadlines under Texas law. To be meaningful, however, deadlines must be enforced. Texas agencies that miss deadlines face real consequences; so too should federal agencies.

Finally, the FOIA law is administered by a corps of well-meaning public officials throughout the federal government. These officials must have all of the tools and training they need to get the job done. If there are additional steps that Congress can take to help FOIA officials do their job, we should take them.

This process of examining, reviewing, and reforming FOIA will take time. It will take patience. And to be truly meaningful and successful, it will require the accumulated wisdom of all who regularly participate in and have experience with the FOIA process. Naturally, any effort to reform our open government laws should itself be open. Accord-

ingly, I invite anyone with good ideas to contribute their thoughts and to make their voices heard.

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Open government is, and must always remain, a nonpartisan issue. Whatever our differences on controversial policy matters, Democrats and Republicans alike should agree that those policy differences deserve as full and complete a debate before the American people as possible. The development and implementation of policy must be presumptively open and accessible to all. Thus, for example, as a cosponsor of the Independent National Security Classification Board Act of 2004, I was pleased to see a remarkably broad and bipartisan consensus emerge that the United States government overclassifies documents. Thomas H. Kean, chairman of the 9/11 commission, has said that "three-fourths of what I read that was classified shouldn't have been." Carol A. Haave, the Bush administration's deputy undersecretary of defense for counterintelligence and security, testified in August that "we overclassify information . . . say, 50-50." Under the leadership of Senators Ron Wyden and Trent Lott, a remarkable bipartisan coalition of Senators has vowed to reform our classification bureaucracy to ensure that our government remains as open as possible.

Just as the cause of open government is nonpartisan, however, so too are the sources of open government problems. Any party in power is always reluctant to share information, out of an understandable (albeit ultimately unpersuasive) fear of arming its enemies and critics. For example, according to the *Secrecy Report Card*—a recent report published by a remarkable coalition of journalists

and private organizations called OpenTheGovernment.org—today we spend \$6.5 billion annually to classify documents, compared to just \$54 million to declassify documents—an overwhelming ratio of 120 to 1. But that same report makes clear that this trend has occurred under both parties, noting that "the rise in government secrecy . . . did not begin during the current administration." Fourteen million documents were classified in 2003—up from 3.5 million in 1995.

President Lyndon B. Johnson famously signed the federal Freedom of Information Act on July 4, 1966—an appropriate day to further the principles of the Declaration of Independence. Yet even that day did not come easily. Open government advocates conducted a furious lobbying campaign out of fear that President Johnson would veto the bill. And a decade later, Congress successfully overrode an actual veto by President Gerald Ford; only then was Congress able to enact into law the 1974 Freedom of Information Act Amendments.

Yet principle must always prevail over party or power. Open government is one of the most basic requirements of any healthy democracy. It allows taxpayers to see where their money is going. It permits the honest exchange of information that ensures government accountability. It upholds the ideal that government never rules without the consent of the governed. President Lincoln once said that "no man is good enough to govern another without that person's consent." But of course, consent is meaningless unless it is informed consent. For that very reason, the cause of open government is as American as our commitment to our constitutional democracy itself.

**LBJ**