

MISQUOTING MADISON

By Michael Doyle

The father of the American Constitution famously warned that governance without information was "a Prologue to a Farce or a Tragedy." But what kind of information was he talking about?

James Madison is known as the tribune of open government and the philosophical father of the Freedom of Information Act. That law, and by extension Madison's role in it, has never had a higher profile than now.

This spring, FOIA helped pry from the government's vaults some 11,000 previously secret pages of documents concerning energy policy deliberations by the Bush Administration. It was a fine moment for a law that previously helped open a window into the susceptibility of Energy Department workers to cancer from plutonium exposure, the inner councils of government during the Bay of Pigs episode, and many other previously hidden government actions. With the Bush Administration keeping information bound tighter than at any time since the Cold War, pundits and lawyers invoked Madison's famous observation:

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.

For the past half-century, no single quotation has been more commonly employed or judged more philosophically resonant, as Congress, courts, and scholars have sought to clarify the public's right to know what the government is up to.

But everyone gets it wrong. Madison's stirring words have been pressed into service on behalf of a cause very different from the one he had in mind. In truth, he'd be better cited as the champion of the Elementary and Secondary Education Act. For as some legal historians have noted, what Madison was talking about was not government information, but the Three Rs.

The misquoting of Madison illustrates the limitations of legislative history, the propagation of literary error, and the dangers inherent in one of the fundamental elements of argument in the law—the lifted quote. Endowed with a spurious constitutional authority, the Madison quote shaped the conventional view of FOIA as a tool for the public to learn about government policy, although the act is properly understood as something else.

By seeing through the passage to Madison's true meaning, however, we can escape a rhetorical trap and appreciate the Freedom of Information Act anew. Surrendering Madison, it turns out, makes room for a stronger argument than the one usually extrapolated from his words.

In 1965, the Senate Judiciary Committee dusted off Madison's quote in its report supporting the original Freedom of Information Act. In 1966, during subsequent House debate on FOIA, the quote was called up again, including (deliciously) by Donald Rumsfeld. He was a young Republican Congressman from Illinois and is now, of course, Secretary of Defense for the Bush Administration and its chief non-information officer during the war on terror.

These lawmakers summoned the quote as expert testimony from a founding father, as would Supreme Court justices in their subsequent interpretation of the act, which President Lyndon Johnson signed into law in 1966. Justice William O. Douglas relished Madison's quote. In the 1973 case of *EPA v. Mink*, Douglas insisted that "we should remember the words of Madison" while fighting against the executive branch's "*carte blanche* to insulate information from public scrutiny." Douglas deployed the Madison quote as quasi-legislative history for the proposition that the First Amendment requires public access.

The man partly responsible for the contemporary popularity of the quote was Congressman John Moss, a Democrat from California. A onetime appliance salesman from Sacramento, he was first elected to the House of Representatives in 1952, when access to government information was governed by the Administrative Procedure Act. That act permitted information to be withheld concerning "any function of the United States requiring secrecy *in the public interest*" [emphasis added].

By 1955, Congressional Democrats were perturbed about the Eisenhower Administration's efforts to withhold information, and they created a special House subcommittee to investigate the executive branch's penchant for secrecy. Moss had a gut feeling for open government, but he needed some intellectual support for his position.

He found it in the work of Harold Cross, a lawyer for the *New York Herald Tribune*. In 1950, the American Society of Newspaper Editors had hired Cross to examine information-access laws. He wrote a 405-page tome titled *The People's Right to Know*. In it, he asserted that a right of freedom of information "has been recognized in general terms since the birth of the nation by philosophers, statesmen, and legal authors...."

Cross marshaled what he termed "typical instances" of such observations, by statesmen Patrick Henry, Edward Livingston, and others. Asserting that "the utterances of the men of 1791 are singularly significant" because of the Supreme Court's necessarily close attention to the framers' thoughts, he quoted Madison as well.

The volume by Cross was thorough, but not always rigorous; it built a bandwagon effect through a kind of serial name-dropping. By bowing respectfully to the "men of 1791," the lawyer encouraged the presumption that the words he quoted had the

flavor of legislative history.

He attributed his Madison quote to an unsigned student article in a 1952 *Indiana Law Journal* titled "Access to Official Information: A Neglected Constitutional Right." In the article, the Madison quote is preceded by the author's statement that "if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided." Assertion, expert support. As Cross did, the article's author included perception-shaping information about Madison—in the case of the article, that Madison was "chairman of [the] committee which drafted the First Amendment."

The anonymous author traced the use of the Madison quote to a respected scholar, the political scientist Harold Lasswell. "The makers of the American commonwealth were in no doubt about the necessity of an informed public opinion," Lasswell stated. Before offering the full Madison quote, he wrote, "James Madison gave classical statement to the point in these words."

And there the trail ends.

It was enough for Lasswell to describe Madison's as a "classical statement." He omitted a footnote to back himself up. As Oliver Wendell Holmes Jr. once warned, though, "one of the misfortunes of the law [is] that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

Holmes appreciated the power of a choice quotation—a classical statement—to freeze thought. Madison's "Farce or a Tragedy" phrase encysted two ideas beyond further analysis: that the public needs access to information to avoid catastrophe in public policy, and that Madison was speaking of government information.

Contrary to wide assumption, however, Madison was writing long after the constitutional ink had dried—and he was referring to the information held not by government bureaucrats but by schoolteachers. More specifically, Madison was thinking of public schools in Kentucky.

In the 1820s, Kentucky struggled with educating its children. As one modern historian noted, the state's rural areas "slumbered in apathy, preferring to emulate the other southern states in hostility to public, so-called poor schools." In December 1821, a hopeful Kentucky legislature established a "Literacy Fund" to help out. The legislature also directed a committee of its members, including a Republican politician and professor named William Taylor Barry, to compile information on other states' practices.

The 37-year-old Barry was a graduate of the College of William and Mary in Virginia, and had served short terms in the Kentucky and federal governments before becoming a professor of law and politics at Kentucky's Transylvania University. Barry and his fellow committee members sent questionnaires to leading citizens in other states. It made sense for Barry to seek Madison's counsel as well. Along with Thomas Jefferson, Madison was the founding father most popularly associated with the

diffusion of knowledge. As president, Madison oversaw the acquisition of Jefferson's books for the Library of Congress.

In June 1822, Barry sent Madison a letter and a circular about Kentucky's quest. The education-minded Madison responded to Barry in August. He began his reply with the observation that "the liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded." In the second paragraph of his letter, Madison set forth his "Farce or a Tragedy" observation as support for the virtues of a "general system of Education." Each paragraph that followed was about public education. Madison praised "Learned Institutions" as the "favorite objects with every free people." He wrote, "They throw that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty."

Madison urged, in addition to the customary "Reading, Writing, & Arithmetic," the teaching of geography. A "Planatarium [*sic*] of the Cheapest construction" might help students in understanding the solar system, he advised. Properly taught, students might gain "a taste for Books of Travels and Voyages" and eventually an appetite for history. This was Madison's "Knowledge [that] will forever govern ignorance." His favored "means of acquiring" information was public schools, properly endowed.

The Freedom of Information Act is about an entirely different form of acquiring knowledge. The law altered the rights of access to government information, providing a recourse to the courts for people denied information and forcing officials to be much more explicit in their reasons for denying requests. More than 1.8 million FOIA requests were filed in fiscal 2001, and the federal law became the inspiration as well for similar information-access laws in states across the country.

FOIA is celebrated as the source of groundbreaking investigative journalism, but it was businesses that seized on the act, as the Congressional Research Service discovered in a 1972 survey. Of 1,503 requests identified by the service, 43 percent came from corporations or law firms. Only 6 percent came from the media. A generation later, the statistics are similar. In fiscal 1998, the Environmental Protection Agency received 21,220 FOIA requests. Only 1 percent came from the media and 2.4 percent came from public-interest groups, while 88.6 percent of the requests were classified as "commercial."

Because the law has been a bigger boon to business than to the media and public-interest groups, skepticism about its value developed almost from the day the law was signed. Skeptics have turned the Madison quote *against* FOIA. In 1995, a *Duke Law Journal* article by Amy Rees examined what she viewed as the act's unmet aims. For her, the commercial use and public-interest disuse of FOIA has become the "Farce or a Tragedy; or, perhaps both."

Typically, FOIA's defenders respond with a litany of light-shedding victories as a result of the act, and with good reason. Such public-spirited successes are very important—but they don't equal the heavily commercial use of the act. The Freedom

of Information Act has been and forever will be a tool for the public, but also for the profit-minded.

But so what? One principle about foia that has been extracted from the Madison quote is that the people using the act must be part of a crusade to keep the government honest. Madison seems to speak for the supposition that people will use FOIA as voters or as public watchdogs. In judging the success of this 36-year-old law, the motive of a person or organization making a request has become paramount. Indeed, observers sometimes infer a motive simply from the identity of the requester.

That's a mistake almost as basic as the misquoting of Madison. What matters most are the consequences of the information released, not the motives of whoever asked for it. Remember Adam Smith's proverbial baker, who works to serve not society but himself, yet provides the bread that society seeks. So, too, with FOIA requesters.

Consider a petition plucked from among many. In January 2000, the timber giant Boise Cascade Corp. filed a FOIA request for documents relating to something called the "roadless directive" of the Agriculture Department. This concerned the Clinton Administration's environment-friendly plans for ending road-building on some 60 million acres of Forest Service land.

The documents that the corporation obtained revealed the department's behind-the-scenes work on this policy and, in 2001, a federal judge ruled—in a lawsuit by Boise Cascade and others—that the Forest Service had violated decision-making procedures. Among the plaintiffs, Boise Cascade had a commercial interest in the government's decision-making, but the information it got served a broader public interest as well.

Madison begone. It is indifference to a FOIA requester's identity and motive, and not a vetting for Madisonian credentials, that ensures the broadest possible diffusion of information. The "Farce or a Tragedy" quote has its place, too—in the argument for public schools and libraries. We need those places, where anyone can check out what Madison wrote and why, so that "knowledge" will forever "govern ignorance."

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